

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs April 11, 2017

STATE OF TENNESSEE v. DONALD GWIN

Appeal from the Criminal Court for Shelby County
No. 15-00010 J. Robert Carter, Jr., Judge

No. W2016-01783-CCA-R3-CD

The Defendant, Donald Gwin, was convicted by a Shelby County Criminal Court jury of aggravated rape, a Class A felony; aggravated robbery, a Class B felony; aggravated burglary, a Class C felony; and aggravated assault, a Class C felony. He was sentenced to an effective term of thirty-five years in the Department of Correction. On appeal, the Defendant argues that: (1) the trial court erred in ruling that his prior sexual battery conviction, similar to that for which he was on trial, could be introduced if he opened the door to its admissibility; (2) the trial court abused its discretion in denying his motion for a mistrial after the jury heard that he wore an ankle bracelet for monitoring as part of the sex offender registry; (3) the trial court abused its discretion in denying his motion for a mistrial after a local newspaper printed an article about his case; and (4) the evidence is insufficient to sustain his conviction for aggravated robbery. After review, we affirm the judgments of the trial court.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and J. ROSS DYER, JJ., joined.

Eric Mogy, Memphis, Tennessee, for the appellant, Donald Gwin.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Abby Wallace and Cavett Ostner, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

On August 28, 2014, the victim entered her apartment after running errands and, after setting down her bags, turned around to discover the Defendant inside. As a result of the events that subsequently took place inside the victim's apartment, the Defendant was indicted for aggravated rape, aggravated robbery, aggravated burglary, and aggravated assault.

At the Defendant's May 2016 trial, the victim testified that in August 2014 she lived in the Country Squire Apartments in Memphis with her two young daughters. On August 28, she had the day off work and was packing in preparation to move. After running some errands, she returned to her apartment and carried several shopping bags inside. She kicked the door closed behind her, dropped the bags in the kitchen, and started back toward the door to get the rest of the bags from her car. When she turned around, she saw a man whom she did not recognize, later identified as the Defendant, standing in her apartment. The Defendant locked the door behind him, and the victim tried to run past him to escape. The Defendant held a pocketknife and told the victim "no" when she tried to flee.

The victim panicked and begged the Defendant not to kill her. The Defendant told her that he was not going to kill her, and the victim asked him if he wanted money. The Defendant asked who else was at home, to which the victim responded "nobody." The Defendant walked the victim from room to room at knifepoint to verify that they were alone. The Defendant asked the victim if she had a boyfriend and where he was. As they walked, the victim begged the Defendant not to rape her, but the Defendant told her to keep moving. She told him that she would give him money, and he responded by telling her to give it to him. The victim gave the Defendant two debit cards and told him the PIN numbers. He put the cards in his pocket but did not look satisfied, so the victim offered to take him to an ATM.

The Defendant told the victim to "come here" and grabbed her by the arm. She again begged the Defendant not to rape her, but he led her into the bedroom she shared with her one-year-old daughter. She told the Defendant that she was menstruating, but the Defendant responded that he had "f***ed plenty of women on their periods." She then told him that she just had a newborn and still had stitches. The Defendant handed the debit cards back to the victim and told her that he "just want[ed] some head anyway." The victim cried and begged the Defendant not to hurt her, and he repeated that he "just want[ed] some head." The Defendant sat the victim down on the bed, stood in front of

her, and told her to “hurry up.” While holding the knife, the Defendant pulled down his pants, and the victim complied with his demands and began to perform oral sex on him.

As the victim performed oral sex, she cried and became nauseated. She began to vomit, and the Defendant let her go to the bathroom while he stood nearby. The Defendant’s cell phone rang, and he answered the call. After the victim finished vomiting and grabbed a towel, the Defendant took her back to the bed where he made her continue performing oral sex. The Defendant pulled the victim’s dress down and kissed her breast. The victim got sick to her stomach again, and the Defendant let her go to the bathroom to vomit. The Defendant then told her that her “head [was] whack” and ordered her to remove her underwear. She cried and repeated that she had just had a baby. The victim promised to do a better job in performing oral sex and began to perform oral sex on the Defendant again. The Defendant eventually ejaculated in her mouth, and, while the Defendant was not looking, she spat the semen into the towel that she had used to clean her vomit.

The victim asked the Defendant to leave and offered her car and debit cards to him. The Defendant told her to get the debit cards. As the victim picked up the cards from the counter in her bathroom, the Defendant approached her from behind and began to choke her with his forearm. He pulled her backwards, and they landed on her bed. Thinking that the Defendant was going to kill her, the victim started to struggle with the Defendant instead of being compliant like she had done thus far. The victim tried to hit the Defendant and scratch his face. She screamed until he choked the breath out of her and threatened to break her neck. They rolled off the bed and onto the floor, and the victim threw up her hands and asked the Defendant to take whatever he wanted and leave. The Defendant told her to get up and brush her teeth because he did not want to leave any evidence. The victim noticed that her tongue was bleeding from having bitten it during the struggle. She brushed her teeth, and the Defendant told her not to call the police or he would return and kill her boyfriend and children. The Defendant told her that he had served eight years in jail and pointed to an ankle monitor. The victim said that, upon seeing the ankle monitor, she believed him and promised not to tell anyone.

The Defendant told the victim to wait in the bathroom. She heard the front door open and close, and the Defendant called out for her not to leave. A few minutes later, the victim heard the front door open and close again. She asked if he was still there and did not hear a response. She ran out of the bathroom to get her phone, but her purse was gone. Luckily, her keys were in a grocery bag, so the victim quickly put on some clothes in order to leave. She looked through the peephole and then cracked open the door to make sure the Defendant was gone. The victim ran to her car and drove to the hospital where she reported that she had been assaulted.

A police officer came to the hospital and talked to the victim. Afterwards, the victim was taken to the rape crisis center where she underwent an examination, including swabbing her breast and mouth for DNA samples. The victim was then taken to the child advocacy center where she spoke with a detective about what had happened. She gave the officer a statement regarding the rape and described her attacker as at least six-feet tall, African-American, slightly athletic build, and wearing a lime green cut-off shirt, black shorts, black shoes, and an ankle monitor. She confirmed that she did not invite the Defendant into her apartment and that he stole her purse, wallet, and cell phone. The officer showed the victim a photographic array from which she identified the Defendant. The police later returned the victim's purse, jewelry that had been in her purse, and cell phone. The victim also identified the Defendant in court as her attacker.

Bridgett White, a retired lieutenant with the Memphis Police Department, testified that she went to the hospital to speak with the victim and directed that a description of the attacker be broadcast to other officers. She sent the victim to the rape crisis center for an examination. Phyllis Crump, a forensic nurse at the rape crisis center, interviewed and examined the victim. The victim provided a consistent account of the rape to Nurse Crump. The victim complained of oral pain, and Nurse Crump found bite marks on both sides of the victim's tongue where she had bitten herself during the attack. Nurse Crump noted scratches and bruising on the victim's neck, as well as facial swelling and redness. She collected swabs from the victim's breast and mouth for DNA testing.

Officer Jay Dorning with the Memphis Police Department Sex Offender Registry testified that he tracked the Defendant's ankle monitor to the location of the victim's apartment during the timeframe of the rape. Several other Memphis police officers testified regarding their involvement in the case. Sergeant Anthony Lee interviewed the victim at the child advocacy center and showed her a photographic array from which she identified the Defendant. Sergeant Nelvin Amerson, Jr. prepared the photographic array that Sergeant Lee showed the victim. Sergeant Judith Blue testified that the Defendant had the victim's cell phone in his possession when he was taken into custody. She obtained a search warrant for the Defendant's vehicle and watched as officers conducted the search. Sergeant Blue observed Judy Pinson, a nurse examiner from the rape crisis center, obtain DNA samples from the Defendant. Detective Michael Sims arrested the Defendant. The Defendant had the victim's cell phone in his possession when he was taken into custody.

Crime Scene Investigation Officers Adam Pickery and Hope Smith testified concerning their processing of the crime scene and the Defendant's vehicle. Officer Pickery collected evidence from the victim's apartment, including the towel into which the victim spat the Defendant's semen and a DNA swab of a spot on the carpet. Officer

Smith processed the Defendant's vehicle in which she found the victim's purse, wallet, and jewelry.

Agent Donna Nelson, a forensic analyst with the Tennessee Bureau of Investigation, tested the DNA swabs collected from the victim's mouth and breast and, on the breast swab, found a partial profile consistent with a mixture of the Defendant's and the victim's DNA. Agent Nelson also found semen on the towel matching the Defendant's DNA.

Following the conclusion of the proof, the jury convicted the Defendant as charged of aggravated rape, aggravated robbery, aggravated burglary, and aggravated assault.

ANALYSIS

I. Rule 404(b)

The Defendant first argues that the trial court abused its discretion in ruling that evidence of a prior sexual assault he committed would be allowed if he opened the door to its admissibility. The Defendant asserts that the trial court's erroneous ruling denied him the opportunity to present a defense.

Before trial, the trial court conducted a hearing pursuant to Rule 404(b) of the Tennessee Rules of Evidence. At the hearing, the victim of a previous sexual offense committed by the Defendant testified that on February 23, 2012, she was walking her dog around the apartment complex where she lived when she was approached by the Defendant. The prior victim knew the Defendant because they had gone to high school together, and he had been to her apartment with friends of her boyfriend. The Defendant told her that he had left his phone charger in her apartment the previous night and that her boyfriend told him he could come get it. The prior victim allowed the Defendant inside to retrieve the charger. When the Defendant entered the apartment, he shut the door behind him and brandished a knife. She asked the Defendant what he was doing, and he repeatedly asked her if she wanted to die. He pushed her to the couch and sat next to her. She told him she would not say anything if he would just leave.

The prior victim testified that the Defendant ordered her to put down her dog and then stood in front of her, pulled down his pants, held the knife to her throat, and ordered her to perform oral sex on him. She tried to push the Defendant away, but he held the knife to her throat making her think that he would kill her if she did not comply. The Defendant ejaculated, and some of the ejaculate got in her hair and on her face. The Defendant told her that she looked horrible and that he wanted something to drink. She

got him a drink and asked him to leave. He told her that he would leave after she drank the drink she had poured for him and calmed down. The prior victim recalled that the Defendant's defense was that he and the prior victim had been texting and flirting with each other, but the prior victim said that was not true.

Tennessee Rule of Evidence 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Such evidence may, however, be admitted for other purposes if the following conditions are met prior to admission of this type of proof:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and

(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). "Other purposes" have been defined to include the defendant's motive, intent, guilty knowledge, identity, absence of mistake or accident, a common scheme or plan, completion of the story, opportunity, and preparation. See State v. Berry, 141 S.W.3d 549, 582 (Tenn. 2004). Where the trial judge has substantially complied with procedural requirements, the standard of review for the admission of bad act evidence is abuse of discretion. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997).

In this case, the trial court followed the Rule 404(b) procedures precisely. The court held a hearing outside the jury's presence. After hearing the arguments of the parties, the trial court found proof of the other sexual assault to be "clear and convincing," accrediting the prior victim's testimony. The court observed that although the crimes were "very, very similar," they were not so unique as to allow 404(b) evidence to establish a signature crime. The court also found that 404(b) evidence would not be appropriate to establish the Defendant's identity. However, the trial court recognized that the Defendant might present evidence that would raise the material issue of consent and held that, should the Defendant raise that issue, the State would be allowed to "call this

proof to rebut the defens[e] [of] consent.” The court continued that, in the event the Defendant raised the issue of consent, “it would be material and relevant and . . . any danger of any prejudice . . . would be outweighed by the absolute need for the fundamental fairness in the trial of this case.” The court noted that if the issue of consent was not raised, then it would not be appropriate for the “404(b) proof to come in” as no material issue would exist other than propensity evidence.

The Defendant asserts that the trial court’s ruling that a defense of consent would open the door to evidence regarding the other sexual assault was tantamount to a ruling excluding such defense. He submits that he was “left with a choice of presenting his defense and a guarantee[d] conviction or not presenting the defense of his choice at all.” Thus, he was essentially “prevented . . . from testifying in his own defense.” However, the trial court did not prevent the Defendant from testifying. Rather, the Defendant made the strategic decision to forego pursuing a defense of consent in order to avoid opening the door to more damaging evidence. Again, as long as the trial court complies with the procedure set out in Tennessee Rule of Evidence 404(b), its determination “will be given great deference on appeal and will be reversed only if the trial court abused its discretion.” State v. Dotson, 450 S.W.3d 1, 76-77 (Tenn. 2014). The trial court properly analyzed the issue, and we uphold its determination.

II. Mistrial

The Defendant next argues that the trial court erred in failing to declare a mistrial after the jury heard that he was wearing an ankle bracelet monitored by the sex offender registry and also after a local newspaper published an article about his trial and prior history.

The decision of whether or not to declare a mistrial lies within the sound discretion of the trial court. State v. Land, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000). A mistrial should be declared in a criminal case only when something has occurred that would prevent an impartial verdict, thereby resulting in a miscarriage of justice if a mistrial is not declared. See id.; State v. Jones, 15 S.W.3d 880, 893 (Tenn. Crim. App. 1999); Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). “Generally a mistrial will be declared in a criminal case only when there is a ‘manifest necessity’ requiring such action by the trial judge.” State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991) (quoting Arnold, 563 S.W.2d at 794). A manifest necessity exists when there is “no feasible alternative to halting the proceedings.” State v. Knight, 616 S.W.2d 593, 596 (Tenn. 1981). The burden to show the necessity for a mistrial falls upon the party seeking the mistrial. Land, 34 S.W.3d at 527. This court will not disturb the trial court’s decision unless there is an abuse of discretion. Id. In reviewing for an abuse of discretion, this court has held that the following three factors should be

considered: (1) whether the State elicited the testimony, (2) whether the trial court gave a curative instruction, and (3) the relative strength or weakness of the State's proof. State v. Welcome, 280 S.W.3d 215, 222 (Tenn. Crim. App. 2007).

A.

The Defendant asserts that the trial court should have declared a mistrial after the jury heard that he was wearing an ankle bracelet monitored by the sex offender registry. He avers that, because he was willing to stipulate "as to [his] location at the scene, any probative value of the monitor went away and the only thing left was the prejudicial effect of such information." He therefore claims that "[m]anifest necessity certainly existed requiring the [t]rial [c]ourt [to] grant the [d]efense's motion for a mistrial," because there was "no way [he] could have received a fair trial once the jury heard" that he, being "on trial for a sex crime, was being monitored by the sex crimes unit[.]"

The Defendant's argument, however, ignores the context in which evidence that he was wearing an ankle monitor initially arose. After the Defendant raped the victim, he threatened to return and kill her boyfriend and children if she reported the rape. He then told her that he had served eight years in jail and pointed to his ankle monitor as evidence of this claim, apparently to intimidate her so that she would not call the police. The victim believed the Defendant's threat when she saw that he was indeed wearing a monitor and became extremely afraid, feeling that his threats were credible. In light of this context, the evidence shows that the Defendant purposefully highlighted the ankle monitor to intimidate and threaten the victim.

The Defendant's claim that the jury heard that he was being monitored by the sex offender registry is an extrapolation of the evidence. The officer, who testified that he located the Defendant via his ankle monitor upon the victim's reporting that her attacker was wearing such a monitor, stated that he presently worked for the Memphis Police Department's Sex Offender Registry when he provided his name and occupation. At no point did the officer explicitly state that the Defendant was being monitored for purposes of the sex offender registry, for what crime the Defendant was wearing the ankle monitor, or mention any further connection to the registry. Moreover, upon the Defendant's complaint to the officer's testimony, the trial court offered to give a curative instruction, but the Defendant declined and requested a mistrial instead.

In any event, the evidence against the Defendant was overwhelming, precluding a finding that the trial court abused its discretion in not declaring a mistrial. See Welcome, 280 S.W.3d at 222. The victim identified the Defendant from a photographic array; the police found the victim's purse, cell phone, and jewelry in the Defendant's possession following the rape; the Defendant's DNA and semen were matched to the victim's rape

kit; and the victim suffered bruising around her neck and face that were documented during her forensic examination. The trial court did not abuse its discretion in declining to declare a mistrial.

B.

The Defendant asserts that the trial court should have declared a mistrial after a local newspaper published an article about his trial and prior history. He asserts that, despite the fact that the trial court admonished the jury at the beginning of trial not to “read the local news,” the jury was “free, able, and susceptible to having seen the news article.” He acknowledges that the trial court voir dired the jury members regarding whether “they had seen anything in the local news” and all said they had not, but he claims that “[t]he entire jury was exposed to this information” and the trial court should have granted a mistrial “[o]nce the possibility of a tainted jury developed.” The State responds that the Defendant failed to establish that any jurors were exposed to the news story.

A defendant is entitled to a trial “by an impartial jury,” U.S. Const. amend. VI, Tenn. Const. art. I § 9, with the jurors “render[ing] their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge.” State v. Adams, 405 S.W.3d 641, 650 (Tenn. 2013). “When a jury has been subjected to either extraneous prejudicial information or an improper outside influence, the validity of the verdict is questionable.” Id.

[E]xtraneous prejudicial information is information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case. An improper outside influence is any unauthorized private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.

Id. at 650-51 (internal citations and quotations omitted).

When a defendant challenges the validity of a verdict on the basis of a tainted jury, he “must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence.” Id. at 651. If a defendant makes this showing, a rebuttable presumption of prejudice arises and the burden shifts to the State to introduce admissible evidence to explain the conduct or demonstrate that it was harmless. Id. (citing Walsh v. State, 166 S.W.3d 641, 647 (Tenn. 2005)).

In this case, upon learning that the newspaper had run an article about the Defendant, the trial court asked the jurors whether they had read the article, and the jurors affirmed that they had not. The trial court then re-admonished the jury not to gather any information about the Defendant from outside sources. In denying the Defendant's motion for a mistrial, the trial court noted that it looked at each member of the jury and "[t]hey all said they did not read the article and would not read it, wouldn't look at any other sources." Accordingly, the trial court concluded that "there's just no reason to believe they have any information other than what's been provided to them." Despite the Defendant's claim that the "entire jury was exposed to this information," there is simply no evidence to establish that the jury was exposed to any extraneous prejudicial information. The trial court did not abuse its discretion in denying the Defendant's motion for a mistrial.

III. Sufficiency

The Defendant challenges the sufficiency of the evidence convicting him of aggravated robbery. In considering this issue, we apply the rule that where sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court 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 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). The same standard applies whether the finding of guilt is predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

A criminal offense may be established entirely by circumstantial evidence. State v. Majors, 318 S.W.3d 850, 857 (Tenn. 2010). It is for the jury to determine the weight to be given the circumstantial evidence and the extent to which the circumstances are consistent with the guilt of the defendant and inconsistent with his innocence. State v. James, 315 S.W.3d 440, 456 (Tenn. 2010). In addition, the State does not have the duty to exclude every other reasonable hypothesis except that of the defendant's guilt in order to obtain a conviction based solely on circumstantial evidence. See State v. Dorantes, 331 S.W.3d 370, 380-81 (Tenn. 2011) (adopting the federal standard of review for cases in which the evidence is entirely circumstantial).

All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v.

Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing Carroll v. State, 370 S.W.2d 523, 527 (Tenn. 1963)). “A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient.” State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

For the purposes of this case, aggravated robbery is defined as “the intentional or knowing theft of property from the person of another by violence or putting the person in fear” that is “[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon[.]” Tenn. Code Ann. §§ 39-13-401(a), -402.

The Defendant admits that, in the light most favorable to the State, the evidence shows that he broke into the victim’s apartment for the purpose of sexually assaulting her and that he took the victim’s purse and phone as he exited the apartment after the sexual assault, sufficient to support a conviction for aggravated burglary. However, he submits that he never demanded money or property from the victim and did not use a weapon or force to take such. He claims that the only discussions about him taking any property from the victim were initiated solely by the victim. We disagree. In the light most favorable to the State, the evidence shows that the victim offered the Defendant her debit cards and money after he broke into her apartment and held her at knifepoint without indicating what he wanted. It is clear that the victim mentioned these items to the armed intruder as a strategy, “grasping at straws,” to get the Defendant to leave her apartment because she was in fear for her life and not out of goodwill or charity. The evidence is sufficient to support the Defendant’s conviction for aggravated robbery.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

ALAN E. GLENN, JUDGE