IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL 1999 SESSION

FILED

June 17, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 02C01-9807-CC-00227
	)	
	)	Fayette County
v.	)	
	)	Honorable Jon Kerry Blackwood, Judge
	)	
JIMMY LEE PIERCE, aka	)	(Aggravated kidnapping)
JIMMY L. ANDERSON,	)	
	)	
Appellant.	)	

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Jimmy Lee Pierce, a.k.a. Jimmy L. Anderson, appeals as of right from his conviction by a jury in the Fayette County Circuit Court for aggravated kidnapping, a Class B felony. The defendant was sentenced as a violent offender to eleven years confinement in the custody of the Department of Correction, to be served consecutively to a previous conviction. The defendant contends that the evidence is insufficient to support his conviction and that his sentence is not supported by the record. We affirm the judgment of conviction.

The victim, Samuel Richardson, testified that he had known the defendant most of the defendant's life. He said that on May 17, 1997, he was driving his gray Ford LTD through town with Lou Ann Vester riding as a passenger. He said he saw the defendant and two of the defendant's friends, Jermaine Johnson and Terrance Hunt, and he offered them a ride. He said they drove to Ms. Vester's house, and Ms. Vester wanted him to buy beer for her. He said that he did not want to go but that the defendant said that he would. He said he gave the defendant the ignition key but not the trunk key, and the defendant and his friends were supposed to come back after they bought the beer. He said that when they failed to return, he went looking for them.

The victim testified that he eventually saw the defendant driving his car and that he flagged down the defendant. He said he entered the backseat of his car and asked the defendant why he had not returned the car. He said the defendant told him that he had to take care of business. He testified that he and the defendant argued and that the defendant said, "I got something for you." He said the defendant drove to a dead-end street and pulled him out of the car. He said the defendant and his friends began pushing and hitting him. He testified that he saw people standing across the street watching, and he screamed because he thought someone would try to help him.

He testified that the defendant said, "I'm going to take you where my sister was at." He said that the defendant's sister was dead and that he thought the defendant was going to kill him.

The victim testified that the defendant told one of his friends to open the trunk but that the friend did not have a key. The victim said they got the key from his pocket and opened the trunk. He stated that the defendant picked him up and put him in the trunk on his back. He said the defendant tried to close the trunk, but he managed to keep it open by pushing against it with his feet. He said the defendant's friends held down the trunk while the defendant got on top of it. He said the trunk almost closed once, and the light inside the trunk went out. He said a car drove up, and the defendant and his friends backed away from the trunk. The victim stated that he managed to escape from the trunk, but when the car drove away, the defendant and his friends got into his car and turned it around. He said they got out, shoved him into the trunk, and were trying to push him down when Officer Dennis Chearis arrived. He said that the defendant and his friends jumped into his car and left. He said that Officer Chearis followed them and that another officer picked him up later. The victim testified that he was confined in the trunk against his will. He said that he suffered a bloody nose and mouth and that his trunk was bent and beaten after the incident.

On cross-examination, the victim denied that he was on drugs that day. He denied that Ms. Vester asked him to take her to buy drugs. He said that when Officer Chearis pulled up, the defendant was trying to push him into the trunk but that he was not fully in the trunk. He denied telling anyone that he would drop the charges for two hundred dollars.

Natosha Reed testified that on May 17, she was working at her beauty salon at around 10:30 or 11:00 p.m. She said her salon was directly across from South

Campus. She said she saw a car at South Campus and heard yelling and screaming. She said she looked outside and saw a gray Ford. She testified that she and her customers went outside and that she saw three men trying to close the trunk of the Ford with a person screaming inside the trunk. She said a man was yelling, "Help me, don't kill me." She said the three men were cursing and screaming that they were going to "kill this Mother." She said the defendant said he was going to kill the victim and throw him into the dump. She said she had known the defendant for a long time and recognized his voice. She testified that she called 9-1-1 and that Officer Chearis responded to the call.

On cross-examination, Ms. Reed testified that she never saw the victim in the trunk. She said she heard someone slam down the trunk more than once.

Officer Dennis Chearis testified that he responded to an emergency at South Campus. He testified that when he arrived, he saw the headlights on the victim's car going up and down. He said he positioned his lights to shine on the back of the car. He said he saw four men at the back of the car, and the trunk was open. He said that he recognized the defendant and the victim and that when he first passed by, the defendant was holding the victim. He testified that when he turned on his blue lights and began to get out of his car, the defendant and his two friends got into the victim's car and sped away. He said that he followed the car until it stopped and that the defendant and his friends jumped out of the car and ran away. He said the trunk of the car was bent and would not close, and he saw shoe marks on the inside of the trunk. A photograph of the trunk was admitted into evidence. Officer Chearis testified that he had seen the defendant driving the victim's car earlier that day. He said the victim had a bloody nose and mouth and was limping. He stated that he found no weapons at the scene of the offense.

On cross-examination, Officer Chearis testified that he never saw the victim in the trunk. He said that when he first drove by, the defendant quickly took his hands off the victim. He said the defendant and his friends fled when he turned on his blue lights.

Jermaine Johnson testified that on May 17, he, the defendant and Terrance Hunt were walking around town when the victim and Lou Ann Vester drove up and offered them a ride. He said the victim told the defendant that he had been looking for the defendant all day and asked him if he had any money. He said they drove to a store, then to Ms. Vester's house. He said the victim told the defendant that he could keep the car for five hours in exchange for thirty dollars. He said the defendant took the car, and they went to a party.

Mr. Johnson testified that at the party, the defendant opened the trunk in order to hear the radio. He said they sat in the trunk listening to music and left at about 10:00 p.m. He testified that when they got ready to leave, the trunk would not close. He said they tried to get on top of the trunk and hold it down, but it would not catch. He said they had to drive with the trunk open and that on the way to Ms. Vester's house, they saw the victim and picked him up. He said the victim wanted to know what happened to the trunk. He said that when they told him the trunk would not close, the victim became angry and said he wanted money for the damaged trunk. He said the defendant stopped at South Campus to give the victim his car. He testified that as everyone got out, the victim swung at the defendant with a baseball bat. He said the defendant ducked then struck the victim in the mouth. He stated that the defendant helped the victim get up and that the victim continued to talk about his damaged trunk. He said he got the bat and put it in the trunk of the victim's car.

Mr. Johnson testified that he and Mr. Hunt were in the car and the defendant and victim were standing outside the car when another car pulled up. He said the victim told them to "go ahead," and the defendant got into the car and they left. He said they drove a short distance then walked away from the car because they did not need it. He testified that he saw money exchanged between the defendant and the victim that night. He said he did not see the victim or Ms. Vester use drugs that day, and he did not hear any discussion about purchasing beer. He said the victim was never in the trunk of the car. He testified that the victim said he wanted ten dollars for the trunk damage in order to purchase a "hit."

On cross-examination, Mr. Johnson admitted that he had a selective memory and that he chose to remember some things and chose to forget others. He said he did not report to the police that the victim attacked the defendant with a bat. He said that fact did not become important until he had to testify. He said he and the defendant probably had one beer that evening. He said the victim yelled when he saw that the trunk was damaged. He said that after they drove away from South Campus and stopped, they walked to the defendant's house. He said he did not recall being followed by the police. He said that he did not remember the victim screaming for help and that he never heard the defendant say he was going to kill the victim and put him in the dump.

Terrance Hunt's testimony was substantially the same as that of Mr. Johnson. Jamie Scott testified that he saw the defendant and his friends at Shiketa Holmes' party on May 17. He said that the trunk of the car the defendant was driving was open and that they were listening to the radio. He said that when the defendant started to leave, he could not get the trunk closed. He said that the defendant slammed the trunk several times but that it would not close. On cross-examination, he testified that he did not see the defendant use drugs and did not see anyone jump on the trunk.

Shiketa Holmes testified that at the party, the trunk of the car was open, and they listened to the radio. She said the defendant and his friends kicked the trunk when they could not get it to close.

Nettie Mae Anderson, the defendant's mother, testified that the victim came to the cafe where she works and told her that for two hundred dollars, he would tell the grand jury that the defendant did not try to put him into the trunk. She said she told the sheriff of the victim's offer. She said she would not lie for the defendant.

Lou Ann Vester testified that the victim came to her house that morning and that they smoked cocaine. She said the victim was driving her to a friend's house for her to buy drugs when they met up with the defendant and his friends. She said the victim took her home and let the defendant borrow his car. She said that about an hour later, the victim went to find his car. She said she did not remember an agreement for the defendant to use the car. She said she did not use drugs when she and the victim arrived at her house after picking up the defendant.

On cross-examination, Ms. Vester testified that the victim was not under the influence such that he could not drive or did not know what he was doing. She admitted that she was released from jail on the morning of her testimony after serving time for a forgery conviction.

The defendant testified that he, Mr. Johnson and Mr. Hunt were walking around town when the victim and Ms. Vester offered them a ride. He said the victim stated that he had been looking for him all day because he needed money for drugs. He said the victim told them to get into the car, and he said he saw a black baseball bat in the back of the car. He said the victim asked him if he had any money, and he said

he told the victim he had fifty dollars. He said the victim offered to let him use the car for five hours in exchange for thirty dollars. He said they dropped off the victim and Ms. Vester at her house, and he and his friends took the car to a party.

The defendant testified that they went to the party at about 7:00 p.m. He said he used the ignition key to open the trunk, and they sat on the edge of the trunk and listened to the radio. He said they left the party at 9:47 p.m. to return the victim's car. He said he told Mr. Hunt to close the trunk, but it would not close. He said he told Mr. Hunt and Mr. Johnson to jump on the trunk while he tried to lock it, but it still would not close. He said he decided that if they could not get it to close, he would pay for the damage.

The defendant testified that as they drove toward Ms. Vester's house, they saw the victim in the road flagging them down. He said he stopped and the victim got into the car. He said the victim asked what happened to the trunk, and he explained that it would not close. He said the victim began cursing and saying he wanted money for drugs. He said he stopped the car because the victim wanted his car back, but when he got out, the victim swung at him with a bat. He said he punched the victim in the mouth, knocking him down. He said he helped the victim get up and asked him what was wrong with him. He said he asked why the victim was trying to kill him after he just lost his sister.

The defendant testified that Officer Chearis arrived and that the victim said, "Go ahead. I have everything under control." He said that he and his friends got into the victim's car and left. He said they did not leave the doors open. He said he drove a few blocks, stopped the car, put it in gear, and walked away. He said he did not run from the car, and he stopped because he was at home. He testified that he did

not know Officer Chearis was following them and that he did not see any blue lights behind him.

On cross-examination, the defendant testified that both Ms. Reed and Officer Chearis were lying. He said he had gotten into a fight with Ms. Reed's brother about two weeks before the incident. He said he did not know why Officer Chearis was lying. He said he did not know what happened to the baseball bat but that it should have been in the trunk where Mr. Johnson put it. He admitted that he did not have a driver's license, and he denied using alcohol or drugs at the party that night. He denied threatening to kill Ms. Reed. He admitted that he could have driven the car to his house instead of leaving it in the road and that he did not know why he left it there. The jury convicted the defendant of aggravated kidnapping upon the foregoing evidence.

I. SUFFICIENCY OF THE EVIDENCE

The defendant contends that the evidence is insufficient to support his conviction. He argues that because the evidence shows that the trunk was never closed, the victim was never confined. He argues that the proof only demonstrates an attempted kidnapping. The state contends that the evidence is sufficient. We agree.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing 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, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Aggravated kidnapping is defined as false imprisonment committed "[w]ith the intent to inflict serious bodily injury on or to terrorize the victim or another[.]" Tenn. Code Ann. § 39-13-304(a)(3). False imprisonment is accomplished when one "knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty." Tenn. Code Ann. § 39-13-302(a).

We believe that the evidence is sufficient to support a conviction for aggravated kidnapping. Despite the defendant's contention that the victim was never confined, the evidence shows that the defendant picked up the victim and confined him in the trunk of his car. The fact that the trunk was broken and would not completely close does not negate the fact that the defendant substantially interfered with the victim's liberty by confining him in the trunk against his will.

The defendant also argues that the evidence is insufficient to show that he acted with the intent to terrorize the victim. The evidence shows that the defendant threatened to kill the victim and put his body in the dump. It reflects a struggle during which the victim, having been forcibly confined in the trunk of his car, fought to prevent the trunk from closing while screaming for help and begging the defendant not to kill him. We believe this evidence sufficiently supports the jury's finding that the defendant acted with the intent to terrorize the victim.

II. SENTENCING

The defendant contends that his sentence is excessive and that the trial court erred by ordering that he serve his sentence consecutively to previous sentences for aggravated assault and reckless endangerment. He contends that the trial court erroneously relied on a previous felony conviction for which the defendant was on bond at the time of the present offense to enhance his sentence and to order the sentence to be served consecutively. He asserts that there is no proof in the record of the felony

conviction or of him being on bond for those charges at the time of the present offense. The state contends that the record supports the sentence and its consecutive nature.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action 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). In this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1995).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the

potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

The sentence to be imposed by the trial court for a Class B felony is presumptively the minimum in the range when there are no enhancement or mitigating factors present. Tenn. Code Ann. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and then reduce the sentence as appropriate for any mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169.

At the sentencing hearing, the district attorney stated that at the time the defendant committed the present offense, he was on bond for aggravated assault and reckless endangerment, charges to which he ultimately pled guilty. The following colloquy occurred at he sentencing hearing in the present case:

> COURT: Okay. Was there [sic] any copies of the convictions or copy of the bond that he may have made?
>
> PROSECUTOR: I can try to find that, Your Honor. Now, the convictions -- the other convictions, of course, was [sic] here in this court. Do you want a copy of that conviction?
>
> COURT: I think it may be best for the record.
>
> PROSECUTOR: All right. I'll do that. So we need the conviction in 4515. Does the Court want those General Sessions convictions, also?
>
> COURT: No, no.
>
> PROSECUTOR: They're listed in the report. I think everything I need is going to be in this file in 4515. It's just a matter of getting it.

> Your honor, I'm pulling out the judgment forms on Jimmy Lee Pierce in 4515 wherein he pled guilty to four counts of aggravated assault and one count of reckless endangerment with a deadly weapon, also the Court's sentencing order in his plea of guilty.
>
> I would move for the admission of certified copies of all of those, and I will -- I just have to continue searching in here for any indication of a bond in that --
>
> COURT: Okay.
>
> PROSECUTOR: -- 4515.
>
> . . . .
>
> DEFENSE ATTORNEY: Actually, Your Honor, those documents can't be used as enhancement factors in this case because he was not convicted of that at that time that this event occurred.
>
> . . . .
>
> PROSECUTOR: I have found, Your Honor, apparently he made bond on the 25th of March in number 4515 which was the four counts of aggravated assault. It's a bond from Tennessee Bonding Company, T.K. Bolton attorney for that, and I would move the Court to allow us to put in a certified copy of that bond to show he was out on bond when this event occurred.

The presentence report prepared in case 4515 was introduced into evidence, apparently as the report to be used in the present case. It reflects that the defendant had a one-thousand-dollar bond in case 4515 and was pleading guilty on November 17, 1997. The report also reflects that the defendant had previous misdemeanor convictions for possession of drug paraphernalia and resisting arrest in 1996 and public intoxication in 1995.

The trial court in the present case found the following enhancement factors applicable, as listed in Tenn. Code Ann. § 40-35-114:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

> (2) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;
>
> (13) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:
>
> (A) Bail, if the defendant is ultimately convicted of such prior felony[.]

The trial court found no applicable mitigating factors. It sentenced the defendant to eleven years confinement and ordered the sentence to be served consecutively to the sentence in case 4515 based on the fact that the defendant was on bond for case 4515 at the time of the present offense. See Tenn. Code Ann. § 40-20-111(b); Tenn. R. Crim. P. 32(c)(3)(C).

The defendant contends that there is no evidence in the record on appeal of a conviction in case 4515 or of the fact that he was on bond for those charges at the time he committed the present offense. He argues that the record does not support the trial court's use of enhancement factor (13) or its imposition of a consecutive sentence. Although the district attorney stated at the sentencing hearing that she was introducing certified copies of the bond and the judgment of conviction in case 4515, our review of the record shows no such documents. Obviously, the better practice would have been to ensure that the certified copies did become a part of the record. Nevertheless, the record before us supports the sentence.

At the sentencing hearing, the district attorney stated that the defendant was released on a one-thousand-dollar bond from the Tennessee Bonding Company in case 4515 at the time of the present offense and that the defendant was ultimately convicted upon a guilty plea in that case. The defendant did not contest this assertion at the sentencing hearing and, in fact, the defendant's attorney acknowledged the existence of the judgment of conviction in case 4515 when he said that the document could not be used for enhancement in the present case. The presentence report, which

the defendant stipulated as accurate, reflects a one-thousand-dollar bond in case 4515 and reflects that the defendant was to plead guilty to those charges on November 17, 1997. Based on this evidence, we conclude that the record supports a finding that the defendant was on bond in case 4515 at the time of the present offense and that the defendant was ultimately convicted of those charges. Thus, the trial court properly applied enhancement factor (13) and ordered consecutive sentencing. See, e.g., State v. Richardson, 875 S.W.2d 671, 677 (Tenn. Crim. App. 1993) (holding that evidence of defendant's prior crimes contained in a presentence report was admissible to determine defendant's sentencing range when defendant did not deny he committed the earlier crimes nor seek a continuance for the opportunity to refute the accuracy of the information).

In consideration of the foregoing and the record as a whole, we affirm the judgment of conviction.

_____
Joseph M. Tipton, Judge

CONCUR:

_____
David G. Hayes, Judge

_____
L.T. Lafferty, Senior Judge