

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9503-CR-00061
Appellee,	*	SHELBY COUNTY
VS.	*	Hon. Joseph B. Brown, Jr., Judge
MILTON S. JONES, JR.,	*	(Aggravated Sexual Battery)
Appellant.	*	

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Milton S. Jones, Jr., pled guilty to one count of aggravated sexual battery of a child less than thirteen (13) years of age. Tenn. Code Ann. § 39-13-504. On the initial direct appeal, this court remanded for resentencing. State v. Milton S. Jones, Jr., No. 02C01-9304-CR-00076 (Tenn. Crim. App., at Jackson, March 23, 1994).¹ The trial judge then sentenced the defendant to a Range I, nine-year term. In this second appeal, two issues are presented for review:

- (1) whether the indictment sufficiently alleged the elements of the offense of aggravated sexual battery; and
- (2) whether the trial court erred in sentencing.

We affirm.

In State v. Roger Dale Hill, Sr., No. 01C01-9508-CC-00267, slip op. at 4-5 (Tenn. Crim. App., at Nashville, June 20, 1996), app. granted, (Tenn., Jan. 6, 1997), this court held that an indictment that alleged the defendant "'did unlawfully sexually penetrate [M.H.] a person less than thirteen (13) years of age'" was "fatally defective because [the indictment] does not allege that he sexually penetrated M.H. intentionally, knowingly, or recklessly."

¹The defendant initially pled guilty to aggravated sexual battery. At the first sentencing hearing, the trial judge, understandably confused by the complicated series of legislative changes to the sexual battery statute, reduced the charge to simple sexual battery and sentenced the defendant to two years in the county workhouse. On appeal, this court reinstated the aggravated sexual battery charge and remanded for resentencing. State v. Milton S. Jones, Jr., No. 02C01-9304-CR-00076 (Tenn. Crim. App., at Jackson, March 23, 1994).

The provisions of both the Federal and Tennessee Constitutions guarantee the criminally accused knowledge of "the nature and cause of the accusation." U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to comply with these constitutional guidelines, an indictment or presentment must provide notice of the offense charged, adequate grounds upon which a proper judgment may be entered, and suitable protection against double jeopardy. State v. Perkinson, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992) (citing State v. Byrd, 820 S.W.2d 739 (Tenn. 1991) and State v. Pearce, 7 Tenn. 66 (1823)). The traditional rule is that when the indictment or presentment fails to fully state the crime, all subsequent proceedings are void. State v. Morgan, 598 S.W.2d 796, 797 (Tenn. Crim. App. 1979). Failure to specifically allege an essential element of the offense, however, is not fatal "if the elements are necessarily implied from the allegations made." State v. Marshall, 870 S.W.2d 532, 538 (Tenn. Crim. App. 1993). "[T]he waiver rule does not apply when the indictment fails to assert an essential element of the offense. In that circumstance, no offense has been charged. In consequence, subsequent proceedings are a nullity." Perkinson, 867 S.W.2d at 6.

The defendant was convicted of aggravated sexual battery. The statute defines the offense as the "unlawful sexual contact with a victim by the defendant or the defendant by a victim," Tenn. Code Ann. § 39-13-504(a), where the "[t]he victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-502(a)(4).

"Sexual contact" includes the following:

[I]ntentional touching of the victim's, the defendant's, or any other person'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) (emphasis added). The terms of these statutes, therefore, expressly provide the requisite culpable mental state of "intentional" for the element of sexual contact; yet the statutory scheme neither prescribes nor "plainly dispenses" with the culpable mental state as to the remaining element, which is met here by proving the victim was less than thirteen (13) years of age. Tenn. Code Ann. § 39-13-502(a)(4). "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). The mens rea for the victim's being under thirteen (13) years of age must be intentional, knowing, or reckless. See State v. Parker, 887 S.W.2d 825, 827 (Tenn. Crim. App. 1994). Thus, to sufficiently allege the elements of aggravated sexual battery, the indictment must allege or necessarily imply that the sexual contact was intentional and that the defendant was at least reckless with regard to the victim's age. See State v. Howard, 926 S.W.2d 579 (Tenn. Crim. App. 1996); Parker, 887 S.W.2d at 827 (both discussing the elements of sexual battery and noting that the different elements have different mens rea because of the statutory definition of "sexual contact").

The indictment contains the following allegation:

[The defendant] on October 27, 1991, ... did unlawfully engage in sexual contact with [the victim],

a person less than thirteen (13) years of age, in violation of T.C.A. 39-13-504, against the peace and dignity of the State of Tennessee.

While there is no specific allegation of the requisite mens rea, we find that the term "sexual contact" does necessarily imply an intentional touching of the underage victim. See State v. Marshall, 870 S.W.2d at 538. In Hill, this court ruled that the term "unlawful" does not sufficiently allege the mens rea of intent. Hill, No. 01C01-9508-CC-00267, slip op. at 6; see also State v. Nathaniel White, No. 03C01-9408-CR-00277 (Tenn. Crim. App., at Knoxville, June 7, 1995). "'Unlawfully' does not, in the ordinary use of the term, connote mental culpability. One cannot logically infer that an accused acting 'unlawfully' necessarily acts 'knowingly.'" White, slip op. at 5. Yet this court can find that the required mens rea of intent is necessarily implied in this indictment. At the time of the indictment, aggravated sexual battery was defined, in pertinent part, as "unlawful sexual contact with a victim by the defendant or the defendant by a victim ... [where t]he victim is less than thirteen (13) years of age." Tenn. Code Ann. §§ 39-13-504(a) and 39-13-502(a)(4)(1991)(emphasis added). When this definition is read in conjunction with the statute defining sexual contact, it is apparent that a mental element is necessarily implied in the offense. Because sexual contact is defined as intentional touching, the mens rea is necessarily implied. We view this case as being distinguished from Hill, where the indictment alleged unlawful sexual penetration. The statutory definition of sexual penetration does not include any mens rea; thus, a reference to sexual penetration, as statutorily defined, does not imply the mens rea. See Tenn. Code Ann. § 39-13-501(7).

An indictment must: (1) inform the defendant of the specific charges, (2) enable the trial court to enter an appropriate judgment and sentence; and (3) protect the defendant against double jeopardy. State v. Trusty, 919 S.W.2d 305, 309 (Tenn. 1996). This indictment meets all three of those demands. The transcript of the submission hearing establishes that the defendant was fully and completely aware of the charges, his panoply of constitutional rights, and the likely sentence. The record demonstrates not only a knowing and voluntary plea but also a full understanding of the nature of the charges.

The defendant next contends that the sentence was excessive.

Our prior opinion contained the following factual summary:

The victim was a child less than thirteen (13) years of age. The appellee held the child in his lap and opened up a pornographic magazine. He apparently placed his hand inside the child's pants and fondled the genital area of the child.

Jones, No. 02C01-9304-CR-00076, slip op. at 2-3. The range for aggravated sexual battery is eight to twelve years. See Tenn. Code Ann. § 40-35-112(a)(2). The sole enhancement factor found by the trial judge was that the defendant had a previous history of criminal convictions or criminal behavior in addition to that necessary to establish his appropriate range. See Tenn. Code Ann. § 40-35-114(1). The defendant argues that the trial court erred by the use of this factor because the defendant's only prior conviction was a misdemeanor.

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); see also State v. Jones, 883 S.W.2d 597 (Tenn. 1994). 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; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for felony convictions, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). But see 1995 Tenn. Pub. Acts ch. 493 (amending the statute effective July 1, 1995, to make the presumptive sentence in a Class A felony the midpoint in the range). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of

relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210. The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

The pre-sentencing report indicates that the defendant's prior misdemeanor conviction was for showing pornography to minors. At the sentencing hearing, the psychiatric report provided by the defendant acknowledged "numerous other contacts with children seven to nine years of age of a similar nature"

This, in our view, would have warranted the application of the enhancement factor. See Tenn. Code Ann. § 40-35-114(1). Given the nature of the prior misdemeanor and given the defendant's admission that he had engaged in this type of criminal behavior "numerous" times, this enhanced sentence is entirely appropriate.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

William M. Barker, Judge

Jerry L. Smith, Judge