

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1995 SESSION

FILED
September 27, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

CLAUDE DOUGLAS COPELAND,

Appellant.

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C.C.A. NO. 01C01-9410-CR-00366

DAVIDSON COUNTY

HON. RAYMOND LEATHERS,
JUDGE

(Delayed Appeal of Original
Case No. C-3599 Below)

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The defendant was charged in a three count indictment with assault with the intent to commit murder in the first degree, robbery with a deadly weapon, and kidnapping with the intent to commit robbery. Although initially dismissed by the trial court on a subsequent motion to reconsider, count one was amended to include the language "and with a certain weapon, to wit: a knife." The defendant was found guilty by a jury of: aggravated assault, for which he received four to ten years incarceration; robbery with a deadly weapon, for which he was sentenced to fifteen years; and kidnapping for the purpose of committing robbery with a sentence of fifty years without the possibility of parole. The trial court ordered the sentences to run consecutively to each other and to prior sentences received in another case.

The trial in this cause was in 1980, and in 1981, trial counsel for the defendant filed a petition for post-conviction relief, asserting that his assistance was ineffective by failing to perfect the appeal. He was given additional time to perfect the appeal; however, the appeal was never perfected. The defendant filed a second petition for post-conviction relief, alleging he was denied his due process for not having the case appealed. The trial court agreed, and granted this delayed appeal.

In this appeal as of right, the defendant presents five issues for review. He contends that:

- (1) The trial court erred in permitting count one of the indictment to be amended over his objection;
- (2) The alleged kidnapping was incidental to the robbery of the victim of the alleged kidnapping and the conviction therefor cannot stand;
- (3) The trial court's failure to instruct on the lesser included offense of kidnapping constitutes prejudicial error;
- (4) The sentence imposed for count three of the indictment of fifty years

without the possibility of parole is an illegal sentence in that it is contrary to the savings statute for repealed offenses then in force; and

(5) The trial court erred in ordering the sentences be served consecutively.

After a review of the record in this cause, we affirm the defendant's convictions and sentences.

The evidence produced at trial revealed that the victim, James M. Gowin, Jr., left the Silver Dollar Saloon in Nashville around eleven o'clock the evening of May 22, 1978. The victim testified that his car had been parked across the street from the saloon in a vacant lot, and that as he had walked towards his car, two men called to him. Apparently, the two men were having car trouble and had asked the victim if he would take them to a mechanic. The victim stated that after talking with the two men, who identified themselves as Larry Lewis and Kenneth Martin, he had agreed to give them a ride. At trial, the victim identified the defendant as the man who called himself Larry Lewis and his codefendant Raymond Jackson as Kenneth Martin.

The victim testified that the defendant had given him directions to where he wanted to go, but then told the victim that he had needed to go to his house to retrieve something. The victim stated that he had agreed to go to the defendant's house because they had all been talking and getting along well. The victim and his passengers wound up at the intersection of Murfreesboro Road and Wharf Avenue where the victim parked the car to allow the defendant to go to his apartment. The victim and Jackson remained in the car. The victim testified that it was after the defendant had returned to the car that he began to get nervous because they were taking back streets and seemed to be going in the wrong direction.

At that point, the victim testified that he was instructed by the defendant to slow down and then the defendant grabbed the automatic stick shift and pushed it into

the park position. The victim stated that the defendant had then pulled a knife and placed it at his throat and told him to step out of the car. Jackson, who had been riding in the rear seat on the driver's side, got out of the car as well and drew a knife on the victim. The victim testified that he had then been instructed to remove his watch and surrender his wallet; he was also instructed to remove his shirt, shoes and blue jeans. This left the victim with no clothing on except for his socks.

After the two men took his things, the victim stated that he was made to lie down in the back seat of the car, and the defendant began driving the car. The victim stated that anytime he stuck his head up, Jackson had forced him back down with either a knife or his hand. The victim testified that they had driven around in this manner for about thirty minutes during which time Jackson kept saying that he was going to kill the victim, but that the defendant said that he was not going to let Jackson kill him and that Jackson would have to "go through [him] first" before he let him kill the victim.

After about thirty minutes the car stopped, and the two men forced the victim into the trunk of the car. The victim stated that it was another thirty minutes or so before the car stopped again. This time the two men took the victim from the trunk, threw him into a telephone pole, and then Jackson proceeded to stab the victim in the back nineteen times and once behind the ear. The two men then drove off in the victim's car.

The victim identified the defendant in a lineup and later identified Jackson, although he was not one hundred percent positive of the latter identification. Neither the defendant nor the codefendant testified at trial. Two alibi witnesses were presented by the defendant.

In his first issue, the defendant claims that the trial court erred by allowing count one of the indictment to be amended over his objection. The defendant, relying on

Bass v. State, 65 Tenn. 579 (1870), argues that because the original indictment for count one failed to allege what weapon was used to commit assault with the intent to commit murder that it was an invalid indictment. Instead, the defendant argues that it was really a charge for assault with the intent to commit a felony, and that his conviction on count one for aggravated assault is not a lesser included of assault with the intent to commit a felony.

In Bass, our Supreme Court found that an indictment alleging that the defendants did feloniously and with malice aforethought assault the victim with the intent to commit murder in the first degree, failed to allege the offense of felonious assault with the intent to commit murder because it did not allege that the assault was made with a deadly weapon. However, the defendant's reliance on this case is unfounded for several reasons. First of all, at the time of that decision, the only means of apprising a defendant of the charges against him/her was through an indictment. At the time of the defendant's trial, the law with regard to the sufficiency of indictments was contained in the Rules of Criminal Procedure, enacted July 13, 1978, two months before the defendant was indicted in this case. The rules provide that a party may file for a bill of particulars to more adequately identify the offense charged. Therefore, pursuant to Rule 7(c), the defendant could have, and indeed should have, moved for a bill of particulars if he felt that more specifics were needed as to the charges against him. See United States v. Birmley, 529 F.2d 103, 108 (6th Cir. 1976); State v. Moore, 672 S.W.2d 227, 229 (Tenn. Crim. App. 1984); State v. Wiseman, 643 S.W.2d 354 (Tenn. Crim. App. 1982).

Furthermore, a careful reading of the original indictment against the defendant reveals that the use of a weapon was alleged. The indictment reads as follows:

[The defendant] with force and arms...unlawfully, feloniously, willfully, deliberately, premeditatedly and maliciously did make an assault upon the

body of one James M. Gowin, Jr. with the unlawful and felonious intent... to kill, and upon him to commit the crime and felony of murder in the first degree... (emphasis added)

In Bass, no use of arms or weapons was alleged at all, thus making it factually distinguishable from the case at bar. In addition, Bass is distinguishable because in that case the elements of first-degree murder were not properly alleged in the indictment, making the failure of the indictment to allege the elements of the offense even more egregious. Finally, Rule 7(b) of the Tennessee Rules of Criminal Procedure provides that if no additional or different offense is charged and no substantial rights of the defendant are thereby prejudiced, the court may permit an amendment to an indictment without the defendant's consent. The defendant's argument that the amendment to the indictment to include the use of a knife to perpetrate the assault was prejudicial is unfounded because the use of arms was already alleged; thus, no new crime was charged by adding that the assault was perpetrated with a knife. For these reasons, we conclude that the defendant's first issue is without merit and that the indictment was properly amended without prejudice to him.

In his second issue the defendant argues that any confinement of the victim against his will was merely incidental to the robbery of the victim; therefore, separate convictions for robbery with a deadly weapon and kidnapping with the intent to commit robbery cannot stand.

In State v. Anthony, 817 S.W.2d 299, 306 (Tenn. 1991), our Supreme Court held that the due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Tennessee Constitution prohibit conviction for kidnapping as a separate offense where the confinement, movement or detention of the alleged victim is essentially incidental to another felony. In State v. Enochs, 823 S.W.2d 539, 540 (Tenn. 1991), our Supreme Court concluded that a new

rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for the cases in which the new rule constitutes a "clear break" with the past. Therefore, although Anthony was decided after the instant defendant's trial in 1980, Enochs mandates that we apply the rule in Anthony retroactively to his case.

For the purpose of determining if the kidnapping was merely incidental to the robbery or a separate event, the question in the case before us thus becomes one of timing: when did the kidnapping begin? The Supreme Court in Anthony directs us that "every robbery, by definition, involves some detention against the will of the victim, if only long enough to take goods or money from . . . the victim. This does not mean that the legislature intended that every robbery should also constitute a kidnapping . . ." Anthony, 817 S.W.2d at 306. According to the facts presented at trial in the case at bar, the victim willingly agreed to take the defendant and his codefendant to a service station for help. In his words, the conversation was amicable, and they were all getting along well. Thus, the kidnapping did not begin there because there was no forcible taking against the will of the victim. See T.C.A. § 39-2601 (1975).

In State v. Davis, 656 S.W.2d 406, 409 (Tenn. Crim. App. 1983), this Court held that where a victim willingly accompanies an accused, a carrying away of the victim becomes a kidnapping if events subsequent to the initial encounter show that the person remained with the accused against his will as a result of force or the use of arms by the accused. From the language of Davis, we conclude that the kidnapping of the victim began only when his voluntary transportation of the defendant and Jackson became a confinement against his will. The kidnapping did not occur when the defendant put a knife to the victim's throat and demanded his money; the language of Anthony tells us that this confinement was incidental to the robbery.

Had the robbery ended with the stealing of the victim's wallet and clothes, then the defendant's argument that the kidnapping was incidental to the robbery might be valid. However, the robbery was not completed when the defendant kidnapped the victim; in fact, the robbery was still in progress. After robbing the victim of his wallet and clothes, the defendant took control of the victim's vehicle, and during his control and possession of the vehicle, he kidnapped the victim by forcing him at knife point to lie down in the back of the car.

The Supreme Court in Anthony stated that the test is "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 sufficient enough, in and of itself, to warrant independent prosecution and is, therefore, significant to support such a conviction." Anthony, 817 S.W.2d at 306. The Court went on to explain 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'." Anthony, 817 S.W.2d at 306, citing State v. Rollins, 605 S.W.2d 828, 830 (Tenn. Crim. App. 1980).

In the present case, the defendant's conduct of forcing the victim, at knife point, to lie down in the car, then forcing him in the trunk, substantially increased the victim's risk of harm. If the defendant had only wanted to steal the victim's wallet and car, he could have left him on the street where he robbed him. It is evident from these facts that the robbery could have been completed without forcing the victim into the car and then the trunk at knife point. Thus, the kidnapping was not incidental to the robbery but rather in addition to the robbery. Therefore, we find that the defendant's conviction for kidnapping with the intent to commit robbery did not violate the mandate of Anthony.

The defendant contends in his third issue that the jury charge in this case

should have included one of simple kidnapping because the facts supported that offense. At the time of trial, T.C.A. § 40-2518 (1975) instructed trial courts to charge juries in cases of criminal prosecution for any felony wherein two or more grades or classes of offense might be included in the indictment, and to charge the jury as to all of the law on each offense included in the indictment.

In the case at bar, the offense of simple kidnapping was a lesser included offense of kidnapping for the purpose of committing robbery. "[A]n offense is necessarily included in another if the elements of the greater offense, as those elements are set forth in the indictment, include, but are not congruent with, all the elements of the lesser." Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979). However, only when there is some evidence upon which reasonable minds could convict the defendant of a particular lesser offense is the court required to instruct regarding that offense. Johnson v. State, 531 S.W.2d 558, 559 (Tenn. 1975); State v. Atkins, 681 S.W.2d 571, 577 (Tenn. Crim. App. 1984). The requirements for kidnapping with the intent to commit robbery are inclusive of the requirements for simple kidnapping. Under T.C.A. § 39-2601 (1975), the elements of kidnapping are the forcible confinement of another with the intent to confine that person against his/her will.

In the case under review, the only defense offered was that of alibi. The State's theory and supporting proof was that the kidnapping was accomplished with the intent to commit robbery. When a "defendant seeks only to establish an alibi, leaving the State's evidence as to the degree of crime uncontradicted, no instruction on lesser included offenses are required." State v. Barker, 642 S.W.2d 735, 738 (Tenn. Crim. App. 1982). The proof did not support the lesser included offense. The offense of kidnapping was accomplished with the intent of robbing the victim. This issue is without merit.

The defendant raises the issue of the illegality of his sentence for the crime

of kidnapping with the intent to commit robbery in his fourth issue. He received a sentence of fifty years without the possibility of parole for this offense. Chapter 318 of the Public Acts of 1979 repealed the kidnapping statute under which the defendant was convicted, i.e., kidnapping with the intent to commit robbery (T.C.A. §39-2603 (1975)). This chapter also adopted a new aggravated kidnapping statute that replaced T.C.A. § 39-2603 and was codified as T.C.A. § 39-2603(Supp. 1979). Chapter 318 also created the "Class X" offenses as set forth in T.C.A. § 39-5401-04(Supp. 1979). The "Class X" act classified aggravated kidnapping as a Class X offense, and sentences for Class X offenses were to be served without eligibility for parole. T.C.A. § 39-5403(Supp. 1979).

The applicable savings statutes, T.C.A. § 39-114(1975), § 39-1-105(1982), § 39-11-112 (1991), have remained unchanged but for an amendment that excepts the specific applicability provisions of the Criminal Sentencing Reform Acts of 1982 and 1989. We conclude that when the defendant was tried after the repeal of T.C.A. § 39-2603(1975)(kidnapping with the intent to commit robbery), under the savings statute in effect, T.C.A. § 39-114(1975), he was to be tried under the original act in effect at the time of the offense, T.C.A. § 39-2603(1975). Since the replacement act adopted in 1979 (Chapter 318, Pub. Acts of 1979) classified aggravated kidnapping as a Class X felony and Class X felony sentences were without parole, there was no lesser punishment provided. Therefore, the punishment provided for the defendant's charge of kidnapping was and is a range of twenty years to life without the possibility of parole.¹

In his fifth issue, the defendant contends that the trial court erred in ordering his sentences be run consecutively to each other and to sentences previously received in another case. The determination of whether to impose consecutive sentences is governed by T.C.A. § 40-35-115. However, that statute, which was a part of the 1989

¹The Criminal Sentencing Reform Act of 1989 provides that for offenses committed prior to July 1, 1982, prior law shall remain in full force and effect in every respect, including . . .sentencing, parole and probation. T.C.A. § 40-35-117(c).

Sentencing Reform Act, was not in effect at the time of the defendant's sentencing. Consecutive sentencing in 1980 was governed by the guidelines set forth in Gray v. State, 538 S.W.2d 391 (Tenn. 1976). In Gray, the Court held that consecutive sentences should be ordered for: (1) the persistent offender, (2) the professional criminal, (3) the multiple offender, (4) the dangerous mentally abnormal person, and (5) the dangerous offender. Gray, 538 S.W.2d 391, 393. The defendant relies on the statute and on State v. Woods, 814 S.W.2d 378 (Tenn. Crim. App. 1991), for his argument; however, neither the statute nor Woods were effective at the time of the defendant's sentencing and we will not retroactively apply new procedural rules as the defendant requests.

Thus, analyzing the sentence received by the defendant according to the guidelines in Gray, we find that the defendant's sentences were properly ordered to run consecutively to each other and to prior sentences. The trial court found that the defendant was a persistent offender because he had been convicted of two counts of armed robbery in a prior case. See Gray, 538 S.W.2d at 393. The trial court also found that the defendant was a dangerous offender because he had demonstrated a propensity toward violent crime, had no regard for human life and had no hesitation about committing a crime when the risk to human life was high. See Gray, 538 S.W.2d at 393. The court further found that the aggravating circumstances of the offenses were without mitigation.

The defendant argues that there were mitigating factors in that the defendant kept his codefendant from killing the victim. The testimony of the victim revealed that Jackson had repeatedly said he was going to kill the victim but that the defendant had told him that he would "have to go through [him] first" before he allowed that. Although the defendant may have said this, he obviously did not act accordingly as he allowed Jackson to stab the victim nineteen times in the back and neck. For these reasons, we too find that there was no mitigation of the aggravating circumstances of the

crimes committed in this case and uphold the trial court's decision to run the sentences consecutively to each other and to prior sentences. The record supports a finding that consecutive sentences are necessary to protect the public.

In conclusion, we affirm the judgment of the trial court in all respects.

JOHN H. PEAY, Judge

CONCUR:

GARY R. WADE, Judge

REX H. OGLE, Special Judge