IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1996 SESSION

STATE OF TENNESSEE,	)	No. 03-C-01-9508-CC-00250
	)	
APPELLEE,	)	Unicoi County
	)	
v.	)	Arden L. Hill, Judge
	)	
BILLY JOE SMITH,	)	(Aggravated Robbery, Aggravated Rape,
	)	Aiding and Abetting Aggravated Rape,
APPELLANT.	)	Aggravated Kidnapping)

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OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Billy Joe Smith, was convicted of two counts of aggravated rape, a Class A felony, aiding and abetting aggravated rape, a Class A felony, aggravated kidnapping, a Class B felony, and aggravated robbery, a Class B felony, by a jury of his peers.[1] The trial court found that the appellant was a persistent offender and imposed the following Range III sentences:

a.) Unicoi County indictment number 4052, Count 1, charging aggravated rape, confinement for thirty (30) years in the Department of Correction;

b.) Unicoi County indictment number 4052, Count 2, charging aggravated rape, confinement for thirty (30) years in the Department of Correction;

c.) Unicoi County indictment number 4052, Count 3, charging aiding and abetting aggravated rape, confinement for twenty-five (25) years in the Department of Correction;

d.) Carter County indictment number 10500, Count 1, charging aggravated robbery, confinement for twenty-five (25) years in the Department of Correction; and

e.) Carter County indictment number 10500, Count 2, charging aggravated kidnapping, confinement for twenty-five (25) years in the Department of Correction.

All of the sentences are to be served consecutively. The effective sentence imposed was confinement in the Department of Correction for 135 years.

Two issues are presented for review. The appellant challenges the sufficiency of the evidence. He also contends the trial court committed error of prejudicial dimensions by denying his motion for a court appointed psychiatrist to evaluate him and assist in the preparation and presentation of his defense.

During the early morning hours of November 29, 1992, the appellant and a co-defendant, Terry Dean "Snuffy" Snead,[2] entered a convenience store in Carter County.

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[1]The aggravated kidnapping and aggravated robbery cases were committed in Carter County. The two aggravated rapes and aiding and abetting aggravated rape occurred in Unicoi County. The crimes were initiated by the robbery and the kidnapping followed by the aggravated rape cases and aiding and abetting aggravated rape.

The parties agreed to waive the venue requirements, and consolidate the cases for a joint trial in Unicoi County.

[2]The cases charging Snead with similar offenses were severed. Thus, Smith was tried alone in this case.

The female clerk asked the appellant if she could help him. He stated he was there to rob her. The appellant and Snead both brandished knives. The appellant told the clerk he wanted all the money in the store, and, if she did not cooperate, he would kill her. The clerk placed the proceeds of the cash register, approximately $500, in a paper sack and gave it to the appellant. The appellant and Snead forced the victim at knife point to accompany them. She was forced into the appellant's vehicle.

The appellant and Snead took the victim to a cemetery near Limestone Cove in Unicoi County. They forced her to drink a beverage containing alcohol. Both the appellant and Snead drank from the bottle. The appellant raped the victim at knife point on two occasions. Snead, who was also armed, raped the victim on one occasion. The appellant aided and abetted the rape committed by Snead. They remained at Limestone Cove until dawn.

The appellant drove to a Roadway Inn in Johnson City. It was the intention of both the appellant and Snead to rape the victim at the motel. When Snead asked an employee of the motel if a room was available, he told Snead there was a room available, but he was too intoxicated to lease a room. Snead exited the vehicle for the purpose of fighting the employee. The victim exited the vehicle. The appellant caught her. He told the employee it was just a lover's spat. The victim broke loose a second time and ran to the motel's office. She called the police. The appellant and Snead got into the car and drove away.

The victim made a courtroom identification of the appellant as the perpetrator of the offenses, and she identified the knife the appellant used in committing these offenses. DNA testing and analysis established the semen found in the victim's vagina matched the blood of the appellant. The victim's hair was found inside the appellant's motor vehicle. Fibers consistent with the shirt the appellant was wearing when committing the crimes were found on the victim's shirt and jeans.

On December 31, 1992, the trial court entered an order directing a local mental health agency, Watauga Mental Health Center (Watauga), to examine the appellant for the purpose of determining (a) his sanity at the time the appellant committed the offenses in question, and (b) the appellant's competency to stand trial. On February 5, 1992, Dr. Jerry Matthews, a psychologist, wrote a letter to the trial court regarding his recommendations.

The letter states in part:

> It is my opinion that Mr. Smith is not competent to stand trial at this time. It is also my opinion that Mr. Smith's criminal responsibility at the time needs to be further evaluated. It is my recommendation a forensic court order be executed and that he be transferred to Middle Tennessee Mental Health Institute, Nashville, TN, Forensic Science Division for a thirty day forensic evaluation to establish his competency and criminal responsibility.

While the Middle Tennessee Mental Health Institute (Institute) examined the appellant for approximately thirty days, no order appears in the record authorizing the evaluation.

The appellant was observed and examined between March 31, 1993 and April 29, 1993. The Institute found the appellant was competent to stand trial and that he was sane when he committed the offenses in question. Staff members of the Institute concluded the appellant "attempted to give the appearance of mental illness." The appellant could answer any question asked of him except questions concerning the circumstances of the offenses and court proceedings. The report states the appellant "was attempting to malinger" while at the Institute. He skewed the results of tests given by the Institute's staff. The results of one test revealed he was mentally retarded. Those who talked to the appellant and observed him during his stay at the Institute knew the appellant was not mentally retarded. Before leaving the Institute, the appellant asked to talk to a psychologist. The appellant told the psychologist "[h]e wanted to clarify that he was not mentally retarded and did not want that diagnosis in his file. He wanted to repeat the evaluation process because he knew he could do better."

A staff member of Watauga, Richard Kirk, examined the appellant at the jail in August of 1994. Kirk had access to the Institute's report regarding the appellant. Kirk confirmed the findings of the Institute. He concluded the appellant was malingering.

On September 9, 1994, the appellant filed a motion seeking an independent evaluation. He argued the report of Dr. Matthews and the report of the Institute conflicted. He contended the report of the Institute was inaccurate because of the conflicts in the facts reported and the opinions expressed by the Institute's staff. Neither the motion nor a transcription of the proceedings held on September 9th are contained in the record.

The appellant argues he raised this very issue before the trial court on December

22, 1994. Actually, the appellant moved to suppress a statement he made to law enforcement officers after his arrest. During the course of the suppression hearing, defense counsel alluded to Dr. Matthews's letter and the Institute's report. Defense counsel advised the trial court that "after this hearing, however Your Honor rules on that, I'm going to ask that there be a further evaluation to determine not -- determine what exactly these people are talking about -- I'm asking for another test to test these guys. To see what their -- if their tests were valid." The following colloquy then took place at the suppression hearing:

> THE COURT: Are you asking that a third test be given?
>
> MR. LAWSON: Yes, sir, by an independent psychologist?
>
> THE COURT: Well, but this -- we're only a few days prior to the trial and we wouldn't have time to have him examined between now and the time of the trial. . . .

On January 3, 1995, two days before the trial was to commence, the appellant filed a "Motion for Expert Services for Re-Evaluation." The motion alleged the appellant "made an ex parte threshold showing [to] the trial court that his sanity is a significant factor in his defense as evidenced by a report from Dr. Jerry Matthews, Phd, dated February 5, 1993. . . ." The motion asked the trial court to "grant the defendant funds to employ a competent psychiatrist to conduct an appropriate examination of the defendant and to assist in the evaluation, preparation, and presentation of the defense of insanity. . . ." The assistant district attorney general was served with a copy of the motion the afternoon before the trial was to commence.

When the trial court asked the parties if they were ready for trial, defense counsel stated he was not. A side bar conference was conducted by the trial court. The following colloquy took place:

> THE COURT: Why is it you're not ready? Is it because of this motion that you filed this morning?
>
> MR. LAWSON: Yes, sir.
>
> THE COURT: Motion for expert services for re-evaluation.
>
> MR. LAWSON: Yes, sir.

> THE COURT: We could have a short one right here as to both -- I've read this motion for expert services for re-evaluation. I've also read Code Section 40-14-208, subsection (b), and it says in capital cases where the defendant -- and I know this is not a capital case. . . .
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> * * * * *
>
> MR. LAWSON: We have several reasons for asking it. We think its mandated by (indiscernible) persons. Mr. Smith was initially evaluated by Mr. Richard Kirk at Watauga Mental Health Services, and we found under the procedures that Doctor Jerry Matthews (indiscernible). He finds that there's a reason -- the defendant is not competent and he refers him to Dr. Matthews, and originally Doctor Matthews found that Mr. Smith is competent to stand trial . . . he found subsequently that (indiscernible) forensic services did extensive evaluation and (indiscernible) which he was found competent to stand trial (indiscernible). It is our contention that evaluation of Mr. Smith is not a valid evaluation of Mr. Smith and Mr. Matthews is here to testify as to the reasons why (indiscernible) evaluation.

The trial court noted the original motion was filed and denied on September 9, 1994. The court advised defense counsel he was granting a hearing on this motion. The court denied the motion on the ground the statute, Tenn. Code Ann. § 40-14-207, was limited in scope to capital cases, and, furthermore, the appellant had been evaluated and found to be competent to stand trial and sane when he committed the offenses. The court told defense counsel he did not think it was necessary for Dr. Matthews to testify. The appellant did not attempt to make an offer of proof regarding Dr. Matthews's testimony.

Dr. Matthews testified as a defense witness during the trial. He testified Richard Kirk talked to the appellant at Watauga. Kirk could not obtain sufficient information to formulate an opinion as to the appellant's competency to stand trial or his sanity at the time he committed the offenses in question. Kirk referred the appellant to Dr. Matthews.

Dr. Matthews talked to the appellant for approximately one hour. He, like Kirk, was not able to obtain sufficient information from the appellant to formulate an opinion as to sanity at the time of the offense or competency to stand trial. He further stated he could not determine whether the appellant "was unable to cooperate or was not willing to cooperate." He subsequently clarified the conclusions he stated in his letter:

> I want to clarify that. As -- as my letter states, I stated he was not competent to stand trial at that time. And the way that I came to that was, that if he was unwilling or unable to answer my questions to establish his behavior at the time of the

> offense, I would assume that he would not be able to answer any questions from yourself [the assistant district attorney general] or from his own attorney in order to participate meaningfully in his own defense, which is what competency is establishing. (Emphasis added).

In short, Dr. Matthews's opinions were predicated on the fact he could not gather enough information. However, he agreed that the competency of a person can change from time to time.

I.

The appellant contends the "state did not prove beyond a reasonable doubt that the defendant was sane at the time of the commission of the offenses." This issue has been waived. The appellant failed to brief this issue. Tenn. R. App. P. 27; Tenn. Ct. Crim. App. Rule 10(b); Nuclear Fuel Services v. Local No. 3-677, 719 S.W.2d 550, 552 (Tenn. Crim. App.), per. app. denied (Tenn. 1986).

It is parenthetically noted that if the issue was considered on the merits, this Court would hold there is ample evidence contained in the record to support a finding by a rational trier of fact the appellant was sane when he committed the offenses in question beyond a reasonable doubt. Tenn. R. App. P. 13(e).

II.

The appellant contends the trial court abused its discretion by "denying appellant's motion for funds for the employment of a private psychiatrist to assure the [appellant] access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the insanity defense." He argues the record "is replete with evidence that the particularized need of the appellant was most apparent." The appellant's argument is predicated upon the reports of Watauga and the Institute. He expresses the opinion that the report of the Institute is inaccurate. In other words, he does not like the results reached by the Institute.

A.

The appellant alleged in the motion filed January 3, 1995 that he had moved the trial court for an independent evaluation on September 9, 1994. However, the record does not contain a written motion, a transcript of the proceedings, or an order of the trial court denying the motion.

It is the duty of the party seeking appellate review to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues raised by the party. State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App.), per. app. denied (Tenn. 1988). When the record is incomplete, and does not contain a transcript of the proceedings relevant to an issue presented for review, this Court is precluded from considering the issue. State v. Groseclose, 615 S.W.2d 142, 147 (Tenn. 1981). Instead, this Court must conclusively presume the ruling of the trial court denying a motion was correct. Ballard, 855 S.W.2d at 560-61; Roberts, 755 S.W.2d at 836.

This portion of the issue is certainly without merit.

B.

The appellant also alleged in the motion filed January 3, 1995 he had raised this issue on December 22, 1994. Although the appellant filed a motion to suppress a statement he made to a police officer and a notice of his intent to rely on the defense of insanity on December 15, 1994, the record does not contain a written motion seeking the appointment of an independent psychiatrist or psychologist. In short, the appellant did not raise this issue prior to the date the motion to suppress was heard on December 22nd.

When arguing the merits of the motion to suppress, defense counsel referred to the Watauga report and the Institute report in an effort to establish the appellant did not have the capacity to waive the right to counsel and make a voluntary confession. The trial court asked defense counsel: "Have we had a full blown hearing as to his competency to stand trial?" The assistant district attorney general advised the court the Institute's findings of competency to stand trial had not been challenged.

Defense counsel in essence told the trial court he was challenging the validity of the Institute report. He stated: "I'm asking for another test to test these guys [the staff of the Institute]. To see what their -- if their tests are valid." He wanted an independent psychologist to make a third evaluation. The trial court advised counsel "we're only a few days prior to the trial and we wouldn't have time to have him examined between now and the time of the trial." The court then asked defense counsel: "How long have you suspected this?" Defense counsel did not answer the question. The record establishes defense counsel was appointed by the trial court on September 9, 1994. The trial court denied the request for a third evaluation.

Contrary to the argument advanced, the appellant did not establish a particularized need for an independent evaluation. State v. Barnett, 909 S.W.2d 423 (Tenn. 1995). Defense counsel simply argued the Institute's reports were inconsistent, he challenged the validity of the Institute's report, and he wanted a third evaluation to determine if the tests given by the Institute were valid. Counsel did not advise the court of the evidence he would elicit from the appellant's family or any other reason why there was a particularized need for an independent evaluation.

The Watauga report and the Institute's report are not inconsistent on the question of sanity at the time the offenses were committed as the appellant asserts. The Watauga report did not express an opinion on the sanity of the appellant when the offenses were committed. Watauga recommended to the court that the appellant be sent to the Institute for examination. As previously stated, the staff of the Institute concluded there was no basis to support an insanity defense.

There is a plausible explanation for the low scores on the tests given to the appellant while at the Institute. It was obvious to the staff the appellant was malingering and feigning a mental condition. When he was first seen, he acted disoriented when asked about the crimes he committed or the judicial process. However, he could answer any other questions the staff posed to him. He purposely skewed the results of the tests. However, he was inconsistent because he missed the easy questions and answered the harder questions. Furthermore, he acted normal in the ward where he was confined and en route to the staff's offices. He changed while in the office. The Institute made a specific

finding of malingering. Later, a member of the Watauga staff saw the defendant in August of 1994. Richard Kirk, who had seen the appellant in February of 1993, found the appellant was malingering. Kirk confirmed the Institute's finding in this regard.

The appellant indirectly admitted he had skewed the test results. Before leaving the Institute, he asked to see a psychologist. He told the psychologist he did not want his record to show he was mentally retarded. He asked if he could retake the tests. He advised the psychologist he knew he could do better on the tests.

The appellant's argument in this regard is skewed. The argument advanced takes portions from both reports out of context. This Court is required to consider both reports in their entirety.

This Court concludes the trial court did not abuse its discretion by denying the appellant's request for a third evaluation. He failed to establish a particularized need for an independent evaluation. Barnett, 909 S.W.2d at 431.

C.

The motion for re-evaluation and funds to obtain the services of an independent and competent psychiatrist was filed with the clerk two days before trial. The assistant district attorney general did not learn until 4:00 p.m. the day before trial that Dr. Matthews was to be called to testify in support of the motion. The motion was not brought to the attention of the trial court until the court asked defense counsel if he was ready for trial. When asked if the motion was the reason he was not ready for trial, he responded in the affirmative. The merits of the motion were discussed at the bench while the prospective jurors sat in the courtroom. Based upon the record, the appellant again failed to establish a particularized need for the appointment of an expert. Barnett, 909 S.W.2d at 431.

Again, defense counsel did not advise the trial court there would be lay testimony offered which tended to support an insanity defense. Counsel simply challenged the Institute's report. He stated Dr. Matthews was present to testify. When denying the motion, the trial court told defense counsel he really did not need to hear from Dr. Matthews. Of course, Dr. Matthews did not make a finding as to sanity at the time of the

offense, and he did not testify during the trial on the issue of sanity. Defense counsel failed to request the right to make an offer of proof regarding Dr. Matthews's opinions regarding the matter.

The same facts and statements made in conjunction with paragraph B are applicable to this motion as well. It is clear there was a definitive reason for the findings of the Institute. This reason was later verified by a Watauga employee, Richard Kirk. As previously stated, this Court must take all of these facts into consideration, not just those favorable to one side or the other, in deciding this case.

III.

The appellant has filed a pro se brief challenging the validity of the aggravated kidnapping count of the indictment. He predicates his argument upon this Court's opinions in State v. Roger Dale Hill, Sr., Wayne County No. 01-C-01-9508-CC-00267 (Tenn. Crim. App., Nashville, June 20, 1996), per. app. pending, and State v. Nathaniel White, Sullivan County No. 03-C-01-9408-CR-00277 (Tenn. Crim. App., Knoxville, June 7, 1995).

In this case, the appellant is represented by counsel. This Court has held on numerous occasions an accused cannot proceed pro se when represented by counsel. State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976). As a general rule, issues raised in a pro se brief will not be considered when the accused is represented by counsel. The Court will consider this issue since it relates to the jurisdiction of the trial court. This Court is required to consider, as a matter of law, whether the trial court and the appellate court have jurisdiction to consider a criminal prosecution sua sponte. Tenn. R. App. P. 13(b).

The count of the indictment which the appellant challenges states in part:

> BILLY JOE SMITH . . . on or about the 29th day of November, 1992, . . . did unlawfully remove [K.R.] from her place of employment so as to substantially interfere with [K.R.'s] liberty while the said BILLY JOE SMITH . . . [was] armed with a deadly weapon. . . .

Aggravated kidnapping is defined as false imprisonment accompanied by one of the factors set forth in Tenn. Code Ann. § 39-13-304. Here, the indictment alleges subsection

(a)(5), namely, the appellant committed this offense while "in the possession of a deadly weapon or threatened the use of a deadly weapon." The elements of the offense in the context of this case are: (a) the unlawful and knowing removal or confinement of another person, (b) substantial deprivation of the person's liberty, and (c) the defendant was armed with a deadly weapon. Tenn. Code Ann. § 39-13-302(a) and -304(a)(5). The mens rea for this offense is "knowingly." While the indictment does not allege the offense was committed "knowingly," the question posed is whether the facts contained in the indictment are sufficient to allege the offense was committed "knowingly."

The term "unlawful," as used in the false imprisonment statute, Tenn. Code Ann. § 39-13-302, means, among other things, the offense was "accomplished by force, threat or fraud." Tenn. Code Ann. § 30-13-301(2). The indictment alleges facts which establish the offense was committed by "force."

The facts alleged in the indictment clearly establish the appellant committed this offense "knowingly." The victim was removed from her place of employment. The appellant used a knife to force the victim from the store to the motor vehicle he was driving. The use of the knife to commit this offense makes it clear the appellant desired to commit the offense, and the appellant committed this offense "knowingly."

This Court has reviewed the remaining indictments pursuant to Rule 13(b), Tenn. R. App. P. These indictments do not violate either Hill or White.

CONCLUSION

This Court concludes the trial court did not abuse its discretion by denying the appellant's multiple requests for an expert witness to reevaluate him. In each instance, the appellant failed to establish a particularized need for the expert within the meaning of State v. Barnett, 909 S.W.2d at 431.

This Court also concludes the indictments returned by the Carter County and Unicoi County grand juries are legally sufficient. Neither Hill nor White was violated.

_____
JOE B. JONES, PRESIDING JUDGE

CONCUR:

_____
DAVID G. HAYES, JUDGE

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WILLIAM M. DENDER, SPECIAL JUDGE