IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

FILED

September 18, 1995

Cecil Crowson, Jr.

Appellate Court Clerk

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| STATE OF TENNESSEE, | * | C.C.A. # 03C01-9408-CR-00279 |
| Appellee, | * | McMINN COUNTY |
| VS. | * | Hon. R. Steven Bebb, Judge |
| GUSSIE WILLIS VANN, | * | (Two Counts of Aggravated Rape and Two Counts of Incest) |
| Appellant. | * | |

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OPINION FILED _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Gussie Willis Vann, was convicted of two counts of incest and two counts of aggravated rape. The trial court imposed concurrent, Range I five-year sentences for each of the incest convictions and consecutive twenty-five-year sentences for each of the aggravated rape convictions. The sentences for incest are to be served concurrently with the sentences for aggravated rape. The effective sentence is, therefore, fifty years.

In this appeal, the defendant challenges the sufficiency of the evidence and claims that the trial court improperly excluded testimony about other sexual conduct of the victim. We affirm the judgment.

The defendant is the uncle of the female victim, A.V.[1] The defendant's wife, alleged to have been present during each offense, was a codefendant at the trial.[2] The victim, fifteen years old at the time of trial in January of 1994, testified that the defendant raped her twice, in June and August of 1991. She recalled that the first rape occurred when she went to spend the night at the defendant's residence shortly before her thirteenth birthday in July. The defendant's children went to bed and the defendant and his wife, Bernice Vann, went to their bedroom. Ms. Vann then returned to the living room and told the victim that she

[1]It is the policy of this court not to refer to minor victims by name.

[2]The defendant's wife entered into a plea agreement for reduced sentences in exchange for her testimony at trial.

wanted her to sleep with the defendant. When the victim refused, the defendant emerged from the bedroom and told his wife to "[g]et that brown headed bitch in here." Despite the protests of the victim, the defendant forced her into his bedroom, then threw her onto the bed, and raped her. The victim testified that the defendant had a gun at the time and ordered her to "[s]hut up or I will kill you." The victim also testified that her aunt observed the assault. She claimed that the defendant threatened to kill her and her family if she told anyone of the incident. After the rape, the victim went to the bathroom. Her aunt followed her, explaining that the defendant would have killed them both had they not cooperated. She urged the victim to remain quiet because of the potential danger. The victim spent the remainder of the night with her younger sister in a separate bedroom of the defendant's residence.

After the first assault but before the second, the defendant gave the victim a motorless blue Firebird automobile for her birthday; the victim testified that the defendant told her that the gift was to keep her quiet about the rape. The second assault on the victim occurred in August of 1991 shortly after her thirteenth birthday. After several prior requests, the victim agreed to spend the night with the defendant's daughter. The victim testified that she had already gone to bed when her aunt entered the bedroom and asked her help with a chore. As the victim entered the kitchen area of the residence, her aunt told her that the defendant wanted sex. When the victim refused, her aunt told

her the defendant would kill her if she refused to cooperate.

At that point, the defendant entered the kitchen, grabbed the victim by the arm, and led her to his bed. Armed with a gun himself, the defendant handed his wife a second, unloaded gun. Thereafter, the defendant sexually penetrated the victim. The victim testified that her aunt smiled during the assault and later warned her not to tell. When the defendant had completed the rape, he ordered the victim to get out. The victim returned to her room but was unable to sleep. On the following day, the victim noticed some vaginal bleeding.

At trial, the victim explained that she had delayed telling her parents of the events until some two years later because of her fear of the defendant. She conceded that she had been fondled by a fifteen-year-old cousin about one year prior to these offenses.

Ms. Vann, who entered into a plea agreement in exchange for her testimony, admitted that she had witnessed each of the rapes. She denied using a weapon, however, and denied having asked the victim to sleep with the defendant. She testified that the victim and the defendant had been completely nude on each occasion, contradicting the victim's assertion that each had been partially clothed. Ms. Vann claimed she was afraid of the defendant and believed that he would kill her if she reported the occurrences. She admitted that she had not told anyone of the events until she had been

in jail for a year on other charges. Ms. Vann testified that she had attempted suicide several times during the course of her marriage to the defendant. By the time of trial, she had filed for divorce.

Joyce Vann, the victim's mother, and Charles Spurling, a family friend, also testified for the state. Spurling claimed that Bernice Vann, the defendant's wife, had told him of the rapes and that he had relayed this information to the parents of the victim. When confronted with the allegations, the victim admitted to having been raped by the defendant.

Dr. Iris Grace Snider examined the victim after the 1990 sexual battery incident and the two incidents at issue here. Dr. Snider stated that the 1990 exam indicated that the victim had not been penetrated vaginally but that the 1993 examination had suggested vaginal penetration. She stated that her "[p]hysical findings [were] compatible" with the victim having had very limited sexual experience.

Elizabeth Vann, the defendant's cousin, testified for the defense. She claimed that she had spent the night at the defendant's home on the same evening of the June assault. Even though she had not gone to sleep until 1:00 A.M., she had heard nothing to indicate the victim had been raped.

The defendant also testified in his own behalf. He claimed that he was 100% disabled and had been on medication

since 1989. He acknowledged that the victim had spent the night in his home twice in 1991 but denied that he had ever raped her. The defendant admitted that he often had traded guns but denied that he owned a revolver of any kind at the times the victim claimed to have been raped. The defendant said that he had given cars to several family members and that he gave the Firebird to the victim because he knew her father could repair it. The defendant observed that his wife had testified against him only because she had become involved with a trusty in the jail. The defendant believed that she had testified in hopes of receiving lenient treatment from the state.

In this appeal, the defendant first asserts that the evidence was insufficient to support any of the four convictions. He claims that the inconsistencies in the state's evidence warranted an acquittal. We disagree.

On appellate review, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

Here, the jury chose to accredit the testimony of the victim and the other state witnesses. That was their prerogative. The victim was the niece of the defendant. There was proof that the defendant had forcibly engaged her in sex on two separate occasions. Thus, each and every element of the four offenses has been established by the record. Under these circumstances, a rational trier of fact could have easily concluded that the crimes were committed beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

Next, the defendant claims that the trial court erred in refusing to allow Virgil Vann, the defendant's brother, to testify about other sexual acts of the victim. At trial, defense counsel sought permission to introduce this testimony to rebut or explain the medical evidence. The state objected based upon Tenn. R. Evid. 412, the replacement for the rape shield statute. See Tenn. R. Evid. 412, Advisory Commission Comments. The trial court sustained the objection.

Rule 412 governs the admissibility of a victim's prior sexual history. In pertinent part, the rule provides as follows:

> Notwithstanding any other provision of law, in a criminal trial, preliminary hearing, deposition, or other proceeding in which a person is accused of an offense

under T.C.A. § ... 39-13-502 [aggravated rape], ... the following rules apply:

(a) Definition of Sexual Behavior.-- In this rule "sexual behavior" means sexual activity of the alleged victim other than the sexual act at issue in the case.

* * *

(c) Specific instances of conduct. -- Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:

* * *

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence[.]

* * *

(d) Procedures. -- If a person accused of an offense covered by this Rule intends to offer ... under subdivision (c) specific instances of conduct of the victim, the following procedures apply:

(1) the person must file a written motion to offer such evidence.

(i) The motion shall be filed no later than ten days before the date on which the trial is scheduled to begin, except the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.

(ii) The motion shall be served on all parties, the prosecuting attorney, and the victim; service on the victim shall be made through the prosecuting attorney's office.

(iii) The motion shall be accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it.

(2) When a motion required by subdivision (d)(1) is filed and found by the court to comply with the requirements

> of this rule, the court shall hold a hearing in chambers or otherwise out of the hearing of the public and the jury to determine whether evidence described in the motion is admissible. The hearing shall be on the record, but the record shall be sealed except for the limited purposes of facilitating appellate review, assisting the court or parties in their preparation of the case, and to impeach under subdivision (d)(3)(iii).
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> (4) If the court determines that the evidence which the accused seeks to offer satisfies subdivisions (b) or (c) and that the probative value of the evidence outweighs its unfair prejudice to the victim, the evidence shall be admissible in the proceeding to the extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be cross-examined.

(Emphasis added).

In a hearing outside the presence of the jury, Virgil Vann testified that in March of 1993 he took his daughter to a skating rink. The victim was there. Vann claimed that the victim came out of the skating rink to speak to him and then introduced a much older boy as her boyfriend. Vann said that he left the skating rink area briefly. Upon his return, he noticed that the victim was not inside. As he returned to his car, Vann noticed the victim with someone other than the boyfriend to whom he had been introduced earlier:

> [She was] on a car hood, her pants ... [and] her panties ... down to her ankles, and as far as you ask [him] in this courtroom was they doing something, he was on top of her, she was on her back on this car hood. If you saying was they having sex, ... I can't say that I went up there and looked and what all like that, but from looking at the corner they was on the

hood.

Vann claimed that he immediately told his wife of the incident. They decided not to tell the victim's father about the event because he was a bit of a "hot head" and might "take the law in [his] own hands."

Virgil Vann also stated that he lived near a pool and that his nieces sometimes came over to swim. He claimed to have seen the victim and her sister there in the company of a "car load" of boys. He had not, however, seen the girls do anything on that occasion except talk.

The state claimed that defense counsel had failed to file adequate notice as required by Rule 412. Although the notice was given only two days before trial, there was no evidence of bad faith on the part of defense counsel. Counsel admitted that they had not been aware of the notice provisions of the rule.

In State v. Stephen Ray Stamps, No. 02C01-9301-CC-00002, at 15 (Tenn. Crim. App., at Jackson, March 2, 1994), perm. to appeal denied, (Tenn. 1994), this court held that "[p]rior sexual behavior with others by the victim is altogether inadmissible unless there is compliance with Rule 412(d)." This court noted that there are policy reasons for the rule in cases such as this and ruled similar evidence inadmissible when there was no pretrial motion and notice was not timely given.

Here, the defense failed to provide adequate notice under Rule 412(d). The evidence was not "newly discovered" and "the issue to which the evidence relates" was not "newly arisen." Tenn. R. Evid. 412(d)(1)(i). Thus the reasoning in Stamps applies; there are valid policy reasons for the exclusion of this type of evidence. Moreover, the evidence was not particularly probative and while it may have explained somewhat the medical evidence provided by Dr. Snider, it did not rebut it. Thus the prejudicial effect of the proffered testimony might not have been outweighed by its probative value. See Tenn. R. Evid. 412(d)(4).

In any event, even if the exclusion of the evidence could be classified as error, we would have found the error to have been harmless in this instance. In State v. Cook, 816 S.W.2d 322, 326 (Tenn. 1991), our supreme court established proper guidelines to be used in determining the gravity of the issue. Errors not rising to the level of constitutional rights deprivations are judged for harm, or prejudice, under Tenn. R. Crim. P. 52(a) and Tenn. R. App. P. 36(b). These rules require that a judgment not be set aside unless an error affirmatively appears to affect the result of a trial or would result in prejudice to the judicial process. Errors of constitutional dimensions do not necessarily require reversal of a criminal conviction on the principal that an otherwise valid conviction should not be set aside if the reviewing court determines that the constitutional error was harmless beyond a reasonable doubt in light of the entire record. Chapman v. California, 386 U.S. 18 (1967); Cook, 816 S.W.2d at

326.

Here, the evidence was not offered to impeach the credibility of the victim. See Tenn. R. Evid. 412(c)(2). Instead, the defendant contended that the excluded testimony might have negated certain of the medical evidence offered by the state. Dr. Snider, however, conceded on cross-examination that the medical evidence could not be used to prove how many times the victim had engaged in sex or when. The essence of her testimony in that regard was that the victim had limited sexual experience. The victim's mother admitted that her daughter may have had a relationship with an older boy. The victim conceded to an instance of fondling prior to the rapes by the defendant. The state's proof against the defendant was particularly strong. Under all of these circumstances, it is doubtful that the proffered testimony, if admitted, would have affected the results of the trial.

Accordingly, the judgment of the trial court is affirmed.

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Gary R. Wade, Judge

CONCUR:

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Joseph M. Tipton, Judge

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Robert E. Burch, Special Judge