

FILED

April 3, 1997

**Cecil W. Crowson
Appellate Court Clerk**

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

STATE OF TENNESSEE,)	
)	C.C.A. NO. 01C01-9603-CR-00106
Appellee,)	
)	DAVIDSON COUNTY
VS)	
)	THOMAS H. SHRIVER,
ROBERT READ, JR.,)	JUDGE
)	
Appellant.)	(Aggravated Sexual Battery)

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OPINION FILED: _____

AFFIRMED

**JOE G. RILEY,
JUDGE**

OPINION

This is a direct appeal from a jury verdict of guilty on three (3) counts of aggravated sexual battery. The defendant was sentenced as a mitigated offender and received 7.2 years on each count. Although the first two (2) counts ran concurrently, the third count ran consecutively for an effective sentence of 14.4 years. Defendant presents the following issues for our review:

- (1) whether the evidence was sufficient to sustain the convictions for aggravated sexual battery;
- (2) whether the trial court erred in allowing the testimony of the victim's mother regarding statements made to her by the victim;
- (3) whether the trial court erred in imposing consecutive sentences; and
- (4) whether the indictment was fatally defective for failing to charge the requisite *mens rea* element of the offenses.

We affirm the judgment of the trial court.

STATE'S PROOF

At the time of the alleged assault, the victim was seven (7) years of age. The defendant was sixty-eight (68) years of age and was a neighbor of the victim and her family.

The proof offered by the state indicated that the victim from time to time visited at the residence of the defendant and his wife. On March 2, 1994, the defendant entered the victim's residence uninvited. The victim was in the care of her nanny. The victim hid behind a door since she did not want to go with the defendant. Upon being asked directly by the defendant to accompany him and he would give her some camping supplies, the victim consented to go.

The victim testified that while they were at the defendant's residence, the defendant took off the victim's clothes. Some of the time the defendant was on top of the victim while they were lying down. He bit her on the leg several inches above the knee which caused her pain. She also testified the defendant's "tongue touched me in my chest, my back, my butt and my bottom." By use of a diagram she pointed

to the vaginal area in referring to her "bottom." She further stated the defendant told her not to tell her mother because he might go to jail.

The victim also testified this happened on a prior occasion when the defendant "used his tongue and he touched me, uh... butt, back, bottom and...uh...chest." The victim stated that on this occasion the defendant's wife asked what she and the defendant were doing in the basement.

Upon the child returning home from the visit on March 2nd, the victim's nanny stated the child appeared "real sad looking," and her eyes were red as if she had been crying. The victim's mother returned home about fifteen (15) minutes after the victim's arrival. The victim appeared very "upset," "teary," exhibited "obvious signs of distress," and was "clinging" to her mother. The child advised her mother that the defendant had hurt her by biting her on the leg. The mother then observed a two-inch scratch on the "upper, inner thigh." The child further advised the mother that the defendant told her not to tell her parents because the police would "take him away."

At this point the mother took the child into a bedroom. The child there related that on a prior visit, believed to be the prior Sunday, the defendant pushed up her shirt, pulled down her pants, kissed her on the chest and "put his tongue in her bottom." According to her mother the child was referring to her vaginal area as her "bottom." The child also told her that the defendant said she "tasted like cream."

The medical examination of the child was within normal limits. There were no medically objective signs of sexual abuse.

ELECTION OF OFFENSES

Since the indictment was non-specific as to dates and there was evidence of multiple offenses, the state made the following election at the conclusion of the state's proof:

Count 1: the alleged incident when the defendant bit the victim on the inner thigh;

Count 2: the alleged incident occurring on the same day

as Count 1 when the defendant “placed his tongue or licked her on the breasts...”

Count 3: the alleged incident which was interrupted by defendant’s wife when the defendant “placed his tongue or..or was licking on her breast.”

There were also two (2) counts charging child rape in which the state made elections. The defendant was subsequently found not guilty of those two (2) counts.

DEFENSE PROOF

The defendant denied being alone with the child and denied committing any acts of sexual abuse. He further denied seeing her at all on the Sunday before March 2nd.

The defendant’s wife also testified the defendant was never left alone with the child, and the child had not been in their home on the Sunday before March 2nd.

The defense also produced three (3) character witnesses.

SUFFICIENCY OF THE EVIDENCE

Defendant contends the evidence was insufficient to prove guilt beyond a reasonable doubt on all three (3) counts of aggravated sexual battery. In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the state’s witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405 (Tenn.1983). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978). Moreover, a guilty verdict removes the presumption of innocence which the appellant enjoyed at trial and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The appellant has the burden of overcoming this presumption of guilty. Id.

Where sufficiency of the evidence is challenged, the relevant question for an

appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); T.R.A.P. 13(e). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542 (Tenn.1984); Byrge v. State, 575 S.W. 2d 292 (Tenn. Crim. App. 1978).

Aggravated sexual battery as defined in T. C. A. § 39-13-504 requires the state to prove beyond a reasonable doubt unlawful sexual contact with a victim less than thirteen (13) years of age. "Sexual contact" includes the intentional touching of the victim's intimate parts if the intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification. T. C. A. § 39-13-501(6). "Intimate parts" includes the "primary genital area, groin, inner thigh, buttock or breast of a human being" (emphasis added). T. C. A. § 39-13-501 (2).

As to Count 1 the state relied upon the alleged incident on March 2nd in which the defendant bit the victim on the "inner thigh." The testimony of the victim indicated that there was an intentional touching. Furthermore, the "inner thigh" is an "intimate part" pursuant to the statute. All the facts and circumstances indicate the touching was for the purpose of sexual arousal or gratification. The evidence is sufficient to support the verdict of guilty in Count 1.

As to Count 2 the state relied upon the alleged incident also occurring on March 2nd in which the defendant placed his tongue on and licked the child's breast. The child's testimony indicated an intentional touching of the "breast" which is an "intimate part" pursuant to the statute. All the facts and circumstances indicate the touching was for the purpose of sexual arousal or gratification. The evidence is sufficient to support the verdict of guilty in Count 2.

As to count 3 the state relied upon the prior incident which was interrupted by the defendant's wife in which the defendant placed his tongue on or was licking the child's breast. The child's testimony indicated an intentional touching of the "breast" which is an "intimate part" pursuant to the statute. All the facts and

circumstances indicate the touching was for the purpose of sexual arousal or gratification. Whether the incident occurred on the Sunday or the Friday before is not determinative. See State v. West, 737 S.W.2d 790 (Tenn. Crim. App. 1987).

The evidence is sufficient to support the verdict of guilty in Count 3.

This issue is without merit.

ADMISSIBILITY OF MOTHER'S TESTIMONY

The trial court admitted the testimony of the victim's mother who related various statements made to her by the victim. The trial judge specifically instructed the jury that this testimony was to be considered for corroborative purposes. The court admitted the testimony under the fresh complaint doctrine which was viable at the time of trial. See State v. Rickman, 876 S.W.2d 824 (Tenn. 1994); State v. Brown, 871 S.W.2d 492 (Tenn. Crim. App. 1993). Under this doctrine statements made by the victim shortly after the sexual abuse are admissible as confirmation of the victim's credibility. State v. Willis, 735 S.W.2d 818, 820 (Tenn. Crim. App. 1987). However, the doctrine was abolished in State v. Livingston, 907 S.W. 2d 392 (Tenn. 1995). Nevertheless, Livingston noted that evidence in the nature of fresh complaint may be admissible as (1) substantive evidence if it satisfies some hearsay exception, and (2) corroborative evidence if it satisfies the prior consistent statement rule. Id at 395.

EXCITED UTTERANCE

The statements made by the victim to her mother were approximately one-half hour after the acts of abuse. The victim was described as looking very sad, as if she had been crying, very upset, teary, and distressed. She had suffered pain from the alleged bite and clung to her mother.

The first statement by the victim to her mother about being bitten on the leg was not challenged at trial and is acknowledged by the defendant as being spontaneous and admissible. However, defendant contends the statements made by the child to her mother later in the bedroom were not admissible.

A statement is admissible as an excited utterance if it relates to a “startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” T.R.E. 803(2). The ultimate test for determining the admissibility of such statements is the spontaneity and logical relation to the main event and whether the act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication. State v. Smith, 857 S.W.2d 1, 9 (Tenn. 1993).

All statements made by the victim to her mother fit within the excited utterance exception to the hearsay rule. T.R.E. 803(2). The mere fact that some of the victim’s statements to her mother were made just prior to the statements in the bedroom does not render the bedroom statements inadmissible. The short time lapse between the incident and the child’s disclosure to her mother greatly diminishes the likelihood of deliberation and fabrication. State v. Binion, 1996 WL 432339, C.C.A. No. 02C01-9505-CC-00141 (Tenn. Crim. App. filed August 2, 1996, at Jackson). This short period of time does not detract from the spontaneity and lack of reflection which form the basis of this hearsay exception. Furthermore, the mere fact that the victim responded to questions of the mother does not render the testimony inadmissible under this exception. State v. Rucker, 847 S.W.2d 512, 517 (Tenn. Crim. App. 1992).

We, therefore, conclude that the testimony of the mother as to the victim’s statements to her are admissible as substantive evidence under the excited utterance exception to the hearsay rule. The defendant was benefited by the trial judge’s instruction that the evidence could only be considered for corroborative purposes.

CONSECUTIVE SENTENCING

The trial court sentenced the defendant to 7.2 years on each of the three (3) counts with the first two (2) counts to run concurrently with each other, and the third count to run consecutively for a total effective sentence of 14.4 years. Defendant contends consecutive sentencing was improper.

The trial court ran one (1) of the sentences consecutively pursuant to T.C.A. § 40-35-115(b)(5). The court found that there were aggravating circumstances arising from the relationship between the defendant and the child victim. Specifically, the court found that the child had been entrusted to his care and that the defendant had greatly abused this position of trust. The court noted that the sexual activity was undetected over a period of time, and the nature and scope of the sexual acts were substantial. He further concluded the victim had suffered significant residual damage as a result of the abuse.

In addition the court concluded that the sentences were reasonably related to the severity of the offenses. The court specifically found that the defendant was especially dangerous, and there was a need to protect children from further criminal conduct by the defendant. The court, therefore, made the necessary findings required by State v. Wilkerson, 905 S.W.2d 933 (Tenn.1995).

Where the record reflects that the trial court considered appropriate sentencing principles and all relevant facts and circumstances, our review of the trial court's sentence is *de novo* with a presumption that the trial court's determinations are correct. T. C. A. § 40-35-401(d); State v. Ashby, 823 S.W.2d 166 (Tenn. 1991). The trial court made specific findings with regard to consecutive sentencing as required by T. C. A. § 40-35-115(b)(5) and State v. Wilkerson, *supra*. The record supports these findings and conclusions. Although it may well be inconsistent for the defendant to have been found to be a mitigated offender and still receive

consecutive sentencing,¹ the mitigated offender status inured to the benefit of the defendant as to the length of the sentence. The record supports the imposition of consecutive sentences even though defendant was sentenced as a mitigated offender.

FAILURE TO ALLEGE MENS REA ELEMENT OF OFFENSE

Defendant contends the indictment charging aggravated sexual battery was fatally defective in that it did not contain the requisite *mens rea* element of the offense. Defendant relies upon State v. Hill, C. C. A. No. 01C01-9508-CC-00267 (Tenn. Crim. App. filed June 20, 1996, at Nashville). The defendant did not raise this issue in the trial court.

The defendant in Hill was charged with the offense of aggravated rape. The court concluded that the failure of the indictment to specifically allege the *mens rea* was fatally defective.

A.

T. C. A. § 40-13-202 provides as follows:

The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and in no case are such words as “force and arms” or “contrary to the form of the statute” necessary.

Fair and reasonable notice of the charges against a defendant is a fundamental constitutional requirement. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. An indictment has three (3) purposes in Tennessee; namely, (1) to inform the

¹At the hearing on the motion for new trial, the trial judge acknowledged that he should have sentenced defendant as a standard offender rather than a mitigated offender.

defendant of the precise charges; (2) to enable the trial court upon conviction to enter an appropriate judgment and sentence; and (3) to protect the defendant against double jeopardy. State v. Trusty, 919 S.W.2d 305, 309 (Tenn. 1996). The facts must be stated in ordinary and concise language so that a person of “common understanding” will know what is intended. Warden v. State, 214 Tenn. 391, 381 S.W.2d 244 (1964).

The indictment in this case alleged that the defendant had unlawful sexual contact with a named victim less than thirteen (13) years of age. The defendant was informed by this indictment of the precise charge. The charge was stated in ordinary and concise language so that a person of common understanding would know what was intended. The charge clearly enabled the trial court upon conviction to enter the appropriate judgment and sentence. Finally, the charges protected the defendant against any double jeopardy problems.

For the above reasons we decline to follow Hill and find this indictment was sufficient to charge aggravated sexual battery.² Furthermore, if there had been an objection to the indictment based upon the failure to allege a requisite mental state, it should have been raised pre-trial. See T.R.Cr.P. 12(b)(2).

B.

Even if Hill has vitality, it is distinguishable from the instant case. Unlike Hill, all three (3) counts of this indictment charged that the defendant “did engage in unlawful sexual contact with [MRR], a child 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.”

Aggravated sexual battery as defined in T. C. A. § 39-13-504 is “unlawful

²Another panel of this Court has recently declined to follow Hill. See State v. James Dison, C.C.A. No. 03C01-9602-CC-00051 (Tenn. Crim. App. filed January 31, 1997, at Knoxville).

sexual contact” with a victim “less than thirteen (13) years of age.” T. C. A. § 39-13-501(6) defines “sexual contact” as the

...intentional 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 (emphasis added).

Therefore, the mental element of “intentional” is included in the definition of “sexual contact” and is impliedly included within the indictment. By statutory definition the only way one can have “sexual contact” is by the “intentional” touching...for the purpose of sexual arousal or gratification.” Id.

We, therefore, conclude that Hill is distinguishable based upon the charged offense.

The judgment of the trial court is AFFIRMED.

JOE G. RILEY, JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

JERRY L. SMITH, JUDGE