IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1994

FILED

November 27, 1995

Cecil Crowson, Jr.

Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9403-CR-00112
	)	
	)	Rhea County
	)	
v.	)	Hon. Buddy D. Perry, Judge
	)	
	)	(Child Abuse)
YAHIA AL-BAGHDADI,	)	
	)	
Appellant.	)	

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Yahia Al-Baghdadi, appeals as of right from his conviction by a jury in the Circuit Court of Rhea County for child abuse, a Class A misdemeanor. He received an eleven-month-twenty-nine-day sentence of which all but fifteen days was suspended and was fined twelve hundred fifty dollars. He contends that:

> (1) T.C.A. 39-15-401 is overly broad and vague in violation of the United States and Tennessee constitutions;
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> (2) the evidence is insufficient to support his conviction;
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> (3) the trial court erred by admitting irrelevant testimony;
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> (4) the trial court erred by charging the jury that "injury" in T.C.A. § 39-15-401 is the same as "bodily injury"; and
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> (5) the trial court failed to comply with T.C.A. § 40-35-102 when sentencing the defendant.

We conclude that reversible error does not exist.

At trial the defendant's twelve-year-old son, Bachar, testified that on January 4, 1993, the defendant hit him "a whole bunch" during a visit at the Department of Human Services (DHS). Bachar testified that his two half-sisters and one of the defendant's friends were present during the visit and that the session began in the usual manner with a prayer. He said that he was showing the defendant his saxophone when the defendant noticed "Bachar Streets" printed on the instrument's tag. Bachar said that the defendant told him that he wanted to remove the tag from the instrument but that he told the defendant not to remove it. When the defendant asked him why he used the name Streets, he explained that Streets was his stepfather's last name and that he wanted to use it. Bachar said that the defendant told him not to use the name but that he told the defendant he would continue to use it. Bachar testified that the defendant kept questioning him about the name tag and then began hitting him. He said that the defendant hit him on the face with the back of his hand and hit

him in the back and sides with his fists. He said that the defendant continued to hit him even after the defendant's friend told him to stop. Bachar said he was scared when the defendant was hitting him and explained that he did not yell or cry because the defendant threatened to kill his grandparents if he did.

Bachar said that he believed the threat and did not tell his grandparents about the defendant hitting him until the next night when he told his grandmother his back was sore. He said that stress from the incident also caused him to have problems breathing and that his grandmother took him to see a doctor. He explained that he lives with his grandparents, loves them and tries to please them. He said that his grandfather has heart problems and emphysema. He knew that his grandparents had disagreements with the defendant prior to the January 4th visit and had heard his grandfather on the phone arguing with the defendant the night before the visit.

Bachar's grandmother, Mary Martin, testified that she was at the Department of Human Services during Bachar's visit with the defendant on January 4, 1993. She explained that Bachar's visits with the defendant were to be unsupervised but that normally a DHS worker, whose work area was located behind a wall of the visitation room that contained a two-way mirror, would glance into the room occasionally. She said that the worker was not present during the January 4th visit and that she and her husband could not see into the room from where they were sitting. She recalled being concerned during the visit when she heard a whimper-like sound and said that she immediately told Sandi Allen, a DHS worker, about the sound. She said that she and her husband then walked with Ms. Allen to the two-way mirror but that they could not see into the room because the lights in the room were off. Ms. Martin testified that after Bachar came out of the room, she noticed his pants were torn. Bachar told her that he turned away from the defendant and that the defendant ripped his pants by grabbing the pocket.

Ms. Martin testified that Bachar was "just not himself" after the visit. She said that he acted sad and went to bed early without eating supper. She said that she knew that the defendant had hurt Bachar's feelings by telling him he was fat but that on the day of the visit Bachar did not tell her about the defendant hitting him, even though she asked him several times what was bothering him. The morning after the visit Bachar said that his stomach hurt and that he did not want to go to school. Ms. Martin said that she sent him to school anyway and that when he returned he was still acting sad and did not eat supper. She said that when she was scratching Bachar's back that night to help him sleep, he complained that his back was hurting and told her that the defendant did it. She recalled that Bachar then started crying and asked her not to tell the defendant. She said that Bachar told her about the threat the defendant made and told her the defendant could step on her like a bug and that his grandfather was a sick old man who the defendant could kill easily. Ms. Martin explained that her husband has a heart condition and has an artificial valve in his heart. She said that Bachar's back was tender all over and that he had approximately six little bruises under each arm. She said that when she took him to a doctor, Bachar flexed every time the doctor touched his back or thigh.

Sandi Allen, a DHS worker, testified that she was startled by a loud crying noise during Bachar's January 4th visit with the defendant and that she and Ms. Martin tried to look into the visitation room but could not see Bachar. She said that as far as she could tell the lights in the room were off and explained that it is not possible to see into the room when the lights are off. She said that she did not go into the room because by court order the visitation was to be unsupervised. Ms. Allen admitted that she did not see who made the loud crying noise and that two smaller children were also in the room with the defendant.

The defendant denied striking Bachar during the discussion over the name tag but said that he and Bachar hit each other when they were playing. He said that he told Bachar that he was mad and that he did not want to see him using the Streets name. He explained that one of his kids may have turned off the lights during the January 4th visit but said that the sun shines directly through a window so that there would have been light in the room. Although he admitted to arguing with Bachar's grandfather the night before the visit, he denied making any threats towards Bachar's grandparents.

Mohammed Jallad testified that he accompanied the defendant to the DHS to visit Bachar. He testified that he and the defendant briefly discussed Bachar's weight problem during the visit and said that the defendant played with Bachar by tickling him and carrying him. He said that he did not see the defendant hit Bachar and that there was no physical contact between the two during the discussion about the name tag. He said that the defendant sounded disappointed, not angry, during the name tag discussion and that Bachar blamed his grandparents for the name being on his saxophone. He recalled that Bachar left the room to speak with his grandparents about the tag and said that when he returned he told the defendant that everything would be fine. Jallad also explained that his physical appearance had changed since the January 4th visit because he was no longer wearing Islamic dress or growing a beard. During the state's rebuttal, both Mary Martin and Sandi Allen testified that Jallad was not the man present during the January 4th visit.

I

The defendant contends that T.C.A. § 39-15-401(a)(1991) is unconstitutionally vague in violation of the due process clause of the 14th amendment of the United States Constitution and Article 1, Section 8 of the Tennessee Constitution. In relevant part, T.C.A. §39-15-401(a)(1991) provides:

> Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare is guilty of a Class A misdemeanor.

The defendant claims that the statute is unconstitutionally vague in two respects. First, he argues that the statute fails to give adequate notice of the proscribed conduct because it fails to define the term injury. The defendant reasons that "injury" in the statute is not limited to bodily injury but may also include emotional, psychological, mental, economic, social, and educational distress. He argues that a parent who refuses a child's request for a bicycle would be guilty of child abuse under the statute if the child became emotionally upset and went on a hunger strike. In essence, the defendant contends that the statute is unconstitutionally vague because it could be interpreted to prohibit any conduct that "distresses" a child.

We do not judge the constitutionality of a statute by theorizing all of its possible applications to determine if any application of the statute could be unconstitutional. Due process does not require that a statute be drafted with absolute precision. State v. McDonald, 534 S.W.2d 650, 651(Tenn. 1976), cert. denied, 425 U.S. 955, 96 S. Ct. 1733, 1748(1976). "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Rose v. Locke, 423 U.S. 48, 50, 96 S. Ct. 243, 244 (1976). A statute may prohibit some conduct with sufficient clarity, although it may be vague if applied to other conduct. State v. Butler, 880 S.W.2d 395, 397 (Tenn. Crim. App. 1994). Thus, a defendant may be limited to challenging only his own conduct under the statute. See

State v. Alcorn, 741 S.W.2d 135, 139 (Tenn. Crim. App. 1987)("Unless the statute substantially affects the exercise of first amendment privileges or other fundamental liberties, or is vague as to all its applications, [a defendant's] challenge is limited to [the defendant's] own conduct."). Such is the case before us.

Statutes are to be construed in the light of reason. State v. Netto, 486 S.W.2d 725 (Tenn. 1972). The evidence shows that the defendant inflicted bodily injury on a twelve-year-old child. In the context of T.C.A. § 39-15-401(a)(1991), any reasonable definition of the term injury necessarily includes bodily injury. We therefore conclude that the statute provided the defendant with sufficient notice that his conduct was prohibited.

Second, the defendant argues that T.C.A. § 39-15-401(a)(1991) is unconstitutionally vague because it fails to define what conduct may "adversely affect the health and welfare" of a child. This argument is likewise without merit. Because the defendant was not charged with child neglect, there is no basis to challenge the neglect portion of the statute. Furthermore, this court rejected a similar argument in State v. Cynthia Denise Smith, No. 1153, Hamilton Co. (Tenn. Crim. App. Sept. 20, 1990).

II

The defendant next argues that the evidence was insufficient to convict him as a matter of law. We disagree. Our standard of review when the sufficiency of the evidence is questioned on appeal 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). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and

drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

In a light most favorable to the state, the evidence shows that the defendant hit Bachar in the face with the back of his hand and punched Bachar in the sides and back. The beating caused bruises under Bachar's arms and hurt his back so that he flexed when the doctor tried to touch it. Stress from the incident caused Bachar to have problems breathing. We conclude that the evidence is legally sufficient to prove that the defendant committed child abuse in violation of T.C.A. § 39-15-401(a)(1991).

III

The defendant contends that the trial court erred by admitting irrelevant testimony concerning the frequency of the defendant's visits with Bachar, visits that the defendant missed, and the health of Bachar's grandfather. Over the defendant's objection, Bachar testified during his direct examination that the defendant had not visited him for several months before the January 4th visit. He said that he went to the DHS and waited thirty minutes for the defendant at times when the defendant missed visits. Immediately after this testimony, when the state asked Bachar whether the defendant called before missing scheduled visits, the trial court instructed the state that the point was made and to move to another line of questioning. The trial court also sustained the defendant's objection when the state asked Ms. Martin how many times the defendant missed scheduled visits. During his direct examination, the defendant explained that sometimes he missed visits because he could not get off from work and other times he missed visits because of his wife or because he did not feel like driving from Chattanooga to Dayton for other reasons. On cross-examination, the defendant admitted that he missed so many visits that the court ordered him to specify visitation

dates and to call before missing visits. The defendant also admitted that he missed many scheduled visits without calling Bachar.

Evidence is relevant if it has "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." T.R.E. 401. The fact that the defendant missed several visits before January 4, 1993, and left Bachar waiting thirty minutes because he failed to call before missing visits is not probative of any fact of consequence to determine whether the defendant abused Bachar on January 4, 1993. Such testimony should have been excluded because it had no probative value and could only serve to prejudice the defendant by portraying him as a bad father. However, the admission of irrelevant evidence does not entitle the defendant to relief on appeal unless the error "more probably than not" affected the judgment. T.R.A.P. 36(b).

Given Bachar's detailed testimony about the abuse he received during the January 4th visit, the testimony about the loud crying noise, and Ms. Martin's corroboration of Bachar's injuries, we are unable to conclude that the brief testimony concerning the missed visits affected the outcome of the trial. The admission of the testimony was therefore harmless.

With respect to the admission of testimony concerning the health of Bachar's grandfather, we agree with the trial court's determination that the testimony is relevant. Bachar testified that he did not immediately tell his grandparents about the abuse because the defendant threatened to hurt them if he did. The testimony about Bachar's grandfather's health was marginally relevant to aid the jury in understanding the effect that the defendant's threats may have had on Bachar.

IV

The defendant next challenges the trial court's jury instruction on child abuse. The court gave the following instruction from T.P.I.--Crim. 21.02 (3d ed.):

> For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:
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> Number 1. That the defendant other than by accidental means treated the child in such a manner as to inflict injury, and
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> That the defendant acts knowingly.
>
> A child means a child under eighteen years of age.
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> Injury includes cuts, abrasions, bruises, burns or disfigurement; physical pain or temporary illness or impairment of the function member[1], organ, or mental faculty. . . .

The instruction defines injury using the T.C.A. § 39-11-106(2) definition of bodily injury. The defendant argues that the trial court erred by equating injury under T.C.A. § 39-15-401 with bodily injury. We disagree. As we previously concluded, the term injury in T.C.A. §39-15-401 includes bodily injury. Under the facts of this case, we need not decide whether "injury" under T.C.A. § 39-15-401 includes more than bodily injury. In no way was the defendant prejudiced by the trial court's definition of the term.

V

In his final claim, the defendant argues that he was improperly sentenced, both as to the length of the sentence and to the length of his confinement. The trial court sentenced the defendant to eleven months, twenty-nine days in jail and ordered that all but fifteen days be suspended with the fifteen days to be served in periodic increments in order to preserve the defendant's work capability. The defendant contends that the trial court improperly found that two enhancement factors existed relative to him having a previous history of criminal convictions and him having a previous history of unwillingness to comply with the conditions of a sentence

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[1]The trial court apparently omitted "of a bodily" which precedes member in T.P.I.--Crim. 21.02 (3d ed.).

involving release into the community. See T.C.A. § 40-35-114(a) and (8). Also, he complains that the trial court improperly considered evidence of his civil contempt, relating to his failure to return his son.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing was improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In fact, the weight to be given to any applicable sentencing factor is left to the discretion of the trial court. See State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992); T.C.A. § 40-35-210, Sentencing Commission Comments.

The defendant was previously convicted on separate occasions for malicious mischief and custodial interference, misdemeanors. Regarding the custodial interference, the record reflects that the defendant, a resident alien, sent his son, Bachar, to Jordan without the permission of the grandparents and in violation of a visitation order. According to the presentence report, he received a suspended sentence and was required to pay one thousand dollars in restitution and court costs. A revocation warrant was filed alleging that he missed some payments, but it was withdrawn. The record indicates the existence of a dispute about whether or not the defendant actually did or did not meet his financial obligations in that case, although the presentence report states that the court costs remain unpaid and, without objection, the presentence officer testified that the recipients of the restitution claimed

that three hundred dollars was still owed. Also, the record reflects that the defendant violated his previous child visitation order on more occasions than the Jordan trip, but he claimed that the order was too restrictive and that he has not violated any such order since his previous conviction.

As the defendant states, the trial court found that enhancement factors (1) and (8) existed, relative to previous criminal history and previous history of unwillingness to comply with conditions of a sentence involving release, but the findings did not end there. The trial court also stated that it found a lot of the defendant's assertions to be untruthful and expressed concern about his willful violation of civil court orders in the past indicating that he would not follow restrictive conditions if probation were imposed. Under all of these circumstances, the trial court determined that some time needed to be served in confinement and that the maximum available sentence should be imposed, although mostly suspended.

Needless to say, the prior misdemeanors justified application of factor (1). Also, the record adequately supports the trial court's findings regarding factor (8) so as not to warrant our concluding otherwise. Moreover, we are aware that application of the enhancement factors in a misdemeanor case focuses mainly on considering how much actual confinement is to occur. "In determining the percentage of the sentence to be served in actual confinement the court shall consider the purposes of this chapter, the principles of sentencing, and the enhancement and mitigating factors set forth herein, and shall not impose such percentages arbitrarily." T.C.A. § 40-35-302(d). Likewise, this statute reflects that misdemeanor sentencing is not limited to consideration of enhancement or mitigating factors, but can include other matters relevant to the purposes and principles of sentencing under the 1989 Sentencing Act. In this fashion, the facts that the trial court did not believe the defendant to be truthful and expressed concern about his history of not following court

orders, regardless of the orders being civil or criminal in nature, constitute findings relevant to the length of the sentence, both as to probation and to confinement.

Given the history of conflict involving the defendant with regard to his son and his history of failing to meet his responsibilities under previous court orders, we cannot hold that the trial court erred in requiring the defendant to serve fifteen days in periodic confinement. For similar reasons, we will not disturb the trial court's decision to impose the maximum eleven months, twenty-nine days sentence, given most of it was suspended.

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

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Joseph M. Tipton, Judge

CONCUR:

_____
Jerry Scott, Presiding Judge

_____
John H. Peay, Judge