IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
OCTOBER SESSION, 1998

FILED

November 12, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
) **No. 02C01-9802-CC-00052**
Appellee)
) **FAYETTE COUNTY**
vs.)
) **Hon. JON KERRY BLACKWOOD, Judge**
KELVIN ANDRE WILSON,)
) **(Aggravated Kidnapping; Attempted**
Appellant) **Felonious Escape)**

For the Appellant:

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(ON APPEAL)

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OPINION FILED: ________________________

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Kelvin Andre Wilson, appeals his conviction and sentence for aggravated kidnapping by the Fayette County Circuit Court. Prior to his trial for the aggravated kidnapping charge, the appellant pled guilty to attempted felonious escape.[1] The trial court imposed a ten year sentence for aggravated kidnapping and eleven months and twenty-nine days for attempted felonious escape.[2] The appellant raises three issues for our review:

1) whether the trial court improperly commented on the evidence during voir dire;
2) whether the trial court improperly considered general deterrence at the sentencing hearing; and,
3) whether the trial court improperly considered the enhancing factor that the victim was treated with exceptional cruelty.

Based upon our review of the record, the judgment of the trial court is affirmed.

Factual Background

At trial, the proof developed the following facts. On March 21, 1997, the appellant, a juvenile, was incarcerated at the Wilder Youth Development Center, a state facility for delinquent youth, which is located in Somerville. Christine Johnson, a forty-two year old youth service officer at Wilder, was supervising the recreation of the Programmatic Segregation Unit (PSU), which the officer described as the "overly aggressive, assaultive type students." A total of eight juveniles were outside at the basketball courts including the appellant, who was seventeen years old, and his two co-defendants, Quincy Bledsoe and Fredreqous Demon Neal, both sixteen years

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[1]The appellant pled guilty to attempted felonious escape on November 12, 1997.

[2]We note the appellant was indicted, along with two other co-defendants Quincy Bledsoe and Fredreqous Demon Neal. Bledsoe pled guilty to aggravated kidnapping and attempted escape on November 12, 1997, and was sentenced to nine years for aggravated kidnapping and nine months for attempted escape.

old.

Because the appellant began “horseplaying” with another juvenile, Ms. Johnson ceased the juveniles’ recreation time and ordered them to prepare to return indoors. The appellant encountered Ms. Johnson stating, “We’re straight.” Ms. Johnson replied, “No, we’re going in because you know horseplaying is not allowed.” The appellant then grabbed Ms. Johnson around her neck and began choking her.

In an effort to call for help, Ms. Johnson attempted to “key” her radio, however, someone had taken the radio as well as her keys. At this point, Ms. Johnson believed she would die; therefore, she feigned unconsciousness and fell to the ground. Next, the appellant and Charles Lusk attempted to handcuff the victim. She pleaded with Bledsoe not to kill her, and Bledsoe told her, “just lay down and let them handcuff you.” After handcuffing Ms. Johnson, one of the co-defendants groped the victim’s buttocks. The appellant and his co-defendants placed a sock in the victim’s mouth to gag her. Then, the group tied her feet with strips of cloth from pillow cases, unlocked the storage room door with her keys, and placed her inside.

While confined, Ms. Johnson overheard the juveniles plotting their escape plans to elude Mr. Hayes, another officer at Wilder stationed at the observation booth. Eventually, Mr. Hayes noticed two other juveniles, uninvolved in these charges, quickly peering inside the door which alerted him to the fact that something was wrong. Upon finding Ms. Johnson’s keys and radio, Officer Hayes radioed for backup. Hayes, then proceeded to secure the remaining juveniles in their quarters. Thereafter, Hayes found Ms. Johnson locked in the storage room ”handcuffed, legs tied, gagged, and . . . trembling.”

At trial, Ms. Johnson testified that the handcuffs were extremely tight upon her wrists requiring the assistance of two officers to remove them. She testified that

she experienced numbness in her hands for one month following the incident. She further testified that she sustained temporary injuries to her wrists from the handcuffs, to her neck from the choking which temporarily damaged her voice, and cuts to the corners of her mouth from the gag. The record reflects that Ms. Johnson missed several months of work in order to physically and mentally recuperate from the effects of this incident.

The defense presented one witness, Charles Tate, an eighteen year old who was housed at Wilder at the time of the offense. Tate testified that he and the appellant had discussed escaping from Wilder one week before this incident. Tate stated that the appellant was the leader in the plot to escape and initiated the plan by choking Ms. Johnson. Tate revealed that Charles Lusk had torn the pillow case into strips and hid them in his pants before going outside for recreation. Through Tate's testimony, he revealed that the appellant and Lusk successfully "got under the fence;" however, the appellant was unable to penetrate the second fence because the fence was affixed to concrete.

The jury found the appellant guilty of aggravated kidnapping, and his co-defendant Neal guilty of false imprisonment, a Class A misdemeanor, and attempted escape, a Class A misdemeanor.

At the sentencing hearing, the State introduced the testimony of Jeanette Birge, the superintendent at Wilder Youth Development Center. She testified that the appellant has passed through numerous juvenile facilities[3] and was moved from these places "due to assault, taunting of peers, run [sic] away, vandalism, and inappropriate sexual behavior." The appellant was moved to Wilder because of an

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[3]She testified that the appellant was initially taken out of his home in December 1992 and placed in the following facilities: St. Joseph's Hospital with the Department of Mental Health and Mental Retardation, Timber Springs, Serendipity, Natchez Trace Wilderness Program, Charter Lakeside Hospital, Shelby Training Center, Wilder Youth Development Center, and Taft Youth Center.

attempted aggravated arson at the Shelby Training Center. Subsequently, he was transferred from Wilder to Taft Youth Center because of another assault.

In January of 1997, the appellant was placed in the PSU at Taft for yet another assault. The following month, he assaulted another staff member with an iron bar. The appellant had numerous other offenses at Taft including "battery, . . . , possession of a weapon, destroying property, arson, threatening staff, threatening students, conspiracy, sexual misconduct, fighting, interfering with staff and repeated refusal [sic]." As a result, the appellant was returned to Wilder. One month later, the appellant then attacked Ms. Johnson in the case before us.

The presentence report reflects that the appellant has an extensive juvenile criminal history including two convictions of theft of a vehicle, aggravated arson, assault, evading arrest, and disorderly conduct beginning in December of 1991 until the present.

I. Trial Judge's Voir Dire Comments

The appellant assigns prejudicial error to the trial judge for "impermissibly invading the province of the jury" during voir dire when the trial judge stated,

> To you 12 that are seated in the jury box, have any of you heard or read anything at all about this case allegedly occurring back on March 21, 1997, involving the allegations of the alleged aggravated kidnapping of Christine Johnson, and attempted escape from Wilder Youth Development Center? *I'm also confident the proof will show that this event occurred at Wilder Youth Development Center.* So, have any of your heard or read anything at all about this case? If you have, raise your hand, please. [emphasis added].

We agree with the State's assertion that this issue has been waived on three grounds. First, defense counsel failed to state a contemporaneous objection at trial which constitutes a waiver of the issue in the absence of the existence of plain error. State v. Leach, 684 S.W.2d 655, 658 (Tenn. Crim. App. 1984), perm. to appeal denied, (Tenn. 1985); State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App.

1993); Tenn. R. App. P. 36(a). The comment referred to by the appellant did not constitute plain error. Tenn. R. of Crim. P. 52(b); State v. Adkisson, 899 S.W.2d 626 (Tenn. Crim. App. 1994). Second, the appellant failed to raise this issue in his motion for a new trial. State v. Walker, 910 S.W.2d 381, 386 (Tenn. 1995); Tenn R. App. P. 3(e). Finally, the appellant failed to cite to the record in his brief for this issue. See Tenn. Ct. Crim. App. R. 10(b). Thus, for all of the stated reasons, the appellant has waived this issue.[4]

II. Sentencing

Second, the appellant avers that the trial court erred at the sentencing hearing by improperly considering a letter signed by sixty-seven employees of Wilder Youth Development Center. Appellant's counsel objected to the introduction of the letter, but the court overruled the objection. Additionally, the appellant challenges the trial court's application of the "exceptional cruelty" enhancement factor.

Review, by this court, of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the case before us, the trial court correctly applied sentencing principles, thus, the presumption applies.

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[4]Notwithstanding the appellant's waiver of this issue, it is without merit. In this instance, the trial judge's comment upon the venue of the criminal offenses was never at issue in the case. Contrary to the appellant's assertion, the trial court neither commented on specific evidence nor on the innocence or guilt of the appellant. Moreover, the comment did not affect a substantial right of the accused, nor did it result in prejudice to the judicial process. State v. Gregg, 874 S.W.2d 643 (Tenn. Crim. App. 1993); Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). The error, if any, was harmless.

In making our review, this court must consider the evidence heard at trial and at sentencing, the presentence report, the arguments of counsel, the nature and characteristics of the offense, any mitigating and enhancement factors, the defendant's statements, and the defendant's potential for rehabilitation. Tenn. Code Ann. § 40-35-102, -103(5), -210(b) (1990). The burden is on the appellant to show that the sentence imposed was improper. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d).

A. Employee Letter

The letter stated as follows:

> We, the undersigned employees of Wilder Youth Development Center, respectfully would like to impress upon you the importance of the case presently pending involving the attack of one of our fellow employee[s]. We are aware that our job comes with a degree of danger. Our primary concern at this point is that the accused receive consequences that will send a message that juvenile acts cannot be tolerated in society and certainly not within our state's juvenile facilities.

The appellant asserts that although it contains a semblance of victim's impact evidence, the letter is an entreaty for the court to consider general deterrence and should not have been allowed into evidence. The trial court has the discretion to admit or exclude evidence and that ruling will not be overturned by this court unless the trial court abused its discretion. State v. Davis, 872 S.W.2d 950, 955 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993). The fact that the trial court permitted the letter to be filed in the record is of no consequence, unless it was relied upon by the court in the sentencing determination. In this regard, the record does not support the appellant's claim that the trial court considered the letter in sentencing the appellant. This issue is without merit.

B. Enhancement Factor

Next, the appellant challenges the trial court's application of the "exceptional cruelty" enhancement factor. See Tenn. Code Ann. § 40-35-114(5). The trial court

found that three enhancement factors and no mitigating factors were present. On appeal, the appellant does not argue that any mitigating factors should have been applied, nor do we find upon our *de novo* review any applicable to this case. See Tenn. Code Ann. § 40-35-113.

Specifically, the trial court found that the appellant was a leader in the offense involving more than two criminal actors, Tenn. Code Ann. § 40-35-114(2) (1996 Supp.); that the appellant allowed the victim to be treated with exceptional cruelty, Tenn. Code Ann. § 40-35-114(5) (1996 Supp.); and that as a juvenile, the appellant was adjudicated delinquent for a crime that would be a felony if committed as an adult, Tenn. Code Ann. § 40-35-114(20) (1996 Supp.).

In the case at bar, the trial court sentenced the appellant as a Range I standard offender to ten years for the aggravated kidnapping under subsection (a)(2) for interference with the performance of a governmental function. Tenn. Code Ann. § 39-13-304(a)(2) (1996 Supp.). The applicable sentencing range for a Class B felony as a Range I standard offender is eight to twelve years. Tenn. Code Ann. § 40-35-112(a)(2). Since the trial court found no mitigating factors and three enhancement factors, the court was permitted to "set the sentence above the minimum in that range but still within the range." Tenn. Code Ann. § 40-35-210(d) (1996 Supp.).

The appellant only challenges the court's application of Tenn. Code Ann. § 40-35-114(5). Specifically, he argues that this case does not contain the egregious facts or injuries necessary for this enhancer to apply. We agree. Initially, we note that the trial court had a duty to state on the record the circumstances qualifying as "exceptional cruelty." State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997) (citing State v. Goodwin, 909 S.W.2d 35, 45 (Tenn. Crim. App. 1995)). In the present case, the record does not reflect whether the trial court made any findings to support the

application of this factor. For this factor to be appropriate, the record must reflect cruelty "over and above" that inherently attendant to the crime of which a defendant is convicted. State v. Embry, 915 S.W.2d 451, 456 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996). "Exceptional cruelty is usually found in cases of abuse or torture." State v. Williams, 920 S.W.2d 247, 250 (Tenn. Crim. App. 1995).[5]

Although the appellant's actions are reprehensible and subjected the victim to indignities, these facts do not establish a culpability inherently greater than that required to sustain a conviction for aggravated kidnapping. This case involved no extended length of torture, no weapons, no unusual type of abuse, nor imprisonment for any extensive length of time. We do not question the injuries suffered by the victim, however, such injuries are consistent with those emanating from this crime. Thus, we conclude this factor was misapplied.

However, upon our *de novo* review, we conclude that the trial court properly applied Tenn. Code Ann. § 40-35-114(2) and (20) as relevant enhancement factors. Notwithstanding, the misapplication of the "exceptional cruelty" enhancement factor, we conclude a mid-range sentence of ten years is justified considering the application of two other enhancement factors and the lack of mitigating factors. The

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[5]As the appellant cited within his brief, the following cases applied the exceptional cruelty enhancement factor. See Poole, 945 S.W.2d 93 (holding this factor applied to aggravated robbery case where victim, seventy year old woman, was beaten unconscious with baseball bat); State v. Alexander, 957 S.W.2d 1 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1997) (holding factor applicable where victim was beaten with hammer and received numerous stab wounds to face requiring complex surgical procedures); State v. Leggs, 955 S.W.2d 845, 848 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1997) (applying this factor where victim of child abuse received severe bruising to his buttocks and scrotum along with other evidence of beating); State v. Carter, 908 S.W.2d 410 (Tenn. Crim. App. 1995) (holding this factor applicable in aggravating kidnapping and aggravated robbery case where victim was left outside in freezing weather unclothed following rape); State v. Kern, 909 S.W.2d 5 (Tenn. Crim. App. 1993) (holding this factor applied in especially aggravated kidnapping and especially aggravated robbery case where the victim was subject to repeated sexual remarks and forced to remove her clothing at knifepoint); State v. Davis, 825 S.W.2d 109, 113 (Tenn. Crim. App. 1991) (applying this factor where rape victim was bound after disrobing, and defendant subsequently urinated in victim's mouth).

But see Embry, 915 S.W.2d 451(rejecting this factor where victim of rape was forced at knifepoint to remove her clothing and subjected to sexual acts); Manning v. State, 883 S.W.2d 635 (Tenn. Crim. App. 1994) (rejecting enhancing factor where victim was abducted in daylight and forced into four separate acts of sexual activity while being held at knifepoint while using abusive language and threats); State v. Edwards, 868 S.W.2d 682, 703 (Tenn. Crim. App. 1993) (rejecting this factor where victim of rape was "gagged, threatened, and struck").

trial court is given the discretion to determine the weight given to the enhancement factors derived from the totality of the circumstances of the case. See State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986); State v. Boggs, 932 S.W.2d 467, 475 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1996).

Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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L. T. LAFFERTY, Senior Judge