

IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE

AT NASHVILLE

JULY SESSION, 1999

FILED

November 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,
NO.

)

C.C.A.

00182 CCA R3 CD
Appellee,

)

M1998

V.

)

DAVIDSON COUNTY

)

HON. SETH NORMAN, JUDGE

JAMES GORDON FREEMAN,

)

(ESPECIALLY AGGRAVATED
KIDNAPPING; THEFT)

Appellant.

)

)

FOR THE APPELLANT:

FOR THE APPELLEE:

LARRY B. HOOVER
500 Church Street, Suite 500
Nashville, TN 37219

PAUL G. SUMMERS
Attorney General & Reporter

LUCIAN D. GEISE
Assistant Attorney General
2nd Floor, Cordell Hull Building
425 Fifth Avenue North
Nashville, TN 37243

VICTOR S. JOHNSON, III
District Attorney General

JOHN ZIMMERMANN
Assistant District Attorney General

CHARLES CARPENTER
Assistant District Attorney General
Washington Square, Suite 500
222 2nd Avenue North
Nashville, TN 37201-1649

OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

James Gordon Freeman appeals as of right from his conviction in Davidson County Criminal Court. Following a jury trial, Defendant was convicted on one count

of theft, more than \$1,000 in value, and one count of especially aggravated kidnapping. Defendant was sentenced to four (4) years and thirty-four years (34), respectively, with the sentences to run consecutively. Defendant argues that:

1. The evidence is insufficient to support his conviction of especially aggravated kidnapping.
2. The trial court erred when it did not grant Defendant's State v. Anthony motion for a verdict of acquittal as to the especially aggravated kidnapping charge.
3. The trial court erred when it allowed the child victim of the kidnapping to testify.
4. The trial court erred when it sentenced the Defendant to 34 years for the especially aggravated kidnapping, and determined that his sentence would run consecutively with the sentence imposed for the theft.

After a thorough review of the record, we find no error, and affirm the judgment of the trial court.

I. Facts

On New Year's Eve 1996 defendant James Freeman wrapped-up three days of crack cocaine use by consuming over a fifth of Cognac at a New Year's party. Early in the morning of January 1, 1997, he went to the Par Mart convenience store at the intersection of 10th Street and Shelby Street, in East Nashville, and badgered the clerk, George Blackwell, for free beer and cigarettes. Blackwell, who knew Defendant because he was a friend of Defendant's wife, refused to give Defendant any free goods. Defendant continued to harass Blackwell, and Blackwell threatened to call the police if Defendant did not leave. Defendant continued to hang around the store, and the store's surveillance tape shows Defendant walking in and out of the main door repeatedly, talking to customers and Blackwell. Eventually, Blackwell called the police and asked to have Defendant removed.

In the meantime, Tina Trevino, an East Nashville resident, stopped at the Par Mart store just before 3:00 AM that morning. She had celebrated the New Year's holiday at her parents' home, and she was returning to her own home with her son, Horatio Lee Trevino. She pulled her Ford Probe in to the Par Mart to get some

snacks for herself and Lee, and parked her car a few feet from the store's entry, immediately adjacent to the curb abutting the front of the store. Ms. Trevino left her car running, so as to keep the heat on for Lee, and locked her door. Lee remained in the car, in the front seat. When Trevino was in the store, Defendant walked around her car several times. When Trevino was at the cash register, ready to pay, Defendant got in her car and drove away. When he did so, Lee Trevino was still in the car.

Blackwell called 911 and informed the police of the theft, and the fact that Lee was in the car. Unbeknownst to Blackwell and Trevino, Defendant let Lee out of the car approximately three blocks away, near 13th Street and Shelby Street. Defendant then ran the car into an obstacle, and drove away. Lee was noticed by a local resident, who took Lee inside his home and called police. Lee was then returned by patrol car to his mother some time between 3:15 and 3:30 AM. Shortly thereafter, Defendant crashed the car on another street in East Nashville. He set the back seat of the car on fire to hide his fingerprints, took several video games from the back seat of the car, and abandoned the vehicle. He was arrested later that morning at his wife's residence on 13th Street South.

Defendant was indicted on April 15, 1997, on one count of theft, more than \$1,000, see Tenn. Code Ann. §§ 39-14-103, 105, and one count of especially aggravated kidnapping, see id. § 39-13-305. After a jury convicted him of both counts, the trial court sentenced Defendant on July 15, 1998. Defendant was sentenced to four (4) years for the theft, and thirty-four (34) years for the aggravated kidnapping, with the sentences to run consecutively.

Defendant filed a motion for a new trial, alleging (1) the evidence was insufficient to support the kidnapping conviction; (2) a judgment of acquittal should have been entered on the kidnapping conviction under State v. Anthony; (3) the child victim of the kidnapping should not have been allowed to testify; (4) the jury should

have been instructed as to the range of punishment for the offenses; (5) the court erred when it sentenced the defendant to thirty-four years (34) at 100% for the kidnapping conviction; and (6) the court erred when it determined that the sentences would run consecutively. The trial court denied the motion.

The only proof that the defense offered at trial was Defendant's testimony. Defendant conceded that he stole Tina Trevino's vehicle. However, Defendant denied knowing that Lee Trevino was in the car when Defendant entered the car and drove away from the Par Mart convenience store. Defendant claimed that he did not know that Lee was in the car until he had exited the Par Mart parking lot.

II. Analysis

A.

Defendant first argues that the evidence is insufficient to support his conviction of especially aggravated kidnapping. Specifically, Defendant argues that there is insufficient evidence to prove that he knowingly interfered with Lee Trevino's liberty. We disagree and find there is sufficient evidence to support Defendant's conviction.

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. State v. Shepherd, 902 S.W.2d 895, 903 (Tenn. 1995) (citing Jackson v. Virginia, 443 U.S. 307, 322-25 (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 reasonable 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 jury verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

A crime may be established by circumstantial evidence alone. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). However, before an accused may be convicted of a criminal offense based only on circumstantial evidence, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). In other words, a "web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inferences save the guilt of the defendant beyond a reasonable doubt." Id. at 613.

Especially aggravated kidnapping occurs when there is false imprisonment "[w]here the victim was under the age of thirteen (13) at the time of the removal or confinement." Tenn. Code. Ann. § 39-13-306 (1997). "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." Id. § 39-13-302 (1997).

[A person] acts knowingly with respect to conduct or to circumstances surrounding conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to the result of the person's conduct when the person is aware that the conduct is reasonably certain to cause a result.

Id. § 39-11-302(b) (1997).

Defendant contends that the evidence is insufficient to show that he “knowingly” interfered with Lee Trevino’s liberty, and directs our attention to this Court’s decision in State v. Kenneth J. New, C.C.A. No. 03C01-9709-CR-00393, 1999 WL 166019 (Sullivan County) (Tenn. Crim. App., Knoxville, March 11, 1999) (no Rule 11 application filed). Defendant is correct in noting that the facts in New are strikingly similar to those in the instant matter. Defendant New frequented a convenience store known as the Minute Market, in Kingsport, Tennessee. Id. at *2. One night, when New was extremely intoxicated, he stole an automobile from the parking lot. Id. When New did so, there were two children in the car—Alicia McCrary, who was in the front passenger seat, and her brother Jordan, an infant, who was in a car seat immediately behind the driver’s seat. Id. New stopped and let Alicia out of the car after approximately 1 minute. Id. Jordan remained in the car until New crashed the car twenty-five to thirty miles from the market. Id.

The jury convicted New on one count of especially aggravated kidnapping—for Jordan—and acquitted him of the kidnapping charge relating to Alicia. Id. at *3. This Court reversed New’s kidnapping conviction, holding that there was insufficient evidence to show that New acted knowingly as to the presence of the infant in the back seat prior to the accident. Id. In so holding, this Court specifically noted:

Alicia McCrary, who was in the car when it was stolen, did not testify. The Defendant did not give a statement other than the one in which he admitted his intoxication at the time he stole the car. Defendant denied any knowledge of the events of that night other than a faint recollection of the crash site. There was no testimony of anyone who saw Defendant enter the car that he looked into the car before he got inside.

Id.

Although the facts here are similar to those in New, we believe that there is sufficient evidence here to uphold Defendant’s conviction. First, unlike New, Defendant testified on his own behalf. Defendant recalled the night in question,

described his intent to take the vehicle, and testified that although he did not see Lee in the car, he did look in the vehicle to see if anyone was in the car. Second, Lee Trevino testified that he was in the front seat of the car when Defendant entered the car, and that Defendant told Lee to get in the back seat. Third, the videotape from the convenience store surveillance camera clearly shows Defendant standing adjacent to Trevino's vehicle a short while before Defendant absconded with it.

Given this evidence, it is possible that a rational trier of fact could have found, beyond a reasonable doubt, that Defendant took the car with the knowledge that Lee was in the car. Even if Defendant did not know Lee was in the car before Defendant entered the car, Lee's testimony shows that Defendant was aware of Lee's presence immediately after entering the car. Although Lee's testimony was not consistent with Defendant's on this point, a jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. Grace, 493 S.W.2d at 476. As a result, the evidence is sufficient to uphold Defendant's conviction.

B.

Defendant next argues that the trial court should have granted his motion for acquittal because his conviction of both theft and especially aggravated kidnapping violates due process under the rationale of State v. Anthony. 817 S.W.2d 299 (Tenn. 1991). We disagree.

The court in Anthony addressed two cases in which each defendant was convicted of both armed robbery and aggravated kidnapping for acts committed during a single criminal episode. See id. at 301-02. The court held that the kidnapping convictions could not stand because the detention of the victims during each robbery was "essentially incidental" to the robbery, and not significant enough to warrant an independent prosecution for kidnapping. Id. at 306-07.

Subsequent courts have applied Anthony to other combinations of crimes. See State v. Barney, 986 S.W.2d 545, 547-49 (Tenn. 1999) (aggravated sexual battery and rape of a child); State v. Gregory, 862 S.W.2d 574, 579 (Tenn. Crim. App. 1993) (rape, murder, and aggravated kidnapping); State v. Roberts, 943 S.W.2d 403, 405-07 (Tenn. Crim. App. 1996) (burglary and attempted theft). Accordingly, the rationale set forth in Anthony may indeed be applicable here. The test used in Anthony, however, is not controlling. Anthony attempted to delineate exactly when criminal conduct, itself an element of or inherently part of a particular crime, should also be prosecuted as a separate crime. See 817 S.W.2d at 306-07. See also State v. Dixon, 957 S.W.2d 532, 533-536 (Tenn. 1997) (holding that dragging victim to unlit vacant lot from sidewalk was more restraint than that necessary to execute aggravated assault and attempted sexual battery, and thus sufficient to support aggravated kidnapping conviction). Here, however, Defendant has been convicted of theft and especially aggravated kidnapping.

The restraint or movement of persons that is prohibited under the kidnapping statute is pointedly dissimilar to the theft crime for which Defendant was convicted. Theft of property is defined in Tennessee Code Annotated as follows: “A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” Tenn. Code. Ann. § 39-14-103 (1997). Defendant was convicted of theft of property with a value of more than \$1,000. See id. §§ 103, 105. The restraint of persons is not an element of, nor is it inherently part of theft of this nature. People may be deprived of their property by another when that property is out of the owner’s presence, and in the total absence of any persons other than the thief. When people are present, a thief may still effectively remove a person’s property without restraining or moving any persons in the process.

Accordingly, the initial focus should be on the relationship of the theft to the kidnapping, and the following test, noted with approval in Anthony, is useful:

If a taking or a confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:

- (a) Must not be slight, inconsequential and merely incidental to the other crime;
- (b) Must not be of the kind inherent in the nature of the other crime; and
- (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Anthony, 817 S.W.2d at 306 (quoting Faison v. State, 426 So.2d 963, 965 (Fla. 1983)). See also State v. Darrell Wentzel, C.C.A. No. 01C01-9705-CC-00193, 1998 WL 842057, at *7-8 (Williamson County) (Tenn. Crim. App., Nashville, Dec. 7, 1998) perm. to appeal denied (Tenn. 1999); State v. Michael K. Christian. Jr., C.C.A. No. 03C01-9609-CR-00336, 1998 WL 125562, at *8-9 (Sullivan County) (Tenn. Crim. App., Knoxville, March 23, 1998) perm. to appeal denied (Tenn. 1999).

Here, the trial court did not state its reasons for denying Defendant's motion for acquittal. However, when the Faison test, as quoted in Anthony, is applied, it is clear that Defendant's kidnapping conviction is not "essentially incidental" to the theft conviction, and thus warrants independent prosecution. First, Defendant's movement of Lee Trevino was not slight or inconsequential. Defendant correctly points out that Lee was only taken a few blocks before Defendant let him out of the car. However, Lee was just five (5) years old at the time of the incident, and Defendant let him out on the street just after 3:00 AM. Given Lee's age, the time of day, and the location of the drop-off, Defendant's movement of Lee was not slight or inconsequential. As discussed above, the restraint or movement of persons is not inherent in the theft crime that resulted in Defendant's conviction.

Finally, Defendant's movement of Lee Trevino does have significance independent of the theft because leaving Lee in the car made it much easier for Defendant to steal the car. Had Defendant entered the car and taken the time to remove Lee there would have been a greater chance that Defendant would have

been caught. By leaving Lee in the car, Defendant was able to simply get in the car and drive away.

In summary, Defendant's kidnapping of Lee Trevino was not incidental to the theft of the car. Defendant is not entitled to relief on this issue.

C.

Defendant next argues that the trial court erred by allowing Lee Trevino to testify. This issue is waived because Defendant failed to make a contemporaneous objection at trial to Lee's competency as a witness. See Tenn.R.App.P. 36(a); Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988); State v. Killebrew, 760 S.W.2d 228 (Tenn. Crim. App. 1988).

Waiver notwithstanding, this issue is without merit. Although Defendant's argument is somewhat ambiguous, the thrust is that Lee did not testify from personal knowledge, but rather testified as coached to do so by his parents. In Tennessee, all persons, including children, are presumed competent to testify unless otherwise disqualified by the rules of evidence. Tenn.R.Evid. 601. Generally, a lay witness is subject to two requirements: he must understand his oath to tell the truth, and testify from personal knowledge. Tenn.R.Evid. 602, 603.

The determination of the competency of a minor witness is within the discretion of the trial court, and will not be overturned absent a showing of abuse of that authority. State v. Howard, 926 S.W.2d 579, 584 (Tenn. Crim. App. 1996). We do not think the trial judge abused his discretion in allowing Lee Trevino to testify. Lee testified from personal knowledge—he was present in the car when Defendant drove away from the Par Mart. Although Lee admitted on cross examination that his mother talked with him about the operation of the locking mechanism of the car doors, Lee denied that his mother had talked with him about the events surrounding

the theft of the car. It was for the jury to determine the weight to be accorded to his testimony.

D.

Defendant next challenges his sentence for his conviction of especially aggravated kidnapping. Specifically, Defendant argues that the trial court did not properly consider the mitigating fact that Lee Trevino was released unharmed, and that as a result Defendant is entitled to a shorter sentence. Defendant also challenges trial court's determination that his sentences will run consecutively, for an effective sentence of thirty-eight (38) years. We find no error and affirm the sentences imposed by the trial court.

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) (1997). 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, 210 (1997). 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 made findings of fact that 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).

Here, the trial court sentenced Defendant to four (4) years at 35% for the theft count based on his status as a multiple offender. On the kidnapping count Defendant was sentenced to thirty-four (34) years at 100%. The trial court determined that the sentences would run consecutively.

The trial court did not, however, follow the required statutory procedure when it sentenced Defendant. The record of the sentencing hearing shows that the trial court found Defendant to be a Range II multiple offender, and that three enhancing factors were present. The trial court also found one mitigating factor to be present. The record does not, however, show which of these factors that the trial court considered to be important in determining Defendant's sentence for the kidnapping. Moreover, the record contains no findings of fact, nor does it discuss any factors that ordinarily merit serious consideration at sentencing, such as rehabilitation potential, or prior criminal history. The trial judge did not explain why Defendant's sentences were to run consecutively. Finally, as to the kidnapping charge, the trial judge sentenced Defendant as a Range II offender, to serve 85% of his sentence, in the sentencing hearing, but the judgment entered provides that Defendant is to serve 100% of his sentence because he is a violent offender.

Because the trial court did not make an affirmative showing in the record that it considered the appropriate sentencing principles, as well as the relevant facts and circumstances, the determinations of the trial court are not entitled to a presumption of correctness, and our review is de novo.

The presentence report shows that Defendant was 30 years old at the time he was sentenced. He has several brothers and sisters in the Nashville area, and is married but separated from his wife. At the time of his arrest for the crimes at issue he was living on the street. Defendant's formal education ended in the 9th grade. The presentence report also shows that Defendant used cocaine and alcohol on a daily basis for three years prior to his arrest for the crimes in this case, and Defendant testified that at the time of these crimes he was drunk and coming off a three day cocaine spree. Defendant has an extensive criminal history, which started when he was 17 years old. The presentence report states that he did not report any employment for the five years prior to the criminal episode at issue. At the time of these crimes he was on parole for a 1995 felony conviction for introducing a controlled substance into a penal institution.

Although the trial court did not follow the appropriate sentencing procedure, we are of the opinion that the trial court did not err in sentencing the Defendant, and affirm the sentence for especially aggravated kidnapping, as well as the determination that the sentences run consecutively. To begin, the trial court correctly determined that Defendant is subject to enhanced punishment, as a multiple offender pursuant to Tennessee Code Annotated § 40-35-106, for the especially aggravated kidnapping charge. Defendant has three prior felony convictions: grand larceny (class D); second degree burglary (class C), and introducing a controlled substance into a penal institution (class C). Section 40-35-106 provides that a defendant convicted of a felony is subject to enhanced punishment as a multiple offender if he has two to four prior felony convictions, and those convictions are the same class as, any class higher, or within the two classes below the felony for which the defendant has been convicted. See Tenn. Code Ann. § 40-35-106 (1997). Here, Defendant has been convicted of a class A felony, and thus the class C prior convictions operate to place Defendant within the multiple offender category.

Especially aggravated kidnapping is a class A felony, and the sentencing range for a multiple offender (Range II) is 25 to 40 years. Id. § 40-35-112. For a class A felony, a court must start at the midpoint of the sentencing range, increase the sentence with the applicable enhancement factors (if any), and then decrease the sentence with any appropriate mitigating factors. See id. § 40-35-210(c), (e); State v. Chance, 952 S.W.2d 848, 850-51 (Tenn. Crim. App. 1997). Persons convicted of especially aggravated kidnapping must serve 100% of their sentence because they are deemed violent offenders, and thus are removed from the sentencing scheme for the purposes of determining the percentage of the sentence that will be served. See Tenn. Code Ann. § 40-35-501(f)(2) (1997).

Here, the trial court was correct in determining that three enhancement factors are present. First, the presentence report chronicles Defendant's extensive criminal history. See id. § 40-35-114(1). Second, the presentence report shows that Defendant has a history of noncompliance with conditions placed on his release on probation or parole. See id. § 114(8). Third, the instant criminal incident occurred while Defendant was on parole from another felony. See id. § 114(13). As to mitigating factors, the trial court was also correct in noting Defendant's voluntary release of Lee Trevino, unharmed, constituted a mitigating factor. See id. § 39-13-305(2).

The trial court sentenced Defendant to 34 years for the crime of especially aggravated kidnapping. We think this sentence is appropriate. The trial court did not err by beginning at the midpoint of the range (32.5 years). See id. § 40-35-210(c), (e); Chance, 952 S.W.2d at 850-51. The increase over the midpoint is warranted based on the enhancement factors discussed above. Although Defendant did release Lee Trevino unharmed, Defendant left him on the street, around 3:00 AM, in a part of town that Defendant acknowledged "ain't no—really, no place safe no more." As a result, the release of Lee is not accorded the weight that it might

otherwise, and as a mitigating factor it is clearly off-set and out-weighted by Defendant's criminal history and non-compliance with conditional release terms.

Finally, the trial court did not err when it determined that Defendant's sentences would run consecutively. The trial judge did not explain why he ruled as such, but the presentence report does show Defendant's extensive criminal history. Over the course of the twelve years before his arrest for these crimes Defendant was arrested approximately twenty-five times, resulting in his conviction of three felonies, and eleven misdemeanors. As a result, the evidence clearly supports the trial court's determination that consecutive sentences are warranted. See Tenn. Code Ann. § 40-35-115(b)(2) (1997).

In summary, in conducting our de novo review of Defendant's sentence for especially aggravated kidnapping, we find no error, and affirm the trial court's sentence of thirty-four (34) years at 100%, to be served consecutively with Defendant's sentence for theft.

III. Conclusion

For the forgoing reasons we affirm Defendant's convictions for theft of property, more than \$1,000 in value, and especially aggravated kidnapping. We also affirm the trial court's sentence for especially aggravated kidnapping, and the trial court's order that the sentences be served consecutively.

THOMAS T. WOODALL, Judge

CONCUR:

JERRY L. SMITH, Judge

NORMA McGEE OGLE, Judge