IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 29, 2023

STATE OF TENNESSEE v. MARK L. WARD

Appeal from the Criminal Court for Knox County
No. 118813 Kyle A. Hixson, Judge

No. E2022-00951-CCA-R3-CD

The Appellant, Mark L. Ward, was convicted by a Knox County jury of aggravated kidnapping, attempted aggravated burglary, and two counts of aggravated rape, for which he received an effective sentence of sixty-eight years in confinement. The sole issue presented for our review is whether the evidence is sufficient to support the Appellant's convictions. Upon our review, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

CAMILLE R. MCMULLEN, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JILL BARTEE AYERS, JJ., joined.

Gerald L. Gulley, Jr., Knoxville, Tennessee, for the Appellant, Mark L. Ward.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Charme P. Allen, District Attorney General; and Joanie Stewart, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The facts, as adduced at the Appellant's April 2022 jury trial, established that the victim, L.A.,[1] and her minor daughter lived in the same apartment complex as the Appellant and his girlfriend. The victim knew the Appellant from seeing him at the apartments and had a cordial relationship with his girlfriend, as the victim's daughter would often play with the girlfriend's dog. On December 13, 2020, the day of the offenses, the victim was in her apartment with her daughter wrapping gifts, and the Appellant knocked on her door.

[1] It is the policy of this court to identify victims of sexual violence by their initials to protect their privacy.

When the victim opened the door, the Appellant, who was wearing black pants and red shoes, told her that his girlfriend was sick and that she had asked him to come and get the victim to help her. The victim told the Appellant to wait at the door, went to tell her daughter where she was going, retrieved her phone, and left her apartment unlocked as she proceeded upstairs to the Appellant's apartment to assist his girlfriend. The Appellant was waiting for the victim on the stairs, and the victim followed him.

When they reached the Appellant's apartment, the Appellant entered first, the victim followed behind him, and the Appellant shut the apartment door and locked it. The victim walked into the living room, and the Appellant placed his hands onto the victim's back and "shoved" her into the bedroom. Once the victim was in the bedroom, the victim asked where the Appellant's girlfriend was, and the Appellant told her "it was none of her f****** business." When the victim attempted to leave, the Appellant hit her on the side of her face with his fist. Although the victim was stunned and hurt, she tried to leave again. The Appellant hit the victim a second time with his fist on the left side of her face, which also hurt the victim. The Appellant then shoved the victim, and she fell backwards onto the bed. The Appellant then demanded the victim remove her clothing or he would kill her. The victim was scared, and she complied. As she removed her clothing, the Appellant also removed his clothing. The Appellant then raped the victim three or four times by placing his penis inside of her vagina. During the rape, the Appellant told the victim if she did not give him what he wanted, he was going to kill her because he had a gun under the bed. The victim said the Appellant licked her breasts with his tongue as well as penetrated her vaginally with his tongue during the rape. The Appellant also forced the victim to perform oral sex on him.

When the victim reminded the Appellant that he told her he would let her go if she gave him what he wanted, the Appellant told her she could leave. However, the Appellant told her to call her daughter to come upstairs because he was going to "rape her next." The victim refused to call her daughter, and the Appellant grabbed the victim's phone from her hand and demanded they go downstairs. As the Appellant followed the victim out of his apartment, the victim ran out of the door and down the steps before the Appellant could get to her apartment door. The victim ran into her apartment, shut the door, and managed to lock it by deadbolt before the Appellant could get inside. The Appellant followed her and was "banging and kicking the door[,]" trying to push it open. The Appellant did not have permission to enter the victim's apartment, and the victim believed the Appellant intended to rape her daughter if he got inside. The victim believed this because the Appellant told her he was going to rape her daughter and that he had been watching them "for a couple of months." He told the victim that he had been watching her daughter come home from school and the victim's comings and goings. The victim's daughter came into the room, and the victim told her to call 911. The victim was in the Appellant's apartment for approximately forty-five minutes to an hour.

Once the police arrived, the victim was taken to the hospital, received medical treatment, and spoke with investigators. The victim underwent a sexual assault exam at the hospital which required the inside of her vagina and her breasts to be swabbed for the perpetrator's DNA. Photographs depicting where the Appellant struck the victim in the face were taken while the victim was at the hospital and photographs taken of the injuries four or five hours after she left the hospital were admitted into evidence. The victim suffered a black eye that was completely swollen shut and a permanent indentation on the side of her head. The victim also developed bruising on her chest from where the Appellant shoved her onto the bed, photographs of which were taken after the victim left the hospital.

On cross-examination, the victim said the Appellant put his penis inside her vagina three or four times. Asked if she saw the Appellant with an erection, the victim said, "Yes." Asked if she saw the Appellant with an erection before he entered her vagina, the victim replied, "Not that I was looking, but I mean, I just wanted it over with." The victim also believed the Appellant ejaculated inside of her because she "felt it." The victim was unsure if the Appellant had an erection when he forced her to perform oral sex on him; however, he did not ejaculate at that time. The Appellant placed his penis back inside the victim's vagina after he forced her to perform oral sex on him, and he had an erection at that time.

Although the victim believed the Appellant ejaculated at this point, she acknowledged he did not wipe himself off with a cloth. The Appellant then performed oral sex on the victim and placed his penis inside the victim's vagina a second time. The victim said the Appellant ejaculated three times. The victim said the Appellant "pounded" on her door for ten or fifteen minutes. The victim's phone was returned to her by Investigator Loeffler. At the time of the 911 call, she did not remember reporting or seeing any markings or tattoos on the Appellant's body. The victim did not initially recall testifying previously at a preliminary hearing that the Appellant smelled of alcohol and was drunk during the encounter. However, the victim testified at trial that he may have been, and she explained her lack of memory on "tr[ying] to block [the encounter] out[.]"

Based on the testimony of Michael Mays, the custodian of records for the Knox County Emergency Communications 911, the computer aided dispatch (CAD) report and a compact disc containing the 911 recording from the day of the offense were admitted into evidence. The 911 recording was played for the jury. On cross-examination, Mays read the following excerpt from the CAD report reflecting what the victim reported to the officer taking the 911 call, "And he is banging on my door." The CAD report later reflects, "Complainant does not hear any banging right now." Mays noted that the officer taking the CAD report does not report his or her own observations on the CAD, rather only what is reported by the complainant.

A.J. Loeffler, a veteran investigator with the Knoxville Police Department (KPD), testified that he responded to the hospital to speak with the victim on the night of the offense. He confirmed the photographs previously admitted during the victim's testimony accurately depicted the victim's injuries as he observed them on the night of the offense. Based on his interview with the victim, the Appellant became a suspect and was interviewed. The Appellant was advised of his rights under Miranda, and waived them. The interview was video recorded, admitted as an exhibit, and played for the jury. During the hour-long interview, the Appellant admitted to having vaginal and oral sex with the victim without her consent. The Appellant explained later in the interview that when his girlfriend was at work, he "plotted . . . . [h]ow the f*** can [he] lure [the victim] in [his] apartment." The Appellant said, "I did something I wasn't supposed to do[,] man." Asked to elaborate, the Appellant said, "I took [the victim] against her will . . . by force." Asked to explain what he meant using the words "by force," the Appellant explained that he lured the victim out of her apartment by telling her that his girlfriend was upstairs and needed the victim to "look at something."

When the victim entered his apartment, the Appellant positioned himself behind her so she could not get out. The Appellant said they went into the bedroom, he pushed the victim onto the bed, and she fell. The victim told the Appellant she did not want to have sex with him as she tried to get up, and the Appellant "punched the shit out of her." The Appellant said he took off his and her clothes. The Appellant said, "I f***** her. I licked her pussy . . . I did a lot of shit to her[,] bro." The Appellant, age fifty, insisted he never ejaculated during the rape. After the rape, the victim "said she was going downstairs to wash some clothes . . . [and] somehow—she got into the apartment and closed the door real quick." The Appellant kicked on the door but was unable to get inside. Asked if he told the victim he wanted to f*** her twelve-year-old daughter, the Appellant said, "I did say it." Had the victim not deadlocked her apartment door, the Appellant said, "I was actually going down there with [the victim] to [rape her twelve-year-old daughter]. I'm just being honest with you[,] man."

When the Appellant was arrested, the victim's phone was recovered from his person and later returned to the victim by Investigator Loeffler. Investigator Loeffler testified further that during the Appellant's interview, Investigator Loeffler did not smell alcohol about the Appellant's person nor did Investigator Loeffler believe the Appellant to be intoxicated at the time.

On cross-examination, Investigator Loeffler described the victim's injuries upon seeing them as "fresh," in relation to how old they were. When he returned to view the apartment the next day, he did not observe "anything obvious like a big shoe print or dent" in the victim's door. A gun was not recovered in this case. He agreed that during the interview, when the Appellant first began talking, the Appellant said "we had sex; me and

[the victim] f***** like crazy[,]" and that the Appellant did not acknowledge that he had forced the victim to have sex until sometime later in the interview. He agreed the Appellant seemed "surprised" when Investigator Loeffler told the Appellant that the victim was bruised, had two black eyes, and "was going to be all torn up inside." He agreed that the Appellant told him that he did not ejaculate during the rape, which was inconsistent with the victim's testimony.

Marlana Franklin of the KPD forensics unit testified that she assisted Investigator Loeffler in taking photographs of the Appellant during his interview, which were admitted into evidence. She also collected buccal swabs from the cheek of the Appellant as well as the Appellant's clothing, both of which were admitted into evidence. Franklin also went to the apartment complex where the offenses occurred and took photographs of the Appellant's apartment, including the bedroom and bedding, all of which were admitted into evidence. Franklin later processed the bedding by laying out all of the bedding pieces individually to be photographed a second time. The bedding was examined under an alternate light source to identify the possibility of bodily fluids on the bedding. She observed an area on the blue blanket "fluorescing," obtained a presumptively positive test, and photographed it. She observed another area "fluorescing" on the sheet and conducted another presumptive test, which was inconclusive. She also observed a "reddish-brown stain" on the same sheet, which tested presumptively positive for blood, and photographed it. The bedding was then transported to the property unit for further testing by the Tennessee Bureau of Investigation (TBI), and the photographs were uploaded to KPD's headquarters. Both photographs were admitted into evidence. The photographs of the blue blanket were published to the jury, and Franklin identified the areas as described for the jury.

On cross-examination, Franklin explained that the presumptive testing does not give an "age" to determine how long the bodily fluid may have been on an item. She said generally, the blood test has a longer test range; however, the seminal fluid has to have been deposited within forty-eight hours to come back positive.

Carrie Bailey, a certified adult sexual assault nurse examiner (SANE), testified as an expert in forensic nursing. She explained the forensic side of the victim's chart, which was admitted into evidence. Bailey met with the victim on December 14 around midnight, and her initial observations of the victim were that she had a black eye and was upset. Bailey conducted a physical examination of the victim and collected breast, oral, and both internal and external vaginal buccal swabs. Bailey detailed the narrative contained in her report which was consistent with the testimony of the victim. The body gram, the portion of Bailey's report which illustrates where the physical injuries were located on the victim on a diagram, was also admitted into evidence. The body gram showed the victim had a black eye that was swollen. Bailey said the photographs of the victim's injuries previously

admitted during the victim's testimony were consistent with the injuries she observed on the night of the offense. She identified the sexual assault kit, admitted into evidence, she conducted on the victim. The sexual assault kit contained the evidence used for testing by the TBI. She explained that vaginal trauma is not always present in a sexual assault case, and that in over half of sexual assault cases evidence of trauma is not present. She said the victim's demeanor and injuries were consistent with the victim's account of rape. She said the victim identified the perpetrator as the Appellant.

On cross-examination, Bailey said she did not know what time the victim arrived or left the hospital; however, Bailey spent about an hour to an hour and a half conducting her report and examination of the victim. On the forensic report form, Bailey checked the box for photograph collection declined. She explained this likely meant that Bailey did not have a camera with her during the examination. She further opined she likely told the victim to take her own photographs when she got home or assumed the police would take photographs. Bailey agreed that she did not observe any injury to the victim's vaginal area based upon visual examination. She agreed that it was consistent with her training and experience in sexual assault cases to see a victim with a black eye but no vaginal injuries. The victim did not take a shower after the assault and prior to the examination. On redirect examination, Bailey clarified that although she did not collect the victim's clothing, the victim's underwear and a pad were collected as part of the sexual assault kit and sent to the TBI for testing.

Tatian Cochran, an expert in biology, testified that she was employed as a TBI forensic scientist in the DNA unit. She received the victim's sexual assault kit and examined the items within it for the presence of DNA. She used the polymerase method of DNA extraction, a standard procedure in her field. Based on her examination, the victim's external vaginal swabs contained the Appellant's DNA. Her report documenting her examination was admitted into evidence. Cochran did not conduct further DNA testing on the other items in the sexual assault kit, per TBI policy, because of the positive DNA match on the external vaginal swabs.

Asked on cross-examination if a person has said that a man has ejaculated three times inside her vagina would Cochran expect to find "some trace of male semen that would include the presence of DNA inside of the vagina," Cochran said it depended on the timeframe between when the rape occurred and when the sexual assault kit was collected. She also clarified that male DNA was present inside of the victim's vagina; however, the victim's DNA "overwhelmed" it such that she would have been unable to create a profile. In Cochran's opinion, if a person has a vaginal swab taken from them within three hours of the sexual event, "the probability would be high" that some male DNA would be left in the vaginal canal. On redirect, Cochran agreed that a vasectomy would impact the

probability of finding male DNA inside the vagina. Cochran was unaware whether the Appellant had had a vasectomy.

The State rested. For count one, the State elected the act of aggravated rape based upon the first act of vaginal penetration by the Appellant of the victim. For count two, the State elected the act of fellatio where the Appellant placed his penis inside the victim's mouth. The Appellant did not offer any proof. Based upon the above proof, the jury convicted the Appellant as charged.

On May 20, 2022, the trial court conducted a sentencing hearing and imposed an effective sentence of sixty-eight years in confinement. On June 13, 2022, the trial court entered corrected judgments imposing a concurrent term of sixty years for each conviction of aggravated rape to be served consecutively to eight years for the conviction of attempted aggravated burglary, for an effective sentence of sixty-eight years in confinement. On July 14, 2022, the trial court conducted a hearing on the motion for new trial, which was subsequently denied by written order. The Appellant filed a timely notice of appeal, and this case is now properly before this court for review.

ANALYSIS

The Appellant challenges the sufficiency of the evidence supporting his convictions. He does not argue that any of the elements of the offense were not met; rather, he attacks inconsistencies in the victim's testimony. Specifically, the Appellant points to the difference between the time the offense was reported by the victim as reflected in the 911 records and nurse accounts at 9:30 p.m., and the victim's testimony at trial that the offenses occurred at 6:00 p.m. The Appellant also insists that the victim's testimony that the Appellant had an erection and ejaculated three times during the forty-five minute to an hour criminal episode was not credible testimony. The State contends, and we agree, that the evidence was sufficient to support each of the offenses of conviction in this case.

When a defendant challenges the sufficiency of the evidence, the standard of review applied by this court 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). The trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and must reconcile all conflicts in the evidence. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). When reviewing issues regarding the sufficiency of the evidence, this court shall not "reweigh or reevaluate the evidence." Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997).

The State, on appeal, is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court has often stated that "[a] guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." Bland, 958 S.W.2d at 659 (citation omitted). A guilty verdict also "removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict." Id. (citing State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982)).

The Appellant was convicted of aggravated kidnapping, attempted aggravated burglary, and two counts of aggravated rape. For the aggravated kidnapping, the State was required to prove "false imprisonment, as defined in § 39-13-302" that is committed "[t]o facilitate the commission of any felony or flight thereafter[.]" Tenn. Code Ann. § 39-13-304(a)(1). False imprisonment occurs when an individual, "knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty." Id. § 39-13-302(a). For the aggravated rape, the State was required to prove unlawful sexual penetration of a victim by the defendant or the defendant by a victim that caused bodily injury. Id. § 39-13-502(a)(2). Sexual penetration is defined as, "sexual intercourse, . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required[.]" Id. § 39-13-501(7). Bodily injury "includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness[.]" Id. § 39-11-106(a)(3). For the offense of attempted aggravated burglary, the State was required to prove the Appellant attempted to enter a habitation without the owner's effective consent which was "not open to the public, with intent to commit a felony, theft, or assault[.]" Id. § 39-13-1002(a)(1), -1003. A habitation is "any structure . . . designed or adapted for the overnight accommodation of persons[.]" Id. § 39-14-401(1)(A) (2014).

Viewing the evidence in the light most favorable to the State, the evidence was sufficient to support each of the Appellant's convictions in this case. The Appellant knocked on the victim's door and lured her to his apartment by telling her that his girlfriend was sick and in need of help. When the victim entered his apartment, the Appellant got behind her so she was unable to leave. He then pushed her into the bedroom and onto the bed. When the victim said she did not want to have sex, the Appellant punched her in the face, resulting in a black eye that became completely swollen shut and leaving a permanent indentation on the side of her face. The Appellant demanded the victim to disrobe and then penetrated her with his penis vaginally and engaged in oral sex with the victim, multiple times. The Appellant also forced the victim to perform oral sex on him.

After the sexual encounter ended, the Appellant demanded the victim call her twelve-year old daughter to come upstairs because he intended to rape her as well. The victim refused, and the two began to walk downstairs to the victim's apartment together. The victim managed to reach her apartment before the Appellant, and she deadbolted the door shut. The Appellant, in his nearly hour-long interview, corroborated the victim's account of the rape. He also said that had he gotten inside of the victim's apartment, he intended to rape her daughter. Based on this evidence, a rational juror could have found the essential elements of each of the offenses of conviction beyond a reasonable doubt. The victim's credibility and any inconsistencies in her testimony are matters for the jury, and not for this court to determine. See Henley, 960 S.W.2d at 578-79. Accordingly, the Appellant is not entitled to relief.

CONCLUSION

Based on the foregoing authority, we affirm the judgements of the trial court.

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CAMILLE R. MCMULLEN, PRESIDING JUDGE