

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT

KNOXVILLE

JANUARY 1997 SESSION

FILED

March 27, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

vs.

WILLIAM HANSARD,

Appellant.

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No. 03C01-9606-CC-00216

SEVIER COUNTY

Hon. Ben W. Hooper, II,
Judge

(Aggravated Assault)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED AS MODIFIED

CURWOOD WITT,
JUDGE

OPINION

The defendant, William Hansard, was convicted of aggravated assault in a jury trial in the Circuit Court of Sevier County. He was sentenced as a Range I, standard offender to serve three years in the custody of the Department of Correction. He appeals as of right and contends (1) that the trial judge erred by ruling as a matter of law that an ex parte restraining order was in effect at the time of the offense, and (2) it was error to allow testimony regarding his prior bad acts.

The defendant was convicted of aggravated assault under Tennessee Code Annotated Section 39-13-102(a)(3). For the reasons discussed below, we modify the defendant's conviction to assault as defined in Tennessee Code Annotated Section 39-13-101(a)(1) and his sentence to eleven (11) months and twenty-nine (29) days.

William Hansard, the defendant, and Holly McGill, the victim, were involved in a brief but turbulent marriage. Within a few weeks of their wedding, McGill fled home to her parents. Recurring violence defeated all attempts at reconciliation. In July, 1994, McGill filed for divorce. On October 25, 1994, McGill requested and Judge Charles S. Sexton granted an ex parte order of protection. The defendant was served with a copy of the order the following day. Neither McGill nor the defendant appeared at the hearing scheduled for November 4, 1994.¹ In mid-December, the defendant began sleeping at

¹ The Circuit Court dismissed the petition for failure to prosecute on April 17, 1995 as part of its regular "housekeeping" procedure.

McGill's apartment. He worked at Ober Gatlinburg and helped McGill buy some things for their son.

On the night before the events at issue in this case the defendant returned home from work to find that McGill had visitors. The defendant became angry. McGill testified that, the next morning as she was cooking his breakfast, the defendant accused her of talking to "her boyfriend" on the telephone. He yanked the phone out of the wall. When she attempted to go to a neighbor's house to use the telephone, he grabbed her by the hair and dragged her down the hall into the baby's room. He struck her several times in the head with his fist. When he released his hold, she kicked him in the groin and ran next door to Bob Parton's apartment. After McGill called her father, Parton called 911. When the police arrived, they arrested the defendant who steadfastly denied he had done anything wrong. Both Parton and the arresting officer testified to the knots and bruises they observed on the victim's scalp.

The defendant was tried and convicted of aggravated assault under Tennessee Code Annotated Section 39-13-102(a)(3) which provides that a person commits aggravated assault, who, after being enjoined by a lawful court order from causing or attempting to cause bodily injury or otherwise committing an assault against an individual, does, in fact, attempt or commit an assault against the protected individual. In this case, a court of competent jurisdiction entered an ex parte order on October 25, 1994, specifically restraining the defendant from "abusing, threatening to abuse, or committing acts of violence upon the victim."

However, neither party appeared at the scheduled hearing. Our Code provides that an ex parte order of protection remains in effect only until a hearing is held. The hearing must occur within ten days of the issuance of the order. Tenn. Code Ann. § 36-3-605 (b). The state concedes that no such order existed at the time of the assault for the purpose of enhancing the offense to aggravated assault under Section 39-13-102(a)(3). This concession dissolves any support for an aggravated assault conviction under this section.² See State v. Allan Olsen, No. 02C01-9408-CR-00185 (Tenn. Crim. App., Jackson, Feb. 15, 1995). Based on the proof in the record, we reduce the aggravated assault conviction to simple assault.

Defendant also contends that the victim's testimony about his prior bad acts and other uncharged conduct was inadmissible under Rule 404(b) of the Tennessee Rules of Evidence. After carefully reviewing the record, we

² The relevant statutory language is not completely clear. It states:

- (a) A person commits aggravated assault who:
(1) Commits an assault as defined in § 39-13-101, and
(3) After having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, attempts to cause or causes bodily injury or commits or attempts to commit an assault against such individual or individuals.
Tenn. Code Ann. § 39-13-102 (1996 Supp.)(emphasis added).

In one case, this court stated, without discussion, that the statute applied while a defendant was enjoined by a lawful court order. See State v. Timothy Scott Galavin, No. 01C01-9401-CC-00027 (Tenn. Crim. App., Nashville, Sept. 15, 1994). In the case before us, the assault occurred after the defendant had been enjoined; however, as neither party has raised this issue, we do not address it here.

conclude that any evidence that may have been erroneously admitted was harmless. Tenn. R. App. P. 36(b).

The victim testified to the defendant's attack upon her, and the jury accredited her testimony. Both her next door neighbor, and the police officer who responded to the call observed the injuries she received as result of the attack. Any testimony regarding prior bad acts did not affect the verdict in this case.

The defendant's conviction is reduced to simple assault, a Class A misdemeanor. Because aggravated assault is a Class C felony, we must also modify the sentence. At the sentencing hearing, the trial judge found that several enhancement factors were applicable. The record supports the use of the following factors to enhance the misdemeanor conviction: (1) the defendant has a history of previous criminal behavior which included several assaults upon his wife, and (5) the defendant treated the victim with exceptional cruelty during the commission of the offense. See Tenn. Code Ann. § 40-35-114(1), (5). The trial judge declined to find that the defendant had acted under extreme provocation. Although the trial judge acknowledged that the defendant's youthfulness was a mitigating factor, he did not accord this factor much weight. Based on the trial court's factual findings, we reduce the sentence to eleven (11) months and twenty-nine (29) days.

This matter is remanded to the trial court for entry of a judgment order consistent with this opinion.

CURWOOD WITT, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

WILLIAM M. BARKER, Judge