

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

FILED

March 20, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,
Appellee,

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C.C.A. # 02C01-9505-000133
HARDIN COUNTY

VS.

Hon. C. Creed McGinley, Judge

DAVID ARNOLD CROSS,
Appellant.

(Rape of a Child)

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, David Arnold Cross, was convicted for rape of a child. The trial court imposed the maximum, Range I sentence of twenty-five (25) years. In this appeal of right, the defendant claims the evidence was insufficient to support his conviction and that the sentence was excessive.

We affirm the judgment.

The defendant is the father of the eleven-year-old victim, TC.¹ They shared a residence on Macon Road in Savannah with the victim's sister, her brother, and the defendant's girlfriend, who had an infant son of her own.

The victim testified that on or about April 12, 1994, the defendant raped her by anal penetration. The victim had been doing the laundry with her sister and brother when the defendant, who often drank to excess and who "may" have been drinking that day, told the victim to put his clothes away in his bedroom. She recalled that the defendant then instructed her to close the door, to take her clothes off, and to get on the bed on her hands and knees. She testified that the defendant, who was only wearing a white tank top, then kissed her, touched her chest, and "put his thing in [her] back part" while "moving back and forth." She testified that she began to cry and the defendant had directed her to put her head in the pillow so that no one could hear. She recalled

¹It is the policy of this court to withhold the identity of children involved in sexual abuse. State v. Schimpf, 782 S.W.2d 186, 188 n. 1 (Tenn. Crim. App. 1989).

that when the defendant was finished, her sister, JC, and the baby then came into the room.

JC, the victim's thirteen-year-old sister, testified that she recalled a day when the defendant's girlfriend left her to watch the baby. She remembered that the defendant had called the victim to his room. JC testified that she got worried after a few minutes and carried the baby into the living room which was closer to the defendant's bedroom. She recalled that when the baby went into the bedroom, the defendant ordered him out. JC stated that she could see that the light was out in the bedroom so she could not see what had occurred inside.

Later, all of the children were placed in foster care due to an unrelated incident. Andrea Davidson, an investigator with the Department of Human Services, interviewed the victim and JC, learned of the victim's allegations, and charged the defendant with rape.

Dr. Michael Smith, who examined TC at the Hardin County Hospital Emergency Room over a month after the rape, discovered vaginal scarring which he believed to be due to trauma or vaginal penetration. He found "extensive damage" and described scarring from the vagina to the rectum. Dr. Smith held the opinion that TC had been the victim of sexual abuse but admitted on cross-examination that he could not say with precision when, how, or who had caused the trauma.

R.C. Highland, who lived next door to the defendant, testified for the defense. He stated that the children appeared to be well taken care of and well-behaved. He acknowledged, however, that he had never been inside the defendant's residence and knew that the defendant often drank.

Sandra Williams, the defendant's former girlfriend, testified that she was living with the defendant at the time of the offense. She stated that her work records indicated that she was at home on April 12, 1994, the date of the rape, and that she had never seen the defendant sexually abuse his children. She did state, however, that the victim had complained that a man named Jim had sexually abused her.

The defendant denied that he had sexually abused the victim and stated that he was aware of TC's claim that she had been abused by someone named Jim. He testified that he did not know the victim had been bleeding. The defendant claimed that the victim's allegations were due to her desire to live with her mother.

I

The defendant first challenges the sufficiency of the evidence. He asserts that contradictions in the testimony of the state's witnesses entitled him to an acquittal.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage,

571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e). A crime may also be established by the use of circumstantial evidence only. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); Marable v. State, 203 Tenn. 440, 451-52, 313 S.W.2d 451, 457 (1958).

Tenn. Code Ann. § 39-13-522(a) defines the offense of rape of a child as "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Sexual penetration is defined as "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, but emission of semen is not required[.]" Tenn. Code Ann. § 39-13-501(7).

Here, the state presented testimony that the defendant had anally penetrated his eleven-year-old daughter.

The jury chose to accredit the testimony of the victim and rejected the claims of the defendant. It was entitled to do so. Because a rational trier of fact could have found the essential elements of the crime, the evidence was legally sufficient to support a conviction of rape of a child. See Jackson v. Virginia, 443 U.S. 307 (1979).

II

The defendant also asserts that the trial court erred by imposing the maximum 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 with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's

potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence on a felony conviction, the presumption is generally the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). But see 1995 Tenn. Pub. Acts ch. 493 (amending the statute effective July 1, 1995, to make the presumptive sentence in a Class A felony the midpoint in the range). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

Here, the trial court found that the following four enhancement factors applied:

- (a) The defendant had a prior history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, Tenn. Code Ann. § 40-35-114(1);
- (b) The personal injuries inflicted upon the victim were particularly great, Tenn. Code Ann. § 40-35-114(6);
- (c) The offense was committed to gratify the defendant's desire for pleasure or excitement, Tenn. Code Ann. § 40-35-114(7); and
- (d) The defendant abused a position of

private trust, Tenn. Code Ann. § 40-35-114(15).

The defendant does not challenge the application of factors (1) and (15) but claims that the record does not support the application of factors (6) and (7).

In our opinion, both factors are supported by the evidence. Dr. Smith testified that the victim had "quite a bit of extensive damage" to the vaginal area. That alone warrants the finding of particularly great personal injuries to the victim. There was also evidence that the defendant had "french" kissed the victim and touched her chest prior to the rape. In our view, these facts would also support the finding that the offense was sexually motivated. See State v. Adams, 864 S.W.2d 31, 34-35 (Tenn. 1993).

In summary, the trial court's findings support the application of the four enhancement factors and the imposition of the maximum sentence of twenty-five years.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

John H. Peay, Judge

David H. Welles, Judge