IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs January 7, 2014

STATE OF TENNESSEE v. MARCUS SMITH

Appeal from the Criminal Court for Shelby County
No. 10-07455 Carolyn Wade Blackett, Judge

No. W2012-01992-CCA-R3-CD - Filed February 25, 2014

Appellant, Marcus Smith, was convicted of one count of criminal attempt to commit rape of a child, a Class B felony. The trial court sentenced appellant to nine years to be served in the Tennessee Department of Correction. On appeal, appellant argues that the evidence at trial was insufficient to support his conviction. Following our review of the parties' briefs, the record, and the applicable law, we affirm appellant's conviction.

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

ROGER A. PAGE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Stephen C. Bush, District Public Defender; and Harry E. Sayle, III (on appeal) and Sanjeev Memula (at trial), Assistant District Public Defenders, Memphis, Tennessee, for the appellant, Marcus Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Caitlyn E.D. Smith, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Terre Fratesi, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case concerns the attempted rape of a five-year-old boy by appellant, the victim's cousin. A Shelby County grand jury indicted appellant for rape of a child and aggravated sexual battery. The State dismissed the charge for aggravated sexual battery prior to trial, which began on April 16, 2012.

I. Facts

At appellant's trial, the State presented Lissette Webster, a former employee at M.C. Outreach Learning Center, as its first witness. She testified that in March 2010, she worked at the learning center and served as a teacher's assistant in the victim's pre-kindergarten classroom. Ms. Webster stated that on March 3, 2010,[1] during nap time, she saw the victim crawl toward another child who was lying facedown on his mat. The victim crawled on top of the other child. When Ms. Webster reprimanded him, the victim stated, "I'm getting my ball," but then began crying and shaking when Ms. Webster continued her inquiry. Ms. Webster testified that she reported the incident and that the victim's mother, L.H.,[2] came to the school that day.

Ms. Webster described the victim as a helpful and "sweet little child." However, she explained that a few months prior to the March 3, 2010 incident, the victim became "very aggressive" and angry. The victim asked her if "your friend[s] [were] supposed to hurt you." Ms. Webster also observed the victim have a nightmare during nap time. While the victim was sleeping, she heard him say, "[O]w," and yell, "[N]o, no." The victim then placed his hand behind him in a "protective mode." Ms. Webster said that when she woke the victim, he got in her lap and began shaking. During cross-examination, Ms. Webster conceded that the victim never mentioned appellant to her.

During re-direct examination, Ms. Webster stated that one day, the victim arrived at school with his right leg swollen, which she reported. She also testified that during the March 2010 incident, the victim lay facedown on the other child's back and "arch[ed] his back to present a role."

The State called the victim to testify next. He stated that appellant touched the "inside" of his "behind" and that it hurt. He stated that this occurred in appellant's bedroom at Aunt Joe's[3] house while everyone else was at the store. The victim explained that appellant pulled down his (the victim's) pants and underwear. He stated that he and appellant were sitting down and that appellant was behind him. He felt part of appellant's

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[1] Although Ms. Webster could not recall the exact date that this incident occurred, subsequent testimony makes clear that the incident at the day care occurred on March 3, 2010.

[2] It is the policy of this court to protect the identity of minor victims; therefore, we will use the initials of the victim's mother in an effort to further protect his identity.

[3] L.H.'s testimony makes clear that "Aunt Joe" is Joe Margret Hamilton, appellant's grandmother and the victim's great-aunt.

body inside "the cheeks" of his "behind." The victim explained that he told his mother about the incident on the same day that his mother was asked to come to his day care.

During cross-examination, the victim testified that when he got in trouble at home his mother "hit" him with a belt. Although the victim did not remember when the incident with appellant occurred, he recalled that he was five years old. He also recalled that he told his mother about the incident the day after it occurred. He testified that his mother did not "hit" him after she learned about the incident at the day care.

L.H., the victim's mother, testified as the State's next witness. She testified that appellant and his mother, Betty Stokes,[4] were her cousins. Specifically, L.H.'s mother was the sister of Ms. Stokes's mother, Joe Margret Hamilton. L.H. testified that prior to January 2010, her family had been living with Ms. Hamilton but that after she received her income tax refund in January 2010, her family moved to another location. She explained that after they left, Ms. Stokes and appellant moved into Ms. Hamilton's home. However, the victim still occasionally visited and spent the night at Ms. Hamilton's home after they moved.

L.H. testified that in March 2010, she received a telephone call from M.C. Outreach Day Care while she was at Ms. Hamilton's house. A day care worker explained what had happened, and L.H. went to the day care. When she saw the victim, the victim ran to her and hugged her. She asked him why he was "acting out," and he shrugged. She asked him if someone had done that to him, and he responded, "No[,] ma'am." She and the victim then left the school and returned to Ms. Hamilton's house. After they arrived at the house, Ms. Hamilton; Ms. Stokes; Rhonda Lane, a neighbor; Shuntay Russell,[5] a cousin; L.H.; and the victim were present. However, appellant arrived after L.H. began asking the victim if anyone had been hurting him. L.H. testified that after appellant arrived, the victim "froze up" and refused to "say anything else." L.H. and the victim left and went to their home. L.H. again asked the victim to tell her what was going on, and the victim began to cry. He told her that "[appellant] put his private on [the victim's] butt." He said that the incident occurred while Ms. Hamilton and Ms. Stokes were at the store. The victim told L.H. that he told Ms. Stokes about the incident after she returned from the store. Ms. Stokes told him that she was going to call the police. After hearing the victim's account of the incident, L.H. began to cry and was upset and angry.

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[4] The witnesses in this case refer to Betty Stokes as Betty Smith. However, during her testimony, Ms. Stokes stated that her name was Betty Carol Smith Stokes. For clarity, we will identify her as Betty Stokes or Ms. Stokes throughout the body of this opinion.

[5] Some of the witnesses in this case refer to Shuntay Russell as Shuntay Smith. However, during her testimony, Ms. Russell stated that her name was Shuntay Denise Russell. For clarity, we will identify her as Shuntay Russell or Ms. Russell throughout the body of this opinion.

L.H. testified that she went to speak with Ms. Stokes, appellant's mother. However, the conversation with Ms. Stokes was unavailing. L.H. then returned to her home; called her boyfriend, Paul Williams; called the police; and took the victim to Le Bonheur Children's Hospital. She also took the victim to the Memphis Child Advocacy Center to be interviewed.

L.H. testified that she told the victim he needed to tell the truth and that she did not threaten him with corporal punishment. She stated that she usually disciplined her children by taking things away from them or not letting them go places. She asserted that she rarely whipped her children with a belt and that the whippings did not leave marks on her children. Mr. Williams also disciplined her children. L.H. recalled a time when the victim injured his leg and explained that the injury occurred when the victim fell off of a skateboard. She also stated that Ms. Hamilton and Ms. Stokes treated the victim differently after he told L.H. that appellant had harmed him.

During cross-examination, L.H. testified that the night prior to her being called to the day care, the victim spent the night at Ms. Hamilton's home. She denied that Mr. Williams came to the day care on the day that the victim was sent home early. She also denied asking the victim whether appellant had harmed him and denied striking the victim while she and appellant were at the day care. She testified that no one administered corporal punishment to the victim on the day he was brought home early from day care.

Lai Brooks, a nurse practitioner at Le Bonheur Children's Hospital, testified next. She stated that she specialized in sexual assault nursing and neurology and that she had been conducting forensic sexual assault examinations since 2009. She testified that she examined the victim on March 3, 2010, when the victim was five years old. Ms. Brooks explained that she did a full-body examination of the victim but that he did not have any injuries or abnormalities. She testified that after the incident with appellant but before her examination, the victim had "bath[ed], urinated, defecated, brushed his teeth, drank[,] ate[,] and changed his clothes." She recalled that the victim said someone had "put his thing in my boodie" but was unable to recall if the victim indicated that appellant was the perpetrator. Ms. Brooks testified that it was common not to find injuries to a victim's genital and rectal area after an assault and that in ninety-five percent of cases, there were no findings of injuries. She explained that the fact that there were no tears or bruises did not mean that a penetrating injury did not occur.

During cross-examination, Ms. Brooks stated that the victim was calm during her examination and that he seemed shy when talking about the incident with appellant. She also conceded that she could neither confirm nor discount the victim's allegations. She testified

that she took rectal, penile, and oral swabs from the victim during the examination to test for DNA.

The State presented Patricia Lewis, a forensic interviewer at the Memphis Child Advocacy Center, as its next witness. Ms. Lewis explained that when she interviewed the victim, he verbally disclosed that he had been abused. The victim then used pictures and dolls to indicate how the abuse occurred. Ms. Lewis stated that the verbal and non-verbal disclosures were consistent. The victim also corrected her once during the interview regarding the position of the dolls, which was significant to her because it indicated that the victim was "totally focused." Ms. Lewis described the victim as a "sociable" and "bubbly" child and stated that he was very cooperative. She also stated that the victim's language and knowledge of male and female anatomy, as well as his narrative ability, was age appropriate. When asked in what grade he was, the victim responded, "[T]he third grade." However, the victim then clarified that he was "getting ready" to attend first grade. Ms. Lewis testified that this type of response regarding "timing" was "normal for a five[-]year[-]old." The State then played the recording of the victim's forensic interview. In the interview, the victim stated that appellant took him into a bedroom. The victim also stated that appellant pulled the victim's pants and underwear down and that appellant "took out" his "private." He explained that both he and appellant were standing during the incident and that appellant was behind him. He stated that appellant put his "private in [the victim's] butt" and that appellant "[dug] in [the victim's] butt." The victim asserted that he told his Aunt Betty[6] about the incident and that she called the police.

During cross-examination, Ms. Lewis stated that she examined the victim on March 15, 2010. She agreed that when asked to indicate specific body parts on a diagram, the victim would indicate body parts on his person. However, she stated that it was common for children to lose focus during interviews and that the interviewer has to refocus the child. Ms. Lewis did not recall hearing the victim refer to the perpetrator as "they" but noted that later in the interview, the victim only referred to appellant. Ms. Lewis testified that the victim stated that no one else touched him and that he said that he was four when the incident happened. The State then rested its case-in-chief.

Appellant called Elizabeth Benson, an investigator for the Shelby County District Public Defender's Office, as his first witness. Ms. Benson testified that she spoke with Lissette Webster on the telephone twice on August 4, 2011. She stated that in the first conversation, she and Ms. Webster discussed the victim's nightmare and that Ms. Webster referred the perpetrators in the victim's dream as "they." They also had a second

[6] L.H.'s and Ms. Stokes's testimony make clear that "Aunt Betty" is Betty Stokes, the victim's cousin and appellant's mother.

conversation, which took place fifteen to twenty minutes after the first conversation. These conversations were both played for the jury. Appellant did not include these recordings or a transcript of the recordings in the appellate record, and the substance of the recordings is not included in the trial transcript.

During cross-examination, Ms. Benson conceded that Ms. Webster did not know that she was being recorded during the interview. She also stated that she asked Ms. Webster questions about the victim's home life and about whether the victim had touched any other children.

Appellant presented Debrah Burell, a director at M.C. Outreach Learning Center, as his next witness. Ms. Burell recalled an incident in the bathroom at the day care in which the victim acted inappropriately but stated that she did not see the incident occur. She testified that after the incident, Ms. Bell, the victim's teacher, reported the incident to her. Ms. Burell called L.H., the victim's mother, about the incident. She explained that L.H. and Mr. Williams, L.H.'s boyfriend, arrived at the day care and that Mr. Williams "had a belt." L.H. and Mr. Williams then entered the victim's classroom. Ms. Burell testified that she followed them into the classroom and that Mr. Williams was "upset." Ms. Burell stated that she and Mr. Williams had an argument and that she asked Mr. Williams to leave the building because he was using profanity in front of the students in the classroom. Mr. Williams went outside, and L.H. and the victim left the room.

Ms. Burell stated that she then went to speak with L.H. but that before she could enter the room, L.H. began repeatedly questioning the victim about whether someone had "touched him." Ms. Burell explained that L.H. did not ask the victim whether a specific person had harmed him and that L.H. only referenced appellant after L.H. brought the victim back to the day care at a later time. She also stated that the victim "kept saying no" in response to L.H.'s questions and that he did not identify a specific person as the perpetrator while he was in her presence.

During cross-examination, Ms. Burell conceded that the incident involving the victim could have occurred somewhere other than the bathroom. She also agreed that there was nothing unusual about the victim's not explaining the situation to his mother while another adult was present. She stated that on the day following the incident at the day care, L.H. called her and told her that appellant had "touched [the victim]." Ms. Burell also conceded that Mr. Williams was on the list of people who were allowed to pick up L.H.'s children and that he had been to the day care on other occasions. She explained that the incident occurred between 12:00 and 12:30 p.m. She stated that no one "whipped" the victim in her presence and that she did not observe any injuries on the victim the following day.

Betty Stokes, appellant's mother and the victim's cousin, testified next. She stated that she first learned of the incident in question when someone from the day care called her home and told L.H. that the victim was "acting out." She stated that she allowed L.H. to borrow her car and that Shuntay Russell, her niece, drove L.H. to the day care. Ms. Stokes explained that when they returned, she heard L.H. and Ms. Hamilton having a discussion about whipping the victim. She also denied that the victim told her about appellant's harming him and denied calling the police.

During cross-examination, Ms. Stokes testified that appellant was still at school when L.H. arrived back at her home after picking the victim up from day care. Ms. Stokes stated that L.H. did not attempt to speak with her regarding the incident. Ms. Stokes also denied questioning the victim about the incident. Ms. Stokes asserted that the victim continued to visit Ms. Hamilton at their home after the incident. Ms. Stokes testified that she loved appellant, her son, and that her family had a very close relationship. She admitted that she had been convicted of a felony for possession of cocaine with the intent to manufacture, sell, or deliver and that she had "an issue with cocaine" for many years.

Appellant presented Shuntay Russell as his next witness. She stated that the victim, L.H., and appellant were her cousins and that Ms. Stokes was her aunt. Ms. Russell testified that on the day of the incident at the victim's day care, she drove L.H. to the day care and waited in the car while L.H. went inside. Ms. Russell asserted that when L.H. returned to the car with the victim, L.H. "pushed [the victim,] and she kicked him[,] and she said[,] I'm going to beat your . . . [.]" Ms. Russell stated that the victim fell against a gate at the daycare. Ms. Russell testified that she told L.H. to wait until she returned home to "whip him." L.H. and the victim then entered the car, and Ms. Russell returned to Ms. Hamilton's home, where Ms. Russell lived with Ms. Hamilton, Ms. Stokes, and appellant. Ms. Russell stated that during the drive, L.H. told the victim that "she was going to whip him" and that "he knew better." Ms. Russell testified that when they returned to the house, L.H. was "looking for a belt" and that after she found one, the victim "was running from her." Ms. Russell explained that L.H. asked her to "hold [the victim's] hands while she whipped him" and that the two women took the victim to the restroom to administer the corporal punishment. Ms. Russell stated that Ms. Stokes was in her bedroom "right across" from the restroom while L.H. disciplined the victim. Ms. Russell recalled that during the punishment, the victim was crying and saying, "[M]om, nobody did. Nobody touched me," in response to L.H.'s questions regarding where he learned his imitated behavior. Ms. Russell also testified that L.H. asked the victim if appellant had harmed him and that the victim responded, "No, mom. Nobody did it." L.H. and the victim then left the house prior to appellant's returning home.

Ms. Russell also recalled a conversation on Thanksgiving Day in 2010, between the victim and Yolanda Shaw, her cousin. She stated that appellant had called the house telephone and that the victim wanted to speak to him. When the victim was not allowed to speak to appellant, Ms. Shaw asked the victim why he had accused appellant of harming him. Ms. Russell testified that the victim responded, "I didn't say that. My momma said that."

During cross-examination, when the State asked Ms. Russell why she had not informed appellant's investigator that L.H. had kicked the victim, Ms. Russell responded that the investigator had not asked. When the State asked Ms. Russell why she had not informed the investigator that she went into the restroom with L.H. to punish the victim, Ms. Russell continued to assert that she was in the restroom during the corporal punishment. When the State asked why Ms. Russell had originally stated that the victim repudiated his allegation against appellant in a conversation with Ms. Hamilton and not Ms. Shaw, Ms. Russell continued to assert that the conversation was between Ms. Shaw and the victim. Ms. Russell also conceded that L.H. was not an abusive parent. Ms. Russell testified that Mr. Williams, L.H.'s boyfriend, did not go to the day care with them to retrieve the victim and that she would have seen him if he had entered the building with a belt. Appellant rested his case at the conclusion of Ms. Russell's testimony.

The State's sole rebuttal witness was Yolanda Shaw, the victim's and appellant's cousin. She testified that on Thanksgiving Day in 2010, she was at Ms. Hamilton's house. She recalled Ms. Russell answering appellant's telephone call but stated that the victim was outside when the call was received. She testified that the victim did not request to speak with appellant on the telephone call. She also asserted that she did not speak with the victim about the victim's allegations.

At the conclusion of the trial, the jury found appellant guilty of criminal attempt to commit rape of a child. The trial court sentenced appellant to nine years in confinement. As a sex offender, appellant was required to register with the Tennessee Bureau of Investigation Sex Offender Registry.

II. Analysis

Appellant argues that the evidence at trial was insufficient to support his conviction. The State responds that the evidence at trial was sufficient. We agree with the State.

The standard for appellate review of a claim challenging the sufficiency of the State's evidence 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) (citing *Johnson*

v. Louisiana, 406 U.S. 356, 362 (1972)); *see* Tenn. R. App. P. 13(e); *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011). To obtain relief on a claim of insufficient evidence, appellant must demonstrate that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319. This standard of review is identical whether the conviction is predicated on direct or circumstantial evidence, or a combination of both. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977).

On appellate review, "'we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.'" *Davis*, 354 S.W.3d at 729 (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)); *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). In a jury trial, questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual disputes raised by the evidence, are resolved by the jury as trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). This court presumes that the jury has afforded the State all reasonable inferences from the evidence and resolved all conflicts in the testimony in favor of the State; as such, we will not substitute our own inferences drawn from the evidence for those drawn by the jury, nor will we re-weigh or re-evaluate the evidence. *Dorantes*, 331 S.W.3d at 379; *Cabbage*, 571 S.W.2d at 835; *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Because a jury conviction removes the presumption of innocence that appellant enjoyed at trial and replaces it with one of guilt at the appellate level, the burden of proof shifts from the State to the convicted appellant, who must demonstrate to this court that the evidence is insufficient to support the jury's findings. *Davis*, 354 S.W.3d at 729 (citing *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011)).

A defendant commits criminal attempt when:

. . . acting with the kind of culpability otherwise required for the offense[, the defendant]:

> (1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101.[7] Criminal attempt is an offense one classification lower than the most serious crime attempted. Tenn. Code Ann. § 39-12-107(a).

Rape of a child "is 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. Sexual penetration is defined as "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).

A jury convicted appellant of one count of criminal attempt to commit the rape of a child. Viewed in the light most favorable to the State, the evidence supports this conviction. The evidence at trial showed that prior to the March 3, 2010 incident at the victim's day care, appellant attempted to rape him. The victim described the attempted rape to several individuals. The victim told his mother that "[appellant] [had] put his private on [the victim's] butt." The victim described the incident to Lai Brooks, a nurse practitioner at Le Bonheur Children's Hospital, by saying that someone "put his thing in my boodie," but Ms. Brooks was unable to recall if the victim indicated that appellant was the perpetrator. The victim also described the incident to Patricia Lewis, a forensic interviewer at the Memphis Child Advocacy Center. The victim stated that appellant took him in a bedroom and pulled the victim's pants and underwear down and that appellant "took out" his "private." He explained that appellant put his "private in [the victim's] butt" and that appellant "[dug] in [the victim's] butt." The victim also testified in this case and stated that he was five years

[7] We note that the trial court instructed the jury regarding all three subdivisions of the criminal attempt statute. The Sentencing Commission Comments to Tennessee Code Annotated section 39-12-101 state, "Subdivisions (a)(1)-(3) are not intended to define mutually exclusive kinds of criminal attempt. Rather, these three subdivisions set out alternative statutory tests for determining if a course of conduct that does not produce a proscribed harm can be classified as an attempt to commit an offense." Therefore, the trial court committed no error by instructing the jury regarding the three tests for criminal attempt. *See State v. Daniel Joe Brown*, No. 02C01-9611-CC-00385, 1997 WL 746440, at *9 (Tenn. Crim. App. Dec. 2, 1997) ("[W]e conclude that there is no requirement that the jury unanimously agree on one of the three theories necessary to support an attempt crime."); *State v. Howard Martin Adams,* No. 03C01-9403-CR-00123, 1995 WL 10340, at *4 (Tenn. Crim. App. Jan. 11, 1995) (" [W]e do not believe that a trial court should limit its jury instructions about a criminal attempt to less than all three tests provided by the statute.").

old when this incident occurred. He explained that appellant touched the "inside" of his "behind" and that it hurt. He also said that he felt part of appellant's body inside "the cheeks" of his "behind."

Furthermore, prior to the March 3, 2010 incident at the victim's day care, Ms. Webster, a former employee at the victim's day care, observed the victim have a nightmare during nap time. While the victim was sleeping, she heard him say, "[O]w," and yell, "[N]o, no." The victim then placed his hand behind him in a "protective mode." Finally, the victim attempted to imitate similar behavior at the day care when he crawled on top of another child, who was lying facedown, and arched his back. This evidence supports appellant's conviction. From this proof, any rational jury could have found appellant guilty of criminal attempt to commit the rape of a child beyond a reasonable doubt. The evidence here was sufficient to support appellant's conviction, and appellant is without relief as to this issue.

CONCLUSION

Based on the parties' briefs, the record, and the applicable law, we affirm the judgment of the trial court.

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ROGER A. PAGE, JUDGE