IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1995 SESSION

FILED

March 22, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE, APPELLEE,	)	No. 01-C-01-9501-CC-00015
v.	)	Lincoln County
	)	W. Charles Lee, Judge
DANNY LEE HOLDER, APPELLANT.	)	(Rape of a Child)

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OPINION FILED:______________________________

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Danny Lee Holder, was convicted of raping a child, a Class A felony, by a jury of his peers. The trial court sentenced the appellant to confinement for twenty-three (23) years in the Department of Correction. Three basic issues are presented for review. The appellant contends that the evidence is insufficient to sustain his conviction; the sentence imposed by the trial court is excessive; and Tenn. Code Ann. § 39-13-523, which requires a person convicted of child rape to serve the entire sentence imposed by the trial court, is unconstitutional. This Court finds that the issues raised by the appellant are without merit, and, therefore, affirms the judgment of the trial court.

The appellant is the natural father of the victim, D.H. The victim's mother and the appellant separated when the victim was five-months-old. The appellant had very little contact with the victim until he visited her in the hospital. The victim, who was having trouble getting along with her mother, asked the appellant if she could live with him and her step-mother. The appellant applied for and obtained temporary custody of the victim. On August 6, 1993, the victim moved into the appellant's home. During the time in question, the victim was twelve years of age and the appellant was thirty-eight years of age.

In October of 1993, the appellant and the victim engaged in sexual activity. The victim testified that they engaged in vaginal intercourse, fellatio, and cunnilingus. These sexual encounters occurred approximately once a week from October to December 8, 1993, when the victim was returned to her mother. The appellant gave a statement to the investigating officer in which he admitted that he engaged in sexual intercourse and cunnilingus with the victim. The appellant also made a courtroom admission of these acts when he testified in support of his defense.

The victim testified that she engaged in the sexual acts with the appellant by mutual agreement. The appellant testified that the victim consented to the sexual acts, he did not threaten her, and he made no promises to her. He did tell the victim that if she told someone, he could go to jail. The victim told a close friend what was occurring.

On December 8, 1993, the appellant's wife, Sandra, entered the residence, went to the shower, and found the appellant and the victim, both nude, in the shower. Mrs. Holder

went to the home of the victim's mother, told her what she had witnessed, and the victim's mother notified the Lincoln County Sheriff's Department.

I.

The appellant contends that the evidence is insufficient, as a matter of law, to support a finding by a rational trier of fact that he was guilty of the rape of a child beyond a reasonable doubt. He argues that the word "unlawful," as used in the applicable statute, Tenn. Code Ann. § 39-13-522, equates to a non-consensual penetration. Therefore, if the sexual penetration was consensual in this case, the accused could not be convicted of the crime proscribed by statute. The state contends that consent is never a defense when the victim is less than thirteen years of age.

A.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

B.

In State v. Jones, 889 S.W.2d 225 (Tenn. Crim. App.), per. app. denied (Tenn. 1994), the accused was convicted of aggravated rape. The age of the victim was the aggravating factor that elevated the offense from rape to aggravated rape. The accused, like the appellant in this case, contended that the term "unlawful," as used in the aggravated rape statute, was synonymous with "non-consensual sex." In holding that "consent" was not a defense, this Court said:

> Even though the term "unlawful" may generally refer to non-consensual acts, the defense of consent is still not available when the factor elevating the crime from simple rape to aggravated rape is the age of the victim. There is plain meaning in the statute. This interpretation is in accord with several unreported opinions rendered by this court. (citations omitted).
>
> These holdings are consistent with the legislative aim to provide special protection for children. . . .
>
> In summary, our view, simply stated, is that consent is never a defense to a sex offense when the victim is less than thirteen years of age. The term "unlawful," as used in the statute, does not afford the defendant any relief.

889 S.W.2d at 227.

This Court holds that the decision in Jones is equally applicable to Tenn. Code Ann. § 39-13-522. This statute also gives special protection to children under the age of thirteen years. It also enhances the punishment when a child is raped. Consequently, the appellant was not entitled to the defense of consent in this case.

C.

This Court finds that the evidence of the appellant's guilt is overwhelming. The victim testified as to what occurred. The appellant confessed his guilt after his arrest. When this case was tried, the appellant took the stand and admitted what occurred. In short, the evidence is more than sufficient to support a finding by a rational trier of fact that the appellant was guilty of the rape of a child beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 673 (1979).

This issue is without merit.

II.

The appellant contends that "the Trial Judge improperly applied the mitigating and enhancing factors" and "the Sentence imposed is excessive." He argues that the trial court should have imposed the minimum sentence. However, the appellant has failed to establish what mitigating factors should have been found and what enhancing factors were improperly applied.

It is the duty of this Court to review sentences de novo with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). However, the appellant has the burden of establishing that the sentence imposed by the trial court was erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn.

1994); State v. Fletcher, 805 S.W.2d 785, 786 (Tenn. Crim. App. 1991). In this case, the appellant has failed to overcome the presumption of correctness. As previously stated, he does not state what factors were erroneously applied or not applied. Furthermore, he does not establish why the sentence was excessive.

The trial court found three enhancing factors and one mitigating factor. The record reveals that the trial court gave great weight to the enhancing factors and little weight to the mitigating factor. This Court has reviewed these factors and finds that they are supported by the record.

This issue is without merit.

III.

The appellant contends that Tenn. Code Ann. § 39-13-523 is unconstitutional because it is disproportionate. He argues that the statute violates the Eighth Amendment and Article 1, § 16 of the Tennessee Constitution. This statute provides that a person convicted of the rape of a child must "serve the entire sentence imposed by the [trial] court undiminished by any sentence reduction credits such person may be eligible for or earn." Tenn. Code Ann. § 39-13-523(b). Moreover, a person convicted of this offense is not eligible for parole, and neither the governor nor the parole board may release such person. Tenn. Code Ann. §§ 39-13-523(c) and (d).

Although the United States Supreme Court has held that proportionality analysis applies only in capital cases, Harmelin v. Michigan, 501 U.S. 957, 994, 111 S.Ct. 2680, 2701, 115 L.Ed.2d 836, 864 (1991), the Tennessee Supreme Court evaluates a proportionality challenge under the Tennessee Constitution by using the method set forth in Justice Kennedy's concurrence in Harmelin. State v. Harris, 844 S.W.2d 601, 603 (Tenn. 1992). Under this approach, the sentence is first compared with the crime committed. "Unless this threshold comparison leads to an inference of gross disproportionality, the inquiry ends -- the sentence is constitutional. In those rare cases where this inference does arise, the analysis proceeds by comparing (1) the sentences imposed on other criminals in the same jurisdiction, and (2) the sentences imposed for

commission of the same crime in other jurisdictions." Harris, 844 S.W.2d at 603.

In State v. Harris, an eight-year-old child spent the night at the accused's residence following a birthday party. The child "awoke to find [the accused] fondling her chest under her nightgown and touching her in the genital area over her shorts." 844 S.W.2d at 602. The accused was convicted of aggravated sexual battery based upon the age of the victim. The trial court sentenced the accused to serve twenty (20) years in the Department of Correction. The accused argued that the sentence imposed was unconstitutionally disproportionate to the crime that he had committed. After comparing the 20-year sentence with the gravity of the offense, the Court found that the sentence was not unconstitutionally disproportionate in the context of the Eighth Amendment to the United States Constitution and Article I, § 16 of the Tennessee Constitution.

In Harmelin v. Michigan, the accused was "convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole." The appellant contended that the sentence imposed was "significantly disproportionate" to the crime he committed; and it was "cruel and unusual" punishment because it was the only punishment the court could impose for the offense. The United States Supreme Court held that the sentence imposed was not unconstitutional. Harmelin, 501 U.S. at 994, 111 S.Ct. at 2701, 115 L.Ed.2d at 864-65. The Court further held that Michigan was not required, as the accused argued, to create a sentencing scheme where life without parole was the highest penalty. Harmelin, 501 U.S. at 994-96, 111 S.Ct. at 2701-02, 115 L.Ed.2d at 864-65.

The courts generally agree that substantial deference should be given to the broad authority of the legislature to determine the type and limits of punishment for a particular crime. It is also recognized that the punishment for a particular crime may differ from jurisdiction to jurisdiction as there is not one method or system for the punishment of crimes.

Tenn. Code Ann. § 39-13-523 is constitutional. This Court is aware of the numerous cases of child rape that have been resolved by this Court in the past. Each year the number of these crimes has increased. Obviously, the prescribed punishment for the offense did not deter the citizens of this state from committing this crime. In 1992 the

Tennessee General Assembly, realizing that the number of these cases continued to grow, enacted Tenn. Code Ann. § 39-13-523 in order to deter this offense.

This state has a legitimate interest in trying to protect children under the age of thirteen from the sexual misconduct of others. These children are generally vulnerable to adults due to the differences in size. Also, a relative of the victim is generally the perpetrator. The relative, as a general rule, has control of the victim.

After comparing the seriousness of the offense with the 23-year sentence imposed, no inference of gross disproportionality arises. Here, the appellant, as the father of the victim, took advantage of a vulnerable twelve-year-old child. During the trial, both the victim and the appellant testified that they had engaged in a sexual act involving penetration approximately once a week or about twelve times. During the sentencing hearing, the appellant testified that the actual number was closer to twenty-four times, or double the trial testimony. Yet the appellant was tried and convicted of a single act. Certainly, the sentence fits the crime in this case; and given the facts of this case, the fact the appellant will have to serve every day of the twenty-three year sentence does not make the punishment unconstitutionally disproportionate.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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JOSEPH M. TIPTON, JUDGE