

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 23, 2013 Session

STATE OF TENNESSEE v. BRUCE ANTON PARKS, JR.

**Direct Appeal from the Criminal Court for Bradley County
No. 11-CR-101 Amy A. Reedy, Judge**

No. E2012-02621-CCA-R3-CD - Filed September 20, 2013

A Bradley County Criminal Court Jury convicted the appellant, Bruce Anton Parks, Jr., of aggravated rape and aggravated robbery, and the trial court sentenced him to twenty-five years and six years, respectively, to be served consecutively. On appeal, the appellant contends that the evidence is insufficient to support the convictions, that the trial court committed plain error by failing to declare a mistrial when the State questioned a police officer about whether anyone had provided an alibi for the appellant, and that his effective thirty-one-year sentence is excessive. Based upon the oral arguments, the record, and the parties' briefs, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are
Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and JEFFREY S. BIVINS, JJ., joined.

Barbara W. Clark (at trial and on appeal), Knoxville, Tennessee, and Richard Hughes (at trial), Cleveland, Tennessee, for the appellant, Bruce Anton Parks, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Robert Steven Bebb, District Attorney General; and Stephen Hatchett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The victim testified that October 22, 2010, was her birthday. That night, she planned to go out with her best friend but felt sick, so she decided to lie on her bed for a while. The

victim said she fell asleep but woke, heard a “distinct sound,” and realized someone was in her apartment. Her bedroom was dark, so she got up and turned on the light. She did not know if her boyfriend was in the apartment and called out, “Hello.” She stated that she heard someone run up the stairs and that a masked man was “staring [her] in the face.” He had what appeared to be a gun pointed at her and told her, ““Shut up, b[****], or I will kill you.”” The victim said that she recognized the man’s voice as that of the appellant and that he was wearing dirty socks over his hands. The appellant punched her, and she fell back onto the bed. The appellant tried to roll the victim onto her stomach, pulled her underwear, and put his finger inside her vagina. The victim started screaming, hoping that her next door neighbor would hear her, and struggled with the appellant. She said that he kept telling her to shut up and that he beat her “continuously.” At some point, one of the socks came off the appellant’s hand, and the victim saw his fist. She did not see a tattoo. She said that the appellant stood up to pull down his pants and that she ran downstairs. She unlocked the front door and ran to her neighbor’s apartment. Her neighbor telephoned the police, and an ambulance took her to the hospital. The victim had two broken bones in her nose, and she had bruises on her legs, elbow, and back. Evidence was not collected for a rape kit.

The victim testified that during the attack, the appellant put his finger in her vagina twice. Prior to the attack, her apartment doors had been locked, and her PlayStation had been plugged in and on the television stand. Afterward, her PlayStation was unplugged and on the floor. The victim said that the appellant was an acquaintance and that she knew his ex-girlfriend and mother. The victim considered the appellant’s mother and ex-girlfriend to be her friends and would speak to them if she saw them out. She said she had “been around” the appellant seven or eight times prior to the attack and that she did not consider him a stranger. Two days before the attack, the victim saw the appellant at the gas station next to her apartment. They spoke, and she asked him about his ex-girlfriend, mother, and children. The victim said she had no doubt the appellant was her attacker.

On cross-examination, the victim testified that at the time of the attack, she was wearing only her underwear. The victim had a live-in boyfriend, but he was not home. Defense counsel asked the victim if the sock came off her attacker’s right or left hand, and the victim said she thought it came off his left hand. During the attack, he hit her face and head with the pistol. The victim held up her arms to try to block him, but he was much stronger, and she received cuts on her hands. He was wearing a black ski mask, and she could see only his eyes and the bridge of his nose. She said that prior to talking with the appellant at the gas station, she had not spoken with him for two or three years.

Sergeant Mark Darnell of the Cleveland Police Department (CPD) testified that he responded to the victim’s residence and saw “jimmy marks” on the back door. The marks indicated that someone had used an object, such as a screwdriver or pry bar, to “jimmy” the

door open. Officer Darnell photographed and collected a plastic pistol and a sock that were on the floor in the bedroom.

On cross-examination, Sergeant Darnell testified that he was unable to determine how the victim's attacker entered her apartment. He requested that the victim's PlayStation be processed for fingerprints.

Detective Steve Ross of the CPD testified that shortly before 1:00 a.m. on October 23, 2010, he went to the hospital emergency room and photographed the victim's injuries. The victim told Detective Ross that the appellant was responsible. Later, Detective Ross spoke with the appellant, and the appellant gave permission for the police to collect a buccal swab. Detective Ross stated that the victim lived in an apartment on Kelly Street, that the appellant lived on Harper Street, and that the appellant's residence was about 100 to 150 yards from the victim's residence. No one provided an alibi for the appellant.

On cross-examination, Detective Ross testified that the victim was "very adamant" that the appellant was her attacker because she recognized his voice. On October 25, 2010, the appellant voluntarily came to the police department, waived his Miranda rights, and spoke with the detective. The appellant told Detective Ross that he was not guilty of the crimes. Detective Ross did not recall seeing a tattoo on the appellant's left hand and did not remember if he inspected the appellant for injuries. The victim had claimed that her attacker was wearing a ski mask, a dark sweat shirt, and dark sweat pants, but Detective Ross never searched the appellant's home for those items. The victim also told Detective Ross that her attacker said "b****" several times. However, Detective Ross did not have the appellant participate in a voice lineup in order to determine whether the victim could identify his voice.

On redirect examination, Detective Ross testified that the appellant never claimed he had an alibi. Detective Ross saw no reason to conduct a lineup because the victim was sure the appellant committed the crimes.

Officer Shane Clark of the CPD testified that three or four days after the crimes, he photographed bruises on the victim. He also collected the appellant's buccal swab.

Tracy Lee Gober, the victim's next-door neighbor, testified that late on the night of October 22 or in the early morning hours of October 23, 2010, the victim came to his apartment "seeing safe haven." She was wearing only panties, and her hair was in disarray. The victim was frantic and upset and wanted to get inside Gober's apartment with the door shut behind her. Gober called 911, and handed the phone to the victim. Gober said that about 10:30 or 10:40 p.m. on October 22, someone had "jiggled" his door knob, knocked on his door, and rung his doorbell. However, when Gober answered the door, no one was there.

On cross-examination, Gober testified that he gave a written statement to police shortly after the victim's attack. He acknowledged that according to his statement, he heard stomping and "a female voice give a slight squeal" in the victim's apartment. Gober said in his statement that he "stood up to see if [his] assistance was needed but everything was silent." Gober did not hear a male's voice. On redirect examination, Gober testified that he heard the noises in the victim's apartment about six minutes before the victim ran to his apartment for help.

Jennifer Shipman, a special agent forensic scientist with the Tennessee Bureau of Investigation (TBI), testified as an expert in serology and DNA analysis that she obtained human DNA from the pistol and the sock recovered from the victim's apartment and compared the DNA to the DNA collected from the appellant's buccal swab. The DNA from the pistol and the sock each contained a mixture of DNA from at least four individuals, and Agent Shipman could not exclude the appellant as a contributor. She explained, "I cannot say conclusively that he is in [those mixtures] of DNA but I also do not see anything that excludes the possibility of him being part of [those mixtures]." At the conclusion of Agent Shipman's testimony, the State rested its case.

Officer Travis Lee Graig of the CPD testified for the appellant that he responded to the victim's 911 call and was the first officer on the scene. Officer Graig spoke with the victim and prepared a report in his patrol car from her information. The victim gave a description of her attacker. However, Officer Graig's report did not say anything about the victim's knowing her attacker's identity.

On cross-examination, Officer Graig acknowledged that the victim told him the identity of her attacker, that he told her to give the information to Detective Ross, and that he did not put the information in his report. On redirect examination, Officer Graig testified that he saw Detective Ross at the hospital and that he told Detective Ross about the victim's identification of the appellant. Officer Graig acknowledged that in his report, he listed the identity of the attacker as "unknown."

Leslie Benton, the appellant's mother, testified that she knew of the victim but did not know the victim personally. The victim had a relationship with Benton's cousin, Montez Morgan. Morgan had lived with Benton, and the victim would pick up Morgan from Benton's home. However, the victim and Benton were not friends. Benton said the appellant had a tattoo on the front part of his left hand.

At the conclusion of Benton's testimony, the defense rested its case, and the jury convicted the appellant as charged of aggravated rape and aggravated burglary. After a sentencing hearing, the trial court sentenced him to twenty-five years for the aggravated rape

conviction, a Class A felony, and six years for the aggravated burglary conviction, a Class B felony. The trial court ordered that he serve the sentences consecutively.

II. Analysis

A. Sufficiency of the Evidence

The appellant claims that the evidence is insufficient to support the convictions and that the trial court should have granted his motion for judgment of acquittal because the State failed to prove beyond a reasonable doubt that he committed the crimes. Specifically, he argues that the State failed to prove that he was the victim's attacker because DNA analysis did not show he committed the crimes, no fingerprint evidence was obtained to link him to the crimes, and the State failed to provide evidence to corroborate the victim's claim that she recognized her attacker's voice as that of the appellant. Regarding the aggravated burglary conviction, the appellant also claims that the State failed to prove that the intruder intended to commit theft. The State contends that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing 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); Tenn. R. App. P. 13(e). 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. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

A guilty verdict can be based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Hall, 976 S.W.2d 121, 140 (Tenn. 1998). "The jury decides the weight to be given to circumstantial evidence, and '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" State v. Rice, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting State v. Marable, 313 S.W.2d 451, 457 (Tenn. 1958)). "The standard of review 'is the same whether the conviction is based

upon direct or circumstantial evidence.” State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009)). “Moreover, “[t]he standard by which the trial court determines a motion for judgment of acquittal at the end of all the proof is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction.” State v. Thompson, 88 S.W.3d 611, 614-15 (Tenn. Crim. App. 2000).

Regarding the identity of the victim’s attacker, the victim testified that she spoke with the appellant two days before the crimes, that she had spoken with him seven or eight times previously, and that she immediately recognized his voice during the attack. The victim identified the appellant to the first officer on the scene and Detective Ross at the hospital. Detective Ross testified that the victim was “very adamant” that the appellant had committed the crimes. Defense counsel cross-examined the State’s witnesses about the victim’s identification of the appellant, and the jury obviously accredited their testimony. Although no forensic evidence directly linked the appellant to the crimes, Agent Shipman’s DNA analysis could not exclude him as the perpetrator. Therefore, taken in the light most favorable to the State, the evidence is sufficient to support the convictions.

Regarding the appellant’s claim that the State failed to show the intruder intended to commit theft, aggravated burglary is defined as burglary of a habitation. Tenn. Code Ann. § 39-14-403(a). Relevant to this case, burglary occurs when, without the effective consent of the property owner, the person enters the habitation with intent to commit theft. Tenn. Code Ann. § 39-14-402(a)(1).

Turning to the instant case, the victim testified that she fell asleep but woke, heard a “distinct sound,” and realized someone was in her apartment. The victim called out “hello,” and a man, who had been downstairs, ran upstairs and pointed a gun at her. After the attack, the victim noticed that her PlayStation had been moved from the television stand to the floor and was unplugged. Prior to the attack, the PlayStation had been on the stand and plugged in. Taken in the light most favorable to the State, the jury could have reasonably concluded that the appellant entered the victim’s apartment, unplugged the PlayStation and removed it from the television stand with the intent of taking it, ran upstairs and attacked the victim when she called out, and fled the apartment without taking the PlayStation when the victim escaped from him. Therefore, the evidence is sufficient to support the appellant’s conviction for aggravated burglary.

B. Mistrial

Next, the appellant contends that the trial court committed plain error by failing to declare a mistrial when the State questioned a police officer about whether anyone had

provided an alibi for the appellant. However, the appellant failed to raise this issue in his motion for new trial, his amended motion for new trial, or at the hearing on the motion for new trial. Rule 3(e), Tennessee Rules of Appellate Procedure, expressly cautions that

no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

In other words, the failure to raise an issue of error, other than sufficiency of the evidence or sentencing, in a motion for a new trial waives that issue for purposes of appellate review. Therefore, the appellant has waived this issue.

C. Excessive Sentencing

Finally, the appellant contends that his sentence is excessive. The State claims that the trial court properly sentenced the appellant. We agree with the State.

At the sentencing hearing, the appellant read a statement in his own behalf. In the statement, he said that the jury was misled by the DNA evidence and that his life had not been the same since the trial. He said that he had lost everything and that he had “nothing but respect for women.” Upon being questioned by defense counsel, the appellant testified that he was disappointed the jury found him guilty in only fifteen minutes. The appellant acknowledged that he had a prior aggravated burglary conviction but said that he was “not this person this DA is trying to make me out to be.” He said that he was kind-hearted and loving and that he had a very good relationship with his fiancé. He said that he was raised by his mother, who was a single parent, and that she raised him to respect women, “be a man,” and take responsibility for his actions. He acknowledged that he was an anti-social person when he was younger but said that he “grew out of it.” The appellant graduated from high school with a special education degree. He said that he was diagnosed with attention deficit hyperactivity disorder (ADHD), had “a problem with functioning,” and began receiving social security disability payments. He said that he had three children and was active in their lives until he was incarcerated.

On cross-examination, the appellant testified that he pled guilty to aggravated burglary and felony theft when he was young. He acknowledged that he was sentenced to probation and community corrections, that he violated both, and that he went to prison. He also

acknowledged that he had been arrested multiple times for domestic violence and numerous other offenses.

Leslie Benton, the appellant's mother, testified that one of her nieces dropped the appellant when he was a child and "split his head wide open." She said she thought his injury resulted in the mental problems he still experienced. A doctor diagnosed him with ADHD, and he began receiving social security benefits when he was four years old. The appellant was in special education classes throughout school because he was a slow learner and had a speech problem. He also had behavior problems and ended up in juvenile court. However, Benton said that he was a very loving person and that children loved him. She said the appellant had never been able to maintain employment because he was not able to stay focused on one task. She acknowledged that the appellant had a prior criminal record but said that "half the stuff, domestic violence and all that stuff, that's not true. I mean he's not a monster that everybody is portraying him to be here. He's not." She said she thought the appellant could be rehabilitated "for the simple [fact] he has children, he has children that's growing up and he don't want his children to be in the same situation he is in."

On cross-examination, Benton testified that one of the people who alleged domestic violence by the appellant was the mother of his children and that "she would tell you she only done it out of anger." Benton said that the police did not like the appellant and that they "would rather see him where he is now." She said that the appellant was supposed to pay for his actions but that "whatever time you all was trying to give him is not fair."

Upon questioning by the court, Benton testified that the appellant had a seven-year-old son who needed him and a little girl he had not yet seen. When asked if the appellant had ever paid child support, Benton said that the appellant took care of his children and that his children did not need for anything.

The State submitted the appellant's presentence report into evidence. According to the report, the then twenty-five-year-old appellant received a diploma from Walker Valley High School in 2005. In the report, the appellant stated that during his ninth grade year, he was sent to an alternative school due to his unruly conduct. He then was placed in the Tennessee Respite Coalition. Subsequently, he went to live in a group home before he returned to live with his mother. The appellant said that he was diagnosed with ADHD as a young child but had no complications from the disorder as an adult. According to the report, the appellant had a psychological evaluation on May 11, 2010, and was diagnosed with mild mental retardation, antisocial personality disorder, depression, paranoia, and anxiety. The report shows that the appellant has worked for Burger King, Wendy's, and Mr. Gatti's Pizza and that he has four prior convictions for driving on a suspended license, two convictions for misdemeanor assault, two convictions for misdemeanor aggravated criminal

trespass, and misdemeanor convictions for reckless endangerment and disorderly conduct. The State also introduced into evidence two judgments of conviction, showing that the appellant has a 2005 conviction for aggravated burglary and a 2007 conviction for felony theft.

The court found that the following enhancement factors applied to the appellant's sentences: (1), that the "defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range"; (8), that "the defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community"; (10), that the "defendant had no hesitation about committing a crime when the risk to human life was high"; and (13), that at the time the felony was committed, the appellant had been released on probation. See Tenn. Code Ann. § 40-35-114(1), (8), (10), (13)(C). The court applied no mitigating factors and sentenced him as a Range I, violent offender to twenty-five years for the aggravated rape conviction and as a Range I, standard offender to six years for the aggravated burglary conviction.

Regarding consecutive sentencing, the trial court found that the appellant was a "dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high." See Tenn. Code Ann. § 40-35-115(b)(4). The trial court specifically stated that confinement for an extended period of time was necessary to protect society from the appellant and that the aggregate length of his sentences reasonably related to the offenses. Thus, the trial court ordered that the appellant serve the sentences consecutively.

Previously, appellate review of the length, range, or manner of service of a sentence was de novo with a presumption of correctness. See Tenn. Code Ann. § 40-35-401(d). However, in State v. Bise, 380 S.W.3d 682, 708 (Tenn. 2012), our supreme court announced that "sentences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" In determining a defendant's sentence, the trial court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also Bise, 380 S.W.3d at 697-98. The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.

In determining a specific sentence within a range of punishment, the trial court should consider, but is not bound by, the following advisory guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c).

Although the trial court should also consider enhancement and mitigating factors, the statutory enhancement factors are advisory only. See Tenn. Code Ann. § 40-35-114; Bise, 380 S.W.3d at 698 n.32. We note that “a trial court’s weighing of various mitigating and enhancement factors [is] left to the trial court’s sound discretion.” State v. Carter, 254 S.W.3d 335, 345 (Tenn. 2008). In other words, “the trial court is free to select any sentence within the applicable range so long as the length of the sentence is ‘consistent with the purposes and principles of [the Sentencing Act].’” Id. at 343. “[A]ppellate courts are therefore left with a narrower set of circumstances in which they might find that a trial court has abused its discretion in setting the length of a defendant’s sentence.” Id. at 345-46. “[They are] bound by a trial court’s decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act.” Id. at 346.

Turning to the instant case, the appellant contends that the trial court’s “finding of enhancement factors . . . weighed against the evidence presented at trial.” However, the appellant does not specifically contend that the trial court misapplied any of the enhancement factors. To the extent he is arguing that the trial court improperly weighed the enhancement factors, the weight of enhancement factors is in the trial court’s discretion, and this court is bound by the trial court’s sentencing decisions as long as sentence is imposed in a manner consistent with the purposes and principles of the Sentencing Act. Carter, 254 S.W.3d at 345-46. Because the trial court’s imposition of the sentences is consistent with the purposes and principles of the Sentencing Act, the sentences are presumptively correct, and we cannot reweigh the enhancing and mitigating factors. See id. at 344-45.

The appellant also argues that the trial court erred by ordering consecutive sentencing. Generally, “[w]hether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court.” State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). Tennessee Code Annotated section 40-35-115(b) contains the discretionary criteria for imposing consecutive sentencing. See also State v. Wilkerson, 905 S.W.2d 933, 936 (Tenn. 1995). The trial court may impose consecutive sentencing upon finding the existence of any one of the criteria. In the instant case, the trial court found that the appellant was a dangerous offender. Tenn. Code Ann. § 40-35-115(b)(4). Our case law clearly reflects that in order to impose consecutive sentencing based upon finding that a defendant is a dangerous offender, a court must also find that “(1) the sentences are necessary in order to protect the public from further misconduct by the defendant and [that] (2) ‘the terms are reasonably related to the severity of the offenses.’” State v. Moore, 94 S.W.2d 570, 574 (Tenn. Crim. App. 1996) (quoting Wilkerson, 905 S.W.2d at 938); see also State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999).

In this case, the trial court specifically addressed the Wilkerson factors and found that consecutive sentencing was appropriate. Therefore, we conclude that the trial court did not abuse its discretion by ordering consecutive sentencing.

III. Conclusion

Based upon the oral arguments, the record, and the parties’ briefs, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE