IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, l995

FILED

October 4, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLANT	)	NO. 0lC0l-9409-CC-00326
	)	
	)	RUTHERFORD COUNTY
V.	)	
	)	HON. JAMES K. CLAYTON, JUDGE
	)	
ROBERT SCOTT	)	(Aggravated Sexual Battery)
	)	
APPELLEE	)	

FOR THE APPELLANT:

Charles W. Burson
Attorney General

Christina S. Shevalier
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Guy R. Dotson
District Attorney General

David L. Puckett
Thomas F. Jackson
Asst. Dist. Attorneys General
Rutherford County Judicial Bldg.
Murfreesboro, TN 37l30

FOR THE APPELLEE:

Dicken E. Kidwell
Attorney at Law
(On appeal only)
300 East Vine St.
Murfreesboro, TN 37l30

Guy R. Dotson, Jr.
Attorney at Law
(At trial only)
l02 South Maple St.
Murfreesboro, TN 37l30

Howard W. Wilson
Attorney at Law
(At trial only)
6 Public Square
Murfreesboro, TN 37l30

REVERSED AND JUDGMENT REINSTATED

OPINION FILED_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

Charged with the rape of a child, the defendant was convicted of aggravated sexual battery, for which he received a sentence of eight years in the state penitentiary as a Range I standard offender. The trial judge granted him a new trial "because the state failed to turn over exculpatory evidence before the trial." From that finding, the state has appealed.

The defendant is the step-grandfather of SLC, who was nine years old at the time of the offense.[1] She testified that while she was visiting in his home, the defendant came into her room after she had gone to sleep, awakened her and told her that he wanted to "show (her) something on the back porch." She followed him to the porch where the defendant pushed her down with both hands onto a chaise lounge and sat down beside her. He stuck his hand down the front of her pants and underneath her panties.[2] He then stuck his finger "up inside of (her) front private part" and it hurt. When he removed his finger, he threatened to kill her parents and burn down her house if she told anyone.

There were a number of other witnesses who testified, including the defendant, his wife and others. The defendant denied that the crime occurred. The jury found the defendant guilty of the lesser offense of aggravated sexual battery.

At the hearing on the motion for a new trial, after obtaining other counsel, the appellant waged a post-conviction - type attack upon his trial counsel, questioning various decisions that he made during the trial. His counsel had filed an extensive motion for discovery, including, of course, a request for any exculpatory evidence. Later, he filed a specific motion for production of exculpatory evidence, which was, likewise, quite extensive. All requested

---

[1]It is the policy of this Court to designate the victims of child sexual abuse by initials or other designators, but never by name.

[2]She had been sleeping in her blue jeans and a shirt.

information was provided, but some of it was not provided until after the victim had testified as required by Rule 26.2(a), Tenn.R.Crim.P. The trial judge found that there were four alleged inconsistencies in the prior, late provided, out-of-court statements. First, in the various documents, the victim stated, or was reported to have stated, that she was forced to lie down in the chaise lounge during the commission of the offense. At trial she testified that the defendant "pushed (her) down."

Another inconsistency was noted in that she had stated that the appellant "stuck his hands down her pants and put his finger up her butt." At trial she testified that he inserted his finger in her "front" and not her bottom. However, the guidance counselor to whom she made the statement testified that as the victim was describing the defendant touching her bottom she "kinda just pointed to herself in front." Furthermore, all of the medical proof related to the condition of her vagina.

Another alleged inconsistency related to the date of the offense. The victim first said that the incident took place on July 8, but in the very same tape recorded interview corrected herself, stating that the incident took place on New Year's Eve. The trial judge noted that the inconsistency was of little import, since everyone agreed it happened, if at all, in late December.

Finally, the other alleged inconsistency was whether the victim was clothed at the time of the incident. There was a statement on a Department of Human Service "Recording Sheet for Social Services" that the author of the document had phoned the guidance counselor to whom the victim made her first complaint, who stated that the victim told her that the defendant "took her clothes off and touched her between the legs." The document is not signed, but it appears that it was written by Janice Stegall of the Department of Human Services. When the victim was interviewed, she stated that the defendant did

not take her clothes off, and at trial the transcript of the statement was provided to the defense counsel.

Based upon the state's failure to provide all of the statements prior to trial, the trial judge found that the state had failed to provide the defense with exculpatory evidence as required by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. ll94, l0 L.Ed.2d 2l5 (l963). He expressed his concern only about the lying down vis-a-vis the sitting and the placement of his hand on her front vis-a-vis her "butt."

In the recent case of State of Tennessee v. Isaac Earl Edgin, Tennessee Supreme Court, opinion filed at Nashville, July l0, l995 and designated for publication, our Supreme Court reiterated, in an opinion on petition for rehearing, the four things that a defendant must show in order to establish a Brady violation. Drawn from State v. Evans, 838 S.W.2d l85, l96 (Tenn. l992), they are:

l) The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);

2) The State must have suppressed the information;

3) The information must have been favorable to the accused; and

4) The information must have been material.

In this case the defendant requested the information and the state did not provide it until the victim had completed her direct examination. It is certainly questionable whether the information was actually favorable to the accused, but, even if it was, the information fails the test of materiality. The standard for materiality of Brady material is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State of Tennessee v. Isaac Earl Edgin, supra. In

Kyles v. Whitley, ____ U.S. ____, ll5 S.Ct. l555, l566, l3l L.Ed.2d 490 (l995), the United States Supreme Court further stated that the "touchstone of materiality is a 'reasonable probability' of a different result." Further, the Court found "(a) 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Id., quoted in State of Tennessee v. Isaac Earl Edgin, supra.

Like our Supreme Court in Edgin, we do not find that the fact that the state did not provide the statements to the defense before trial undermined confidence in the outcome of the trial. There is no reasonable probability that had the evidence been disclosed to the defendant earlier, the result of the proceeding would have been any different.

This case boiled down to the testimony of two individuals. The victim testified that the crime happened and the defendant testified that it did not happen. Tangential matters about the victim's position on the chaise lounge, the victim's clothes, the date and the penetration would not have changed the outcome in any way. The victim was unequivocal in her statement as to what occurred and the jury chose to believe her and to disbelieve the defendant.[3] The allegedly exculpatory materials were available to the defense at the trial and the victim was cross-examined thoroughly. Earlier revelation of those materials would have changed nothing. In fact, it is clear that the jury was indeed merciful to the appellant, since, even though there was ample evidence of penetration, they did not find him guilty of raping the victim, but only found him guilty of the lesser included offense of aggravated sexual battery.

The judgment granting a new trial is reversed and the judgment of conviction is reinstated.

---

[3]Indeed, at the hearing on the motion for a new trial, the trial judge observed that as he was hearing SLC's testimony, he knew "she was telling the truth."

_____
JERRY SCOTT, PRESIDING JUDGE

CONCUR:

_____
JOSEPH M. TIPTON, JUDGE

_____
DAVID G. HAYES, JUDGE