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Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs March 3, 2020

STATE OF TENNESSEE v. DARRELL ROBY

Appeal from the Criminal Court for Shelby County
No. 16-00946 Jennifer Johnson Mitchell, Judge

No. W2019-00438-CCA-R3-CD

Darrell Roby, Defendant, was convicted by a jury of one count of rape of a child and one count of aggravated sexual battery. As a result of the convictions, Defendant was sentenced to an effective sentence of fifty-two years. After the denial of a motion for new trial, Defendant appeals his convictions. On appeal, he argues that the evidence was insufficient to support his convictions. After a thorough review, we determine that the evidence is sufficient to support the convictions. Consequently, the judgments of the trial court are affirmed.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J. ROSS DYER, JJ., joined.

Phyllis Aluko, District Public Defender; Harry E. Sayle, III, Memphis, Tennessee; Nigel Lewis and Ben Rush, Assistant District Public Defenders, for the appellant, Darrell Roby.

Herbert H. Slatery III, Attorney General and Reporter; Katharine K. Decker, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Sara Poe and Devon Lepeard, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Defendant was indicted by a Shelby County grand jury for one count of rape of a child and one count of aggravated sexual battery for incidents involving his seven-year-old niece, the victim.¹ Defendant was indicted in a third count for the aggravated sexual battery of another child less than thirteen years of age. This count was tried separately.

Between October of 2014 and April of 2015, Defendant was living with relatives at various locations in Memphis, including the home of his sister and the home of his brother and sister-in-law. Defendant's sister had three children including an eleven-year-old daughter and two teenaged sons. Defendant's brother and sister-in-law had two children, the seven-year-old victim and a four-year-old son. The female cousins had a close relationship. The seven-year-old female victim often spent the night at her "Aunt TT's" house. At some point, the victim's aunt saw something "inappropriate" on a cell phone. This led her to tell the victim's mother that she should ask the victim if something had happened to her.

When the victim's mother asked the victim if anyone had ever touched her, the victim told her that Defendant touched her in her "tutu area," while pointing to her vagina. The victim told her mother that she and Defendant were playing hide-and-seek and Defendant lay beside her and "humped" her. The victim's mother called the police and later took the victim for a forensic interview at the Child Advocacy Center.

Teresa Onry, a forensic interviewer at the Child Advocacy Center, interviewed the victim. The interview was observed from a separate room by Sergeant Stacey Hughes of the Memphis Police Department. The interview of the victim was videotaped. At trial, a redacted version of the interview was played for the jury. During the interview, the victim called Defendant a "bad man." The victim explained that she often went to "Auntie TT's" house to spend the night with her cousins. On one occasion, the victim remembered Defendant slapped her on the face and shook her to wake her up when she was sleeping in the living room on a "little blue thingy" she called a "cotton." At the time, her cousin was sleeping on the couch and Defendant was sleeping next to the victim on a "flat mattress." Defendant touched her on the inside of her panties and on the inside of her vagina. The victim explained that Defendant's actions made her vagina "start[] hurting" because Defendant's nails were really "sharp." The victim explained that they were playing a game – hide and seek – before this incident took place. After Defendant touched her, he got up out of the bed to get something out of the oven. The victim thought that her cousin saw what Defendant was doing to her.

¹ It is the policy of this Court to protect the identity of minor victims of sexual abuse.

Defendant touched her more than one time. On another occasion, the victim was sleeping on the couch when Defendant got behind her and started touching her vagina inside her clothes. Defendant also put his finger on the inside of her vagina. Defendant's finger was "wiggling" inside of her vagina. Another occasion occurred at her own house. Defendant was lying in her Dad's bed. Defendant asked her to "get on him." Defendant placed her on top of his penis and moved her body up and down on top of his body. The victim explained that both she and Defendant had their clothes on this time. The victim's younger brother came into the room and Defendant told him to get out of the room. When Defendant stopped, he got out of the bed and went to the bathroom. The victim described how Defendant put his teeth like "that"² because he thought it felt good when he was touching her vagina. Defendant told the victim not to tell anyone about what happened.

At trial, the victim testified that she was born in December of 2007 and that Defendant was her uncle. She was ten years old at the time of trial but explained that Defendant "did a bad thing to [her]" when she was seven years old. In December of 2014, the victim remembered playing hide and seek at her Aunt's house. Defendant asked her to get under some covers on the living room floor. They both had their clothes on at the time, but when she got under the covers with Defendant, he reached his hand inside of her clothes and touched the inside of her vagina with one of his fingers. The victim explained that Defendant moved his finger around and that it felt uncomfortable. The victim felt something wet on her bottom. During this encounter, she did not see Defendant's penis. Defendant and the victim were discovered by her female cousin. The cousin pulled the covers up and saw Defendant and the victim. After the cousin discovered them, Defendant left the room to get something out of the oven.

The victim described another incident at trial. The victim was spending the night at her Aunt's house, sleeping on a "cotton"³ in the living room. Defendant was sleeping on the floor and the victim's cousin was sleeping on the couch. The victim got under the covers with Defendant on the floor and he again reached inside her clothes and put his finger inside her vagina. This time, Defendant moved his finger around and Defendant also made a face by putting his lips under his teeth, biting his lip. The victim again stated that it was uncomfortable for Defendant to have his finger inside her vagina.

² The victim described that Defendant was placing his teeth over his lower lip, biting his lip.

³ The victim referred to a cot as a "cotton." The victim's aunt confirmed that she owned a cot but admitted that on an earlier occasion she testified that she did not own a cot. The victim's aunt claimed that she had forgotten about the cot.

On one other occasion, Defendant was at the victim's house in her father's bedroom. Defendant was lying on her father's bed and told the victim to get on top of him. According to the victim, Defendant "just grabbed [her] and put [her] on top of him." Defendant placed the victim on top of his penis and put his arms around her back. Then, Defendant moved her up and down for what she thought was a long time. Defendant and the victim both had on clothing. Defendant eventually stopped and got up to go to the bathroom. The victim did not tell anyone because she was afraid that she would get into trouble.

The victim's cousin testified at trial. She confirmed that she saw Defendant and the victim under the covers during the hide-and-seek game around Christmas of 2014. The victim's cousin testified that when she lifted the covers and saw Defendant and the victim; she saw that Defendant's pants were unzipped and that his penis was outside of his clothing. After she found Defendant and the victim, Defendant got up to go to the bathroom.

Defendant did not testify or present any proof. The State elected to use the hide-and-seek incident to support the charge of rape of a child and the incident that occurred in the victim's father's bedroom to support the charge of aggravated sexual battery. The jury found Defendant guilty as charged in the indictment.

At the sentencing hearing, the trial court sentenced Defendant as a Range II multiple offender to 40 years at 100% for the rape of a child conviction, and sentenced Defendant to 12 years at 100% for the aggravated sexual battery conviction. The trial court ordered the sentences to run consecutively, for a total effective sentence of 52 years. After the denial of a motion for new trial, this timely appeal followed.

Analysis

On appeal, Defendant challenges the sufficiency of the evidence. Specifically, with respect to the rape of a child conviction, Defendant insists that the only evidence supporting the conviction "comes from the equivocal and outright contradictory testimony of [the victim]." With respect to the conviction for aggravated sexual battery, Defendant insists that "[f]or the same doubtful credibility of [the victim] as cited above, and the lack of a corroborating witness to the allegation of sexual battery, evidence to support the conviction is insufficient." The State disagrees.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A guilty verdict removes

the presumption of innocence and replaces it with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). The burden is then shifted to the defendant on appeal to demonstrate why the evidence is insufficient to support the conviction. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On appeal, “the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom.” *State v. Elkins*, 102 S.W.3d 578, 581 (Tenn. 2003). As such, this Court is precluded from re-weighting or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own “inferences for those drawn by the trier of fact from circumstantial evidence.” *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). “The standard of review ‘is the same whether the conviction is based upon direct or circumstantial evidence.’” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

“Rape of a child is the unlawful sexual penetration of a victim by the defendant . . . if the victim is more than three (3) years of age but less than thirteen (13) years of age.” T.C.A. § 39-13-522(a). “Sexual penetration” is defined as “sexual 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.” T.C.A. § 39-13-501(7). In order to be convicted of aggravated sexual battery, the State had to prove that there was unlawful sexual contact between Defendant and the victim, who was less than thirteen years of age. T.C.A. § 39-13-504(a)(4). “Sexual contact” means the intentional touching of anyone’s intimate parts—or the clothing covering those parts—if the touching can be “reasonably construed as being for the purpose of sexual arousal or gratification.” T.C.A. § 39-13-501(6). The “primary genital area, . . . buttock[, and] breast” are each considered “intimate parts.” T.C.A. 39-13-501(2). A jury can reasonably infer a purpose of sexual gratification or arousal from proof of touching a victim’s vagina. *See State v. Randall Ray Mills*, No. M2000-01065-CCA-R3-CD, 2001 WL 1246387, at *5 (Tenn. Crim. App. Oct. 17, 2001), *perm. app. denied* (Tenn. Mar. 4, 2002).

The proof at trial, in the light most favorable to the State showed that the victim was staying the night at her aunt's house. Defendant was also staying there at the time. During hide-and-seek game, the victim hid under covers with Defendant and Defendant inserted his finger into her vagina. The victim explained that Defendant "wiggled" his finger around inside her vagina and that it felt "uncomfortable" because his fingernails were long and sharp. The victim's cousin testified that she discovered the victim and Defendant under the covers during hide-and-seek and that she saw Defendant's penis outside his pants. On another occasion, at her own house, the victim explained that Defendant made her get on top of him on her own father's bed. Defendant then wrapped his arms around her and moved her up and down on his penis for what seemed like a long time. The victim explained that they were interrupted by her younger brother and Defendant told him to get out of the room. The victim demonstrated how Defendant bit his lip during the incident and explained that he did this because it felt good. Defendant argues that the evidence is insufficient because the victim's testimony was contradictory and uncorroborated. He specifically challenges the victim's failure to tell the forensic interviewer about the hide-and-seek game. We have viewed the interview, and the victim clearly references hide-and-seek during the interview. Defendant's complaints are mainly complaints regarding witness credibility. Despite Defendant's argument to the contrary, it was within the jury's province to accredit the victim's testimony and convict Defendant upon that proof. *State v. Bonds*, 189 S.W.3d 249, 256 (Tenn. Crim. App. 2005) ("It is well-settled law in Tennessee that the testimony of a victim, by itself, is sufficient to support a conviction.") (internal quotation omitted). Defendant is not entitled to relief.

Conclusion

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

TIMOTHY L. EASTER, JUDGE