IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER SESSION, 1993

STATE OF TENNESSEE,	)	
	)	No. 02C01-9307-CR-0014
Appellee	)	
	)	Shelby County
v.	)	
	)	Hon. Joseph B. McCartie, Judge
GWENDOLYN D. WALLS,	)	
	)	(Aggravated Sexual Battery)
Appellant	)	

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OPINION FILED: _____

CONVICTIONS AFFIRMED IN PART & REVERSED IN PART

JOSEPH S. DANIEL
Special Judge

O P I N I O N

Appellant, Gwendolyn D. Walls, was convicted of two counts of aggravated sexual battery. She was sentenced to two consecutive ten year sentences by the Shelby County Criminal

Court. She appeals these convictions and raised essentially five issues for this court's consideration. The first of these issues is that the trial court committed error by the admission of certain testimony as fresh complaint. Secondly, appellant complains that the court erred when it required her attorney to conduct cross-examination of the female child witness while the child was crying. Appellant also asserts that she was denied the right to present testimony regarding the credibility of the child to appellant's prejudice. Thirdly, appellant asserts that the trial court erred in denying certain discovery motions of appellant. Fourth, appellant contends that the evidence is insufficient to support her conviction. Finally, appellant contends that a new trial should be granted because the jury convicted her by way of a compromise verdict.

After carefully considering these arguments and the record, we find that one of these convictions should be reversed and remanded for a new trial because of error in the admission of evidence that deprived appellant of her constitutional right to a fair trial. We affirm the conviction of appellant as to the charge associated with the complaint of the male child.

Appellant was indicted April 28, 1992, in a two count indictment charging the offense of aggravated sexual battery in each count. These charges have as their basis offenses against two children, both of whom were under the age of thirteen at the time of the assaults. Each count of the indictment alleged sexual contact with a person less than thirteen (13) years of age during a period of time between June 1, 1989 and February 17, 1992, in violation of Tennessee Code Annotated Section 39-13-504. Tennessee Code Annotated Section 39-13-504 became effective November 1, 1989. Prior to this date, Tennessee Code Annotated Section 39-2-606 defined aggravated sexual battery. The state prosecuted this case based on events that occurred prior to November 1, 1989. Because the exact dates of these offenses could not be discerned, the state stipulated with appellant that she should receive the benefit of the more lenient sentencing envisioned by the provisions of the Tennessee Criminal Sentencing Reform Act of 1989. Thus, appellant was indicted under the provisions of Tennessee Code Annotated Section 39-13-504 which did not exist at the time of the complained of offenses. Notwithstanding, the elements of proof relied on to make such a charge were the same under the prior code provisions, Tennessee Code Annotated Section 39-2-606, that being unlawful sexual contact with another accompanied by the circumstance that the victim is less than thirteen (13) years of age. Tenn. Code Ann. § 39-2-603(a)(4).

During the summer of 1989, appellant resided with Flora Smith and her two minor children, S.S. and R.S.,[1] who were nine and eight years old respectively at the time of the trial. Appellant was unemployed and served as a baby sitter while Flora Smith either worked or was hospitalized during the pregnancy of her third child. Oscar Burnett, Flora Smith's boyfriend, is the father of her third child.

On Labor Day weekend, 1989, Mary Smith, Flora Smith's mother and the grandmother of the two minor victims, moved to Decatur, Illinois to be with her ailing mother.

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[1]Court policy provides that other names or initials are used in the text of the opinion to protect the identity of minors involved in cases of this nature.

With the consent of Flora Smith, Mary Smith took S.S. to live with her in Illinois. In February 1990, S.S. was caught by Mary Smith engaging in mutual fondling with a minor cousin. When confronted by her grandmother as to where she had learned to engage in this type of conduct, the child indicated that appellant had taught her those things. Later, in February 1990, Mary Smith and S.S. moved back to Memphis and the child returned to her mother's home to live with her mother and her brother. Mary Smith informed Flora Smith of the child's conduct and accusations. However, Flora Smith delayed reporting these allegations to the authorities for a year.

While Oscar Burnett maintained his relationship with Flora Smith, he was also engaging in sexual relations with appellant. Smith did not learn of this relationship until late in 1991. Burnett's relationship with appellant ultimately resulted in her conceiving and giving birth to a child prior to her arrest in January, 1992. When Smith learned of appellant's relationship with Burnett, she threatened to "get that bitch." This occurred shortly before the charges in this case.

At the trial of this case, S.S. testified that appellant had touched her in her private areas and required her to "play boyfriend and girlfriend with R.S." S.S. described this activity by explaining that R.S. was required to take off his clothes. Afterwards, appellant placed a blindfold over his eyes and directed S.S. to get on top of her brother and move up and down. S.S. further testified that on another occasion, appellant required her to insert a carrot into appellant's privates. S.S. explained that she did not report this incident to her mother because she was afraid. S.S. indicated that appellant had previously whipped her with an electric extension cord and warned her that if she told anyone she would be whipped again.

R.S. testified that appellant had touched his privates "in the front and the back." He explained that he had been required to play "boyfriend and girlfriend" and described this play similarly to that of his sister. R.S. indicated that he had not told his mother of this conduct because he was afraid that appellant would punish him by whipping him with an electric extension cord.

In addition to the children's testimony, there was expert testimony to the effect that S.S.'s hymenal opening was twice the size of a child her age and that this condition was consistent with repeated vaginal entrances. R.S.'s examination revealed a star-shaped rectum, a condition where fissures or small tears around the rectum are observed. This condition is also consistent with anal penetration of the child.

Over the objection of appellant, Mary Smith testified to a statement made by S.S. in February 1990, when they both lived in Decatur, Illinois. This testimony was allowed by the trial court on the basis of fresh complaint. This exchange was as follows:

> Q. Did you talk to [S.S.] about the fondling?
>
> A. Yes, I asked her where did she learn such things as that and she --
>
> Q. Did she tell you where she learned it?
>
> A. She told me from her mother's friend. And I asked her who was her mother's friend, and she said the lady that used to baby-sit them. And I asked who

> and she said Denice [appellant]. And I said how or what happened, and she said, well, she used to make her take carrots and smoked sausage -- they call them hot dogs, but they're wienies -- and she said make her stick them up her butt.

This exchange occurred after a jury out hearing held by the trial court. Appellant objected to this testimony on the basis that it failed to meet the definition of fresh complaint. However, the trial court ruled the testimony admissible as fresh complaint. Appellant did not request, nor did the trial court provide, any cautionary instructions to the jury advising them that they might consider this testimony only as corroboration of the child's complaint and not as substantive evidence of such an assault.

In considering appellant's first issue, we have the benefit, which the trial judge did not have, of the Supreme Court's recent pronouncement in State v. Livingston, No. 01S01-9305-CR-00077, (Tenn. S. Ct., Nashville, Sept. 5, 1995), for publication, _____ S.W.2d _____ (Tenn. 1995).

In Livingston, the Court was faced with the issue it left open in State v. Kendricks, 891 S.W.2d 597 (Tenn. 1994). Kendricks retained the fresh complaint rule for adult victims based on the perceived historical underpinnings. It specifically limited its application to adult complainants.

In Livingston, the Court noted that the reasons which justified the retention of the rule in adult cases was not present in cases with child victims. Thus, the Court declined to allow the introduction of either the facts or the details of the complaint in cases with child victims.

Accordingly, we find that the statement attributed to S.S. as a fresh complaint in Mary Smith's testimony was improperly admitted. Appellant failed to raise the error associated with the erroneous introduction of Mary Smith's testimony in its motion for new trial. Ordinarily such failure would waive the error. State v. Brock, 678 S.W.2d 486, 490 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1984). However, appellant raised this issue vigorously during the trial of this case. We are convinced that had the issue been presented to the trial court it would have been overruled.

Initially, appellant failed to include in the record the transcript of the motion for new trial. However, we allowed the supplementation of the record in this case. Both appellant and appellee briefed and argued the issue. We have considered the merits and find that the action of the trial court constituted plain error which necessitates our consideration of the issue under the provisions of Rule 52(b) of the Tennessee Rules of Criminal Procedure.

> An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.

See State v. Ogle, 666 S.W.2d 58 (Tenn. 1984).

The introduction of this testimony prejudiced appellant's right to a fair trial as guaranteed by the Fifth and Sixth Amendments to the United States Constitution and Article I, Section 9, of the Tennessee Constitution.

We find no error by the trial court in requiring appellant's counsel to cross-examine the child witness while she appeared upset. Although the child cried during her direct examination, the record does not demonstrate that her ability to respond to questions was impaired. Appellant demonstrated no prejudice by the state's action affording the child a tissue to wipe her tears prior to cross-examination. The propriety, scope, manner, and control of the cross-examination of witnesses rests within the discretion of the trial court. Coffee v. State, 216 S.W.2d 702, 703 (Tenn. 1948). Appellate courts may not disturb discretionary decisions concerning cross-examination absent clear and plain abuse. State v. Fowler, 373 S.W.2d 460, 466 (Tenn. 1963); State v. Johnson, 670 S.W.2d 634 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1984). Therefore, we overrule the second assignment of error.

Appellant complains that the trial court denied her the right to present testimony concerning S.S.'s alleged prior consensual sexual activities. This issue was not presented to the trial court in appellant's motion for new trial but instead was first raised on appeal. Rule 3(e) of the Tennessee Rules of Appellate Procedure provides, in part:

> [i]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived . . . .

In light of the foregoing rule, we find this issue to have been waived.

The third issue raised by appellant concerns the denial by the trial court of certain Brady motions.

The state furnished discovery materials which prompted appellant to file nine Brady motions on August 26, 1992. The court conducted a hearing on the motions on September 18, 1992 and found that the motions were untimely and that the requested information was not exculpatory.

Appellant complained about the denial of only three of these motions. Those motions were denominated as Brady motions Four, Five, and Six. They specifically requested the following:

> Four: The names and addresses of witnesses who could corroborate the accused's position in asserting her innocence.
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> Five: The names and addresses of witnesses who possess favorable information that would enable defense counsel to conduct further

> and possibly fruitful investigation regarding the fact that someone other than the accused committed the crime alleged.
>
> Six: A list of all baby sitters used by Flora Smith, the mother of the children making the allegations from January 1, 1988 through February 17, 1992.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), held that the prosecution has a compelling duty to voluntarily furnish the accused, upon request, any exculpatory evidence that pertains to the guilt or innocence of the accused or the punishment which may be imposed if the accused is convicted of a criminal offense. Three conditions must exist before the prosecution is required to furnish exculpatory evidence. First, the evidence must be material. Second, the evidence must be favorable to the accused, his or her defense, or the sentence that will be imposed if found guilty. Third, the accused must make a proper request for the production of the evidence unless the evidence, when viewed by the prosecution, is obviously exculpatory in nature and will be helpful to the accused. State v. Marshall, 845 S.W.2d 228, 232 (Tenn. Crim. App.), perm. to appeal denied (Tenn. 1992)(citing United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)); Strouth v. State, 755 S.W.2d 819, 828 (Tenn. Crim. App. 1986), perm. to appeal denied, (Tenn. 1987).

Notwithstanding these principles, the prosecution is not required to disclose information that the accused already possesses or is able to obtain. State v. Caldwell, 656 S.W.2d 894, 897 (Tenn. Crim. App. 1983). Likewise, the prosecution is not required to embark on a hunting expedition "to seek out information not possessed or under the control of itself or another governmental agency." Id. If exculpatory evidence is equally available to both sides, the defense bears the burden of being responsible to seek its discovery. United States v. McKenzie, 768 F.2d 602, 608 (5th Cir. 1985), cert. denied, 474 U.S. 1086, 106 S.Ct. 861, 88 L.Ed.2d 900 (1986).

The information requested by appellant is of questionable materiality and would be unlikely to exonerate appellant. The trial court correctly noted that such information was not exculpatory. In addition, there is no showing that any of the information was within the possession of the state. Appellant was in a better position to obtain the requested information than the state. This information could have been obtained from the children's mother, from appellant or from appellant's boyfriend, who testified that he was involved with both women.

We find no error in the court's denial of these motions and overrule this assignment of error.

The fourth issue is that the evidence is insufficient to support the convictions. This assignment is mooted by our decision to reverse the conviction associated with S.S.'s complaint and will be limited to the conviction associated with R.S.'s complaint.

When sufficiency of the evidence is challenged, the standard for review by an appellate court is whether, after considering 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, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). In determining the

sufficiency of the evidence, this court should not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956); Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App.), cert. denied, (Tenn. 1978).

In this case, the child testified that appellant had engaged in touching his privates "in the front and the back." The crime for which appellant was convicted required, as its elements, that there be unlawful sexual contact accompanied by the fact that the victim be under the age of thirteen (13). Sexual contact was defined by Tennessee Code Annotated Section 39-2-602(10) as:

> "Sexual contact" includes the intentional touching of the victim's or the actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

In addition to the testimony of R.S., Loretta Dandridge, a nurse clinician at the Memphis Sexual Assault Resource Center, testified than an examination of R.S.'s rectum revealed star-shaped fissures consistent with anal penetration.

After considering these elements and the record we find that any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. This assignment of error is without merit and is overruled.

Finally, appellant contends that the convictions should be set aside and a new trial granted because the jury convicted appellant by way of a compromise verdict. Appellant contends that the jury reached a majority verdict and failed to follow the instructions of the court requiring them to reach a unanimous verdict. However, this record fails to contain the affidavit of the juror on which appellant relies to make this assertion. We find that this issue has been waived because of the inadequacy of the record on this issue.

It is the responsibility of appellant to prepare an accurate and complete record of what transpired in the trial court with respect to each and every issue that forms the basis for the appeal. Tenn. R. App. P. 24(b); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); State v. Miller, 737 S.W.2d 556, 558 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1987). When the record is incomplete on an issue or does not contain the proceedings relevant to an issue, this court is precluded from considering the issue. Tenn. R. App. P. 13(c); State v. Miller, supra, at 558; State v. Griffin, 649 S.W.2d 9, 10 (Tenn. Crim. App. 1982); State v. Hoosier, 631 S.W.2d 474, 476 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1982).

The appellant's conviction for aggravated sexual battery as to R.S. is affirmed. We find it necessary to reverse the conviction in count two because of the erroneous introduction of prejudicial and improper evidence in the testimony of Mary Smith. Count two, involving S.S., is hereby remanded for a new trial.

Joseph S. Daniel, Special Judge

CONCUR:

_____
Joe B. Jones, Judge

_____
Penny J. White, Judge