

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1998 SESSION

FILED

October 6, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

*

No. 03C01-9707-CR-00307

Appellee,

*

BLOUNT COUNTY

vs.

*

Hon. D. Kelly Thomas, Jr., Judge

BRUCE ALAN RUDD,

*

(Rape of a Child)

Appellant.

*

For Appellant:

Gregory D. Smith
Contract Appellate Defender
One Public Square, Suite 321
Clarksville, TN 37040
(on appeal)

R. Mack Garner
District Public Defender
419 High Street
Maryville, TN 37804
(at trial and on appeal)

For Appellee:

John Knox Walkup
Attorney General & Reporter

Todd R. Kelley
Assistant Attorney General
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Kirk Andrews
Assistant District Attorney General
Blount County Courthouse
363 Court Street
Maryville, TN 37804

OPINION FILED: _____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Bruce Alan Rudd, was convicted of rape of a child, a Class A felony. Tenn. Code Ann. § 39-13-522. The trial court sentenced the defendant, who qualified as a child rapist, to twenty-five years imprisonment. See Tenn. Code Ann. § 39-13-523(b), (c) (a child rapist must serve the entire sentence undiminished by sentence reduction credits and there is no release eligibility or parole eligibility for a child rapist). A fine of \$50,000.00 was imposed.

In this appeal of right, the defendant presents the following issues for review:

- (I) whether the evidence is sufficient to support the conviction for rape of a child;
- (II) whether the trial court erred by restricting cross-examination of the victim's mother;
- (III) whether the trial court erred by admitting the defendant's statements to law enforcement officers; and
- (IV) whether the sentence is excessive.

We affirm the judgment of the trial court.

On September 8, 1996, James and Lora Jean Normile permitted the defendant to share a residence with them and their three children. On the next day, while her husband was at work, Ms. Normile noticed AN,¹ the two-year-old victim, "pulling at her vagina" in the living room. The defendant was in her bedroom. Ms. Normile initially thought that the victim, who has a speech problem, needed to use the bathroom. Ms. Normile put her infant son down for a nap and, after he went to sleep, resumed her housework. During the course of the day, Ms. Normile noted

¹It 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).

that the defendant and the victim had been going in and out of the bedroom continually. The defendant appeared to be nervous. As the victim left her bedroom, again "pull[ing] at her vagina," the defendant walked to the bathroom. Soon, both returned to the victim's bedroom. Ms. Normile, who had become suspicious, then peeked through the keyhole of the bedroom door and saw the victim lying on the bed with her shorts and panties pulled down to her knees and her shirt lifted up to her neck. The defendant was touching her vagina. Ms. Normile then burst into the room, called her name, and took the victim into her arms. When Ms. Normile asked what he was doing, the defendant replied that he was reading her a book. Ms. Normile did not see a book but did notice that the defendant had an erection and that the victim's shorts were askew, as if pulled up hurriedly.

When Ms. Normile examined the victim in the bathroom, she noticed redness and scratches on her vagina. The victim whined and appeared fearful. Ms. Normile then gave her a bath, telephoned her husband, and then telephoned the police. Meanwhile, the defendant stood outside smoking a cigarette. He was watching television in the living room when police arrived to arrest him.

Detective William Manuel of the Maryville Police Department placed the defendant in custody, read him his rights, and, at 6:15 P.M., questioned the defendant about the incident. The detective repeated the rights of the defendant, who signed a waiver form. During the interview, which was taped and played at trial for the jury, the defendant admitted to kissing the victim's breasts and licking her vagina. On the following day, in a second interview, the defendant acknowledged to Detective Manuel that he had, in fact, committed the offense. This statement was also recorded on video tape and played at trial.

David Henry Saxon, a physician at Blount Memorial Hospital, examined the victim, whom he described as healthy but with delayed speech, in the emergency room. He concluded that she had a raw abrasion one centimeter in length along her inner labia, which was outside the entrance to her vagina. It was his opinion that the victim's legs and outer labia had to be spread apart for such an injury to occur. Dr. Saxon estimated that the abrasion was only a few hours old and could have been caused by a finger or small rough object. It was his belief that tongue contact to the genital area of the victim would not leave an injury and that the injury was not self-inflicted.

Dr. Mary Palmer Campbell of the East Tennessee Children's Hospital examined the victim about two weeks after the incident. Dr. Palmer described the victim's genital area to be within normal limits but concluded that it is "quite common in children who have been sexually abused to have an acutely abnormal exam with rapid and subsequently normal healing."

Juanita Flynn Robertson, a child abuse investigator for the state, spoke with the defendant on the day of his arrest and was present during the second interview conducted by Detective Manuel. She testified that ten days after his arrest, the defendant claimed that he had lied in his earlier statements to her and that he had never abused the victim.

At trial, the defendant testified that he came to Tennessee from California seeking work and found a job as a busboy and dishwasher at a Shoney's restaurant. He stated that he lived with friends for about four months until September 8, 1996, when he moved in with Jim and Lora Normile, the victim's parents. He contended that on the following day, his day off from work, the victim

took his hand and led him into her bedroom. The defendant maintained that he had tried to keep the door open but the victim repeatedly closed it. He testified that he read her a book and, after about thirty minutes, the victim hugged him and fell asleep. He claimed that as he stood up to leave, Ms. Normile entered the room and asked what was happening. The defendant denied pulling the victim's clothing or touching her. He explained that if Ms. Normile recalled that he had acted oddly, it was because he had experienced a dizzy spell, having just stood up after tying his shoelaces, when she entered the room.

The defendant described himself as having a "theory complex." He claimed he had lied about touching the victim during each of the interviews because Detective Manuel had threatened him. He maintained he had never kissed, licked, or fondled the victim.

I

The defendant contends that the evidence is insufficient to support the conviction for rape of a child. He argues that his confessions were false and that Ms. Normile, the eyewitness, could not have seen through the keyhole in the door.

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 the trier 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). Cunnilingus is "a sexual activity involving oral contact with the female genitals." State v. Hoyt, 928 S.W.2d 935, 942 (Tenn. Crim. App. 1995) (quoting State v. Karl E. Vanderbilt, No. 70 (Tenn. Crim. App., at Jackson, Apr. 8), app. denied, (Tenn. 1992)). Rape of a child is a Class A felony. Tenn. Code Ann. § 39-13-522(b).

On two occasions, the defendant confessed to Detective Manuel that he had licked the victim's vagina. His statements were recorded. Although he testified at trial that his statement to Detective Manuel was untruthful, the jury rejected his retraction as false. That was its 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

Next, the defendant claims that the trial court denied his right to a fair trial by restricting the cross-examination of Ms. Normile. Ms. Normile, who had been

the victim of sexual abuse herself, was according to the defendant, "hypersensitive to perceived sexual abuse." He contends that he should have been permitted to cross-examine her on the subject of her own sexual abuse.

The Sixth Amendment guarantees a criminal defendant the right to cross-examine witnesses against him. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974). The rights of confrontation and cross-examination are essential to a fair trial. See, e.g., Pointer v. Texas, 380 U.S. 400 (1965). Rule 616, Tenn. R. Evid., provides that "[a] party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Rule 611(b), Tenn. R. Evid., provides that a witness "may be cross-examined on any matter relevant to any issue in the case, including credibility." Any "feelings that a witness has with regard to a party or issue are an important factor for the trier of fact to consider in assessing the weight to be given to the witness' testimony." State v. Williams, 827 S.W.2d 804, 808 (Tenn. Crim. App. 1991).

In a jury out hearing, Ms. Normile testified that while she had been sexually assaulted as a teenager and had felt traumatized by the experience, she was not overly vigilant regarding her own children. She denied that her experience affected how she perceived the incidents between the defendant and the victim and asserted that she had never before suspected or accused anyone of abusing any of her children. The trial court refused to permit defense counsel to cross-examine Ms. Normile about the matter: "I can see how in some situations it would be something that was relevant, but listening to the questions you had of this witness and observing her demeanor here on the witness stand ... I don't think it is relevant."

The better practice is to permit unrestricted cross-examination. The defendant argued that Ms. Normile was a witness prejudiced by her prior experiences. Possible witness bias or prejudice is a common subject in cross-examination. It is always relevant. Davis v. Alaska, 415 U.S. at 316.

Any error, however, would be harmless in this instance. In State v. Howell, 868 S.W.2d 238 (Tenn. 1993), our supreme court announced the standards for determining when constitutionally improper restrictions on the right to cross-examine constitute harmless error:

[T]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, the error was nonetheless harmless beyond a reasonable doubt. A number of factors are relevant to this inquiry including the importance of the witness' testimony in the prosecution's case, the cumulative nature of the testimony, the presence or absence of evidence corroborating or contradicting the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case.

Howell, 868 S.W.2d at 253 (citations omitted).

Ms. Normile was the only eyewitness to testify. Yet the tape-recorded admissions of the defendant to Detective Manuel clearly qualified as the most damaging evidence to the defense. In our view, a rigorous cross-examination of Ms. Normile as to the details of her own sexual abuse as a teenager would have had little if any impact on a jury possessed with two separate confessions of the defendant. The defendant was otherwise allowed a broad cross-examination of the witness. In sum, the overall strength of the state's case demonstrates that error was harmless beyond a reasonable doubt.

III

The defendant challenges the ruling of the trial court denying his motion to suppress his statements to police. He claims that the statements were involuntary and the result of coercion by police.

At the suppression hearing, the defendant testified that he had a prior conviction in California and had been hospitalized on a number of occasions. He asserted that, as a child, he had been sexually abused by his older brother over a period of several years. He contended that the abuse had resulted in psychological problems he called a "theory complex."

The defendant testified that he had a twelfth grade education but read on a fourth grade level. He asserted that his initial confession was untruthful. The defendant claimed that he was not advised of his rights at the time of his arrest and that Detective Manuel had threatened him prior to their first interview, saying, "Don't you lie to me or I'll make your life real miserable." He maintained that during the initial interrogation, he was nervous, confused and afraid, so that when he was asked if he wanted a lawyer, he said, "I don't know, I guess not." The defendant explained that no one read the waiver of rights form to him and that he was unaware of the contents of the form. He stated that he did not read the waiver because he was unable to do so. He explained that he did not request a lawyer because he was afraid of the detective. He insisted that the first audio tape had been altered and that the detective's threats had been replaced with his statement that he had read the defendant his various rights.

At the motion hearing, the defendant claimed that Detective Manuel had not advised him of his rights before he was questioned the second time on the

day after the offense. During cross-examination by the state, however, he conceded that he had been so advised. He contended that the second statement was untrue and that he had confessed to the crime only because he felt fatalistic.

Detective Manuel testified that he arrested the defendant at the Normile residence and read him his rights there. Another officer transported the defendant to the police department without asking any questions about the incident. Upon their arrival at the police department, Detective Manuel escorted the defendant to his office, read him his rights a second time, and asked the defendant to sign a waiver of rights form. Detective Manuel testified that the defendant acknowledged that he understood his rights, appeared calm, and was very cooperative. Detective Manuel denied raising his voice at the defendant or threatening him in any manner. He also denied altering the tape-recording. Detective Manuel, who conducted the second interview in the presence of Ms. Robertson, described the defendant as calm and coherent during that interrogation.

The trial court reviewed the audio and video tapes, the signed waiver of rights form, and the testimony at the suppression hearing and fully accredited the testimony of Detective Manuel:

I never detected any kind of strain in [the defendant's] voice, no hesitancy ... nothing, other than ... a little bit of a flat [a]ffect. ...

As a matter of fact, I find that Detective Manuel read his rights to him from the form before the audiotape was made and that [the defendant] signed the waiver that has been introduced and that the statement was not taken in violation of the rules set out in Miranda.

The videotaped statement, standing alone, doesn't have an adequate Miranda warning in it, but I think it was a continuation, obviously, of the same investigation And it's clear to me that before [the defendant] started the videotaped interview, he was already well aware ... of all his rights and that therefore the omission on the videotape ... is [not] fatal. So, I do not think that suppression of it is proper

The confession must meet constitutional safeguards. Miranda v. Arizona, 384 U.S. 436 (1966). This court must examine the "totality of the circumstances" to ascertain whether the particular defendant knowingly and voluntarily waived his constitutional rights prior to making a confession. State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997). Factors relevant in determining whether a confession is voluntary include (1) the length of time between the arrest and the confession; (2) the occurrence of intervening events between the arrest and confession; (3) the giving of Miranda warnings; and (4) the purpose and flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. 590, 603-04 (1975); State v. Chandler, 547 S.W.2d 918, 920 (Tenn. 1977). The overriding question, however, is whether the behavior of law enforcement officials served to overbear the defendant's will to resist. State v. Kelly, 603 S.W.2d 726, 728 (Tenn. 1980); see State v. Howard, 617 S.W.2d 656, 658-59 (Tenn. Crim. App. 1981).

Our scope of review is limited. The findings of fact made by the trial judge at a hearing on a motion to suppress "will be upheld unless the evidence preponderates otherwise." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Questions about witness credibility and "resolution of conflicts in the evidence are matters entrusted to the trial judge." Id. If the "greater weight" of the evidence supports the court's ruling, it will be upheld. Id.

Here, the trial court's conclusion that the statement was voluntary is supported by the record. The tape recordings suggest that determination. The initial interview occurred within a few hours of the defendant's arrest. There were no intervening events of any consequence. Miranda warnings were provided on two separate occasions before the initial confession. There is no credible proof of official misconduct. Under these circumstances, the trial court properly denied the

motion to suppress.

IV

Finally, the defendant contends that his sentence is excessive. At the sentencing hearing, he conceded that he had a 1984 conviction for sexual molestation of his niece in California. He also acknowledged that in 1977 he pled guilty to molesting a five-year-old boy in a public park in California. He denied two earlier occurrences of child molestation. In arriving at a twenty-five year sentence, the trial court concluded that the defendant had a previous history of criminal convictions and criminal behavior, citing his prior convictions for sexual molestation of children. Tenn. Code Ann. § 40-35-114(1). This factor was afforded great weight. The trial court also concluded that the victim was particularly vulnerable because of her extremely young age and inability to speak. Tenn. Code Ann. § 40-35-114(4). Finally, the court concluded that defendant committed the rape to gratify his desire for pleasure. Tenn. Code Ann. § 40-35-114(7). This factor received the least weight in the enhancement of the defendant's sentence. The trial court allowed as a mitigating factor the defendant's mental condition but assigned only slight weight. Tenn. Code Ann. § 40-35-113(8).

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). 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 midpoint in the range, here twenty years, if there were no enhancement and mitigating factors. Tenn. Code Ann. §§ 40-35-210, -112(a)(1). Should the trial court find mitigating and enhancement factors, it must start at the presumptive minimum sentence 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); State v. Chance, 952 S.W.2d 848, 851 (Tenn. Crim. App. 1997). 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.

The defendant argues that application of Tenn. Code Ann. § 40-35-114(7) was improperly applied to enhance his sentence because child molesters commit the act out of sexual desire, so this factor is inherent in the offense. Our supreme court has ruled otherwise. State v. Walton, 958 S.W.2d 724, 730 (Tenn. 1997). We concur in the sentence imposed.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Presiding Judge

CONCUR:

Joseph M. Tipton, Judge

David H. Welles, Judge