IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 04, 2014

STATE OF TENNESSEE v. JONATHAN L. HENDERSON

Appeal from the Circuit Court for Madison County
No. 12504 Roy B. Morgan, Jr., Judge

No. W2013-01247-CCA-R3-CD - Filed July 28, 2014

A Madison County Jury convicted Defendant, Jonathan Henderson, of rape of a child and aggravated sexual battery. He received concurrent sentences of twenty-five years for the rape conviction and ten years for aggravated sexual battery. On appeal, Defendant argues: (1) that the evidence was insufficient to support his convictions; (2) that the proof at trial did not establish venue; and (3) that his sentence was excessive. After a thorough review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

A. Russell Larson, Jackson, Tennessee, for the appellant, Jonathan L. Henderson.

Robert E. Cooper, Jr., Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; James G. (Jerry) Woodall, District Attorney General; and Jody S. Pickens, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The victim, M.W. (we will refer to the minor victim by her initials), was nine years old in May of 2011 and lived in Jackson with her mother, four brothers and Defendant. M.W. first met Defendant when she was four years old, and she referred to him as "Daddy Jon." She said that her mother and Defendant were never married and that Defendant was her

mother's boyfriend. Defendant first moved in with M.W.'s family when M.W. was five years old.

M.W. testified that in May of 2011 she had her own bedroom, and there were occasions when Defendant took care of her. During the last week of school before summer vacation in 2011, M.W. told Rileyann Smith, a guidance counselor at her school, about events that occurred at M.W.'s residence the prior weekend. M.W. explained that she had also told her friend what happened, and her friend encouraged her to tell someone what Defendant had done to M.W. because it was "wrong."

M.W. testified that she had been at home with Defendant and her brothers the previous weekend in May of 2011. Her mother was not home at the time. M.W. testified that she was playing with her little brother, who was two years old, when Defendant told her that he needed to talk with her in the bedroom the Defendant shared with M.W.'s mother. Defendant shut the door when M.W. walked into the room. M.W. testified that Defendant told her to get on the bed, and he pulled her pants and underwear down while she was lying on her back. M.W. did not resist Defendant because she did not want him to harm her little brother. She said that Defendant had previously told her that if she "ever told or did anything to push him away then he would" harm her brother.

M.W. testified that once Defendant removed her pants, he began licking her vagina. She described the incident as "[d]isturbing," and it made her feel bad. M.W. noted that Defendant's tongue moved from side to side as he licked her and that his tongue felt "slimy" and "wet." M.W. testified that she could have yelled for her other brothers, ages twelve, sixteen, and seventeen who were in the living room at the time, but she was scared of Defendant and thought that he would hurt her.

M.W. testified that Defendant also "play[ed] with [her] private part" with his hands. She said that he put his finger inside of her vagina and that his fingernails were sharp and hurt her. M.W. testified that Defendant told her that she would be in trouble if she told anyone what had happened.

On cross-examination, M.W. admitted that she was not happy that her mother and Defendant were going to be married. She said: "Because I knew that if they got married they weren't gonna break up and the abuse would go on even longer, but I didn't tell." M.W. denied being jealous of her mother being with Defendant. She said that the cried when her mother got home from school and told her about the abuse.

On redirect, M.W. testified that her mother told her to say that the abuse was just a dream and that M.W. had imagined it. M.W. recalled that she did not attend the last day of school in 2011, and she testified that the "bad day" was May 15, 2011.

Rileyann Smith is employed by the Jackson-Madison County School System as a guidance counselor at the Montessori School at Bemis. She testified that M.W., along with two of M.W.'s friends, talked to her on May 19, 2011. M.W. told Ms. Smith that she was being sexually abused by M.W.'s mother's fiancé.

Dr. Lisa Piercey examined M.W. at the Madison County Child Advocacy Center on June 13, 2011. She took M.W.'s medical history and asked her why she was at the Child Advocacy Center. Dr. Piercey testified that M.W. told her that Defendant had "touched [her] inappropriately." M.W. told Dr. Piercey that Defendant "put his hand inside [M.W.'s] private and tried to lick [her] private, too." M.W. indicated that most of the "incidents" with Defendant occurred in M.W.'s mother's bedroom. M.W. denied that Defendant physically abused her. When asked whether she thought M.W. was being truthful, Dr. Piercey testified:

> As you know, there is no truth test and there is no reliable indicator of that. We do the best we can. In children, in speaking with children, and in speaking to several hundred children, I do see it occasionally. In children that are not being - - and I'm not speaking specifically of [M.W.] but just in general, - - in general that are being less than truthful or are maybe perhaps fabricating or repeating things that they've been told to say and haven't actually experienced, there is oftentimes a lack of descriptive details. For example, they will just give one statement, and you ask clarifying questions or questions about the environment or what else was going on and they can't tell you that because they never experienced it. I did not get that vibe at all from [M.W.]. She was able to describe the location. She was able to somewhat quantify the amount of times it had happened, although she didn't count them, which is developmentally appropriate for her. She wouldn't be able to tell me exactly how many. She told me where, she told me what types of incidents, all of those things, and those are inconsistent with what I typically see for children that have been coached to tell something inappropriate.

Dr. Piercey noted that M.W. was nine years old when she examined M.W. She felt that M.W.'s knowledge of a man performing oral sex on a female would be "inappropriate knowledge" for a child that age. Dr. Piercey testified:

> When we talk about inappropriate knowledge for children, we're talking about younger children in particular that have sexual knowledge that they wouldn't

> otherwise know unless they have seen it or experienced it, and it's kind of crude, but what you hear in your training is, they didn't learn that off of Sesame Street. That's not something that they encounter in their everyday lives. For example, young children don't instinctually know that it is a sexually pleasurable event to have someone's genitals in their mouth or vice versa. That is typically only seen when it's been visualized or experienced. So for a young child to have that type of knowledge, that would be an example of something we call inappropriate knowledge.

Dr. Piercey also noted that M.W.'s knowledge of the act of "digital penetration of the vagina is something that a nine-year-old wouldn't typically know on her own."

Dr. Piercey examined M.W. from "head to toe." M.W.'s vaginal examination was relatively normal, which she noted could be consistent with sexual abuse, "even full penile penetration and certainly could be consistent with what [M.W.] described, which is digital touching as well as oral sex or oral penetration." Dr. Piercey testified that her assessment of M.W, was "child sexual abuse." She further indicated that "the finding of no acute trauma or residua of trauma is to be expected given the child's description of the events and the length of time since the last episode."

Defendant testified that he never sexually abused or touched M.W. He admitted that he had recently been convicted of simple possession of marijuana. On cross-examination, Defendant agreed that he was living with M.W.'s mother in May of 2011, and he would babysit M.W. and her brothers from time to time. Defendant told police on May 20, 2011, that he and M.W. sometimes watched television in the bedroom that he shared with M.W.'s mother and that M.W.'s younger brother was usually in the room. However, Defendant testified at trial that the other teenage children were also in the room with him and M.W.

Defendant testified that M.W. did not seem to be jealous of his relationship with M.W.'s mother, and there were not any disciplinary problems with M.W. that would cause her to make up the allegations of sexual abuse.

M.W.'s maternal grandmother testified that M.W. "fabricates an awful lot. She tells little stories that just aren't true, and she has fun with them, you know. She's just a little girl in her own little world." M.W.'s grandmother further testified that M.W.'s stories have been the source of problems within the family. She said, "It's been ever since [M.W.] was little, you know. When she was a little bitty thing she would just tell all kinds of crazy things."

On cross-examination, M.W.'s grandmother testified that she took M.W. to the Child Advocacy Center to report the allegations. M.W.'s grandmother admitted that she did not know all of the specifics of the allegations against Defendant.

II. Analysis

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence for his convictions for rape of a child and aggravated sexual battery. More specifically, he argues that there was no physical evidence to support his convictions. Defendant further contends:

> In light of the gross lack of any evidence upon which a rational trier of fact could have relied other than a theory of "inappropriate sexual knowledge," there was no basis whatsoever for a jury to have rendered a verdict against [Defendant] absent sympathy with a nine (9) year old alleged victim.

We completely disagree with Defendant's statement that there was "no basis whatsoever" for a jury to have rendered a verdict against Defendant and accordingly conclude Defendant is not entitled to relief on this issue.

When an accused challenges the sufficiency of the convicting evidence, our standard of review is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The trier of fact, not this Court, resolves questions concerning the credibility of the witnesses, and the weight and value to be given the evidence as well as all factual issues raised by the evidence. *State v. Tuttle*, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995). Nor may this Court reweigh or re-evaluate 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 inferences therefrom. *Id*. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this Court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). "[D]irect and circumstantial evidence should be treated the same when weighing the sufficiency of [the] evidence." *State v. Dorantes*, 331 S.W.3d 370, 381 (Tenn. 2011).

Rape of a Child is defined as the "unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age. Tenn. Code Ann. § 39-13-522(a). "'Sexual penetration'

includes: 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). Digital penetration constitutes an act of "penetration" for purposes of establishing that a rape occurred. Tenn. Code Ann. § 39-13-501(7).

Aggravated sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

> (1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon;
>
> (2) The defendant causes bodily injury to the victim;
>
> (3) The defendant is aided or abetted by one (1) or more other persons; and
>
> > (A) Force or coercion is used to accomplish the act; or
> >
> > (B) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
>
> (4) The victim is less than thirteen (13) years of age.

Tenn. Code Ann. § 39-13-504(a). "Sexual contact" is defined as including "the intentional touching of the victim's, the defendant's, or any other persons's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person'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). "'Intimate parts' includes the primary genital area, groin, inner thigh, buttock or breast of a human being." Tenn. Code Ann. § 39-13-501(2).

Viewing the evidence in a light most favorable to the State, the proof showed that in May of 2011, when M.W. was nine years old, Defendant lived with M.W., M.W.'s mother, and M.W.'s four brothers. M.W. referred to Defendant, whom she had known since she was four years old, as "Daddy Jon." On May 15, 2011, M.W. was at home with Defendant and her four brothers. Her mother was not home at the time. While M.W. was playing with her two-year-old brother, Defendant walked into the room and told her that he needed to talk

with her in the bedroom. Defendant shut the door when M.W. walked into the room, and he told her to get on the bed. Defendant proceeded to pull M.W.'s pants and underwear down while she was lying on her back. M.W. testified that she did not resist Defendant because she did not want him to harm her little brother. She further testified that Defendant had previously told her that if she "ever told or did anything to push him away then he would" harm her brother.

Once Defendant removed M.W.'s pants and underwear, he began licking her vagina. M.W. described the incident as "[disturbing]," and it made her feel bad. She specifically noted that Defendant moved his tongue from side to side as he licked her and that his tongue felt "slimy" and "wet." M.W. explained that she did not call out to her older brothers who were in the livingroom at the time because she was afraid of Defendant and thought that he would hurt her or her little brother. M.W. testified that Defendant would also "play with [her] private part" with his hands. She said that he placed his finger inside her vagina and that his fingernails were sharp and hurt her.

Dr. Lisa Piercy examined M.W., who told her that Defendant "put his hand inside [her] and tried to lick [her] private, too." M.W. told her that the incidents occurred in M.W.'s mother's bedroom. Dr. Piercy felt that M.W. was being truthful about the allegations of abuse, and she also felt that M.W.'s knowledge of a man performing oral sex on a female would be "inappropriate knowledge" for a child of M.W.'s age. Dr. Piercy acknowledged that she did not find any physical evidence of the offenses, but that was expected "given the child's description of the events and the length of time since the last episode."

Based on our review of the evidence, we conclude that the evidence was sufficient to support beyond a reasonable doubt Defendant's convictions for rape of a child and aggravated sexual battery. Although Defendant asserts that M.W.'s testimony was not credible and that there was a lack of physical evidence, the jury obviously accredited the testimony of M.W. and Dr. Piercy that the offenses occurred. The credibility of witnesses and the weight afforded to their testimony are for the jury to determine and should not to be re-evaluated on appeal. *State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Gentry*, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). Defendant is not entitled to relief on this issue.

Venue

Defendant asserts that the State failed to establish that the offenses in the case occurred in Jackson, Madison County, Tennessee. An accused is entitled to a trial in the county where the offense was committed. *State v. Marbury*, 908 S.W.2d 405, 407 (Tenn. Crim. App. 1995). The burden is on the State to prove that the offense was committed in the county specified in the indictment. *Id*. at 407. Venue is not an element of the offense which

must be proved beyond a reasonable doubt; it is a jurisdictional fact which must be proved by a preponderance of the evidence. Tenn. Code Ann. § 39-11-201(e); *State v. Hutcherson*, 790 S.W.2d 532, 533 (Tenn. 1990); *State v. Smith*, 926 S.W.2d 267, 269 (Tenn. Crim. App. 1995).

M.W. testified that on May 15, 2011, she was living at "407 Burkett" in Jackson with her mother, Defendant, and her four brothers and that the abuse occurred at the home on Burkett Street. Rileyann Smith testified that she was employed as a guidance counselor by the Jackson-Madison County School System at the Montessori School at Bemis where M.W. was a student in May of 2011. Dr. Lisa Piercy testified that she examined M.W. at the Madison County Child Advocacy Center on June 13, 2011.

The testimony presented at trial was sufficient to prove venue by a preponderance of the evidence. A jury could reasonably conclude, from the entire proof, that the offenses occurred in Madison County. Defendant is not entitled to relief on this issue.

In this issue, Defendant also argues that the trial court erred by not granting his motion for judgment of acquittal at the close of the State's proof. However, Defendant introduced proof in his defense and, thus, waived the right to assert as error that he should have been granted an acquittal at the end of the State's proof. *State v. Peat*, 790 S.W.2d 547 (Tenn. Crim. App. 1990).

Sentencing

Defendant next contends that the trial court erred in sentencing him. Defendant's entire argument on sentencing consists of one page with no references whatsoever to any authority to support his argument. Tennessee Rule of Appellate Procedure 27(a)(7) provides that a brief shall contain "[an] argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on[.]" Tennessee Court of Criminal Appeals Rule 10(b) states that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." *See also State v. Sanders*, 842 S.W.2d 257 (Tenn. Crim. App. 1992)(determining that issue was waived where defendant cited no authority to support his complaint).

In any event, the trial court properly sentenced Defendant. In *State v. Bise*, the Tennessee Supreme Court reviewed changes in sentencing law and the impact on appellate review of sentencing decisions. The Tennessee Supreme Court announced that "sentences imposed by the trial court within the appropriate statutory range are to be reviewed under an

abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 709 (Tenn. 2012). A finding of abuse of discretion "'reflects that the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case.'" *State v. Shaffer*, 45 S.W.3d 553, 555 (Tenn. 2001) (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)). To find an abuse of discretion, the record must be void of any substantial evidence that would support the trial court's decision. *Id*. at 554-55; *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The reviewing court should uphold the sentence "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10. So long as the trial court imposes a sentence within the appropriate range and properly applies the purposes and principles of the Sentencing Act, its decision will be granted a presumption of reasonableness. *Id*. at 707.

We note that even a trial court's misapplication of an enhancing or mitigating factor in passing sentence will not remove the presumption of reasonableness from its sentencing determination. *Bise*, 380 S.W.3d at 709. Here, Defendant asserts that the trial court was "in error in imposing such a lengthy sentence, twenty-five (25) years at one hundred (100%) percent in the Tennessee Department of Corrections on this Defendant whose criminal history category contained only a misdemeanor marijuana conviction." He also contends that there was no proof offered at the sentencing hearing that M.W. suffered any physical or emotional injuries.

However, we conclude that the sentencing decision was "within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id*. at 709-10. As pointed out by the State, according to the statute in effect at the time of the offenses in May of 2011, the mandatory minimum sentence for rape of a child was twenty-five years. Tenn. Code Ann. § 39-13-522 (b)(2)(A)(2007). Therefore, the trial court was not authorized to impose a lesser sentence for that conviction. As for the ten-year sentence for Defendant's aggravated sexual battery conviction, the record reflects that the trial court explained the enhancement and mitigating factors that it considered and then determined that a sentence of ten years was appropriate under the circumstances. Defendant is not entitled to relief.

For the foregoing reasons, the judgments of the trial court are affirmed.

THOMAS T. WOODALL, JUDGE