

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
JULY SESSION, 1996

**FILED**

January 13, 1997

**Cecil Crowson, Jr.**  
Appellate Court Clerk

**STATE OF TENNESSEE,**

Appellee

vs.

**ROBERT R. BLACK,**

Appellant

No. 03C01-9511-CC-00372

CAMPBELL COUNTY

Hon. LEE ASBURY, Judge

(Agg. Sexual Battery)

For the Appellant:

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

AFFIRMED

**David G. Hayes**  
Judge

## OPINION

The appellant, Robert R. Black, was convicted by a Campbell County jury of two counts of aggravated sexual battery, a Class B felony. Tenn. Code Ann. § 39-13-504 (1991). For each offense, the trial court sentenced the appellant as a standard, range I offender to ten years imprisonment in the Tennessee Department of Correction. See Tenn. Code Ann. § 40-35-112(a)(2) (1990). The court ordered concurrent service of the sentences. The appellant now challenges the sufficiency of the evidence supporting his convictions and further asserts that his sentences are excessive.

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

### Factual Background

On October 20, 1993, the Campbell County Grand Jury indicted the appellant on two counts of aggravated sexual battery of his step-daughter, AS.<sup>1</sup> The appellant's case proceeded to trial on June 27, 1994. At trial, AS testified that, in November, 1992, shortly before her tenth birthday, her step-father entered her room and touched her between her legs. AS further recounted that, on a separate occasion during the same month, the appellant forced her to perform oral sex on him in her mother's bedroom and forced her to touch his "private part." Both incidents occurred during the day while her mother was away from home. AS was alone with the appellant. According to AS, following the first incident, the appellant threatened to burn the house down if AS reported his actions to anyone. At some point, the appellant also held a gun to the victim's head and threatened to shoot her if she resisted. On cross-examination, the

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<sup>1</sup>As a matter of policy, this court does not name minors involved in sexual abuse but, instead, uses their initials. See State v. Schimpf, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989). The record reflects that, in the instant case, the victim was nine years old at the time of the offenses.

victim admitted that, at an earlier hearing in August, 1993, she had only recounted the first incident. She explained that she was “too afraid to tell the whole story.” She further conceded that, in April, 1993, she had told Wanda Snodgrass, an employee of the Department of Human Services, that the appellant had only sexually assaulted her once. Moreover, the victim had indicated to Ms. Snodgrass that her sister, Monica, was present at the time.

The victim’s mother, Beverly Kay Sutton, also testified. She stated that, in February, 1993, the appellant informed her that voices were instructing him “to do things to [AS].” The appellant further stated to Ms. Sutton, “You know, she’s not a virgin. I won’t get in trouble for it because nobody will believe you.” When Ms. Sutton asked the appellant if he had “done it,” the appellant replied, “Well, let’s put it this way. It’s too late.” Mable Meadors, the victim’s grandmother, testified that, following the appellant’s confession to Ms. Sutton, Ms. Meadors spoke with the appellant on the telephone, and he admitted sexually assaulting AS, claiming that “[t]hey was forces told me.” Ms. Sutton separated from the appellant and initiated divorce proceedings. She obtained a divorce the following month. After the divorce, in March, 1993, AS confirmed that the appellant had sexually assaulted her.

Judge Davis, a detective with the LaFollette Police Department, testified that he investigated the victim’s allegations of sexual assault by her step-father. During his investigation, on June 10, 1993, he participated with Wanda Snodgrass in an interview of the appellant. The appellant voluntarily accompanied Detective Davis and Ms. Snodgrass to the police station. At the station, the detective advised the appellant of his Miranda rights, and the appellant gave a written statement. Following this statement, the detective again advised the appellant of his constitutional rights. At this time, the appellant signed a written waiver of his rights. Davis recorded a second statement, which

was substantially the same as the first statement.

The appellant initially denied ever touching his step-daughter. However, he then conceded that he heard voices. The voices, referring to AS, told him, "There's strange hair and there's some fresh stuff." The appellant then indicated that he needed help in order to manage "stress and so that the demons won't tell me to get toward no kid. I'm talking about boys and girls." When asked what he had done to AS, the appellant responded, "Well, it's like this. Demons, it took, it just took over my body and, like I said, it's a possibility it took over my body and touched [AS]." Detective Davis arrested the appellant the next day.

The appellant offered no proof at trial, and the jury found the appellant guilty of two counts of aggravated sexual battery. The trial court conducted sentencing hearings on October 17, 1994, and February 21, 1995. The State and the appellant relied upon the pre-sentence report and the proof adduced at trial. Defense counsel additionally submitted to the court twenty-two letters from acquaintances of the appellant, attesting to his good character. With respect to the letters, the court observed:

Well, the Court accepts them, of course. They're part of the record and the court read them, and, of course, the court considers them and the court tries, as best it can, to, to weigh what the people writing the letters are trying to convey to the court and, also, to look at who they are, what the relationship is to the defendant, and take all of those factors into consideration. ... Friends, relatives, neighbors, pastors, and others, by letter, do, do support [the appellant's] application for some clemency.<sup>2</sup>

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<sup>2</sup>At the sentencing hearing, defense counsel asked that the trial court consider the following mitigating factors:

- (1) the appellant's criminal conduct neither caused nor threatened serious bodily injury, Tenn. Code Ann. § 40-35-113(1) (1990);
- (2) before his detection, the appellant compensated or made a good faith attempt to compensate the victim of his criminal conduct for the injury the victim sustained, Tenn. Code Ann. § 40-35-113(5);
- (3) the appellant was suffering from a mental condition that significantly reduced his culpability for the offense, Tenn. Code Ann. § 40-35-113(8);
- (4) the appellant acted under duress or under the domination of another person, Tenn. Code Ann. § 40-35-113(12);
- (5) other factors consistent with the purposes of the Sentencing Act, Tenn. Code Ann. § 40-35-113(13), including
  - (a) the appellant's lack of a criminal record;

Additionally, at the conclusion of the February 21, 1995, sentencing hearing, in sentencing the appellant to two concurrent ten year terms of imprisonment, the trial court made the following findings:

The Court finds in this case as a single overriding enhancing factor is the abuse of private trust violated by this defendant. I know of no more sacred relationship on earth than that of the parent and child, and this gentleman has clearly violated that. And that is certainly an enhancing factor in the opinion of the Court. Therefore, the Court doesn't hesitate to enhance and increase the minimal sentence of eight years up to ten years for that reason.

The Court finds that there exists a single mitigating factor that might in some way be considered significant. That is, the defendant has no significant prior criminal history, but in the opinion of the Court that does not outweigh the enhancing factor of violating the private trust.

### **Analysis**

Again, the appellant contends that the evidence adduced at trial was insufficient to support his convictions for aggravated sexual battery. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense

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- (b) the appellant's remorse;
  - (c) the appellant's good character;
  - (d) the appellant's "non-aggressive nature;"
  - (e) the appellant's good conduct in the county jail;
  - (f) the appellant's acquittal of two, more serious, charges;
  - (g) the appellant's good employment record prior to his disability;
  - (h) upon release, the appellant would be unable to have any contact with the victim without the consent of the victim's mother and the victim;
  - (l) the appellant has custody of his son by a prior marriage and, immediately following his divorce from the victim's mother, was granted visitation rights with respect to the victim;
  - (j) the appellant has the support of family, friends, and neighbors.

beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, \_\_ U.S. \_\_, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e).

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992).

In order to obtain a conviction for aggravated sexual battery, the State must demonstrate that the accused engaged in sexual contact with the victim, Tenn. Code Ann. §39-13-504(a), and the victim was less than thirteen years of age, Tenn. Code Ann. § 39-13-502(a)(4) (1991).

'Sexual contact' includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.

Tenn. Code Ann. § 39-13-501(6) (1991). We conclude that the victim's testimony and the appellant's statements both to the victim's mother and grandmother and to Detective Davis overwhelmingly support the guilty verdicts in the instant case.

The appellant also challenges the trial court's effective imposition of a ten year, mid-range, sentence. Review, by this court, of the length of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption only

applies, however, if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court applies inappropriate factors or otherwise fails to comply with the 1989 Sentencing Act, the presumption of correctness falls. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In any case, the appellant bears the burden of establishing that the sentence imposed by the trial court is erroneous. State v. Lee, No. 03C01-9308-CR-00275 (Tenn. Crim. App. at Knoxville, April 4, 1995). In determining whether the appellant has met this burden, this court must consider the factors listed in Tenn. Code Ann. § 40-35-210(b)(1990) and the sentencing principles described in Tenn. Code Ann. § 40-35-102 and § 40-35-103. Moreover, with respect to the length of a sentence, Tenn. Code Ann. § 40-35-210 provides that the minimum sentence within the appropriate range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. Id. If there are no mitigating factors, the court may set the sentence above the minimum in that range, but still within the range. Id. See also State v. Dies, 829 S.W.2d 706, 710 (Tenn. Crim. App. 1991). "[T]here is no particular value assigned by the 1989 Sentencing Act to the various factors and the 'weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved.'" State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993)(citation omitted). The weight assigned to any existing factor is generally left to the trial court's discretion. Id.

The appellant contends that the trial court "failed to evaluate [mitigating

factors suggested by the appellant] and use them in balancing Appellant's sentence." However, in the instant case, as pointed out by the State, the record reflects that the trial court thoroughly considered each proposed mitigating and enhancement factor. Nevertheless, the appellant cites State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994)(citing Tenn. Code Ann. § 40-35-210(f)(1990)), for the following proposition:

To facilitate meaningful appellate review, the Act provides that the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

Yet, in contrast to the trial court in Jones, the trial court in this case clearly stated the mitigating and enhancement factors relied upon and the basis for the sentence. Id. at 600. The trial court did not, however, list the rejected mitigating factors. This court has observed, "Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found ... These findings by the trial judge must be recorded in order to allow an adequate review on appeal." Chrisman, 885 S.W.2d 834, 839 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). Nevertheless, this court will apply the presumption of correctness even in the absence of an explicit listing of the rejected mitigating factors so long as the record and the findings are reasonably clear as to their absence. State v. Parks, No. 02C01-9401-CC-00010 (Tenn. Crim. App. at Jackson, April 5, 1995). We conclude that the record adequately supports the absence of the mitigating factors or, at least, the negligible weight merited by the proposed factors. Therefore, the presumption of correctness applies. The appellant has failed to overcome this presumption. Moreover, pursuant to our *de novo* review, we agree that the enhancement factor applied by the trial court outweighs the proposed mitigating factors and justifies the sentence imposed.



Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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William M. Dender, Special Judge