IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT

KNOXVILLE

JANUARY 1997 SESSION

FILED

April 10, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9602-CC-00079
	)	
	)	
vs.	)	Blount County
	)	
TIMOTHY D. LUNDEEN,	)	Honorable D. Kelly Thomas, Jr., Judge
	)	
Appellant.	)	(Aggravated Sexual Assault)
	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

CURWOOD WITT,
JUDGE

OPINION

The defendant, Timothy Lundeen, was convicted in a jury trial in the Blount County Criminal Court of attempt to commit aggravated sexual battery, a Class C felony. As a Range I, standard offender, he received a four year sentence in the Department of Correction. In this direct appeal, the defendant challenges the sufficiency of the evidence and the propriety of the trial court's denial of alternative sentencing.

We affirm the judgment of the trial court.

This case arose out of an incident that occurred on August 21, 1993 at the apartment where the victim, C.I., and her parents lived.[1] The state's proof showed that the defendant and the victim's father were close friends, and the defendant often visited the family. On August 21, the mother and C.I.'s brother were visiting with a neighbor. C.I., who was twenty months of age, her father, and the defendant were together in the living room. At some point, C.I.'s father left the room to use the bathroom. After he had been in the bathroom for about five minutes, he heard his daughter scream out as though she were afraid or in pain.

The bedroom was directly across from the bathroom, and when he opened the bathroom door, he saw his daughter lying on the bed with her feet dangling over the end of the bed. Her diaper was on the floor, and the defendant

[1] It is the policy of this court to refer to victims of child sexual abuse by initials or other identifiers, but never by name.

was leaning over her with his weight on both hands which were placed just above the toddler's head. The defendant's pants were on, but his genital area was so close to that of the victim that the father could not testify for certain whether the defendant actually touched her genitalia.

The father cried out, and the defendant ran out the bedroom door and out of the apartment. The diaper on the floor was dry but it was obvious it had been worn. One of the tapes had been ripped off. The father sent a neighbor child to find his wife, and when she returned she examined the child. The mother testified that she saw nothing unusual in her daughter's genital area. A neighbor woman who came to help also examined the child. She testified that the genital area and legs were reddened. The neighbor also testified that a few moments later, when the defendant reentered the apartment, the little girl became hysterical, sobbing and clinging to her mother. Both parents testified that materials for changing C.I.'s diapers were in the living room, not the bedroom. The defense put on no proof.

The jury returned a guilty verdict for attempted aggravated sexual battery. Tenn. Code Ann. §§ 39-12-101, 39-13-504 (1991 Repl.) The defendant now contends that the proof is insufficient, as a matter of law, to sustain the jury's verdict.

Since a jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, a convicted defendant has the burden of demonstrating on appeal that the evidence is

insufficient. State v, Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In determining sufficiency, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). 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. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). It is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, was sufficient for any rational trier of fact to have found the essential elements of the offenses beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789; State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e).

Although the evidence in this case is circumstantial, a criminal offense may be established exclusively by circumstantial evidence. Duchac v. State, 505 S.W.2d 237 (Tenn. 1973); State v. Jones, 901 S.W.2d 393, 396 (Tenn. Crim. App. 1995). Before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 225 Tenn. 478, 484, 470 S.W.2d 610, 613 (1971); State v. Jones, 901 S.W.2d at 396.

The state proves criminal attempt, upon showing the defendant had the specific intent to commit the crime and took a substantial step toward its completion. Tenn. Code Ann. § 39-12-101(a)(3). In this instance, proof in the record demonstrates that the father saw his daughter lying on the bed with her genitals exposed. The defendant was leaning over her with his genital area practically touching hers. Although the diaper on the floor had been worn, it was

neither wet nor soiled. No new diaper was found in the bedroom. The father testified that he heard his daughter cry out in fear or pain, and when the father shouted at the defendant, the defendant fled. Later when the defendant reentered the apartment, the little girl began to scream and cling to her mother. A neighbor testified that the area around the little girl's genitals was red a few minutes after the incident.

Inferences to be drawn from circumstantial evidence are within the province of the trier of fact. This court may not substitute its inferences for those drawn by the jury from the evidence, Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856,859 (1956) cert. denied 325 U.S. 845, 77 S.Ct. 39 (1956); Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). In this case, a rational juror could conclude beyond a reasonable doubt that the defendant, acting with the intent to commit aggravated sexual battery, had taken a substantial step toward completing that act. The evidence is sufficient to sustain the jury's verdict.[2]

As his second issue, the defendant complains that the court erred in not sentencing him to an alternative other than immediate incarceration. We respectfully disagree and affirm his sentence as imposed by the trial court.

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[2] Although not raised as a separate issue or briefed in detail, appellant alleged in his brief that the jury did not follow the trial court's instructions. However, the trial judge appropriately charged the jury on the law of criminal attempt, reasonable doubt and circumstantial evidence. We must presume that the jury followed the instructions of the court unless the accused demonstrates by clear and convincing evidence that the instructions were not followed. State v. Vanzant, 659 S.W.2d 816, 819 (Tenn. Crim. App. 1983). Even if this issue had been properly raised, appellant would be entitled to no relief.

When an accused challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d)(1990 Repl.). 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). Thus, in order to analyze appellant's claim we must review de novo the trial court's determinations to ascertain whether the denial of an alternative sentence was justified.

Our inquiry must begin with the determination of whether appellant is entitled to the statutory presumption that he is a favorable candidate for an alternative sentence. Tennessee Code Annotated Section 40-35-102(6) states that:

> A defendant who does not fall within the parameters of subdivision (5) and is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.

Here appellant was convicted of a class C felony as a Range I offender, and unless there is evidence to the contrary, he is presumably a favorable candidate for alternative sentencing. However, the presumption can be successfully rebutted by facts contained in the presentence report, evidence presented by the state, the testimony of the accused or a defense witness, or any other source that is part of the record. State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993).

In this case, the state has successfully rebutted the presumption. The principles upon which our sentencing act is based include the idea that confinement should be based on consideration of societal protection. When measures less restrictive than confinement have frequently or recently been applied to the defendant, incarceration is appropriate. Tenn. Code Ann. § 40-35-103 (1)(C)(1990 Repl.). Moreover, potential or lack of potential for rehabilitation must be considered. Tenn. Code Ann. § 40-35-103(5). In this instance, the defendant has demonstrated a clear disregard for the law and a disinclination to conform his actions to the rules of society. Although his criminal history is not as extensive as some, it includes one felony conviction and misdemeanor convictions for criminal trespass, public intoxication, assault, and driving without a license all of which occurred within a four year period.[3] His arrest for criminal trespass and public intoxication occurred while he was awaiting trial in this offense. Moreover, the defendant failed to complete successfully the six years of probation ordered by a Georgia court in his one prior felony conviction. The record indicates that he failed to report, failed to work or look for serious employment, was arrested and convicted of assault during this period, had two positive drug screens, and absconded from supervision. In addition, he failed to appear for his first scheduled arraignment and the first sentencing hearing in this conviction.

Once arrested and convicted of a felony, a person inclined to become a law-abiding citizen would learn from his mistakes and would be

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[3] Defendant's prior criminal history record includes the following:
5/3/91 - convicted of theft by taking (Georgia)
5/31/92 - convicted of driving without a license (fine still owed)
1/4/93 - convicted of assault
11/10/94 - convicted of public intoxication
5/15/95 - convicted of criminal trespass

inclined to remain arrest-free. The appellant did not choose this path but rather went on to accumulate a criminal history. The appellant is a convicted felon who has previously shown a disregard for the laws of this state and for the rehabilitative opportunities offered him. As such he is not a favorable candidate for rehabilitation. See Tenn. Code Ann. § 40-35-102(5). Any presumption that he is an appropriate candidate for alternative sentencing has been rebutted by the facts in the record.

The trial court sentenced him to serve four years in the Department of Corrections. This sentence is one year above the minimum sentence for a Class C felony. The sentence is appropriate.

The judgment of the trial court is affirmed.

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CURWOOD WITT, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOSEPH M. TIPTON, JUDGE