

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH 1998 SESSION

FILED

April 9, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 VS.)
)
 GARY L. GREEN,)
)
 Appellant.)

NO. 01C01-9706-CR-00207

DAVIDSON COUNTY

HON. THOMAS H. SHRIVER,
JUDGE

(Especially Aggravated Kidnapping,
Aggravated Assault and Assault)

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

The defendant, Gary L. Green, was convicted by a Davidson County jury of especially aggravated kidnapping, aggravated assault and simple assault. He was sentenced as a Range II offender to concurrent terms of thirty (30) years for especially aggravated kidnapping, ten (10) years for aggravated assault and eleven (11) months and twenty-nine (29) days for simple assault. On appeal, he challenges the sufficiency of the evidence for the kidnapping conviction and contends that the trial court erred in allowing the state to introduce photographs of the victim's injuries. Finding no error, we affirm the judgment of the trial court.

FACTS

Defendant was indicted pursuant to a series of events occurring over a four (4) month period. During this period of time, the defendant repeatedly assaulted his live-in girlfriend, Lori Fitzpatrick. The victim testified at trial that she and the defendant began living together after becoming romantically involved. Defendant was providing her with cocaine at the time. Several months after their relationship began, the defendant began physically abusing the victim.

On January 18, 1995, Fitzpatrick was taken to the emergency room at Nashville General Hospital. She had bruises on her back and was in a lot of pain. The victim testified that defendant had hit her with his fist in her side. X-rays revealed that the victim had healing fractures of her left fourth and fifth ribs. An emergency room physician testified at trial that these fractures were approximately two weeks old. Upon her release from the hospital, the victim lived with her sister for a few days, but soon returned to the defendant's home.

On March 27, Fitzpatrick was once again admitted to the emergency room. She claimed that the defendant had held her in his home against her will for five (5) days while physically abusing her. She testified that during those days, the defendant "stomped" on her, kicked her in the face, hit her with his fist, hit her

with a toilet lid and spit on her. An emergency room physician diagnosed the victim with muscular skeletal strain.

The victim lived with a friend for several weeks, but returned to defendant's home after he promised to provide her with drugs. On April 30, Deborah Johnson, the victim's sister, visited the defendant's home in order to check on her sister's welfare. When Johnson approached the defendant's apartment, she noticed that the iron security door had a chain wrapped around it which was locked with a padlock. Fitzpatrick was inside, but could not get out because she did not have a key to the lock. Furthermore, the kitchen window would not open and the bathroom window had been nailed shut.

Johnson left to contact the police, and when she returned, defendant was inside the apartment. Police officers attempted to convince the defendant to open the door, but he became belligerent and verbally abusive. One officer tried to pry open a window, but was unable to open it. The officers' pleas to open the door continued for approximately 20 minutes. Finally, the defendant's mother was able to convince him to unlock the chain.

When Fitzpatrick was allowed to leave, she was so severely beaten that she could barely walk. Johnson described her sister's injuries as follows:

She was bruised from the top of her head to the bottom of her feet. She had gashes in the top of her head to where they had to cut her hair, put staples in the gashes. She was bruised everywhere, her ears, her neck, her chest, her arms, her back, her butt, her legs, everywhere. Her hands were swollen like three times the size. Her fingers were all swollen. Her feet were swollen. She had -- I mean, she was bruised everywhere, except for the bottom of her feet and the palms of her hands.

The victim testified that from April 28 to April 30, she was assaulted by the defendant while being held captive in his home. She testified, "[h]e cut the cord off the blow dryer. He hit me with that. He stomped me. He hit me with a belt. He hit me with the blow dryer. He drug me in the alley. . . I was throwed [sic] off the bed." Defendant also choked her and burned her with a cigarette. The photographs of her injuries depict numerous injuries all over the victim's body.

After defendant was taken into custody by the officers, he gave a statement blaming a man named "Reggie." Defendant claimed that Reggie was responsible

for Fitzpatrick's injuries, and he was merely trying to protect her. Subsequently, at defendant's bond hearing, Fitzpatrick testified that a man named "Reggie" was the man who injured her.

At trial, the victim testified that defendant was actually the man who injured her. She claimed that she lied at the bond hearing because she still had feelings for defendant, and he was pressuring her to tell the authorities that he was not responsible for her injuries.

Ben Leonard, an investigator with the Public Defender's Office, testified on defendant's behalf. He was investigating this case when the defendant was represented by the Public Defender's Office. He testified that he tape recorded a telephone conversation with Fitzpatrick where she stated that she left defendant's home on Friday, April 28, and did not return until Sunday, April 30, the time period in which defendant was allegedly detaining her against her will.¹

¹ In an unusual approach, defense counsel also called himself to testify on defendant's behalf. He testified that he spoke with Fitzpatrick on the telephone, and she said that defendant did not hurt her and that the state was pressuring her to change her testimony. Generally, the practice of counsel testifying at trial is strongly discouraged. See State v. Webster, 688 S.W.2d 460 (Tenn. Crim. App. 1994).

Supreme Court Rule 8, DR 5-102(A) provides as follows:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the lawyer's firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial and the firm, if any, shall not continue representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in the lawyer's firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

The four (4) exceptions listed in DR 5-101(B) are as follows:

- (1) If the testimony will relate solely to an uncontested matter.
- (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
- (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client.
- (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or the lawyer's firm as counsel in the particular case.

Our Court in Bowman v. State, 598 S.W.2d 809 (Tenn. Crim. App. 1980), recognized the dilemma faced by trial counsel when the need for his or her testimony is brought about by the testimony of other witnesses during the trial itself. We concluded that testimony of trial counsel in this instance is discretionary with the trial court. Id. at 811. This holding has been the subject of some criticism since there was no analysis of the exceptions set forth in

The jury returned guilty verdicts for aggravated assault, simple assault and especially aggravated kidnapping.² From these convictions, defendant brings this appeal.

SUFFICIENCY OF THE EVIDENCE

In his first issue, defendant claims that the evidence is insufficient to sustain a finding of guilt on the especially aggravated kidnapping conviction. He bases this argument on the fact that the victim identified some other person as the perpetrator at defendant's bond hearing.

Where sufficiency of the evidence is challenged, the relevant question for an appellate 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 or crimes beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Abrams, 935 S.W.2d 399, 401 (Tenn. 1996). The weight and credibility of the

DR 5-101(B). See N. Cohen, D. Paine and Sheppard, *Tennessee Law of Evidence* § 601.5 (3rd ed. 1995).

The reason for the rule is often overlooked. An advocate who becomes a witness is in the unseemly and ineffective position of arguing the advocate's own credibility. Rule 8, EC 5-9. The roles of advocate and witness are inconsistent, and the lawyer becomes more easily impeachable for interest, and thus, may be a less effective witness. Id. In other words, such testimony can inure to the detriment of the client.

The discussion with the trial court by the prosecutor and defense counsel concerning counsel's testifying centered upon whether the former witness' testimony was inconsistent with counsel's proposed testimony. The ethical dilemma was never discussed. The trial court concluded defense counsel could "testify to what you think is relevant about that conversation."

We have examined the record to ascertain whether the defendant was in any way prejudiced by counsel's testimony. Counsel's testimony was largely consistent with Fitzpatrick's testimony. We find no prejudice to defendant as a result of counsel testifying.

² Count One of the indictment charged defendant with aggravated assault occurring between January 1 and January 18, 1995; Count Two charged defendant with simple assault occurring on January 18, 1995; Count Three charged defendant with aggravated kidnapping occurring between March 18 and March 23, 1995; and Count Four charged defendant with especially aggravated kidnapping occurring between April 28 and April 30, 1995. Defendant was acquitted of aggravated kidnapping as charged in Count Three of the indictment and all lesser included offenses.

witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996).

Fitzpatrick admitted that she was untruthful at defendant's bond hearing and testified at trial that defendant was responsible for her injuries and unlawful confinement in April 1995. The jury obviously accredited her testimony at trial, and it was within their prerogative to do so. We find that there is sufficient evidence from which a reasonable trier of fact could find that defendant was the perpetrator of especially aggravated kidnapping.

This issue is without merit.

ADMISSION OF PHOTOGRAPHS

Defendant also contends that the trial court erred in allowing the state to introduce into evidence photographs of the victim's injuries. He insists that while the photographs may have been relevant, their probative value was substantially outweighed by their unfair prejudice. See Tenn. R. Evid. 403.

Defendant failed to object to the admission of the photographs at trial. Therefore, this issue is waived. See Tenn. R. App. P. 36(a).

Notwithstanding the waiver, we also find this issue to be without merit. The state introduced one photograph depicting the victim's injuries on January 18, and several photographs depicting her injuries on April 30. These photographs were taken by detectives with the Domestic Violence Division of the Nashville Metropolitan Police Department.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. For the offense of especially aggravated kidnapping, the state was required to show that the victim suffered "serious bodily injury," and for the offense of simple assault, the state was required to show that the victim suffered "bodily injury." See Tenn. Code Ann.

§§ 39-13-305(a)(4), 39-13-101(a)(1). Photographs are generally relevant to prove the extent of injuries. State v. Norris, 874 S.W.2d 590, 597 (Tenn. Crim. App. 1993). The admissibility of photographs lies within the sound discretion of the trial court whose ruling will not be overturned on appeal except upon a clear showing of an abuse of discretion. State v. Stephenson, 878 S.W.2d 530, 542 (Tenn. 1994); State v. Bordis, 905 S.W.2d 214, 226 (Tenn. Crim. App. 1995). Furthermore, while the photographs depict the extent of the severe bruising on the victim's body, they were not overly prejudicial. The trial court did not abuse its discretion in admitting the photographs.

This issue has no merit.

CONCLUSION

We find that the evidence was sufficient to support defendant's conviction for especially aggravated kidnapping. Moreover, the photographs of the victim's injuries were properly admitted at trial. Accordingly, the judgment of the trial court is affirmed.

JOE G. RILEY, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

DAVID H. WELLES, JUDGE