IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1998 SESSION

FILED

September 8, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 03C01-9709-CC-00383
Appellee,	)
	) Anderson County
V.	)
	) Honorable James B. Scott, Judge
	)
RANDY D. VOWELL,	) (Aggravated Rape; Rape)
	)
Appellant.	)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

In October 1996, Randy D. Vowell, the appellant, was convicted by a jury of one count of aggravated rape and one count of rape in the Anderson County Criminal Court. He was sentenced to twenty-three (23) years and eight (8) years for the respective offenses to be served in the Tennessee Department of Correction. The sentences are to run concurrently. The appellant raises the following issues for our review:

I. Whether the appellant's counsel was ineffective.

II. Whether the evidence was sufficient to support the conviction for aggravated rape.

III. Whether the state improperly alluded to the virginity of the victim.

IV. Whether there was inappropriate contact between the victim and prosecuting officials, requiring a mistrial.

V. Whether the indictment was fatally flawed for failure to allege the requisite culpable mental state.

VI. Whether the sentence for aggravated rape is unconstitutionally disproportionate to the crime.

FACTS

On Friday night, September 15, 1995, the thirteen-year-old victim spent the night at a girlfriend's house.[1] The girlfriend's older sister was at home but was asleep. The victim and her friend watched television until around midnight when they went upstairs to go to bed. Shortly thereafter, they heard a car pull up near the house. The victim recognized the car as the appellant's vehicle. The victim knew the appellant because her father had hired him to chop wood and do other labor. The victim testified that the appellant had called her several times, usually when she was spending the night with MR. The victim testified that she did not like the appellant and would usually hang up on him when he called.

The victim went downstairs to find the appellant standing in the door of the house. The victim told the appellant that she and MR were getting ready to go to

[1] Because the victim's friend is a minor, we will refer to her as MR.

bed. She remembered, however, that MR did not have anything to drink and that she and MR were thirsty. The victim asked the appellant to take her to a nearby store to get some soda.

The appellant drove toward the store, but he turned off onto a gravel road. He would not tell the victim where they were going. The victim testified that the appellant stopped the car, told her that she was beautiful, and asked her to kiss him. She refused. The victim testified that the appellant locked the car doors and raped her. She testified that the appellant got on top of her and held her hands behind her head. The victim testified that she told the appellant "No," and tried to push him off of her. She testified that the appellant removed their clothing and vaginally penetrated her. The victim testified that, after the rape, the appellant told her that he was sorry. She told him not to do "it" again. The victim testified that the appellant pulled the car forward, stopped, and vaginally raped her again. She testified that he told her that he would kill her if she told anyone what happened.

The appellant took the victim back to MR's house. The victim told her friend what happened and called the police. The victim was taken to the hospital where she was examined. The hospital prepared and sent a rape kit to the Tennessee Bureau of Investigation (TBI). The emergency room physician, Dr. Van Mask, testified that his examination of the victim was neutral. He did not find evidence of sperm or evidence that the victim had been forcibly raped. Samera Zavaro, a forensic scientist at the TBI, testified that the vaginal swab in the rape kit tested positive for sperm. Raymond DePriest, another forensic scientist with TBI, testified that the DNA samples taken from the vaginal swabs of the victim matched that of the appellant.

The defense did not put on any proof. The state, however, introduced a statement made by the appellant to a police officer. In the statement, the

appellant denied that he knew the victim. He did admit that on the night in question, he picked up a girl that he later learned to be the victim. He let her drive his car on some of the country back roads. He denied that he had ever made any advances toward the victim and that he had ever been interested in her.

The appellant argues that his trial counsel was ineffective because he failed to call the appellant as a witness. The appellant also contends that his attorney should have cross-examined the victim and MR to establish inconsistencies in the victim's testimony. The appellant attached his affidavit and the affidavit of his sister, Sherry Rainey, to his motion for new trial. Ms. Rainey attests to statements made by MR that contradict the testimony of the victim. Affidavits are considered evidence in a motion for a new trial. Tenn. R. Crim. Proc. 33(c). The state did not file opposing affidavits. The trial court denied the motion. The court did not state findings of fact in its order. The court essentially incorporated its findings as found at the hearing on the appellant's motion for a new trial.

The appellant failed to include the transcript of the motion for a new trial in the record on appeal. The state argues that the appellant has waived this issue for failure to submit a record adequate for review of the issue on appeal. See T.R.A.P. 24(b). "When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citation omitted). Although the record contains the appellant's unopposed affidavits, we are of the opinion that the record is inadequate to properly review the issue raised by the appellant. We do not have the findings of the trial court. The record does not reflect whether any evidence was submitted at the hearing on the motion for new trial. "Where the record is incomplete and does not contain a transcript of the proceedings relevant to an

issue presented for review . . . an appellate court is precluded from considering the issue." Id. at 560-61. The merits of the appellant's ineffective assistance of counsel issues raised in his motion for new trial have not been addressed or waived. We point out this fact for purposes of collateral attack, should that circumstance arise in the future.

The appellant next argues that the evidence is insufficient to establish bodily injury as required to support the aggravated rape conviction. Aggravated rape is defined as unlawful sexual penetration of a victim by the defendant or the defendant by a victim and the defendant causes bodily injury to the victim. Tenn. Code Ann. § 39-13-502(a)(2) (Supp. 1995). Bodily injury includes a cut, abrasion, bruise, burn or disfigurement; physical pain; or temporary illness or impairment of the function of a bodily member, organ, or mental faculty. Tenn. Code Ann. § 39-11-106(a)(2) (Supp. 1995).

A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the state and resolves all conflicts in favor of the prosecution's theory. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Questions concerning the credibility of 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. This Court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Therefore, on appeal, the state is entitled to the strongest legitimate view of the trial evidence and all reasonable and legitimate inferences which may be

drawn from the evidence. Jackson v. Virginia, 443 U.S. 307 (1979); T.R.A.P. 13(e).

The victim testified that during the first rape, the appellant banged her head on the side of the car, causing her to lose consciousness. She also testified that he hit her in the side of the head, slapped her in the mouth and caused her to cut her finger. Doctor Van Mask testified that the victim had a bruise on her ear and a small cut on her finger. An examining room nurse testified that the victim had a small cut on her finger and a cut on her ear. Chief Detective Penny Baker testified that the victim had a bruise on her left ear and a cut on her finger. The legislature has included bruises and cuts as adequate elements justifying a conviction for aggravated rape. "It is not the duty of this Court to apply size or degree requirements to such unambiguous legislation." State v. Smith, 891 S.W.2d 922, 928 (Tenn. Crim. App. 1994) (quoting State v. Harris, 866 S.W.2d 583 (Tenn. Crim. App. 1983)). This issue is without merit.

The appellant claims it was reversible error for the state to allude to the virginity of the victim. On direct examination, the state asked the victim if she had ever had sex before the night of the alleged rape. The victim responded that she had not. The appellant did not object at trial; therefore, this issue is waived. T.R.A.P. 36(a). The appellant argues that he was "ambushed" at trial because, pursuant to Tennessee Rule of Evidence 412, the state should have given notice that it intended to introduce specific instances of conduct or behavior of the victim. There is no showing that the admission of this evidence was prejudicial to the defense such as to require a reversal. T.R.A.P. 36(b).

The appellant next argues that the jury was improperly allowed to see a state employee comfort the victim, requiring a mistrial. In her affidavit, the appellant's sister, states that "I saw the jury and [the victim] occupying the same space near a hallway bench during a recess. The state's witness coordinator

"comforted" [the victim] who was crying, by patting her on the hand and buying her a [c]oke, all in front of the jury which was sequestered." Apparently this issue was raised for the first time in the appellant's motion for a new trial. As the state notes, there is no transcript of the motion for a new trial. The only evidence in the record is the appellant's sister's affidavit. The trial court found no merit to the issue.

Whether an occurrence during the course of a trial warrants a mistrial is a matter that rests in the sound discretion for the trial judge. This Court will not reverse the trial judge's decision absent a clear abuse of discretion. State v. McPherson, 882 S.W.2d 365 (Tenn. Crim. App. 1994). In McPherson, the witness coordinator went to the jury box and hugged the victim of an aggravated rape apparently before the jury had retired to the jury room. The Court said that there was no indication that the jurors knew that the witness coordinator was an employee of the state. Id. at 370-71. The Court held that the trial judge did not abuse its discretion in overruling the appellant's motion for a new trial because the record prevented the court from reaching any other decision. Id. at 370. The facts in the case at bar are remarkably similar. There is nothing in the record to indicate that any juror knew that the witness coordinator was an employee of the state. The victim was visibly upset throughout her testimony. We find nothing in the record to indicate an abuse of discretion. This issue is without merit.

The appellant next argues that the indictment was fatally flawed for failure to allege the requisite culpable mental state. The counts of the indictment allege that the appellant did unlawfully and feloniously engage in sexual penetration. The Tennessee Supreme Court recently addressed a similarly dispositive issue in State v. Hill, 954 S.W.2d 725 (Tenn. 1997). The Court said:

> The offense alleged in the indictment under consideration is aggravated rape. Tennessee Code Annotated § 39-13-502(a)(4) defines the applicable category of aggravated rape as the "unlawful sexual penetration of a

> victim by the defendant, ... [when] the victim is less than thirteen (13) years of age." This statute does not specify a mental state. Thus, pursuant to Tenn. Code Ann. § 39-11-301(c), the mental element is satisfied if the indictment alleges that the defendant committed the proscribed act with intent, knowledge, or recklessness. Obviously, the act for which the defendant is indicted, "unlawfully sexual penetrat[ing]" a person under the age of thirteen, is committable only if the principal actor's mens rea is intentional, knowing, or reckless. Thus, the required mental state may be inferred from the nature of the criminal conduct alleged. Clearly, the language of this indictment provides adequate notice to both the defendant and the trial court of the offense alleged protects the defendant from subsequent reprosecution for this same offense. The form of the indictment complies with the requirements of Tenn. Code Ann. § 40-13-202.

Id. at 729.

This issue is without merit.

Lastly, the appellant argues that the sentence for aggravated rape is unconstitutionally disproportionate to the crime. Aggravated rape is a class A felony with a sentencing range for a Range I offender of fifteen to twenty-five years. The court ordered the appellant to serve a twenty-three-year sentence. The court also ordered him to serve a concurrent sentence of eight years for the rape conviction. The sentencing range for rape, a class B felony, is eight to twelve years. The appellant argues that the gravity of the victim's injuries in this case do not justify the fifteen-year difference in his sentence for aggravated rape and his eight-year sentence for rape. We have already determined that the evidence is sufficient to support the appellant's conviction for aggravated rape. The question, then, is whether the twenty-three-year sentence constitutes cruel and unusual punishment in violation of the state and federal constitutions. In this regard, the Tennessee Supreme Court has stated:

> At the outset we note that because reviewing courts should grant substantial deference to the broad authority legislatures possess in determining punishments for particular crimes, '[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare.' See Solem v. Helm, 463 U.S. 277, 289-90, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 637, 649 (1983) (emphasis in original) (quoting Rummel v. Estelle, 445 U.S. 263, 272, 100 S.Ct. 1133, 1138, 63 L.Ed.2d 382, 390 (1980)).

* * * *

> We hold that the proper means by which to evaluate a defendant's proportionality challenge under the Tennessee Constitution is that set forth by Justice Kennedy in Harmelin, --- U.S. at ---- - ----, 111 S.Ct. at 2702-09, 115 L.Ed.2d at 866-74 (Kennedy, J., concurring in part). Under this methodology, the sentence imposed is initially compared with the crime committed. Unless this threshold comparison leads to an inference of gross disproportionality, the inquiry ends--the sentence is constitutional. In those rare cases where this inference does arise, the analysis proceeds by comparing (1) the sentences imposed on other criminals in the same jurisdiction, and (2) the sentences imposed for commission of the same crime in other jurisdictions.

State v Harris, 844 S.W.2d 601, 602-03 (Tenn. 1992).

The threshold comparison of the crime to the sentence in this case does not lead to an inference of gross disproportionality. Rape and aggravated rape are serious crimes. The young victim in this case was injured as defined by the legislature. We are not at liberty to adjust sentences based on our determination of the gravity of a victim's injuries. The sentence was within a range that was set by our legislature within constitutional parameters.

The judgment of the trial court is AFFIRMED.

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PAUL G. SUMMERS, Judge

CONCUR:

_____
JERRY L. SMITH, Judge

_____
CURWOOD WITT, Judge