

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1995 SESSION

**FILED**

**October 26, 1995**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

STATE OF TENNESSEE,

\*

C.C.A. #03C01-9411-CR-00409

APPELLEE,

\*

SULLIVAN COUNTY

VS.

\*

Hon. Lynn W. Brown, Judge

JAMES BRIAN WILLIAMS,

\*

(Aggravated Rape)

APPELLANT.

\*

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For the Appellee:

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OPINION FILED: \_\_\_\_\_

AFFIRMED

William M. Barker, Judge

## OPINION

The appellant, James Brian Williams, was convicted of aggravated rape, a class A felony, by a jury of his peers.<sup>1</sup> He was sentenced as a Range I standard offender to fifteen years in the Department of Correction. On appeal, he contends that the evidence is insufficient to support the jury's verdict, that the trial court erred in admitting statements made by the victim as evidence of "fresh complaint," and that the trial court erred in failing to sentence him as an especially mitigated offender.

The judgment of the trial court is affirmed.

The victim was nine years of age at the time of the offense. On September 29, 1990, she and her brother spent the day with their aunt, Melissa Williams, and their uncle, the appellant. Melissa Williams and the appellant took the two children shopping and to dinner. At one point, Melissa Williams, who was nearly two months pregnant, became ill and wanted to go to the hospital. The appellant drove her to Holston Valley Hospital, accompanied by the two children.

Melissa Williams was treated and released the same evening. Afterward, all four returned to the Williams' trailer. Melissa Williams and the victim went to sleep in the same bed. Later that night, the victim was awakened by the appellant:

When I woke up, my shirt was pulled up, and my panties were pulled down. And [the appellant] was rubbing my stomach, and he had his finger in my vagina area.

The victim did not wake her aunt; instead, she got out of the bed and went to the bathroom to see whether she was bleeding. She reiterated that the appellant had digitally penetrated her vagina and that it had hurt.

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<sup>1</sup> Tenn. Code Ann. §39-13-502(a)(4)(1991 Repl.). This offense is presently codified as Rape of a Child in Tenn. Code Ann. §39-13-522 (1993 Supp.)(effective July 1, 1992).

The victim went to the living room, crying, and got on the couch to sleep next to her brother. The appellant came down the hallway and threatened to kill her if she told anyone what had happened. The next day, the appellant drove her home.

The victim did not tell anyone about the incident until approximately January of 1991. On that day, the appellant showed up at her home looking for Melissa Williams.<sup>2</sup> The victim got upset and ran onto the back porch crying. Once there, she told a neighbor, Jackie Callahan, that the appellant had touched her private parts. The victim testified that she did not tell anyone about the offense sooner because she was afraid of the appellant, and also because she was concerned about her aunt's pregnancy.

The victim admitted that she originally told officers that the offense had occurred in December. She had also told police that her younger sister had been staying at the Williams' home on the night of the offense. Finally, the victim admitted that her family, including the appellant, had visited relatives in West Virginia on the Thanksgiving weekend after the offense allegedly occurred. She could not recall whether she drove back to Tennessee with the appellant and Melissa Williams.<sup>3</sup>

Melissa Williams related the events of September 29, 1990. When she, the appellant and the two children arrived home that evening, she was "exhausted" from the day's events and the trip to the hospital. The victim slept in the same bed with her that night, but did not wake her at any point. Melissa Williams testified that her marriage to the appellant was marked by periodic separations. They eventually

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<sup>2</sup> Apparently, Melissa Williams was staying with the victim's parents while she and the appellant underwent a separation.

<sup>3</sup> The victim's brother, Melissa Williams, and the appellant all testified that the victim had driven back with the appellant and Melissa Williams.

divorced in May of 1992. She denied telling the victim to make up the allegations to "hurt" or "get back at" the appellant.

Jackie Callahan testified that he was a friend of the victim's mother and step-father and close to the victim and her brother as well. One afternoon in December of 1990 or January of 1991, the appellant stopped by the victim's home looking for Melissa Williams. The victim got upset and ran outside and Callahan went with her. She told him that the appellant had touched her private area. Callahan convinced the appellant to tell her parents and authorities were subsequently notified.

Dr. Judith Fischer examined the victim on May 2, 1991. The victim's hymen was "swollen and soft" and had a definite "notch" at its base. Dr. Fischer observed an "old disruption" to the hymenal ring that was indicative of a permanent change caused by a separation of the connective tissue. She concluded based on her examination that there was a "level of strong suspicion" to confirm the victim's allegation of sexual abuse. She acknowledged, however, that there were a variety of possible causes relative to the victim's physical condition and that she could not state with any degree of certainty what caused the victim's injuries.

The appellant testified on his own behalf. On the night in question, the victim and Melissa Williams slept in one bedroom while he slept in another. The victim's brother slept on the couch. The appellant denied sexually abusing the victim on that night or any other occasion. He did not know why the victim would make such an allegation, as he had always been kind to her. The appellant testified that he and Melissa Williams had separated and reconciled often during their relationship. He eventually obtained a divorce on the grounds of irreconcilable differences and the fact that Melissa Williams' pregnancy was with another man.

When the sufficiency of the evidence is challenged, the standard for review by an appellate court is whether, after considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). In determining the sufficiency of the evidence, this court should not reweigh or reevaluate the evidence, id., and this court should not substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956).

Aggravated rape as applied in this case is unlawful sexual penetration of a victim who is less than thirteen years of age. Tenn. Code Ann. §39-13-502(a)(4). Unlawful sexual penetration "means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body...." Tenn. Code Ann. §39-13-501(7)(1991 Repl.) (emphasis added).

In the present case, the jury heard the victim's specific testimony that the appellant digitally penetrated her vagina. Her testimony was partially corroborated by other witnesses and the examining physician. On appeal, the appellant, in effect, asks this court to reweigh the credibility of the witnesses, something this court may not do. State v. Cabbage, 571 S.W.2d at 836. Therefore, we conclude that a rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. Tenn. R. App. P. 13(e).

## II

Next, the appellant argues that the trial court erred in admitting evidence of the victim's "fresh complaint" statement made to witness Jackie Callahan. The appellant contends that the victim's statement was not made spontaneously, and that it was not made soon enough after the alleged offense to qualify as "fresh." Conversely, the state maintains that the evidence was properly admitted as fresh complaint testimony, and that the trial court gave a proper limiting instruction to the jury in this regard.

We are constrained by the recent holding of our Supreme Court on September 5, 1995, in the case of State v. Livingston, \_\_\_ S.W.2d \_\_\_ (Tenn. 1995), in which the fresh complaint doctrine was completely abolished in cases involving child abuse. Accordingly, we must hold that if the evidence was admitted solely pursuant to the fresh complaint doctrine, it would have been error. However, in State v. Tilley, a companion case to Livingston, the Supreme Court recognized the continuing vitality of the use of prior consistent statements where a witness' credibility has been attacked. Livingston, \_\_\_ S.W.2d. at \_\_\_ (slip op. at 13-15).

The Tilley case is factually similar to the case at bar. In Tilley, the victim, who was the niece of the defendant, alleged that the defendant digitally penetrated her vagina. Both the trial court and this court ruled that the testimony of the child's cousin was admissible under the fresh complaint doctrine even though the victim did not report the abuse to her cousin until some three months after the abuse occurred. At the trial, the child's credibility was attacked on cross-examination by defense counsel. She was asked if she had previously told her mother and aunt something other than the story she told in court. The Supreme Court held that although not admissible under the abandoned fresh complaint doctrine, the cousin's testimony was admissible as a prior

consistent statement because the victim's credibility had been attacked prior to the introduction of the cousin's testimony. Id.

In the case at bar, defense counsel similarly attacked the victim's credibility by suggesting that she had made up the story to help her aunt get a divorce from the appellant. Defense counsel also asked the child if she had told her friends that she made up the allegations of abuse by the appellant. Given this serious attack on the victim's credibility, we hold that the testimony of Jackie Callahan, which was introduced after the attack on the victim's credibility, was admissible as evidence of the victim's prior consistent statement. Id.; see also State v. Meeks, 867 S.W.2d 361 (Tenn. Crim. App.1993). Moreover, as in Tilley, the trial court instructed the jury that the evidence was limited to corroboration of the victim's testimony and not substantive evidence of guilt. The instruction was given just after Callahan testified. Under these circumstances, we conclude that the trial court did not commit error.

### III

Finally, the appellant argues that the trial court erred in not sentencing him as an especially mitigated offender pursuant to Tenn. Code Ann. §40-35-109(a)(1990 Repl.). He claims that he meets the criteria for such sentencing because he has no prior felony convictions and the record supports a finding of mitigating, but no enhancing factors. The state, however, maintains that the sentence was appropriate.

When a defendant challenges the length, range or manner of service of a sentence, the reviewing court must conduct a de novo review on the record with a presumption that the determinations made by the trial court were correct. Tenn. Code Ann. §40-35-401(d)(1990 Repl.). The presumption of correctness 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); see also Tenn. Code Ann. §40-35-102, -103 (1990 Repl.). The burden is on the appealing party to demonstrate that the sentence imposed by the trial court is improper. See Tenn. Code Ann. §40-35-401 (1990 Repl.) (Sentencing Commission Comments).

In conducting a de novo review on the record, we must consider (a) the evidence, if any, received at the trial and 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, (e) any mitigating or statutory enhancing factors, (f) any statement made by the defendant on his own behalf, and (g) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §40-35-102, -103, and -210 (1990 Repl.); see also State v. Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

A defendant may be sentenced as an especially mitigated offender if he has no prior felony convictions and the court finds mitigating, but no enhancing factors. Tenn. Code Ann. §40-35-109. The wording of this provision and the sentencing commission comments thereto illustrate that the decision is left to the discretion of the trial court. State v. Hicks, 868 S.W.2d 729, 731 (Tenn. Crim. App. 1993); State v. Braden, 867 S.W.2d 750, 762-63 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993); see also State v. Buttrey, 756 S.W.2d 718, 722 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988).

Here, the trial court gave full consideration to the facts and circumstances of the case, as well as the principles of sentencing. The court concluded that the



appellant was not eligible for sentencing as an especially mitigated offender in light of two enhancing factors in the record: the prior criminal history of the appellant, which the court conceded was deserving of only minimal weight, and the appellant's abuse of a position of trust. See Tenn. Code Ann. §40-35-114(1) and (15). The trial court also found mitigating factors in the record, which is why the court imposed the minimum sentence within Range I.

The appellant argues on appeal that the enhancement factors found by the court were not supported by the record. He notes that his only prior conviction was a fine he paid for driving an overloaded truck.<sup>4</sup> He further argues that he did not abuse a position of trust because he is not related to the victim by blood. The record, however, reflects that the appellant was the victim's uncle by marriage. Moreover, as noted by the trial court, the victim, who was nine, was entrusted to the appellant's custody and care at the time of the offense. See, e.g., State v. Willard "Bill" Carpenter, No. 03C01-9108-CR-00268 (Tenn. Crim. App., Knoxville, Jan. 23, 1992), perm. to appeal denied, (Tenn. 1992). Thus, the record fully supports the trial court's finding in this regard.<sup>5</sup> There being an enhancement factor in the record, it follows that the trial court did not err in refusing to impose an especially mitigated offender sentence. See State v. Hicks, 868 S.W.2d at 731.

The judgment of the trial court is affirmed.

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<sup>4</sup> The trial court afforded this "factor" minimal value. The record is unclear whether it was a fine or forfeiture mailed in outside of court. If it was a forfeiture in lieu of court, we do not consider this a conviction. See Williams v. Brown, 860 S.W.2d 854 (Tenn. 1993). Because of the abuse of trust enhancer, the traffic issue is academic.

<sup>5</sup> We therefore do not address the state's contentions on appeal that the record supported two enhancement factors not found by the trial court: the particular vulnerability of the victim due to her age, and the offense was committed to gratify the appellant's desire for pleasure or excitement. See Tenn. Code Ann. §40-35-114(2) and (7)(1990 Repl.).

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William M. Barker, Judge

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Paul G. Summers, Judge

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David G. Hayes, Judge