IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1999

FILED

February 2, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	
	*	**No. 03C01-9901-CR-00035**
Appellee,	*	
	*	**HAMILTON COUNTY**
vs.	*	
	*	**Hon. Douglas A. Meyer, Judge**
DAVID ANDREW NICHOLSON,	*	
	*	**(Rape of a Child)**
Appellant.	*	

For the Appellant:

Ardena J. Garth
District Public Defender
and
Donna Robinson Miller
Assistant Public Defender
701 Cherry Street, Suite 300
Chattanooga, TN 37402

For the Appellee:

Paul G. Summers
Attorney General and Reporter

Elizabeth B. Marney
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
2d Floor, Cordell Hull Building
Nashville, TN 37243-0493

William H. Cox III
District Attorney General

Clair Brant
Asst. District Attorney General
City and County Courts Building
Chattanooga, TN 37402

OPINION FILED: ________________________

AFFIRMED

David G. Hayes, Judge

OPINION

______The appellant, David Andrew Nicholson, appeals his conviction by a Hamilton County Criminal Court jury for the offense of rape of a child. The trial court sentenced the appellant to twenty years in the Department of Correction. On appeal, the appellant raises three issues for our review: (1) whether testimony of two police officers improperly bolstered the credibility of the minor victim; (2) whether the trial court erred in charging the jury on parole eligibility; and (3) whether the appellant was properly sentenced.

After review, we affirm the judgment of the trial court.

BACKGROUND

In the summer of 1996, the appellant, his wife, Loretta Nicholson, and her daughters, K.M.[1] and S.M., resided on Tunnel Boulevard in Chattanooga. During that summer, Mrs. Nicholson had experienced disciplinary problems with her daughter K.M. who at the time was eleven years old. The problem arose from K.M.'s sexual activity with two young boys. Following disciplinary action by the Nicholsons, the problems appeared resolved. K.M. returned to the seventh grade in the fall of 1996 where she was enrolled as a gifted student in accelerated classes.

After the Christmas break in 1996, K.M.'s behavioral problems at home and at school resurfaced and continued to escalate. In January of 1997, after an incident at school, K.M. met with a school counselor and informed the counselor of her sexual encounter with the appellant. The counselor advised K.M. to tell her mother or he would call the police. The same day K.M. told her mother that the appellant "had sex with me." Later that afternoon, Mrs. Nicholson confronted the appellant with the accusation. At first, the appellant denied any involvement; however, he later admitted to her that he had engaged in sexual intercourse with K.M. stating that he was "just trying to teach her a lesson and about life and sex and boys."

---

[1] It is the policy of the appellate courts of this state to refer to child victims of sexual abuse by their initials. State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

Mrs. Nicholson did not immediately report the rape to the police because of her shame and denial. After this incident, Mrs. Nicholson continued to allow the appellant to remain in the residence. However, she implemented precautions in order that the appellant would not be left alone with her children. During this time, the appellant had been terminated from his employment and was alone with the children during the early morning hours due to Mrs. Nicholson's early schedule as a school bus driver. She ordered the appellant to leave her home when she left each day, she changed the locks on her doors, and she would return each morning to unlock the doors for her daughters to meet their school bus.

In June of 1997, Mrs. Nicholson took K.M. to a mental health center for counseling. At the counselor's insistence, Mrs. Nicholson reported the appellant's sexual involvement with her daughter to the police. The appellant was interviewed by Detective Mike Gilliam and Inspector Janice Atkinson of the Chattanooga Police Department. Upon questioning, the appellant admitted to sexually penetrating K.M. explaining that he was concerned about her sexual activity with other boys and "wanted to teach her about sex so she wouldn't go out there and find it on the street somewhere with a whole bunch of guys, that one guy makes love like another one."

At trial K.M. testified that the rape occurred one morning before school was dismissed for Christmas break. That morning when her mother left for work, the appellant asked her to have sex with him. At first, K.M. resisted, however, the appellant convinced her that no one would find out. She was unable to remember whether the appellant took her underwear off or pushed them aside. Then, the appellant put on a condom and "stuck his penis inside [her] vagina." The appellant told her "that he wanted to teach me that I didn't have to go out and get sex in the street." After the rape, K.M. returned to her bed feeling "bad" and "scared" and did not report the offense.

In addition to the victim's account of the crime, the State produced four other witnesses corroborating the appellant's guilt: the testimony of Mrs. Nicholson relating the appellant's admission of rape to her; the testimony of Officers Gilliam and Atkinson who introduced the appellant's written and recorded confession; and the rebuttal testimony of Richard Ervin, the grandfather of the victim, who testified

that the appellant told him he had sexual relations with K.M.

At trial, the appellant denied any sexual involvement with the victim. He testified that, on that morning in December, the victim awoke early and was trying to sneak out of the house to spend some time with her friends before the school bus arrived. The appellant informed K.M. that she would not be leaving the house. Before the taped interview with the officers, the appellant told them that he had no sexual relations with the victim. He testified that Mrs. Nicholson wanted him to admit to the sexual abuse in order for K.M. to receive counseling. She assured him that he would only be required by DHS to leave her home a year and later they could reunite as a family. He agreed to do this because he loved her and was concerned "about Loretta and keeping my family together."

Based upon the proof presented, the appellant was found guilty by the jury of rape of a child, a Class A felony.

I. IMPROPERLY BOLSTERING TESTIMONY

The appellant argues that the trial court erred by admitting (1) Detective Gilliam's testimony over objection that he believed the victim's accusation of abuse and (2) testimony from Inspector Atkinson that sexually abused children and their parents often delay in reporting the offenses. He complains that this testimony bolstered the testimony of the victim, invaded the province of the jury, and requires reversal.

A. Detective Gilliam's Testimony

First, we address the contested testimony elicited from Detective Gilliam. Specifically, the relevant portion of the testimony is as follows:

> Q: Detective Gilliam, based on your interview with her, did you arrange to talk with [the appellant]?
> A: (Detective Gilliam) Right. I keep a completely open mind when I interview children, and after the interview with her, <u>I was convinced that she was telling the truth</u>, there was some truth here, maybe not, not every little bit that she said, because she, . . .
> [Objection by defense counsel] Judge, we'd submit that his opinion as to her truth is not relevant. It's something that's sort of invading the province of the jury again, we think.
> THE COURT: Any witness can testify to that, that's something we can all do, and it just goes to the weight of his opinions. You can argue it later, but really any, any witness can testify whether or not they thought somebody was truthful.

. . .
Q: (Prosecutor) You were saying that you believed she was telling the truth?
A: Correct, and the fact that she had had sex with defendant.
. . .

Although the trial court ruled this testimony was admissible based upon the fact that "any witness can testify whether or not they thought somebody was truthful," we find the trial court's ruling clearly erroneous. Tenn. R. Evid. 401 provides that relevant evidence is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This witness' voluntary statement that he believed the victim was telling the truth was wholly irrelevant to the material issue of whether the appellant raped the victim; the issue was not whether the detective believed that the victim was telling the truth.

Furthermore, even though Detective Gilliam's statement that "I was convinced she was telling the truth" was nonresponsive and volunteered, it was clearly offered to bolster the testimony of the victim. Opinion testimony regarding the credibility of a witness is only admissible after the character of the witness for truthfulness has been attacked. Tenn. R. Evid. 608(a). At trial, appellant's counsel never challenged the truthfulness of the victim as a witness; counsel only elicited a few details regarding the appellant's use of a condom and the victim's delay in reporting the abuse. Moreover, Detective Gilliam had never met the victim prior to the interview; his association on that one occasion was not sufficient to qualify him to testify as to the victim's reputation in the community for truthfulness. See State v. Dutton, 896 S.W.2d 114, 118 (Tenn. 1995) (holding that before opinion on witness's character for truthfulness is admissible, the character witness must be personally familiar with person's character to offer opinion on subject). For all these reasons, the trial court should have sustained defense counsel's objection to Detective Gilliam's statement and contemporaneously instructed the jury not to consider it. However, in light of the substantial nature of the evidence against the appellant, we hold that this was harmless error. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

B. Detective Atkinson's Testimony

Second, we address the testimony of complaint from Detective Atkinson.

The

following colloquy occurred at trial during her testimony:

> Q: (Prosecutor) Detective Atkinson, in those three or four hundred sexual abuse cases you have worked, would it be fair to say that there have been some with 12-year-old girls?
> A: (Detective Atkinson) Yes, ma'am.
> Q: Is it unusual, would you say that it's unusual for a 12-year-old to not disclose sexual abuse right away?
> [Objection by defense counsel] Judge, I object to relevancy of other cases. That has nothing to do with this case here on trial today.
> THE COURT: No, she can state what her practice is and what her experience has been.
> A: It is not unusual.
> . . .
> Q: Is it unusual for the mother of a child who's been sexually abused to delay reporting it once she's been told by the child?
> A: We have had cases where the mother has delayed in reporting.

Again, we find the trial court's ruling erroneous. The State argues that this testimony was proper because she testified to her direct experience. The question posed and the answer provided , however, had nothing to do with the officer's experience, i.e., "Is it unusual, would you say that it's unusual for a 12-year-old to not disclose sexual abuse right away?" Under the established case law of this state this question was objectionable for multiple reasons. First, this type of testimony requires the specialized knowledge of an expert. See Tenn. R. Evid. 701 and 702. More importantly, our supreme court has held that admission of expert testimony concerning symptoms of post-traumatic stress syndrome exhibited by victim's of child sexual abuse is inadmissible. State v. Ballard, 855 S.W.2d 557, 561-563 (Tenn. 1993); see also State v. Anderson, 880 S.W.2d 720, 728-730 (Tenn. Crim. App. 1994), perm. to appeal denied, (Tenn. 1995) (admitting expert testimony relating to "delayed disclosure" and "recantation" as "predictable phenomenon" in child abuse cases constitutes error).

Clearly, the introduction of the challenged portion of this witness' testimony was an attempt to bolster the victim's testimony. As noted in Anderson, "[i]n fact, if the testimony were not introduced by the state as a means of bolstering the child victim's testimony, it would have had no probative value at all." 880 S.W.2d at 730 (citing D. Paine, Tennessee Law of Evidence, § 220 (1974)). Since our supreme court has ruled that this type of testimony is inadmissible, the admitted testimony

was in effect irrelevant. See Tenn. R. Evid. 401.[2] Again, if not for the overwhelming nature of the appellant's guilt, these errors of fundamental law would constitute reversible error. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

II. PAROLE ELIGIBILITY INSTRUCTION

Next, the appellant argues that the parole eligibility instruction given in this case violates the due process clause of Article 1 § 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution. Although the appellant requested the instruction be given at trial, now he complains that the instruction under Tenn. Code Ann. § 40-35-201(b)(2) (1997) (repealed 1998) allowed the jury to consider extraneous information to guilt or innocence.[3] In support of his contention, the appellant cites State v. Jason M. Weiskopf, No. 02C01-9611-CR-00381 (Tenn. Crim. App. at Jackson, Dec. 4, 1998), application for perm. to appeal filed, (Feb. 3, 1999), perm. to appeal held in abeyance, (Tenn. May 12, 1999).

The State relies upon the supreme court's decision in State v. King, 973 S.W.2d 586 (Tenn. 1998). Although the State concedes that the instruction in the present case deviated from the King instruction which added that the instruction was "for your information only," the present language of complaint is that jurors were

---

[2]Our previous rulings involving this trial court in identical or similar evidentiary issues have obviously gone unheeded. See State v. McCary, 922 S.W.2d 511, 513-515 (Tenn. 1996); State v. Schafer, 973 S.W.2d 269, 275 (Tenn. Crim. App. 1997); State v. Maddox, 957 S.W.2d 547, 552-553 (Tenn. Crim. App. 1997); State v. Bragan, 920 S.W.2d 227, 241-242 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996); State v. Charles Edwin Lamb, No. 03C01-9701-CR-00010 (Tenn. Crim. App. at Knoxville, Feb. 20, 1998), perm. to appeal denied, (Tenn. Nov. 2, 1998); State v. Robert E. Smith, No. 03C01-9203-CR-00067 (Tenn. Crim. App. at Knoxville, April 15, 1993); State v. Alonzo Felix Andres Juan, No. 03C01-9211-CR-00382 (Tenn. Crim. App. at Knoxville, Aug. 17, 1993).

[3]The jury was instructed as follows:

> Range of punishment: The jury will not attempt to fix any sentence. However, you may weigh and consider the meaning of a sentence of imprisonment. The range of punishment for the crimes involved herein is as follows: Rape of a child, 15 to 25 years; rape, 8 to 12 years; aggravated sexual battery, 8 to 12 years; attempt rape of a child, 8 to 12 years; attempt rape, 3 to 6 years; attempt aggravated sexual battery, 3 to 6 years; sexual battery, 1 to 2 years; attempt sexual battery, up to 11 months 29 days; assault, up to 11 months 29 days.
>
> You're further informed that the minimum number of years a person sentenced to imprisonment for these offenses must serve before reaching the earliest release eligibility date is: Rape of a child, 15 years; rape, 6.8 years; aggravated sexual battery, 6. 8 years; attempt rape of a child, 2.4 years; attempt rape, .9 years; sexual battery, .3 years; attempt sexual battery and assault, no time has to be actively served.
>
> Whether a defendant is actually released from incarceration on the date when they're first eligible for release is a discretionary decision made by the board of paroles and is based on many factors. The board of paroles has the authority to require a defendant to serve the entire sentence imposed by the court.

instructed to "weigh and consider" the meaning of a sentence of imprisonment analogous to the instruction in Weiskopf. The State argues that the instruction fully complied with due process and even instructed the jury that they had no role in sentencing and solely were to answer the question of guilt. The State claims the semantics are merely "a distinction without a difference." We disagree.[4]

Notwithstanding the fact that the appellant invited error by requesting that the so called "truth in sentencing" instruction be given, we find the trial court's instruction that the jury may "weigh and consider" those instructions a violation of due process. The function of a jury in a criminal proceeding is limited to a determination of the defendant's guilt or innocence based solely on the evidence introduced at trial and not on extraneous conditions not adduced as proof at trial. See Taylor v. Kentucky, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934 (1978) (citing Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976)). For a jury to "weigh and consider" parole eligibility goes outside the facts of the case and is not germane to a determination of guilt or innocence. Clearly, an instruction on the law of parole constitutes an extraneous condition which is not substantive proof of the accused's guilt or innocence. Parole is not a judicial function, rather it is an executive function. It is best that the

---

[4]Various panels of this court have decided this issue under the rationale of Weiskopf. See generally, State v. Billy Joe Henderson, No. 03C01-9804-CR-00139 (Tenn. Crim. App. at Knoxville, June 18, 1999) (weigh and consider instruction harmless error); State v. Teddy Echols, No. 03C01-9708-CR-00342 (Tenn. Crim. App. at Knoxville, May 17, 1999) (instruction was harmless error); State v. Raymond Hale, No. 01C01-9712-CR-00564 (Tenn. Crim. App. at Nashville, May 6, 1999) (instruction harmless error); State v. Adrian Wilkerson, No. 01C01-9610-CR-00419 (Tenn. Crim. App. at Nashville, Aug. 26, 1998) (instruction was harmless error); State v. Robert Anthony Payne, No. 01C01-9701-CR-00031 (Tenn. Crim. App. Nashville, June 17, 1998), perm. to appeal granted in part, (Tenn. Dec. 28, 1998); State v. Michael Dinkins, No. 02C01-9702-CR-00075 (Tenn. Crim. App. at Jackson, March 12, 1998) (instruction harmless error);State v. Gary Antonio Johnson, No. 02C01-9803-CR-00082 (Tenn. Crim. App. at Jackson, April 26, 1999) (J. Wade, dissenting) (instruction required reversal because degree of homicide in question); State v. James C. Nichols, No. 01C01-9704-CR-00158 (Tenn. Crim. App. at Nashville, Aug. 12, 1998), perm. to appeal granted, (Tenn. Feb. 1, 1999) (J. Wade, dissenting) (instruction harmless error); State v. Marcus L. Nelson, No. 01C01-9707-CR-00237 (Tenn. Crim. App. at Nashville, Aug. 27, 1998) (J. Wade, concurring)

But see State v. Otis J. Wickfall, No. 02C01-9711-CR-00442 (Tenn. Crim. App. at Knoxville, June 3, 1999) (instruction proper as jury was instructed "for your information only" as in King); State v. Lewis L. Bell, No. 01C01-9807-CR-00279 (Tenn. Crim. App. at Nashville, May 26, 1999) (instruction proper under King); State v. Harry David Johnson, No. 03C01-9712-CR-00526 (Tenn. Crim. App. at Knoxville, May 17, 1999) (instruction proper under King, distinguishes case from Weiskopf because no (b)(2) information given); State v. Gary Antonio Johnson, No. 02C01-9803-CR-00082 (Tenn. Crim. App. at Jackson, April 26, 1999) (instruction proper under King but harmless error found when neither party requested instruction); State v. Jasper D. Lewis, No. 01C01-9604-CR-00162 (Tenn. Crim. App. at Nashville, April 23, 1999) (weigh and consider instruction proper under King); State v. Cedric K. Harts, No. 01C01-9702-CR-00056 (Tenn. Crim. App. at Nashville, April 8, 1999) (instruction proper under King); State v. Charles Frank Bankston, No. 03C01-9608-CR-00302 (Tenn. Crim. App. at Knoxville, Feb. 4, 1999), perm. to appeal denied, (Tenn. July 26, 1999) (instruction proper; however, harmless error of incorrect calculation of release eligibility date);State v. Rachel Marie Green, No. 01C01-9706-CR-00223 (Tenn. Crim. App. at Nashville, Oct. 12, 1998), perm. to appeal denied, (Tenn. April 12, 1999) (instruction proper under King); State v. Marcus L. Nelson, No. 01C01-9707-CR-00237 (Tenn. Crim. App. at Nashville, Aug. 27, 1998) (instruction proper under King); State v. James C. Nichols, No. 01C01-9704-CR-00158 (Tenn. Crim. App. at Nashville, Aug. 12, 1998), perm. to appeal granted, (Tenn. Feb. 1, 1999) (instruction proper under King).

correctional authorities and not the jury be left to commence the process of rehabilitation. A jury charge which instructs on parole eligibility will invariably result in unjust verdicts and may prejudice either the accused or the State's right to a fair trial, depending upon the particular facts and circumstances of the case. Accordingly, we find that the statutorily mandated jury instruction at the guilt phase of trial violates due process as secured by Article 1, Section Eight of the Tennessee Constitution.

Having determined that the trial court's jury instruction was error, it remains subject to harmless error review. Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827 (1967); see also State v. Bobo, 814 S.W.2d 353, 356 (Tenn. 1991); State v. Belser, 945 S.W.2d 776, 782 (Tenn. Crim. App. 1996). If the reviewing court finds that the complained constitutional error did not affect the outcome of the trial, then the error is harmless. Id.

Applying this standard to the present case, the evidence points overwhelmingly to the guilt of the appellant for the offense of rape of a child. We are led, beyond a reasonable doubt, to the conclusion that the statutory eligibility instruction made no contribution to the jury's verdict. Accordingly, an error in providing the instruction was harmless beyond a reasonable doubt. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

III. CUMULATIVE ERROR

We note that this court has found on three occasions harmless error in this case. However, considering these errors as a whole, after carefully reviewing the entire record in this case and considering the errors assigned by the appellant, we conclude that their cumulative effect fails to constitute prejudicial error requiring a reversal finding the appellant's guilt beyond a reasonable doubt.

IV. SENTENCING

In his final issue, the appellant argues that the twenty year sentence imposed by the trial court is excessive. We first address the appellant's contention that, in arriving at the twenty year sentence, the trial court misapplied Tenn. Code Ann. § 40-34-210 by setting the presumptive sentence for a class A felony, with applicable

enhancement and mitigating factors, at the midpoint of the range. He insists that the plain language of the statute directs sentencing courts to set the presumptive sentence for a Class A felony at the midpoint of the range only if there are no enhancement and no mitigating factors. For this reason, he contends in this case his presumptive sentence was fifteen years.

This identical issue was resolved by this court in State v. Chance, 952 S.W.2d 848, 850 (Tenn. Crim. App. 1997). In Chance, we held that the presumptive sentence, i.e., the starting point for all Class A felonies irrespective of the presence or absence of mitigating or enhancing factors, is the midpoint of the applicable sentencing range. Id. at 850. Thus, the presumptive sentence for a defendant convicted as a standard offender is twenty years.

Next, the appellant contends that the trial court should have applied as a mitigating factor, the appellant's good character and reputation in the community, under Tenn. Code Ann. § 40-35-113(13).[5] Furthermore, he challenges the weight given to these factors by the trial court in determining the length of the sentence. Thus, he argues that the presumption of correctness should not apply and requests that his excessive sentence be set aside or reduced.

This court's review of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1997). See also State v. Bingham, 910 S.W.2d 448 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). This presumption is only applicable if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The record reflects that the trial court considered the relevant principles of sentencing; accordingly, the presumption is afforded. Additionally, the appellant bears the burden of demonstrating that the sentence imposed was improper.

---

[5]The appellant does not contest the propriety of the two enhancement factors or the mitigating factors applied by the court. Specifically, the trial court found that (1) the appellant has a history of criminal convictions or criminal behavior and (15) the appellant abused a position of public or private trust. Tenn. Code Ann. § 40-35-114. The following mitigating factors were applied: (1) the appellant's conduct neither caused nor threatened serious bodily injury and (13) the defendant's childhood background; his good employment record; his presence in court; and his voluntary surrender to the authorities. Tenn. Code Ann. § 40-35-113.

Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d).

The appellant presented six witnesses who testified to his deprived childhood, his current respectful nature, his care for others, his good work ethic, his artistic ability, and his love for his family and children. Some of these witnesses considered him a part of an "adoptive" family. Conversely, the appellant's wife testified that the appellant was adulterous, conceiving a child with another woman during their marriage, and physically abused her. The presentence report reflects that the appellant has a prior felony conviction from Georgia for possession of a "sawed off shotgun." The record at trial indicates that the appellant had been fired from his employment at the time of this offense. At the time of the sentencing hearing, he was unemployed. In view of the contested nature of the appellant's "good character and reputation in the community," we conclude that any weight attributable to the application of this non-enumerated mitigating factor would be minimal.

The appellant's sentence is not determined by the mathematical process of adding the sum total of enhancing factors present then subtracting from this figure the mitigating factors present for a net number of years. State v. Boggs, 932 S.W.2d 467, 475 (Tenn. Crim. App. 1996). The weight afforded to these factors is left to the trial court's discretion so long as the court complies with the purposes and principles of the Sentencing Act and its findings are adequately supported by the record. Id. See also State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995). The trial court's imposition of the mid-range sentence of twenty years is clearly justified under the facts and circumstances of this case.

For the forgoing reasons, the judgment of conviction and the accompanying sentence are affirmed.

DAVID G. HAYES, Judge

CONCUR:

GARY R. WADE, Presiding Judge

DAVID H. WELLES, Judge