IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1996 SESSION

STATE OF TENNESSEE,	)
	) C.C.A. No. 01C01-9506-CC-00160
Appellee,	)
	) Robertson County
V.	)
	) Hon. Robert W. Wedemeyer, Judge
	)
HUGH NICELY,	) (Aggravated Rape - 7 counts; Aggravated
	) Sexual Battery; Child Rape)
Appellant.	)

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OPINION FILED: _____

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

PAUL G. SUMMERS,
Judge

O P I N I O N

A jury convicted the appellant, Hugh Nicely, on seven counts of aggravated rape, one count of aggravated sexual battery, and one count of child rape. He received an effective sentence of fifty-three (53) years. He raises four issues on appeal:

1. Whether the evidence was sufficient to sustain the verdicts.

2. Whether the cross-examination of the victim violated his right to due process.

3. Whether his right to due process was violated by introduction of his father's alleged prior bad acts.

4. Whether consecutive sentencing was improper and excessive.

We affirm in part and reverse and remand in part.

FACTS

The victim was twelve years old at the time of trial. She was born in 1982, and the appellant was her stepfather. She testified that when she was six years old, the appellant instructed her to run out of the house if he ever came into her bedroom "to do something." Shortly thereafter, the appellant entered the victim's bedroom and instructed her to remove her clothing. She removed everything but her shirt. She stated that the appellant undressed. He then placed her blanket over her face and inserted his penis into her vagina. She stated that the penetration hurt and made her cry.

The victim testified that when she was in the second grade, or seven years old, the appellant again "put his privates in [her]." That summer, the appellant took her into his bedroom after her mother had left for work. She stated that if she cried, he would hit her and tell her to "shut up."

The victim next testified to sexual assaults occurring during her third grade year. She stated that when her mother was home, the appellant would take her

into the woods. The appellant would place a blanket on top of the car. She stated the appellant would make her undress and have intercourse with him. Following the sexual act, they would go shopping. She could not recall how many times the appellant sexually penetrated her during that time frame. She did, however, testify that it happened "a lot."

The victim next testified that when she was nine years old, she and the appellant took showers together. She also stated that he would approach her after she showered but before she had time to get dressed. She stated that he would then "take me into his room . . . and put his privates in me." She stated that this happened on more than one occasion. She stated that he raped her vaginally and anally. She also stated that she rubbed his privates and "white stuff came out."

The victim testified that the appellant took naked pictures of her. She stated that he kept them in his drawer. She testified that later he cut up the pictures "and threw them away . . . in the garbage can."

The victim testified that in 1992 she had head lice. She stated that after she washed her hair with the lice shampoo, the appellant took her into his bedroom. He then "put his privates in [her]."

Louise Head testified. She worked at the victim's day care. She described the victim as being "real shy" and "timid." She stated that the victim isolated herself and had a low self worth. When she complimented the victim, she stated the victim would respond "I'm ugly." She further stated that the victim pulled away from her whenever she tried to communicate with her.

Ms. Head testified that when the victim was around six years old, she had told day care workers that the appellant sexually abused her. Ms. Head

informed the victim's mother of the sexual abuse allegations. Ms. Head stated that the mother wrote the allegations off as lies. Approximately four years later, in 1992, the allegations resurfaced. The 1992 allegations were brought to the attention of the police.

The victim was interviewed and examined at a child sex abuse clinic. Medical examinations revealed physiological findings consistent with the victim's allegations of abuse. The victim had a damaged hymen. Medical testimony also established that vaginal penile penetration was not only possible, but was consistent with their findings.

I

The appellant's first assignment of error is that the evidence was insufficient to support the convictions. He argues that the victim's testimony was not credible, and she was motivated to lie. Therefore, pursuant to Tome v. United States, ___ U.S. ___, 115 S. Ct. 696 (1995), he argues that the conviction cannot be based solely upon her testimony.

Appellant's argument is misguided.[1] Assessing witness credibility is exclusively "the purview of the jury." State v. Barnes, 874 S.W.2d 73, 78 (Tenn. Crim. App. 1993). The jury may take into consideration all the evidence and draw whatever reasonable inferences that may exist therefrom. State v. Copeland, 677 S.W.2d 471, 474 (Tenn. Crim. App. 1984). We will not reweigh the evidence. Nor will we supplant the jury's inferences with those of our own. Id. (citing Hawkins v. State, 469 S.W.2d 515 (Tenn. Crim. App. 1971)).

Appellant's first issue further alleges, under a separate heading "Other Sex Crimes," that the victim's testimony did not relate specific dates or instances

[1]We also note that the appellant's brief is difficult to follow and falls dangerously close to waiver. See Tenn. R. Ct. Crim. App., Rule 10.

and, therefore, cannot support the conviction. Appellant intertwines an argument that the non-date specific testimony was improper and violated State v. Rickman, 876 S.W.2d 824, 829-30 (Tenn. 1994). Again, appellant's argument is misguided.

Evidence of other sex crimes is admissible when: (1) the indictment is not time specific, and (2) the evidence related to sex crimes that allegedly occurred during the time frame as charged in the indictment. Rickman, 876 S.W.2d at 829. In such cases, however, the state must elect at the close of its proof the particular incident(s) for which a conviction is being sought. Id.

The victim testified to acts occurring within the time span charged in the indictment. The victim was a young child. The state was, therefore, properly granted latitude while prosecuting the appellant's crimes against a young victim unable to identify the specific dates of the charged offenses. Id. (citing Shelton v. State, 851 S.W.2d 134, 137 (Tenn. 1993)).

The state, however, points out that the prosecution may have failed to properly elect the particular offenses for which the appellant was charged in counts 4 and 5 and in counts 6 and 7. The state argues that the appellant either waived the issue or, in the alternative, that the evidence was sufficiently specific to sustain convictions on counts 4 and 6. The appellant's reply brief concurs in the state's assertion of probable error and argues that the error is of constitutional dimension and, therefore, cannot be waived.

We have reviewed the entire record. As to count 1, the appellant was charged with rape for the vaginal penetration occurring when the victim was six years old. Count 2 was the vaginal penetration occurring when the victim was seven years old. Count 3 was the anal penetration occurring when the victim was seven years old. Count 8 charged the appellant with aggravated sexual

battery for forcing the victim to masturbate him to a climax. For count 9, the appellant was charged with raping the victim when she was approximately ten years old. Accordingly, we find that reasonable minds could not differ as to the particular offenses that constituted counts 1, 2, 3, 8, and 9.

For counts 4 and 5, the state relied upon the victim's testimony. She testified that when she was eight, the appellant took her into the woods. She stated that he would place a blanket over the hood of the car. Then he would rape her. She stated that after the appellant raped her, "sometimes" they would go to the store and buy her mother flowers. She testified that she could not count how many times this happened but stated that it happened "a lot."

On counts 6 and 7, the appellant was charged with rape for incidents occurring when the victim was nine. She testified that on one occasion, the appellant caught her getting out of the shower. She stated that before she could get dressed, he took her into his room and "put his privates in [her]." She stated that sometimes they showered together before he would rape her.

At the close of the state's proof in chief, the judge had a duty to require the state to elect the particular offenses for which it was seeking convictions. Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1973). Election shall be required to ensure unanimity in jury verdicts. Shelton, 851 S.W.2d at 137. The election requirement is "fundamental, immediately touching on the constitutional rights of an accused." State v. Purvis, No. 02C01-9412-CC-00278 (Tenn. Crim. App. Sept. 20, 1995) (quoting Shelton, 851 S.W.2d at 137). The duty is incumbent upon the trial court even in the absence of a specific request by the defendant. Burlison, 501 S.W.2d at 804. See State v. Clabo, No. 03C01-9307-CR-00217 (Tenn. Crim. App. Jan. 12, 1995) (holding trial court's failure to order election was plain error).

The victim testified that the appellant had penetrated her on more than one occasion when she was eight years old. She did not however, distinguish one crime or event from another. She merely stated that it happened "a lot" and "sometimes" they bought flowers at the store afterwards. Likewise, counts 6 and 7 charge two counts of rape occurring when the victim was nine years old. We find that the state's failure to require election on counts 4, 5, 6, and 7 constitutes reversible error. Accordingly, counts 4, 5, 6, and 7 are reversed and remanded for a new trial at the state's discretion.

Appellant also contends that the state's expert "commented on the fact that [the victim's] statements to her were very credible." He argues that such comments were harmful error. He cites State v. Ballard, 855 S.W.2d 557 (Tenn. 1994) in support of his contention. We have reviewed that portion of the record he cites. However, we are unable to find the comments which the appellant claims to have occurred. Accordingly, the issue is waived pursuant to Tenn. R. Ct. Crim. App., Rule 10.

II

The appellant's next assignment of error is that the "direct and cross-examination" of the victim were unduly prejudicial and violated his right to due process. The appellant argues that the trial court abused its discretion in permitting the state to ask the victim leading questions.

Trial courts are vested the authority to supervise the presentation of evidence. Tenn. R. Evid., Rule 611. Trial courts may permit leading questions to victims in child sexual abuse cases. Swafford v. State, 529 S.W.2d 748, 749 (Tenn. Crim. App. 1975); see also United States v. Rossbach, 701 F.2d 713 (8th Cir. 1983) (holding leading questions were permissible on direct examination of fifteen and seventeen year old victims hesitant to testify about sexual assault).

The trial court's exercise of its broad discretion in permitting leading questions will not be reversed absent a showing of abuse of discretion. See State v. Lewis, No. 01C01-9307-CC-00232 (Tenn. Crim. App. Jan. 12, 1995) (holding although all questions were leading and most answers comprised of only one or two words, no abuse of discretion).

The record clearly demonstrates that eliciting the victim's testimony was particularly difficult. The difficulty may be attributed to her age, the fact that her own mother refused to believe her, and the nature of her testimony. Accordingly, we find no abuse of discretion.

III

The appellant's third issue asserts that his due process rights were violated by introduction of evidence that his father was a homosexual. On direct examination, however, appellant's own trial counsel "opened the door" by asking the appellant whether his father was a homosexual. The appellant responded "no." On cross-examination, the state attempted to impeach the appellant's veracity by challenging this denial. The appellant did not raise a proper contemporaneous objection to the state's cross-examination. Relief will not be accorded to a party either responsible for the error or who has failed to take whatever action reasonably available to nullify the harmful effect of an error. Tenn. R. App. P., Rule 36(a). This issue is without merit.

IV

The appellant's last assignment of error challenges the trial court's ordering of consecutive sentences. He argues that 53 years is excessive and unjustified. We disagree.

When a sentencing issue is appealed, this Court shall conduct a de novo review with the presumption that the trial court's findings are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumption of correctness is conditioned upon an 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). The burden remains upon the defendant to show the impropriety of his sentence. State v. Anderson, 880 S.W.2d 720, 727 (Tenn. Crim. App. 1994).

In conducting a de novo review of a defendant's sentence, we must consider: (1) the evidence received at the trial and the sentencing hearing, (2) the pre-sentence report, (3) the principles of sentencing and arguments to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating and enhancement 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. §§ 40-35-210, -103, and -210 (1990). Consecutive sentencing may be imposed, in the discretion of the trial court, upon a determination that:

> The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims.

Tenn. Code Ann. § 40-35-115(b)(5) (1990).

The appellant began sexually abusing his stepdaughter when she was six years old. He then continued to sexually abuse her over a significant period of time. His conduct ranged from having her masturbate him to a climax to vaginal and anal intercourse. When she cried out, he would slap her in the face and instruct her to "shut up." There was also evidence that the victim had suffered emotional damage. She was extremely introverted and unsocial with other children. She seldom looked anyone in the face and when complimented, she stated "I'm ugly." Accordingly, we find that consecutive sentencing was appropriate.[2]

CONCLUSION

Counts 4, 5, 6, and 7 are reversed and remanded for a new trial. Appellant's effective sentence of 53 years, however, remains unchanged since counts 4, 5, 6, and 7 ran concurrently with counts 2 and 3.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

PAUL G. SUMMERS, Judge

CONCUR:

[2]Because we have reversed counts 4, 5, 6, and 7, the appellant's sentence is as follows: He will serve 15 years on counts 1, 2, 3, and 9. He will serve 8 years on count 8. Counts 2 and 3 will run concurrently but will be served consecutively to Count 1. Count 8 will run consecutively to counts 2 and 3. Count 9 will run consecutively to count 8. The net effect of appellant's sentence is, therefore, unchanged.

_____
GARY R. WADE, Judge

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JOSEPH M. TIPTON, Judge