

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 29, 2023

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. RAYMOND D. ARWOOD

Appeal from the Criminal Court for Hamblen County
No. 19CR577 Alex E. Pearson, Judge

No. E2022-01292-CCA-R3-CD

A Hamblen County jury convicted Defendant, Raymond D. Arwood, of one count of sexual exploitation of a minor involving more than fifty images. The trial court imposed a sentence of ten years as a Range II, multiple offender to be served in confinement. On appeal, Defendant argues that the trial court abused its discretion by denying his motion to suppress certain photographs and that the evidence was insufficient to support his conviction. After reviewing the record and briefs of the parties, and considering the applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JILL BARTEE AYERS, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., AND JAMES CURWOOD WITT, JR., J., joined.

Jessica Sisk (at trial and on appeal), Newport, Tennessee, and Clifton Barnes (at trial), Morristown, Tennessee, for the appellant, Raymond D. Arwood.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Dan E. Armstrong, District Attorney General; and Connie Trobaugh, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

The trial transcript was not included in the record on appeal, and no statement of the evidence was filed with the trial court. We glean the facts from the pretrial hearing on Defendant's motion to suppress photographs and his presentence report, which was

admitted without objection. On December 4, 2018, Detective Joshua Akard of the Morristown Police Department (“MPD”), who had been working with the Internet Crimes Against Children Task Force, used investigative software that uses BitTorrent, a peer-to-peer file-sharing website, to directly connect to a device with an IP address in Morristown. He made “single source downloads” from the IP address and reviewed a “downloaded incomplete file and confirmed that it [was] child pornography and [he] conducted a query on the IP address which came back to Charter.” Detective Akard obtained a subpoena for information concerning the IP address and served it on Charter Communications. He learned that the address was connected to an active account in Defendant’s wife’s name, and it listed their home address.

Detective Akard made additional “single source downloads” of child pornography from the IP address on June 24 and 25, 2019, and on July 4, 5, 7 and 23, 2019. There were a total of 111 files downloaded from the IP address. Detective Akard submitted a criminal history request for background information concerning Defendant and his wife, and he learned that Defendant was a registered sex offender. Defendant had applied for termination from the sex offender program in 2015, and his request was granted by the Tennessee Bureau of Investigation.

A search warrant was executed at Defendant’s residence on August 2, 2019. Several items, including seven laptops, three external hard drives, and a desktop computer were taken into evidence. Defendant and his wife were both interviewed at the scene, and Defendant indicated that he was familiar with the BitTorrent file sharing network and that he used it to download movies and music. The electronic devices recovered from the residence were taken to the MPD for forensic examination. The pre-examination revealed that child pornography was stored on a Toshiba laptop. A “forensic image” was made of the hard drive, and seventy-five images of child pornography were discovered along with photos of Defendant’s business cards. Defendant was interviewed at the police department on October 10, 2019. He said that he was unsure how images of child pornography came to be on his laptop, but he had seen what he believed to be child pornography on his laptop in the past.

Pretrial Hearing

Defendant filed a “Motion to Suppress Pictures Which Do Not Show Sexual Activity or Simulated Sexual Activity,” arguing that the majority of the pictures in this case did not show “sexual activity or simulated sexual activity and should not be shown to the jury.” He further requested that the trial court review the photographs “as the gatekeeper of the evidence in the criminal trial.”

At the hearing, the trial court noted that it had reviewed Defendant’s motion and the “70-some photographs,” and it divided the photographs into three categories. The first category depicted young girls, some of whom were bound, gagged, and lying on a bed,

being penetrated orally, vaginally, and anally. The trial court said that there was “no dispute” that the ten to fifteen photographs “obviously” involved sexual activity. Defendant agreed that ten or eleven of the photographs showed sexual activity or simulated sexual activity. The second category consisted of photographs of nude young girls near a body of water, hot tub, or swimming pool. Several of those images showed the young girls walking “through the water or just outside the water.” The photographs focused almost entirely on the child’s exposed vagina, buttocks, and breasts. The child’s face and head were cut off in many of the photographs, but in the remaining images, the child is posed in a suggestive manner and staring directly at the camera.

The trial court found that the third category of photographs consisted of “images of similar-aged young girls in various attire such as either swimsuits or lingerie, for a lack of a better term, and those appear to be taken on a photo set[.]” There were also various “props” lying around the set. As pointed out by the State, these images depict children posed in a sexual manner with their legs spread and staring straight at the camera. In some of the photographs, the child is on a bed. The focal point of the images appear to be the child’s vagina or buttocks, and they are clothed in lingerie or very short skirts. None of them are wearing pants.

The trial court granted Defendant’s motion as to five of the photographs because they did not meet the statutory definition of sexual activity or simulated sexual activity and excluded them from trial. As for the remaining images, the trial court noted that in accordance with the Tennessee Supreme Court’s decision in *State v. Whited*, 506 S.W.3d 416 (Tenn. 2016), it was required to examine the actual photograph itself to see what is depicted and not its “intent.” The trial court found that in the vast majority of the “clothed photographs” it was clear that “there’s been direction, it’s clear that there’s posing, it’s clear that they are photographs that the individual - - that these young ladies know they’re being photographed and told what they’re supposed to be doing or looking like.” The court distinguished those photographs from those in *Whited* because those photographs did not depict the children performing “everyday functions” with no posing and no direction. The court found that the children in the images in this case were wearing lingerie and had “a leg up in the air,” and they were smiling “right at the camera.” The trial court further said: “It’s pretty obvious that that is not the same thing as somebody just quickly wrapping a towel around themselves as they get out of the shower.” The court concluded that “based on the framework laid out by the Tennessee Supreme Court and the statutory definition of what simulated sexual activity is that the vast majority of [the] photographs are appropriate for the jury with the exception of four or five[.]”

ANALYSIS

I. Motion to Suppress Photographs

Defendant contends that the trial court erred by denying his “Motion to Suppress Pictures Which Do Not Show Sexual Activity or Simulated Sexual Activity.” The State argues that whether the pictures depict sexual activity or simulated sexual activity is a jury question, and in any event, the photographs were relevant, and “the trial court properly exercised its discretion when it denied [Defendant’s] motion to exclude.”

It is unlawful for any person to knowingly possess material that includes “a minor engaged in . . . [s]exual activity” or “[s]imulated sexual activity that is patently offensive.” T.C.A. § 39-17-1003(a). A person in possession of such material “may be charged in a separate count for each individual image.... Where the number of materials possessed is greater than fifty (50), the person may be charged in a single count to enhance the class of offense....” *Id.* § 39-17-1003(b). “Sexual activity,” as relevant in this case, includes the “[l]ascivious exhibition of the female breast or the genital, buttocks, anus or pubic or rectal area of any person.” *Id.* § 39-17-1002(8)(G) (2017). As pointed out by the State, the Tennessee Supreme Court has held that “whether a depiction rises to the level of a ‘lascivious exhibition’ is a mixed question of fact and law.” *State v. Hall*, ---S.W.3d ---, 2019 WL 117580, at *7 (Tenn. 2019). The jury “determines whether ‘the depiction is a lascivious exhibition, including underlying factual issues such as the extent to which the minor appears nude or whether the minor appears to be portrayed in a sexually suggestive manner.” *Id.*

Although Defendant styled his motion as a motion to suppress and argues it at such on appeal, he does not allege that the photographs were obtained in violation of a constitutional right. “The purpose of a motion to suppress evidence is to prevent the state from introducing evidence that was obtained by violating a constitutional right of the accused.” *State v. Campbell*, No. 02-C-01-9408-CR-00165, 1996 WL 368224, at *4 (Tenn. Crim. App. June 28, 1996); *see also State v. Foote*, 631 S.W.2d 470, 473 (Tenn. Crim. App. 1982). The State argues on appeal that the motion should be analyzed under Tennessee Rules of Evidence 401 and 403 as relevant evidence. Neither Defendant’s motion nor his brief argues that the photographs were not relevant, or that if relevant, the probative value was outweighed by unfair prejudicial effect. The motion avers that “[t]he majority of these pictures do not show sexual activity or simulated sexual activity and should not be shown to the jury.” In this type of case, the photographs are prejudicial by their very nature.

Prejudicial evidence, however, is not per se excluded; indeed, if this were true, all evidence of a crime would be excluded at trial. Rather what is excluded is evidence which is unfairly prejudicial, in other words, evidence

which has an undue tendency to suggest a decision on an improper basis, frequently, though not necessarily, an emotional one.

State v. Gilbreath, No. E2020-00971-CCA-R3-CD, 2021 WL 4438554, at *8, (Tenn. Crim. App. Sept. 28, 2021); *see also State v. Banks*, 564 S.W. 2d 947, 951 (Tenn. 1978).

Notwithstanding the title of Defendant's motion, and the State's relevancy argument, we find that based on its wording, Defendant's motion is more akin to a motion to dismiss the charge on the grounds that the photographs, except those Defendant agreed involved sexual activity, do not violate the statute.¹ The photographs are certainly relevant, and by their nature they are prejudicial. However, their admissibility is required for the State to prove the elements of the crime charged. Thus, we will evaluate the trial court's ruling accordingly.

Rule 12 of the Tennessee Rules of Criminal Procedure provides in pertinent part:

(b)(1) A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

....

(e) The court shall decide each pretrial motion before trial unless it finds good cause to defer a ruling until trial or after a verdict. The court shall not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court shall state its essential findings on the record.

Tenn. R. Crim. P. 12.

Our supreme court has determined that Rule 12 "is identical to its federal counterpart," Federal Rule of Criminal Procedure 12, and has concluded that matters "substantially founded upon and intertwined with factual evidence of the alleged offense that will necessarily be introduced at trial ... fall[] within the province of the ultimate finder of fact, and ruling" on such matters "should be deferred until trial." *State v. Vickers*, 970 S.W.2d 444, 447 (Tenn. 1998) (citations omitted). An "issue is 'capable of determination' under the analogous federal rule if 'the facts surrounding the commission of the alleged offense would be of no assistance in determining' the issue." *State v. Sherman*, 266 S.W.3d 395, 403 (Tenn. 2008) (quoting *United States v. Covington*, 395 U.S. 57, 60 (1969)).

¹ Defendant filed a motion to dismiss based solely on jurisdiction. That motion was denied.

Although those questions capable of determination tend to “raise questions of law rather than questions of fact,” Rule 12 permits the trial court to “make findings of fact necessary to decide the questions of law presented by a pretrial motion so long as the factual findings are not intertwined with the general issue of guilt or innocence.” *State v. Goodman*, 90 S.W.3d 557, 561 (Tenn. 2002) (citations omitted). “Where the factual findings necessary to resolve the motion are intertwined with the general issue, a ruling must be deferred until trial since, in criminal cases, there simply is no pretrial procedure akin to summary judgment for adjudicating questions of fact involving the general issue of guilt or innocence.” *Id.* (citing *Vickers*, 970 S.W.2d at 447; *State v. Burrow*, 769 S.W.2d 510, 512 (Tenn. Crim. App. 1989)). To this end, the trial court “may consider evidence beyond the face of the indictment” so long as the facts to be considered are “relevant only to the legal question presented by the defendant's motion, not to the general issue of guilt or innocence” and do not “qualify as ‘factual evidence of the defendant's conduct at the time of the alleged offense.’” *Sherman*, 266 S.W.3d at 402 (quoting *Goodman*, 90 S.W.3d at 561). In any event, the trial court's factual findings must “not encroach upon the province of the jury.” *Sherman*, 266 S.W.3d at 403 (citation omitted).

State v. Lambert, No. E2018-02282-CCA-R3-CD, 2020 WL 2036651, at *2 (Tenn. Crim. App. Apr. 28, 2020); *State v. Lambert*, No. E2018-02298-CCA-R3-CD, 2020 WL 2027761, at *5 (Tenn. Crim. App. Apr. 28, 2020); *State v. Lambert*, No. E2018-02296-CCA-R3-CD, 2020 WL 2036649, at *2 (Tenn. Crim. App. Apr. 28, 2020). “A defendant has no traditional procedural vehicle to challenge the sufficiency of the State’s evidence prior to trial.” *State v. Merriman*, 410 S.W.3d 779, 787 (Tenn. 2013).

This court has opined that there are limited contexts in which a trial court may evaluate the weight of the evidence pretrial. *State v. Smith*, No. W2019-01227-CCA-R3-CD, 2020 WL 3542240, at *6 (Tenn. Crim. App. June 30, 2020).

For example, in a *Ferguson* challenge, a court may weigh the adequacy of the State’s evidence to “provide[] context to the lost or destroyed evidence, allowing the trial court to weigh the significance of the lost evidence in light of the other evidence and to determine an appropriate remedy, if one is required.” *Merriman*, 410 S.W.3d at 790 (citing *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999)). Additionally, in deciding to aggregate separate thefts into a single count, a trial court may determine if there is “sufficient information before [the trial court] to establish that the prosecution had probable cause to conclude that the Defendant's five separate thefts arose

‘from a common scheme, purpose, intent or enterprise[.]’” *State v. Jones*, 589 S.W.3d 747, 759 (Tenn. 2019) (quoting Tenn. Code Ann. § 39-14-105(b)(1)).

Id. As in *Smith*, neither of those situations is present in this case.

In ruling on the motion, the trial court found that “the vast majority of these [photographs] are admissible, that they do meet the statutory definition of simulated sexual activity.” The trial court granted Defendant’s motion by excluding five of the photographs after finding that those five photographs did not meet the statutory definition of sexual activity or simulated sexual activity.² We conclude that the trial court properly denied Defendant’s motion to exclude the remaining photographs because the motion requested the court to make a pretrial determination as to the sufficiency of the State’s evidence to support a conviction which would be “akin to summary judgment for adjudicating questions of fact involving the general issue of guilt or innocence.” *Goodman*, 90 S.W.3d at 561. This procedure does not exist in criminal cases. *Id.* The question of whether the photographs depict minors involved sexual activity or simulated sexual activity was for the jury to decide. Defendant is not entitled to relief on this issue.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction for sexual exploitation of a minor involving more than fifty images because “the circumstantial evidence presented by the State failed to prove his identity as the perpetrator.” He asserts that no witnesses could affirm that he knowingly possessed the images on the laptop, “nor was specific forensic evidence found directly connecting [Defendant] to the commission of the offense.” The State responds that this issue is waived because Defendant failed to provide an adequate record on appeal. We agree with the State.

“Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict.” *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009) (citing *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992)).

In order to review the evidence in this case to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must have before us the evidence presented to the jury at trial. The only portions of the trial contained in the record are the opening statements and trial exhibits. It is the duty of the accused to provide a record which conveys a fair, accurate, and complete account of what transpired with regard to the issues which form the basis of the appeal. Tenn. R. App.

² The five photographs the trial court excluded are not included in the record and neither party raised an issue regarding those photographs; therefore, we have not included them in our analysis.

P. 24(b); *see State v. Taylor*, 992 S.W.2d 941, 944 (Tenn.1999). The transcript of the trial was not included in the record, and we cannot determine whether the evidence was sufficient without a trial transcript. Therefore, the issue is waived for failure to provide a complete appellate record. *See State v. Perkins*, No. W2001-02635-CCA-R3-CD, 2002 WL 3139737, at *1 (Tenn. Crim. App. Oct. 14, 2002) (sufficiency issue waived where transcript of the trial was not included in the record). Accordingly, Defendant is not entitled to relief on this issue.

CONCLUSION

Based on foregoing analysis, we affirm the judgment of the trial court.

JILL BARTEE AYERS, JUDGE