

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1997

FILED
October 24, 1997
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

DAVID M. CANTRELL,

Appellant.

) C.C.A. NO. 01C01-9604-CC-00136

)

)

) HICKMAN COUNTY

)

)

) HON. DONALD P. HARRIS, JUDGE

)

)

) (AGGRAVATED RAPE)

FOR THE APPELLANT:

JOHN H. HENDERSON

District Public Defender

407-C Main Street

P.O. Box 68

Franklin, TN 37065

FOR THE APPELLEE:

JOHN KNOX WALKUP

Attorney General & Reporter

KAREN M. YACUZZO

Assistant Attorney General

425 Fifth Avenue North

2nd Floor, Cordell Hull Building

Nashville, TN 37243

JOSEPH D. BAUGH, JR.

District Attorney General

RONALD L. DAVIS

Assistant District Attorney General

Williamson County Courthouse, Ste. G-6

P.O. Box 937

Franklin, TN 37065

OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Defendant, David L. Cantrell, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Following a jury trial in the Circuit Court of Hickman County, Defendant was convicted of four counts of aggravated rape and one count of false imprisonment. He was sentenced by the trial court to serve forty (40) years for each count of aggravated rape and eleven (11) months and twenty-nine (29) days for the false imprisonment conviction. Defendant was to serve all sentences concurrently, except for two of the forty (40) year sentences, resulting in a total sentence of eighty (80) years. Defendant challenges the sufficiency of the evidence and argues the eighty (80) year sentence is excessive. We affirm the judgment of the trial court.

I. SUFFICIENCY OF THE EVIDENCE

When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the

verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Questions concerning the credibility of 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. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. Cabbage, 571 S.W.2d at 835. A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. Grace, 493 S.W.2d at 476.

The victim, Eudena Lovell Bates, moved into the Hickman County Line Apartments in January 1995. Shortly after she moved into her apartment, she was introduced to the Defendant, another tenant in the apartments. A few days later, on January 15, the Defendant asked her out for a drink. She told him that she was on her way to work and what time she got off. When Ms. Bates returned home, Defendant was waiting. When she declined to go out because she was tired, he asked if she would at least come and meet some of his friends. She agreed and went to apartment number 7 where she met persons named Steve and Connie. As the Defendant, Connie and Steve all "seemed pretty lit" and wanted more beer, Ms. Bates agreed to drive them into Dickson. On their way back to the apartments, they discussed watching movies at Defendant's apartment.

Ms. Bates followed Defendant into his apartment, thinking Steve and Connie were behind her. After she realized she was with only the Defendant, he

went to the door and locked it. She told the Defendant she was tired and wanted to go home to her apartment. He told her he was Jessie James and to “go for her gun.” When she protested, Defendant proceeded to tell her that no one was leaving the apartment, and that he had killed before and would kill again. Defendant then told her that they were going to have sex. She stood up to get away from him, and he tried to take off her clothes. When she resisted, he told her he would kill her and acted like he was “going for a weapon.” While Ms. Bates never saw a weapon, she believed Defendant to have one in his jacket pocket.

Before her clothes were removed by Defendant, he forced her to perform oral sex on him. When she gagged and started crying, Defendant let her head up but then ripped her clothes off. He told Ms. Bates that she was his wife and belonged to him. After repeatedly threatening and squeezing her, he attempted to have sexual intercourse and penetrated her vaginally “a little bit” with his penis. Defendant also penetrated her vaginally with his fingers. She again resisted only to be met with more of Defendant’s threats and force. He then proceeded to perform oral sex on her.

During the rest of the night, Defendant attempted to have sexual intercourse with her several times. When Defendant finally appeared to have gone to sleep, Ms. Bates got up to get her clothes and escape. Defendant awoke so Ms. Bates said she had to go to the bathroom. He refused to let her shut the bathroom door and told her if she told anyone what had happened he would kill her.

Defendant finally agreed to leave the apartment the next morning with Ms. Bates after she promised to call his boss to tell him they had gotten married and he would not be there for work. While she drove, he directed her down a dirt road in order to find a pay phone. Ms. Bates became scared and angrily said, "Shoot me, I don't care, but I've had enough." Defendant responded, "F--- you, take me back." They went back to the apartment complex, and Defendant threatened her again. She went straight into her apartment and locked the doors.

Trisha Knight testified that early on the morning of January 16th, Ms. Bates arrived at her house. The two usually rode together to work. On that morning, Knight noticed that the victim "did not look right" and "[h]er face was red and puffy like she'd been crying, and she was walking like her stomach hurt her." Knight also noticed red marks on the victim's neck. When Knight noticed that the victim was not acting like herself, she asked her what was wrong. She told Knight that she had been raped, but did not give any details. Knight told her to go to the authorities, but she was scared and did not want to. On the following day, Ms. Bates showed Knight bruises on her legs, breasts, and arms that looked like markings made by fingers.

John Blanks, an officer in White Bluff, testified that he had been friends with Ms. Bates for the past three years. In January of 1995, Ms. Bates called him and told him she had been raped. She asked him to perform a background check on the Defendant, and he told her to call the police in Hickman County. While Ms. Bates was reluctant to complain to the authorities due to Defendant's threats and his criminal record, she did show Officer Blanks bruises the following day at the police department.

James Beasley, the manager of the apartments where the victim resided, testified that on a Friday evening Ms. Bates told him she had been raped . He advised her to notify the authorities. The following morning, after Ms. Bates agreed, he contacted Woodrow Chandler, a police officer in Burns, Tennessee, who was also involved with women's abuse programs. Chandler talked with Ms. Bates and recommended to her that she make a complaint to the Hickman County Sheriff's Department. Officer Chandler saw bruises on the victim's arm.

Dwight England, Sheriff of Hickman County, testified that in January of 1995 he became involved in an investigation involving Ms. Bates and Defendant. Ms. Bates came to his office and wanted to talk to an officer regarding the rape. He saw bruises on her arms and legs and photographed them. At Sheriff England's request, Jean Smith, a judicial magistrate for Hickman County, took pictures of the bruises on Ms. Bates' breasts and inner thighs. England stated the bruises were reddish-blue and they were in a pattern with four bruises on one side and one bruise on the other. The various photographs identified by the witnesses and showing bruises on the victim were introduced into evidence and passed to the jury.

Steve Shoemaker, a friend of Defendant and resident at County Line Apartments, and Connie Luttmann, a friend of Shoemaker, testified for the defense that on the evening of January 15, 1995, they accompanied the victim and Defendant to Dickson. After getting some beer, Shoemaker asked the victim to bring them home. Shoemaker and Luttmann returned to his apartment where they talked until approximately 3:30 a.m. During that time, they never heard any sounds from the Defendant's apartment next door. Shoemaker testified he saw

the Defendant and victim leave the apartment complex shortly after they let Shoemaker and Luttmann out of the car, and he did not see or hear the victim's car return. He looked outside about 2:30 a.m. and again at 4:30 a.m., but did not see the victim's car parked in the area. Luttmann saw Defendant and the victim standing outside the next morning. On cross-examination, Shoemaker admitted that he was an alcoholic and had been drinking on that day. The Defendant did not testify, and the defense rested.

The State called Roger Shelby and Leon Smith, officers with the Hickman County Sheriff's Department as rebuttal witnesses. Their testimony impeached certain matters testified to by Shoemaker.

As pertinent to the indictment that charged Appellant with aggravated rape, the statute defines that offense as "unlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: . . . (2) the defendant causes bodily injury to the victim;" Tenn. Code Ann. § 39-13-502(a)(2). The Defendant was charged with four (4) counts of aggravated rape, and each count in the indictment essentially made the same allegations. The State elected to proceed under Count 1 based upon the proof of Defendant forcing the victim to perform oral sex, under Count 2 upon the proof of digital penetration, in Count 3 on the proof of the Defendant performing oral sex upon the victim, and in Count 4 on the proof involving vaginal penetration with Defendant's penis.

Tennessee Code Annotated section 39-13-501(7) defines sexual penetration as any penetration, however slight, and specifically includes penile,

digital, and oral penetration. The definition of bodily injury includes bruises. Tenn. Code Ann. § 39-11-106(a)(2). False imprisonment is an offense when the defendant “knowingly removes or confines another unlawfully so as to interfere substantially with the other’s liberty.” Tenn. Code Ann. § 39-13-302(a). Defendant admits in his brief that in the light most favorable to the State, the prosecution proved that Defendant locked the victim in his apartment against her will and despite her vocal protestations, committed the acts of unlawful penetration, refused to allow the victim to leave the apartment during the night and released her only after they rode around together in her vehicle the following morning, and that the victim suffered bruises during the incident on her legs, breasts, and thighs.

However, the Defendant argues that proof the victim did not report the incident for a considerable period of time, never went to a hospital for a medical examination until several weeks after the incident, and that no noises were heard by persons in an adjoining apartment on the night of the incident shows that the State did not prove the Defendant’s guilt of the offenses beyond a reasonable doubt. He also argues that the proof does not support four (4) separate convictions of aggravated rape. In essence, the Defendant is asking this court to reweigh and reevaluate the evidence. This we cannot do. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978). The jury verdict of guilt, approved by the trial court, has accredited the State’s witnesses and resolved all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Furthermore, there was sufficient evidence for Defendant to be convicted of four (4) separate counts of aggravated rape. See State v. Phillips, 924 S.W.2d

662, 665 (Tenn. 1996). Finally, there was overwhelming proof that the Defendant confined the victim unlawfully in a manner to interfere substantially with her liberty to support the conviction for false imprisonment. This issue is without merit.

II. SENTENCING

Following the sentencing hearing, the trial court sentenced Defendant to serve forty (40) years for each of the four convictions of aggravated rape as a Range II Multiple Offender. He was also sentenced to serve eleven (11) months and twenty-nine (29) days for the conviction of false imprisonment. The trial court found that Defendant's prior conviction for second degree murder, a Class A felony, justified Range II Multiple Offender sentencing based upon the Class A felony convictions of aggravated rape, and Defendant does not contest the Range II status on appeal.

The trial court ordered Counts 1 and 2, which were convictions for aggravated rape, to be served concurrently with each other. The trial court ordered Counts 3 and 4, also convictions for aggravated rape to be served concurrently with each other. The sentence for false imprisonment was ordered to be served concurrently with the sentence for aggravated rape in Count 1. However, the court ordered the forty (40) year sentences under Counts 1 and 2 to be served consecutively to the forty (40) year sentences for Counts 3 and 4 of the indictment. The effective sentence was eighty (80) years. The trial court found the following enhancement factors applied to each of the convictions:

1. The defendant has a previous history of criminal convictions or criminal behavior in addition to those

necessary to establish the appropriate range. Tenn. Code Ann. § 40-35-114(1).

2. The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. Tenn. Code Ann. § 40-35-114(8).
3. The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person, and the defendant has previously been convicted of a felony that resulted in death or bodily injury. Tenn. Code Ann. § 40-35-114(11).
4. The felony was committed while the defendant was on parole from a prior felony conviction. Tenn. Code Ann. § 40-35-114(13).

The trial court ordered consecutive sentencing based upon a finding by a preponderance of the evidence that Defendant is an offender whose record of criminal activity is extensive. Tenn. Code Ann. § 40-35-115(b)(2).

The range of punishment for each Class A felony conviction as a Range II Multiple Offender is not less than twenty-five (25) nor more than forty (40) years. Tenn. Code Ann. § 40-35-112(b)(1).

Defendant challenges the applicability of enhancement factor number eight (8), that Defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release in the community, but does not dispute any of the remaining findings of the trial court at the sentencing hearing. Defendant does argue that there was an abuse of discretion by the trial court in imposing an effective sentence of eighty (80) years and argues that an effective sentence of substantially less than forty (40) years would be more appropriate with the facts and circumstances of this particular case.

The record reflects that Defendant was released on parole from the sentence for a conviction of second degree murder approximately one month prior to the commission of the offenses which are involved in this appeal. The record also indicates that Defendant committed the offenses of DUI and leaving the scene of an accident while he was on parole from the second degree murder conviction on a prior occasion in 1993. His criminal record includes convictions for DUI and leaving the scene of an accident in 1993, second degree murder in 1985, secreting property of another in 1983, second degree burglary in 1979, DUI in 1978, shooting into a dwelling, third degree burglary, and petit larceny in 1971 and an additional conviction of petit larceny in 1967.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court’s findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

We agree with the trial court that all four (4) enhancement factors apply to each of Defendant's convictions. We also agree that a sentence of forty (40) years for each conviction of aggravated rape, and eleven (11) months and twenty-nine (29) days for the conviction of false imprisonment are appropriate sentences. We find no error in the trial court's order that two of the sentences for aggravated rape should be served consecutively. The record supports the trial court's finding that the Defendant is an offender whose record of criminal activity is extensive. Furthermore, we find the proof establishes that consecutive sentencing as imposed by the trial court is reasonably related to the severity of the offenses which were committed by Defendant and consecutive sentencing is necessary in order to protect the public from further criminal acts by the Defendant. See State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995).

III. SUFFICIENCY OF THE INDICTMENT.

Although not raised as an issue by the Defendant, the State, in a footnote to its brief states as follows:

After [Defendant] filed his brief, this Court issued its opinion in State v. Hill, Wayne County, C.C.A. No. 01C01-9508-CC-00267, opinion filed June 20, 1996, at Nashville. The State has filed an application for permission to appeal this Court's ruling in this case. But if this Court's decision in that case is not reversed, it appears that the rape convictions in this case would be rendered void.

Even if the mens rea must be alleged in the indictment, we disagree with the State's concession. Each of the counts of the indictment charging the Defendant with aggravated rape states in part that the Defendant "unlawfully and

feloniously did engage in sexual penetration of [victim] by use of force or coercion, and did cause bodily injury to the said [victim] in violation of Tennessee Code Annotated Section 39-13-502.”

In State v. Marshall, 870 S.W.2d 532, 538 (Tenn. Crim. App. 1993), this court held that a failure to specifically allege an element of a criminal offense is not fatal “if the elements are necessarily implied from the allegations made.” In State v. John Haws Burrell, No. 03C01-9404-CR-00157, Anderson County, slip. op. At 34. (Tenn. Crim. App., Knoxville, Feb. 11, 1997) (Rule 11 Application filed April 10, 1997), (filed after the State had filed its brief in this case), this court held “sexual penetration by coercion . . . necessarily implies the sexual penetration would occur intentionally or knowingly . . . if one threatens a person in order to be able to sexually penetrate that person, . . . the penetration must be intentional.”

_____ In Defendant’s case, the victim testified that just prior to the first act of sexual penetration, the Defendant told her that he “had killed before and that he could kill again.” The mens rea was necessarily implied in the allegations of the indictment, which stated that the sexual penetration was accomplished by force or coercion.

The judgments of the trial court are affirmed.

THOMAS T. WOODALL, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

JOE G. RILEY, Judge