

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 2000 SESSION

FILED
March 21, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
Appellee,)
v.)
DAVID SHARPE,)
Appellant.)

No. M1999-00262-CCA-R3-CD
Hickman County
Honorable Timothy L. Easter, Judge
(Sexual battery)

For the Appellant:

John H. Henderson
District Public Defender
Post Office Box 68
Franklin, TN 37065-0068

For the Appellee:

Paul G. Summers
Attorney General of Tennessee
and
Lucian D. Geise
Assistant Attorney General of Tennessee
425 Fifth Avenue North
Nashville, TN 37243

Ronald L. Davis
District Attorney General
and
Judson Phillips
Assistant District Attorney
Post Office Box 937
Franklin, TN 37065-0937

OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The defendant, David Sharpe, was convicted by a jury in the Hickman County Circuit Court of sexual battery, a Class E felony. He was sentenced as a Range I, standard offender to one year, with probation after serving sixty days in confinement.

In this appeal of right, the defendant contends (1) that the evidence is insufficient to prove sexual battery, (2) that he is entitled to full probation, and (3) that he should be designated as an especially mitigated offender. We affirm the trial court.

The defendant was prosecuted for a May 1991 sexual battery committed upon his six-year-old cousin. The victim testified that while she was playing outside her trailer home, the defendant called to her from the front porch of a nearby trailer. Although the defendant did not live in the area, his brother owned the property upon which the two mobile homes were located. The victim testified that she and the defendant entered the other trailer. She said he shut the door to the trailer and went into a bedroom. She said that when she entered the bedroom, the defendant told her to sit on the bed. She said the defendant shut the bedroom door and began unbuttoning her blouse, rubbing her chest. She said he then pulled her pants and panties down and spread her legs. She said he touched and rubbed her vagina with his fingers. She stated that he started to take off his pants but that he was interrupted by the victim's mother, who entered the trailer. She said the defendant told her not to tell anyone, buttoned his pants, and left the bedroom.

The victim's mother testified that she noticed her daughter was missing. She said that when she entered the other trailer, the defendant walked out of the bedroom, closing the door behind him. She stated that the defendant acted nervous. She stated that when her daughter emerged from the bedroom, her clothes looked loose and sloppy, and her blouse was unbuttoned at the top. The victim's mother testified that when she and her daughter returned to their trailer, her daughter told her that the defendant had taken off her clothes and fooled with her "privates."

The defendant, who was in his late thirties at the time of the incident, testified that he was unaware that the victim was in the trailer when her mother came looking for her. He said he did not go into the bedroom that day, and he denied touching the victim.

The defendant contends that the evidence is insufficient to convict him of sexual battery, indicating that his proof at trial raised a reasonable doubt. However, the

appellate standard for review of the sufficiency of evidence 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, 99 S. Ct. 2781, 2789 (1979); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992). In this respect, the victim testified that the defendant led her into the bedroom of a trailer and shut the door. She said that he unbuttoned her blouse and rubbed her chest. She stated that he pulled her panties down, rubbed her vagina with his fingers, and began pulling off his pants. This evidence fully supports the jury’s finding beyond a reasonable doubt that the elements for sexual battery existed. See Tenn. Code Ann. § 39-13-505.

The defendant contends that the trial court erred in sentencing. On appeal, the trial court’s sentencing determinations are presumed to be correct. Tenn. Code Ann. § 40-35-401(d). This means that the burden of showing that a sentence is improper is upon the defendant. See Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. However, the presumption of correctness is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. See State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The presentence report and evidence at the 1999 sentencing hearing reflect that at the time of the hearing, the defendant was a single, forty-six-year-old male who resided with his ailing mother. He left school after the seventh grade and had been unemployed for many years. He claimed to be in good physical health and denied use of any drugs or alcohol. However, the defendant has been classified as mentally disabled, receiving disability benefits for retardation. He has never been arrested or convicted for any crime. He continued denying that he committed the present offense, noting that the victim had visited with his mother on several occasions since the incident.

The defendant’s brother testified that the defendant has been receiving disability income for at least twenty-five years. He stated that he would ensure that his

brother met all appointments required by a probation officer and that he believed his brother to be a good candidate for probation.

The trial court found as an enhancement factor that the defendant abused a position of trust. See Tenn. Code Ann. § 40-35-114(15). In mitigation, it found that the defendant had suffered from a mental condition that significantly reduced the degree of his culpability. See Tenn. Code Ann. § 40-35-113(6). It also found in mitigation that the defendant continued to be mentally disabled and that he had no previous history of criminal behavior. See Tenn. Code Ann. § 40-35-113(13). In denying full probation, the trial court stated that confinement was necessary to avoid depreciating the seriousness of the offense and was particularly suited to provide an effective deterrent to others likely to commit similar offenses. See Tenn. Code Ann. § 40-35-103(1)(B).

In contesting his sixty-day confinement, the defendant argues that the offense did not result from a breach of any private trust. He asserts that his kinship to the victim was incidental to the offense. We disagree. The record supports the conclusion that the fact that the defendant knew the victim as a relative was instrumental in the victim going into the trailer and into the bedroom. In this manner, as the trial court stated, the defendant's position as a relative significantly facilitated the commission of the offense. Enhancement factor (15) applies.

We note that the trial court made no findings upon which it based its conclusion that confinement was necessary because of the seriousness of the offense and its effectiveness as a deterrent to others. Absent factual support, such a conclusion may not justify confinement. A Range I, standard, Class E felon "is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). However, in the present case, we believe that the evidence shows that the defendant, in fact, committed aggravated sexual battery, a Class B felony, because the victim was under thirteen years of age. See Tenn. Code Ann. § 39-13-504. A person guilty of aggravated sexual battery is ineligible for probation. See Tenn. Code Ann. § 40-35-303(a). In other words, the evidence reflects an offense that was committed in an aggravated fashion

that would justify confinement under the circumstances of the case. See, e.g., State v. Welch, 565 S.W.2d 492, 494 (Tenn. 1978). In this respect, although most of the defendant's personal history and circumstances would support full probation, some confinement is appropriate in order to avoid depreciating the seriousness of the offense. The defendant's confinement for sixty days is appropriate.

In consideration of the foregoing and the record as a whole, the judgment of conviction is affirmed.

Joseph M. Tipton, Judge

CONCUR:

David H. Welles, Judge

L. Terry Lafferty, Senior Judge