

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

FILED
July 26, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 APPELLEE,)
)
 v.)
)
 ROY L. SHERROD,)
)
 APPELLANT.)

No. 02-C-01-9510-CR-00331
Shelby County
Carolyn Wade Blackett, Judge
(Aggravated Rape, Robbery)

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OPINION FILED: _____

CONVICTIONS AFFIRMED, SENTENCES MODIFIED

JOE B. JONES, Presiding Judge

OPINION

The appellant, Roy L. Sherrod, was convicted of robbery, a Class C felony, and aggravated rape, a Class A felony, by a jury of his peers. The trial court found that the appellant was a career offender and imposed a sentence of confinement for fifteen (15) years in the Department of Correction for robbery. The trial court found that the appellant was a persistent offender and imposed a Range III sentence consisting of confinement for forty (40) years in the Department of Correction for aggravated rape. The sentences are to be served concurrently. Three issues are presented for review. The appellant challenges the sufficiency of the evidence regarding his conviction for aggravated rape, the denial of his special request for an instruction on theft of property under the value of \$500, and the sentences imposed by the trial court. After a thorough review of the record, the briefs of the parties, and the law governing the issues presented for review, it is the opinion of this Court that the judgment on the convictions and the aggravated rape sentence should be affirmed, and the robbery sentence modified.

During the early morning hours of September 11, 1993, Jacqueline Thomas was walking to her mother's residence when she encountered the appellant in front of a vacant gas station. The appellant asked Thomas if she had a cigarette. Thomas advised the appellant that she did not have a cigarette. The appellant grabbed Thomas's neck from behind her and asked if she had ever engaged in anal intercourse. Thomas advised the appellant that she had never had such an experience. The appellant replied: "[W]ell bitch, this is one time that you're going to experience it." The appellant was holding something against Thomas's neck. Although Thomas could not see the object, she thought it was a knife.

The appellant began dragging Thomas behind the vacant building. She attempted to fight the appellant. The appellant told Thomas that he would cut her throat if she did not cooperate with him. After the appellant maneuvered Thomas behind the building, he told her to remove her clothing. She refused. The appellant pulled her pants down, reached in her pocket, and retrieved four dollars and twenty-one cents. He then ordered Thomas to lay on the ground. Thereafter, the appellant penetrated Thomas anally and vaginally. The appellant ran away and Thomas cried for help.

A person passing the situs of the crime saw the victim. She was taken to a gas station where she encountered two City of Memphis police officers. She advised the officers what she had experienced and gave them a description of the perpetrator. She further advised the officers that the perpetrator took a dollar bill and three dollars and twenty-one cents in coins and related the precise pocket where he placed the money. Officer Rogers took the victim to the situs of the crimes. Officer Bowen began cruising the neighborhood in an attempt to locate the perpetrator. A few blocks from the crime scene Officer Bowen saw the appellant. He was wearing the same clothing that Thomas described to the officers. When Officer Bowen took the appellant to the situs of the crime, Thomas positively identified the appellant as the person who had robbed and raped her. The appellant had in his possession a one dollar bill and three dollars and twenty-one cents in coins. The money was found in the same pocket described by Thomas.

An examination at the Memphis Sexual Assault Center did not reveal trauma to the vaginal area of the victim, but there was evidence of anal trauma. The nurse who examined the victim stated that the victim's mucosa membranes had "been pulled out from the rectum, outside the anus."

I.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn.

298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

The evidence is sufficient to support a finding by a rational trier of fact that the appellant was guilty of aggravated rape beyond a reasonable doubt. Tenn. R. App. P. 13(e). The state proved beyond a reasonable doubt that the appellant (1) unlawfully penetrated the victim anally and vaginally, (2) used force and coercion to accomplish each penetration, and (3) was either armed with a weapon or used an article in such a manner to lead the victim to believe he was armed with a weapon. Tenn. Code Ann. § 39-13-502.

The appellant's argument is that "there is no direct and no material circumstantial evidence" that he was armed with a weapon. First, the applicable statute does not require that the accused actually possess a weapon. Proof that the accused possessed "any article used or fashioned in a manner to lead the victim reasonably to believe" that he has a weapon is sufficient to establish the offense of aggravated rape. Tenn. Code Ann. § 39-13-502(a)(1). In this case, the appellant held an object to the victim's neck. The victim

thought it was a knife. Moreover, the appellant led the victim to believe that he was armed with a knife. He threatened to cut the victim's throat if she did not cooperate with him. The victim quit resisting the appellant because she feared for her life -- she thought that the appellant would cut her throat if she persisted.

This issue is without merit.

II.

The appellant contends that the trial court committed error of prejudicial dimensions by refusing his request to instruct the jury on the offense of theft of \$500 or less, a Class A misdemeanor. Tenn. Code Ann. §§ 39-14-104 and -105. This Court disagrees with this contention. While theft is a lesser included offense of robbery and aggravated robbery, State v. King, 905 S.W.2d 207, 214 (Tenn. Crim. App. 1995), the appellant was not entitled to an instruction of this lesser included offense based upon the evidence. As this Court stated in State v. Wright, 649 S.W.2d 22, 24 (Tenn. Crim. App.), per. app. denied (Tenn. 1993): "The proof clearly makes out the offense for which the defendant was convicted, and there was no credible view of the evidence under which the defendant could have been found guilty of a lesser offense."

Before a trial court is required to instruct the jury on a lesser included offense, there must be evidence contained in the record which would support a conviction for the offense. State v. Mellons, 557 S.W.2d 497, 499 (Tenn. 1977). When the record is devoid of evidence to support a conviction for a lesser included offense, the trial court is not required to instruct on the lesser offense. State v. Stephenson, 878 S.W.2d 530, 549-50 (Tenn. 1994); State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 800, 112 L.Ed.2d 861 (1991); State v. Rhoden, 739 S.W.2d 6, 11 (Tenn. Crim. App. 1987).

In this case, the appellant placed an object against the victim's neck, and he threatened to cut her throat if she did not cooperate with him. He forced her to accompany him to the rear of the vacant building where the appellant took the money from the victim's pocket. The victim stated that she stopped fighting with the appellant because she feared

for her life. She was afraid that if she did not cooperate, the appellant would kill her. Given these facts, the evidence only supports the offense of robbery, not theft.

This issue is without merit.

III.

The appellant raises two sentencing issues. First, he contends that the trial court committed error of prejudicial dimensions when the court sentenced him as a career offender in the robbery case. Second, he contends that the trial court also erred in sentencing him as a persistent offender in the aggravated rape case.

The record is clear that the appellant does not qualify as a career offender. Although the appellant has been convicted of several serious offenses, he has not been convicted of the requisite number of crimes. The state concedes that the appellant should not have been sentenced as a career offender for this reason. The trial court should have imposed a Range III sentence in both the robbery and aggravated rape cases as the appellant does qualify as a persistent offender.

Tenn. Code Ann. § 40-35-107(a) provides:

A “persistent offender” is a defendant who has received:

1. Any combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes, where applicable; or
2. At least two (2) Class A or any combination of three (3) Class A or Class B felony convictions if the defendant’s conviction offense is a Class A or B felony.

The appellant has been convicted of robbery with a deadly weapon, a Class B felony, two counts of rape, a Class B felony, robbery, a Class C felony, selling marijuana, a Class E felony, petit larceny, a Class E felony, and solicitation for aggravated burglary, a Class E felony.

In the robbery case, a Class C felony, the appellant qualifies as a persistent offender because he has the requisite five felony convictions required by Tenn. Code Ann. § 40-35-107(a)(1). Actually, appellant has seven separate felonies that apply. The Class

E felonies apply because this classification is “within the next two (2) lower felony classes.”

In the aggravated rape case, a Class A felony, the appellant qualifies as a persistent offender because he has three Class B felony convictions required by Tenn. Code Ann. § 40-35-107(a)(2). As previously noted, the appellant has been convicted of robbery with a deadly weapon and two counts of rape, both Class B felonies.

The record establishes that the robbery with a deadly weapon and one of the rape convictions occurred on the same date. The appellant argues that Tenn. Code Ann. § 40-35-117(b)(4) prohibits the use of these felonies to enhance his sentence because there is no evidence in the record that these felonies were not “committed as part of a single course of conduct,” and, therefore, these two felonies should be considered as one offense. This argument is flawed. The fallacy underlying the argument is that this exception does not apply when underlying convictions result “in bodily injury or threatened bodily injury to the victim or victims” of the two offenses. Tenn. Code Ann. § 40-35-107(b)(4). Robbery with a deadly weapon and rape are such offenses. This Court cannot conceive how either offense can be committed without at least “threatened bodily injury” to the victim.

This Court has conducted a de novo review of the record pursuant to Tenn. Code Ann. § 40-35-401(d). See State v. Williamson, 919 S.W.2d 69, 81 (Tenn. Crim. App. 1995). The trial court found one enhancement factor, namely, the appellant has a history of criminal convictions in addition to the convictions used to determine the appropriate range. Tenn. Code Ann. § 40-35-114(1). This Court finds that two additional enhancements apply in this case. See State v. Pearson, 858 S.W.2d 879 (Tenn. 1993); State v. Adams, 864 S.W.2d 31 (Tenn. 1993).

The appellant inflicted personal injuries to the victim that were particularly great. Tenn. Code Ann. § 40-35-114(6). While all rapes and aggravated rapes involve physical and mental injury to the victim, State v. Kissinger, ____ S.W.2d ____, slip op. at 10 (Tenn. 1996), the evidence in this case established that the appellant inflicted particularly great injuries when he anally penetrated the victim. An examination of the victim shortly after the rape revealed “erythema, a lot of redness, and the tissue from the gut was pulled out. . . . [T]he inside of her intestines had been pulled out and it was on the outside” of her

body. The victim testified that she had suffered a great deal of pain as a result of the anal penetration, and she was suffering from this pain during the trial. Since the use of a weapon or use of an object to make the victim think that the appellant had a weapon was used to enhance the offense of rape to aggravated rape, these facts may not be used to enhance the appellant's sentence within the appropriate range.

The appellant raped the victim to gratify his desire for pleasure and excitement. Tenn. Code Ann. § 40-35-114(7). The evidence establishes that the initial anal penetration did not satisfy the appellant, and he stopped the anal penetration. He then made the victim engage in foreplay. Later, the appellant vaginally penetrated the victim and achieved an orgasm. While an orgasm, standing alone, does not establish this factor, it is a circumstantial factor that may be considered when determining the motivation for the rape. Kissinger, ____ S.W.2d at ____, slip op. at 18.

The trial court found that the record did not support any mitigation factors. This Court's review of the record supports the trial court's findings of fact in this regard.

This Court affirms the appellant's sentence for aggravated rape. The sentence for robbery must be modified. The evidence establishes that the appellant is a persistent offender. The Range III punishment for a Class C felony is ten (10) to fifteen (15) years confinement in the Department of Correction. Based upon the circumstances of the offense, the existence of three enhancement factors, and the additional factors that must be considered in determining an accused's sentence, see State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987), the sentence imposed by the trial court is reduced to confinement for fourteen (14) years in the Department of Correction.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

GARY R. WADE, JUDGE

WILLIAM M. BARKER, JUDGE