IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1996 SESSION

FILED

May 16, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	NO. 01C01-9511-CC-00378
	)	
Appellee	)	DICKSON COUNTY
	)	
V.	)	HON. LEONARD W. MARTIN, JUDGE
	)	
FRED NICHOLS	)	(Rape)
	)	
Appellant	)	
	)	

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

Opinion

The appellant, Fred Nichols, appeals as of right his conviction of rape. He argues on appeal that the evidence introduced at trial was insufficient to prove beyond a reasonable doubt that he committed rape, and that the trial court erred when it excluded evidence of the victim's prior sexual activity. We have carefully reviewed the record on appeal and we find that the appellant's arguments have no merit. Therefore, we affirm the trial court's judgment.

On the evening of August 29, 1994, the appellant appeared at an apartment occupied by Tom Stone and K.S.[1], the victim. The appellant was intoxicated and told Stone and K.S. that he had just broken up with his girlfriend and asked if he could spend the night on their couch. Stone and K.S. agreed.

The following morning Stone woke up around 7:00 a.m. He had sexual intercourse with K.S. and then got up. K.S. went back to sleep and Stone awoke the appellant and then left the apartment around 7:30 a.m. At approximately 7:35 a.m., K.S. woke up because the appellant, who had gotten totally undressed, was on top of her and had his hand between her legs. To get him to stop she said, "Get off of me. . . . Get off of me. . . . Get your hands off of me." He responded, "I want it, and if I want it I'm going to take it."

A struggle ensued. With the appellant on top of her, K.S. screamed for help and tried to bite and scratch him. She also tried to kick him and push him away with her knees. After about five minutes the appellant pulled back and to get her to stop resisting, he told her, "I'll break your face girl." K.S. started crying and finally acquiesced to the appellant's advances. The appellant vaginally penetrated K.S. and ejaculated.

After the intercourse, K.S. ran to the bathroom and locked the door behind her. Through the door the appellant apologized for having had sex with her against her will

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[1] Although the victim of the rape was not a minor, we have nevertheless chosen to refer to her by initials only.

and promised that it would never happen again. When the appellant left the apartment, K.S. went to a nearby hospital. The medical report from her examination showed that when K.S. came in she was tearful and bruised on her arms, thighs, and calves. There was also evidence of vaginal penetration and ejaculation inside the vagina.

Later that day, the appellant voluntarily went to the police station and gave a statement. In his statement he confirmed that K.S. had told him that she did not want to have sex with him and that she had resisted him for about five minutes screaming and struggling before they had sexual intercourse. The appellant also confirmed that he had apologized for having had sexual intercourse with her.

The appellant was tried and convicted by a jury of his peers. The trial court sentenced him as a Range II offender to thirteen years imprisonment in the Tennessee Department of Correction.

I

The appellant first argues that the evidence introduced at trial was insufficient to convict him of rape. This issue is without merit.

The appellant does not deny that he did have sexual intercourse with K.S. He does, however, argue that the sexual intercourse was consensual and that the evidence was insufficient to prove that he used force or coercion to penetrate her.

Rape, at the time this offense occurred, was defined as the "unlawful sexual penetration of a victim by the defendant . . . [if] . . . [f]orce or coercion is used to accomplish the act." Tenn. Code Ann. § 39-13-503(a)(1) (1991). In a rape case, the issue of consent is a question for the jury. Haynes v. State, 540 S.W.2d 277, 278 (Tenn. Crim. App. 1976). Tacit consent by non-resistance has been held to be no consent. State v. Lundy, 521 S.W.2d 591, 593 (Tenn. Crim. App. 1975).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis added). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). An appellant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

The evidence shows, through the victim's testimony and the appellant's admission to the police, that the appellant used force and coercion to sexually penetrate K.S. When the appellant was on top of her, K.S. not only said "no" several times to sexual intercourse, but she also fought him for about five minutes. K.S. screamed for help, kicked the appellant, tried to push him away, and tried to scratch him. Eventually, to get K.S. to stop resisting, the appellant threatened K.S. that he would "break her face" if she did not have sex with him. The medical report showed that K.S. was tearful and had bruises on the inside of her thighs and on her wrists and calves. The appellant's view of consent can best be described by a statement he made to the police: "She's what you call it, consent. I guess that's the word, consent, or whatever, she just, she didn't fight, she just laid there."

The appellant attempted to prove that K.S. consented to the intercourse by introducing evidence showing that he had had sexual intercourse with K.S. on one previous occasion, and that K.S., during his birthday party, had acted as if she was inviting him to have sex with her. The appellant also claims that if K.S. had been fighting him, he would have suffered visible injuries. However, it is unlikely that K.S., who only weighs approximately 100 pounds, would have been able to inflict any particular injuries on the appellant, who apparently weighs close to 250 pounds. We find that the evidence overwhelmingly supports the appellant's rape conviction.

II

The appellant next contends that the trial court erred when it excluded evidence regarding the victim's prior sexual activity. This issue is also without merit.

The appellant's position at trial was that his sexual intercourse with the victim was with her consent and was not rape. In an attempt to prove that K.S. consented to the intercourse, the appellant sought to introduce the testimony of two teenaged males to show that K.S. had been engaged in a pattern of regularly providing sex in exchange for drugs. In that regard, the appellant contended that following his sexual intercourse with K.S., he went to a local bank, withdrew thirty dollars, and had intended to pay K.S. for the sex act.

After the jury was selected, but outside of its presence, an evidentiary hearing was conducted pursuant to Rule 412(d)(2) of the Tennessee Rules of Evidence for the purpose of determining if evidence of the victim's prior sexual behavior with others would be admissible at trial. In that jury-out hearing, the appellant introduced the testimony of two male teenagers who each testified that they previously had had sex with the victim. One of the teenagers testified that he had previously been engaged in selling crack cocaine and that on three occasions he had given the victim crack cocaine in exchange for oral sex. He further testified that on one occasion he had given the victim cocaine in exchange for vaginal intercourse.

The other teenager, a fourteen-year-old, testified that he received oral sex from the victim on one of the occasions when the other teenager had provided the victim with cocaine.

Additionally, in the jury-out hearing, the appellant testified that after he and the victim had sexual intercourse he went to a local bank and withdrew thirty dollars, which he intended to give to the victim. He presumed that she would use it to purchase drugs.

Following the hearing, the trial court ruled that the evidence of the victim's prior sexual behavior with the two teenagers was inadmissible because it was not evidence contemplated by Rule 412(c)(4)(iii) of the Tennessee Rules of Evidence. That portion

of Rule 412 provides that specific instances of a rape victim's sexual behavior with persons other than the defendant is admissible:

> to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

Tenn. R. Evid. 412(c)(4)(iii).

Thus, before a defendant may prove consent by evidence of a victim's past sexual behavior with others, there must be a showing that the victim's past sexual behavior with the others involved a pattern of distinctive and virtually identical sexual activity as that with the defendant. This rule is applied stringently in Tennessee. Neil P. Cohen, *et al.*, Tennessee Law on Evidence, § 412.4 (3d ed. 1995). Recently a panel of this Court had occasion to consider the scope of admissible evidence regarding prior sexual behavior of an alleged rape victim with others for the purpose of showing the consent of the alleged victim. State of Tennessee v. Stephen Tracy Sheline, C.C.A. No. 03C01-9505-CR-00141 (Tenn. Crim. App., Knoxville, June 14, 1996). In that case, our Court found that the trial court had erred in excluding the defendant's proffered evidence of the alleged rape victim's prior sexual behavior with others. In Sheline, the defendant met the victim in a college bar. At the bar, the defendant and the alleged victim both consumed alcohol and at the end of the evening the victim gave the defendant a ride to her dorm room where they engaged in sexual intercourse. The alleged victim later claimed that the defendant raped her. While not denying that he had sexually penetrated the victim, the defendant claimed that the sexual intercourse was consensual. Id.

To bolster his defense of consent, the defendant attempted to introduce the testimony of another college student who had previously met the victim in a bar under similar circumstances. That witness would have testified that at the time he and the victim only vaguely knew each other, that they had been drinking in a bar, and that

later that evening he and the victim returned to his apartment where they engaged in sexual intercourse. The defendant also sought to introduce the testimony of another young man who was at the college bar the night the alleged rape occurred. This man would have testified that he and the victim had been drinking together and that she had asked him if he wanted to go home with her. This second man, however, declined her invitation and later that evening the victim offered to give the defendant a ride. Id.

Our Court found that what the two men had experienced with the victim was sufficiently similar to the defendant's sexual contact with the victim that it should have been admitted pursuant to Rule 412 of the Tennessee Rules of Evidence.

In the case before us, however, we agree with the trial court's finding that the defendant's proffered evidence of the victim's prior sexual behavior with others did not rise the level required by Rule 412. Unlike the two teenaged boys who had provided the victim with cocaine in exchange for sex, the appellant was a guest in K.S.'s home. When he awoke after spending the night in the home, and after the victim's boyfriend had left for work, the appellant undressed and walked into the bedroom where the victim was sleeping and demanded sex. The appellant's claim that he intended to pay K.S. for her sexual favors and that he suspected that she would use the money for drugs was not sufficient to establish a virtually identical pattern as that described by the teenagers. Even if K.S. might have been engaged in a pattern of providing sexual favors in exchange for crack cocaine from drug dealers, the events that occurred in her home on August 30, 1994, were significantly different from that pattern. Accordingly, we hold that the trial court properly excluded the contested testimony.

For the reasons contained herein, the appellant's conviction of rape is affirmed.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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JOE G. RILEY, JUDGE