

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1995 SESSION

FILED

September 9, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee,)
)
V.)
)
DARROW HILL,)
)
Appellant.)

NO. 03C01-9504-CR-00125

GREENE COUNTY
NO. 11882

HON. JAMES EDWARD BECKNER
(Sexual battery)

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OPINION FILED: _____

REVERSED AND REMANDED

LEE RUSSELL, SPECIAL JUDGE

OPINION

_____ This case is an appeal as of right from a conviction by a jury in the Criminal Court of Greene County, Tennessee, for sexual battery. The Defendant appeals the admission of certain expert medical and psychological evidence presented by the State, appeals the exclusion of evidence concerning physical abuse of the alleged victim by her spouse, appeals the exclusion of the records of the diagnosis and treatment of the alleged victim for psychological problems prior to the alleged sexual battery, appeals a statement made to the jury by the trial court and the admission of statements made in testimony by the husband of the victim, appeals the imposition of the maximum sentence on the Defendant, and challenges the sufficiency of the evidence to support a finding of guilt beyond a reasonable doubt. We reverse the conviction on the basis of the improper admission of certain expert testimony to the effect that symptoms of post-traumatic stress syndrome observed in the alleged victim were consistent with a sexual battery on her having been made by the particular individual charged with the crime.

The Defendant in this case, Darrow Hill, was the plant manager of the plant operated by Tuscarora, Inc., in Greeneville. The alleged victim in this case, Edwina Wilhoit, had been an employee at the plant for approximately ten years when the sexual battery is alleged to have occurred on June 15, 1994. At approximately 5:00 P.M. on that date, Ms. Wilhoit was in the Defendant's office at the plant. The Defendant showed her a manual containing calibrations related to her work, and the two visited together the site of a new sign for the plant. It is undisputed that the two were in the Defendant's office alone for a period of time, but they described the events that occurred very differently in their testimony at trial. Ms. Wilhoit described being grabbed by the Defendant around her entire body and of being held by the neck while the Defendant felt her breast. When Ms. Wilhoit struggled free, the Defendant ran his hand under her shorts and grabbed her buttocks, according to the Defendant. The alleged victim described being grabbed three times before escaping to the far side of the office, and she testified that then Mr. Hill told

her that the incident was to remain inside the office and between the two of them. The Defendant described an uneventful business meeting, and both agree that Ms. Wilhoit exited the office after the plant foreman arrived in the office.

It is undisputed that in April of 1994 prior to the incident in June of 1994, Ms. Wilhoit was physically abused by her husband and was treated for her injuries by Dr. Ronald Cole, M.D., a general practitioner. The injuries on this occasion included "fingerprint marks" on her neck and bruises elsewhere on her body. Dr. Cole also treated Ms. Wilhoit after the alleged sexual battery. There was testimony at the trial that Ms. Wilhoit had finger marks or welts on her shoulders after the alleged sexual battery. Ms. Wilhoit also saw Dr. Lynn Petras Gould, Ph.D., a clinical psychologist, following the alleged sexual battery. It is undisputed that in 1983, Ms. Wilhoit was diagnosed and treated for depression and suicidal tendencies and did not accept recommended inpatient treatment at the Nolachuckey-Holston Area Mental Health Center.

The Greene County Grand Jury indicted the Defendant for sexual battery on July 25, 1994. On December 2, 1994, pre-trial motions were heard in the case, including motions *in limine*. It was revealed that the State would produce at trial both the medical doctor and the clinical psychologist who had seen Ms. Wilhoit to describe her condition after the alleged sexual battery. This exchange occurred between the trial court and counsel:

Prosecutor: And, finally, the -- I'm not going to call the dermatologist who treated her for her hair falling out, but she did confer with a Ph.D., clinical psychologist, and he diagnosed her as suffering from a post-traumatic stress disorder. And that would be her diagnosis.

Defense counsel: We object

Trial court: I think that's admissible to a limited point, as long as you don't do what has happened in some of these child abuse cases that have caused them to get reversed.

Prosecutor: I'm not going to get into a Ballard situation at all. I'm simply showing that is a result of this attack, not use that as a means of proving the attack.

Trial court: Right. You're okay.

Defense counsel: Maybe I misunderstand. Now, what?

Trial court: In other words, he can't say, well, these symptoms indicate that certain things happened to this woman. That's what he can't do.

____ Defense counsel: Right.

Trial court: What he can do is say, I found this woman and she is suffering from post-traumatic stress syndrome.

Both Dr. Cole and Dr. Gould testified at trial about post-traumatic stress syndrome, and the details of that testimony will be discussed below. Timely objections were made to the testimony and were overruled, and admission of the expert testimony was one of the grounds of a motion for new trial, which was also overruled.

During the trial, there were some rulings limiting the introduction of evidence by the Defendant concerning the physical abuse of Ms. Wilhoit by her husband in April of 1994, but the jury ultimately heard testimony concerning that physical abuse. During the trial, the victim's husband testified and contrary to rulings by the trial court, burst out certain angry remarks about the Defendant, including remarks which could be interpreted by the jury to mean that there had been prior incidents of sexual battery by this Defendant. On a separate occasion, the trial judge casually acknowledged the prosecuting officer as the son of his bailiff, although it is disputed between the parties whether this was done in the presence of the jury. The trial court excluded as too remote in time any evidence of diagnosis and treatment of the victim in 1983 for psychological problems with symptoms similar to those she experienced after the June 1994 incident.

The testimony of both Dr. Cole and Dr. Gould was brief, and the State offered them for no purpose except to describe the symptoms of Ms. Wilhoit after the alleged sexual battery and to relate these symptoms to the alleged battery. In its direct examination of Dr. Cole, the State had the doctor describe Ms. Wilhoit's two visits and one telephone call to his office and had the doctor identify her symptoms as being upset, crying or on the verge of tears, having hair loss and difficulty sleeping, and being anxious. The State then asked the following single question calling for an expert opinion:

Prosecutor: Can you state with a reasonable degree of medical certainty, sir, whether or not the symptoms that she presented were consistent with the anxiety created by having been attacked by her boss?

Dr. Cole: Yes, they were.

On cross-examination, Dr. Cole also conceded that the symptoms Ms. Wilhoit had were also consistent with having been physically abused by her husband.

Dr. Gould testified that she saw Ms. Wilhoit first on July 8, 1994, and continued to see her up to the week before trial. Dr. Gould testified that Ms. Wilhoit “presented with symptoms of anxiety related to a sexual assault occurring at work.” The psychologist testified that her diagnosis of Ms. Wilhoit was post-traumatic stress syndrome or PTSD and described symptoms of sleep disturbance, nausea, diarrhea, and hair loss. After Dr. Gould listed these symptoms, this testimony was given:

Prosecutor: Are those [symptoms] consistent with the history that she gave to you of having been sexually attacked by her boss at work?

Dr. Gould: Yes, these are all symptoms that are consistent with the nature of the assault.

Prosecutor: Do you have an opinion, based upon a reasonable degree of medical certainty, certainly consistent with your profession, that these symptoms are related and are the result of that?

Dr. Gould: Yes.

An objection by defense counsel at that point was again overruled.

In both the pre-trial motion hearing and at trial, both the State and the trial judge acknowledged that *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993), and related cases involving child sexual abuse control and limit the admission of expert testimony on post-traumatic stress syndrome. The State and the Defendant agree on appeal that *Ballard* is the controlling case, although the parties apply the case very differently to the facts of the case *sub judice*. In *Ballard*, the criminal defendant was charged with aggravated sexual battery on a minor. An expert had been allowed to testify at trial that four children whom Ms. Ballard was accused of sexually abusing exhibited “symptom constellations” consistent with post-traumatic stress syndrome and that, in the expert’s opinion, the

“stresser” precipitating the syndrome in the children was sexual abuse. *Id.* at 561. Among the symptoms of sexual abuse were bed-wetting, clinging, fear, irritability, nightmares, anxiety, and discipline problems at school. *Id.*

The Supreme Court acknowledged the expert’s expertise on the psychological effects of child sexual abuse, but found that an evaluation of the probative value of the testimony versus its prejudicial effect had to be made. *Id.* The Supreme Court described as follows the danger of questionable expert testimony and the nature of the examination that should be made to determine whether such evidence should be admitted:

In the context of a criminal trial, expert scientific testimony solicits the danger of undue prejudice or confusing the issues or misleading the jury because of its aura of special reliability and trustworthiness. *United States v. Green*, 548 F.2d 1261 (6th Cir.1977). This “special aura” of expert scientific testimony, especially testimony concerning personality profiles of sexually abused children, may lead a jury to abandon its responsibility as fact finder and adopt the judgment of the expert. Such evidence carries strong potential to prejudice a defendant’s cause by encouraging a jury to conclude that because the children have been identified by an expert to exhibit behavior consistent with post-traumatic stress syndrome, brought on by sexual abuse, then it is more likely that the defendant committed the crime. See *Bussey v. Commonwealth*, 697 S.W.2d 139, 141 (Ky.1985); *State v. Maule*, 35 Wash.App. 287, 667 P.2d 96 (1983). Testimony that children exhibit symptoms or characteristics of post-traumatic stress syndrome should not suffice to confirm the fact of sexual abuse. *Schimpf*, supra at 193. The symptoms of the syndrome are “not like a fingerprint in that it can clearly identify the perpetrator of a crime.” *Mitchell v. Commonwealth*, 777 S.W.2d 930, 932 (Ky. 1989). Expert testimony of this type invades the province of the jury to decide on the creditability of witnesses.

We are also troubled by the accuracy and reliability of expert testimony involving the emotional and psychological characteristics of sexually abused children. When expert testimony involves a novel kind of scientific basis that has not received judicial approval, a court must first determine whether the basis upon which the testimony is built is reliable enough to assist the jury to reach an accurate result. See, *United States v. Brown*, 557 F.2d 541 (6th Cir.1977). The State advanced no evidence at trial that the facts underlying Dr. Luscomb’s testimony were of a type reasonably relied on by experts in the particular field, *Tenn.R.Evid.* 703, or

that it is possible to make a statement that sexually abused children will exhibit the same characteristics or traits.

In Tennessee the qualifications, admissibility, relevancy and competency of expert testimony are matters which largely rest within the sound discretion of the trial court. *State v. Rhoden*, 739 S.W.2d 6 (Tenn. Cr.App.1987). Such discretion, however, is not absolute and may be overturned on appeal where the discretion is arbitrarily exercised. *Baggett v. State*, 220 Tenn. 592, 598, 421 S.W.2d 629, 632 (1967).

Ballard, 855 S.W.2d at 561, 562.

Examining the specifics of the expert's testimony in *Ballard*, the Supreme Court rejected it because it was contrary to the opinions expressed in numerous scholarly works researched and identified by name by the Court and because the experts list of symptoms was "too generic." *Id.* at 562. The testimony of the expert was not reliable enough to "substantially assist" the jury in determining whether a child sexual abuse had occurred, the criteria contained in Tennessee Rule of Evidence 702. *Id.*

The testimony of the two experts in the case *sub judice* is considerably less reliable than the expert testimony in *Ballard*. In the present case, neither expert testified to any particular expertise in identifying the symptoms of sexual battery or of identifying the causes of or "stressors" causing post-traumatic stress syndrome. Neither expert testified that any court had previously accepted his or her testimony on the causes of a particular case of post-traumatic stress syndrome or accepted his or her testimony about what symptoms generally follow from sexual battery or what stressors generally cause particular clusters of symptoms. The two experts cite no scholarly study on the subject and did not administer a battery of psychological tests on the alleged victim. Unlike the expert in *Ballard*, it was not established that the experts in the present case were even qualified to render an opinion on causation of symptoms.

In *Ballard*, the experts purported to tie a set of symptoms to child sex abuse, but the expert did not pretend to tie the symptoms to a particular alleged perpetrator. In the case *sub judice*, because of the way the prosecutor asked his questions, the experts actually tied Ms. Wilhoit's symptoms to a particular assailant, identified as her "boss." Nothing in the record comes close to qualifying the experts to tie symptoms to a particular assailant or to the genre of boss assailants. The list of symptoms described by these two experts is no less generic than the symptoms criticized on that grounds in *Ballard*.

Both the trial judge in his initial ruling *in limine* and the State on appeal make a distinction between expert testimony that the symptoms prove the crime and the kind of

testimony given by these two experts, that the symptoms are “consistent” with the crime charged. This is still an effort to prove the crime (and even the identity of the criminal) based upon the presence of the symptoms, even though the declaration of consistency is less strong than a statement that the symptoms were caused by a sexual assault. The presence or absence of psychological harm from the sexual battery is not a separate element of the crime of sexual battery which must be proved; if the Defendant forcibly ran his hand down the victim’s shorts while holding her in a headlock against her will, he committed the crime, regardless of whether the victim had post-traumatic stress syndrome days or weeks later. The prosecutor’s question was clearly intended to prove the fact of an assault and the identity of the assailant based on symptoms observed later. The Supreme Court in *Ballard* summarized the expert’s testimony as being that the symptoms observed were “consistent” with child sexual abuse. *Id.* at 561. Clearly the testimony of the experts in the case *sub judice* could not substantially assist the jury.

The majority opinion of this court in *State v. Schimpf*, 782 S.W.2d 186, (Tenn. Cr.App. 1989), a case relied upon in *Ballard*, sets out a list of principles that apply to the admission of expert testimony in general. The expert evidence must not invade the province of the jury, must be used only when the jurors themselves are not equipped to draw correct conclusions from the facts proved, and must neither mislead nor confuse the jury. *Schimpf*, at 192. The expert evidence should not relate to credibility of witnesses. *Id.* In the case *sub judice*, the testimony of the two experts invaded the province of the jury by bolstering the credibility of the victim and diminishing the credibility of the Defendant. The jury itself could determine whether the victim behaved and looked like a victim of sexual battery immediately after the alleged assault based on the fact that the plant foreman saw the victim before she even left the Defendant’s office and described her at trial. The evidence could have misled the jury into believing that a victim’s symptoms suggest not only the fact of a sexual assault but also the identity of the assailant.

The State contends that the admission of this evidence was harmless error if it

was error. There is in fact one sound argument for the proposition that the testimony here, though less reliable than the *Ballard* testimony, was also less harmful. Defense counsel skillfully had the experts concede that the symptoms observed were also consistent with spousal physical abuse, of which Ms. Wilhoit had been a victim. On the other hand, the experts here purport to tie symptoms to a particular assailant, the boss, and not just to tie symptoms to a kind of assault, increasing the chances of harm. In addition, review of the record of the trial as a whole reveals that the trial largely came down to which of the only two witnesses to the event was more credible. If one witness could have her credibility “blessed” by the testimony of an expert tying her psychological profile to the crime she described and to the accused she identified, then the likelihood goes up dramatically of her being believed over the one other witness to the event. The error could not be said to be harmless.

If the inadmissible expert testimony had been properly excluded, the other evidence in the case might have been sufficient to support a guilty verdict. Again, the credibility of the two witnesses to the incident, Defendant and alleged victim, who told dramatically different versions of the facts, was the real issue in the case. There is evidence in the record that could very well have convinced a jury that the Defendant’s story was incredible and that Ms. Wilhoit’s story was entirely credible, even though it cannot be said that the jury was not significantly influenced by the improper evidence when they decided credibility. The jury was in a superior position to observe the demeanor of the witnesses and to assess their credibility.

It is not necessary that the other issues in the case be reached. Exclusion of the State’s expert testimony would eliminate most of any need that existed to produce eleven year old psychological records on the alleged victim. Evidence of spousal physical abuse of the victim should have been and ultimately was admitted, being at the very least relevant to the issue of the sources of physical injuries that the alleged victim had after the alleged sexual battery. At a second trial, the spouse of the alleged victim can be and

should be prevented from making the kind of outbursts that he made, contrary to the trial court's instructions, at the first trial. At a second trial the trial judge will no doubt avoid any reference to the relationship between the prosecuting officer and the bailiff, or perhaps he can provide a substitute bailiff for this particular trial. Review of the application of the appropriate sentence standards can occur when and if there is a second conviction and a second sentencing hearing.

The judgment of the trial court is reversed and the case is remanded for a new trial.

LEE RUSSELL, SPECIAL JUDGE

CONCUR:

WILLIAM M. BARKER, JUDGE

JOHN K. BYERS, SENIOR JUDGE