



## OPINION

The petitioner, Tracy Higginbotham, appeals the Wayne County Circuit Court's dismissal of his petition for a writ of habeas corpus. He was convicted by a jury in the Robertson County Criminal Court on September 11, 1992 of two counts of aggravated sexual battery and one count of aggravated rape. He received an effective sentence of twenty years in the Tennessee Department of Correction. In his habeas corpus petition, he challenged the sufficiency of the Robertson County indictment, which alleged five counts of aggravated sexual battery and one count of aggravated rape, on the grounds that the essential mens rea elements were not stated. After a review of the record on appeal, the briefs of the parties, and the applicable law, we affirm the dismissal of the habeas corpus petition.

The count of aggravated rape as contained in the indictment charged that the defendant "unlawfully did penetrate [the victim], to-wit: by inserting defendant's penis in victim's vagina, the said [victim] being a person under thirteen (13) years of age, in violation of [Tennessee Code Annotated section] 39-14-502 . . . ."

The counts of aggravated sexual battery charged the defendant with having "sexual contact with [the victim], to-wit: by [performing specific acts of licking or touching the defendant's or the victim's intimate body parts, one such act being described in each of five counts], the said [victim] a being person under 13 years of age in violation of [Tennessee Code Annotated section] 39-13-504 . . . ."

At the time of the offenses in August and September of 1991, Tennessee Code Annotated section 39-13-502(a) proscribed aggravated rape as an "unlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: . . . (4) The victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-502(a) (1991) (amended

1992).

Tennessee Code Annotated section 39-13-504(a) proscribed aggravated sexual battery as an “unlawful sexual contact with a victim by the defendant or the defendant by the victim accompanied by any of the circumstances listed in § 39-13-502(a). Tenn. Code Ann. § 39-13-504(a) (1991) (amended 1993).

Habeas corpus relief is available in this state only when it appears on the face of the judgment or the record that the trial court was without jurisdiction to convict or sentence the defendant or that the sentence of imprisonment has otherwise expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993); Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992). In this instance, the petitioner does not contend that his sentence has expired, nor has he established that the trial court lacked jurisdiction to enter the judgments on the felony offenses charged. If the proscriptive statutes do not indicate that the accused’s culpable mental state is a material element of the offenses, “the appellant’s challenge is not jurisdictional in nature.” Robert Duane Bitner v. Billy Compton, No. 02C01-9610-CC-00336, slip op. at 4 (Tenn. Crim. App., Jackson, Nov. 4, 1997), pet. for perm. app. filed (Tenn. Jan. 8, 1998); see Roger Lee Kimmel v. State, No. 02C01-9701-CR-00006, slip op. at 6 (Tenn. Crim. App., Jackson, Jan. 12, 1998) (Wade J., concurring), pet. for perm. app. filed (Tenn. Feb. 24, 1998); see also Jackie Slagel v. State, No. 03C01-9704-CR-001435 (Tenn. Crim. App., Knoxville, June 10, 1997), perm. app. denied (Tenn. 1997); State v. Robert Read, Jr., No. 01C01-9603 -CR-00106 (Tenn. Crim. App., Nashville, Apr. 3, 1997), pet. for perm. app. filed (Tenn. May 30, 1997); State v. John James, No. 01C01-9601-CR-00016 (Tenn. Crim. App., Nashville, Mar. 27, 1997); State v. John Haws Burrell, No. 03C01-9404-CR-00157 (Tenn. Crim. App., Knoxville, Feb. 11, 1997), perm. app. denied (Tenn. 1997) (concurring in results only), cert. denied, --- U.S. ---, --- S. Ct. --- (1998).

The proscriptive statutes in this case do not indicate that the mens rea

is a material element of the offenses of rape or aggravated sexual battery. Therefore, because the defect of which the petitioner complains does not divest the trial court of jurisdiction or render the subsequent proceedings void, habeas corpus relief is not available. Roger Lee Kimmel, slip op. at 6; James Clyde Saylor v. Howard Carlton, No. 03C01-9612-CR-00453, slip op. at 3 (Tenn. Crim. App., Knoxville, Oct. 31, 1997).

Even if this issue were properly before this court, the petition would fail on substantive grounds as well. The defendant claims, based upon State v. Roger Dale Hill, Sr., No. 01C01-9508-CC-00267 (Tenn. Crim. App., Nashville, June 20, 1996), that the indictment is defective because it fails to allege a culpable mens rea; however, the supreme court reversed this court's decision in Roger Dale Hill. See State v. Hill, 954 S.W.2d 725 (Tenn. 1997). Accordingly, our resolution of this issue is guided by the supreme court's pronouncement in Hill.

The Sentencing Reform Act of 1989 requires a culpable mental state in order to establish an offense unless the statutory definition of the crime "plainly dispenses with a mental element." Tenn. Code Ann. § 39-11-301(b) (1997). The question raised in Hill is whether a charging instrument which charges a crime that by its statutory terms does not expressly require or plainly dispense with a culpable mental state is sufficient without explicitly alleging a culpable mens rea. Hill, 954 S.W.2d at 726. The supreme court said that such a charging instrument is nevertheless sufficient to support prosecution where

- (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, 954 S.W.2d at 726-27.

The indictment language alleging aggravated sexual battery in this case closely follows the statutory language describing the crime. It complies with the statutory form by stating the "facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment . . . ." See Hill, 954 S.W.2d at 728; Tenn. Code Ann. § 40-13-202 (1997). Further, it is adequate to protect the defendant from double jeopardy.

Whether the requisite mental state may be inferred from the charging language requires more analysis. The crime of aggravated sexual battery involving a child less than thirteen years of age has two elements: (1) sexual contact, and (2) a victim less than thirteen years old. Tenn. Code Ann. § 39-13-504(a)(4) (1991) (amended 1993). This court has previously observed that the mens rea for sexual contact is intentional, as provided in the definition of sexual contact found in Code section 39-13-501(6)<sup>1</sup> (1997), and the mens rea for the victim's age is intentional, knowing, or reckless, as defined by Code section 39-11-301(c).<sup>2</sup> See, e.g., Roger Lee Kimmel, slip op. at 7; State v. Howard, 926 S.W.2d 579 (Tenn. Crim. App. 1996); State v. Parker, 887 S.W.2d 825 (Tenn. Crim. App. 1994).

We find the language of the indictment adequately supplies the mens rea. This court has held that use of the phrase "sexual contact" does "necessarily imply an intentional touching" of the victim. State v. Milton S. Jones, Jr., No. 02C01-9503-CR-00061, slip op. at 5 (Tenn. Crim. App., Jackson, March 7, 1997), pet. for perm. app. filed (Tenn. May 6, 1997); see also State v. John James, No. 01C01-

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<sup>1</sup>"Sexual contact" is defined in the Criminal Code as including "the intentional touching of the victim'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) (1997).

<sup>2</sup>Code section 39-11-301(c) provides, "If the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state." Tenn. Code Ann. §39-11-301(c) (1997).

9601-CR-00016, slip op. at 19-20 (Tenn. Crim. App., Nashville, March 27, 1997). Inclusion of the words "sexual contact" in the indictment necessarily implies an intentional mens rea for this element of the crime. Milton S. Jones, Jr., slip op. at 5; John James, slip op. at 19. But see Roger Lee Kimmel, slip op. at 4 (The phrase "sexual contact" imports no mental state.).

As to the second element of the crime, Code section 39-11-301(c) supplies the necessary mens rea of intentional, knowing or reckless which is necessarily inferred from the conduct alleged. See Hill, 954 S.W.2d at 726-27.

With respect to the aggravated rape charge, we find the indictment at bar to be virtually identical to the aggravated rape indictment upheld in Hill. It closely follows the statutory language describing the crimes. It complies with the statutory form by stating the "facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment . . . ." See Tenn. Code Ann. § 40-13-202 (1997); Hill, 954 S.W.2d at 727. Further, the mental state is capable of logical inference from the conduct alleged. See Hill, 954 S.W.2d at 729; see also State v. Marshall, 870 S.W.2d 532, 537-38 (Tenn. Crim. App. 1993). As the supreme court noted in Hill, the allegation of "unlawfully sexually penetrat[ing]" a victim necessarily requires an intentional, knowing or reckless mens rea. Hill, 954 S.W.2d 729. Therefore, the allegation raises an inference of the required mental state. Hill, 954 S.W.2d at 729.

Accordingly, the indictment satisfies the three Hill requirements for sufficient allegations to support prosecution for both aggravated sexual battery and aggravated rape. See Hill, 954 S.W.2d at 729. The trial court acted properly in summarily dismissing the petition. The judgment of the trial court is affirmed.

CURWOOD WITT, JUDGE

CONCUR:

GARY R. WADE, JUDGE

WILLIAM M. BARKER, JUDGE