IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
JANUARY SESSION, 1996

FILED

June 10, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 02C01-9503-CC-00092
Appellee	)	
	)	HENRY COUNTY
vs.	)	
	)	Hon. C. Creed McGinley, Judge
WOODROW FREDERICK JACKSON,	)	
	)	
	)	
Appellant	)	(Rape; Aggravated Kidnapping)
	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Woodrow Frederick Jackson, was convicted of one count of rape and one count of aggravated kidnapping following a jury trial in the Circuit Court of Henry County.[1] The trial court sentenced the appellant as a Range II offender to seventeen years incarceration for the rape conviction and twenty years incarceration for the aggravated kidnapping conviction. The court ordered that the sentences be served concurrently. In this appeal as of right, the appellant raises six issues for our review:

> (1) Whether the trial court properly overruled the appellant's challenge to the racial composition of the jury;
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> (2) Whether the verdict was contrary to the weight of the evidence presented;
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> (3) Whether the sentence imposed by the trial court was harsh, unfair, prejudicial and much greater than the normal sentence in like cases;
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> (4) Whether the trial court erred by finding the appellant to be a Range II offender;
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> (5) Whether the trial court erred by referring to the knife allegedly used in the commission of the crime as enhancement for sentencing when the verdict was for rape and not aggravated rape; and
>
> (6) Whether the trial court erred by denying the appellant probation.

After reviewing the record before us, we affirm the judgment of the trial court.

I. Factual Background

On February 3, 1994, at around 10:30 p.m., the appellant went to the

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[1]The appellant was indicted for the offense of aggravated rape. However, the jury found him guilty of the lesser offense of rape.

apartment of Erica Willis, a nineteen year old mother of two. Willis knew the appellant and invited him inside her apartment.[2] She and the appellant began discussing a problem involving Willis and her cousin, Sarah White. Soon thereafter, the appellant asked that Willis permit him to perform oral sex on her. Willis refused and asked the appellant to leave. He apologized to her, but repeated the request and added, "I will pay you." Willis again refused and asked the appellant to leave. At this point, the appellant asked for a glass of water and went to the kitchen. When he returned to the living room, he was carrying a butcher knife.

Willis testified that "he told me, 'You should have done what I asked you to do,' and I grabbed the blade and tried to break it, and that is when I cut my finger[s]." The appellant then grabbed Willis' arm and led her into the bedroom. Willis began yelling, but the appellant informed her, "[I]f you don't shut up, I am going to stick you [with the knife]."

In the bedroom, while holding the knife, the appellant forced Willis to remove her clothes. Willis complied, because she was afraid that the appellant would kill her. However, she did not remove her panties. The appellant, maintaining his hold on the knife, removed her panties. He then proceeded to lay her on the bed and get on top of her. The appellant told Willis to place his penis inside her vagina. Again, she obeyed, because she was afraid that he would kill her and/or her children. The appellant then attempted to anally penetrate the victim. When this attempt failed, the appellant made Willis perform oral sex on him. Following the oral sex, the appellant again forcibly penetrated Willis.

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[2]The record reveals that the appellant was the boyfriend of Emma Jean Dunlap Hilliard, a relative of Ms. Willis. Willis referred to Hilliard as "mommy" and called the appellant "daddy."

Afterward, Willis asked the appellant if she could use the bathroom. The appellant told her "that [she] couldn't go to the bathroom, - he told [her] to 'piss on [her]self.'" She replied that "[she] wasn't going to pee in [her] clothes, -- and [she] wasn't going to pee in [her] room either." Shortly thereafter, the appellant accompanied Willis to the bathroom. Once inside the bathroom, Willis was unable to urinate. The appellant accused her of lying and threatened to "stick [her]." Willis began "hollering." While the two wrestled on the bathroom floor, the appellant threatened, "I am going to stick you, B---h, - if you don't shut up." The appellant then led Willis back to the bedroom where he again forcibly penetrated her. Throughout the entire episode, the appellant retained the knife and continued to threaten Willis.

Finally, the appellant smoked some crack cocaine in a pipe crudely fashioned from an empty Coke can and dozed off, forcing Willis to lie in front of him with his arm and shoulder resting against her. After he had fallen asleep, Willis attempted to move. However, the appellant woke up and patted her shoulder. At some point, the appellant apologized to Willis for what he had done.

The appellant left the next morning at about 4:20 a.m. Before he left, he told Willis that she should not call the police until 9:00 a.m. He also stated that, if she contacted the police, he would "come after [her]" as soon as he was released from prison. After he left, Willis waited approximately ten minutes and then went to a nearby apartment where a neighbor called the police.

Monique Moore, Willis' neighbor, testified at trial that, during the early morning hours of February 4th, 1994, Willis knocked on her bedroom window. Once inside Moore's apartment, Willis stated, "Freddy [,the appellant,] raped me, - call the police." Moore related that Willis was "hysterical, - shaking like she was

in shock, - she couldn't stop shaking, - and my brother was just holding her."

Officer Tony Hutcherson was called to the scene. When he arrived, he observed that Willis' "hair was all over her head, - and her clothes were kind of, - just messed up a little bit. ... She had a cut to her third and fourth fingers, - on her right hand." An ambulance was called, and Willis was taken to the Henry County Medical Center Emergency Room. Dr. Julio Guerra testified that he examined Willis and completed a rape kit. A Dr. Robert Adams also testified that, later that day, he obtained rape kit samples from the appellant.

Lieutenant Tom Lankford, an investigator for the Paris Police Department, secured evidence collected from Willis' apartment, including bloodied sheets, a nightgown, a coca-cola can, and a knife. He sent the knife, the rape kit samples taken from Willis and the appellant, and samples from the appellant's clothing to the Tennessee Bureau of Investigation Crime Laboratory. Tests performed on the evidence identified the appellant as a type O secretor with a PGM 2-1, findings consistent with the vaginal swab residue from Willis. Moreover, the DNA tests on the vaginal swabs revealed that the DNA profile from the male sperm cells collected by the swabbings was consistent with the appellant's DNA.

When the appellant was taken into custody, he gave a statement to Lt. Lankford. At trial, Lankford related the statement to the jury. The appellant conceded that he was at Willis' apartment on the night of the rape. The appellant stated that he visited Willis in order to discuss a conflict between "her and another boyfriend of hers." He maintained that he and Willis only watched "The Love Connection" on the television in her living room. He then smoked a rock of crack cocaine in the back bedroom. He denied having sexual intercourse with Willis, emphasizing the fact that he was not "romantically involved with Erica Willis." However, at trial, the appellant testified that he and Willis engaged in

consensual sex on the evening in question. He further asserted that they had been doing so twice a month during the past year. He admitted lying to the police, but explained that he was afraid that his girlfriend would find out about his affair with Willis.

II. Juror Pool

The appellant first challenges the "array of the jury for the reason that there were not enough Black Americans [sic] available for jury service." The appellant is African-American. The State correctly contends that the appellant has waived this issue for failure to present any substantial argument and for failure to cite to authority. Tenn. R. App. P. 27(a)(7), (h); Tenn. Ct. Crim. R. App. 10(b).[3] Moreover, this issue has been waived pursuant to Tenn. R. Crim. P. 12(b)(1) and (f), as this issue should have been raised as a pre-trial objection.[4] Nevertheless, we elect to review this contention on its merits.

The United States Supreme Court set forth a three-pronged test in Duren

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[3]We note that the brief submitted on behalf of the appellant does not comport with the Tennessee Rules of Appellate Procedure. The statement of the case and the statement of the facts are inadequate. More importantly, the issues are not supported by argument, citation to authority, or, for the most part, citation to the record. Tenn. R. App. P. 27(a)(7), (g), (h); Tenn. Ct. Crim. R. App. 10(b). Consequently, this brief is inadequate and the appellant has waived all issues presented for review.

"Lawyers practicing before the appellate courts of this State are not at liberty to disregard the mandate of Tenn. R. App. P. 27, regarding the form and content of briefs. Each requirement of the rule serves a specific purpose. When a lawyer does not comply with this rule, it impedes the ability of adversary counsel as well as this Court to address the issue or issues raised in the brief." State v. Smith, C.C.A. No. 49 (Tenn. Crim. App. at Knoxville, Mar. 7, 1990).

[4]The appellant's objection is not stated on the record. The trial court did take notice of an objection, which was apparently made off the record. Immediately after the jury was impaneled, the trial court announced:

> [Y]ou did mention that you were voicing an objection, . . . I gather to the entire panel, - but to the jury that has been selected, - based upon the fact that you feel it is not representative of the defendant's peers; he is entitled, -- according to your argument, - a representative panel. . . . There is no evidence being offered that there was any systematic exclusion. . . .

v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979), for determining whether a jury was properly selected from a fair cross-section of the community pursuant to the Sixth and Fourteenth Amendments.[5] Accordingly, in order to establish a prima facie violation of the fair cross-section requirement, the defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community[6];
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> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;
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> (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 363, 99 S.Ct. at 668. The Tennessee Supreme Court has adopted this test. State v. Buck, 670 S.W.2d 600, 610 (Tenn. 1984). See also Adkins v. State, 911 S.W.2d 334, 353 (Tenn. Crim. App.), perm. to appeal dismissed, (Tenn. 1995).

The appellant has failed to establish a prima facie case under either the state or federal constitution. The appellant has not introduced evidence concerning the percentage of African-Americans in Henry County, the percentage of African-Americans on other venires, the potential for abuse of the selection procedure, or the systematic exclusion of African-Americans in the jury selection process. Given the failure of the appellant to establish a prima facie case with respect to the selection process, we conclude that the trial court did not err in denying the appellant's challenge to the racial composition of the jury. This issue is without merit.

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[5]We note that the State, in its brief, erroneously construes the appellant's challenge to the jury's composition as an assertion of a Batson violation.

[6]We recognize that the appellant automatically satisfies the first prong as the United States Supreme Court has recognized African-Americans to be a distinctive group in the community. See Alexander v. Louisiana, 405 U.S. 625, 628, 92 S.Ct. 1221, 1224 (1972).

III. Sufficiency of the Evidence

In his next issue, the appellant argues that "the verdict was contrary to the weight of the evidence presented." Specifically, the appellant argues that the jury could not find the appellant guilty of aggravated kidnapping due to the use of a knife and acquit the appellant of aggravated rape, when both offenses were committed at the same time.[7] Again, we conclude that the State is correct in its assertion that the appellant has waived this issue, because he has failed to present any substantial argument in support of his challenge to the jury's verdict, he has failed to cite any authority, and he has failed to cite to the record. Tenn. R. App. P. 27(a)(7), (g), (h); Tenn. Ct. Crim. R. App. 10(b). Nonetheless, in the interest of justice, we elect to review this issue on its merits.

Initially, we note that the appellant phrases his issue as one challenging the "weight of the evidence." However, this court does not have the authority to review the weight of the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)(this court does not reweigh or reevaluate the evidence). Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this court. State v. Moss, No. 02C01-9404-CR-00072 (Tenn. Crim. App. at Jackson, Nov. 2, 1994). This court only has the power to review the sufficiency of the evidence under Tenn. R. App. P. 13(e) and Tenn. R. Crim. P. 36(a). Id.

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[7]We note that it is a well established rule that inconsistent jury verdicts are not fatal to a conviction. See Wiggins v. State, 498 S.W.2d 92, 93-94 (Tenn. 1973)(citing Dunn v. United States, 284 U.S. 390, 393-394, 52 S.Ct. 189, 190-191 (1932)). See also State v. Jones, No. 03C01-9302-CR-00057 (Tenn. Crim. App. at Knoxville, November 22, 1994), perm. to appeal denied, (Tenn. 1995); State v. Eaton, No. 03C01-9202-CR-00044 (Tenn. Crim. App. at Knoxville, December 29, 1992), perm. to appeal denied, (Tenn. 1993). In Wiggins, 498 S.W.2d at 94, our supreme court observed, "This court will not upset a seemingly inconsistent verdict by speculating as to the jury's reasoning if we are satisfied that the evidence establishes guilt of the offense upon which the conviction was returned."

With respect to the sufficiency of the evidence, on appeal the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368 (1993). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). It is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, is sufficient for any rational trier of fact to find the essential elements of the offenses beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e).

The jury found the appellant guilty of aggravated kidnapping, as charged in the indictment. Tenn. Code Ann. § 39-13-304(2)(5) (1991). In order to obtain a conviction under this statute, it was incumbent upon the State to prove, beyond a reasonable doubt, (1) that there was false imprisonment, as defined in Tenn. Code Ann. § 39-13-302 (1991),[8] (2) that the defendant acted intentionally, knowingly, or recklessly, and (3) that the offense was committed while the defendant was in possession of a deadly weapon or threatened the use of a deadly weapon. The proof in this case clearly establishes that the appellant knowingly, by use of a deadly weapon, confined the appellant to her apartment against her will. This act of confinement continued into the early morning hours, long after perpetration of the rape had been accomplished. We hold that there is sufficient evidence that the appellant committed the offense of aggravated kidnapping. Tenn. R. App. P. 13(e).

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[8]Under Tenn. Code Ann. § 39-13-302, "a person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty."

The appellant was also convicted of rape pursuant to Tenn. Code Ann. § 39-13-503(1991). In order to obtain a conviction under this statute, the State was required to prove that there was unlawful "sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by ... the following circumstances:

(1) Force or coercion ... ;" and
(2) The defendant acted intentionally, knowingly, or recklessly.

The evidence in the present case overwhelmingly establishes that the appellant unlawfully penetrated the victim by the use of force. The appellant admits sexual penetration of the victim, denying only the use of force or coercion. The jury's verdict reflects that the jury accredited the testimony of the victim and rejected the appellant's defense that the victim consented to sexual penetration. Clearly, the evidence is sufficient for a reasonable juror to find the appellant guilty of rape. Tenn. R. App. P. 13(e).

IV. Sentencing Issues

The appellant raises four issues relating to sentencing. First, he contends that "the [t]rial [j]udge err[ed] in rendering a sentence that is harsh, unfair, prejudicial and much greater than the normal sentence imposed in like cases." Second, he argues that "the [t]rial [j]udge err[ed] in declaring the defendant a Range II offender when [the] defendant's previous felony conviction was more than ten (10) years old." Third, he asserts that "the [t]rial [j]udge err[ed] in referring to a knife allegedly used in the commission of this crime as enhancement for sentencing when the jury's verdict was for rape, not aggravated rape which would have included the use of a weapon such as a knife." Finally, the appellant contends that the "trial court erred in not considering the

defendant/appellant for probation."[9]

We are unable to provide a meaningful review of these issues. Again, the appellant has waived these issues for failure to present any substantial argument, for failure to cite to authority, and for failure to cite to the record. Tenn. R. App. P. 27(a)(7), (g), (h); Tenn. Ct. Crim. R. App. 10(b). Moreover, more importantly, the appellant has failed to include a transcript of the sentencing hearing in the appellate record. He has, therefore, waived his right to challenge the sentencing determinations of the trial court. The appellant has the burden to prepare a record on appeal that presents a complete and accurate account of what transpired in the trial court with respect to the issues on appeal. Tenn. R. App. P. 24(b). The failure to do so results in a waiver of such issues and a presumption that the ruling of the trial court was correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991).[10] Accordingly, the appellant is not entitled to relief on these grounds.

Furthermore, we conclude that the appellant's sentencing issues are without merit. First, we are compelled to note that, assuming compliance by the trial court with the Tennessee Criminal Sentencing Reform Act of 1989, the "harsh, unfair, and prejudicial" nature of a sentence is not within the scope of

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[9]We note that the issue of probation is not properly raised in the appellant's brief. Rather, the issue, posed at the conclusion of the brief, appears to have been included as an afterthought.

[10]See also State v. Boling, 840 S.W.2d 944 (Tenn. Crim. App. 1992), perm. to appeal denied, (Tenn. 1993)(it is the appellant's duty to prepare a record which conveys a fair, accurate, and complete account of what transpired in the trial court with respect to the issues which form the basis of the appeal); State v. Draper, 800 S.W.2d 489 (Tenn. Crim. App. 1990)(an appellate court is precluded from considering an issue when the record does not contain a transcript or statement of what transpired in the trial court with respect to that issue); State v. Bennett, 798 S.W.2d 783 (Tenn. Crim. App. 1990)(when the record is incomplete and does not contain the proceedings and documents relevant to an issue, the court is precluded from considering the issue); McDonald v. Onoh, 772 S.W.2d 913 (Tenn. App. 1989)(failure to provide a transcript from which the appellate court could determine sufficiency of evidence resulted in a frivolous appeal).

appellate review. Tenn. Code Ann. § 40-35-401 (1991). Specifically, Tenn. Code Ann. § 40-35-401(a) provides that a "defendant in a criminal case may appeal from the length, range or the manner of service of the sentence imposed by the sentencing court. The defendant may also appeal the imposition of consecutive sentences." (Emphasis added). Moreover, Tenn. Code Ann. § 40-35-401(b) provides that an appeal from a sentence must be related to one or more of the following grounds: "(1) The Sentence was not imposed in accordance with [the Sentencing Act]; or (2) The enhancement and mitigating factors were not weighed properly, and the sentence is excessive under the sentencing considerations set out in Tenn. Code Ann. § 40-35-103 [(1990)]." We conclude that the appellant's first sentencing issue does not fall within those grounds for which an appeal is provided in § 40-35-401.

With respect to the appellant's challenge to his classification as a Range II offender, the record indicates that the appellant's criminal history includes two prior class C felony convictions.[11] Accordingly, the appellant would meet the criteria of Tenn. Code Ann. § 40-35-106 (1991) for sentencing as a Range II offender. Moreover, Tenn. Code Ann. § 40-35-106 (b)(2) provides: "All prior felony convictions, including those occurring prior to November 1, 1989, are included." In other words, there is no provision in our sentencing laws which prohibits the use of a conviction more than ten years old to impose an enhanced range of punishment. This issue is meritless.

Due to the absence of the transcript of the sentencing hearing, we are unable to review the trial court's consideration of the knife in enhancing the appellant's sentence for rape. In any event, we are unable to conceive how the trial court's consideration of the knife was error. The appellant, in his brief,

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[11]The record of these convictions is contained in the State's notice seeking enhanced punishment of the appellant as a Range II offender.

implies that, because the use of a knife is not an element of the offense of rape, the trial court's consideration of such use was improper. However, under Tenn. Code Ann. § 40-35-114 (Supp. 1994), an enhancement factor may be applied precisely when it is not an essential element of the offense.

Finally, with respect to the denial of probation, we conclude that the appellant's argument is misplaced and without legal foundation. The appellant was sentenced to seventeen years for the rape conviction and twenty years for the aggravated kidnapping conviction. Only those defendants receiving a sentence of eight years or less are eligible for probation. Tenn. Code Ann. § 40-35-303(a)(1991). Therefore, the appellant is not eligible for probation.[12] This issue is also without merit.

V. Conclusion

Having considered the issues raised by the appellant, we conclude that they are without merit. Accordingly, we affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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JERRY L. SMITH, Judge

_____
LYNN W. BROWN, Special Judge

[12]Moreover, we note that a defendant convicted of aggravated kidnapping is not eligible for probation. Tenn. Code Ann. § 40-35-303(a).