IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1996 SESSION

STATE OF TENNESSEE,	)	C.C.A. NO. 03C01-9508-CC-00217
	)	
Appellee	)	BRADLEY COUNTY
	)	
v.	)	HON. R. STEVEN BEBB, JUDGE
	)	
SAMUEL SCOTT MINTON,	)	conspiracy to commit aggravated
	)	burglary (1 count);
	)	aggravated rape (5 counts);
Appellant	)	especially aggravated kidnaping
	)	(1 count)
	)	especially aggravated robbery
	)	(1 count)
	)	theft over $1,000 (1 count)

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OPINION FILED _____

AFFIRMED IN PART;
REVERSED AND DISMISSED IN PART.

JOHN K. BYERS
SENIOR JUDGE

OPINION

The defendant was convicted of the following offenses and sentenced to serve the punishments therefore as follows:

> Conspiracy to commit aggravated burglary with a sentence of two years running consecutive to counts 2 - 11;
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> Aggravated rape (5 counts) with a sentence of twenty years running consecutive to counts 1 and 7-11;
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> Especially aggravated kidnaping with a sentence of twenty years running consecutive to counts 1-6 and 8-11;
>
> Especially aggravated robbery with a sentence of twenty years running consecutive to all counts except 10;
>
> Judgment of dismissal as to aggravated assault;
>
> Especially aggravated burglary with a sentence of ten years to run consecutive to all other counts except count 8; and
>
> Theft of over $1,000. with a sentence of four years to run consecutive to all other counts.

The defendant raises the following issues in this appeal:

(1) Whether the evidence is sufficient to support the verdict or whether the verdict was based on sympathy for the victim;

(2) Whether or not the Trial Court erred in refusing the Motion for change of venue;

(3) Whether or not the Trial Court erred in refusing to grant the Motion to Suppress the lineup;

(4) Whether or not the Trial Court erred in allowing the statement of the Defendant to be introduced when it was a coerced statement;

(5) Whether or not the Trial Court erred in refusing to grant a Motion for New Trial after it was learned that the District Attorney General's Office and/or other law enforcement agencies had withheld information of prior bad acts of the alleged victim;

(6) Whether or not the Trial Court erred in ordering some of the sentences to run consecutively; and

(7) Whether or not the Trial Court erred in sentencing the Defendant to a sentence that is excessive.

We affirm all of the judgments, the sentences and the manner of their service with the exception of the conviction for especially aggravated kidnaping. We

reverse the conviction on that offense and dismiss that charge.

The State's evidence is this case on the commission of the crimes comes from the testimony of the victim and the statement made to the police by the defendant which implicates him in the crimes.

The defendant did not claim that the acts of violence alleged in the indictments to have been committed against the victim did not occur; neither did he refute the victim's detailing of the acts committed against her. The defendant denied he was present at the crime scene and based his defense entirely on one of alibi and a claim that his statement to the police was not true but coerced in that they were made despite his wish for an attorney.

The victim testified that on October 31, 1993 she was at her home in Bradley County. At 10:30 a.m., two men and a woman entered the home. The defendant and the woman physically assaulted the victim, burned her in several places with a cigar, tied her hands when she resisted, committed upon her one act of anal intercourse, one act of oral sex, forced her to perform oral sex upon the male and female, stole over eight thousand dollars from the house, and shot her in the leg. The victim identified the defendant as the man who assaulted her, and who assisted the woman in the commission of all the acts against her.

The unrefuted evidence shows beyond a reasonable doubt that the offenses alleged in the indictment were committed except the offense of especially aggravated kidnaping. The only issue on the sufficiency of evidence is whether the defendant's evidence of alibi raises a sufficient defense as to cause the identification of him as the perpetrator of the offense to be insufficient to show his guilt beyond a reasonable doubt.

The defendant called eighteen witnesses to testify that he was in Rhea County and in the City of Dayton during the time the offenses were being committed. Most of the witnesses did a remarkable job of pinpointing the defendant's whereabouts at certain times in their testimony. We need not go into all of them in this opinion. However, as we read the record, there are three areas concerning the defense that contradict and erode the alibi evidence. Witnesses from

the Advance Auto Parts Store testified the defendant was at the store at 10:00 a.m. and made a purchase at 10:16 a.m. on October 31, 1993. They submitted a cash register receipt to show the time of a purchase by the defendant. The employee testified the clock at the store had been set back automatically by the home office in Roanoke, Virginia. The State called the person in charge of computer settings from the Roanoke office, who testified the clocks at the store which control the cash register receipt times are not set automatically from Roanoke but are set at each store. The defendant was seen at a gas station not far from the Advance Auto Store at 9:15 a.m. on the morning of the crime. This was the day clocks were to be turned back one hour because of the end of daylight savings time. The clerk at the gas station testified their clocks would change time on their own - a receipt for the purchase of gas was timed at 9:15 a.m. on the station cash register.

One of the defendant's alibi witnesses testified he saw the defendant at a local store in Rhea County at 11:00 a.m. on the date of October 31, 1993. The State called the person who was working at the store as a witness. He testified neither the defendant or the witness were at the store on the date of the crime.

The defendant relies upon the case of *State v. Williams,* 657 S.W.2d 405 (Tenn. 1983) and *State v. Cabbage,* 571 S.W.2d 832 (Tenn. 1978) to assert the evidence is insufficient in the face of his alibi proof to convict. *Williams* and *Cabbage* are of no help to the defendant. Those cases clearly hold that the matter of whether an alibi has been made out is for the jury to determine from all the evidence in the case. The jurors are the arbiters of the credibility of the witnesses, and their verdict approved by the trial judge accredits the State's theory of the case.

On appeal, we must affirm the verdict and the judgment if there is sufficient evidence upon which a rational trier of fact can find guilt beyond a reasonable doubt. We find the evidence is sufficient for that purpose in this case on all the offenses charged except the offense of especially aggravated kidnaping.

We have an unusual stance taken by the State on the offense of especially aggravated kidnaping. The original brief filed by the State, which is quite lengthy and well done, was filed by one Assistant Attorney General. In the brief, the State

conceded there was no evidence of kidnaping within the holding of *State v. Anthony,* 817 S.W.2d 299 (Tenn. 1991). This brief was filed Feb. 1, 1996. On March 28, 1996, the State, by another Assistant Attorney General, filed a supplemental brief saying the interpretation of *Anthony* by the Assistant who filed the first brief was erroneous and the concession should not have been made.

We have looked carefully at the facts in this case and the holding in *Anthony.* We conclude the State's concession in the first brief was based upon a correct analysis of the facts in this case vis-a-vis the holding in *Anthony.*

In this case, the victim testified her hands were bound when she began to resist the physical assaults upon her. She was not moved, hidden or otherwise restrained, other than as an incident of the other crimes being committed. We find the evidence is insufficient to support the verdict of especially aggravated kidnaping and we reverse the judgment of the court on that offense and dismiss that charge.

The record before us does not reflect any ruling of the trial judge upon a motion for a change of venue made by the defendant nor does it show any proceeding upon the motion. In the absence of this, we cannot pass upon this issue and consider the same to be waived and presume the ruling the trial court made, if any, was correct. See *State v. Ogle,* 823 S.W.2d 554 (Tenn. Crim. App. 1991).

The defendant contends the trial judge should have suppressed the in-court identification of him because the victim's identification of him at trial was based upon an unconstitutionally tainted line-up.

The method, manner and content of the line-up was testified to in a suppression hearing. The allegation of taint made by the defendant was disputed by the officer who conducted the line-up. The trial judge found the line-up to be proper. The decision of the trial judge on the admission of the evidence is for the trial judge and the decision comes to us with the weight of a jury verdict. Unless the record shows the decision of the trial judge is arbitrary, the ruling will not be overturned on appeal. *State v. Davis,* 872 S.W.2d 950 (Tenn. Crim. App. 1993). We affirm the judgment of the trial court.

The defendant contends the police officer continued to question him when he stated he wanted a lawyer and that he only confessed because he was subject to harsh conditions in the jail until he confessed.

The only testimony in the case was given by the officer who took the confession. On the matter of an attorney the officer testified:

> A: (Officer Benefield): I had heard that on the way to his being locked up, he made a suggestion to Detective Burtt, "I guess I'm going to have to have a lawyer." To my understanding he had never said he wanted one, and so when I called him out [for an interview], I wanted to be sure, "Do you want a lawyer." "No." and as we got to talking he said, "I guess," he said, "I wouldn't even know the phone number of one to call." I said, "Now wait a minute, " I said, "Are you saying if you knew of a phone number you would call one or are you saying you want a lawyer?' And he said, "No, no," he said, "I don't want one. I'm just saying I don't know one to call." I said, "If you want a lawyer, I can get you attorney names. We can get the judge to appoint you one, there are several things we can do" . . . [T]he bottom line was, "No, I want to talk. I want to tell my story, I want to talk."
>
> Q: (Arnold Fitzgerald): Alright, when the discussion came up about an attorney on November 2, why would you not have let him go and call an attorney? Do you recall that? Why didn't you after that discussion came up?
>
> A: Because I was very clear, and I was very determined, and I asked him, because he made it kind of like a passing statement, "I don't even know the [phone] number of one if I wanted to," or something like that. I said, "Now wait a minute, are you saying if you knew a number, are you saying you want an attorney if you knew one to call." I said, "We can get you an attorney if you want to talk to one." He said, "No, no, no. I want to talk. I want to talk now." He said, "I'm not saying I want an attorney."

There was no evidence by the defendant offered on either the request for an attorney or the condition of the jail.

Whether to admit the statement was within the discretion of the trial judge. Unless the evidence shows a clear abuse of that discretion, the action thereon will be affirmed. *State v. Goforth,* 678 S.W.2d 477 (Tenn. Crim. App. 1984). We find no abuse of discretion in this case.

The defendant contended in his motion for a new trial that the State withheld evidence of past check fraud crimes being committed by the victim and further alleged the victim had previously burned herself. The defendant insists this was exculpatory evidence and the withholding of the evidence entitled him to a new trial under the holding in *Brady v. Maryland,* 373 U.S. 83 (1963) and its progeny.

We reject this argument primarily because there is a failure in this record to show the matters alleged are based in fact. The allegations are contained in the motion for a new trial and no offer of proof was made to show the allegations were true. This alone would foreclose a review of this matter. Further, even if true, the allegations would go only to the credibility of the witness and in the face of this record we cannot see that this evidence would have caused the jury to reach a different conclusion, a prerequisite to relief under a claimed *Brady* violation. See *State v. Edgin,* 902 S.W.2d 387 (Tenn. 1995).

Sentencing

The trial court made the following findings in each of the cases for the purpose of sentencing:

Conspiracy to commit aggravated burglary:

No applicable factors found - (*except for history prior criminal behavior)

Five Counts of aggravated rape:

(1) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense -- TENN. CODE ANN. § 40-35-114(5) (hereafter, cruelty);

(2) The personal injuries inflicted upon the victim were particularly great -- TENN. CODE ANN. § 40-35-114(6) (hereafter great injuries);

(3) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement -- TENN. CODE ANN. § 40-35-114(7) (hereafter, gratification for pleasure);

(4) The defendant had no hesitation about committing a crime when the risk to human life was high -- TENN. CODE ANN. § 40-35-114(11) (hereafter willful infliction of injuries);

Especially aggravated robbery:

(1) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense -- TENN. CODE ANN. § 40-35-114(5) (cruelty);

(2) The defendant possessed or employed a firearm during the commission of the offense -- TENN. CODE ANN. § 40-35-114(9) (firearm use); and

(3) The defendant had no hesitation about committing a crime when the risk to human life was high -- TENN. CODE ANN. § 40-35-114(10) (high risk);

Especially aggravated burglary:

(1) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense -- TENN. CODE ANN. § 40-35-114(5) (cruelty);

(2) The defendant possessed or employed a firearm during the commission of the offense -- TENN. CODE ANN. § 40-35-114(9) (firearm use); and

(3) The defendant had no hesitation about committing a crime when the risk to human life was high -- TENN. CODE ANN. § 40-35-114(10) (high risk);

Theft:

(1) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense -- TENN. CODE ANN. § 40-35-114(5) (cruelty);

(2) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great -- TENN. CODE ANN. § 40-35-114(6) (great injuries);

(3) The defendant possessed or employed a firearm during the commission of the offense -- TENN. CODE ANN. § 40-35-114(9) (firearm use);

(4) The defendant had no hesitation about committing a crime when the risk to human life was high -- TENN. CODE ANN. § 40-35-114(10) (high risk); and

(5) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person -- TENN. CODE ANN. § 40-35-114(11) (willful infliction of injuries).

In addition to the above findings, the trial court found the defendant had a prior history of criminal conviction or behavior in addition to those necessary to establish the range

The State properly concedes the trial court could not apply the use of a firearm and serious bodily injury in the enhancement for aggravated rape because the use of the firearm and great bodily harm were alleged in the indictment to enhance the charge from rape to aggravated rape. Further, the State properly concedes the trial court could not use the use of a firearm and action which was a high risk to human life to further enhance the charge of especially aggravated robbery because these were used to enhance the crime from robbery to especially aggravated robbery. However, the trial court properly applied the other enhancement factors set out in the aggravated rape and robbery convictions.

The trial judge set out the reason for fixing the term, the range, and the manner of running the sentence. We review these with a presumption of correctness. *State v. Ashby,* 823 S.W.2d 166 (Tenn. 1991); *State v. Jones,* 883 S.W.2d 597, 600 (Tenn. 1994). When the finding of fact of the trial court is adequately supported by the record, we are required to affirm the findings. *State v. Fletcher,* 805 S.W.2d 785 (Tenn. Crim. App. 1991). The burden is on the defendant to show the sentences imposed are erroneous. The defendant has not done so.

We affirm the judgments in all respects except the judgment finding the defendant guilty of especially aggravated kidnaping. We reverse the judgment on that offense and dismiss that charge.

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John K. Byers, Senior Judge

CONCUR:

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John H. Peay, Judge

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Jerry L. Smith, Judge