

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER SESSION, 1995

**FILED**

May 1, 1996

C.C.A. NO. 02C01-9501-CC-00023  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )

Appellee, )

VS. )

ROGER GRISSOM, )

Appellant. )

C.C.A. NO. 02C01-9501-CC-00023

MADISON COUNTY

HON. JOHN FRANKLIN MURCHISON  
JUDGE

(Aggravated Sexual Battery)

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF MADISON COUNTY

FOR THE APPELLANT:

GEORGE MORTON GOOGE  
District Public Defender

DANIEL J. TAYLOR  
Assistant Public Defender  
26th Judicial District  
227 West Baltimore Street  
Jackson, TN 38301

FOR THE APPELLEE:

CHARLES W. BURSON  
Attorney General and Reporter

ELLEN H. POLLACK  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0485

JERRY WOODALL  
District Attorney General

DONALD H. ALLEN  
Assistant District Attorney General  
225 Martin Luther King Drive  
Jackson, TN 38301

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

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Defendant appeals his conviction pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was indicted for two counts of rape of a child and two counts of aggravated sexual battery. He was convicted of two counts of aggravated sexual battery after a jury trial. The trial court sentenced him to two concurrent twelve-year sentences to be served as a Range I standard offender.

The Defendant argues three issues in his appeal. The first issue is whether the trial court erred in denying the Defendant's motion to suppress statements he made to investigators. The second issue is whether the trial court erred in refusing to grant the Defendant's motion for a mistrial. The third issue is whether the trial court erred in the sentencing phase of the trial because (a) the trial court considered an improper enhancement factor, and (b) the trial court did not properly weigh the enhancement and mitigating factors.

The victim in this case was a ten-year-old girl. The Defendant had been the boyfriend of the victim's mother for about seven years. Although the Defendant did not live with the victim and her mother, the Defendant and the victim's mother often spent the night with each other while the victim was present. The Defendant often picked the victim up at day care and took care of her while her mother was at work. One night the victim's mother walked into the bathroom to find the victim examining her vaginal area. When asked why she was doing this, the victim replied that she had a "bump." The victim's mother took the victim

to a doctor and after examination it was discovered that the bump was a venereal wart. At this time, the victim's mother brought charges.

The victim testified at trial. She testified to an incident that occurred when the Defendant picked her up at day care to go buy a pair of tennis shoes. She stated that after he picked her up they went to the mall and got the shoes. The Defendant then took the victim to his house. She testified that when they got to his house she sat on the couch watching television, and the Defendant went back to his room. When the Defendant came back into the room he was not wearing any clothes. The victim stated that the Defendant picked her up and carried her into the bedroom. When he took her back to the bedroom he took all of her clothes off and "rubbed his private" against her private part. The victim also described the Defendant as having an erection and ejaculating. She testified that he tried to put his private part inside of her and it hurt.

She also testified that this happened on another occasion while her mother was attending classes at night. The victim stated that she and the Defendant were at her house one night. She testified that the Defendant did the same thing every time. He carried her back to the bedroom and took her clothes off. Then, he put his private part between her legs and pushed against her private part. She stated that she did not know if his private part was in her private part. This testimony lead to the Defendant's conviction for two counts of aggravated sexual battery.

I.

The Defendant's first argument is that the trial court erred in denying the Defendant's motion to suppress his statements to the investigators. The Defendant argues his motion to suppress should not have been denied because the Defendant was under the influence of medication, had been wakened from a sound sleep before the interview, and was not advised of his Miranda rights.

After the victim's mother confronted the Defendant with her suspicions, the Defendant checked himself into the West Tennessee Behavioral Center. The Defendant stated that he checked himself into this facility because he was contemplating suicide. He was placed on medications while he was in the facility. While there, a Jackson Police Department investigator and a Department of Human Services worker came to question the Defendant regarding the accusations. The Defendant gave permission to the staff for the investigator and the Department of Human Services worker to speak with him.

We will first address the issue concerning the lack of Miranda rights. When he overruled the motion to suppress, the trial judge stated:

The Miranda Warning was not required because the defendant, Mr. Grissom, was not in custody. He was not under arrest. Nor were circumstances such that would have led him to believe that he was under arrest. The officer went in and asked for permission to talk to him.

The factual findings of a trial court at a hearing on a motion to suppress are conclusive unless the appellate court finds that the evidence preponderates against the findings of the trial court. State v. Johnson, 717 S.W.2d 298, 304

(Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1986). The evidence presented at the hearing on the motion to suppress does not preponderate against this finding.

In determining whether an accused should have been advised of his Miranda rights, the initial inquiry is whether the suspect was subjected to custodial interrogation. It is only "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning [that] the privilege against self-incrimination is jeopardized." Miranda v. Arizona, 384 U.S. 436, 478 (1966); see also California v. Beheler, 463 U.S. 1121, 1125 (1983); Oregon v. Mathiason, 429 U.S. 492, 494 (1977). A person is said to be "in custody" within the meaning of Miranda if there has been "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Beheler, 463 U.S. at 1125. In Berkemer v. McCarty, 468 U.S. 420 (1984), the United States Supreme Court applied the "objective reasonable-man test," holding the only relevant inquiry in determining custody is "how a reasonable man in the suspect's position would have understood his position." 468 U.S. at 442.

The Defendant was clearly not in custody when he was questioned at the hospital. The Defendant voluntarily checked himself into the West Tennessee Behavioral Center. The Defendant gave permission for the investigator and the Human Services worker to speak with him. There was not a formal arrest, and law enforcement personnel did not restrain the Defendant's freedom of movement in any way. A reasonable man in the Defendant's position

undoubtedly would have felt capable of stopping the inquiry at any time due to the fact that he gave permission for the interaction in the first place.

We now turn to the issue concerning the medication. A nurse who worked at the West Tennessee Behavioral Center testified at the hearing on the motion to suppress. She testified about the medications taken by the Defendant both the day before he was questioned and the day he was questioned. She said that the Defendant was admitted at about 11:00 a.m. the day before he was questioned. Upon his admittance the Defendant was given an injection of Toradol, which is a mild pain reliever. At 12:15 p.m., he was given Ativan, which is a medication to relieve anxiety. He was given further doses of Ativan at 4:50 p.m. and 9:00 p.m. The Defendant was given a dose of Halcion at 11:30 p.m. Halcion is a minor tranquilizer that is utilized as a sleeping agent. The next day, prior to the Defendant being questioned at 1:00 p.m., he was given a dose of Ativan, the anxiety-relieving medication, at 9:00 a.m. and 1:00 p.m. The nurse stated that when she administered the 1:00 p.m. medication on the day of the questioning, the Defendant appeared coherent and they talked.

The investigator also testified at the hearing on the motion to suppress. She testified that the Defendant was very coherent at the time of questioning and that he was conscious of what they were talking about. The Defendant testified at the hearing that he was woken up from a deep sleep, and he had been given some medication. He testified that he remembered speaking with the investigator and the Human Services worker for about thirty minutes.

The trial judge made a ruling at the end of the hearing. In regard to the medication and alertness question he stated:

There's no indication that any of these drugs would obscure a person's ability to think. Although, it may have. I'm not saying it didn't. [The investigator] testified that he appeared to be perfectly normal, lucid, knew what he was doing. Her words were "very coherent." That's what appeared to her.

The situation there is something that the jury should consider in determining the weight and credibility to be given to the statement, if it is introduced by the State. But it would go to the weight and not the admissibility of the statement.

The evidence does not preponderate against the trial court's findings. The trial court did not err in not denying the Defendant's motion to suppress.

Therefore, this issue is without merit.

## II.

The Defendant's second argument is that the trial court erred in denying the Defendant's motion for a mistrial. The jury began their deliberations at 9:30 a.m. the morning after the trial was completed. At about 5:30 that afternoon, the jury still had not reached a verdict. Defendant asked the trial court to ask the jury if they thought returning the next day would help and, if not, the Defendant asked that a mistrial be declared. The judge asked the jury if they would go home and return the next day to try again. At about 12:30 p.m. the next day, the jury returned to the courtroom with their verdict. Because the jury was unable to reach a verdict on counts one and three, rape of a child, the trial court declared a mistrial on those counts. The jury then announced their verdict that the Defendant was guilty of counts two and four, both aggravated sexual battery.

The impossibility of a jury to reach a verdict is a sufficient reason for a trial court to declare a mistrial. State v. Freeman, 669 S.W.2d 688, 692 (Tenn. Crim. App. 1983). The granting of a mistrial is in the sound discretion of the trial court. Id. This discretion will not be disturbed on appeal unless there is a finding of abuse of discretion. Id.

We cannot conclude that the trial court abused his discretion in failing to declare a mistrial. The jury deliberated for only one and a half days. They were unable to reach a verdict as to two of the counts, and the trial court correctly declared a mistrial as to those counts. We do not consider the trial court's action in asking the jury to return the next morning to deliberate as an abuse of discretion. The trial court did not err in refusing to grant a mistrial.

Therefore, this issue is without merit.



### III.

The Defendant's third argument is that the trial court erred in the sentencing phase of the trial because (1) the trial court considered an improper enhancement factor, and (2) the trial court did not properly weigh the enhancement and mitigating factors. The trial court sentenced the Defendant to twelve years, the maximum in his range, for each of the two convictions, to be served concurrently as a Range I standard offender.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the 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 involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The trial court found several aggravating factors. The aggravating factors are: (1) That the victim was ten years old, from Tennessee Code Annotated section 40-35-114(4), "A victim of the offense was particularly vulnerable because of age or physical or mental disability," (2) that the victim contracted a disease from the Defendant; (3) that the Defendant abused a position of trust, Tennessee Code Annotated section 40-35-114(15), and (4) that the trial court was "of the opinion that the Defendant gave false testimony at trial." The second and fourth enhancement factors applied by the trial court are not enhancement factors recognized in the statute, and therefore, cannot be used to enhance the Defendant's sentence.

The trial court also found several mitigating factors. The mitigating factors are: (1) The Defendant does not have a criminal record; (2) the Defendant has "obviously been a hard-working, honest man, who has taken care of himself; and (3) the Defendant has felt remorse. These mitigating factors fall under Tennessee Code Annotated section 40-35-113(13), which is a "catch-all provision," and are not necessarily given much weight in sentencing.

A.

The Defendant argues that the trial court's application of the age of the victim as an enhancing factor is error because the age of the victim is an element of the offense. This enhancement factor has previously been held applicable by this court when it would be considered an element of the offense. State v. Williams, 768 S.W.2d 714 (Tenn. Crim. App. 1988), perm. to appeal denied, id. (Tenn. 1989). Our supreme court considered the application of this enhancement factor to the sentence of a Defendant convicted of the aggravated rape of a child in State v. Adams, 864 S.W.2d 31 (Tenn. 1993). The supreme court held that the main focus of this enhancement factor is not whether the victim was under thirteen, but whether the victim was particularly vulnerable because of age. Id. at 35. The supreme court states that if this factor is to be applied in such a case that "[t]he State bears the burden of proving the victim's limitations rendering him or her particularly vulnerable." Id.

Although we agree that a ten-year-old girl would ordinarily be vulnerable to the will of a grown man because of both age and physical size, our supreme court has held that because the State in Adams did not prove that the four-year-old and five-year-old victims were particularly vulnerable, the enhancement factor did not apply. Therefore, we cannot conclude that a ten-year-old girl is particularly vulnerable simply because of her age and size. Because the State did not bear its burden of proving that the victim was particularly vulnerable, this enhancement factor is not applicable.

We also believe that this record clearly supports the finding of two additional enhancement factors not relied upon by the trial court. The

Defendant's statement readily supports a finding that the offense was committed to gratify the Defendant's desire for pleasure or excitement. Tenn. Code Ann. § 40-35-115(7). The fact that the Defendant infected the victim with venereal disease qualifies the personal injuries to the victim as being particularly great. Tenn. Code Ann. § 40-35-114(6).

B.

The Defendant also argues that the trial court did not properly weigh the enhancement and mitigating factors. "Should there be enhancement and mitigating factors, then the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors." Tenn. Code Ann. § 40-35-210(e). "Subsection (e) requires a weighing process based on the merits of the various enhancement and mitigating factors." Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments.

Although three of the enhancement factors found by the trial court were inapplicable, we have noted the presence of two additional enhancement factors not relied upon by the trial court. We therefore cannot conclude that the trial judge erred or abused his discretion in sentencing this Defendant to two concurrent twelve-year sentences to be served as a Range I standard offender.

The judgment of the trial court is affirmed.

---

DAVID H. WELLES, JUDGE

CONCUR:

---

GARY R. WADE, JUDGE

---

JOHN H. PEAY, JUDGE