IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1996

STATE OF TENNESSEE,	)	C.C.A. NO. 01C01-9506-CC-00169
	)	
Appellee,	)	WILLIAMSON COUNTY
	)	
v.	)	HON. HENRY DENMARK BELL
	)	JUDGE
	)	
RICHARD BROWN and	)	
KEITH PUCKETT,	)	(Especially aggravated
	)	kidnapping, aggravated
Appellants	)	robbery, conspiracy.)
	)	

FOR THE APPELLANTS:

BROWN:
J. TIMOTHY STREET
136 Fourth Ave. South
Franklin, TN 37064

PUCKETT:
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Franklin, TN 37064

FOR THE APPELLEE:

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OPINION FILED _____.

AFFIRMED

WILLIAM S. RUSSELL, SPECIAL JUDGE

OPINION

Richard N. Brown and Keith Puckett appeal from their joint trial convictions. Brown was convicted of especially aggravated kidnapping, robbery and conspiracy to commit aggravated kidnapping; with resultant sentences respectively of twenty years, three years plus a $1,500.00 fine and eight years. The twenty and eight years are to be served concurrently and the three years consecutively, for an effective total of twenty-three years.

Puckett was convicted of the same three offenses; but his sentences were for eighteen, eight and three years respectively, to be served concurrently, for an effective sentence of eighteen years as a standard offender, plus a fine of $1,500 for robbery and a like fine for conspiracy to commit especially aggravated kidnapping.

THE FACTS

Neither appellant testified or presented any evidence in his defense.

The female victim was employed at a Shoney's restaurant in Nashville. She testified that she knew Mr. Puckett. He called her at work and asked to borrow some money. She had about $1,500.00 on her person from a recently received income tax refund. Appellant Puckett called a second time and arranged to come to Shoney's and borrow twenty dollars. Puckett called a third time and the victim told him that she had taken the money home. He called again at closing time and he and the victim agreed that he would give her a ride home from work.

He showed up with two other men, appellant Brown and one Jeff Carter. Puckett was driving, Brown was upon the front seat, and

the victim rode upon the rear seat where Jeff Carter was already seated. Puckett told the victim in explanation of the presence of Brown and Carter, that he was giving a ride home to two of his friends.

Once all were in the car Jeff Carter asked Puckett where was the money that Puckett owed him. They drove to the interstate highway, where Jeff Carter pushed the victim's head into her lap and pulled her jacket over her head. During this time Carter asked her where her money was. In a few minutes they left the interstate and stopped to buy gasoline, taking $10.00 from the victim to pay for the gasoline. When they left there they drove down a dark road, with appellant Brown giving directions. They subsequently stopped and Jeff Carter ordered the victim out of the car. Brown told Puckett to stand in front of the car. While this was happening Carter was making the victim disrobe, all the time threatening her if she did not have the money. The victim had hidden the money in her mouth while her head was forced down in her lap. Her nose had started to bleed while they were driving on the interstate highway. When Carter could not find the money he took the victim about twenty-five yards behind the vehicle and raped her. When he had finished this assault Carter ran back to the car and the three men left the victim naked except for a bra. She heard what sounded like all three of them laughing as they prepared to leave. She obtained help from a nearby resident.

Key evidence came from one Thomas Gooch, a cellmate of Brown subsequent to the aforesaid events. Brown talked to Gooch about these events. He stated that he had been riding around with two other men, that they got money from the victim for drugs twice and

then came up with the idea to trick the victim out of her money, that they were going to act like Puckett owed them some money and threaten to kill Puckett if he did not pay them, their idea being that the victim would pay them her money in order to save

Puckett's life. Brown told Gooch that Brown, Puckett and Carter went to Texas after the events of that criminal episode.

ISSUES ON APPEAL

Brown raises seven issues on this appeal. He contends:

1. The evidence was legally insufficient to support the verdict of guilty of conspiring to commit aggravated kidnapping.

2. The evidence was legally insufficient to support the verdict of guilty of especially aggravated kidnapping.

3. The trial court erred in allowing the defendant to be tried in part while attired in prison clothing.

4. The trial court erred in not granting Brown a severance from Puckett.

5. The trial court erred in sentencing Brown to partially consecutive sentences.

6. The sentence imposed upon Brown is inconsistent with the jury's verdict.

7. The sentence should have only been for the minimum for the offense of especially aggravated kidnapping.

Puckett defines only one issue, to wit:

1. Whether the trial court erred in denying the defendant Puckett's motion for severance of trial from Brown in violation of the Bruton rule.

DISPOSITION OF THE ISSUES

Brown's first two issues question the legal sufficiency of the convicting evidence.

Initially, he contends that the kidnapping was purely incidental to the robbery, and hence barred by the rule of State v. Anthony, 817 S.W. 2d 299 (Tenn. 1991). That rule allows

conviction when the kidnapping is more than just incidental to the accompanying felony and is significant enough, in and of itself, to warrant independent prosecution. The Anthony court expressly stated that where a robbery victim was moved from the scene of the robbery under circumstances giving rise to a substantially increased likelihood of harm a kidnapping prosecution lies, citing State v. Rollins, 605 S.W. 2d 828, 831.

The case at bar is much like Rollins. There the victims were transported by car, robbed and left on the side of the road at night. Here, the victim was driven to another county, robbed, stripped, raped and left alone and naked by the side of a country road in freezing weather. Certainly the transporting of the robbery victim increased the risk of harm to her.

Brown also contends that the evidence was insufficient to convict him of conspiracy to commit especially aggravated kidnapping. We find that the evidence supports the jury's conclusion that Appellant Brown's actions were consistent with a scheme to unlawfully detain the victim. The definition of conspiracy per T.C.A. Sec. 39-12-103 is met. Our review confirms that a rational trier of fact could find the essential elements of the charge of conspiracy beyond a reasonable doubt, which equates to the legal sufficiency of the convicting evidence. State v. Clifton, 880 S.W. 2d 737, 742 (Tenn. Crim. App. 1994). There is substantial evidence that the defendants conspired to remove or

confine the victim unlawfully so as to interfere substantially with her liberty, as proscribed by T.C.A. Sec. 39-13-305.

The issues raised by Brown questioning the legal sufficiency of the convicting evidence are therefore overruled.

Brown's plaint that he was tried in prison clothes is based upon the fact that on the first day of the trial his defense

counsel called to the court's attention the fact that Brown was wearing prison attire. He was wearing a light blue outfit that looked similar to a surgeon's scrub uniform. His clothing had no writing upon it, no number or facility name. Brown himself indicated that he personally did not object to being tried in those clothes, but his counsel persisted in his objection.

On the second day of trial Brown wore personal clothing. During the course of the testimony of witness Gooch the fact of Brown's incarceration was properly before the jury. The evidence of Brown's guilt was overwhelming.

No prejudice from Brown's wearing prison clothing has been demonstrated. Carroll v. State, 532 S.W. 2d 934 (Tenn. Crim. App. 1975), permits under these circumstances our holding that what occurred was harmless error, and we so rule.

Appellant Brown contends that the trial court erred in not granting him a severance from Puckett, because Puckett was a personal friend of the victim and was responsible for arranging the criminal episode. He also contends that their defenses were antagonistic because Puckett took the position that Puckett was a victim, too.

Whether a trial court should grant a motion to sever is a matter of discretion, and a denial will not be reversed absent a clear showing of prejudice to the movant. State v. Burton, 751 S.W. 2d 440, 447 (Tenn. Crim. App. 1988). We find no clear showing of prejudice to Brown from his being tried with Puckett.

Finally, Brown contends that his sentence was erroneously partially consecutive, that it is inconsistent with the jury's verdict and the sentence for the offense of especially aggravated kidnapping should have only been for the minimum.

Tenn. Code Ann. Sec. 40-35-115 provides that a trial court may impose consecutive sentences if it finds that any one of the enumerated factors in that section applies. In this case two of the factors were found to apply; that is, Brown's record of criminal activity is extensive and the offenses were committed while he was on probation. The imposition of consecutive sentences was proper and is upheld.

The minimum sentence for especially aggravated kidnapping was not demanded by the law in this case, as Brown contends. Tenn. Code Ann. Sec. 40-35-114 allows for the application of any one or more of sixteen enhancement factors, provided they are not themselves essential elements of the charged offense. One of those enhancement factors is present when the crime is committed under circumstances under which the potential for bodily injury to a victim is great. This is not an essential element of especially aggravated kidnapping, per Tenn. Code Ann. Sec. 39-13-305, which defines that crime. In this case, the potential for bodily injury was great. The victim was not just kidnapped. She was robbed, driven to another county, stripped and left naked on the side of a rural road in the dark in freezing weather.

The trial court also applied the enhancement factor of exceptional cruelty to the victim during the commission of the especially aggravated kidnapping. The essential elements of this crime are removing and confining the victim so as to interfere substantially with her liberty, accomplished by display of an article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon. The court could properly consider any additional facts in determining that Brown treated the victim with exceptional cruelty. Truly, under the facts of this case, the victim was treated with exceptional cruelty.

Finally, regarding his sentences, Brown complains that his twenty year sentence for especially aggravated kidnapping should be reduced to the minimum for that crime.

The weight to be given to enhancing and mitigating factors is left to the discretion of the trial judge. State v. Shropshire, 874 S.W. 2d 634, 642 (Tenn. Crim. App. 1993). We find that the trial court properly considered and weighed the appropriate enhancing and mitigating factors applicable to the charges in this case. The court specifically noted that the mitigating factors were greatly outweighed by the enhancement factors. Under the totality of the evidence in this case we find no abuse of discretion in the setting of this twenty year sentence.

Appellant Brown's issues are without merit and his convictions and sentences are affirmed.

Appellant Puckett's single plaint is that the trial court erred in denying his motion for severance from Brown because of the Bruton rule. It is his position that the testimony of Thomas

Gooch, who testified to Brown's confession to him while they were cellmates, was a violation of his constitutional right to confront the witness against him as pronounced in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). His co-defendant, Brown, did not testify; but his confession was introduced through Gooch. The prosecuting attorney, in introducing the evidence, argued that the Bruton rule does not apply in conspiracy cases.

In Bruton, the Supreme Court held that an inculpatory confession of a non-testifying co-defendant should not have been admitted in a joint trial with the defendant who had not confessed his participation in the crime. Later, in Parker v. Randolph, 442 U.S. 62, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979), a plurality of

that court held that admission of interlocking confessions (where a defendant's confession recites essentially the same facts as those of his non-testifying co-defendant), with proper limiting instructions, conforms to the requirements of the Sixth and Fourteenth Amendments.

Later, in Cruz v. New York, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987), the Supreme Court held that where a non-testifying co-defendant's confession which incriminates the defendant is not directly admissible against the defendant, the Confrontation Clause of the Fifth Amendment bars its admission at their joint trial, even if a limiting jury instruction is given. However, the Court held that any violation was subject to harmless error analysis.

In the case of State v. Cameron, 909 S.W. 2d 836 (Tenn. Crim. App. 1995), this court held that where no contemporaneous objection was made to the admission of the co-defendant's

statements on the basis of an alleged Confrontation clause violation either prior to or during trial constituted a waiver of the issue.

Counsel for Puckett, when the Bruton situation arose, neither asked for a severance nor moved that any reference to him be redacted from Gooch's testimony. Before calling Gooch the prosecuting attorney informed both the court and the defendants that his witness had been co-defendant Brown's cellmate and was going to testify as to the details of Brown's confession to him, including Brown's statement that the defendants had planned the crime together. Puckett objected to the testimony on the ground that he had not had the opportunity to interview Gooch. Thereupon the court took a recess to allow the interview, stating "we're in recess until you tell us we're not". Puckett made absolutely no objections concerning the testimony of Gooch as it related to the

Bruton issue. He failed to ask for a severance or object to any of the questions asked by the State and/or his co-defendant.

It was incumbent upon Puckett to take whatever action was reasonably available to prevent or nullify the harmful effect of the Bruton violation. He did nothing. The issue is therefore waived. T.R.A.P. 36.

All issues having been found to be without merit, the convictions and sentences of the appellants are affirmed.

WILLIAM S. RUSSELL, RETIRED JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

JERRY L. SMITH, JUDGE

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ORDER

This cause came on to be heard at the March Session in Nashville and was taken under advisement.

After a full consideration of all of the issues the Court is of the opinion that the judgments against each defendant are without reversible error, and said judgments are in all matters affirmed. Costs on appeal are assessed to the respective appellants.

The cases are remanded to the trial court for the enforcement of the judgments.

Hayes, J.
Smith, J.
Russell, Sp. J.