IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1995 SESSION

FILED

February 8, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	NO. 03C01-9501-CR-00008
	)	
Appellee	)	KNOX COUNTY
	)	
V.	)	Hon. Mary Beth Leibowitz, Judge
	)	
MICHAEL EUGENE DUFF,	)	(Aggravated Rape - 2 Counts
	)	Especially Aggravated Kidnapping)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

William M. Barker

OPINION

The appellant, Michael Eugene Duff, was indicted by a Knox County Grand Jury for five counts of aggravated rape, one count of especially aggravated kidnapping, and four counts of aggravated kidnapping. He was found guilty by a Knox County jury of two counts of aggravated rape and one count of especially aggravated kidnapping. He was acquitted of the remaining counts of the indictment. The trial court sentenced the appellant to twenty-five years on each conviction as a Range I offender. The sentences were ordered to be served consecutively for an aggregate term of seventy-five years.

On appeal, the appellant has raised the following issues for our review. He argues that:

(1) The evidence adduced at trial does not support the guilty verdicts returned by the jury in this case.

(2) The trial court failed to comply with the Supreme Court's ruling in Batson v. Kentucky, thus denying appellant the opportunity to select a fair and impartial jury.

(3) The trial court erred when it refused to grant the appellant's motion for a mistrial.

(4) The actions, comments, and demeanor of the trial court toward the appellant's counsel and toward the victim in the case during the trial and in the presence of the jury deprived the defendant of a fair trial.

(5) The sentences imposed by the trial court following the convictions were excessive and unlawful given the facts and circumstances of the case.

After a careful review of the record on appeal, briefs, and argument of counsel, we conclude that the judgment of the trial court should be affirmed.

I. FACTUAL BACKGROUND

During the early morning hours of July 31, 1992, the victim in this case was driving on Oak Ridge Highway in Knox County on her way home. A car travelling behind her activated a blue emergency light. The victim assumed that the car behind

her was a police officer signalling her to stop. Therefore, she pulled off to the side of the highway in front of Shucker's Restaurant. While she sat in her car waiting for who she thought was an officer of the law, the victim reached in her purse to produce her driver's license. As she was searching for her driver's license, the car door flew open and a man later identified as the appellant hit her in the face and pushed her in the floor. Someone else got into the passenger side of her car and held her down. The appellant drove the victim's car a short distance behind the closed restaurant where she had originally stopped her car. The victim struggled with her attackers and was eventually able to fight her way out of her car. She ran toward a hill behind the restaurant. Under a violent attack of nightmarish proportions, the victim had the presence of mind to dial "911" on the cellular phone which she had in her purse. She told the 911 dispatcher that three men were trying to rape or kill her. At approximately ten seconds into the emergency call, the appellant and the other attackers caught up with her, threw her down, and proceeded to rape her. The victim testified that the appellant got directly on top of her and inserted his penis inside her. Another one of the assailants also raped her while the defendant held her down. The victim testified that the twigs of a tree branch were placed in her vagina.

In response to the 911 call, officers of the Knoxville Police Department arrived on the scene and found the victim in the wooded area on top of an embankment behind the restaurant. The victim was taken to the emergency room where she was examined by Dr. Roger Millwood. Dr. Millwood removed the twigs from the victim's vagina and observed that the victim had suffered various scratches, bruises, and lacerations on her body. There was no vaginal bleeding. Although a rape kit was completed, Dr. Millwood saw no sperm on the swab that he obtained.

The victim gave a description of one of her attackers to Officer Thomas Michael Presley, a criminal investigator with the Knoxville Police Department. Based on the description given by the victim, Officer Presley compiled a photo array and showed it to the victim on August 7, 1992, in his office. The appellant's picture was

one of six shown to the victim at that time. The victim identified the appellant's photograph as being that of one of her attackers. The victim told Officer Presley that the appellant's photograph looked like the attacker in that his nose, face, and eyes were the same. However, she said that her attacker's hair was shorter than that in the picture and that her attacker did not have a mustache. At that time she requested to hear his voice.

Based upon the victim's identification of the appellant in the photo array, the Knoxville Police Department determined to bring the appellant in for questioning. On August 25, 1992, at approximately 10:30 p.m., Officer Rodney Patten of the Knoxville Police Department and another police officer were on a routine patrol when they saw the appellant standing next to a dumpster. They pulled the car over and as they were getting out of their car, the appellant ran. The officers pursued the appellant on foot, and the appellant eventually stopped running. Officer Patten told the appellant that they needed to speak with him, but did not say why. The appellant immediately said, "I don't know nothing about no rape." The testimony at trial was that up to that point no officer had indicated why they were taking the appellant into custody. As the officers brought the defendant to the police department, the appellant “several” times said, "Man, I don't know nothing about no rape." The appellant was not questioned while he was in the company of Officer Patten and his partner. Officer Presley met with the appellant after he was brought to the police station. The appellant asked why he was there, and Officer Presley told him that he would tell him at a later time the reason for his being brought to the station. At that point the appellant said once again, "If this is about a rape, I didn't have anything to do with it." Again, the testimony at trial was that no one of the Knoxville Police Department had told the appellant the reason he had been brought in.

Subsequently, the appellant was placed in a six (6) man lineup and the victim was called in to see if she could identify her attacker from the lineup. The victim requested to hear each man speak the words that one of her attackers had used

during the rape. The appellant was standing in the number three position, and the victim identified him as being one of the men who raped her on July 31, 1992.

The appellant presented no proof on his behalf at trial.

II. SUFFICIENCY OF THE EVIDENCE

The appellant contends that the evidence was insufficient to support the convictions returned against him in this case. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). A defendant challenging the sufficiency of the evidence has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Based upon our careful review of the evidence in this case and in light of the above-cited authority, we conclude that the evidence more than sufficiently supports each verdict of guilt.

A. AGGRAVATED RAPE - COUNT THREE (3)

Count three (3) of the indictment charged the appellant with aggravated rape in violation of Tennessee Code Annotated section 39-13-502(a)(3)(A) which provides that:

> Aggravated rape is unlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by ... the following circumstances;
>
> (3) The defendant is aided or abetted by one (1) or more other persons; and (A) force or coercion is used to accomplish the act.

The appellant contends that the victim in this case offered contradictory testimony and therefore the jury should not have accredited her testimony. On the critical issue of whether there was sufficient proof to support the jury's finding that the appellant was aided and abetted by one or more other persons in the penile penetration of the victim in this case, there was testimony from the victim that the appellant ordered his co-assailants to hold the victim down and that he did insert his penis into her vagina. The appellant correctly notes that some of the victim's testimony was confused and at times contradictory on such issues as whether the same person who had disrobed her also raped her, or whether the vehicle which ultimately "pulled her over" had been behind her for a long period of time or a short period of time. Additionally, a thorough cross examination of the victim revealed that the victim's statements to the emergency room physician were in conflict with the statements she made at trial. It is well settled that "a guilty verdict approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in testimony in favor of the theory of the State." State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978); State v. Townsend, 525 S.W.2d 842, 843 (Tenn. 1975). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835 (Tenn. 1978). The jury was well within reason to accredit the victim's testimony on the crucial issue of whether the appellant was the man who, with the help of others, forced penile penetration upon the victim in this case. Accordingly, this issue is without merit.

B. AGGRAVATED RAPE - COUNT FIVE (5)

For his next issue the appellant asserts that the evidence was insufficient as a matter of law to support his conviction for the aggravated rape charged in count five (5) of the indictment. This count of the indictment was that the appellant did unlawfully and forcibly aid and abet the sexual penetration of the victim by another individual in violation of Tennessee Code Annotated section 39-13-502 (2) which provides that:

> Aggravated rape is unlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by ... the following circumstances;
>
> (2) The defendant causes bodily injury to the victim.

The appellant does not contend that the elements of the offense were not met, only that the victim's identification of the appellant as the man who aided and abetted another in the rape was insufficient. The appellant argues that the identification of him as the rapist was based solely on the testimony of the victim and that this identification was unreliable.

We disagree with the appellant's contention that the eyewitness identification of him was the sole evidence introduced to prove identity in this case. As the State correctly points out in its brief, the State was also able to introduce evidence of identity through the testimony of Officers Rodney Patten and Thomas Presley. As stated earlier, both officers testified that the appellant denied responsibility for the rape before he was ever informed that he was to be questioned about the incident. The appellant's premature statements that he " ...didn't have anything to do with" the rape could have been construed reasonably by the jury as strong indications of the appellant's involvement in the crimes.

The appellant filed a motion seeking to have the results of both the photo array lineup and the physical lineup suppressed because the identification by the victim of the appellant was unreliable. The appellant relies upon Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), to support his argument that the identification of the appellant in this case was too unreliable to be admitted into

evidence. At the outset we note that the appellant has not argued in his brief that either the photo array or the physical lineup were conducted in an unduly and impermissibly suggestive fashion. [1] Accordingly, we will not review the procedures employed by the Knoxville Police Department in this case.

The identification of the appellant by the victim as one of the men who raped her was found to be reliable by the trial court. We agree with the trial court and affirm the trial court's decision to allow the victim's testimony as to the identity of her attacker. Under the standard announced in Neil v. Biggers, supra, the following factors are to be taken into consideration when determining whether an identification is too unreliable to be admitted into evidence; (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention at the time of the crime; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated at confrontation; (5) the time elapsed between the crime and the confrontation. Id. at 199.

The victim in this case testified that she clearly saw the appellant's face illuminated by her interior car light when he forced his way into her vehicle at the beginning of the attack. Additionally, the victim testified that the appellant's face was directly in front of her as he lay on top of her and raped her. The victim was not knocked unconscious, nor was she intoxicated at the time of the rape, and her description of one of her attackers led the police to the appellant. Based upon the foregoing the trial judge concluded as a matter of law that the victim’s identification was reliable and therefore admissible. We agree. The victim in this case never wavered in her identification of the appellant as one of the men who raped her. She picked him out of a six-photo array and was able to articulate which features on the suspect in the photograph led her to believe that it was a photograph of one of the

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[1] The appellant raised the argument that the photo array and the physical lineup were unduly suggestive in his Motion for New Trial. We assume that the appellant has chosen to abandon this argument on appeal.

men who had attacked her while pointing out that the suspect's hair was shorter at the time he raped her than it was at the time the photograph was taken. Additionally, when the appellant was presented in a six (6) man physical lineup, the victim immediately picked him out of the lineup and was further "absolutely sure" that the appellant was the same man who raped her when, during the lineup, he spoke the words that he had spoken during the rape. Officer Presley testified that the photo array took place only seven days after the rape occurred. Further, he testified that the physical lineup took place twenty-six days after the rape occurred. We conclude that this lapse in time between the crime and the confrontation was insignificant in this case. See Forbes v. State, 559 S.W.2d 318, 323 (Tenn. 1977) (ninety-eight days found to be close enough in proximity). Accordingly, we find this issue to be without merit.

C. ESPECIALLY AGGRAVATED KIDNAPPING - COUNT SIX (6)

Finally, with regard to the sufficiency of the evidence, the appellant claims that the jury's verdict of guilty of especially aggravated kidnapping should be reversed. The appellant argues first that based on our Supreme Court's holding in State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), the evidence did not support a separate conviction for this offense. Second, the appellant argues that the evidence failed to establish that the victim suffered serious bodily injury as required by the especially aggravated Kidnapping statute. See Tenn. Code Ann. § 39-13-305 (1991 Repl.). We disagree as to both arguments.

In Anthony, our Supreme Court recognized that in certain circumstances due process of law will not permit a kidnapping conviction where the detention of the victim is merely incidental to the commission of another felony, such as robbery or rape. Id. at 306. In analyzing the question of whether the appellant's conduct in getting into the victim's car, ordering her held down, and driving the vehicle around to the back of the

restaurant where the victim had originally stopped her car is sufficient to support the separate conviction of especially aggravated kidnapping, we turn to the question posed by the Supreme Court in Anthony. That is, "whether the confinement, movement or detention is essentially incidental to the accompanying felony." Id. As the Court noted, one way to answer this question is to determine whether the defendant's conduct "makes the other crime substantially easier of commission or substantially lessens the risk of detection. Id. (emphasis added).

In this case there is no question but that the victim was confined, moved, and detained by her attackers in order for them to commit the crime of rape upon her. The movement of the victim in this case was not slight or inconsequential. After the victim was tricked into pulling off the side of the road by the appellant and his companions, she was forced into the floorboard of her car while the appellant took control of her car and drove it around to the back of a restaurant. We conclude that in this case the detention and movement of the victim was not an inherent part of the rape. While confinement and detention are necessarily part of rape, the movement of the victim behind the restaurant where she had originally stopped her car was not necessary for the appellant to carry out the rape. Finally, it is clear that in this case the appellant and his companions sought to "substantially lessen the risk of detection" of their crime by a passerby when they drove the victim off of the main highway to an isolated area behind the restaurant. As we stated in Thomas Ray Tarpley v. State, No. 03C01-9303-CR-00067 (Tenn. Crim. App., at Knoxville, December 20, 1993), perm. to appeal denied (Tenn. 1994), when a rapist moves his victim to an isolated location he "substantially increas[es] the risk of harm to the victim by making the offense of rape easier to commit." Accordingly, the appellant's contention that his rights to due process were violated by being convicted of especially aggravated kidnapping and rape is without merit.

The second portion of the appellant's attack on the especially aggravated kidnapping conviction is that especially aggravated kidnapping requires that the victim

suffer serious bodily injury and that no such showing was made by the prosecution at trial. Tennessee Code Annotated section 39-11-106(33) defines serious bodily injury as injury which involves;

(a) A substantial risk of death;

(b) Protracted unconsciousness;

(c) Extreme physical pain;

(d) Protracted or obvious disfigurement; or

(e) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.

The appellant argues that because the treating emergency room physician testified that the victim's injuries consisted of superficial scratches and bruises the evidence failed to establish serious bodily injury. However, the appellant fails to take note of the victim's testimony on this issue which was that,

> ...my face was beaten real bad. You couldn't even see my face. It was, the bruises and cuts, I had all over my face. I had deep cuts on my thighs, and then bruises with hand prints all over my breasts and all over my buttocks, and then they, had to pull a twig, or a piece of tree limb out of me, and I was all cut up from that, and then, I got some kind of sexual disease from them.

The victim also testified that she was kicked in the ribs and was repeatedly told that she was going to be killed. We find that there is more than sufficient evidence from which the jury could have concluded that the appellant inflicted serious bodily injury upon the victim.

Based upon all of the foregoing discussion, we conclude that the evidence established beyond a reasonable doubt that the appellant committed the crimes of aggravated rape and especially aggravated kidnapping for which he was convicted. Accordingly, we decline to reverse the convictions on grounds that the evidence was insufficient.

II. JUROR CHALLENGE

The appellant next contends that the State improperly exercised a preemptory challenge to strike a potential juror who was black, and thereby violated the rule announced in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

In Batson, the Supreme Court of the United States held that;

> The equal protection clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

Id. at 476 U.S. 89, 106 S.Ct. at 1719.

During voir dire, the prosecutor inquired of the jury panel whether, as members of the jury, they would require the state to produce any medical evidence before they could find the defendant guilty of rape. One juror initially answered that she would require medical evidence of rape before she could convict. This juror also stated that she would require the appellant to take the stand and tell his side. The State attempted to challenge this juror for cause which was denied by the trial court. The trial court had attempted a rehabilitation of this juror by further exploring her views and examining whether or not she had understood the questions posed to her when she gave the two objectionable responses. The trial court satisfied itself that the juror should not be challenged for cause. Ultimately, the State used one of its preemptory challenges to strike the juror from the panel. The appellant's attorney objected to the challenge on grounds that the State was striking the juror because she was black and the defendant was black in violation of Batson v. Kentucky. At that point the State gave a nondiscriminatory reason for exercising the preemptory strike. The prosecutor stated,

> Your Honor, we originally, as we informed the court, wanted to challenge her for cause. It was our understanding from [sic] she said, at least from the last direct response that she gave, that she was going to require the State to put on medical proof. And her response at that time indicated that she would not follow the law, basically, if we didn't put on some type of proof

> that was satisfactory to her, and that was never any way we were going to get a verdict for the State. I am not sure that this question is still cleared, still has cleared that up, at least, in our minds as to what she's going to require on medical proof. For that reason we are still challenging her for cause.

Additionally, when pushed further for a nondiscriminatory reason for challenging the juror, the State said,

> We have stated our reason previously, for cause, Judge. We don't feel like she will follow the law in this case. The thing is, when, her answers were so inconsistent when we were questioning her earlier. She said that she was going to require the State to put on medical proof. That she was going to require the defendant to testify. And she seemed totally confused, ah, we challenged her for cause. The court would not let us challenge her for cause. So, we are exercising a preemptory strike based upon the same reasons that we gave in the challenges for cause. Is, that we don't feel like she can follow the law in this case, and follow the court's instructions.

The Supreme Court held that in order to establish a prima facie Batson claim, the defendant must raise an inference that the prosecutor excluded certain veniremen from the petty jury on account of their race. In order to raise such an inference the defendant must show that he is a member of a cognizable racial group, and that the prosecutor has exercised preemptory challenges to remove from the venire members of the defendant's race. “The defendant is entitled to rely on the fact ... that preemptory challenges constitute a jury selection that permits those to discriminate who are of a mind to discriminate." Id. The trial court did not make a finding on the record that the appellant made out a prima facie case of discrimination. This court is not at all certain after a thorough review of the record that the appellant did make the required showing under Batson. However, even assuming the appellant did make out a prima facie showing under Batson, we hold that there was no racial discrimination on the part of the State in the selection of the jury in this case. The State provided a neutral and acceptable reason "related to the particular case to be tried" for striking the potential juror. Id.at 98. Although the reason given by the State may not have been sufficient to justify a challenge for cause, in Batson, the Supreme Court held that

"the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. Id. at 97.

We agree with the trial court's finding that the State's reason for exercising a preemptory strike of this juror was unrelated to her race. Accordingly, this issue is without merit.

III. MISTRIAL

Next the appellant contends that the trial court erred in failing to grant his motion for a mistrial following the revelation that a female court officer had held the victim's hand in court in front of the jury during cross-examination. Although the record is silent in that regard, the parties and the court agreed on the record that the incident did in fact occur. Surprisingly, at the time the hand-holding occurred, none of the attorneys for the parties noticed that this conduct was occurring even though the victim apparently was testifying at the time. We are able to discern from a discussion which occurred on the record the day after the hand-holding incident, that when the trial judge saw the court officer holding the victim's hand she immediately called for a recess in the proceedings and sent the jury from the courtroom. In the absence of the jury, and off the record, the trial judge alerted both counsel for the State and appellant's counsel of the occurrence and directed the court officer to refrain from such conduct. Additionally, the trial court advised counsel for the parties that if either desired, the female court officer would be removed from all duties in connection with the case. Apparently, counsel for the appellant and the State agreed that the court officer's removal from the case was unnecessary.

The following day, however, appellant's counsel moved for a mistrial based upon the conduct of the court officer in holding the victim's hand during her testimony. After hearing argument of counsel, the trial court determined that a mistrial was not required, but that a general curative instruction should be given to the jury.

The decision to grant or deny a motion for mistrial rests within the sound discretion of the trial judge. State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994). Counsel for the appellant candidly admits in appellant's brief that there is no evidence in the record that any of the jurors even observed the court officer holding the victim's hand while testifying. Therefore, because there has been no showing of prejudice to the appellant, we must concur with the trial court's judgment that a mistrial was not warranted. See State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994).

IV. TRIAL COURT BIAS

Appellant next argues that the actions, comments and demeanor of the trial judge toward defense counsel and toward the alleged victim during the trial and in the presence of the jury revealed prejudice against the appellant, denied appellant the opportunity to effectively cross-examine the alleged victim, and generally prevented appellant from receiving a fair trial. The only specific allegation made by the appellant in his brief to support this contention is that during cross examination of the victim, and in response to an objection by the state, the trial judge said that her recollection of a specific portion of the direct examination to which appellant's attorney made a reference was different from his. Directly thereafter, the trial judge admonished the jury that regardless of what the attorneys or the court said, the only statements which were to be considered by the jury as evidence were those statements made by witnesses. While we believe the better practice is for trial judges to refrain from making statements which could be construed as comments on the evidence, we do not believe that the judge's comments in this case were anything but an honest attempt by the court to keep the trial proceeding smoothly. In any event, our thorough review of the record in this case reveals no bias or prejudice against the appellant by the trial judge. We therefore conclude that nothing contained within the record demonstrates that the appellant had anything but a fair trial. Accordingly, we decline to reverse on this ground.

V. SENTENCING

Finally, the appellant contends that the sentences imposed by the trial court following conviction were excessive and unlawful. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with the presumption that the determinations made by the trial court are correct. Tenn Code Ann. § 40-35-401 (d) (1990 Repl.). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W. 2d 166, 169 (Tenn. 1991).

In sentencing a person convicted of a criminal offense the trial court is to take into consideration (1) the evidence, if any, received at the trial and at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors in sections 40-35-113 and 40-35-114; and (6) any statement the defendant wishes to make in his own behalf about sentencing. Tenn. Code Ann. §40-35-210(b) (1995 Supp.).

The appellant first contends that the number of years ordered to be served on each conviction is excessive. The court ordered the appellant to serve twenty-five years (25) on each conviction. These sentences represented the maximum sentence within the range. Further the court ordered that the sentences be served consecutively.

It is undisputed that no mitigating factors applied in this case and that there is at least one undisputed enhancement factor. Therefore, the court was authorized to

set the sentence above the minimum but still within Range I. Tenn. Code Ann. §40-35-210 (d) (1995 Supp.).

The record clearly shows that trial court applied the following enhancement factors found at Tennessee Code annotated section 40-35-114 to each conviction.

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;.
>
> (2) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;
>
> (5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;
>
> (6) The personal injuries inflicted upon ...the victim [were] particularly great;
>
> (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community;

The record is unclear whether the trial court also applied two additional enhancement factors. The appellant argues that the trial court did apply two additional enhancement factors. It is the State's position that the trial court did not apply those two additional factors. The enhancement factors which are in dispute are:

> (7) the offense involved a victim and was committed to gratify that defendant’s desire for pleasure or excitement;
>
> (11) the felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury.

As we review this record upon appeal, we conclude that the record is simply unclear whether the trial court applied enhancement factor (7) and (11). Notwithstanding the somewhat confusing remarks of the trial court during sentencing, our de novo review leads us to agree that the length of sentences imposed by the trial court is well supported by the evidence. The enhancement factors which are apparent from the record justify the sentences given.

Even the appellant does not contest the applicability of factor (1) to this case. The criminal history of the appellant was well established by the state.

Factor (2) applies because the appellant was a leader in the commission of the offenses. It was the appellant who drove the victim's car around to the back of the restaurant. It was the appellant who barked out orders to his cohorts to hold the victim down so that he could rape her. It was the appellant who threatened to kill the victim and held her down while another man raped her.

The trial court found that based upon the appellant's allowing the broken twigs of a tree branch to be shoved inside the victim's vagina he allowed the victim to be treated with exceptional cruelty. The appellant contends that because the jury acquitted him of all charges resulting from this incident he cannot be held accountable for this extreme act of cruelty. We disagree. The appellant was present when the act occurred. That is sufficient to establish that he allowed the victim to be treated with exceptional cruelty. The trial court properly applied factor (5).

Additionally, we conclude that the trial court correctly applied enhancement factor (6) to the aggravated rape convictions but erred by applying it to the especially aggravated kidnapping conviction. Factor (6) allows for an enhanced sentence where the personal injuries of the victim are "particularly great." During the commission of these crimes the victim was beaten in the head and face, kicked in the ribs, sustained deep cuts to her thighs, had her clothing ripped from her body, held down, and told that she was going to be killed. The evidence supported the trial court's finding that the personal injuries suffered by the victim were particularly great. The conviction on count three (3) of the indictment did not require proof of bodily injury to the victim. While count five (5) required proof of bodily injury we agree with the trial court that the proof established that she sustained particularly great personal injuries over and above those injuries necessary to support the count five (5) aggravated rape conviction. In State v. Smith, 891 S.W.2d 922 930, (Tenn. Crim. App. 1994), this court held that enhancement factor (6) may be applied in a case of aggravated rape.

We reasoned that "the clear intent of the General Assembly was to make this enhancement factor broad enough to include injuries which are not presently embraced in the statutory definition of 'bodily injury.' " Id. Accordingly, this factor was properly applied to both aggravated rape convictions.

However, with regard to the especially aggravated kidnapping conviction, we conclude that the of proof of "serious bodily injury " required to support the conviction, is essentially the same as proof of "particularly great" personal injuries. Therefore, factor (6) cannot be used to further enhance the sentence for this conviction. See State v. Jones 883 S.W.2d 597, 602 (Tenn. 1994)(proof of "serious bodily injury" will always satisfy definition of "particularly great personal injuries"). However, because three (3) enhancement factors do apply to this conviction we hold that the maximum sentence ordered by the trial court is justified.

The state concedes that factor (8) was inapplicable to this case. There was simply no evidence that the appellant ever refused to comply with the terms of a sentence involving community release. The trial court gave this factor little weight. However it was error to apply factor (8) at all.

Similarly, there was no evidence introduced by the state that the appellant committed any of these crimes for pleasure or excitement. Accordingly, if factor (7) was applied by the trial court, it was error. See State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993).

Finally, with regard to factor (11) there was no proof that the robbery conviction which the trial court believed triggered the application of this factor resulted in death or bodily injury or the threat of death or bodily injury to another person. Accordingly, if this factor was applied, it was error.

Notwithstanding the errors committed by the trial court in applying certain enhancement factors to the convictions, we conclude that the application of factors (1), (2), (5) and (6) are clearly sufficient to support the imposition of maximum

sentences for each aggravated rape conviction and that factors (1),(2) and (5) justify the maximum sentence for the especially aggravated kidnapping conviction.

Next the appellant contends that the trial court erred when it ordered the sentences to be served consecutively rather than concurrently. In determining whether to impose consecutive sentences for multiple counts in a single trial, the criminal courts of Tennessee are guided by Tennessee Code Annotated section 40-35-115. Section 115 provides that consecutive sentences are not to be routinely imposed. State v. Taylor, 739 S.W.2d 227, 230 (Tenn. 1987); see also Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments. However, a sentencing court may order consecutive sentences if it finds by a preponderance of the evidence that:

> (1) [t]hat defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
>
> (2) [t]he defendant is an offender whose record of criminal activity is extensive;
>
> * * *
>
> (4) [t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime when the risk to human life is high... .

Tenn. Code Ann. § 40-35-115. (1990 Repl.).

Once again the record of the trial court's findings is unclear. The trial court appears to have found that the appellant has an extensive criminal history. It is unclear whether the court also found the appellant to be a professional criminal. The trial court did find the appellant to be a dangerous offender based apparently upon the nature of the crimes committed.

The factors enumerated in section 115 are listed in the alternative. The statute plainly allows a trial court to impose consecutive sentences when any one of the factors enumerated are present. Because we agree with the trial court that the appellant has an extensive history of criminal activity, we need not reach the issue of whether either of the other two criteria also would have justified the imposition of

consecutive sentences in this case. The appellant has been convicted of four (4) prior felonies, and at least three (3) misdemeanor convictions as an adult. His juvenile record is even more extensive with adjudications beginning in 1979 and continuing every year through 1983. Accordingly, we agree with the trial court's judgment that the appellant should be ordered to serve his sentences consecutively.

Having found no reversible error in the record, the judgment of the trial court is affirmed.

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WILLIAM M. BARKER, JUDGE

CONCUR BY:

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JOHN K. BYERS, SENIOR JUDGE

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F. LEE RUSSELL, SPECIAL JUDGE