IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 29, 2008 Session

STATE OF TENNESSEE v. TRAVIS BURRIS

Appeal from the Criminal Court for Campbell County
No. 12654 E. Shayne Sexton, Judge

No. E2007-02072-CCA-R3-CD - Filed February 27, 2009

The defendant, Travis Burris, was convicted by a Campbell County Criminal Court jury of sexual battery, a Class E felony. See T.C.A. § 39-13-505 (2003) (amended 2005). He received a two-year sentence as a Range I offender, to be served as forty-five days in jail and four years of probation. On appeal, he contends that insufficient evidence exists to support his conviction because the State failed to prove he committed the offense for the purpose of sexual arousal or gratification. We affirm the judgment of the trial court.

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

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Michael G. Hatmaker, Jacksboro, Tennessee, for the appellant, Travis Burris.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; William Paul Phillips, District Attorney General; Scarlett Wynne Ellis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant's conviction relates to his conduct toward the minor cousin, K.H., of his wife, Davina Burris. The defendant was charged with the offense of rape and convicted of the lesser included offense of sexual battery.

At the trial, K.H. testified that she was born on February 24, 1991. She said that around May 2004, when she was thirteen years old, she spent a lot of time at the defendant's home, staying there every other weekend and other times when she did not have school. She described having a close relationship with the defendant, his wife, and their two children. She participated in cheerleading activities with the defendant's eight-year-old daughter.

K.H. testified that she was asleep in bed with the eight-year-old daughter on the night of May 26 or morning of May 27 when she was awakened by the defendant rubbing her leg. She said she became scared and crossed her legs at her ankles but that the defendant forced her legs apart. She said that she kept crossing her legs as hard as she could but that the defendant kept forcing them apart. She said he stuck his finger in her "private area" between her legs, which she said was underneath her shorts and panties. She said that she coughed and that he removed his finger and left the room. She said that the defendant did not say anything during the encounter but that he had been looking underneath the bedcovers with a flashlight. She said that she had been underneath the bedcovers but that the defendant had removed them.

K.H. testified that shortly after the incident, a dog that was sleeping in the bed vomited. She said that the defendant and Davina Burris came into the room to remove the sheets but that she did not say anything about the earlier incident because she was scared and wanted to tell her mother first.

K.H. testified that the next day around noon, Davina Burris took her to the daycare where Davina was employed along with the defendant's and Davina's mothers and some other relatives. She said she was there for about five hours but did not tell any of these people what the defendant had done. Later that day, Davina took K.H. to cheerleading practice. K.H. said that her mother, Deena Jeffers, picked her up from cheerleading practice and that she told her mother when they walked out of practice what the defendant had done.

K.H. testified that her mother was pregnant at the time and became so distraught that evening that she had to be taken to the hospital. She said her mother almost lost her baby. K.H. said that she was examined sometime later by a nurse practitioner but that she did not know how long it was following the incident.

Gail Clift, a pediatric nurse practitioner and sexual assault nurse examiner, testified as an expert in forensic sexual assault nurse examinations. She examined K.H. on July 27, 2004. She said K.H. had a small vaginal tag attached to her hymen and a cleft in her hymen. She said that these abnormalities could be either from an injury or anatomical variances, the latter meaning they had existed from birth. She said a skin tag may form adjacent to an injury. She said that the cleft could have been from digital penetration but that it would not have resulted from tampon use or cheerleading. She said her findings neither confirmed nor disproved penetration.

Deena Jeffers testified that she was K.H.'s mother. She said K.H. reported what had happened with the defendant on May 27, 2004, as they were leaving cheerleading practice. She said K.H. was nervous, upset, shaking, and crying. She said that she called Davina Burris that evening for her to come to their home and that K.H. told Ms. Burris what had happened. She said that they reported the matter to the LaFollette Police Department the following day. She said the delay in reporting the matter to the police was due to a complication with her pregnancy that required emergency medical treatment that night. She acknowledged that she did not take K.H. for a medical evaluation for two months.

Robert Byrge testified that he was K.H.'s grandfather. He said the defendant called him a couple of weeks after the incident and wanted to talk. He instructed the defendant to come to his

place of employment, and the defendant did so. He said the defendant told him he "didn't do it." He said the defendant stated that he had gone into the bedroom where K.H. and the defendant's daughter were asleep to check on a sick dog and found one of the girls uncovered. He said that the defendant claimed that K.H.'s buttocks were exposed and that the defendant said he had taken the victim's panties out of her "crack" with his finger. He said that the defendant stated that the victim had done the right thing by reporting the incident but that he had done nothing wrong.

Captain Jack Widener of the LaFollette Police Department testified that he interviewed the defendant on June 10, 2004. He said the defendant made no statement other than that "God had forgiven him and he hoped the family would, too." He said that he interviewed the defendant a second time on June 14, 2004, and that the defendant said he had gone into the bedroom to check on the girls and the dog. Captain Widener stated that the defendant said that he found K.H. uncovered with her clothing rolled up into her "crack" and that he took his finger and removed her clothing from her "crack" and covered the girls. He said the defendant stated that he thought K.H. was asleep. He said the defendant stated that he did not want anyone to think he had done anything inappropriate.

A transcript of the defendant's June 14 statement to Captain Widener was read to the jury, with Captain Widener acknowledging its contents. In the statement, the defendant said that he loved K.H. like a daughter and denied having sexual feelings for her.

The defendant did not offer proof. The jury acquitted the defendant of rape but found him guilty of sexual battery. This appeal followed.

The defendant challenges the sufficiency of the evidence to sustain his conviction. Focusing on a statement by the trial court at sentencing, he argues that the State failed to present sufficient proof that his touching of K.H. was for the purpose of sexual arousal or gratification. He argues that he is guilty of no offense greater than assault. The State responds that the trial court's statements with respect to application of the enhancement factors at sentencing are not on point in evaluating the sufficiency of the evidence and that the jury resolved the conflicts in the evidence with respect to the elements of the offense in favor of the State, a determination that the appellate court may not revisit.

Sexual battery is defined, in pertinent part, as:

> (a) unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:
> (1) Force or coercion is used to accomplish the act;
> (2) The sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the contact that the victim did not consent;
> (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
> (4) The sexual contact is accomplished by fraud.

> (b) As used in this section, "coercion" means the threat of kidnapping, extortion, force or violence to be performed immediately or in the future.
> . . .

T.C.A. § 39-13-505(a), (b) (2003) (amended 2005). In addition, the Code provides that "sexual contact" includes:

> (6) the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of 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[.]

T.C.A. § 39-13-501(6) (2003) (amended 2005).

While making findings regarding enhancement factors at the sentencing hearing, the trial court stated, "I don't find that there is sufficient evidence to support that the victim was – that the offense was committed to gratify the defendant's desire for pleasure or excitement." The court made this statement when announcing its findings about the enhancement factors that had been addressed in argument. The defendant had argued that the trial court should not enhance the defendant's sentence with the enhancement factor providing, "The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement[,]" because this was an element of the offense. See T.C.A. § 40-35-114(8) (2003) (amended 2005, 2007); see also T.C.A. § 40-35-114 (2003) (amended 2005, 2007) (providing that enhancement factors may be applied if appropriate for the offense and not essential elements of the offense). The State argued that the factor should apply based upon the proof.

We note, first of all, that the trial court was addressing enhancement factors, not sufficiency of the evidence. At the motion for new trial hearing, the court addressed and rejected the defendant's argument that the evidence was not sufficient because it failed to show that the defendant's actions could be reasonably construed as being for the purpose of sexual arousal or gratification. The court found that there was sufficient proof to support a verdict of either sexual battery or assault and that the jury resolved the conflicts in the evidence in favor of a sexual battery verdict. The trial court noted, as well, that it had accepted the verdict previously and reiterated its approval. See Tenn. R. Crim. P. 33(d). In light of these findings of the trial court with respect to the sufficiency of the evidence, we are unconcerned with the trial court's statements at the sentencing hearing and construe them as nothing more than a finding that the enhancement factor should not apply.

Turning, then, to the evidence presented at trial, we note that the defendant went into the bedroom where K.H. was sleeping late at night with a flashlight. K.H. testified that the defendant was looking under the bedcovers with the flashlight and that she struggled with him to keep her legs crossed but that he forced them apart. According to the defendant's own admissions, he thought K.H. was asleep, and when he saw her exposed buttocks, rather than simply covering her with

bedcovers, he removed her rolled shorts and panties from between her buttocks. He later made a statement when questioned about the offense that "God had forgiven him and he hoped the family would, too." Despite the fact that the jury chose not to find beyond a reasonable doubt that the State had proven penetration, there was sufficient proof from the testimony of the victim and the State's other witnesses that the defendant committed the offense of sexual battery, and specifically that his actions were for the purpose of sexual arousal or gratification.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE