

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY SESSION, 1996

FILED
June 10, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee,)
)
)
VS.)
)
ROBERT J. BURTON, SR.,)
)
Appellant.)

C.C.A. NO. 02C01-9507-CC-00193

WEAKLEY COUNTY

HON. WILLIAM B. ACREE, JR.
PRESIDING JUDGE

(Rape and Incest - Direct Appeal)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Weakley County Circuit Court jury found Appellant Robert Burton guilty of one count of rape and one count of incest. As a Range I standard offender, Appellant received a sentence of twelve years for the rape conviction and a sentence of six years for the incest conviction. The sentences were ordered served concurrently. In this appeal, Appellant presents two issues for review: (1) whether the evidence presented at trial is legally sufficient to sustain convictions for rape and incest; and (2) whether the length of sentence is excessive. Additionally, the State presents an issue unaddressed by Appellant regarding the introduction of testimony under the fresh complaint doctrine.

After a review of the record, we affirm the judgment of the trial court.

I. SUFFICIENCY OF THE EVIDENCE

Appellant alleges that the evidence presented at trial is legally insufficient to sustain convictions for rape and incest. When an appeal challenges the sufficiency of the evidence, the standard of review is whether, after viewing 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. Jackson v. Virginia, 443 U.S. 307, 318 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not re-

weigh the evidence, re-evaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). In a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995).

Once approved by the trial court, a jury verdict accredits the witnesses presented by the State and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). We will review the facts of this case in light of the foregoing well-established principles of law.

On the afternoon of Friday, March 25, 1994, Appellant invited his thirteen-year-old daughter S.B. to accompany him to his workshop.¹ Once there, S.B. assisted Appellant in the repair of an air conditioner. After some period of time, Appellant approached S.B., pulled down her shorts and underwear, and pushed her back onto a couch. Appellant then unbuttoned and unzipped his pants, kneeled down on top of S.B., and vaginally

¹It is the policy of this Court to refrain from referring by name to minor victims of sex offenses. The victim will be referred to by her initials.

penetrated her. Having ejaculated, Appellant returned to his work on the air conditioner. After ten or fifteen minutes, Appellant and S.B. left the workshop together and returned home.

On the following Thursday, S.B. told Sherry Page, her school guidance counselor, about the incident. At the behest of Ms. Page, S.B. then told her mother. Ms. Page contacted the Department of Human Services and asked the agency to investigate S.B.'s claim. The Department of Human Services interviewed S.B. on the following Monday and arranged for Dr. Susan Brewer, a pediatrician, to examine her for signs of sexual abuse. During the examination, S.B. again recounted the details of the incident. The physical examination revealed that S.B.'s hymenal opening was enlarged for her age and that she had significant vaginal scarring, as a result of "tears" in the vaginal tissue. Dr. Brewer stated that these physical characteristics indicate vaginal penetration.

Having heard the foregoing evidence, the jury found Appellant guilty of one count of rape and one count of incest. In order to sustain a conviction for rape in this case, the State was required to prove that Appellant unlawfully penetrated S.B. and that the penetration was accompanied by force or coercion. See Tenn. Code Ann. § 39-13-503(a)(1) (Supp. 1995). S.B. testified that, on the afternoon in question, Appellant removed her shorts and underwear, pushed her back onto a couch, and vaginally penetrated her. Medical evidence supported the fact that S.B. had been vaginally penetrated. This evidence is sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that a rape had been committed.

In order to sustain a conviction for incest in this case, the State was required to prove that Appellant sexually penetrated S.B. and that Appellant was S.B.'s natural father. See id. § 39-15-302(a)(1) (1991). S.B. testified that Appellant vaginally penetrated her on the afternoon in question and that Appellant is her natural father. S.B.'s sister Priscilla also testified that Appellant is S.B.'s father. The foregoing is sufficient to allow a rational trier of fact to find the essential elements of incest beyond a reasonable doubt.

Appellant contends that the evidence presented at trial is insufficient to sustain his convictions because the actions of S.B. were not consistent with one who had just been raped, because there was inconsistent testimony regarding S.B.'s search for a lost earring just before the attack, because the medical examination failed to specify when and by whom S.B. had been penetrated, and because the jury failed to give adequate weight to Appellant's unrefuted alibi testimony. However, as stated previously, determining the credibility of witnesses and the weight to be given their testimony and resolving conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. Sheffield, 676 S.W.2d at 547. This Court, even if it wished to do so, may not substitute its evidentiary inferences for those drawn by the jury. Carey, 914 S.W.2d at 95. Here, it appears that the jury chose to believe the testimony of S.B. regarding the attack and to disbelieve the testimony of Appellant's alibi witness. Under well-settled Tennessee law, it was within the province of the jury to do so. Thus, we find that, when viewed in a light most favorable to the State, the evidence is more than legally sufficient to support Appellant's convictions for rape and incest.

II. FRESH COMPLAINT DOCTRINE

The trial court admitted the testimony of S.B.'s school guidance counselor under the fresh complaint doctrine for the purpose of corroborating S.B.'s account of the attack. Under the fresh complaint doctrine, the fact that a rape victim made an immediate complaint is admissible in the prosecution's case-in-chief for limited purposes. State v. Kendricks, 891 S.W.2d 597, 602-03 (Tenn. 1994). This doctrine evolved from the sexist expectation that a "normal" woman would make an immediate outcry if raped. Id. at 604. However, finding no acceptable basis for the extension of the doctrine to child victims, the Tennessee Supreme Court recently held that, in cases where the victim of sexual abuse is a child, neither the fact of the complaint nor the details of the complaint are admissible. State v. Livingston, 907 S.W.2d 392, 395 (Tenn. 1995). Despite this limitation, the Court noted that "evidence in the nature of fresh-complaint may be admissible . . . as corroborative evidence if it satisfies the prior consistent statement rule." Id.; see also State v. Meeks, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993), cert. denied, 114 S. Ct. 1200 (1994) (holding that, when the credibility of a witness is impeached with the suggestion that the testimony is fabricated or based upon faulty recollection, prior consistent statements may be introduced for the sole purpose of corroborating the testimony of the witness). Here, Appellant's trial counsel cross-examined S.B. regarding whether she had ever lied to get someone else in trouble, whether she had lied to her mother about setting the house on fire, and whether she had previously told her teachers that her parents were not feeding her. We find that, although the guidance counselor's testimony is inadmissible under the fresh complaint doctrine contemplated in Livingston, reversal of Appellant's convictions is unwarranted because the testimony was

admissible as a prior consistent statement to rebut Appellant's suggestions that S.B. had fabricated her claim.

III. SENTENCING

Appellant alleges that his length of sentence is excessive due to improper application of two enhancement factors. When an appeal challenges the length, range, or manner of service of a sentence, the appellate court conducts a de novo review with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d) (1990). However, the presumption of correctness only applies when the record demonstrates that the trial court properly considered the relevant sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting a review of the sentence, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

In the absence of enhancement and mitigating factors, the presumptive length of sentence for a Class B, C, D, and E felony is the minimum sentence in the statutory range. Tenn. Code Ann. § 40-35-210(c) (Supp. 1995). Where one or more enhancement factors apply but no mitigating factors exist, the trial court may sentence above the minimum but still within the range. Id. § 40-35-

210(d). Where both enhancement and mitigating factors apply, the trial court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate to the enhancement factors, and then reduce the sentence within the range as appropriate to the mitigating factors. Id. § 40-35-210(e). The weight afforded an enhancement or mitigating factor is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the Tennessee Criminal Sentencing Reform Act of 1989 and its findings are supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

Appellant was convicted of one count of rape, a Class B felony, and one count of incest, a Class C felony. See Tenn. Code Ann. §§ 39-13-503(b), 39-15-302(b). As a Range I standard offender, Appellant was eligible for a sentence of eight to twelve years on the rape conviction and three to six years on the incest conviction. In determining the length of sentence, the trial court found the following four enhancement factors applicable to both the rape conviction and the incest conviction: (1) “[a] victim of the offense was particularly vulnerable because of age or physical or mental ability . . . ,” id. § 40-35-114(4); (2) “[t]he offense involved a victim and was committed to gratify the defendant’s desire for pleasure or excitement,” id. § 40-35-114(7);² (3) “[t]he felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury,” id. § 40-35-

² We note that the Tennessee Supreme Court has recently held that this enhancement factor is not an essential element of the offense of rape and may be used to enhance the sentence of a convicted rapist. State v. Kissinger, No. 02S01-9504-CR-00029, 1996 WL 208525, at *5 (Tenn. April 29, 1996).

114(11); and (4) “[t]he defendant abused a position of public or private trust” Id. § 40-35-114(15).³ The trial court found no mitigating offenses. Based on the foregoing, Appellant received the maximum sentences of twelve years for the rape conviction and six years for the incest conviction. Because the trial court considered the principles, purposes, and goals of the Criminal Sentencing Reform Act of 1989, the presumption of correctness applies to these sentences.

While not considered by the trial court during sentencing, the State submits the following additional enhancement factors: “[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate,” Tenn. Code Ann. § 40-35-114(1), and “[t]he personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great.” Id. § 40-35-114(6). In our de novo review of Appellant’s sentence, we may consider any factor supported by the record. See State v. Kyte, 874 S.W.2d 631, 633 (Tenn. Crim. App. 1993). Given Appellant’s Illinois felony conviction for aggravated battery and the fact that his status as a Range I standard offender requires no previous convictions, we conclude that enhancement factor (1) is applicable. Furthermore, this Court has previously held that enhancement

³ Although not raised in this appeal, “coercion” of a rape victim may be accomplished through the use of parental authority over a child less than fifteen years of age. Tenn. Code Ann. § 39-13-501(1). However, in this case, the trial judge, in sentencing Appellant, clearly viewed the case as one involving the use of actual force to accomplish the rape. Thus, we need not address the issue of whether coupling proof of abuse of parental authority to coerce a child rape victim with abuse of such authority as a breach of a private trust for sentencing enhancement constitutes a violation of the prohibition against double enhancement. See id. § 40-35-114. Moreover, although this act of incest involved an abuse of a private trust, such abuse is not an essential element of the crime of incest. Therefore, there is no impediment to sentencing Appellant by applying the enhancement factor of abuse of a private trust. See State v. Pruitt, No. 01C01-9304-CR-00123, 1994 WL 108936, at *5 (Tenn. Crim. App. Mar. 31, 1994); see also State v. McKnight, 900 S.W.2d 36, 50 (Tenn. Crim. App. 1994) (embracing the proposition that even though it is likely that a particular enhancement factor will be present during the commission of a particular offense, the enhancement factor may still be applied).

factor (6) is applicable to injuries psychological in nature. See State v. Smith, 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994); see, e.g., State v. Hunter, No. 01C01-9410-CR-00335, 1995 WL 623785, at *5 (Tenn. Crim. App. Oct 25, 1995). The record reveals that S.B. suffered severe psychiatric problems as a result of the rape. The record further reveals that, as a result of these problems, S.B. was admitted into the acute care psychiatric unit at Goodlark Regional Medical Center. She received thirty days of treatment for post-traumatic stress disorder and depressive disorder with no organic ideology. Once discharged from the psychiatric hospital, S.B. was placed into a residential facility with on-site psychiatric staff. At the time of the sentencing hearing, S.B. was only spending weekends with her family. Based on the serious psychiatric problems suffered by the victim as a result of the rape, we conclude that enhancement factor (6) is applicable.

Appellant first argues that the trial court improperly applied the enhancement factor of the victim's particular vulnerability to the rape conviction, submitting that this factor was an essential element of the offense. Appellant relies upon the fact that one of the definitions of rape is the unlawful penetration of a victim where "the defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless." See id. § 39-13-503(a)(3) (Supp. 1995). However, Appellant was not indicted under subsection (a)(3). Appellant was indicted under Tenn. Code Ann. § 39-13-503(a)(1), which defines rape as the unlawful penetration of a victim accompanied by force or coercion. Because particular vulnerability was not an essential element of Appellant's rape conviction under Section 39-13-503(a)(1), the trial court was not barred from considering this enhancement

factor. A victim is particularly vulnerable when incapable of resisting, summoning help, or testifying against the perpetrator. State v. Adams, 864 S.W.2d 31, 34-35 (Tenn. 1993). This factor relates more to the natural physical and mental limitations of the victim than merely to the victim's age. Id. The State bears the burden of showing particular vulnerability. Id. While the record contains proof of pre-offense behavioral problems, the State fails to show that these behavioral problems made S.B. particularly vulnerable to the rape attack. Therefore, we conclude that the application of enhancement factor (4) was inappropriate. However, in light of the strength and the number of other enhancement factors, we further conclude that the improper application of enhancement factor (4) constitutes harmless error. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

Appellant next argues that the trial court improperly applied the bodily injury enhancement factor to both the rape and the incest conviction, submitting that S.B. did not suffer bodily injury. "Bodily injury" includes "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106(a)(2) (Supp. 1995). In support of the application of this enhancement factor, the State points out that S.B. suffered an enlarged hymen, vaginal scarring, and psychological injuries. While it is questionable whether these injuries constitute bodily injury as anticipated by enhancement factor (11), it is without question that the severity of her resulting psychological problems alone qualify as particularly great personal injuries under enhancement factor (6). Therefore, we do not choose to address the

question of whether an enlarged hymen, vaginal scarring, and psychological problems constitute bodily injury under enhancement factor (11).

In sum, the record supports the application of enhancement factors (1), (6), (7), and (15) to both of Appellant's convictions. Upon de novo review and in accord with the presumption of correctness, we find that the length of Appellant's sentences are not excessive.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOSEPH B. JONES, PRESIDING JUDGE

GARY R. WADE, JUDGE