

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
January 24, 2023 Session

**FILED**  
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**STATE OF TENNESSEE v. NICKLAUS EDWARD BRUSH, ALIAS**

**Appeal from the Criminal Court for Knox County  
No. 116998 Steven Wayne Sword, Judge**

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**No. E2022-00379-CCA-R3-CD**

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The defendant, Nicklaus Edward Brush, alias, appeals his Knox County Criminal Court jury convictions of aggravated kidnapping and domestic assault, arguing that the first count of the indictment failed to charge an offense, that the evidence was insufficient to support his aggravated kidnapping conviction, that the State failed to establish venue, and that the trial court improperly questioned a witness at trial. Discerning no error, we affirm.

**Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed**

JAMES CURWOOD WITT, JR., P.J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR. and KYLE A. HIXSON, JJ., joined.

Jackson M. Fenner, Knoxville, Tennessee, for the appellant, Nicklaus Edward Brush, alias.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Senior Assistant Attorney General; Charme P. Allen, District Attorney General; and Christy Smith and Randall Kilby, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

On January 20, 2020, the Knox County Grand Jury indicted the defendant on charges of aggravated kidnapping and domestic assault resulting in bodily injury, third offense, of his girlfriend, Diane Thomas, which occurred in January 2019. Count 1 of the indictment, charging the defendant with aggravated kidnapping, alleged that

[o]n or about the 24th day of January, 2019, and on divers and diverse days between that date and the 25th of January, 2019, in the State and County aforesaid, [the defendant] did

unlawfully and knowingly remove and confine Diane Thomas so as to interfere substantially with the liberty of the said Diane Thomas, where said Diane Thomas did suffer bodily injury, in violation of T.C.A. 39-13-304, and against the peace and dignity of the State of Tennessee.

During the trial held on August 25, 2021, Robert Watlington testified that on the evening of January 25, 2019, he was at H&R Block, where his wife was employed, waiting for her to complete her work so that he could drive her home. The office was located in a shopping center with multiple other businesses. Mr. Watlington saw a woman come across the parking lot and approach the store. She knocked on the locked door, while looking “rather terrified.” Mr. Watlington stated that he opened the door for her and that she appeared to want to “get in to safety.” Mr. Watlington saw a man, whom he identified at trial as the defendant, walking across the parking lot, and the victim told Mr. Watlington that the defendant was searching for her. Those inside the store hid the victim on the floor behind the counter, and Mr. Watlington called 911. He saw the defendant driving around the parking lot, but the defendant was gone by the time the officers arrived.

During cross-examination, Mr. Watlington testified that the woman came to the store at around 9:00 p.m. He stated that he saw the defendant when the defendant looked inside the store through a window, but the defendant did not attempt to enter the store. Mr. Watlington said that the woman was afraid to call the police. She was wearing long sleeves and pants, and Mr. Watlington did not see any marks or bruising on her.

The State then called the victim to testify. The victim repeatedly stated that she did not wish to testify, that she loved the defendant, and that she could not recall the events of January 24, 2019. The victim testified that on January 24th, she was in a relationship with the defendant and that they lived in a one-room camper located on four or five acres of land and a few hundred yards away from the home of the defendants’ parents. The victim did not recall the address of the defendant’s home, but when asked whether the home was located in Knox County, she replied, “Yes.” At that time, the victim did not own a vehicle or a cell phone.

Although the victim testified that she did not recall the morning of January 24th, she also testified that the defendant became angry and “intimidated” her with a gun “for a few hours.” She stated that she did not know whether the gun was “real” but that “people with guns scare me.” The victim said that she was afraid and was “[c]owering” inside the residence. The defendant left at one point, and the victim testified, “I guess I could have left then.” She stated that she wanted to escape but did not do so because she loved the defendant and believed “things would change.”

The victim testified that the defendant waived the gun but did not do anything else to her. In response to questioning by the State, the victim stated that although she recalled testifying at a prior hearing, she did not recall the substance of her testimony, explaining, “I’m a recovering addict, so...it kind of affected my brain.” The trial court then questioned the victim as follows:

THE COURT: Let me ask a couple of questions here regarding the elements of the offense.

At any point during that morning, did [the defendant] hit you or strike you in any way?

THE WITNESS: Maybe.

THE COURT: When you say “maybe,” why do you say maybe, not yes or no? Do you not remember or—

THE WITNESS: Yeah.

THE COURT: Yeah, you don’t remember?

THE WITNESS: No.

THE COURT: Okay.

A hearing then was held outside the jury’s presence during which the State played the recording of the victim’s testimony at the preliminary hearing. The victim affirmed that listening to her prior testimony had refreshed her recollection of the events. However, once the jury returned to the courtroom, the victim refused to answer any other questions. The trial court found that the victim was unavailable as a witness and allowed the State to present the victim’s testimony from the preliminary hearing pursuant to Tennessee Rule of Evidence 804(b)(1).

During the preliminary hearing, the victim testified that she and the defendant met in September 2018, began dating in October 2018, and began living together in the defendant’s home in November 2018. She stated that they lived in a small camper and affirmed that the camper was located in Knox County. She recalled that on January 24, 2019, she and the defendant awoke around 11:00 a.m. or noon and that the defendant was in a “bad mood.” The victim decided to leave because the defendant was upset, but the defendant did not want her to leave. When the victim walked toward the door, the defendant instructed her to return, and the victim complied.

The victim stated that the defendant told her to go to a corner, that she complied, and that he hit and kicked her while she was “crouched” in the corner. She said that the defendant hit her at least three times and kicked her at least three times, striking her arms, legs, and face. The defendant ordered the victim to cover herself, including her face, with a blanket, and the victim remained underneath the blanket for three to four hours, during which time she did not feel free to leave. The defendant was “sitting there,” and

whenever the victim tried to remove the blanket, the defendant ordered her to cover her face. The victim stated that the defendant had a gun and that although he did not point the gun at her, he used it as an “intimidation method.”

The victim testified at the preliminary hearing that after the defendant grew calm, they ate dinner and discussed their relationship and how to “work on it.” On the following evening, they decided to go together to purchase pizza. Once they arrived, the victim fled. She explained that on the previous night, she “made a promise to [her]self that [she] wasn’t going to go through it again.” She stated that she did not want the defendant to hurt her or himself and that she believed it was best to leave. The victim ran to a nearby H&R Block where she told those inside the store that she was fleeing her boyfriend and needed to use the telephone to call her sister. Someone inside the store called the police. When the officers arrived, they photographed the victim’s injuries, which included bruises on her arms, legs, and face and dried blood on her mouth. The victim again confirmed that the events occurred in Knox County.

During cross-examination at the preliminary hearing, the victim testified that during the episode, the defendant left the camper “a couple of times” and was absent from the camper for approximately one hour. She stated that once the defendant calmed, they ate dinner and talked, and the victim went to sleep while the defendant worked outside. She said that on the following day, they both made the decision to go to the pizza restaurant and went in the defendant’s truck. The victim explained that she fled because the defendant was getting upset and that she did not wish to endure another similar episode or for either of them to be injured.

After the recording of the victim’s preliminary hearing testimony was played, the State recalled the victim, who identified the photographs of her injuries taken by officers on January 25, 2019. During cross-examination at trial, the victim testified that the injuries occurred while inside the camper. She agreed that there was a period of time of approximately one and one-half hours during which the defendant was absent from the camper and that during that time period, she made no attempt to contact the defendant’s parents who lived nearby. She stated that the defendant did not point his gun at her or threaten to shoot her but was “kind of wa[v]ing it around.” She agreed that after the incident, she and the defendant talked for some time. On the following day, the victim slept, while the defendant worked outside. The victim went to a friend’s house after leaving H&R Block and returned to the defendant’s home a few days later. She acknowledged that she was with the defendant when he was arrested four or five days later.

At the conclusion of the State’s proof, defense counsel made an oral motion for a judgment of acquittal. The trial court noted that although the statute provided that aggravated kidnapping can be accomplished through removal *or* confinement, the first

count of the indictment alleged that the defendant removed *and* confined the victim. *See* T.C.A. §§ 39-13-304(a)(4) (defining aggravating kidnapping as false imprisonment where the victim suffers bodily injury); 39-13-302(a) (providing that “[a] person commits the offense of false imprisonment who knowingly removes or confines another unlawfully as to interfere substantially with the other’s liberty”). The trial court found that the State presented proof of confinement but did not present proof of removal. The trial court noted its intention to conduct additional research to determine whether the language was surplusage but denied the defendant’s motion.

After a *Momon* colloquy, the defendant elected not to testify, and he did not present any additional proof. During a hearing outside the jury’s presence, the trial court found that the conjunctive phrasing in the indictment was surplusage and that the defendant had sufficient notice of the charges against him because the indictment cited to the aggravated kidnapping statute. The trial court determined that it would instruct the jury regarding “removal *or* confinement” as set forth in the statute rather than “removal *and* confinement” as set forth in the indictment.

During closing arguments, the State argued that the evidence established aggravated kidnapping based on the defendant’s confinement of the victim inside the defendant’s home. Although the oral jury instructions were not transcribed, the written jury instructions reflect that the trial court instructed the jury that to establish the offense of aggravated kidnapping, the State was required to prove “removal or confinement.”

The jury convicted the defendant of aggravated kidnapping and domestic assault resulting in bodily injury. Following a bifurcated hearing, the jury determined that the conviction for domestic assault resulting in bodily injury constituted a third offense. *See* T.C.A. § 39-13-111(c)(3) (providing for enhanced punishment for a third conviction of domestic assault resulting in bodily injury). During the sentencing hearing, however, the trial court found that the State failed to establish at trial that the defendant’s two prior convictions for domestic assault resulted in bodily injury. The trial court imposed concurrent sentences of twelve years for aggravated kidnapping and eleven months and twenty-nine days for domestic assault.

The defendant filed a timely motion for new trial, which the trial court denied following a hearing. The defendant then filed a timely notice of appeal.

#### *A. Validity of the Indictment*

As relevant to the instant case, aggravated kidnapping is false imprisonment “[w]here the victim suffers bodily injury[.]” T.C.A. § 39-13-304(a)(4). “A person commits the offense of false imprisonment who knowingly removes *or* confines another

unlawfully so as to interfere substantially with the other's liberty." T.C.A. § 39-13-302(a) (emphasis added). Unlike the statutory provisions, which define aggravated kidnapping as involving either removal *or* confinement, Count 1 of the indictment charged that the defendant committed aggravated kidnapping by removing *and* confining the victim. The defendant maintains that, as a result, Count 1 "failed to charge an offense." The State responds that the use of a conjunctive term rather than a disjunctive term did not affect the validity of the indictment and that the indictment satisfied the constitutional and statutory requirements. We agree with the State.

Although the defendant did not raise the issue prior to trial, a claim that the indictment failed to charge an offense is not subject to waiver and may be raised at any time during the proceedings. Tenn. R. Crim. P. 12(b)(2)(B) (listing as motions that must be filed prior to trial as including "a motion alleging a defect in the indictment, presentment, or information—but at any time while the case is pending, the court may hear a claim that the indictment, presentment, or information fails to show jurisdiction in the court or to charge an offense"); *see State v. Nixon*, 977 S.W.2d 119, 121 (Tenn. Crim. App. 1997). Thus, the defendant did not waive the issue.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee an accused the right to be informed of the nature and cause of the accusation against him. *See State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997). Pursuant to Tennessee Code Annotated section 40-13-202, the indictment must "state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner so as to enable a person of common understanding to know what is intended, and with that degree or certainty which will enable the court, on conviction, to pronounce the proper judgment." T.C.A. § 40-13-202.

Generally, an indictment is valid if it "provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy." *Hill*, 954 S.W.2d at 727; *see State v. Smith*, 492 S.W.3d 224, 239 (Tenn. 2016). Strict pleading requirements are no longer necessary due to the decline of common law offenses and the advent of statutory offenses. *Hill*, 954 S.W.2d at 727-28. "*Hill* and its progeny leave little doubt that indictments which achieve the overriding purpose of notice to the accused will be considered sufficient to satisfy both constitutional and statutory requirements." *State v. Hammonds*, 30 S.W.3d 294, 300 (Tenn. 2000). "[A]n indictment which references the statute defining the offense is sufficient and satisfies the constitutional and statutory requirements' for a charging instrument." *State v. Duncan*, 505 S.W.3d 480, 488 (Tenn. 2016) (quoting *Hammonds*, 30 S.W.3d at 300). "In other words, citing the statute in the indictment provides the defendant with notice regarding the

mens rea of the offense, gives notice regarding the offense upon which to enter judgment, and protects against future prosecution for the same offense.” *Smith*, 492 S.W.3d at 239. We avoid “pettifogging, technicality or hairsplitting” when the indictment is sufficient to allow the accused to know the charge. *Id.* at 241 (quoting *Hill*, 954 S.W.2d at 728). We review the validity of an indictment de novo on appeal. *Id.* at 239.

“Historically, when two means of committing an offense were charged in the conjunctive in a single count of an indictment as part of the same transaction, proof of either sufficed to support a conviction.” *State v. Zonge*, 973 S.W.2d 250, 254 (Tenn. Crim. App. 1997). In *Zonge*, this court upheld the defendant’s conviction for especially aggravated kidnapping even though the indictment alleged removal and confinement rather than removal or confinement as provided in the statute. *Id.* In concluding that the evidence was sufficient to sustain the conviction based on proof that the defendant confined the victim, this court also concluded that “the indictment sufficiently informed the defendant that he was charged with especially aggravated kidnapping, which only requires proof that he knowingly used a weapon to confine or remove the victim.” *Id.*

Although Count 1 of the indictment alleged removal *and* confinement rather than removal *or* confinement as provided by statute, we conclude that the use of a conjunctive term rather than the disjunctive term provided in the statute did not render Count 1 of the indictment invalid. The indictment cited to the aggravated kidnapping statute, stated the allegations in ordinary and concise language, and sufficiently identified the offenses with which the defendant was charged. The indictment provided sufficient information to enable the defendant to know the accusation to which an answer was required, to furnish the trial court with an adequate basis for entry of a proper judgment, and to protect the defendant against double jeopardy. *See Hill*, 954 S.W.2d at 727. We conclude that the indictment was sufficient to fulfill the “overriding purpose of notice to the accused.” *Hammond*, 30 S.W.3d at 300. Therefore, the indictment is valid, and the defendant is not entitled to relief.

### *B. Sufficiency*

The defendant contends that the evidence is insufficient to support his conviction for aggravated kidnapping. He asserts that notwithstanding the statutory provisions, the State was required to establish both removal and confinement of the victim as alleged in the indictment and that the State failed to do so. The State responds that the evidence is sufficient to support the aggravated kidnapping conviction based on the defendant’s confinement of the victim.<sup>1</sup> We agree with the State.

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<sup>1</sup> The State notes in its brief that the defendant appears to argue that there was a fatal variance between Count 1 of the indictment and the proof presented at trial. However, we do not read the defendant’s

Sufficient evidence exists to support a conviction if, after considering the evidence—both direct and circumstantial—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. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). This court will neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Dorantes*, 331 S.W.3d at 379. The verdict of the jury resolves any questions concerning the credibility of the witnesses, the weight and value of the evidence, and the factual issues raised by the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

The defendant asserts that although the statutes governing aggravated kidnapping only require the State to prove either removal or confinement, *see* T.C.A. §§ 39-13-302(a); 39-13-304(a)(4), the use of the conjunctive language in the indictment bound the State to the higher burden of establishing both removal and confinement to sustain a conviction.<sup>2</sup> However, this court previously rejected the claim that an indictment charging elements in the conjunctive rather than in the disjunctive as provided by statute requires that the State prove both elements. *See Zonge*, 973 S.W.2d at 254 (concluding that proof of confinement was sufficient to support the especially aggravated kidnapping conviction based on an indictment that alleged both removal and confinement); *see also State v. Donnie Bridges*, No. E2019-01003-CCA-R3-CD, 2021 WL 928467, at \*7-8 (Tenn. Crim. App., Knoxville, Mar. 11, 2021), *perm. app. denied* (Tenn. July 14, 2021) (“[T]he argument that the State must prove both elements if the State indicts for both elements has previously...been rejected by this court.”); *State v. Zan Ray McCracken*, No. E2000-1762-CCA-R3-CD, 2001 WL 812250, at \*3 (Tenn. Crim. App., Knoxville, July 19, 2001) (“Unfortunately for the defendant, this same argument based on the contrast between an indictment charging in conjunctive while the statute defines the offense in the disjunctive

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brief as raising an issue as to whether there was a fatal variance between the indictment and the evidence presented at trial. Rather, he argues that there was a variance between the aggravated kidnapping statute and the indictment in support of his claim that the indictment was invalid. He also did not cite to any authority addressing fatal variances between an indictment and evidence presented at trial. *See, e.g. State v. Moss*, 662 S.W.2d 590, 592 (Tenn. 1984) (addressing a variance between an indictment and evidence presented at trial). Accordingly, we decline to address the issue.

<sup>2</sup> The defendant does not raise any issues on appeal relating to the trial court’s instructing the jury that the State must establish either removal or confinement as provided by statute rather than both removal and confinement as provided in the indictment. The defendant likewise does not raise any issue of election of a particular mode of the offense.



has not met with success.”). The State need only establish either removal or confinement to support a conviction for aggravated kidnapping. *See Zonge*, 973 S.W.2d at 254.

According to the evidence presented at trial, on the day of the offense, the victim was aware that the defendant was in a bad mood and attempted to leave the home where she lived with him. The defendant did not want her to leave and ordered her to come to him. When she complied, the defendant struck her multiple times on her arms, legs, and face, causing bruises. He also used a gun to intimidate the victim but did not point it at her. He ordered the victim to sit under a blanket where she remained for several hours. Whenever the victim tried to remove the blanket, the defendant ordered her to cover herself. The victim did not feel free to leave during this time period. This evidence established that the defendant knowingly confined the victim so as to substantially interfere with her liberty and that the victim suffered bodily injury. *See* T.C.A. §§ 39-13-302(a); 39-13-304(a)(4). Accordingly, the evidence is sufficient to support the defendant’s conviction for aggravated kidnapping.

### C. Venue

The defendant asserts that the evidence failed to establish that the offenses occurred in Knox County. The State responds that the victim’s testimony that the home where she and the defendant lived and the offenses occurred was located in Knox County was sufficient to establish venue. We agree with the State.

Venue refers to the fact that offenses generally must be tried in the county where the offenses were committed. *See* Tenn. Const. art. I, § 9 (stating that “in all criminal prosecutions, the accused hath the right to...a speedy public trial, by an impartial jury of the County in which the crime shall have been committed”); *see also* Tenn. R. Crim. P. 18(a) (“Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was committed.”). “Proof of venue is necessary to establish the jurisdiction of the court, but it is not an element of any offense and need only be proven by a preponderance of the evidence.” *State v. Hutcherson*, 790 S.W.2d 532, 535 (Tenn. 1990); *see also* T.C.A. § 39-11-201(e) (“No person may be convicted of an offense unless venue is proven by a preponderance of the evidence.”). Venue is a question of fact to be determined by the jury, which may “draw reasonable inferences from the evidence” and may make its determination based solely upon circumstantial evidence. *State v. Young*, 196 S.W.3d 85, 101, 102 (Tenn. 2006).

In challenging the sufficiency of the evidence to support venue, the defendant argues that the State failed to present any maps or surveys or testimony from county officials, experts, residents of nearby houses, the owner of the lot where the home was located, or the arresting officer to establish that the residence where the defendant and the

victim lived and the offenses occurred was located in Knox County. However, such extensive proof is not required. Rather, “[s]light evidence is enough to carry the prosecution’s burden of proof if such evidence is uncontradicted.” *State v. Ellis*, 89 S.W.3d 584, 598 (Tenn. Crim. App. 2002) (citing *Ellis v. Carlton*, 986 S.W.2d 600, 602 (Tenn. Crim. App. 1998); *State v. Smith*, 926 S.W.2d 267, 269 (Tenn. Crim. App. 1995)). At trial, the victim confirmed multiple times that the home where she and the defendant lived and the offenses occurred was located in Knox County. We conclude that this evidence was sufficient to establish venue.

#### *D. Trial Court’s Questioning of the Victim*

The defendant asserts that the trial court’s questioning of the victim at trial amounted to an improper comment on the evidence. The State responds that the trial court properly asked impartial questions to clarify a portion of the victim’s testimony and that the trial court’s questioning was proper pursuant to Tennessee Rule of Evidence 614(b). We agree with the State.

The Tennessee Constitution prohibits judges from making any comment “with respect to matters of fact.” Tenn. Const. art. VI, § 9; *State v. Shuttles*, 767 S.W.2d 403, 406 (Tenn. 1989). The purpose of this rule is to avoid giving “the jury any impression as to [the judge’s] feelings or to make any statement which might reflect upon the weight or credibility of evidence of which might sway the jury.” *Suttles*, 767 S.W.2d at 407; see *State v. Schiefelbein*, 230 S.W.3d 88, 117 (Tenn. Crim. App. 2007). “It is natural that jurors should be anxious to know the mind of the Court, and follow it; therefore, a Court cannot be too cautious in [its] inquiries.” *Schiefelbein*, 230 S.W.3d at 117 (quoting *McDonald v. State*, 14 S.W. 487, 488 (Tenn. 1890)).

Tennessee Rule of Evidence 614(b) permits the interrogation of witnesses by the trial judge. “So long as the inquiry is impartial, trial courts may ask questions to either clarify a point or to supply any omission.” *Id.* at 118 (citing *Collins v. State*, 416 S.W.2d 766 (Tenn. 1967); *Parker v. State*, 178 S.W. 438 (Tenn. 1915)). The trial judge’s questioning should not be hostile, such that it constitutes a “rigid cross-examination” of the witness. See *Collins*, 416 S.W.2d at 767. “When a court has improperly commented on the evidence, the comments must be considered in the overall context of the case to assess prejudice.” *State v. Dwayne Jones*, No. W2016-02070-CCA-R3-CD, 2018 WL 1040131, at \*5 (Tenn. Crim. App., Jackson, Feb. 21, 2018) (citing *State v. Hester*, 324 S.W.3d 1, 89 (Tenn. 2010) (appendix)).

Prior to the trial court’s questioning of the victim, she testified that the defendant prevented her from leaving the home and used a gun to intimidate her and that she wanted to leave but was afraid to do so. However, the victim also claimed that she was

unable to recall many of the details surrounding the incident, maintained that she did not wish to testify, and attempted to avoid answering the prosecutor's questions. Due to the victim's evasiveness, the trial court asked impartial questions to the victim in an attempt to clarify her testimony. We conclude that the trial court's questions were proper and that, therefore, the defendant is not entitled to relief.

For the foregoing reasons, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., PRESIDING JUDGE