**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**
**AT KNOXVILLE**
**FEBRUARY SESSION, 1996**

FILED

**October 15, 1996**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

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| **STATE OF TENNESSEE**, | ) | |
| | ) | No. 03C01-9504-CR-00121 |
| Appellee | ) | |
| | ) | HAMILTON COUNTY |
| vs. | ) | |
| | ) | Hon. Douglas A. Meyer, Judge |
| **RICKY MICHAEL DIXON**, | ) | |
| | ) | (Agg. Kidnapping; Agg. Assault; |
| Appellant | ) | Attempted Sexual Battery) |

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OPINION FILED: _____

AFFIRMED IN PART; REVERSED IN PART

**David G. Hayes**
Judge

## OPINION

The appellant, Ricky Michael Dixon, was convicted by a Hamilton County jury of aggravated kidnapping, aggravated assault, and attempted sexual battery. The appellant received, respectively, concurrent sentences of twenty years confinement in the Department of Correction, fifteen years confinement in the Department of Correction, and eleven months and twenty-nine days confinement in the local workhouse. On appeal, the appellant presents the following issues: (1) whether the evidence is insufficient to support his convictions, and (2) whether his convictions violate the holding of our supreme court in State v. Anthony, 817 S.W.2d 299 (Tenn. 1991). After reviewing the record, we conclude that the evidence is sufficient. However, in light of the facts of this case and pursuant to Anthony, we agree that the appellant's multiple convictions and punishments violate the principle of fundamental fairness, depriving the appellant of his due process rights. For the reasons set forth below, we conclude that fundamental fairness requires the dismissal of the convictions for the lesser offenses and that the conviction for the greater offense of aggravated kidnapping should stand.

## I. Factual Background

The evidence adduced by the State at trial revealed that in the early morning hours of September 6, 1992, in Chattanooga, Donna Candies Little was returning home from a barbeque, celebrating her birthday. She had drunk approximately one and a half beers at the party.[1] An acquaintance drove her and a friend and former roommate, Sheila Roe, to Ms. Roe's home on Willow Street. Ms. Little resided at that time on Clio Avenue, approximately 2.3 miles

[1]Although Ms. Little admitted to past marijuana and LSD use, she denied any drug use on that evening or since that evening.

from Ms. Roe's home. Ms. Roe was intoxicated and asked Ms. Little to drive her in Ms. Roe's car to Chili De-Bos, a bar adjacent to Ms. Little's home. Ms. Roe wanted to talk with her roommate, "Cat," who worked as a bartender at the bar. Because of Ms. Roe's intoxicated state and despite Ms. Little's desire to return home, Ms. Little agreed.[2] She and Ms. Roe remained at the bar for approximately ten minutes. While at the bar, she and Ms. Roe encountered the appellant, and Ms. Roe agreed to drive the appellant to Willow Street, where the appellant was to meet some friends. Apparently, the bartender was familiar with the appellant and informed Ms. Little, "He's all right; he comes in here ... ." Ms. Little testified at trial that, although she had seen the appellant once before at Chili De-Bos, she had never spoken to the appellant and did not know his name. Again because of Ms. Roe's intoxicated state, Ms. Little decided to drive Ms. Roe home. The appellant rode in the backseat.

When they arrived at Ms. Roe's residence, the appellant departed. Ms. Little asked Ms. Roe if she could borrow her car to return home. Ms. Roe indicated that there was no gas in her car.[3] Therefore, Ms. Little decided to walk home. As she approached her house on Clio Avenue, Ms. Little noticed the appellant walking behind her. She assumed that he was returning to the bar. When she was a few blocks from her home, the appellant spoke to her. She turned and looked at the appellant. The appellant then grabbed her.

At trial, Ms. Little recounted:

> He pinned me down with one of his arms and covered my mouth with the other, and lifted me up off the ground so I couldn't move or anything. Then he slammed me to the ground right there, and he grabbed me around my throat. He started squeezing and it scared me so bad that when I was still and he knew I wasn't gonna fight anymore, he pulled me over into the bushes. And I was so terrified

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[2]Ms. Little wanted to return home, as she was to begin a job as a cook at a nearby McDonald's at 7:00 a.m.

[3]Ms. Little was unable to determine, herself, the amount of gas in Ms. Roe's car, because the gas gauge was apparently broken.

... .

After the appellant dragged Ms. Little from the sidewalk into the bushes growing on a vacant lot, he forced her to pull her pants to her knees. He then removed her underwear. The appellant was unable to engage in intercourse with the victim due to her continued struggles. Finally, the appellant forced Ms. Little to perform oral sex on him.[4] When she attempted to break away from the appellant, he began to hit her on the side of her face. The appellant completely removed Ms. Little's pants and her shoes. He then positioned himself on top of the victim, squeezing her throat. When Ms. Little ceased struggling, the appellant released her. At this point, Ms. Little thrust her fingers into the appellant's eyes and ran, screaming, toward a nearby house.

In the early morning hours of September 6, 1992, Francisca Reyna was awakened in her home on Clio Avenue by "a girl screaming" and "a big old knock and pounding on the door." Ms. Reyna testified that, when she looked outside,

> what I seen was a nude girl there. She had a piece of shirt on, and you couldn't tell her face cause she had blood all over on the side of her face, and you couldn't --- her face was just so messed up where it had been beaten. She was screaming, "Help me, please; I've been raped."

Ms. Reyna did not know the victim. Nevertheless, she obtained some clothes for Ms. Little and, because she did not own a telephone, drove Ms. Little to a nearby gas station and called the police. She and Ms. Little awaited the police's arrival at Ms. Reyna's home.[5]

Malcolm Kennemore, a patrol officer employed by the Chattanooga Police

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[4]With respect to her statements to various individuals on the morning of the incident, describing the incident, Ms. Little explained at trial that she was unsure what she said that morning, because, on that morning, she was "addled" and "in shock."

[5]During this time, Ms. Little did not inform Ms. Reyna that she lived nearby.

Department, was dispatched to Ms. Reyna's residence at approximately 4:00 a.m. At trial, Officer Kennemore described the victim's condition when he arrived at Ms. Reyna's residence:

> She basically in general terms seemed to be beat up pretty bad. She was scratched up real bad. Sides of her face were scratched up. ... [H]er face appeared to be getting swollen. Her neck was scratched up and it was real red around her neck. ... [Ms. Little] was very upset. I could only get just sketchy bits and pieces of information from her. She was just tremendously upset. ... [B]etween crying and things she managed to get out in bits and pieces that she was saying that she was raped in the field next door to the house.

Officer Kennemore further testified that, although the victim was upset, she did not appear to be intoxicated or under the influence of drugs. She indicated to Kennemore that she believed her assailant's name to be "Ronnie," but was not certain. She also informed Kennemore that the attacker had penetrated her vagina both digitally and with his penis.

Officer Kennemore searched the vacant lot adjacent to Ms. Reyna's home. In a wooded area, he discovered a pair of jeans, a pair of tennis shoes, and a pair of underwear.[6] One shoe was stuck in a bush. Another shoe was underneath the same bush. The jeans "were just wadded ... They just seemed to be that they were just tossed down there ... ." He and another officer photographed the clothes as they were discovered at the scene. However, these photographs were lost at some point during the ensuing investigation.

Kennemore indicated that there are streetlights on Clio Avenue but also stated that, at night, a person standing on Clio Avenue would probably be unable to see someone standing at the location of the clothing, and, even during the day, would be unable to see someone lying on the ground at that location. With

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[6]Kennemore testified during direct examination that the underwear was slightly torn. However, during cross-examination, he conceded that he might be mistaken. Detective Larry Swafford, a major crimes detective employed by the Chattanooga Police Department, testified that, prior to trial, the clothing had been returned to Ms. Little and that there had been nothing unusual about the clothing.

respect to whether he noticed drag marks between the sidewalk and the location of the clothing, the officer remarked, “With all the I guess debris in the area there and in the yard, it would’ve been really hard to tell if there had been any force used around there.” Kennemore testified that the neighborhood is considered a “high crime area.”

Officer Kennemore transported Ms. Little to Erlanger Hospital. Dr. Frank Calhoun, who practices emergency medicine at the hospital, testified that, when Ms. Little arrived at the hospital, she was crying. She informed the doctor that she had been assaulted and raped. Dr. Calhoun examined Ms. Little. She was experiencing “a lot of pain” on the right side of her face. The right side of her face was very swollen and exhibited severe bruising. X-rays revealed that Ms. Little had suffered a facial fracture, which required an operation. She had also suffered hemorrhages on her right eardrum. With respect to her torso, she was experiencing tenderness over her breastbone and in her abdomen. She had multiple, widespread scratches on the front and back of her torso. As to the severity of the victim’s injuries, Dr. Calhoun testified that there was a risk of death, there was disfigurement, and there was extreme physical pain. Dr. Calhoun did not perform a vaginal examination, because, at the hospital, the victim denied penetration. She was not subjected to a blood alcohol test, because she appeared to be “alert and coherent.”

Detective Larry Swafford, the principal investigating officer, testified that Officer Kennemore notified him of the incident in the early morning hours of September 6, 1992, and that he immediately proceeded to Erlanger Hospital. He interviewed the victim at the hospital, but did not record her statement. Detective Swafford did testify that, In her statement to him, Ms. Little only alleged digital penetration by her assailant. Therefore, Swafford did not request a vaginal examination of the victim. The victim never mentioned to Detective

Swafford that she had been forced to perform oral sex on the appellant.

The appellant testified at trial. He admitted to numerous prior convictions, including convictions for burglary, grand larceny, and DUI. He stated that, on August 17, 1992, he was serving a sentence in Georgia and was issued a 48 hour pass. He violated the pass, escaping to Chattanooga, Tennessee. While in Chattanooga, he sporadically performed yard work and frequented Chili De-Bos, where he drank beer, played pool, and socialized. According to the appellant, he met, spoke with, and danced with Ms. Little at the bar on various occasions. Ms. Little introduced the appellant to Ms. Roe approximately three or four weeks prior to the instant offense and gave the appellant Ms. Roe's phone number and address.

The appellant further recounted that, on September 5, 1992, he spent the day at Ms. Roe's house, socializing and drinking beer. Ms. Little subsequently arrived. She and Ms. Roe left the house to attend a party. They returned at approximately 7:30 p.m. and accompanied the appellant to Chili De-Bos. They remained at the bar until it closed at approximately 1:00 a.m. Ms. Little then drove the appellant and Ms. Roe to Ms. Roe's home. At some point, Ms. Little invited the appellant to go on a walk. They exited the house through the back door, which locked automatically. According to the appellant, Ms. Roe refused to allow them back into the house. Ms. Little then convinced the appellant to walk with her to her home on Clio Avenue.

When they were approximately four houses from Ms. Little's home, Ms. Little suggested that she and the appellant walk onto a vacant lot and talk. She then informed the appellant that he could not enter her home, because her boyfriend was present. The appellant became angry, but Ms. Little indicated that he could visit her later. Ms. Little and the appellant then began to kiss. The

appellant testified at trial that Ms. Little voluntarily performed oral sex on him. With Ms. Little's consent, the appellant removed Ms. Little's pants and shoes. During this sexual encounter, the appellant indicated that he would later return to Ms. Roe's house. Ms. Little reacted angrily, refusing to proceed further. The appellant, in turn, became angry and hit Ms. Little. They engaged in a struggle, during which they fell into some hedge bushes. Ms. Little then ran away. The appellant testified that he left immediately thereafter, because he did not want to await the police's arrival. Several days later, the appellant left Tennessee and visited a girlfriend in Jackson, Mississippi. He remained in Mississippi for approximately four weeks. He then returned to the Department of Correction in Georgia. He became aware of the instant charges in May, 1993, and, on May 17, 1993, submitted a "Demand for Speedy Trial."

## II. Analysis

The appellant challenges the sufficiency of the evidence supporting his convictions for aggravated kidnapping, aggravated assault, and attempted sexual battery. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e).

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). "A jury verdict approved by the trial judge accredits the

testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429 (1984). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368 (1993).

A person is guilty of aggravated kidnapping if he knowingly removes or confines another so as to interfere substantially with the other's liberty (1) in order to facilitate the commission of any felony or flight thereafter; (2) with the intent to inflict serious bodily injury on or to terrorize the victim or another; or (3) where the victim suffers bodily injury. Tenn. Code Ann. § 39-13-304 (1991). See also Tenn. Code Ann. § 39-13-302(a) (1991). Again, the victim testified at trial that the appellant seized her as she was walking home and dragged her some distance from the well lit street into a nearby vacant lot. In the lot, the appellant restrained the victim as he physically and sexually assaulted her. Dr. Calhoun described, at trial, Ms. Little's extensive injuries. The appellant challenges the credibility of the victim's testimony. However, as already noted, weighing the credibility of witnesses lies solely within the province of the jury. Accordingly, we conclude that the record supports a conviction for aggravated kidnapping.

A person commits aggravated assault if, causing *serious* bodily injury, he (1) intentionally, knowingly, or recklessly causes bodily injury to another; (2) intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. Tenn. Code Ann. § 39-13-102 (1991). See also Tenn. Code Ann. §

39-13-101(a) (1991). Serious bodily injury means bodily injury which involves (1) a substantial risk of death; (2) protracted unconsciousness; (3) extreme physical pain; (4) protracted or obvious disfigurement; or (5) protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty. Tenn. Code Ann. § 39-11-106(a)(33) (1991). The appellant admitted at trial that he had physically assaulted Ms. Little. Moreover, as mentioned earlier, medical testimony established that, as a result of the appellant's assault, the victim suffered a facial fracture, which required surgery and caused extreme physical pain. We conclude that the record supports a conviction for aggravated assault.[7]

Finally, a person commits sexual battery if he engages in sexual contact with the victim by the defendant or the defendant by a victim, accompanied by force or coercion. Tenn. Code Ann. §39-13-505 (1991). See also Tenn. Code Ann. §39-13-503(a)(1) (1991). Sexual contact includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's,

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[7]In his brief, the appellant suggests that, during defense counsel's cross-examination of Dr. Calhoun, the trial court improperly explained to the doctor the legal definition of serious bodily injury and asked the doctor if, in his opinion, the victim had suffered such injury. The appellant failed to raise this issue in his Motion for New Trial, cites no authority for this proposition in his brief to this court, and has, accordingly, waived this issue for the purpose of appeal. Tenn. R. App. P. 3(e); Tenn. R. App. P. 27(a)(4) and (7); Ct. Crim. App. R. 10(b).

Nevertheless, we simply note that Tenn. R. Evid. 614(b) provides that the court may interrogate witnesses. Tennessee law recognizes a court's power to ask questions of witnesses in order to clarify the testimony, if done in an impartial manner. Cohen, Sheppeard, Paine, Tennessee Law of Evidence (1995) § 614.2, p. 418 n. 474.

> The trial judge may, in the exercise of discretion and with use of restraint, ask questions of witnesses to clear up confusion in the testimony of a witness. Unless the record shows the trial judge has so far questioned a witness in such a manner to clearly show the accused has been prejudiced, a new trial will not be granted.

State v. Hardin, 691 S.W.2d 578, 581 (Tenn. Crim. App. 1985). See also State v. Caughron, 855 S.W.2d 526, 536-537 (Tenn.), cert. denied, 510 U.S. 979, 114 S.Ct. 475 (1993)("[w]hile we caution restraint in a trial court's interjections and comments during trial, in the overall context of this case, the trial court's behavior in the cited instances did not so clearly violate the mandate of impartiality as to infringe upon the Defendant's right to a fair trial").

Moreover, an expert may testify concerning an ultimate issue to be decided by the trier of fact if his testimony will substantially assist the trier of fact to understand the evidence or to determine a fact in issue. See Tenn. R. Evid. 702 and 704. See also State v. Wallen, No. 03C01-9304-CR-00136 (Tenn. Crim. App. at Knoxville, November 30, 1995), perm. to appeal denied, (Tenn. 1996)("[i]f jurors lack experience or knowledge on a given subject and will be substantially assisted by expert testimony in their fact-finding task, the testimony should not be excluded because it addresses an ultimate issue"). We conclude that the trial court committed no error in eliciting the doctor's testimony describing the extent of Ms. Little's injuries.

the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification. Tenn. Code Ann. § 39-13-501(6) (1991). A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense, completes a substantial step toward the commission of the offense. Tenn. Code Ann. § 39-12-101(a)(3) (1991). The statute provides that it is no defense to prosecution for criminal attempt that the offense attempted was actually committed. Tenn. Code Ann. § 39-12-101(c). Again, the victim testified that the appellant dragged her onto the vacant lot, forcibly removed her shoes, pants, and underwear, attempted penile penetration and, when unsuccessful, forced the victim to perform oral sex on him. We conclude that the record supports a conviction for attempted sexual battery.

Additionally, the appellant contends that his convictions for aggravated kidnapping, aggravated assault, and attempted sexual battery violate his constitutional guarantee of due process.[8] Citing Anthony, 817 S.W.2d at 299, he contends that the movement and detention of the victim were essentially incidental to the accompanying aggravated assault and attempted sexual battery. We agree.[9]

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[8]Although the appellant does not address principles of double jeopardy in his brief, we simply note that the appellant's convictions survive application of the Blockburger test, adopted by our supreme court in State v. Black, 524 S.W.2d 913, 919-920 (Tenn. 1975). This test was originally enunciated by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932), and was recently reaffirmed by the Supreme Court in United States v. Dixon, 509 U.S. 688, 696, 113 U.S. 2849, 2856 (1993).

> The broad question is whether or not the offenses at issue constitute the 'same offense' under the double jeopardy clause. As Black makes clear, multiple convictions do not violate double jeopardy if '[t]he statutory elements of the ... offenses are different, and neither offense is included in the other.' Specifically, the Blockburger test requires that 'courts ... ascertain "whether each [statutory] provision requires proof of a fact which the other does not."'

State v. Stephenson, 878 S.W.2d 530, 538 (Tenn. 1994)(citations omitted). See also State v. Phillips, 924 S.W.2d 662, 664-665 (Tenn. 1996). A comparison of the statutes at issue in this case, in the context of this case, clearly demonstrates that the offenses are not identical and do not rest on the same facts.

[9]As the appellant observes in his brief, the trial court also agreed with the appellant's position. At the close of the State's proof, the appellant submitted a motion to dismiss the kidnapping charge. The trial court ruled:

> I'm not going to sustain your motion as far as the kidnapping is concerned at this time. I will let the jury determine that. But I think based on the law, and that is considering State vs. Anthony and the latest case, State vs. Meeks, where they

In Anthony, 817 S.W.2d at 306, the Tennessee Supreme Court held that, where the appellant is charged with kidnapping in conjunction with another felony, the court must make the following determination:

> [W]hether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction.

One method of resolving this question is to inquire whether the confinement, movement, or detention substantially increased the risk of harm to the victim over and above that necessarily present in the accompanying felony or felonies. Id. The conclusion reached by a court will depend heavily upon the facts in each case. Id. at 306.[10]

In the instant case, the appellant dragged Ms. Little from a well lit street to a wooded area located in a nearby vacant lot, where he proceeded to physically and sexually assault her. An investigating officer testified at trial that, at night, an individual standing on the street or sidewalk would be unable to see someone

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> again applied the standards they set out in State vs. Anthony, that this case does not constitute kidnapping. But, as I say, I will let the jury decide first, but I think as a matter of law you'll probably win that.

Following the presentation of all the proof, the appellant renewed his motion for judgment of acquittal. The trial court again observed:

> I will deny your motion for a directed verdict as to the kidnapping even though I believe that probably it cannot stand based on the law. But I'm going to give the jury the opportunity to hear it and decide it, and that way it would be preserved for appeal.

[10]Generally, in determining whether a separate kidnapping conviction was supportable, courts have considered the following factors:

> (1) evidence that the seizure, detention, or movement was or was not inherent in the nature of the underlying crimes;
> (2) whether the crime was facilitated by the confinement;
> (3) whether the movement or confinement prevented the victim from summoning assistance;
> (4) whether the movement or detention lessened the defendant's risk of detection;
> (5) whether the movement or detention created a significant danger or increased the victim's risk of harm;
> (6) the length of time the victim was held or moved;
> (7) the distance the victim was moved; and
> (8) the location and environment of the place the victim was detained.

See Annotation, Seizure or Detention for Purpose of Committing Rape, Robbery, or Other Offense as Constituting Separate Crime of Kidnapping, 39 A.L.R.5th 283, 358 (1996).

standing in the vacant lot, at the location from which Ms. Little's clothes were recovered. However, he indicated that the distance from the sidewalk to the location of the clothes was less than the length of the courtroom.[11] In State v. McCurdy, No. 01C01-9505-CC-00124 (Tenn. Crim. App. at Nashville, December 15, 1995), this court held that a kidnapping conviction was essentially incidental to the accompanying rape when the defendant forced the victim twenty to twenty-five feet from the coffee/cocoa counter of a convenience store to the men's rest room. Once inside the bathroom, the assailant forced the victim to perform oral sex on him. This court observed:

> The fact that [the victim] was abducted into the rest room makes this issue a more difficult one to resolve. It appears obvious that this was done by the defendant to lessen the possibility of being so readily detected. [Nevertheless, w]e do not believe that the removal and confinement of the victim herein is significant enough, in and of itself, to warrant independent prosecution for kidnapping ... .

See also State v. Coleman, 865 S.W.2d 455 (Tenn. 1993)(conviction for aggravated kidnapping reversed when, while robbing a retail shoe store, the defendant used a gun to force the female sales person into a back room of the store where he proceeded to rape her); State v. Sanders, 842 S.W.2d 257 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1992)(conviction for aggravated kidnapping reversed when defendant forced the victim, at gunpoint, to return from the parking lot to the inside of a restaurant where the defendant ordered the victim to open a safe and then bound the victim's hands with duct tape).[12] Similarly, the proof adduced at trial in the instant case does not support

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[11]Although argument of counsel is not evidence, the prosecutor noted during argument that the distance from the public street to the victim's clothing was approximately thirty or forty feet.

[12]Contrast State v. Duff, No. 03C01-9501-CR-00008 (Tenn. Crim. App. at Knoxville), perm. to appeal denied, (Tenn. 1996). In Duff, No. 03C01-9501-CR-00008, this court affirmed the defendant's convictions for aggravated kidnapping and rape when the victim was tricked into stopping her car on the side of the road in front of a closed restaurant, and her assailants seized control of her car and drove it around to the back of the restaurant. This court held:

> We conclude that in this case the detention and movement of the victim behind the restaurant was [sic] not an inherent part of the rape. While confinement and detention are necessarily part of rape, the movement of the victim behind the restaurant ... 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 the main highway to an isolated area behind the restaurant.

a conviction for aggravated kidnapping in addition to convictions for aggravated assault and attempted sexual battery, particularly in light of the mandate in Anthony, 817 S.W.2d at 306, "to apply the [kidnapping] statute narrowly, so as to make its reach fundamentally fair and to protect the due process rights of every citizen, even those charged with robbery, rape, or the like."

Having concluded that fundamental fairness precludes convictions for all three offenses charged in the instant case, we must next determine whether Anthony mandates the reversal of the kidnapping conviction rather than the lesser convictions. Generally, "[u]pon a finding that two convictions cannot both stand, the conviction for the greater offense must stand and that for the lower offense must be vacated. The grade of the offense is determined by the punishment; the offense with the most severe punishment is the greater offense and is the offense that must stand." State v. Beard, 818 S.W.2d 376, 379 (Tenn. Crim. App. 1991). See also Walton v. State, 448 S.W.2d 690, 696-697 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1969). However, in State v. Gaskell,

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See also Tarpley v. State, No. 03C01-9303-CR-00067 (Tenn. Crim. App. at Knoxville, December 20, 1993), perm. to appeal denied, (Tenn. 1994). This court in Tarpley, No. 03C01-9303-CR-00067, upheld the defendant's convictions for aggravated kidnapping and rape when the victim was tricked into stopping on the side of the road, and her assailant seized control of her car and drove the victim to a cemetery where he proceeded to rape her. This court held:

> In the instant case, we do not find the kidnapping to be incidental to the rape of the victim. Appellant kidnapped the victim along the side of the highway and moved her a great distance to an isolated cemetery before raping her. In moving her to such a location he substantially increased the risk of harm to the victim by making the offense of rape easier to commit.

Arguably, both of these cases are distinguishable from the instant case due to the greater risk inherent in an assailant seizing control of a victim's vehicle and the greater distance of the movements in these cases.

We acknowledge the State's citation to People v. Thomas, 3 Cal. App. 3d 859, 83 Cal.Rptr. 879 (Cal. Ct. App. 1970), in which the California Court of Appeal upheld a kidnapping conviction when the defendant stopped two young women at approximately midnight on a lighted public street, forced them to enter a nearby dimly lighted alley, and committed robbery. Nevertheless, we note that the California court's decision rested on that court's interpretation of the relevant California kidnapping statute rather than upon general principles of due process. Indeed, our supreme court in Anthony, 817 S.W.2d at 306, after citing Thomas, noted that "it must be remembered that individual cases are sometimes dependent upon the wording of the particular statute being construed, and upon the clarity of local legislative intent."

Moreover, pursuant to their interpretation of the California kidnapping statutes, the California courts have been able to distinguish from Thomas those cases involving the factual situations described in Coleman, Sanders, and McCurdy. Citing the California statutory requirement of asportation into another part of the same county, a requirement absent from the Tennessee kidnapping statutes, the California courts have reversed kidnapping convictions when the defendant does no more than "'move his victim around inside the premises in which he finds him.'" People v. Rayford, 884 P. 2d 1369, 1375 (Cal. 1994).

No. 285 n.1 (Tenn. Crim. App. at Knoxville, April 13, 1992), a panel of this court suggested that the primary focus of Anthony was sufficiency of the evidence to support a kidnapping conviction.[13] Thus, an Anthony violation would require the reversal of the kidnapping conviction. We propose, instead, that the focus of Anthony was the fairness of multiple convictions for inherently interwoven offenses, an interpretation permitting the reversal of the accompanying offenses should they be of a lesser grade.[14]

Moreover, this court has observed that a prosecutor may choose, consistent with Anthony, to charge only kidnapping when confronted by factual scenarios contemplated by the supreme court in Anthony. See Gaskell, No. 285 n.1. See also State v. Roberts, No. 03C01-9407-CR-00262 n. 4 (Tenn. Crim. App. at Knoxville, April 16, 1996)(per curiam). If a single conviction for kidnapping, unaccompanied by other convictions, may rest upon facts similar to those in Anthony, then clearly sufficiency of the evidence cannot be the principle concern. In other words, if the issue were truly sufficiency of the evidence, then facts, insufficient to support a kidnapping conviction accompanied by a conviction for an interwoven offense, would be insufficient to support a kidnapping conviction alone.

Finally, an individual who engages in a course of criminal conduct, involving numerous related offenses of varying degrees of seriousness, does so at his own risk. We believe that this conclusion is not only consistent with due process, but also with legislative intent. See Anthony, 817 S.W.2d at 306. Thus, as we have already determined that the evidence presented at the appellant's

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[13]For example, the test set forth by our supreme court is whether the kidnapping "is significant enough, in and of itself, to warrant independent prosecution." See Anthony, 817 S.W.2d at 306. Moreover, the supreme court expressed its doubt "that the legislature intended that every robbery[, rape, or assault] should also constitute a kidnapping." Id.

[14]Thus, in Anthony, 817 S.W.2d at 307, the supreme court noted, at one point, that the defendant's conduct "[s]uperficially at least, might appear adequate to constitute a separate offense."

trial is sufficient to support the jury's verdicts, we affirm the kidnapping conviction and, in accordance with the principle of fundamental fairness, reverse the lesser convictions of aggravated assault and attempted sexual battery.

## III. Conclusion

For the reasons set forth above, we reverse the appellant's convictions for aggravated assault and attempted sexual battery and dismiss the charges. The appellant's conviction for aggravated kidnapping is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

_____
JOHN H. PEAY, Judge

_____
WILLIAM M. BARKER, Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION



| | | |
|---|---|---|
| STATE OF TENNESSEE, | ) | NO. 03C01-9504-CR-00121 |
| | ) | |
| Appellee | ) | HAMILTON COUNTY |
| | ) | |
| V. | ) | HON. DOUGLAS A. MEYER |
| | ) | JUDGE |
| RICKY MICHAEL DIXON, | ) | |
| | ) | (Agg. Kidnapping, Agg. Assault; |
| Appellant | ) | Attempted Sexual Battery) |

**SEPARATE CONCURRING AND DISSENTING OPINION**

I concur in the majority's opinion to affirm the appellant's conviction for aggravated kidnapping, but I do not concur in the decision of the majority to reverse and dismiss the appellant's convictions for aggravated assault and attempted sexual battery. I am of the opinion that based upon the facts of this case and the law as I view it, all of the appellant's convictions should be affirmed.

The majority, rather unconvincingly to me, attempts to distinguish the present case from State v. Duff, No. 03C01-9501-CR-0008 (Tenn. Crim. App. at Knoxville) perm. to appeal denied, (Tenn. 1996). The majority attempts to distinguish the Duff case from this case solely on the basis that a vehicle was involved in the Duff kidnapping.

The victim in the Duff case, while driving her automobile late at night on a Knoxville street, was tricked by the defendant into stopping her car in front of a closed restaurant. Thereafter, the defendant and his companions commandeered the victim's vehicle and drove it a short distance from its stopping place upon the well-lit city street to a dark area of the parking lot behind the restaurant, and there raped the victim. In affirming Duff's conviction for aggravated kidnapping and rape, our court found that "the movement of the victim behind the restaurant . . . 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 the main highway to an isolated area behind the restaurant."

Similarly, in this case the victim was accosted by the appellant as she walked late at night along the sidewalk of a well-lighted city street. In order to "substantially lessen the risk of detection" the appellant forcibly dragged the victim from the sidewalk onto a vacant lot which was overgrown. Testimony at trial indicated that because of poor lighting in the vacant lot coupled with the large amount of overgrown vegetation, it would not be possible for persons on or near the street to observe someone in the vacant lot at night even if they were standing up. Further, testimony indicated that it would be difficult to see someone in the vacant lot even during daylight hours if that person were lying down. Under these facts, I cannot conclude that there is any meaningful or significant distinction between Duff and this case. Moreover, the photographic exhibits which were introduced at trial graphically reveal numerous cuts, scratches, and abrasions sustained by the victim in this case as a result of being sexually attacked in the bushes and briars growing in the vacant lot. Simply put, her injuries were greater because of the location of the rape.

Based upon the foregoing, I simply am unable to conclude that any of the appellant's crimes were incidental to another as contemplated by State v. Anthony, 817 S.W.2d 299 (Tenn. 1991). Accordingly, I would affirm the appellant's conviction for each offense.

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WILLIAM M. BARKER, JUDGE