

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
September 6, 2023 Session

FILED

09/27/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. TYRELL WEBB

**Appeal from the Criminal Court for Shelby County
No. C1806651, 18-04617 A. Melissa Boyd, Judge**

No. W2023-00195-CCA-R3-CD

The defendant, Tyrell Webb, pleaded guilty to rape, and the trial court imposed a sentence of eight years' incarceration in the Tennessee Department of Correction. On appeal, the defendant argues the trial court erred in denying his request for probation and in restricting cross-examination of the victim. After reviewing the record and considering the applicable law, we affirm the judgment of the trial court. However, we remand the case for entry of judgments reflecting the dismissal of counts two and three.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed and Remanded for Entry of Judgments

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TOM GREENHOLTZ, JJ., joined.

Michael R. Working and Josie Holland (on appeal), and Jason Ballenger (at guilty plea hearing), Memphis, Tennessee, for the appellant, Tyrell Webb.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Devon Dennis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

I. Guilty Plea

On May 31, 2022, the defendant pleaded guilty to rape (count one).¹ Pursuant to the plea agreement, the State and the defendant agreed the defendant would receive an eight-year sentence at 100%, with the manner of service to be determined by the trial court. The facts underlying the plea, as explained by the State, were as follows:

[O]n February 16th 2018, A.W.² reported to the Memphis Police Department that she was asleep in her residence on the 3200 block of Morningside in the early morning hours of February 16, 2018.

Victim advised that she had just arrived around – home around 1:20 a.m. She was intoxicated. She stated around 3:30 a.m. the defendant [] entered her home using a key that he obtained from the victim’s friend, witness Tashara Nelson and entered the victim’s bedroom.

Once inside her bedroom, the defendant removed the victim’s clothing, began perform[ing] oral sex on her and had vaginal intercourse with her. The victim stated that she woke up still intoxicated and the defendant stated that he was bringing her her key and pretended to be her boyfriend Robert Howard.

The victim stated that the room was dark and she could not see who he was. The victim stated that she only remembers part of the rape due to her level of intoxication. Victim stated she did not consent to the sex. She stated that after the suspect left, she called her boyfriend, who then called [the defendant].

[The defendant] returned to the victim’s house, admitted having sex with her. However, [the] defendant said it was consensual sex.

Everybody did go down to sex crimes, give statements. [The defendant] changed his story several times and gave conflicting statements as to what other witnesses and the victim stated.

All this did occur – the DNA did come back as a match to [the defendant]. This did occur in Shelby County, Tennessee.

¹ The defendant was also indicted for rape (count two) and aggravated burglary (count three), but those charges were dismissed as part of the plea deal.

² It is the policy of this Court to refer to victims of sexual abuse by their initials. For purposes of this opinion, “the victim” will refer to A.W. unless otherwise noted.

II. Sentencing Hearing

During the sentencing hearing, a copy of the defendant's presentence report and psychosexual evaluation were introduced. The defendant testified on his own behalf, stating he entered the victim's apartment through the front door, which was unlocked, and had sex with the victim while she was intoxicated. Because the defendant and the victim had previously had sex while the victim was intoxicated, the defendant testified that he was not aware that he needed to obtain consent from the victim before having sexual intercourse. However, he now understands what he did was wrong and stated that "if [he] could change it [he] would but . . . [he] can't right now." The defendant acknowledged that he pled guilty to attempted aggravated sexual battery when he was nineteen years old and was placed on the sex offender registry. However, he stated that the charge was part of a "secret indictment" and that he was unaware of the facts surrounding the charge, including who the victim was. He testified that he only pled guilty because he was young and did not know what to do at the time.

The defendant stated that he lived with his grandmother and great-grandmother, who suffered from Alzheimer's. The defendant also testified that his oldest daughter was recently involved in a severe car accident and that he was helping her recover from her injuries. Although the defendant opened a carpet cleaning business while awaiting trial, he acknowledged that the business license he presented to the trial court was expired. Additionally, the defendant testified that he volunteered with an outreach program called Gift. Through the program, the defendant fed the homeless, ran a coat drive, and reached out to youth about staying away from gangs. The defendant was previously a high-ranking member of the Vice Lords. However, he testified that he was no longer active. The defendant requested that the trial court sentence him to probation and "give [him] another chan[c]e." The defendant testified that he was trying to take care of his children and grandmothers. He also stated that he was willing to go to weekly classes and "whatever it takes."

On cross-examination, the defendant acknowledged that his version of the facts did not match those of the victim or other witnesses. When asked why he did not look at the victim when he was apologizing, the defendant stated that the last five years have "been a lot" for him because the victim "bashed [his] name all over Facebook." He later acknowledged that it may have been hard for the victim to see the defendant in the community after he was released on bail. The defendant also acknowledged violating the Sex Offender Registry Act numerous times.

Mary Dye, the defendant's grandmother, testified the defendant began living with her and her mother when he was released on bail. According to Ms. Dye, the defendant helped his great-grandmother when her caretaker was not available. Additionally, he

mowed the yard, took out the garbage, and washed clothes. Ms. Dye testified that, if the defendant was sentenced to jail, “[she] would really be in trouble because [she] need[ed] [her] grandson.”

The victim testified that she and the defendant, who she knew as Murder, were in the same branch of the Vice Lords, and the victim previously dated the defendant’s cousin, Christopher. According to the victim, on the night of her assault, she went on a date and returned home at 1:00 a.m. Although she was intoxicated, the victim recalled locking the door behind her and getting into bed. After she fell asleep, the victim heard someone say, “[T]his [is Robert Howard]. I brought you your keys.” The victim opened her eyes, and the person ran out of the room. When she followed him, she saw that her assailant had left his jacket behind. It was a unique jacket that only the defendant and Mr. Howard owned, so the victim asked both men if they raped her. Although the defendant initially denied raping the victim, he later stated that they had consensual sex, which the victim denied.

The victim testified that, since the assault, she has been unable to keep a steady job or stay in one place. The victim stated that she thinks about the incident every day and wonders what would have happened if the defendant had walked into her children’s bedroom by mistake. The victim testified that the defendant did not deserve probation because he has “had chance after chance after chance to get his act together and still he chose to do the wrong thing.”

In denying probation, the trial court noted

[A]fter listening to the defendant, reading the psych[] eval, reading the – his history, he knew better – he should have known better when he was on the sex offender registry from a – from the other charge that was reduced. He knew better. It’s not like he didn’t know. He doesn’t take responsibility for anything, not his fault. For anything. He violated the sex offender registry many times. How can I trust that he’s [going to] do what he’s supposed to be doing?

And she was somebody he knew. And for him to take advantage of a woman like that is absolutely wrong. And for you to devalue a woman, it’s just this, it’s not intentional, makes no difference. She was violated, period. Period.

And you want to say, well he hadn’t done anything. That rape of a child is – that was just a few years ago. It’s the same thing he did to her. What does all this mean? So you – did he know her? Yeah. He knew. He’s

still banging everybody else. He has six kids. How many mothers do you have to your children? How many mothers is it? Three? Four?

He won't show up for treatment. His – his risk level is above average. He's a danger to society. He's a danger to this community. To women. And I will not let you devalue women like that. I will not have it because if he can get out, you see he hasn't done anything. We don't know what he's done really. He may not have been arrested but whatever. We don't know. He's a – okay.

I'm sentencing you to eight years in the Tennessee Department of Correction[] and that's my ruling.

Analysis

On appeal, the defendant argues the trial court erred in denying probation. The defendant also requests plain error review of the trial court's restriction of the victim's cross-examination. The State contends the trial court properly exercised its discretion in ordering confinement, and the defendant is not entitled to plain error relief.

I. Denial of Probation

The defendant argues the trial court erred in denying probation when it failed to consider any of the appropriate factors in denying an alternative sentence. He contends that the trial court improperly considered arrests that did not result in convictions as well as juvenile conduct that was not substantiated during the sentencing hearing. The State contends the trial court properly denied probation.

A trial court's decision to grant or deny probation is reviewed under an abuse of discretion standard with a presumption of reasonableness when the sentence reflects the purposes and principles of sentencing. *State v. Caudle*, 388 S.W.3d at 278-79. “[A] trial court's decision to grant or deny probation will not be invalidated unless the trial court wholly departed from the relevant statutory considerations in reaching its determination.” *State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014) (order) (per curiam). The burden of establishing suitability for probation rests with a defendant, who must demonstrate that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” *State v. Souder*, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002) (quoting *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)); see Tenn. Code Ann. § 40-35-303(b); *State v. Russell*, 773 S.W.2d 913, 915 (Tenn. 1989); *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008).

Generally, probation is available to a defendant sentenced to ten years or less. Tenn. Code Ann. § 40-35-303(a). A defendant who is convicted as an especially mitigated or standard offender of a Class C, D, or E felony is considered a favorable candidate for probation. Tenn. Code Ann. § 40-35-102(6)(A). In determining whether incarceration is appropriate, the trial court should consider whether:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses;
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. § 40-35-103(1)(A)-(C). Additionally, “[t]he sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed,” and “[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” *Id.* § 40-35-103(4), (5).

“[T]he key to meaningful appellate review under the abuse of discretion standard is whether the trial court recites a proper basis for the sentence.” *Caudle*, 388 S.W.3d at 279. “When considering probation, the trial court should consider the nature and circumstances of the offense, the defendant’s criminal record, the defendant’s background and social history, the defendant’s present condition, including physical and mental condition, the deterrent effect on the defendant, and the best interests of the defendant and the public.” *State v. Harbison*, No. M2015-01059-CCA-R3-CD, 2016 WL 613907, at *3 (Tenn. Crim. App. Feb. 12, 2016), *no perm. app. filed*. An appellate court should perform a de novo review when the trial court fails to articulate the specific facts upon which it relies in denying probation. *Id.* at *3 (conducting a de novo review when the trial court, in denying probation, “stated simply, ‘the court finds that [a probationary sentence] would [depreciate the severity of the offense]’”). Here, in imposing confinement, the trial court failed to adequately explain its reasoning on the record for denying probation. Therefore, we will perform a de novo review with no presumption of reasonableness.

A. Nature and Circumstances of the Offense

The defendant used deception to gain access to the victim’s keys and entered the victim’s apartment during the middle of the night while the victim’s children were present.

He proceeded to rape the victim while she was intoxicated and unable to consent. The victim testified to the devastating consequences of the attack and how it has negatively impacted her life.

B. The Defendant's Criminal Record

The defendant's criminal record as detailed in the presentence report includes two convictions for theft up to \$500, one conviction for prohibited weapons, and one conviction for attempted aggravated sexual battery. Additionally, during the sentencing hearing, the defendant admitted to violating the sex offender registry multiple times, including with the commission of the instant offense.

C. The Defendant's Background and Social History

Based on the presentence report, the defendant has six children, none of whom lived with him at the time of sentencing. The defendant dropped out of high school in the tenth grade and completed his GED. He is close with his family and has no documented problems with drugs or alcohol. The defendant owns a carpet cleaning business that he started while on bail for the instant offense; however, as admitted by the defendant during the hearing, his business license had expired.

D. The Defendant's Present Mental and Physical Condition

The defendant has no documented physical or mental conditions. Based on the psychosexual evaluation, the defendant's sexual "history seems to change every time he reports it" and "[n]one of his reports could be corroborated by [the] other." During Sex Offender Treatment, the defendant "denied his past sex offenses" and "placed blame on his victims."

E. Deterrent Effect on the Defendant

There is no evidence in the record concerning deterrence.

F. Best Interests of the Defendant and the Public

We conclude the defendant and the public would best be served by a sentence of confinement. When the defendant was arrested, he lied about the rape, claiming that it was consensual sex. At the sentencing hearing, the defendant persisted in this fiction, insisting that he walked through an unlocked door and simply failed to ask the victim for consent. The defendant's psychosexual evaluation concluded that "his level of victim empathy is considered to be superficial" and that he "denied his offense" and "placed blame on his

victims.” The defendant’s failure to take responsibility for his actions reflects poorly on his potential for rehabilitation. *See State v. Garris*, No. M2012-01263-CCA-R3-CD, 2013 WL 838673, at *7 (Tenn. Crim. App. Mar. 6, 2013) (finding a lack of candor and failure to accept responsibility are acceptable grounds to deny probation), *no perm. app. filed*. Accordingly, we conclude the record supports the trial court’s denial of probation, and the defendant is not entitled to relief on this issue.

II. Cross-Examination of the Victim – Plain Error

The defendant argues the trial court committed plain error in unfairly restricting trial counsel’s cross-examination of the victim. Specifically, the defendant asserts the premature termination of the victim’s cross-examination violated the Confrontation Clause of the Sixth Amendment. The State contends the defendant is not entitled to plain error relief.

Before an error may be recognized, it “must be ‘plain’ and it must affect a ‘substantial right’ of the accused.” *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). “An error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error.” *State v. Page*, 184 S.W.3d 223, 231 (Tenn. 2006). In *State v. Smith*, our supreme court adopted *Adkisson*’s five-factor test for determining whether an error should be recognized as plain:

- (a) The record must clearly establish what occurred in the trial court;
- (b) A clear and unequivocal rule of law must have been breached;
- (c) A substantial right of the accused must have been adversely affected;
- (d) The accused did not waive the issue for tactical reasons; and
- (e) Consideration of the error is “necessary to do substantial justice.”

24 S.W.3d 274, 282-83 (Tenn. 2000) (quoting *Adkisson*, 899 S.W.2d at 641-42). “[A]ll five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established.” *Id.* at 283.

During trial counsel’s cross-examination of the victim, trial counsel attempted to question the victim regarding her prior record. Following an objection from the State, the trial court held that the victim’s prior record was irrelevant because the defendant had already pled guilty. Although trial counsel argued the victim added additional facts during

her testimony beyond the scope of the defendant's guilty plea, trial counsel was unable to articulate what those additional facts were, and the trial court ended the victim's examination.

Here, the defendant has not demonstrated that he is entitled to plain error relief, as consideration of the alleged error is not necessary to do substantial justice. The right of cross-examination witnesses may be "limited to questions that are designed to elicit relevant evidence." *State v. Wallace*, No. W2018-01649-CCA-R3-CD, 2020 WL 768731, at *9 (Tenn. Crim. App. Feb. 14, 2020), *perm. app. denied* (Tenn. June 5, 2020). Our supreme court has also recognized that a defendant's right to cross-examine witnesses may be reasonably limited "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *State v. Sheline*, 955 S.W.2d 42, 47 (Tenn. 1997) (quoting *Michigan v. Lucas*, 500 U.S. 145, 149 (1991)).

The trial court did not improperly limit the defendant's right to cross-examine the victim, though the trial court's actions in doing so were unprofessional and beneath the dignity of the court. Trial counsel sought to ask the victim about her prior criminal record on the issue of her "truthfulness." At the same time, trial counsel agreed that the defendant pled guilty to the charge of rape, that he agreed he was guilty of the charge, that he understood the nature of the plea, and that he was not seeking to withdraw his plea. He also proffered to the trial court what the victim's prior convictions were. On appeal, the defendant has not shown how additional questioning would have been relevant to the issues at sentencing. The defendant has not established that a clear and unequivocal rule of law was breached, and therefore, is not entitled to plain error relief. *See Adkisson*, 899 S.W.2d at 640-41.

Finally, we note one issue concerning the judgments in this case. While the transcript from the guilty plea hearing shows the State was entering a nolle prosequi as to counts two and three, the trial court did not enter separate judgment forms for these counts. *See* Tenn. R. Crim. P. 32(e)(3) ("If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall enter judgment accordingly."); *State v. Berry*, 503 S.W.3d 360, 364 (Tenn. 2015) (order) ("For charges resulting in a not guilty verdict or a dismissal, the trial court should 'enter judgment accordingly' as to the respective count."). Therefore, we remand the case to the trial court for entry of judgments reflecting the dismissal of counts two and three.

Conclusion

For the aforementioned reasons, the judgment of the trial court is affirmed. However, we remand this case for entry of judgments in counts two and three as specified in this opinion.

J. ROSS DYER, JUDGE