IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1996 SESSION

FILED

September 19, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01C01-9601-CC-00021
	)	
	)	Cheatham County
v.	)	
	)	Hon. Leonard W. Martin, Judge
	)	
JERRY D. REECE,	)	(Attempted aggravated sexual battery)
	)	
Appellant.	)	

For the Appellant:

Carey J. Thompson
Assistant Public Defender
P.O. Box 160
Charlotte, TN 37036
(AT TRIAL AND ON APPEAL)

Ron Cosgrove
Assistant Public Defender
P.O. Box 160
Charlotte, TN 37036
(AT TRIAL)

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
M. Allison Thompson
Counsel for the State
450 James Robertson Parkway
Nashville, TN 37243-0493

Dan Mitchum Alsobrooks
District Attorney General
Court Square
P.O. Box 580
Charlotte, TN 37036-0580
and
James W. Kirby
Assistant District Attorney General
105 Sycamore Street
Ashland City, TN 37015

OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Jerry D. Reece, was convicted in a jury trial in Cheatham County Circuit Court of two counts of attempted aggravated sexual battery, a Class C felony. He received concurrent three-year sentences as a Range I, standard offender. In this appeal as of right, the defendant's sole contention is that the evidence was insufficient to convict him. We disagree.

This case involves the defendant's conduct toward two girls, J.A., age ten, and A.P., age nine, while their parents were on an errand away from home. J.A. testified that she and A.P. knew the defendant, who entered their home for the ostensible purpose of using the telephone. She said that he then sat down on the couch next to the two girls. She said that the defendant smelled of beer. She stated that each of them was wearing a nightshirt and underpants and were sitting under a blanket on the couch.

J.A. testified that the defendant grabbed the collar of her nightshirt, pulled it down, and tried to reach down the shirt with his other hand. She said that she told him to stop and tried to push him away. She said that A.P. reached over and pushed the defendant's hand and face away. She said that the defendant then grabbed the bottom hem of A.P.'s shirt and tried to pull it up. J.A. said that, at some point, the defendant grabbed her arm and licked it, then leaned over her lap and "waggled his tongue back and forth like a dog." She said that she and A.P. got up, dressed, and left the house. She said they told their parents about the incident as soon as the parents returned home.

A.P. testified that she and J.A. were under a blanket on the couch. J.A. started pulling the blanket off her and she told J.A. to stop because she did not have any pants on. She said that the defendant then pulled up her shirt a little above her belly button, although she and J.A. tried to stop him. He told her that she had pants on.

She said that she was only wearing underwear. She testified that the defendant "slapped" her in the face, but not hard enough to hurt, being more of a playful slap.

A.P. testified that the defendant said something to J.A. about her breasts, comparing them to different types of fruits. She said he then pulled J.A.'s shirt and looked into it.

The defendant contends that there is no evidence in the record indicating that he ever attempted to touch the victims in a way that would constitute attempted aggravated sexual battery. He particularly notes that the evidence only showed that he pulled the bottom of A.P.'s shirt above her stomach, but did not touch her elsewhere.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, 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, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

As pertinent to this case, aggravated sexual battery includes unlawful sexual contact by a person with a victim under thirteen years old. T.C.A. § 39-13-504(a)(4). Sexual contact includes "the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T.C.A. § 39-13-501(6).

"Intimate parts" includes the "primary genital area, groin, inner thigh, buttock or breast of a human being." T.C.A. § 39-13-501(2). Also, a criminal attempt is committed when a person "[a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." T.C.A. § 39-12-101(a)(3).

Unquestionably, the testimony about the defendant trying to put his hand down the front of J.A.'s shirt, under the circumstances described by both victims, provides sufficient evidence from which the jury could find beyond a reasonable doubt that the defendant attempted to touch an intimate part of J.A. for the purpose of sexual arousal or gratification. Also, even though, as the defendant claims, his actual touching relative to A.P. was limited to the bottom of her shirt, we believe that the evidence is sufficient to sustain his conviction relative to her. In this respect, we do not believe that the defendant's conduct toward one victim must be considered in isolation from the conduct toward the other victim.

With the two victims in similar states of dress and under the same blanket, the defendant's actions as described by the victims can easily be interpreted as an attempt to involve both in improper activity. Success with one would aid in success with the other. Under such circumstances, the pulling up of A.P.'s shirt could be found to be of similar character to the defendant's actions toward J.A. and done with similar motive. Moreover, one could easily infer that the level of the victims' resistance was sufficient to notify the defendant that they were not willing participants. Even so, the defendant's actions with each constituted substantial steps toward his commission of aggravated sexual battery upon both. See State v. Reeves, 916 S.W.2d 909, 912-14 (Tenn. 1996) (discussing what constitutes a substantial step for criminal attempt).

The judgments of conviction are affirmed.

_____
Joseph M. Tipton, Judge

CONCUR:

_____
John H. Peay, Judge

_____
David H. Welles, Judge