

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs August 1, 2023

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. TYLER HEMMINGWAY

**Appeal from the Criminal Court for Shelby County
Nos. 20-01702, C2003035 Jennifer Johnson Mitchell, Judge**

No. W2022-01248-CCA-R3-CD

The Defendant, Tyler Hemmingway, was convicted by a Shelby County Criminal Court jury of aggravated sexual battery and sentenced by the trial court as a Range I, standard offender to eight years at 100 percent in the Tennessee Department of Correction. On appeal, the Defendant challenges the sufficiency of the evidence and argues that the trial court abused its discretion by allowing the State to introduce a photograph of the Defendant's bedroom that showed a pornographic poster on the wall. Based on our review, we affirm the judgment of the trial court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and MATTHEW J. WILSON, JJ., joined.

Charles W. Gilchrist, Jr., Memphis, Tennessee (at trial and on appeal), for the appellant, Tyler Hemmingway.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Devin Dennis and J. D. Hamblen, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

The victim in this case is the Defendant's daughter, who was approximately eight-years-old at the time of the offense. The Defendant and the victim's mother were never married but lived together with their two children, the victim and the victim's younger brother, until two or three years prior to the offense. After the Defendant and the victim's mother ended their romantic relationship, the victim and her brother had regular weekend visits with the Defendant at his Memphis home.

On July 7, 2019, the victim tearfully disclosed to her mother that the Defendant had been touching her inappropriately when she was in the shower. The victim's mother called the police, and an investigation ensued that ultimately resulted in the Defendant being indicted by the Shelby County Grand Jury for the aggravated sexual battery of the victim.

At the May 23-25, 2022 trial, the victim's mother testified that she and the Defendant were never married. She said she and the Defendant were a couple for approximately eight years but broke up a few years prior to 2019. Although their breakup involved a lot of heartache, by 2019 "[e]verything was really great." She and the Defendant "were co-parenting really well[,]" with the Defendant having custody of their two children every other weekend and for one week during the summer. The Defendant was "always there when [they] needed him[,]" and, in short, "[e]verything was as good as you could have asked for."

The victim's mother testified that she had no indication that anything was wrong until July 7, 2019, when she picked up the children from the Defendant's grandmother's house, where they had spent the weekend. She said she and the children were having a general conversation in the car about their weekend when her son, who was seven at the time, said something that caused the victim to immediately start crying. The victim's mother stated that she asked the victim what her brother meant, and the victim responded that she was not allowed to tell. She asked the victim another time or two, and the victim "finally screamed out loud, 'Daddy touches me where he's not supposed to.'" At the same time, the victim was "crying, very quiet, [and had] ducked herself kind of into a ball, into her seat."

The victim's mother testified that she immediately drove to her mother's home because she was "in a state of panic" and unsure of what to do. She said she called the police from her mother's home and gave a statement to the officers who responded. She stated that she had no reason to fabricate allegations against the Defendant and had not made up any of what she reported.

On cross-examination, the victim's mother testified that the children had not had any contact with the Defendant since the day she called the police. She said that she and the children were living in Millington with her boyfriend, who remained her boyfriend at the time of trial. She acknowledged that the children had looked forward to their visits with the Defendant, that the Defendant "[f]or the most part" regularly paid monthly child support of \$783, and that she had never noticed any issues with the children returning home from their visits dirty or unbathed. She testified that the victim was a good student but denied that she had "a vivid imagination" or was "a good storyteller for a child of her age[.]"

The victim, who was twelve at the time of trial, testified that her birthday was September 28, 2009, and the Defendant was her biological father. She said she and her brother lived with their mother but in the past had every other weekend visitation with the Defendant in his Memphis home, which had two bathrooms. The bathroom she regularly used was a hall bathroom beside her bedroom and across from her brother's bedroom, and the other bathroom was accessed through the Defendant's bedroom. The victim testified that during her visitations with the Defendant, the Defendant began touching her in his shower. She said "it technically started when [she] was seven, but [she] was close to turning eight." She testified that the Defendant asked her to take a shower in his bathroom. She stated that she undressed and got into the shower, and the Defendant, who was outside the shower, handed her a small kitchen towel and told her to hold it over her eyes. She did as he instructed, and the Defendant then got into the shower and touched her in her "female area" with his hand. Because her eyes were covered, she did not know if the Defendant was dressed. The victim testified that the Defendant did not say anything. She was certain that the Defendant was not washing her when he touched her because he used a hard bar soap for washing and all she felt was his hand.

The victim testified that the touching occurred "[t]he majority [of] the time [she] went" to the Defendant's home, always in the Defendant's bathroom, and always in the same manner. She said the Defendant sometimes touched her on the upper chest as well "and rarely ever would he touch [her] on [her] bottom." She said her brother would be in his bedroom playing when the episodes occurred. She stated that when she told the Defendant to stop, he would tell her to be quiet or to "shut up." She recalled that on one occasion, the Defendant told her "to shut up or he would make it 10 times worse." She testified that the Defendant always touched her "on the top of [her] vagina [sic]"; the Defendant never penetrated her vagina.

The victim testified that she did not initially tell anyone what was happening because she was frightened and the Defendant had convinced her that if she told anyone, both she and the Defendant would be in trouble. She said she eventually told her mother

after her brother said something during a car ride that caused her mother to question her. Afterward, she talked to someone at a place with teddy bears on the wall. She said she truthfully told that individual everything that had happened. The victim identified the DVD of her July 22, 2019 forensic interview, which was admitted as an exhibit and later played for the jury. The victim also identified photographs of the Defendant's home, which were introduced as exhibits and published to the jury. She identified a photograph of the Defendant's bedroom, with a door leading to the hallway outside his bedroom and another door behind his bed leading to his bathroom.

On cross-examination, the victim testified that she walked through the Defendant's bedroom to reach his bathroom where the incidents occurred. She agreed that the Defendant's bathroom was also accessible via a door in her bedroom but said she never used that door, which was covered by a blanket or curtain and blocked by a large toy box. When asked what the Defendant had in his bedroom, she replied "DVD's, action figures. I think at one point a poster." She acknowledged that she never told the forensic interviewer or the police that the Defendant told her to be quiet or he would make it ten times worse. Although she could not remember for certain, she believed her last visitation with the Defendant was about a week before she disclosed the abuse. She repeated that she did not know if the Defendant was clothed when he touched her in the shower and said that she never saw the Defendant naked in the shower. She testified that during the ride to her maternal grandmother's house, her mother told her only to tell the truth about what happened. When asked how her mother felt about the Defendant at that time, she replied: "They were becoming like really, really close. Not as a couple, but as friends. They were getting along always [and] were happier with each other." The victim testified that she had no physical injuries and was not examined by a nurse.

On redirect examination, the victim agreed that the prosecutors told her in a pre-trial meeting to "think really hard about all the details [she] might have forgotten" and that was when she remembered the Defendant's statement about making it ten times worse. She testified that she was very close with the Defendant's mother, whom she was no longer able to see because of the situation. The victim stated that it had been "[e]xtremely hard" on her not to be able to see her paternal grandmother.

Officer Bryan Alexander Farrington of the Memphis Police Department testified that on July 7, 2019, he went to an East Memphis residence in response to a 911 call about a "forcible fondling." After speaking with "a mother, female juvenile and a male juvenile[.]" he contacted his supervisor. On cross-examination, he testified that he took a report that was forwarded to an investigator in sex crimes. He said he did not take a formal statement from the mother and did not question the suspect.

Lieutenant Ronald Polk of the Memphis Police Department testified that in July 2019 he was an investigator in the Sex Crimes Special Victim's Unit and assigned to investigate the victim's case. He said he scheduled a forensic interview of the victim and watched via video from a separate room as the interview was conducted. He also scheduled an interview with the Defendant, but the Defendant was a "no call or no show." When he called the Defendant to ask about the missed interview, the Defendant told him that he had an attorney and to contact the attorney.

Lieutenant Polk testified that he twice presented the case for prosecution to the Child Protection Investigation Team, known by its acronym of "CPIT." The first time he presented the case, the prosecutor suggested that he get photographs of the crime scene. He obtained and executed a search warrant of the Defendant's home, during which photographs were taken, and presented the case to CPIT again. Upon his second presentation, the case was approved for prosecution. On cross-examination, he acknowledged that crime scene photographs were not taken until approximately two months after he began the investigation. He further acknowledged that the victim described the crime scene to him as a walk-in shower.

Teresa Onry of the Memphis Child Advocacy Center, the forensic interviewer who interviewed the victim, identified the previously admitted DVD of the victim's July 22, 2019 forensic interview, which was then published to the jury. She also identified the anatomical drawing she used during her interview with the victim, on which the victim pointed to the pubic area, the buttocks, and the chest to indicate areas on her body where the Defendant had touched her. On cross-examination, she acknowledged that, although an independent entity, the Child Advocacy Center was housed in the same building as the Department of Children's Services and the Memphis Police Department officers who were assigned to the special child abuse unit.

In the forensic interview, the victim said that the touching began after the Defendant moved from an apartment to his house and started paying more attention to her and her showers. She said the Defendant told her that girls needed to bathe a lot and to get in the shower in his bathroom. After she got into the shower, the Defendant would give her a small towel to hold over her eyes or would tell her to keep her eyes closed. The Defendant would then get into the shower with her and start touching her. The victim said the Defendant would lay his hand on her and start rubbing. When asked what part of her body he would rub, the victim first demonstrated on her own body and then pointed to the pubic area on the drawing. She said she knew the Defendant was not using soap because the soap he used was cold and she would have felt it.

The victim said the Defendant sometimes squeezed her buttocks, which hurt, but when she told him it hurt, he kept doing it. The Defendant also occasionally grabbed, held, and played with her breasts. She stated that on one occasion when the Defendant was touching her, he quickly moved his hand away and said that he should not be doing that, which indicated to the victim that he knew he was doing something wrong. The victim said the touching made her very uncomfortable and that she tried to move to the corner of the shower to get away from the Defendant. Sometimes she told the Defendant to stop, but he would tell her in a stern voice to be quiet or to shut up. She said the showers and touching occurred “the majority” of the time she visited the Defendant in his house. The Defendant did not make her brother take as many showers as he made her take, telling her that girls needed more showers to stay clean. She said each shower lasted about an hour. The Defendant rubbed her pubic area only with his hand and only rubbing occurred. The Defendant always shut the door to the bathroom before the showers. She did not know if he locked the door. The Defendant told her if she told anyone about the showers, they would both get in trouble.

The victim said about three weeks prior to the interview, her brother walked in the Defendant’s bathroom needing something. She said she was already in the shower with a towel over her eyes. The Defendant was not yet in the shower and she did not know if he was clothed. She stated that the Defendant told her brother, “I’m bathing your sister. What do you need?” The Defendant then left with her brother for about thirty minutes. During that time, the victim remained in the shower shaking. When the Defendant came back, the usual touching occurred. The victim said she later told her brother that “gross stuff” was occurring in the shower. Her brother brought up the “gross stuff” when they were riding in a car with their mother, and the victim began “bawling” and told her mother what was occurring.

The Defendant elected not to testify but presented a witness on his behalf. Joseph Tibbs testified he had known the Defendant for three or four years, had visited with the Defendant at his home, and had witnessed the Defendant’s interactions with his children. In Mr. Tibbs’s opinion, the Defendant “was an exceptional father” who “loved his kids unconditionally” and “spoiled his kids[.]”

In its election of offenses, the State chose the first time that the Defendant touched the victim on her pubic area in the shower. Following deliberations, the jury convicted the Defendant of the indicted offense, and the trial court subsequently sentenced him as a Range I, standard offender to eight years at 100% in the Department of Correction. After the trial court denied his motion for new trial, the Defendant filed a timely notice of appeal to this court. On appeal, Defendant challenges the sufficiency of the evidence and argues

that the trial court abused its discretion in allowing the State to introduce a photograph that showed pornographic posters on the Defendant's bedroom wall.

ANALYSIS

I. Sufficiency of the Evidence

As his first issue, the Defendant contends that the evidence is insufficient to sustain his conviction. Specifically, he argues that “no reasonable juror could have concluded that [he] touched the victim’s private parts for sexual arousal or gratification.” In support, he cites the fact that there was no testimony of his “talking dirty[,]” masturbating, or “talking about anything in a sexual way before, during, or after the showers.” The Defendant also argues that no reasonable juror could find the victim’s testimony credible given her testimony about holding a kitchen towel over her eyes and never seeing whether the Defendant was naked on the multiple occasions that he allegedly touched her when she was in the shower. The State argues that the evidence was sufficient to sustain the verdict. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing 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 beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) (“Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt.”); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992).

Therefore, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *See State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). “A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim.

App. 1999). The standard of review for the sufficiency of the evidence is the same whether the conviction is based on direct or circumstantial evidence or a combination of the two. *See State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

For the purposes of this case, aggravated sexual battery is defined as unlawful sexual contact with a victim by the defendant or the defendant by a victim when the victim is less than thirteen years of age. Tenn. Code Ann. § 39-13-504 (a)(4). “‘Sexual contact’ includes the intentional touching of the victim’s . . . intimate parts . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification[.]” *Id.* at § 39-13-501(6). “‘Intimate parts’ includes the primary genital areas, groin, inner thigh, buttock, or breast of a human being.” *Id.* at § 39-13-501(2).

We begin our analysis by noting that the testimony of a minor victim, alone, is sufficient to uphold a conviction for aggravated sexual battery. *See State v. Smith*, 42 S.W.3d 101, 106 (Tenn. Crim. App. 2000). The Defendant argues that there was insufficient proof that any touching was for the purposes of sexual arousal or gratification. However, “[t]he determination of whether . . . contact was for the purpose of sexual arousal or gratification is a question of fact for the jury.” *State v. Walton*, No. M2014-01337-CCA-R3-CD, 2015 WL 2257130, at *3 (Tenn. Crim. App. May 12, 2015). It is well-established that a jury may infer intent from the circumstances surrounding an offense, *see Hall v. State*, 490 S.W.2d 495, 496 (Tenn. 1973), and that jurors are entitled to “use their common knowledge and experience in making reasonable inferences from evidence.” *State v. Meeks*, 876 S.W.2d 121, 131 (Tenn. Crim. App. 1993).

The victim testified that when she was approximately eight years old, the Defendant told her to take a shower in his bathroom instead of the hall bathroom she regularly used. She testified that she took off her clothes and got into the Defendant’s shower. The Defendant handed her a small towel and instructed her to hold it over her eyes so that she could not see. The Defendant then entered the shower with her and touched her on her “female area” with his hand. The victim expressed certainty that the Defendant was not washing her, testifying that the Defendant used a hard bar soap for washing, that the soap was cold and she would have felt it, and all she felt was his hand. In the recorded forensic interview, the victim, using an anatomical drawing to demonstrate body parts, provided the additional details that the Defendant would place his hand on her pubic area and rub it, occasionally squeeze her buttocks so that they hurt, and hold and play with her breasts. She said when she told the Defendant to stop, he would tell her in a stern voice to be quiet or to shut up. The Defendant also told the victim not to tell anyone or they would both get into trouble. The victim also testified that the Defendant made the victim’s brother leave the room so they could be alone. The victim also told the interviewer that on one occasion when the Defendant was rubbing her in the pubic area, he moved his hand away and said,

“I shouldn’t be doing this.” This evidence was sufficient for a rational jury reasonably to conclude that the Defendant’s touching of the victim’s genital area was for the purpose of sexual arousal or gratification. As for the Defendant’s assertion that the victim’s testimony was not believable, we note that credibility determinations are within the province of the jury. By convicting the Defendant of the indicted offense, the jury obviously found the victim’s testimony to be credible. Accordingly, we conclude that the evidence is sufficient to sustain the Defendant’s conviction for aggravated sexual battery.

II. Admission of Photographs Showing Pornographic Posters

The Defendant next contends that the trial court abused its discretion by allowing the State to introduce a photograph of the Defendant’s bedroom that showed posters that were either pornographic, or “at the very least extremely sexual in nature.” The Defendant cites Tennessee Rule of Evidence 403 and argues that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The State responds that the trial court acted within its discretion in admitting the photograph. In the alternative, the State argues that even if the admission of the photograph was error, it was harmless.

The photograph at issue shows a bed, a chest of drawers with a television on top, and the door to the Defendant’s bathroom. On the wall above and to the right of the television is a large poster that appears to depict two naked women engaged in a sex act, with a portion of one woman’s breast and her buttocks showing as she is lying on top of the second woman. There are drawings or smaller posters on the adjacent wall above the Defendant’s bed, but what those posters depict is unclear.

In a pre-trial hearing, the prosecutor argued that the photograph with the poster provided “contextual background” of the inappropriate relationship the Defendant had with the victim and would help the State meet its burden of proving that the touching was performed for sexual gratification. Pointing out that the photograph was taken over three months after the alleged incident occurred, the Defendant argued that it was not only irrelevant, but also highly prejudicial and should be excluded. After reviewing the photograph and noting that it was “clear to anybody who comes into the room” that the poster depicted what appeared to be “two naked women” “performing a sex act[.]” the trial court found that it was relevant to prove that the unlawful sexual contact was for the purpose of sexual gratification. The trial court further found that its probative value was not substantially outweighed by the danger of unfair prejudice: “Because part of the State’s proof and one of its elements . . . has to be proven that the unlawful sexual contact is for sexual gratification, the Court finds that . . . the admission of this is not substantially outweighed by its prejudicial effect.”

Generally, “[a]dmission of evidence is entrusted to the sound discretion of the trial court, and a trial court’s ruling on evidence will be disturbed only upon a clear showing of abuse of discretion.” *State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004). An abuse of discretion occurs only if “the court applied an incorrect legal standard, or reached a decision which is against logic or reasoning” and admission of the evidence “caused an injustice to the party complaining.” *State v. Gilliland*, 22 S.W.3d 266, 270 (Tenn. 2000) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)) (internal quotation marks omitted).

Relevant evidence is defined as evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. Relevant evidence, however, “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Tenn. R. Evid. 403.

We agree with the State that the photograph was relevant to show that the victim was forced to walk past a “highly sexual poster” each time the Defendant made her take a shower in his bathroom, a fact from which the jury “could have reasonably inferred that [the] Defendant was intentionally grooming [the victim]” or “attempting to desensitize her to what he was doing to her in the shower.” We note that the victim testified she remembered the poster as one of the items in the Defendant’s room when she was being cross-examined. We further agree that the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice. The poster is not child pornography, and the Defendant’s display of a poster depicting what appears to be two naked adult women having sexual intercourse does not constitute a crime or propensity evidence. *See, e.g. State v. Rodriguez*, 254 S.W.3d 361, 377 (Tenn. 2008) (concluding in a child rape and aggravated sexual battery case that admission of defendant’s possession of child pornography constituted propensity evidence that was not harmless error under Tenn. R. App. P. 36(b)). We, therefore, conclude that the trial court did not abuse its discretion in admitting the photograph.

CONCLUSION

Based on our review, we affirm the judgment of the trial court.

JOHN W. CAMPBELL, SR., JUDGE