IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 26, 2002 Session

STATE OF TENNESSEE v. CARL G. DODD

Appeal from the Circuit Court for Rhea County
No. 15189 Thomas W. Graham, Judge

No. E2001-01304-CCA-R3-CD
May 28, 2002

Carl G. Dodd appeals his rape conviction from the Rhea County Circuit Court. Dodd's conviction stems from a sexual assault upon a mentally retarded adult man. He is presently serving an eleven-year sentence in the Department of Correction for this crime. In this direct appeal, he claims that the trial court erred in admitting a psychological report as a business record even though it was not prepared by the agency through whose employee it was admitted, that the lower court erred in admitting evidence of the victim's statements to a caseworker about the crime, and that he was sentenced too harshly. Because we are unpersuaded of harmful error, we affirm.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Jeffrey Harmon, Jasper, Tennessee, for the Appellant, Carl G. Dodd.

Paul G. Summers, Attorney General & Reporter; Angele M. Gregory, Assistant Attorney General; James Michael Taylor, District Attorney General; and Will Dunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In the light most favorable to the state, the evidence at trial demonstrated that on an evening in April 1999, the victim, who is a mentally retarded man in his forties, visited at his father's home. Irene Dodd lived with the victim's father. Ms. Dodd, who has since married the victim's father, is the defendant's mother. The defendant, his wife, the defendant's brother Robert Dodd, and Robert's girlfriend Wendy Livingston were also present that evening. The defendant and his brother consumed a sizable quantity of beer that evening. By the defendant's own admission, he alone drank approximately one case of beer. Eventually, Robert and his girlfriend departed. The victim's father, the defendant's mother, and the defendant's wife retired for the evening. This was sometime around 3:00 a.m. During the evening, the defendant was unconscious on a living room

sofa, although it is not clear whether he later retired to a bedroom with his wife. The victim slept on a mattress in the living room floor.

After everyone was in bed, the defendant got onto the mattress with the victim, undressed the victim, and fellated him. The victim protested to no avail. The defendant sat on the victim, placed the victim's penis in his anus, and moved up and down. The defendant threatened to "mess up" the victim and to kill him if he reported these activities. At some point, the defendant went to the bathroom, and the victim fled the house.

The victim went to his brother Lonis Daniels' home, and he called a caseworker who worked with him, Gail Waller. The victim told Ms. Waller that he was hurt, could not walk, and that the defendant had gotten on top of him. Ms. Waller arrived at the victim's brother's home about ten minutes after the 7:30 a.m. telephone call. The victim told her that "Carl Gene had f-ed him." Ms. Waller characterized the victim as excited, nervous, and scared. Ms. Waller summoned law enforcement officers, and the victim revealed what had happened to him and the identity of the perpetrator.

When interviewed by a sex crimes investigator, the defendant at first denied any sexual conduct with the victim. He later claimed that he had found his pants unbuttoned when he awakened that morning and that his bottom had been sore. An anal swab taken of the defendant revealed the presence of sperm.

During the state's case-in-chief, the state gained admission of a psychological report performed at Team Evaluation Center, Inc. This report was sponsored by a witness who was employed at Rhea of Sunshine, a non-profit organization that works with the mentally and physically disabled. The custodian testified that the psychological report was required to be performed every five years to maintain the victim's continued placement in the agency's programs. The report's authors opine that the victim is in the moderate to severe range of mental retardation and functions with a mental ability equivalent to an individual of six years and eight months of age.

The state had charged the defendant with two counts of rape, one relative to fellatio and the other relative to anal intercourse. The jury acquitted the defendant of the rape count relative to fellatio as well as the lesser-included offense of sexual battery. It returned a guilty verdict on the rape count relative to anal intercourse.

The defendant faced a sentence of eight to twelve years. At the sentencing hearing, the court imposed an eleven-year sentence. Because the sentence was greater than eight years, the court rejected the defendant's bid for probation.

The case is now before us on direct appeal.

I

The defendant's first issue is whether the trial court properly admitted the psychological report from Team Evaluation, Inc. via a witness from Rhea of Sunshine. He claims that if this document was admissible, it was via a records custodian of Team Evaluation, Inc. We are inclined to agree.

Evidence Rule 803(6) provides that notwithstanding its hearsay character, "Records of Regularly Conducted Activity" may be admitted. Tenn. R. Evid. 803(6). That rule provides

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, profession, occupation, and calling of every kind, whether or not conducted for profit.

Tenn. R. Evid. 803(6) (amended 2001).

In this case, the record in question was prepared by psychological professionals with Team Evaluation, Inc. The report states that the victim "was referred for a routine, 5-year psychological re-evaluation, as required for his placement in the present day program at Rhea of Sunshine, Inc." The witness corroborated the purpose of the report as such. She testified that Rhea of Sunshine used reports of this nature in determining whether individuals are qualified to enroll in the program and in tailoring its services to these individuals.

As written at the time of the defendant's trial, Rule 803(6) required that in order for a record of regularly conducted activity to be admissible, it must be "kept in the course of a regularly conducted business activity and [it must be] the regular practice of that business activity to make the . . . report . . . ." Tenn. R. Evid. 803(6). In this case, the state established that the report of Team Evaluation was kept in the regular course of business of Rhea of Sunshine. However, the evidence did not demonstrate that it was the regular practice of *Rhea of Sunshine's* business activities to *make* the report. To be sure, the report was generated by Team Evaluation. Thus, the report's admission predicated upon Rule 803(6) was error.

The remaining question is whether the erroneous admission was harmful to the defendant. The state's purpose in seeking admission of the record was to demonstrate that the victim "functions on a six year old level." The defendant claims that the report was not cumulative of trial

testimony in that it contains evidence outside the knowledge of any trial witness. The defendant further opines, without explanation, that its introduction was not harmless.

Upon consideration, we cannot see how this evidence changed the result of the trial to the defendant's detriment. An element of the state's case was that the victim was "mentally defective." *See* Tenn. Code Ann. § 39-13-503(a)(3) (1997). Even absent the evidence of the victim's age-level of functioning, all the witnesses generally agreed that the victim suffered from a significant mental disability. That much is apparent from the victim's own testimony. Numerous examples were given by witnesses which demonstrated the victim's limitations and level of functioning. To the extent that the report in question contained any additional information in this regard, its erroneous admission was harmless. *Cf. State v. Michael Brady*, No. M1999-02253-CCA-R3-CD, slip op. at 9-10 (Tenn. Crim. App., Nashville, Jan. 12, 2001) (even if exclusion of defendant's school records was error, it was harmless where jury had opportunity to evaluate defendant's hearing and speech impediments through his testimony and through his wife's testimony about the disabilities).

II

The defendant's second appellate complaint is that the trial court allowed Gail Waller to testify about the victim's statements to her the morning after the rape. The lower court admitted these statements as excited utterances.

A statement, otherwise hearsay in nature, is admissible as an excited utterance if it relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Tenn. R. Evid. 803(2).

> The ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication.

State v. Smith, 857 S.W.2d 1, 9 (Tenn. 1993). On appeal, a trial court's decision to admit evidence will not be overturned absent a demonstration of an abuse of discretion. *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997).

The only specific complaint the defendant makes about the trial court's admission of this evidence relates to the passage of several hours between the rape and the statements in question. Thus, the critical inquiry is whether the statements were made while the declarant/victim was still under the stress of excitement from the startling event or occurrence. *See* Tenn. R. Evid. 803(2). In that regard, Ms. Waller's testimony is relevant. During the jury-out hearing to determine whether the victim's statements to her about the rape would be admissible, she testified,

> He was upset, he was nervous, and he was scared. . . . So the whole time he was telling me [what happened] his eyes are wide like someone scared and he ringing [sic] his hands, which is a habit that [the victim] very seldom has, very seldom. He was excitable. He was antsie in his seat. [The victim] was acting so – I've never seen him act this way.

Ms. Waller also testified that the victim tended to get excited "especially when he's hurt or scared." After the court ruled that the victim's prior statements would be admissible as excited utterances, Ms. Waller testified before the jury, "[The victim] was excited. He was nervous. He was scared. . . . he was sitting on the curb and he was wide-eyed and he was rubbing has hands and he was nervous. He was excited . . . ."

The time interval is but one consideration in determining whether a statement is made under the stress of excitement. "Other relevant circumstances include the nature and seriousness of the event or condition; the appearance, behavior, outlook, and circumstances of the declarant, including such characteristics as age and physical or mental condition; and the contents of the statement itself, which may indicate the presence or absence of stress." *State v. Gordon*, 952 S.W.2d 817, 820 (Tenn. 1997) (quoting Cohen, et al., Tennessee Law of Evidence, § 803(2).2 at 534 (3d ed. 1995)) (emphasis added). In this case, the time span was from sometime after 3:00 a.m. until approximately 7:30 a.m. The declarant was a mentally retarded man who had just been the victim of a homosexual rape. Upon review, we see no abuse of discretion in the admission of this testimony. The trial court obviously concluded that the victim was agitated when he summoned and then spoke with Ms. Waller and was still under the stress of excitement of the previous night's events. *Cf. State v. Smith*, 868 S.W.2d 561, 574 (Tenn. 1993) (although victim had calmed enough to talk about one incident and had "flat" demeanor when relating a second incident, statements admissible as excited utterances, given time interval between events and statements, nature and seriousness of events, and appearance, behavior, outlook and circumstances of victim); *State v. Reginald L. Edmonds*, No. 02C01-9708-CC-00334 (Tenn. Crim. App., Jackson, Aug. 25, 1998) (in case in which child victim reported sexual abuse the day after it occurred, court noted that the time interval "is material only as a circumstance bearing on the issue of continuing stress") (citing Cohen, et al., Tennessee Law of Evidence, § 803(2).2 at 534 (3d ed. 1995)); *State v. Robert Bacon*, No. 03C01-9608-CR-00308 (Tenn. Crim. App., Knoxville, Jan. 8, 1998) ("Neither [the victim's] ability to calm down nor the fact that she did not report the incident for a few hours precludes a finding that the victim was still suffering from the stress of excitement from the rape.").

III

Finally, we address the defendant's complaint that he should have been given a more lenient sentence. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. *See* 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 felony sentencing, the trial court has an affirmative duty to state on the record, either orally or in writing, which enhancement and mitigating factors it found and its findings of fact. Tenn. Code Ann. §§ 40-35-209(c), - 210(f) (Supp. 2001); *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998); *State v. Russell*, 10 S.W.3d 270, 278 (Tenn. Crim. App. 1999).

In this case, the trial court made findings which it memorialized on the record. Accordingly, we afford presumptive correctness to its sentencing determination.

The defendant's crime is a Class B felony. *See* Tenn. Code Ann. § 39-13-503(b) (1997). His Range I classification mandates a sentence of eight to twelve years. *See id.* § 40-35-112(a)(b) (1997). For Class B, C, D or E felony sentencing where there are both enhancement and mitigating factors, the sentencing determination begins at the minimum within the range, and the sentence is enhanced as appropriate for the enhancement factors and then reduced as appropriate for the mitigating factors. *Id.* § 40-35-210(e) (Supp. 2001). If there are enhancement factors but no mitigating factors, the court may increase the sentence as appropriate for the enhancement factors. *Id.* § 40-35-201(d) (Supp. 2001).

The trial court found that the length of the defendant's sentence should be enhanced based upon his prior record of criminal activity, including two prior sex offenses, and his history of unwillingness to comply with conditions of release into the community. *See* Tenn. Code Ann. § 40-35-114(1),(8) (Supp. 2001). The court found no mitigating factors applicable, despite the defendant's urging that his sentence be mitigated for lack of actual or threatened serious bodily injury, unusual circumstances attending the crime which render it unlikely that the defendant was motivated by a sustained intent to violate the law, and the defendant's role as caretaker for his disabled wife. *See generally id.* § 40-35-113(1), (11), (13) (1997).

The defendant does not challenge the enhancement factors employed by the trial court, and the record reveals that the court's use of these factors was proper. The court commented, "The [prior criminal] record of the defendant is, the say the least, bad. It's atrocious really." This was not an overstatement. The defendant has a history of criminal convictions spanning virtually his entire adult life, including two convictions for sexual battery. Moreover, he has had non-incarcerative sentences of probation and Community Corrections revoked at least four times, and a fifth revocation proceeding was pending against him at the time of sentencing.

With respect to the mitigating factors, the trial court properly rejected the mitigating factor, "The defendant's criminal conduct neither caused nor threatened serious bodily injury." *See* Tenn. Code Ann. § 40-35-113(1) (1997). The victim testified that the defendant said "he would mess [the victim] up" if he told his father what the defendant had done to him. The victim also testified that the defendant threatened to kill the victim if he revealed the crime. We believe rejection of this mitigating factor is amply supported in the record.

We are likewise unpersuaded that there are unusual circumstances making it unlikely that the defendant's criminal conduct was motivated by a sustained intent to violate the law. *See* Tenn. Code Ann. § 40-35-113(11) (1997). The defendant does not explain these unusual circumstances in his appellate brief, and we are at a loss to fathom what they might be, especially given the defendant's history of prior sex offenses and other criminal conduct.

Finally, we consider the trial court's rejection of the defendant's claim that he should be afforded mitigation based upon his role as caretaker of his disabled wife. *See* Tenn. Code Ann. § 40-35-113(13) (1997). The trial court was underwhelmed by the defendant's proof, essentially perceiving that the defendant was exploiting his wife's condition for personal gain. The lower court was entitled, as the finder of fact, to assess the genuineness and sincerity of the defendant's and his wife's testimony in this regard. On appeal, the defendant has not overcome the presumed correctness of this determination. As such, we cannot say that the court erred in declining to apply this mitigating factor.

Thus, the trial court properly determined that the defendant's sentence should be enhanced. Upon consideration, we cannot quibble with the eleven-year sentence imposed. The sentence is reflective of the court's heavy weighing of the two enhancement factors and the absence of any mitigating evidence.

For these reasons, the judgment is affirmed.

_____

JAMES CURWOOD WITT, JR., JUDGE