

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY SESSION, 1996

FILED
October 9, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

GROVER LIVESAY,)

Appellant.)

C.C.A. NO. 03C01-9510-CC-00298

HAMBLEN COUNTY

HON. JAMES EDWARD BECKNER
PRESIDING JUDGE

(Direct Appeal)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Hamblen County Criminal Court jury found Appellant Grover C. Livesay guilty of rape of a child. Following a sentencing hearing, the trial court imposed a sentence of twenty-five years in the Tennessee Department of Correction. In this appeal, Appellant presents the following issues for review: (1) whether the evidence presented at trial is legally sufficient to sustain a conviction for second degree murder; (2) whether the trial court erred in failing to grant a mistrial following testimony regarding a request for legal counsel; (3) whether the trial court erred in allowing the State to discuss the issue of flight during closing argument; and (4) whether the trial court erred in determining the length of his sentence.

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

I. FACTUAL BACKGROUND

As accredited by the jury's verdict, the proof shows that on July 27, 1993, T.J.,¹ an eleven-year-old male, and his seven-year-old brother visited Appellant's apartment. Because Appellant resided above the apartment of the boys' mother, such visits were common. On this occasion, T.J. and his brother watched television with Appellant until the boys' father returned from work. T.J. was then given permission to remain at Appellant's apartment while his father and brother went to the grocery store.

Soon thereafter, Appellant, a fifty-four-year-old male, approached T.J. and placed his hand on T.J.'s inner thigh. When T.J. pushed the hand away, Appellant pinned the boy's hands to the chair in which he was sitting, threatened him if he screamed, and forcibly performed fellatio on him. At some point during the attack,

¹ It 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 his initials.

Myrtle Louise Farmer Sellars and Jerry Fox entered Appellant's apartment to drop off some beer they had purchased for him. When Ms. Sellars witnessed the attack, she extricated T.J. from the situation and sent him home with instructions to tell his parents what had happened. After interacting briefly with Appellant, Ms. Sellars and Mr. Fox left the apartment.

When his father returned from the grocery store, T.J. told him about the attack. T.J.'s father then reported the rape to the police. On the following day, Detective David Peoples of the Morristown Police Department interviewed T.J. regarding the incident. Based on this interview, Detective Peoples contacted Appellant at his place of employment. Appellant accompanied the detective to the police station, waived his rights, and denied that he had attacked T.J. He then requested an attorney, and the questioning ended. Appellant was released but never returned to his place of employment. Approximately one week after the interview, he left his apartment in Hamblen County and moved in with his sister in neighboring Grainger County.

On October 11, 1993, the Hamblen County Grand Jury indicted Appellant for rape of a child in violation of Tennessee Code Annotated § 39-13-522. Authorities in Hamblen County attempted to locate Appellant for over a year without success. Eventually, in November of 1994, Appellant was found and arrested in Grainger County. On March 23, 1995, Appellant was tried before a jury in the Hamblen County Criminal Court. At the conclusion of the trial, the jury found Appellant guilty of rape of a child. The trial court imposed a sentence of twenty-five years in the Tennessee Department of Correction, a term to run consecutive to a Jefferson County sentence for which Appellant was already on probation.

II. SUFFICIENCY OF THE EVIDENCE

Appellant first alleges that the evidence presented at trial is legally insufficient to sustain a conviction for rape of a child. Appellant points to several inconsistencies in the testimony of State witnesses to support his claim. In order to convict Appellant of rape of a child, the State had to prove beyond a reasonable doubt that Appellant engaged in unlawful sexual penetration with T.J. and that T.J. was less than thirteen years of age at the time of the penetration. See Tenn. Code Ann. § 39-13-522. Sexual penetration means “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s, the defendant’s, or any other person’s body, but emission of semen is not required.” Id. 39-13-501(7).

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), cert. denied, 510 S.W.2d 1064 (1994); 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 reweigh 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). Furthermore, 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), cert. denied, 465 U.S. 1073 (1984).

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).

At trial, T.J. testified that Appellant forcibly performed fellatio on him. Ms. Sellars testified that she witnessed the attack as she entered Appellant's apartment. Mr. Fox testified that, while he did not witness the attack, he observed Appellant on the ground in front of T.J., whose pants were undone. T.J.'s father testified that T.J. was eleven years old at the time of the attack.

As stated previously, determining the credibility of witnesses and the weight to be given their testimony as well as 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 from the verdict that the jury chose to believe the testimony of T.J., Ms. Sellars, and Mr. Fox regarding the attack and to disbelieve Appellant's denial. Under well-settled Tennessee law, the jury was within its province in doing so. Thus, we find that, when viewed in a light most favorable to the State, the evidence is legally sufficient to support Appellant's conviction for rape of a child.

III. TESTIMONY REGARDING APPELLANT'S REQUEST FOR LEGAL COUNSEL

Appellant also alleges that the trial court erred in failing to grant a mistrial following testimony regarding a request for legal counsel. During the direct examination of Detective Peoples, the following exchange took place:

THE STATE: "Now, did [Appellant] give a written statement or an oral statement?"

PEOPLES: "He gave an oral statement."

THE STATE: "And what did he say about this offense?"

PEOPLES: "He says, 'I ain't never bothered no kids and I ain't no queer. The boys were watching T.V. and they came up here. I had drank a few beers in the evening after I got off work every day.' That is all he said to me, and he didn't wish to say anymore without an attorney present."

DEFENSE COUNSEL: "Objection, your Honor."

THE COURT: "Sustained. I will ask the jury to disregard that statement."

Following this exchange, the trial court gave the following instruction to the jury:

I know that it was inadvertent on the officer's part, members of the jury, but do you understand that you must not, cannot, hold it against the accused in this case, for any purpose, because he chose to remain silent. Does everyone understand that at some point?

And can you promise me that in this case that will not be any part of your deliberation or consideration at all, the fact that the officer made that statement?

You will not consider it and you will not hold it against the defendant. If you can promise me that you will do that, would you raise your hands, please?

(All jurors so indicate.)

Let the record show that all jurors are present and raised their hands.

The trial court then overruled Appellant's motion for a mistrial. In support of his allegation that the trial court erred in overruling his mistrial motion, Appellant argues that the statement made by Detective Peoples implied that Appellant had something to hide and created an improper impression of guilt in the minds of the jury.

Appellant further argues that the trial court's curative instruction was unsatisfactory

because it failed to explain the constitutional reasons why Detective Peoples' statement was improper.

Generally, a mistrial is necessary only when there is a "manifest necessity" requiring such action by the trial court. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). The decision to grant a mistrial lies within the discretion of the trial court and will not be disturbed on appeal unless the trial court abuses this discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990). Moreover, prompt curative action by the trial court to an unresponsive answer presumptively cures any error. State v. Jones, 802 S.W.2d 221, 222 (Tenn. Crim. App. 1990).

Here, the trial court immediately instructed the jury not to consider the improper and unresponsive testimony of Detective Peoples. The trial court went on to explain to the jury that Appellant's request for legal counsel must not be taken into consideration when determining his guilt or innocence. We must assume that the jury followed the instructions of the trial court. State v. Gregg, 874 S.W.2d 643, 644 (Tenn. Crim. App. 1993). In light of this satisfactory curative instruction, no "manifest necessity" requiring a mistrial existed in this case. Thus, we conclude that the trial court did not abuse its discretion in overruling Appellant's motion for a mistrial.

IV. CLOSING ARGUMENT REGARDING FLIGHT

Appellant next alleges that the trial court erred in allowing the State to discuss the issue of flight during closing argument. At trial, Appellant's trial counsel objected to the following portion of the State's closing argument:

And then where is [Appellant]. The big question, where has [Appellant] been since August 1993. Where has he been? He had a good job at Burnett Produce, worked every day, and on August the 4th at 3:50 -- he worked that day, August the 4th until 2:21, I think. And at 3:50 he was

interviewed by the detective, and he never goes back to work. He's not seen in Hamblen County again. . . . Looks like he ran. He ran. He knew, he knew what he had done.

Appellant maintains that such an argument was improper and unduly prejudicial given the fact that the trial court had previously determined that flight had not been so clearly established to warrant a jury charge on the issue.

The control of closing argument rests largely within the sound discretion of the trial court, and this Court will not interfere with that discretion absent clear abuse. State v. Cox, 655 S.W.2d 903, 912 (Tenn. 1983), cert. denied, 464 U.S. 1063 (1984). Any reasonable inference drawn from the evidence presented at trial is suitable subject matter for closing argument. State v. Cone, 665 S.W.2d 87, 94 (Tenn.), cert. denied, 467 U.S. 1210 (1984). Moreover, flight is a circumstance from which guilt may be inferred. State v. Payton, 782 S.W.2d 490, 493 (Tenn. Crim. App. 1989).

From our review of the record, it appears that a reasonable inference to be drawn from the facts of this case is that Appellant sought to avoid prosecution following his initial interview with police. Appellant stopped reporting for work and, soon thereafter, abandoned his apartment without taking any of his belongings with him. Appellant took up residence in Grainger County with his sister, who eventually returned to his apartment alone to retrieve his belongings. As a result of these actions, Hamblen County authorities were unable to locate Appellant for over a year, despite regular efforts to do so. Based on these facts, we believe that a jury instruction on the issue of flight was warranted. However, the trial court chose not to give such an instruction. Inexplicably, the trial court then permitted both sides to address the issue during closing argument. Given the fact that the trial court had determined that flight had not been so clearly established to warrant a jury charge on the issue, we believe that it was inconsistent to then allow trial counsel to

address the issue in their closing arguments. However, any error is harmless given the evidence establishing flight and the overwhelming evidence of Appellant's guilt, specifically the testimony of the victim and the two unbiased eyewitnesses. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

V. SENTENCING

Finally, Appellant alleges that the trial court erred in determining the length of his sentence. Specifically, Appellant argues that the trial court improperly applied to his sentence certain enhancement factors and failed to apply certain mitigating factors.

When an appeal challenges the length, range, or manner of service of a sentence, this 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, this presumption of correctness is "conditioned upon the affirmative showing 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 the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. If appellate review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this Court must affirm the sentence, "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In conducting a review, 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).

We note initially that, because the record demonstrates that the trial court adequately considered the sentencing principles and all relevant facts and circumstances, our review of Appellant's sentence will be de novo with a presumption of correctness.

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 while the presumptive length of sentence for a Class A felony is the midpoint 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 sentence 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, 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).

Rape of a child is a Class A felony. See Tenn. Code Ann. § 39-13-210(b). The statutory sentencing range for a Class A felony is fifteen to twenty-five years. See id. § 40-35-112(a)(1). The trial court found not only that the following enhancement factors applied to Appellant's sentence but also that they carried a significant amount of weight: (1) "[t]he defendant has a previous history of criminal

convictions or criminal behavior in addition to those necessary to establish the appropriate range,” id. § 40-35-114(1); (2) “[t]he defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community,” id. § 40-35-114(8); (3) “[t]he felony was committed while on [probation] if such release is from a prior felony conviction,” id. § 40-35-114(13)(C); and (4) “[t]he defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense.” Id. § 40-35-114(15). The trial court found that the following mitigating factors applied to Appellant’s sentence but that they only carried slight weight: (1) Appellant’s good work ethic, see id. § 40-35-113(13); and (2) the State’s recommendation that the length of sentence be somewhere in the middle of the range. See id. At the conclusion of the sentencing hearing, the trial court imposed a sentence of twenty-five years.

A. UNWILLINGNESS TO COMPLY WITH THE CONDITIONS OF A PREVIOUS SENTENCE

Appellant first argues that the trial court improperly applied enhancement factor (8), concerning a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. He maintains that his previous violations of probation do not reflect an unwillingness to comply with the conditions of alternative sentences. We disagree. On October 7, 1992, Appellant pled guilty to the felony offense of violating the Habitual Motor Vehicle Offender’s Act. Following his term of incarceration, Appellant was placed on supervised probation for the balance of his two-year sentence. The attack on T.J. occurred during this probationary period. Furthermore, on three separate occasions over a seventeen-year period, Appellant was convicted of public intoxication while on probation for other alcohol-related offenses. Such conduct reveals an unwillingness

to comply with conditions of a sentence involving release into the community. Thus, we conclude that the trial court's application of enhancement factor (8) was proper.

B. ABUSE OF A POSITION OF PUBLIC OR PRIVATE TRUST

Appellant next argues that the trial court improperly applied enhancement factor (15), concerning an abuse of a position of public or private trust. Appellant asserts that periodic visitation does not rise to the level of a position of private trust. In applying this enhancement factor, the trial court reasoned that, as a result of the regular visits to Appellant's apartment, T.J. developed a trusting friendship with Appellant. The trial court further reasoned that Appellant's abuse of this trust significantly facilitated the commission of the attack.

Typically, this enhancement factor is applied to the sentences of offenders who are the parents, relatives, or legal guardians of the child victims of sexual crimes. State v. Murphy, No 02C01-9503-CC-00032, 1996 WL 368213, at *3 (Tenn. Crim. App. June 28, 1996). However, our Supreme Court has recently made the following observation:

The determination of the existence of a position of trust does not depend on the length or formality of the relationship, but upon the nature of the relationship. Thus, the court should look to see whether the offender formally or informally stood in a relationship to the victim that promoted confidence, reliability, or faith. If the evidence supports that finding, then the court must determine whether the position occupied was abused by the commission of the offense.

State v. Kissinger, 922 S.W.2d 482, 488 (Tenn. 1996).

We believe that the nature of Appellant's relationship with T.J. did promote confidence and trust not only with respect to T.J. but also with respect to T.J.'s parents. The record reveals that a friendship of some kind existed, manifested by T.J.'s regular visits to Appellant's apartment. Without a certain level of trust, T.J. would not have wished to visit or to remain alone with Appellant. Appellant took

advantage of this trust by molesting T.J. while alone in the apartment with him.

Thus, we conclude that the trial court's application of enhancement factor (15) was proper.

C. CRIMINAL CONDUCT NEITHER CAUSED NOR THREATENED SERIOUS BODILY INJURY

Appellant also argues that the trial court should have applied mitigating factor (1) to his sentence. Mitigating factor (1) states that “[t]he defendant’s criminal conduct neither caused nor threatened serious bodily injury.” Tenn. Code Ann. § 40-35-113(1). The trial court refused to consider this factor because of the mental and emotional trauma associated with the attack and T.J.’s subsequent need for psychological counseling. Indeed, this Court has previously held that psychological injuries resulting from a rape negate the applicability of this mitigating factor. See State v. Smith, 910 S.W.2d 457, 461 (Tenn. Crim. App. 1995). Furthermore, according to T.J.’s testimony, Appellant threatened to hurt him if he screamed during the attack. Such a threat also renders this mitigating factor inapplicable. See State v. Pewitt, No. 01C01-9411-CC-00375, 1996 WL 474443, at *4 (Tenn. Crim. App. Aug. 22, 1996). Thus, we conclude that the trial court’s refusal to apply mitigating factor (1) was proper.

D. NON-STATUTORY MITIGATING FACTORS

Finally, Appellant argues that the trial court should have considered other non-statutory mitigating factors under Tennessee Code Annotated § 40-35-113(13). Specifically, Appellant points to his honest character, his good work ethic, and the fact that his criminal conduct involved an isolated incident. The trial court refused to consider Appellant’s honest character because, in light of the verdict, the jury found his representations regarding the attack to be dishonest. The trial court did, however, give marginal consideration to the testimony regarding Appellant’s good

work ethic. We believe that, even if each of these non-statutory mitigating factors were given some consideration, the great weight attributable to the four applicable enhancement factors more than justifies a maximum sentence of twenty-five years.

Upon de novo review and in accord with the presumption of correctness, we conclude that the sentence of the trial court is reasonable.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOHN K. BYERS, SPECIAL JUDGE