

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1998

FILED
June 10, 1998
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

JOSEPH LEE BERNELL)
BRYANT,)

Appellant.)

C.C.A. NO. 01001975 CR 00194

DAVIDSON COUNTY

HON. CHERYL BLACKBURN
JUDGE

(Aggravated Rape)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF DAVIDSON COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Joseph Lee Bernell Bryant, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted by a Davidson County jury of one count of aggravated rape, two counts of aggravated sexual battery, and one count of attempted aggravated rape¹. He was sentenced as a standard, Range I offender to twenty-three years for the aggravated rape, ten years for each count of aggravated sexual battery and ten years for the attempted aggravated rape. The trial judge ordered the aggravated rape and sexual battery convictions to be served concurrently with each other and consecutively to the conviction for attempted aggravated rape for an effective sentence of thirty-three years. He appeals his convictions and sentences and raises the following issues for our review: (1)(A) That the evidence was insufficient to support the verdicts of guilt; and (B) that the evidence failed to establish the element of “bodily injury;” (2) that the trial court erred by granting the State’s request for a special jury instruction regarding the attempt to destroy or conceal evidence; and (3)(A) that the trial court imposed an excessive sentence because it misapplied sentence enhancement factors, and (B) that the trial court erred by imposing a partial consecutive sentence. After a careful review of the record and arguments in the case at bar, we affirm the judgment of the trial court.

We begin with a review of the facts. Both the Defendant and the victim in this case, Regina Ervin, were security guards working the night shift on April 11-

¹ Tenn. Code Ann. §§ 39-13-502, 39-13-504, 39-12-101.

12, 1995. They worked for the Integrity Security company which contracted with the State of Tennessee for security services in state office buildings. The victim was stationed at the Tennessee Education Association (TEA) building on James Robertson Parkway in Nashville, and the Defendant was stationed at the building next door, the Volunteer Plaza. The victim was a twenty-four year old mother of three who had delivered her last child in December of 1994. Her husband worked in heating and air conditioning and she obtained a night job to help support the family and because the job schedule worked with her child care schedule. On the night of the offenses in question, the victim had been working with Integrity Security for approximately four months and had been assigned to the TEA building on the same shift during this time. The Defendant had come over from the Volunteer Plaza building on three or four prior occasions to get coffee, which was not available at his building. The victim would let him in, he would go downstairs for coffee, then would leave. The victim never had concerns about the Defendant. The victim never went to the Volunteer Plaza.

On the night of the incident, the victim arrived at the beginning of her shift and had made hourly "rounds" of the building. The victim worked alone in the TEA building. The victim wore a bright pink sweater over her uniform because the building was cold. She read a book she had brought with her. She recorded her rounds, with the last entry indicating that she checked the building at 3:00 a.m. The victim had difficulty recalling the time when the Defendant arrived, but stated that he showed up around 2:30 a.m. The Defendant appeared at the door and the victim unlocked it and let him in to get coffee. The Defendant went downstairs and the victim stayed at her desk and read her book.

The Defendant came back upstairs. The victim did not see him at first, but then he attacked her by grabbing her and shoving her back in her chair. The Defendant grabbed the victim by the arms and shoulders and they struggled. The victim hit her head against the wall. The victim told the Defendant to stop. The victim freed herself and ran to the front doors but could not get out because they were locked. The Defendant grabbed the victim and made her go into the elevator, taking her to the third floor offices. The victim noticed that the Defendant emitted a strong odor of alcohol, although she did not see him drinking. The victim attempted to call for help on her radio, but no one responded. The victim described the events as lasting for "several hours."

The Defendant took the victim into the third floor women's bathroom, where there was an area with a table and a couch. The victim struggled with the Defendant and he threw her on the couch. The Defendant hit and smacked the victim with his hands and shoved her into the couch. The victim hit her head on the wall several times and felt like she "blacked out" briefly. The Defendant pulled down the victim's pants and underwear. He turned the victim on her stomach, pinning her arms under her, and vaginally penetrated the victim with his penis. The Defendant also attempted to penetrate her anally. During the assault, the Defendant digitally penetrated the victim's vagina and put his mouth on her genital area. The Defendant also licked the victim's cheek and hand at some time during the incident.

The Defendant threatened the victim during the incident, stating that he would go to her house and make a threat regarding her children. The victim was afraid the Defendant would assault her children in the same manner. The victim

was unsure, but thought that the Defendant had ejaculated. The Defendant stopped and then the victim told him to leave, which he did. The victim stayed in the third-floor bathroom until she thought the Defendant had left the building. The victim then ran out of the bathroom and down the stairs to the first floor because she was afraid to get back on the elevator. The victim was either wearing her sweater or had it in her hands when she came downstairs. She noticed that a button on her shirt was missing and her clothes were "messed up." The victim called her supervisor, Virginia Cooper, and then she called the police. The victim found the keys she had left on her desk in the front door of the building. The doors were unlocked and the victim locked them until the police arrived.

Virginia Cooper received a telephone call from the victim at 3:40 a.m. The victim sounded hysterical, was crying and told Ms. Cooper that she had been raped by the Defendant. The victim told her she was under her desk and that she was afraid to get up. Ms. Cooper called the police, who were already present when she arrived at the TEA building. Ms. Cooper noted that it was difficult to understand the victim on the telephone, but that she appeared more composed when she saw her.

Sergeant Billy Smith received a report at 3:52 a.m. and was the first police officer to arrive on the scene. He saw the victim, who was "very upset, crying [and] real nervous." He determined that the victim was not seriously wounded and attempted to calm her. Ms. Cooper arrived and gave Sergeant Smith a key to the Volunteer Plaza building. Sergeant Smith and Officer Michael Sanders went to the other building and, as they were securing the lobby, the Defendant

emerged from the men's bathroom. They arrested the Defendant, and Officer Sanders took him out of the building. Officer Sanders searched the Defendant and discovered a locked knife in the back pocket of his pants. Sergeant Smith returned to the TEA building.

Detective Johnny Lawrence arrived around 4:00 a.m. and noticed that the victim's hair was disarrayed, she appeared to have been crying, and her clothes were messed up with a button missing on her shirt. Detective Lawrence observed that the victim's desk area was disarrayed and found a button on the floor that matched the victim's buttons. Detective Lawrence retraced the sequence of events surrounding the assault. He observed the women's bathroom on the third floor and saw a couch that was covered with pink lint. He found the victim's pink sweater under her desk on the first floor. The pink lint on the couch and the fibers from the sweater looked identical.

Detective Lawrence went outside to see the Defendant, who was wearing the same type of security uniform as the victim. The Defendant had pink lint all over his uniform and in his beard. The Defendant was transported to booking. Detective Lawrence then turned the case over to Detective Gooch. The ID unit photographed the scene and collected evidence. Pink fibers were also found in the men's restroom in the Volunteer Plaza building on the sink area and on the top of the trash in the waste receptacle. While Officer Corcoran was taking photographs of the Defendant, the Defendant stated "I didn't do nothing" several times. An application of ultraviolet light to the couch area of the women's bathroom revealed no evidence of semen.

Detective Kim Gooch first saw the victim at the warrants window at night court. She appeared very upset and frightened and became more so when the Defendant was brought in. The victim was composed, but was tearful at times and appeared frightened. Detective Gooch took the victim to Nashville General Hospital, where a nurse practitioner, Colleen Powers, performed a rape kit examination. She performed a wood-slide exam, which revealed no evidence of semen around the victim's labia. Ms. Powers noted red fibers in the victim's pubic hair. Ms. Powers discovered no bruising, but the victim complained of lower back pain and Ms. Powers discovered mild tenderness of the spine. Ms. Powers saw no trauma to the vagina, but noted a thin white discharge in the vaginal vault. No semen was detected at that time. However, the victim stated that she had engaged in sexual intercourse with her husband two or three days before the incident and had douched afterwards. Ms. Powers took swabs of the victim's cheek and hand, where she had stated the Defendant licked her. A vaginal swab and a blood sample were taken from the victim. The rape kit samples were transported to the TBI laboratory.

Forensic testing at the TBI laboratory revealed that the pink fibers at the crime scene and on the Defendant matched those from the victim's sweater. Also, the rape kit swabs from the victim's cheek and hand revealed no saliva. Sperm was detected from the vaginal swab, but it was not consistent with the Defendant's DNA.

The Defendant was charged with three counts of aggravated rape and one count of attempted aggravated rape. He was tried by a jury on October 28-30, 1996. The State elected the offenses as follows: count one was vaginal

penetration by penis, count two was digital penetration of the vagina, count three was penetration by oral sex and count four was attempted anal penetration by penis. The jury found the Defendant guilty of aggravated rape in count one, guilty of the lesser-included offense of aggravated sexual battery in counts two and three, and attempted aggravated rape in count four.

I. Sufficiency of the Evidence

As his first issue, the Defendant contends that the evidence was insufficient to support his convictions. When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Questions concerning the credibility of the 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, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of

illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

(A). General Insufficiency

The Defendant alleges that the evidence did not prove that the events occurred because the physical evidence and testimony of the victim were inadequate. He notes the inconsistency between the time the victim alleged the attack occurred, at 2:30 a.m., and her notation in her log book that she made rounds at 3:00 a.m. He also argues that the victim made inconsistent statements to various individuals regarding the actual acts that were perpetrated upon her. Finally, the Defendant argues that the forensic evidence does not support that the he ejaculated because there was no semen detected that was linked to him. The Defendant contends that these problems create a reasonable doubt.

Obviously, the jury considered any inconsistencies and resolved them against the Defendant. Questions of credibility and the weight of the evidence are properly reserved for the jury. Therefore, this issue is without merit.

(B) Failure to Establish the Bodily Injury Element

Next, the Defendant argues that the evidence was insufficient to prove that the victim suffered bodily injury and as a result, the convictions for aggravated rape, aggravated sexual battery and attempted aggravated rape cannot stand.

Bodily injury is the aggravating factor upon which the State relied to raise the offenses from simple rape and sexual battery to the aggravated offenses². “‘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).

The Defendant argues that the evidence was insufficient to prove this element because the victim’s claims of injury were not properly substantiated. The victim testified at trial that she hit her head on the wall several times during the struggle with the Defendant. She also testified that she thought she “blacked out” momentarily. The nurse practitioner did not note any evidence of bruises on the victim’s head. The victim complained to the nurse that she was experiencing lower back pain shortly after the incident. The nurse noted a mild tenderness of the spine. The victim did not seek medical attention for her back injury and had filed a worker’s compensation claim for her back injury, but later withdrew this as a ground for relief. The victim testified that she had sought counseling after the incident and was still receiving treatment at the time of the trial.

We cannot conclude that the evidence was insufficient to show that the victim suffered bodily injury. Even what could be considered slight injuries have satisfied the bodily injury element. See State v. Smith, 891 S.W.2d 922, 927-28 (Tenn. Crim. App. 1994)(physical pain caused by vaginal penetration); State v.

² “Aggravated sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: . . . (2) The defendant causes bodily injury to the victim.” Tenn. Code Ann. § 39-13-504. “Aggravated rape is unlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: . . . (2)The defendant causes bodily injury to the victim.” Tenn. Code Ann. § 39-13-502.

Harris, 866 S.W.2d 583, 588 (Tenn. Crim. App. 1992)(small bruise on the victim's hip). Here, the victim testified that she hit her head several times and may have blacked out. Furthermore, she stated to the nurse shortly after the incident that she was experiencing lower back pain, which was substantiated by the nurse's observation of tenderness of the spine. The legislature has seen fit to include "physical pain" in the statutory definition of bodily injury. Tenn. Code Ann. § 39-11-106(a)(2). "It is not the duty of this Court to apply size or degree requirements to such unambiguous legislation." Harris, 866 S.W.2d at 588. As a result, we find that this issue lacks merit.

II. Special Jury Instruction

Next, the Defendant contends that the trial court erred by granting the State's request for a special jury instruction regarding destroying or concealing evidence. In the case at bar, the Defendant was discovered coming out the men's bathroom in the Volunteer Plaza building. The Defendant had pink fibers in his beard and on his uniform, primarily stuck to the Velcro on his pocket. When the police examined the bathroom, they discovered pink fibers on the sink and pink fibers on top of the trash in the waste receptacle. The State requested and the trial court issued the following instruction: "Any attempt by an accused to conceal or destroy evidence is relevant as a circumstance from which guilt of the accused may be inferred."

The Defendant argues that the proof does not support the trial court's instruction and that it served as an impermissible comment on the evidence violative of Article VI, section 9 of the Tennessee Constitution. Our law provides

that when the issue is raised by the proof, it is appropriate for the trial court to issue such a jury instruction. See State v. Phipps, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994). The trial court's instruction was issued in compliance with Tillery v. State, 565 S.W.2d 509, 511 (Tenn. Crim. App. 1978), which states: "Any attempt by an accused to conceal or destroy evidence, including an attempt to suppress the testimony of a witness, is relevant as a circumstance from which guilt of the accused may be inferred." Furthermore, the instructions did not shift the burden of proof to the Defendant because the jury was instructed that the State had the burden of proving all of the elements of the crime beyond a reasonable doubt. Post-crime concealment of evidence has continued to be an acceptable inference suggesting that a defendant has committed some crime. See State v. West, 844 S.W.2d 144, 148 (Tenn. 1992); State v. Larry Gene Maddox, C.C.A. No. 03C01-9609-CR-00339, Hamilton County (Tenn. Crim. App., Knoxville, Aug. 5, 1997); State v. Michael Carlton Bailey, C.C.A. No. 01C01-9403-CC-00105, Cheatham County (Tenn. Crim. App., Nashville, July 20, 1995), perm. to appeal denied (Tenn. 1996).

The proof raised the issue that the Defendant attempted to conceal evidence of the crime. The trial judge has a duty to give a complete charge of the law applicable to the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn.1986). Therefore, the jury instruction did not function as an impermissible comment upon the evidence. The jury was free to decide whether the Defendant did indeed attempt to conceal evidence. Once this was resolved as a fact, the jury was permitted to infer that the Defendant committed the crime in question. The Defendant argues that the instruction precluded him from presenting innocent explanations for his removal of the pink fibers. However, the proof

established that fibers were placed in the trash with the obvious intent that they be disposed of as waste. These facts may give rise to an inference and nothing in the jury instruction required the jury to presume that the Defendant tried to conceal evidence. Indeed, the presence of the pink fibers on and in the vicinity of the Defendant became the most incriminating circumstantial link between the Defendant and the victim. An otherwise innocuous action may appear highly suspect in the context of the particular facts and circumstances, i.e. disposal of a gun, or wiping off blood with a paper towel and discarding it in the trash, or in the case of flight, a sudden trip out of town after a crime was committed. If raised by the proof, the trial court is justified in issuing an instruction that the jury "may" infer guilt from such circumstances. The instructions clearly placed the burden of proof on the State. Therefore, we conclude that this issue is without merit.

III. Sentencing

As his final issue, the Defendant charges that the trial court erred by imposing excessive sentences and by ordering the sentences to run consecutively. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The presentence report reflects that the Defendant was forty-two years old, married, with three children. He graduated from high school in 1972 and reported that he received training in geriatric nursing in 1982, but this was not verified. The Defendant reported working for a moving company from 1983 to 1991, but this was unverified. The Defendant also worked for Brentwood Security from 1993 to 1994, and Integrity Security from 1994 to the time the incident occurred. The Defendant has an extensive history of criminal activity, including nine convictions for DUI, three convictions for driving with a suspended license, one conviction for driving with a revoked license and one conviction for simple assault. A number of other charges had been dismissed, retired, or the

disposition was unknown, and the Defendant was arrested several times for probation violations.

A sentencing hearing was conducted on December 18, 1996, and the arguments of counsel were considered. The trial judge applied the following three enhancement factors to all four convictions: (1) That the Defendant had a previous history of criminal convictions or criminal behavior; (8) that the Defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; and (15) that the Defendant abused a position of private trust. Tenn. Code Ann. § 40-35-114(1), (8), (15). The trial judge applied enhancement factor (7), that the offense was committed to gratify the Defendant's desire for pleasure or excitement, to the convictions for aggravated rape and attempted aggravated rape. Tenn. Code Ann. § 40-35-114(7). Finally, the trial judge found that the Defendant possessed a weapon during the commission of the offense, although she gave that factor no weight. Tenn. Code Ann. § 40-35-114(9). The trial court found no mitigating factors. After considering the appropriate sentencing considerations, the trial judge sentenced the Defendant to twenty-three years for the aggravated rape, ten years each for the aggravated sexual batteries, and ten years for the attempted aggravated rape³. Because it appears that the trial court adhered to the sentencing principles, we review the Defendant's sentences *de novo* with a presumption of correctness.

³ Aggravated rape is a Class A felony and for a Range I offender, carries a sentence of fifteen (15) to twenty-five (25) years. Aggravated sexual battery and attempted aggravated rape are Class B felonies and for a Range I offender, have a sentence range of eight (8) to twelve (12) years.

The Defendant first asserts that the trial court should not have applied enhancement factor (1), a history of criminal convictions, because the Defendant has only been convicted of misdemeanors and that this Court typically applies this factor when felony convictions are involved. The State counters that misdemeanor records have been sufficient to support this factor and we agree. See, e.g., State v. Carter, 908 S.W.2d 410, 413 (Tenn. Crim. App. 1995); State v. Ramsey, 903 S.W.2d 709, 714 (Tenn. Crim. App. 1995); State v. Keel, 882 S.W.2d 410, 419 (Tenn. Crim. App. 1994). We have found nothing that precludes application of this factor. Accordingly, we must also reject the Defendant's argument that a lack of felony convictions provides a mitigating factor in this case. See Tenn. Code Ann. § 40-35-113(13).

Next, the Defendant contends that the trial court erred in applying factor (15), that he abused a position of private trust. He notes that the perpetrators in cases where this factor has been applied are typically parents, babysitters, coaches, and others in similar relationships. Indeed, our supreme court has held that:

The determination of the existence of a position of trust does not depend on the length or formality of the relationship, but upon the nature of the relationship. Thus, the court should look to see whether the offender formally or informally stood in a relationship to the victim that promoted confidence, reliability, or faith. If the evidence supports that finding, then the court must determine whether the position occupied was abused by the commission of the offense.

State v. Kissinger, 922 S.W.2d 482, 488 (Tenn. 1996). The Defendant contends that he barely knew the victim and had only come to her building three or four times. He argues that his status as a fellow employee did not promote a relationship of "confidence, reliability or faith."

We disagree. Here, the Defendant and the victim worked late at night in state office buildings in downtown Nashville. The Defendant knew that the victim worked alone in the building and that the doors were kept locked. The Defendant came to her building to get coffee on three or four prior occasions without incident. No doubt, the Defendant's position as a fellow employee with "Integrity Security" was the factor that allowed him to gain access to the victim in the middle of the night. Furthermore, the Defendant used his relationship to the victim to perpetrate the crime. We find no error in applying this enhancement factor.

Finally, the Defendant claims that the trial court erred by applying factor (7) that the acts were committed to gratify his desire for pleasure or excitement. In State v. Adams, 864 S.W.2d 31, 34-35 (Tenn.1993), our supreme court rejected the proposition that, "as a matter of law, every rape is implicitly committed for the purpose of pleasure or excitement." The supreme court noted that not all such crimes are committed for pleasure, but rather may be motivated by factors such as brutality, revenge, punishment, or intimidation. Id.; State v. Hoyt, 928 S.W.2d 935, 949 (Tenn. Crim. App. 1995). In State v. Kissinger, 922 S.W.2d 482, 491 (Tenn. 1996), the supreme court added that the commission of a crime to gratify a desire for pleasure or excitement is not limited to proof of sexual desire or sexual pleasure. Thus, evidence of the achievement of sexual orgasm will not, by itself, prove factor (7), nor will the absence of orgasm negate such application. Id. The State must demonstrate that a defendant was motivated to commit a crime to gratify a desire for pleasure or excitement. Id. "The focus is the offender's motive, not the eventual result." Id. We note the instruction provided by our supreme court in this regard:

It applies anytime an offender commits an applicable offense to gratify the offender's desire for any pleasure or any excitement. While that pleasure or excitement may be of a sexual nature, it does not have to be. Therefore, an offender who is motivated to rape by his or her desire to overpower or brutalize, when that desire creates pleasure or excitement for the offender, may suffer a factor (7) sentence enhancement.

Kissinger, 922 S.W.2d at 490.

Here, the Defendant perpetrated a brutal rape upon the victim. The trial judge based the application of this factor on the victim's testimony that the Defendant kissed her lips, then licked her cheek and hand. She also noted that the Defendant claimed in his presentence report that he and the victim "fondled each other." The Defendant argues that the victim could not correctly remember where or if he licked her. The actions and statement of the Defendant suggest that his attack of the victim may have been, in part, motivated by a desire for sexual gratification. We cannot conclude that the trial court erred in applying this factor.

The Defendant proposes that we should find and apply several statutory mitigating factors not found by the trial court. First, he argues that he neither caused nor threatened serious bodily injury. Tenn. Code Ann. § 40-35-113(1). Yet, we have concluded that the Defendant did cause bodily injury. The Defendant has cited no case in which this factor was applied when bodily injury was involved. We decline to do so now. Likewise, we find nothing in the record which demonstrates that the Defendant committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct. Tenn. Code Ann. § 40-35-113(11). Here, the Defendant used his position to gain entry to the building, attacked the victim when she had

her back to him, and dragged her upstairs to complete the act. We cannot conclude that the trial court so erred.

The Defendant also argues that the trial court erred in imposing a partial consecutive sentence. The trial judge ordered three sentences to run concurrently and one ten-year sentence to run consecutively for an effective sentence of thirty-three years. The trial judge articulated on the record that she relied upon Tennessee Code Annotated section 40-35-115 (b)(2) and (b)(6) when she ordered consecutive sentences. It is clear from this record that the Defendant is an offender whose record of criminal activity is extensive and that the Defendant was being sentenced for an offense committed while on probation. Tenn. Code Ann. § 40-35-115(b)(2) and (6); see State v. Tuttle, 914 S.W.2d 926, 933 (Tenn. Crim. App. 1995). These factors authorize the trial court to consider consecutive sentences pursuant to Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure. When a defendant falls within the statutory classifications for eligibility to be considered for consecutive sentencing, the only remaining considerations are whether (1) the sentences are necessary in order to protect the public from further criminal conduct by the defendant and (2) "the terms are reasonably related to the severity of the offenses." State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995).

The trial court clearly had a basis for concluding that consecutive sentences are necessary to protect the public. These offenses were committed while the defendant was on probation, thus, he has demonstrated a lack of amenability for rehabilitation. It is also of grave concern that the Defendant used his position as a security officer to perpetrate a crime on another employee. We

are frankly surprised that the Defendant could have even obtained such employment with his criminal record. Due to his lengthy record and his failure to demonstrate any rehabilitative qualities, we conclude that the terms are reasonably related to the severity of the offenses.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

JOE G. RILEY, JUDGE