IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1997 SESSION

FILED

November 25, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. NO. 01C01-9606-CR-00241
	*	
Appellee,	*	DAVIDSON COUNTY
	*	
VS.	*	Hon. Seth W. Norman, Judge
	*	
ANTWAN PATTON,	*	(Rape of a child)
	*	
Appellant.	*	

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OPINION FILED:_____

AFFIRMED AS MODIFIED

GARY R. WADE, JUDGE

OPINION

The defendant, Antwan Patton, was convicted of two counts of rape of a child. The trial court imposed Range I, eighteen-year consecutive sentences on each count. The result is an aggregate sentence of thirty-six years. In this appeal of right, the defendant challenges the sufficiency of the evidence, attacks the sufficiency of the indictment, and complains that the trial court erred in imposing excessive and consecutive sentences.

We affirm the judgment of the trial court but modify each eighteen year sentence to sixteen years, six months. The effective sentence is, therefore, thirty-three years.

On an evening between September 25 and 30, 1993, at approximately 5 or 6 p.m., the male victim, twelve year old BP,[1] was playing hide-and-seek near his residence in Preston Taylor Homes, a public housing project in Nashville. The defendant approached the victim, who was hiding behind a tree, saying he had a birthday present for him. The victim recognized the defendant whose mother was a friend of the victim's mother.

When the defendant, who was carrying a stick about one-and-one-half feet in length, grabbed his arm, the victim attempted to resist and run away. The defendant then struck the victim with the stick, producing a large bruise on his arm, and forced the victim into some bushes about fifty feet from the street. The defendant removed a roll of duct tape from his back pocket, tore off a section with his teeth, and placed it over the victim's mouth. The victim cried as the defendant

[1] It is the policy of this court to withhold the identity of children involved in sexual abuse. State v. Schimpf, 782 S.W.2d 186, 188 n. 1 (Tenn. Crim. App. 1989).

anally penetrated the victim with his penis. Afterward, the defendant removed the tape, forced the victim to his knees, and required him to perform oral sex. Revulsed, the victim vomited.

The defendant then released the victim, threatening to kill the victim and his mother if he told of the incident. When he returned home, the victim complained to his mother of rectal pain but did not inform her of the rape. The victim took some milk of magnesia and prune juice after which he experienced a bowel movement and bleeding.

On October 11, 1993, about two weeks after the rapes, the victim received a poor report card from school and was grounded. At this point, the victim informed his mother about the defendant's assault. His mother called the victim's grandmother and then the police. Afterward, the victim made a statement to the police, spoke with social worker at the Department of Human Services, and went for an evaluation at Our Kids Clinic at Vanderbilt.

There were inconsistencies in the victim's testimony. His recollection at trial of the sequence of the sex acts differed from his testimony at the preliminary hearing. The victim explained that he had misunderstood the questions posed to him at the preliminary hearing and was certain that the rapes occurred as he testified at trial. He also testified that the defendant had sexually assaulted him on eight other occasions in different locations. The victim acknowledged, however, that he had not told anyone of these other incidents. In fact, just three days prior to September 25, 1993, when questioned by a doctor at Vanderbilt Hospital, the victim

denied that he had ever been sexually abused.[2]

Pamela Primm, the victim's mother, testified that in September, 1993, the victim came home complaining that his bottom hurt. She described his eyes as "kind of watery," his behavior as "kind of strange," and his gait as "kind of hopping." She recalled having given the victim some milk of magnesia and prune juice but did not ask him about his leg. She confirmed that when she grounded the victim two weeks later for a report card containing three failing grades, he first told her of the rapes.

Ms. Primm claimed that her son had been adversely affected by the incident. She testified that he would not play outside, and was just "not the same little boy anymore." She also arranged counseling for him.

Detective Harry Meek of the Metro Police Department testified that the victim showed him numerous locations where the victim claimed the other assaults had occurred. Detective Meek took photographs of these locations.

Julie Rosof of Our Kids Center at Vanderbilt, an expert trained in examination of sexually abused children, testified that she examined the victim. After learning of the victim's account of the rapes, she examined and found normal the victim's mouth and rectal area. Ms. Rosof testified that it is not unusual for small abrasions or injuries in the rectal area to heal "very, very quickly . . . within 24 or 72 hours." She saw no signs of scarring. Laboratory tests for sexually transmitted diseases were negative.

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[2]BP was admitted to Vanderbilt Hospital for three days in September, 1993, because he was experiencing seizures.

Corey Dewayne Smith, thirteen years old, testified that he lived in Preston Taylor Homes. While acknowledging that he had played with the victim in the past, Smith denied playing hide-and-seek with the victim in September, 1993. He testified that he stopped playing with the victim in 1990 or 1991 because of rumors that the victim was gay.

The defendant, twenty years old at the time of trial, was eighteen in September of 1993. He testified that he left school, where he took special education classes, in the ninth grade. The defendant, who has a three-year-old child and has worked off and on since leaving school, testified that he was sometimes living with his girlfriend's aunt and sometimes at his mother's home during that time. He acknowledged knowing the victim but denied raping him.

At trial, the defendant claimed that he worked for Labor World and had worked there regularly the week before the trial. The General Manager of Labor World, however, established that the defendant had not worked at all the week before trial and had worked only one day during the preceding week. Don Black of the Davidson County Sheriff's office testified that the defendant was in jail for approximately seven days during the same time period.

The jury returned a verdict of guilty on both counts of rape of a child as charged in the indictments. At the sentencing hearing, Ms. Primm testified that the victim no longer played outside in the neighborhood and had suffered recurrent nightmares since the rapes. She stated that the victim had moved in with his grandmother to escape the environment at Preston Taylor Homes.

The trial court found the defendant to be a Range I offender with no

prior criminal convictions. Without making findings of fact on the record, the trial court applied two enhancement factors, found no mitigating factors, and sentenced the defendant to two consecutive, eighteen-year sentences.

I

The defendant first challenges the sufficiency of the evidence. He asserts that the evidence presented at trial was insufficient to convince a rational trier of fact that the defendant is guilty of rape of a child beyond a reasonable doubt. The defendant's assertion is based in the lack of physical evidence, lack of corroborating witnesses, and the unreliability of the victim's testimony.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing 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. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); Tenn. R. App. P. 13(e).

Tennessee Code Annotated, Section 39-13-522(a) defines the offense of rape of a child as the "unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Sexual penetration is defined as "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[.]" Tenn. Code Ann. § 39-13-501(7). Rape of a child is a Class A felony. Tenn. Code Ann. § 39-13-522(b).

Here, the victim testified that the defendant had anally penetrated him and forced him to perform fellatio. The jury chose to accredit that testimony and rejected the denials made by the defendant. That was their prerogative. Because a rational trier of fact could have found the essential elements of the crime, the evidence was legally sufficient to support a conviction of rape of a child. See Jackson v. Virginia, 443 U.S. 307 (1979).

II

During the appeal, the defendant filed supplemental authority pursuant to Rules 27(d) and 36(a), Tenn. R. App. P., asserting as an additional ground for relief that the indictment was insufficient for failure to allege the requisite mental culpability for rape of a child. The defendant did not challenge the sufficiency of the indictment in his motion for a new trial or appellate brief.

Failure to raise objections to a defective indictment does not result in waiver. State v. Perkinson, 867 S.W.2d 1 (Tenn. Crim. App. 1992). Rule 12(b)(2), Tenn. R. Crim. P., provides that either jurisdictional defects or the failure to properly charge an offense "shall be noticed by the court at any time during the pendency of the proceedings." If the indictment does not charge an offense, Rule 34, Tenn. R. Crim. P., permits an arrest of the judgment if "filed within thirty days of the date [of] sentence...." Moreover, our rules require that we determine "whether the trial and appellate court have jurisdiction over the subject matter," even though the issue

might not have been presented as a ground for relief. Tenn. R. App. P. 13(b).

In State v. Roger Dale Hill, ___ S.W.2d ___, No. 01S01-9701-CC-00005 (Tenn., at Nashville, Nov. 3, 1997), our supreme court addressed the sufficiency of an indictment charging aggravated rape. The court ruled as follows:

> We hold that for offenses which neither expressly require nor plainly dispense with the requirement for a culpable mental state, an indictment which fails to allege such mental state will be sufficient to support prosecution and conviction for that offense so long as
>
> > (1) the language of the indictment is sufficient to meet the constitutional requirements of notice to the accused of the charge against which the accused must defend, adequate basis for entry of a proper judgment, and protection from double jeopardy;
> >
> > (2) the form of the indictment meets the requirements of Tenn. Code Ann. § 40-13-202; and
> >
> > (3) the mental state can be logically inferred from the conduct alleged.

Hill, slip op. at 3.

In Hill, the indictment in question charged that "[the defendant] did unlawfully sexually penetrate [the victim] a person less than thirteen (13) years of age, in violation of Tennessee Code Annotated 39-13-502. ..." Id., slip op. at 5 (alteration in original). Here, the indictment alleged as follows:

> Antwan Patton ... did engage in unlawful sexual penetration with [BP], a child less than thirteen (13) years of age, in violation of Tennessee Code Annotated §39-13-522, and against the peace and dignity of the State of Tennessee.

Because the language of this indictment is nearly identical to that in Hill,[3] we must

[3]The offense of rape of a child, Tenn. Code Ann. § 39-13-522 is the same offense as that charged in Hill; it has simply been recodified. Id. slip op. at 9, n.5.

hold that its content (1) meets the requirements of the Tennessee and United States Constitutions for notice, judgment and protection from double jeopardy, (2) satisfies Tenn. Code Ann. § 40-13-202 (statute setting forth requirements for an indictment), and (3) that the culpable mental state for rape of a child can be logically inferred from the conduct alleged.

III

The defendant also contends that the sentences were excessive. He argues that the trial court erroneously applied two statutory enhancement factors and failed to apply two mitigating factors warranted by the proof.

When there is a challenge to 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). 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing 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. §§ 40-35-102, -103, and

-210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

At the time of this offense, the presumptive sentence was the minimum in the range if there were no enhancement and mitigating factors. Tenn. Code Ann. §§ 40-35-210 (amended in 1995 changing the presumptive sentence for a Class A felony to the midpoint in the range). Should the trial court find mitigating and enhancement factors, it must start at the minimum sentence in the range and enhance the sentence based upon any applicable enhancement factors, and then reduce the sentence based upon any appropriate mitigating factors. Tenn. Code Ann. § 40-35-210(e). The weight given to each factor is within the trial court's discretion provided that the record supports its findings and it complies with the Criminal Sentencing Reform Act of 1989. See Ashby, 823 S.W.2d at 169. The trial court should, however, make specific findings on the record which indicate its application of the sentencing principles. Tenn. Code Ann. §§ 40-35-209 and -210.

In 1989, the statute enumerated sixteen potentially applicable enhancement factors. Tenn. Code Ann. § 40-35-114. Since then, amendments have established five additional enhancement factors. Tenn. Code Ann. § 40-35-114(17) through (21) (Supp. 1996). The mitigating factors appearing in the 1989 Act remain unchanged. Tenn. Code Ann § 40-35-113.

The trial court found no mitigating factors but ruled that the following enhancement factors applied:

> (16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great;
>
> ***
>
> (18) A victim, under § 39-15-402, suffered permanent impairment of either physical or mental functions as a

> result of the abuse inflicted[.]

Tenn. Code Ann. § 40-35-114 (16), and (18) (1995).

"[L]aws made for the punishment of acts committed previous to the existence of such laws ... are contrary to the principles of a free Government ... ." Tenn. Const. art. I, §11. See Beazell v. Ohio, 269 U.S. 167, 169-70 (1925). Safeguards against ex post facto laws also apply to statutory enhancement factors:

> [T]he use of this [enhancement] factor violated the ex post facto provision contained in the Tennessee Constitution because these offenses occurred prior to the effective date of the Criminal Sentencing Reform Act of 1989.

State v. Melvin, 913 S.W.2d 195, 204 (Tenn. Crim. App. 1995) (citations omitted). In Melvin, the offenses were committed in 1982, and the enhancement factor applied by the trial court was not in the 1982 Act. Id. Application of Tenn. Code Ann. § 40-35-114(18) (1995) in this case was erroneous because these offenses occurred prior to the 1995 amendment and the enhancement factor was not in effect at that time.

The defendant also argues that application of Tenn. Code Ann. § 40-35-114(16) was erroneous. He contends that because rape of a child is a Class A felony and rape is a Class B felony, the General Assembly has already enhanced the penalty for this crime; therefore, the potential for bodily injury is inherent in the crime. In State v. Kissinger, 922 S.W.2d 482 (Tenn. 1996), however, our supreme court decided that this enhancement factor was potentially applicable for the offense of rape of a child.

In Kissinger, the defendant was found guilty of rape of a nine-year old boy. After considering the circumstances of the crime, the court decided that the

enhancement factor concerning bodily injury, while applicable, should be given little weight because the record was devoid of evidence suggesting "that [the defendant] ever threatened to harm the boy[] or that [he] was fearful of [the defendant]." Kissinger, 922 S.W.2d at 488. Here, there was proof that the defendant threatened the victim and his mother with death. Thus, the potential for bodily injury was great. In our view, Tenn. Code Ann. § 40-35-114(16) was properly applied to enhance the defendant's sentence.

The trial court found no mitigating factors and, without explanation, disregarded the two mitigating factors argued by the defendant:

> (6) The defendant, because of his youth or old age, lacked substantial judgment in committing the offense;
>
> (8) The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense[.]

Tenn. Code Ann. § 40-35-113(6) and (8) (emphasis added).

As for the first mitigator, in State v. Carter, 908 S.W.2d 410 (Tenn. Crim. App. 1995), this court held:

> In determining whether the sentence should have been mitigated because the defendant lacked substantial judgment because of his youth, "courts should consider the concept of youth in context, i.e., the defendant's age, education, maturity, experience, mental capacity or development, and any other pertinent circumstance tending to demonstrate the defendant's ability or inability to appreciate the nature of his conduct."

Carter, 908 S.W.2d at 413 (quoting State v. Adams, 864 S.W.2d 31, 33 (Tenn. 1993)). In Carter, the defendant was eighteen years old at the time of sentencing, had not completed high school, and was in good mental and physical health. This court decided that youth was not a mitigating factor in that case because the defendant was "sufficiently mature to understand the nature of his conduct." Id.

Here, the defendant was twenty years old at sentencing and eighteen years old when he raped the victim. The defendant has an overall IQ of sixty-four which is within the mildly mentally retarded range, achieved only a ninth-grade education, and apparently cannot read or write. The psychological examination included in the pre-sentencing report indicates that the "defendant's relative weaknesses include[] judgment in practical social situations and proper selection, organization and emphasis of facts and relationships." Given the defendant's mental ability, poor educational achievement, and weak capacity for judgment, we conclude that these shortcomings may have had some impact on the defendant's ability to appreciate the nature of his conduct. Yet, we cannot conclude that the defendant lacked "substantial judgment" in committing this offense.

As for the defendant's mental condition, the pre-sentencing report psychological evaluation states that the defendant suffers from a personality disorder with dependent and antisocial features. The defendant's mental condition may have played a role in his abuse of this victim, and therefore, this factor should have been entitled to some consideration. See State v. Haynes, 720 S.W.2d 76, 86 (Tenn. Crim. App. 1986) (low IQ considered as a mitigating factor, but nonetheless the maximum sentences were affirmed); State v. Johnny Alfred Junior Johnson, C.C.A. No. 03C01-9105-CR-00157, Carter County (Tenn. Crim. App. at Knoxville, Apr. 22, 1992). In Johnson, this court held that low mental ability, an IQ of sixty-one, did not significantly reduce culpability because the defendant "knew what he was doing, knew it was wrong, and threatened the victim in order for her not to divulge his wrongdoing." Id., slip op. at 19. These circumstances are very similar. The defendant understood the nature of his actions, as evidenced by his directive to the victim not to report the incident. Thus, the mental condition of the defendant did not "significantly reduce his culpability."

Because the trial court erred in its application of one enhancement factor, we modify each of the eighteen-year sentences to sixteen years, six months.

We now address the appropriateness of consecutive sentences. Prior to the enactment of the 1989 Sentencing Act, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution, "[C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved." Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. §40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court upon a determination that

> (5) [T]he 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 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).

In imposing the consecutive sentences in this case, the trial court made no formal observations. Thus, our review of this issue must be de novo without a presumption of correctness. See Ashby, 823 S.W.2d at 169. The defendant cites to State v. Hayes, 899 S.W.2d 175 (Tenn. Crim. App. 1995), for the proposition that consecutive sentencing is inappropriate in this case. In Hayes, the

defendant, convicted of sexual battery for french kissing his daughter, challenged the imposition of consecutive sentencing. This court weighed the factors listed in subsection (115)(b)(5) against one another; whereas one factor weighed in favor of consecutive sentencing, remaining factors militated against it:

> The state stresses the fact that the victim was the defendant's daughter. However, the circumstances in this case relating to the remaining factors to be considered militate against the use of subsection 115(b)(5). There was no significant time span of undetected sexual activity, the nature of the criminal conduct was nonaggravated, and the extent of residual damage to the victim caused by the conduct is not sufficiently shown.

Id. at 187. Thus, the court modified to provide for concurrent sentencing. Id. But see State v. Woodcock, 922 S.W.2d 904 (Tenn. Crim. App. 1995).

In our view, the reliance on Hayes is misplaced. As applied in this case, the factors listed in subsection 115(b)(5) do not militate against consecutive sentencing; they weigh in favor of it. Here, the defendant was convicted of "two or more statutory offenses involving sexual abuse of a minor." There was evidence at trial that the defendant had sexually abused the victim eight times over a one-and-one-half to three-year period. Emotional damage to the victim was significant. We find that the trial court properly imposed consecutive sentences.

Accordingly, the convictions and sentences, as modified, are affirmed.

_____
Gary R. Wade, Judge

CONCUR:

_____
David H. Welles, Judge

_____
Curwood Witt, Judge