

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1996

STATE OF TENNESSEE,)

Appellee,)

VS.)

JERRY BURKE,
ERIC DAVIS, AND
MELVIN RIMMER,)

Appellants.)

C.C.A. NO. 02C01-9510-CR-00319

SHELBY COUNTY

HON. JOSEPH B. DAILEY
JUDGE

(Aggravated Robbery and
Aggravated Kidnapping)

FILED
December 11,
1996
Cecil Crowson, Jr.
Appellate Court Clerk

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendants, Jerry Burke, Eric Davis, and Melvin Rimmer, appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. They were tried together and convicted by a Shelby County jury of aggravated robbery, attempted aggravated robbery, and two counts of especially aggravated kidnapping. The trial court sentenced Burke as a Range II multiple offender to eight years for attempted aggravated robbery, fourteen years for aggravated robbery, and twenty-seven years for each count of especially aggravated kidnapping. The trial court sentenced Davis as a Range II multiple offender to six years for attempted aggravated robbery, twelve years for aggravated robbery, and twenty-five years for each count of especially aggravated kidnapping. The trial court sentenced Rimmer as a Range I standard offender to three years for attempted aggravated robbery, eight years for aggravated robbery, and fifteen years for each count of especially aggravated kidnapping. All sentences were ordered to run concurrent to each other and, with regard to Burke and Davis, consecutive to the sentences for which they were on parole at the time of the present offenses.

In this appeal, the Defendants argue that the evidence is insufficient to support their convictions for especially aggravated kidnapping. In addition, Defendant Davis contends that the trial court erred in consolidating the indictments for trial, that he received ineffective assistance of counsel at trial, and that the trial court erred in denying his motion for judgment of acquittal. We

conclude that the Defendants' issues lack merit and affirm the judgment of the trial court.

The offenses in the present case arose out of a single criminal episode. On the night of June 14, 1993, Jerry Craft was sitting on her front porch at 3222 Princeton in Memphis, Tennessee. Craft's husband, Larry Minor, was in the living room watching television, and Craft's brother, Leroy Woods, was in the living room sleeping on a couch. Timothy Woods, Craft's son, and his girlfriend Tara Talley were sleeping in the front bedroom of the two bedroom home.

Two men approached Craft and asked her if Tim was at home. She replied, "Tim Who?" At that point, the men displayed handguns and forced Craft into her home. A third man appeared shortly thereafter and followed them inside the house. Once inside the living room, the men forced Minor and Leroy Woods to lie on the floor. They bound Minor with phone cord and removed approximately twenty-five dollars (\$25) from his pockets. Although they did not bind Leroy Woods, they did take approximately twenty-five dollars (\$25) from his pockets.

Craft was arguing with the intruders while they were forcing Minor and Leroy Woods to lie on the living room floor. She asked what the men wanted, and they replied that they were looking for Tim. They demanded to know where Tim was. Craft inquired about their reasons for wanting Tim, and the men replied that Tim had shot the brother of one of the men. Craft disputed that assertion and continued to argue with the intruders. As a result, the men forced Craft into

the back bedroom and bound her hands with telephone cord. They pulled her blouse up over her head and bound her feet with a brassiere.

Unbeknownst to the intruders, Craft's arguments had awakened Timothy Woods in the front bedroom. He awakened Tara Talley and told her that someone was robbing the house. He then picked up a cordless telephone, hid in a closet behind some clothes, and called the police. Talley tried to hide in the closet, but there was not enough room for both of them. She removed her jewelry and hid it, and then she feigned sleeping on the couch in the bedroom. Shortly thereafter, a man armed with a handgun entered the bedroom, grabbed her by the arm, and asked her if anyone else was in the room. She replied that there was nobody else in the room. The intruder conducted a short search of the room, including the closet, but did not discover Timothy Woods. He then forced Talley to accompany him to the living room.

The armed intruders began to search the house, going from room to room and ransacking the rooms in the process. They continued to inquire about the whereabouts of "Tim" and sometimes commanded Talley to aid them in their search. During their search, they discovered that police officers had arrived outside the house. The men discussed what to do and eventually went to the back bedroom to free Craft. They told Craft to go outside and tell the police officers that they lived there with her. Craft walked outside and told the police officers what had actually transpired that night. As a result, the police ordered everyone out of the house. The intruders hid their guns in the house, and everyone walked outside. Craft identified the members of her family, and the police arrested the three remaining individuals, the Defendants in this case. The

police searched the Defendants and discovered approximately sixty dollars (\$60) in cash. Police officers entered the house and discovered that it had been ransacked. Three handguns were eventually recovered from the house, none of which were owned by any members of Craft's family. Police officers also discovered a small quantity of a substance which appeared to be illegal drugs.

Neither Defendant Burke nor Defendant Davis offered any proof at trial. Defendant Rimmer testified in his own behalf. He stated that he and the other two defendants had come to the house at 3222 Princeton on June 14, 1993 in order to purchase cocaine. They had done so on nine previous occasions. They entered the house, gave Timothy Woods fourteen thousand dollars (\$14,000), and waited in the living room while Woods went into the back of the house to get the drugs. When Timothy Woods did not return immediately, they began to grow impatient and argued with Craft, Minor, and Leroy Woods. At that point, Craft opened the front door, and police officers appeared outside. The officers ordered everyone out of the house and arrested the Defendants. On cross-examination, Rimmer denied owning any of the handguns recovered from the house, denied binding Craft and Minor, and denied ransacking the house.

In the first issue before this Court, each Defendant argues that the evidence was insufficient to support their convictions for the especially aggravated kidnappings of Jerry Craft and Larry Minor. More specifically, each Defendant contends that the kidnapping offenses were incidental to the robbery

offenses and, therefore, cannot withstand due process scrutiny under the principles of State v. Anthony, 817 S.W.2d 299 (Tenn. 1991).¹

In Anthony, our Supreme Court addressed the issue of “the propriety of a kidnapping conviction where detention of the victim is merely incidental to the commission of another felony, such as robbery or rape.” Anthony, 817 S.W.2d at 300. The Anthony Court held that double jeopardy analysis was inadequate for resolving this issue and focused instead on due process guarantees. See Anthony, 817 S.W.2d at 306. Our Supreme Court announced that in order to resolve the constitutional validity of a separate kidnapping conviction in such cases, courts must determine “whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction.” Anthony, 817 S.W.2d at 306. The Court commented that “one method of resolving this question is to ask whether the defendant’s conduct ‘substantially increased [the] risk of harm over and above that necessarily present in the crime of robbery itself.’” Id. (citation omitted).

In the present case, the Defendants were convicted of especially aggravated kidnapping based on their conduct with regard to Jerry Craft and Larry Minor. The record reveals that the Defendants brandished handguns and

¹ Defendant Davis also contends that the evidence supporting his convictions is insufficient because the victims never identified him. This contention is plainly contradicted by the record. In fact, Jerry Craft, Leroy Woods, and Tara Talley all identified Defendant Davis at trial. We therefore conclude that Defendant Davis’ additional argument lacks merit.

forced Craft into a back bedroom where they bound her with telephone cord and a bra. The Defendants forced Minor to lie on the living room floor and tied him with telephone cord. Although they did forcibly take money from two of the occupants of the house, it appears from the record that the Defendants did not bind Minor and Craft for the sole purpose of facilitating the robbery or their escape. Instead, the record indicates that the primary purpose of the Defendants in entering Craft's home was to locate "Tim" because he had shot the brother of one of the Defendants. It seems that the Defendants restrained the occupants of the home in order to demand the location of "Tim." As the trial court noted, the Defendants spent the majority of their time in the home searching for "Tim," including looking under beds and in closets, rather than robbing the occupants.

After a careful review of the entire record, we must conclude that the evidence supporting the especially aggravated kidnapping offenses is significant enough to warrant convictions independent of the Defendants' robbery convictions. The record demonstrates that the movement and restraint of the victims was not essentially incidental to the commission of the robbery offenses. The Defendants' first issue is therefore without merit.

Defendant Davis presents three additional issues for review. In his second issue, he argues that the trial court erred in consolidating the indictments for trial. He contends that consolidating the indictments impermissibly suggested a propensity on his part to commit multiple crimes.² Initially, we note that Defendant Davis failed to include this issue in his motion for new trial. Therefore,

² In his brief, Defendant Davis' challenge to the consolidation of the indictments seems to arise from a concern over the alleged prejudicial effect of a joint trial for all offenses rather than a joint trial for all defendants.

this issue has been waived. T.R.A.P. 3(e); see State v. Clinton, 754 S.W.2d 100, 103 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1988). Nevertheless, we will address this issue further because Defendant Davis was represented by counsel at trial but filed his appellate brief pro se.

The record reveals that the Shelby County Grand Jury returned nine separate indictments, each naming Jerry Burke, Eric Davis, and Melvin Rimmer as defendants. Although there is nothing in the record regarding the consolidation of the indictments for trial, the Defendants were tried together on all charges at a single proceeding. Presumably, the trial court ordered consolidation of the indictments pursuant to Rule 13(a) of the Tennessee Rules of Criminal Procedure.

In fact, it appears that the consolidation of the separate indictments for trial was mandatory under Rules 13(a) and 8(a) of the Tennessee Rules of Criminal Procedure. Rule 8(a) of the Tennessee Rules of Criminal Procedure reads in pertinent part:

Two or more offenses shall be ... consolidated pursuant to Rule 13 if the offenses are based upon the same conduct or arise from the same criminal episode and if such offenses are known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s) and if they are within the jurisdiction of a single court. A defendant shall not be subject to separate trials for multiple offenses falling within this subsection unless they are severed pursuant to Rule 14. (emphasis added)

It appears from the record that the offenses set forth in the nine separate indictments met all of the requirements for consolidation under Rule 8(a) of the Tennessee Rules of Criminal Procedure.

In addition, as the State points out, the record contains nothing that indicates Defendant Davis, when faced with the consolidated indictments, requested a severance pursuant to Rule 14 of the Tennessee Rules of Criminal Procedure. Although Defendant Davis claims in his brief that the trial court granted the State's motion to consolidate over his objection, the record contains no objections whatsoever to the consolidation of the indictments. Moreover, it appears that Defendant Davis did not merit a severance pursuant to the exceptions to mandatory joinder of offenses set forth in Rule 14(b)(2) of the Tennessee Rules of Criminal Procedure.

Accordingly, we conclude that the trial court did not err in consolidating the indictments for trial. Defendant Davis' second issue is not only waived but also lacks merit.

In his third issue, Defendant Davis argues that he received ineffective assistance of counsel at trial. More specifically, Defendant Davis contends that his trial attorney neither visited him in jail prior to trial nor communicated with him at all about possible defenses. Defendant Davis claims that he specifically requested that his attorney conduct a fingerprint analysis on the handguns recovered from the crime scene, but his attorney refused to do so. In addition, Defendant Davis complains that there was no identification of him as one of the perpetrators and his attorney failed to pursue this avenue of defense.

We first note that Defendant Davis failed to include this issue in his motion for new trial. This issue has therefore been waived. T.R.A.P. 3(e); see Clinton, 754 S.W.2d at 103. Moreover, as we have previously noted, the record clearly

contradicts Defendant Davis' allegation concerning identification of him as one of the perpetrators. The record is utterly silent on Defendant Davis' other allegations. It is not surprising, then, that Defendant Davis made no references to the record in his brief. As a result, this issue is waived because the Defendant failed to make appropriate references to the record. Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1988); see also T.R.A.P. 27(a)(7) and (g).

In his fourth issue, Defendant Davis argues that the trial court erred in denying his motion for judgment of acquittal. Davis once again focuses his argument on the alleged lack of an identification of him as one of the perpetrators.

Rule 29 of the Tennessee Rules of Criminal Procedure provides that the trial court shall order the entry of judgment of acquittal if the evidence is insufficient to sustain a conviction. In considering a motion for judgment of acquittal, the trial court is required:

to look at all of the evidence, to take the strongest legitimate view of it in favor of the opponent of the motion, and to allow all reasonable inferences from it in its favor; to discard all countervailing evidence, and if then, there is any dispute as to any material determinative evidence, or any doubt as to the conclusion to be drawn from the whole evidence, the motion must be denied.

State v. Torrey, 880 S.W.2d 710, 712 (Tenn. Crim. App. 1993) (citations omitted).

The standard for determining whether to grant a motion for judgment of acquittal is therefore analogous to this Court's standard of review for determining the legal sufficiency of the evidence after conviction.

When an accused challenges the sufficiency of the convicting evidence, the standard 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). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835.

From a review of the entire record, we can only conclude that the evidence is sufficient for a rational trier of fact to have found Defendant Davis guilty beyond a reasonable doubt. Accordingly, the trial court did not err in denying the motion for judgment of acquittal. Defendant Davis' fourth issue therefore lacks merit.

For the reasons set forth in the discussion above, we conclude that the Defendants' issues on appeal are meritless. Thus, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

JERRY L. SMITH, JUDGE