IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 25, 2006

STATE OF TENNESSEE v. ALVIN W. ALLEN

Direct Appeal from the Circuit Court for Maury County
No. 14090 Jim T. Hamilton, Judge

No. M2005-02573-CCA-R3-CD - Filed February 20, 2007

After a bench trial, the Maury County Circuit Court convicted the appellant of child rape and sentenced him to twenty years in confinement. In this appeal, the appellant claims (1) that the trial court erred by refusing to suppress his statement to police, (2) that the evidence is insufficient to support the conviction, and (3) that his sentence is excessive. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES, and J.C. MCLIN, JJ., joined.

Robin Farber, Columbia, Tennessee, for the appellant, Alvin W. Allen.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; Mike Bottoms, District Attorney General; and Christi Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The victim, C.O.,[1] was thirteen years old at the time of trial and testified that she was born on January 16, 1991. In August 2003, the appellant and his wife lived in a house behind the victim's home and the appellant and the victim would "hangout together." One night, the appellant's wife asked the victim if she wanted to spend the night for a "girls' night," and the victim decided to spend the night at the Allen home. Alexis Daniels and Andrew Pierce were also present at the home, and Pierce was the victim's boyfriend at the time. Sometime that evening, the appellant's wife took

[1] It is the policy of this court to refer to minor victims of sexual crimes by their initials.

Daniels and Pierce home, and the victim was at the Allen home alone with the appellant. The victim was upset because Pierce had just broken up with her, and she was sitting outside on a porch railing. The appellant approached the victim and tried to hug her, but the victim pushed him away and the appellant went inside the house. After the appellant's wife returned, the victim got ready for bed and put on a t-shirt and boxer shorts. She did not wear a bra or panties under her pajamas and went to bed in the computer room, which was next to the appellant's and his wife's bedroom. The victim got into bed and fell asleep while lying on her stomach but was awakened by someone rubbing her back. The appellant's hand was under the covers and the victim's t-shirt, and she heard the appellant tell her that everything was going to be okay. The victim pushed the appellant's hand away, acted like she was asleep, and told him to leave her alone. The victim rolled over onto her back and pulled the covers over her. The appellant pulled down the covers and started rubbing the victim's bare stomach.

The appellant told the victim that everything was going to be okay and that he was not going to hurt her. The appellant put his hand up the victim's t-shirt, and she pushed him away and told him to stop. The appellant then put his fingers in her boxer shorts and tried to put "his hand down there." The victim pulled the appellant's hand away and told him to stop. The appellant told the victim that he was not going to hurt her and left the room. The victim fell asleep but was awakened again a short time later. Her boxer shorts were pulled down to her knees, her knees were bent, and the heels of her feet were touching the backs of her legs. The victim could feel the appellant's knees on her feet, and the appellant pushed his penis inside of her. The appellant was hurting the victim, and she told him to stop. He got off the victim, and the victim pulled up her boxer shorts, hid under the covers, and put a pillow over her head. The appellant went into the living room, where his wife was sleeping, and the victim fell asleep. She did not say anything to the appellant's wife about what he had done, and she went home the next day. Two or three weeks later, the victim told the appellant's sister, Brenda Odom, about the rape.

On cross-examination, the victim acknowledged that she had visited the Allens' home before, had used their computer, and treated their home as a place she could go. She also acknowledged that she had felt safe with the appellant and his wife, considered the appellant to be a father-figure, and was not afraid of him. She acknowledged that the appellant did not ask her to spend the night at his house and that she had wanted to spend the night there in order to spend some time with Andrew Pierce. She stated that after Pierce broke up with her, she no longer wanted to spend the night with the Allens and asked the appellant if she could telephone home. However, the appellant told the victim that she should stay and have some fun. She acknowledged that she never told anyone prior to trial that the appellant would not let her use the telephone. She also acknowledged that someone named Mike Collins was also at the Allens' home that evening, but she stated that he had left by the time she went to bed.

The victim acknowledged that the appellant's wife was in the living room during the rape and that the appellant would have had to walk through the living room in order to get to the computer room. She also acknowledged that after the appellant rubbed her back and she pushed him away, she rolled onto her back; the appellant did not roll her over. She stated that she did not tell the

appellant's wife what he had done because she was "scared that he was going to say something or do something to me." She said that although the appellant never threatened her, his actions scared her. She acknowledged that she never told Mount Pleasant Police Investigator Tommy Goetz or the investigator from the Department of Children's Services (DCS) that the appellant left the room and later returned. She said she did not tell Investigator Goetz the whole truth about the rape because she "was scared if I did they would take me away from my mom." The victim stated that she was not lying but acknowledged that she would say anything to prevent being taken away from her mother.

The victim testified that she did not scream out in pain when the appellant pushed his penis into her. About 11:30 a.m. the next day, she telephoned her mother but did not tell her mother about the rape. The day after the rape, the victim and Pierce spent some time with the appellant and his wife. She acknowledged that when her friend, Jamie Wright, asked her what had happened at the appellant's home, she said, "Nothing happened." On redirect examination, the victim testified that she told a DCS worker that the appellant rubbed her back and stomach, that he put his hand inside her boxer shorts, that she told him to stop, that she pushed him away, and that something was put inside of her.

Investigator Tommy Goetz testified that he received a complaint of child sexual abuse involving the appellant and the victim. On September 9, 2003, he went to the victim's school to speak with her. However, school officials would not allow him to talk with the victim without parental consent, so Investigator Goetz and Sergeant Charles Vendever went to speak with the appellant at his workplace, the Tennessee Aluminum Plant. They arrived at the plant about 10:15 a.m. and spoke with the plant manager. The two officers and the appellant then met alone in the manager's office, and Investigator Goetz told the appellant that he needed to speak with him about a matter. Investigator Goetz told the appellant that he was not under arrest and that the police did not have a warrant for the appellant's arrest. He recited Miranda warnings to the appellant, and the appellant stated that he understood the warnings. Investigator Goetz then asked the appellant about the victim's spending the night in his home, and the appellant told him the following: The victim had slept in the computer room. The appellant went into the room, and the victim was crying. He began rubbing her stomach and private areas and put his right index finger inside of her for about five minutes. The appellant became sexually aroused and "did play with himself during this time." The appellant denied putting his penis inside the victim.

Investigator Goetz testified that he wrote down the appellant's statement, telephoned the district attorney's office, and took the appellant to the police department. He then returned to the victim's school and was able to speak with her. The victim told him that the appellant came into the computer room and began rubbing her back. She told him to stop, and he kept telling her that everything was going to be all right and that he would not hurt her. The appellant rubbed the victim's stomach and breast and tried to rub her privates. He got on top of her and put his penis inside of her. Investigator Goetz returned to the police department and charged the appellant with rape of a child.

On cross-examination, Investigator Goetz testified that prior to visiting the appellant's workplace, he had spoken with the appellant's mother. The appellant's mother, not the victim, made allegations about him and the victim. Investigator Goetz also spoke with the appellant's sister, Brenda Odom. He acknowledged that he did not ask the appellant about his level of education and said that he assumed the appellant had a high school diploma or a general equivalency diploma (GED). He stated that he did not read Miranda warnings to the appellant but recited them from memory and that the appellant said he understood the warnings. He said that when he first asked the appellant about the victim, the appellant "had a hard time looking at me." Investigator Goetz told the appellant that the victim did not have a reason to lie, and the appellant held his head down and said, "She dresses like a slut." The appellant never denied raping the victim but denied penile penetration. Investigator Goetz acknowledged that there were inconsistencies in the victim's story. For example, the victim never told Investigator Goetz that she woke up with her knees bent or that the appellant had masturbated, and she told him that she ran into the bathroom to get away from the appellant.

Angie Allen, the appellant's wife, testified for the appellant. She said that she and the appellant had been married for about nine years, that the appellant had never been in trouble during that time, and that she never saw the appellant interact strangely with the victim. On the day in question, Angie Allen, the appellant, the victim, and Andrew Pierce were at the Allens' home, and the victim asked if she could spend the night, which she had never done before. Angie Allen did not say yes or no, but the victim ended up spending the night. That evening, some people stopped by the house to visit. About 2:00 a.m., Angie Allen and the victim drove Pierce home. When they returned to the Allen home, the victim went to bed and Angie Allen watched television in the living room. The appellant had been outside but came inside, and he and his wife went to bed in their bedroom. Angie Allen stated that she would have been awakened if the appellant had gotten out of bed. She also stated that after the victim reported the rape, the victim told her that the victim had lied about the allegations and had been paid to lie. The victim told Allen that she had lied because she needed the money. Angie Allen testified that after the alleged rape, the victim did not act like someone who was afraid of the appellant. She stated that she loved the appellant very much and was telling the truth.

On cross-examination, Angie Allen testified that she did not remember telling the victim that the victim should spend the night for a girls' night. She said that the victim came over to her house all of the time but that she did not know the victim well enough to consider her a friend and felt sorry for the victim because the victim's mother worked all of the time. On the night of the alleged rape, Pierce had told the victim that he did not want to see her anymore because he was seventeen years old and the victim was too young for him. After the victim told Angie Allen that she had lied about the rape, Allen did not take the victim to the police department and did not inform Investigator Goetz about the victim's lies. She said that she could not get in touch with the investigator and that she did not ask the victim how much money the victim had been paid because "it wasn't none of my business."

The appellant testified that he had never been in trouble with the law prior to this offense, could read but not write in cursive, and had only gone through the eighth grade. On the day of the alleged rape, he was never outside alone with the victim, never tried to put his arm around her, and told his wife that he did not think it was a good idea for the victim to spend the night. Sometime that evening, the appellant's wife and the victim drove Andrew Pierce home. When they returned, the appellant stayed outside for a while and then went inside and watched television with his wife. The victim was already asleep in the computer room when the appellant and his wife went to bed. He said he never went into the computer room, never touched the victim's back or stomach, and never digitally penetrated her. The next day, Pierce returned to their home, and the victim "jumped on the boy and straddled him and tried to put hick[ies] all over his neck."

The appellant testified that on September 9, 2003, Investigator Goetz visited him at work. Investigator Goetz told the appellant that he did not have a warrant for the appellant's arrest and was not going to arrest him. However, the officer never told the appellant that he did not have to speak with the officer, had a right to an attorney, and had a right to remain silent. The appellant told Investigator Goetz that he did not touch the victim or put his finger inside the victim. Regarding the statement written out by Investigator Goetz and signed by the appellant, the appellant said that he "did not tell [Investigator Goetz] all that stuff that's on that paper."

On cross-examination, the appellant acknowledged that he could read part of the statement and that he signed the written statement. He said he signed it because he was scared and did not know what to do and because Investigator Goetz told him, "Sign this and everything is going to be okay." Investigator Goetz read part of the statement to the appellant before he signed it but did not read the bottom part of the statement to him. The appellant said he did not tell Investigator Goetz the victim dressed like a slut. The appellant's wife told him that the victim had admitted lying about the rape. The appellant stated that the victim had also written a letter to her friend, Jamie Wright, in which she admitted that she had lied and "wanted to see [the appellant] behind bars." The appellant said that he had seen the letter and that he thought his attorney had it.

Sergeant Charles Vandever of the Mount Pleasant Police Department testified for the State on rebuttal that he accompanied Investigator Goetz to speak with the appellant on September 9, 2003. Investigator Goetz introduced himself and Sergeant Vandever to the appellant and told the appellant that he did not have warrants for his arrest. Investigator Goetz told the appellant that he needed to speak with him about a case and advised the appellant of his rights. At first, the appellant denied raping the victim. However, he later told the officers that he went into the computer room, got into the bed, rubbed the victim's back and breast, and digitally penetrated her. The appellant also stated that he masturbated during the penetration. Investigator Goetz wrote out the statement and read the statement to the appellant. Investigator Goetz asked the appellant if he understood the written statement and asked the appellant to sign it, which the appellant did. On cross-examination, Sergeant Vandever testified that he had known the appellant "for quite a while" but did not know the appellant had not graduated from high school. The trial court found the appellant guilty of child rape.

II. Analysis

A. Suppression of Appellant's Statement

The appellant claims that the trial court erred by refusing to suppress his statement to Investigator Goetz. He contends that he was subject to a custodial interrogation at the time of the statement and, therefore, should have received Miranda warnings. Moreover, he contends that even if he received Miranda warnings, his statement was involuntary due to his "obvious lack of education and his ability to comprehend the nature of the rights and the consequences of the waiver." The State claims that Investigator Goetz was not required to give Miranda warnings because the appellant was not in custody when he gave his statement and that, in any event, the appellant received Miranda warnings and knowingly and voluntarily waived his rights. We agree with the trial court's conclusion that the appellant received Miranda warnings and waived his constitutional rights.

Before trial, the appellant filed a motion to suppress his statement, claiming that he never received Miranda warnings, that he was coerced into confessing by the officers' trickery and a promise of leniency, and that his statement was involuntary because of his extremely limited education. At the suppression hearing, Investigator Goetz testified that the mother of six-year-old twins filed a complaint with the police department, alleging that the appellant had sexually abused her two children. On September 8, 2003, Investigator Goetz spoke with the children and their mother, and the next day, Investigator Goetz spoke with the appellant's mother. Both the children's mother and the appellant's mother made allegations about the appellant and the victim. Investigator Goetz believed he had enough information to obtain an arrest warrant against the appellant for sexually abusing the twins. However, he wanted to speak with the appellant first, so he and Sergeant Vandever went to the Tennessee Aluminum Plant. Management brought the appellant to speak with the officers. Investigator Goetz told the appellant that he needed to talk with him about a matter, and the officers and the appellant sat down in a conference room. Investigator Goetz informed the appellant that he was not under arrest and that the officers did not have a warrant for the appellant's arrest. He then recited Miranda warnings from memory and asked the appellant if he understood the warnings or needed an explanation. The appellant said he understood. Investigator Goetz first asked the appellant about the twins. The appellant stated that he and his wife babysat the twins and that he touched their "privates" while cleaning them after they had used the bathroom. He denied touching them in a sexual way, and Investigator Goetz wrote out the appellant's statement.

Investigator Goetz testified that he then confronted the appellant with allegations about the victim. The appellant told Investigator Goetz that the victim spent the night in his home, that he went into the computer room to check on her, and that he found her crying. The appellant began to rub the victim's back, she rolled over, and he began to rub her breast. The appellant said he rubbed the victim's "privates," put his right index finger inside of her, and masturbated while digitally penetrating her. Investigator Goetz wrote out the appellant's statement. While writing the statement, Investigator Goetz made some mistakes, which he marked out, corrected, and initialed. He also had the appellant initial the corrections. After writing the statement, Investigator Goetz left the room and telephoned the district attorney's office. He then returned to the conference room and arrested the

appellant for sexually abusing the twins. He did not arrest the appellant for raping the victim at that time and took the appellant to the police department. He stated that the appellant did not appear to have trouble reading or writing and "knew exactly what was going on."

On cross-examination, Investigator Goetz testified that he did not speak with the victim before he interviewed the appellant. When he first met with the appellant, he was wearing plain clothes but identified himself as a Mount Pleasant police officer. Sergeant Vandever was present and was wearing a police uniform. Investigator Goetz stated that the appellant was nervous but "wasn't falling out" and that he asked the appellant if the appellant could read and write. He gave the appellant Miranda warnings but did not know that the appellant had only a ninth-grade education. At first, the appellant denied raping the victim. However, Investigator Goetz told the appellant, "We all make mistakes" and asked the appellant, "What reason would [the victim] have to lie?" He also told the appellant that he had two goals: to make sure the appellant and the victim got help. After making these statements to the appellant, the appellant took a deep breath and said, "She dressed like a slut." The appellant then said he digitally penetrated the victim and admitted becoming aroused but denied any penile penetration. Investigator Goetz wrote down the appellant's statement and let the appellant read the statement. They also read the statement together. Investigator Goetz stated, "And I read it word for word, right there with him, . . . making sure he understood, making sure there was nothing he wanted to change." When they finished reading the statement, the appellant signed it. Investigator Goetz testified that he never promised the appellant anything and that the appellant never asked to leave the conference room. He said that prior to telephoning the district attorney's office, he would have allowed the appellant to go outside to smoke if the appellant had asked to do so.

Sergeant Vandever testified that on September 9, 2003, he went with Investigator Goetz to the Tennessee Aluminum Plant to speak with the appellant. Investigator Goetz told the appellant that he was not under arrest and that he did not have a warrant for the appellant's arrest. Investigator Goetz also gave the appellant Miranda warnings and asked the appellant if he understood them. The appellant gave his statement, Investigator Goetz wrote out the statement, and the appellant signed it. Sergeant Vandever stated that he had read the appellant's written statement and that it was an accurate reflection of what the appellant said during the interview. He acknowledged that the appellant answered questions logically and conversed with Investigator Goetz in a normal manner. The appellant appeared to understand his rights and gave no indication that he did not understand what was going on. On cross-examination, Sergeant Vandever testified that he was present during the interview but did not participate and did not take notes.

The appellant testified that he did not have a high school diploma or GED. He said that he had been a good student but quit school because people were making fun of him and that he could read and write but could not read or write in cursive. On September 9, 2003, the appellant was called from his job to speak with Investigator Goetz. He said that he understood Miranda rights "half and half" and that he understood Miranda rights to mean an attorney would be appointed for a person who could not afford one. When the appellant met with Investigator Goetz and Sergeant Vandever, Investigator Goetz did not tell him that he had a right to remain silent or give any other Miranda

warnings, and the appellant did not sign any paper regarding the warnings. The appellant stated that he was very nervous during the interview, did not think he could leave the room, and did not ask to leave. He said Investigator Goetz did not make any promises to him and acknowledged that he had difficulty reading part of the statement because Investigator Goetz wrote it in cursive handwriting. He said he did not remember Investigator Goetz telling him that there was no warrant for his arrest or that he was not under arrest.

The trial court ruled that regardless of whether a custodial interrogation had occurred in this case, both of the officers testified that the appellant received Miranda warnings. The trial court noted that the appellant's written statement also showed that he received the warnings. The court also noted that the appellant admitted signing the statement and that the officers testified they witnessed him sign it. The trial court denied the appellant's motion to suppress.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23. Moreover, we note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998).

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." These procedural safeguards require that police officers must advise a defendant of his or her right to remain silent and of his or her right to counsel before they may initiate custodial interrogation. State v. Sawyer, 156 S.W.3d 531, 533 (Tenn. 2005). If these warnings are not given, statements elicited from the individual may not be admitted in the prosecution's case-in-chief. Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528 (1994). A waiver of constitutional rights must be made "voluntarily, knowingly and intelligently." Miranda, 384 U.S. at 444, 86 S. Ct. at 1612. In determining whether a defendant has validly waived his Miranda rights, courts must look to the totality of the circumstances. State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992). "Custodial" means that the subject of questioning is in "custody or otherwise deprived of his freedom by the authorities in any significant way." Miranda, 384 U.S. at 478, 86 S. Ct. at 1630. Our supreme court has expanded this definition of custodial to mean "whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself

deprived of freedom of movement to a degree associated with a formal arrest." State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996).

In this case, the trial court ruled that even if a custodial interrogation occurred, Investigator Goetz advised the appellant of his Miranda rights and the appellant waived those rights. We agree. The trial court obviously accredited the officers' testimony. Investigator Goetz testified that he advised the appellant that the appellant was not under arrest and that he gave the appellant Miranda warnings. In the appellant's written statement, which was introduced at the hearing and at trial, he acknowledged receiving the warnings. The statement provides that "I Alvin Allen, have been informed by T. Goetz of my [r]ights [and] I understand my rights. I know that at this time I am not under arrest nor is there a warrant for my [a]rrest." Investigator Goetz also testified that the appellant said he understood the Miranda warnings and that he went over the appellant's written statement with him. He and Sergeant Vandever testified that they saw the appellant sign the statement, and the appellant admitted signing it. Although the entire statement is written in cursive handwriting and the appellant claimed that he could not read cursive writing, the officers testified that the appellant appeared to understand the statement and what was going on. The appellant also admitted during the hearing that Investigator Goetz did not promise him anything. Based upon the totality of the circumstances, we believe the trial court properly concluded that the appellant received Miranda warnings at the beginning of the interview and that he knowingly, intelligently, and voluntarily waived his rights. Therefore, the trial court properly denied the appellant's motion to suppress his statement to police.

B. Sufficiency of the Evidence

The appellant claims that the evidence is insufficient to support the conviction because the only proof supporting the conviction, aside from his "involuntary" statement, is the victim's testimony, which "was riddled with inconsistencies, changes of fact[,] and admissions of prior untruths." The State argues that the evidence is sufficient because the trial court chose to accredit the victim's testimony. We conclude that the evidence is sufficient to support the conviction.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by 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 beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Accordingly, in a bench trial, the trial judge, as the trier of fact, must resolve all questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence. State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). The trial judge's verdict carries the same weight as a jury verdict. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). Rape of a child

is "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a) (2003).

In the instant case, it is uncontroverted that the victim was under thirteen years of age at the time of the offense. Moreover, the victim testified that the appellant came into the computer room, rubbed her back and stomach, and tried to put his hand "down there." The victim protested, and the appellant left the room. The victim fell asleep but later awoke to find her boxer shorts pulled down, her legs bent, and the appellant's knees on her feet. She stated that the appellant put his penis inside of her. Although the victim waited two weeks to report the rape and there were inconsistencies between her testimony and what she told Investigator Goetz, the defense cross-examined the victim about the inconsistences. Moreover, the appellant told Investigator Goetz that he digitally penetrated the victim, and we have concluded that the appellant's statement was properly admitted into evidence. Therefore, based upon the victim's testimony and/or the appellant's statement, the evidence is sufficient for the trial court to have found the appellant guilty of rape of a child.

C. Excessive Sentence

Finally, the appellant claims that his sentence is excessive because he should have been sentenced as an especially mitigated offender, the enhancement factors used to enhance his sentence are inapplicable, and several mitigating factors apply. The State argues that the appellant's twenty-year sentence is proper. We agree with the State.

At the appellant's sentencing hearing, Reba Owen, the victim's mother, testified that as a result of the appellant's raping the victim, the victim did not sleep through the night, had nightmares, and wanted to curl up in bed with her. She said the victim was very untrusting of adults, "more so than most young teenage girls are." Owen testified that the rape had impacted her life as well, that she also did not trust anyone, and that she liked to have the victim with her.

Kathy Long, the appellant's sister, testified that the appellant did not finish high school and quit school in the eighth or ninth grade. She stated that she and her sister would often do the appellant's homework for him and that he was mentally challenged. When the appellant was nine years old, a tractor ran over him, and since that time, he had been unable to make his own decisions. The appellant had been around Long's fourteen-year-old daughter often, and he had never made any advances toward her. Long stated that the appellant's wife was planning to divorce him and that Angie Allen completely controlled the appellant during their marriage. The appellant also had an unexplained broken arm and bruises during his marriage and would make excuses for his injuries. Long stated that the appellant had never even received a speeding ticket before, had always been employed, and should receive the minimum sentence. On cross-examination, Long testified that the appellant had never been mentally evaluated or diagnosed with a mental condition and was afraid of his wife.

Ida Bell Landers, the appellant's mother, testified that the appellant had a normal childhood but "never learned" in high school. She stated that the appellant's younger brother was mentally

retarded, that the appellant had difficulty learning, and that the appellant stayed in school "as long as they could keep him there." The appellant had never been in trouble with the law before and was always employed. Landers stated that Angie Allen controlled the family and mistreated the appellant, and she acknowledged that Allen would pressure the appellant to do certain things. She asked that the trial court sentence the appellant to the minimum punishment and stated that she would probably never see the appellant again because she has a diseased heart. She stated that Angie Allen framed the appellant but that she could not prove it because Angie Allen "always covered her tracks."

The appellant testified that he worked at the Tennessee Aluminum Plant for five years and lost his job when he was arrested. He stated that he currently was working on cars and driving a backhoe for Stoney's Auto Salvage and Wrecker Service and would continue working there until his incarceration. He stated that his IQ had never been tested but that he had difficulty reading and writing and had difficulty in school. He stated that he "was covering up a lot of stuff" for his wife and acknowledged that she had exerted a lot of control over his life. He asked that the trial court "take it easy on me" and give him a fair sentence. On cross-examination, the appellant acknowledged that Angie Allen was not present during his interview with Investigator Goetz on September 9, 2003, and that she did not go into the computer room with him when he went in to comfort the victim.

Christy Dickey from the State Office of Probation and Parole testified that she met with the appellant and prepared his presentence report. She stated that during her interview with the appellant, he never claimed Angie Allen framed him.

The State introduced the appellant's presentence report into evidence. In the report, the then forty-year-old appellant described his physical and mental health as good but said he had been prescribed Paxil for depression. The appellant reported that he had never used alcohol or illegal drugs and began working as a laborer for Stoney's in September 2003. The report also shows that the appellant worked as a skimmer for the Tennessee Aluminum Plant from September 1998 to September 2003. In the report, the appellant stated that he worked for AP TennTech for about six years prior to working for Tennessee Aluminum. According to the report, the appellant had no prior convictions but had two charges for aggravated sexual battery pending against him.

The State argued that the trial court should apply enhancement factor (8), that the "offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement," because the appellant had masturbated while penetrating the victim. Tenn. Code Ann. § 40-35 114(8) (2003). In mitigation, the defense argued that the trial court should consider the appellant's lack of a prior criminal record, work history, and mental capacity. See Tenn. Code Ann. § 40-35-113(13). The defense also argued that the appellant's conduct neither caused nor threatened serious bodily injury, that he was suffering from a mental condition that significantly reduced his culpability for the offense, that he "committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct," and that he acted under the

duress or domination of another person. See Tenn. Code Ann. § 40-35-113(1), (8), (11), (12). The trial court ordered that the appellant serve twenty years in confinement.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Tenn. Code Ann. § 40-35-401(d); Ashby, 823 S.W.2d at 169.

The appellant was convicted of a Class A felony. At the time of his sentencing, a trial court was required to begin a sentencing determination regarding a Class A felony at the midpoint of the range, then "enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors." Tenn. Code Ann. § 40-35-210(e) (2003). The presumptive sentence for a Class A felony was the midpoint sentence within the appropriate range if no enhancement or mitigating factors were present. See Tenn. Code Ann. § 40-35-210(c) (2003). The appellant was sentenced as a Range I offender. Accordingly, the presumptive sentence was twenty years. See Tenn. Code Ann. § 40-35-112(a)(1).

Initially, we note that in announcing the appellant's sentence, the trial court simply stated as follows:

> Punishment imposed shall be 20 years in the Tennessee Department of Corrections. The Court is considering the enhancing factor that was filed by [the] State and the Court has considered the mitigating factors used by the defense.
>
> [The court is] also considering that there are two other charges presently pending charging Mr. Allen with basically the same type of offense.

This pronouncement of sentence failed to adequately identify which enhancement or mitigating factors the trial court found applicable, state the specific facts supporting the enhancement factors, and state the weight the court was assigning to the factors. See State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994) (stating that the trial court "must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement

factors have been evaluated and balanced in determining the sentence"). Moreover, the trial court's comments reveal that it improperly considered pending sexual battery charges against the appellant as an enhancement factor. See State v. Buckmeir, 902 S.W.2d 418, 424 (Tenn. Crim. App. 1995) (providing that pending charges are not proper bases for applying Tennessee Code Annotated § 40-35-114(2) (2003), that the defendant has a previous history of criminal convictions or behavior, to a defendant's sentence). For these reasons, our review of the appellant's sentence is de novo with no presumption of correctness.

We agree with the State that enhancement factor (8) applies in this case because the appellant told Investigator Goetz that he masturbated while digitally penetrating the victim, suggesting that the appellant raped the victim in order to gratify his desire for pleasure or excitement. Given the applicability of this factor, the appellant is not entitled to be sentenced as an especially mitigated offender. Tenn. Code Ann. § 40-35-109(a) (providing that a court may find a defendant to be an especially mitigated offender if the defendant has no prior felony convictions and the court finds applicable mitigating factors but no enhancement factors).[2]

As to mitigating factors, we conclude that the appellant is not entitled to any type of mitigation for his mental capacity because he failed to present any evidence that he suffered from a mental condition that reduced his culpability for the offense. Similarly, nothing in the record supports the appellant's claim that he committed the crime under such unusual circumstances that he lacked a sustained intent to violate the law or that he acted under the domination of another person. We also refuse to apply mitigating factor (1), that the appellant's conduct neither caused nor threatened serious bodily injury, because the victim's mother testified that the victim could not sleep through the night, had nightmares, wanted to sleep with her, and had become unusually untrusting of adults. See State v. Smith, 910 S.W.2d 457, 461 (Tenn. Crim. App. 1995) (providing that serious bodily injury can include psychological injury). However, the appellant is entitled to some consideration for his employment history and some, albeit slight, consideration for his lack of a prior criminal record. In our view, the one enhancement and two mitigating factors are entitled to equal weight and justify the appellant's twenty-year sentence.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE

[2] Regardless of his offender status, the appellant must serve one hundred percent of the sentence before being eligible for release. Tenn. Code Ann. § 40-35-501(i)(1), (2)(I).