

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs January 8, 2002

STATE OF TENNESSEE v. MICHAEL DANELLE HARVEY

**Direct Appeal from the Circuit Court for Madison County
No. 00-544 Donald H. Allen, Judge**

No. W2001-01164-CCA-R3-CD - Filed May 31, 2002

Defendant was convicted for one count of statutory rape and one count of criminal exposure to HIV. Defendant appeals alleging (1) that there was insufficient evidence to support his convictions and (2) the imposition of consecutive sentences was excessive. We affirm the trial court judgment.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID G. HAYES and ALAN E. GLENN, JJ., joined.

Clifford K. McGown, Jr., Waverly, Tennessee (on appeal); George Morton Googe, District Public Defender (at trial and on appeal); and Vanessa D. King, Assistant District Public Defender (at trial and on appeal), for the appellant, Michael Danelle Harvey.

Paul G. Summers, Attorney General and Reporter; Angele M. Gregory, Assistant Attorney General; James G. (Jerry) Woodall, District Attorney General; and Shaun A. Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On July 3, 2000, defendant, Michael Danelle Harvey, was indicted for statutory rape, a Class E felony, in violation of Tennessee Code Annotated section 39-13-506 and for criminal exposure to HIV, a Class C felony, in violation of Tennessee Code Annotated section 39-13-109. A jury found defendant guilty of both charges. After a sentencing hearing, defendant was sentenced to six years for statutory rape and fourteen years for criminal exposure to HIV. The sentences were ordered to be served consecutively. They were ordered to be served consecutively with two prior Madison County sentences for which defendant was on parole at the time the current offenses were committed.

Defendant filed a motion for new trial and a verdict of acquittal. The motion was denied. Defendant filed a timely notice of appeal and contends (1) that there was insufficient evidence to support his convictions and (2) that the imposition of consecutive sentences was excessive.

Facts

The facts give rise to an allegation that on January 1, 2000, defendant, age twenty-four, had sex with the victim, age fourteen, while defendant was infected with HIV and knew that having unprotected sex would expose the victim to great danger. The following testimony was adduced at trial.

David Argo, manager of the Sexually Transmitted Disease Control Program at the Jackson-Madison County General Health Department, testified that defendant had been a patient at the health department since the early 1990's. He stated that defendant was diagnosed with HIV in 1993. He further stated that HIV is the virus that leads to the development of AIDS. He testified that the role of the program in which he works is to "educate [patients] to what the disease – the implications of the disease, the ramifications of the disease, the – how the disease is transmitted, and, of course, go over information as to where they contracted this disease."

Argo testified that defendant was advised that anyone might be at risk of contracting the virus if coming into contact with defendant's blood or bodily fluids and that he should inform any potential sexual partner of that risk. He testified that defendant was given a form that specifically advised defendant of those risks. He also stated that he personally reviewed the form with defendant on previous occasions. The form, entitled "Important Information Regarding HIV Infection," was read into the record.

Argo testified that the victim was brought into the clinic for an STD screening. At this point, Argo learned of the sexual activity between defendant and the victim and stated he was concerned because he was aware of defendant's history. He also stated that on January 24, 2000, defendant was again tested for HIV and tested positive. He further stated that defendant tested negative for other sexually transmitted diseases including syphilis, chlamydia, and gonorrhea.

The victim testified that on January 1, 2000, she spent the night at the home of defendant's mother. She testified that she was friends with defendant's niece, Darcelia Day, and was spending the night with Darcelia. She testified that at that time she was fourteen years old. She stated that she met defendant in November of 1999. She said that defendant, his mother, his two sisters, and his niece Darcelia Day were all present. She also stated that on that evening she and defendant had sexual intercourse. She testified that the intercourse was consensual.

The victim stated that when she first met defendant in November of 1999, she told defendant how old she was. She stated that on January 1, at about 5:00 or 5:30 p.m., some of defendant's family members left to take someone to the hospital, leaving the victim, defendant, and Darcelia at home. She stated that she and Darcelia were in defendant's mother's bedroom when the victim left

and went into defendant's bedroom where defendant was located. She said that no form of birth control was used by either herself or defendant. The victim further testified that she was never told by defendant that defendant suffered from HIV, and she stated that had she known defendant was HIV positive, she would not have had sex with him.

The victim testified that defendant's family members returned around 8:00 p.m. She stated that she did not tell Darcelia that she and defendant had sex. She and Darcelia returned to Darcelia's home later that evening, and she spent the night at Darcelia's house.

On January 15, 2000, the victim told her mother about the sexual encounter she had with defendant. At this point, the record reflects that the State attempted to elicit testimony regarding how the victim found out about defendant's condition. Defendant objected on grounds of hearsay, and the subsequent testimony reveals that the victim was aware of defendant's condition. She stated that she told her mother because she was concerned about the HIV. Her mother took her to the health department to be tested for HIV. She tested negative for HIV but will have to be retested every six months. However, she stated that she tested positive for gonorrhea but, prior to the test, did not know she had gonorrhea and had never been treated for the disease. She testified that she talked with defendant by telephone at which time she asked him if he had HIV, and he denied having HIV or AIDS.

On cross-examination, she acknowledged that she reported to the health department that she had experienced a discharge for two months prior to the visit when she was diagnosed with gonorrhea. She stated that she did not know that the discharge was a symptom of gonorrhea. She finally stated that her mother called the police department after learning that defendant was twenty-four years old.

Dr. John Guidi, medical director of the Communicable Disease Clinics in Jackson, testified that he was defendant's doctor. Dr. Guidi testified that he began seeing defendant in 1995 and at that time, defendant was HIV positive. As of January 14, 2000, the HIV had not developed into AIDS. The doctor stated that he advised defendant of the consequences of the disease. He stated that a form had been developed to inform HIV patients that HIV was a life threatening, communicable disease. He testified that he advised defendant of this, and defendant signed the form. The form was introduced into evidence.

The doctor testified that prior to January of 2000, during his treatment of defendant, defendant was never treated for any other sexually transmitted disease. He further stated, however, that defendant was taking an antibiotic and that such antibiotic could have potentially cured any infection. The doctor stated that gonorrhea is easily transmittable but is not 100% transmittable. Finally, he stated that if a patient has one disease and is involved in sexual intercourse, it is not 100% certain that the partner will contract the same disease.

Criminal investigator Cathy Ferguson, who is employed by the Jackson Police Department, stated that the victim's mother was interested in pressing charges. She stated that she interviewed

defendant, and defendant gave his consent for Ferguson to obtain defendant's medical records. A copy of the records were obtained pursuant to a search warrant. She testified that she learned defendant was twenty-four years old at the time of the incident. She also learned that defendant was taking antibiotics for an upper respiratory infection.

Defendant's mother, Jattie Harvey, testified that she was at home during the entire day of January 1, 2000, and the victim did not come over to Ms. Harvey's house. She stated that defendant's niece, Darcelia Day, was not home that day as she was visiting a friend in Brownsville. Ms. Harvey testified that no one went to the hospital that day. She also stated that defendant was with one of his older brothers, Willie, and did not return until later that evening. She stated that she and her family knew that defendant was HIV positive. She also acknowledged that defendant was not living with her during that time, but that he was staying with his brother or other friends.

Willie Harvey, defendant's brother, testified that he was with defendant the entire day of January 1, 2000. He testified that he was with his cousin Frederick Anderson, his nephew Brian Day, and defendant during the day celebrating the new year. He testified that he dropped off defendant on January 2nd. He testified on cross-examination that in May of 1994, he was convicted of theft of property. He also testified that on January 1, 2000, no one in his family went to the hospital.

At the conclusion of the trial, a jury found defendant guilty of both statutory rape and criminal exposure to HIV.

A sentencing hearing was conducted on March 9, 2001, at which time the State introduced a presentence report prepared by the Tennessee Department of Correction. Defendant's mother testified that her daughter recently died, and defendant's mother was left with two grandchildren to raise. She testified that she is not in good health and had suffered a heart attack and stroke. She also stated that defendant was the only one available to help with the children. She said that she was unable to return to work. She finally stated that her son suffers from depression.

Defendant testified on his own behalf and denied the offense of statutory rape for which he was convicted. He asked the court to consider his poor health. He testified that he was needed to help with his mother.

The court ruled that defendant should receive a six-year sentence on the statutory rape conviction to run consecutively with a fourteen-year sentence for the criminal exposure to HIV conviction. He was also fined \$1,500 and \$5,000 for each crime, respectively.

Analysis

I. Sufficiency of Evidence

Defendant alleges that the evidence was insufficient to support his convictions. Though he does not specify in his brief which conviction he is challenging, whether the statutory rape or criminal exposure to HIV, we affirm both.

When a defendant challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); Tenn. R. App. P. 13(e). This rule applies to findings of guilt based on direct, as well as circumstantial, evidence. State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977). 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. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). 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).

To convict defendant of statutory rape, the State must prove beyond a reasonable doubt that defendant sexually penetrated the victim when the victim was at least thirteen (13), but under eighteen (18) years of age, and defendant was at least four (4) years older than the victim. Tenn. Code Ann. § 39-13-506(a). To convict defendant of criminal exposure to HIV, the State must prove beyond a reasonable doubt that defendant, knowing he was HIV positive, engaged in intimate contact with the victim. Tenn. Code Ann. § 39-13-109(a)(1).

In the instant case, when viewed in a light most favorable to the State, the evidence reveals that defendant committed statutory rape upon the victim. Defendant asserts that it was impossible for the crime to have occurred because defendant, with the testimony of his mother and brother, “proved he was elsewhere” at the time of the alleged rape. Indeed, the only testimony attempting to establish the act is that of the victim. The question, then, is purely one of credibility of the witnesses. It is a jury question. The jury obviously found the victim’s testimony more credible than that of defendant’s mother and brother. As such, we cannot and will not reweigh the evidence. We affirm the conviction for statutory rape.

The evidence, when viewed in a light most favorable to the State, also reveals that defendant criminally exposed the victim to HIV. The testimony revealed that defendant, at the time of the alleged sexual encounter, was infected with HIV. Defendant does not dispute this. There is also clear evidence that he was informed of the dangers of unprotected sex. However, defendant’s defense is that he did not have sex with the victim. Again, this issue is one of credibility and is thus a determination to be made by a jury. We conclude that there is sufficient evidence for a reasonable jury to find defendant guilty beyond a reasonable doubt. We affirm the conviction for criminal exposure to HIV.

II. Sentencing

Defendant next asserts that the trial court erred in imposing consecutive sentences. We disagree and affirm the trial court's judgment.

When there is a challenge to the length or manner of service of a sentence, this Court conducts 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 State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In conducting a *de novo* review of a sentence, this Court must consider (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, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

A trial court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous, mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b)(1)-(7).

In the instant case, the trial court made specific findings of fact in sentencing defendant. The trial court judgment is therefore entitled to a presumption of correctness.

The trial court found that consecutive sentencing was justified based upon Factors two (2) and four (4) of the above-mentioned statute. The trial court found that defendant had a record of extensive criminal activity. A review of defendant's presentence report justifies this conclusion. The report indicates that defendant has a lengthy record of felonies, which, among other crimes, includes burglary, aggravated burglary, and theft. Further, the trial court found that defendant is a dangerous offender whose behavior indicates little or no regard for human life. In applying this factor, the trial court noted the seriousness of the underlying crimes for which defendant was convicted and for exposing a fourteen-year-old child to HIV. The court also noted its concern for the fact that defendant has fathered at least one child since testing positive for HIV. We conclude that the trial court properly considered these factors in finding that defendant acted with little regard to human life. Concluding that the trial court properly applied the factors in imposing consecutive sentencing and properly placed its findings in the record, this Court affirms the trial court's judgment.

CONCLUSION

Accordingly, we affirm the judgment of the trial court.

JOHN EVERETT WILLIAMS, JUDGE