IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1995 SESSION

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9409-CC-00317**
	)	
Appellee,	)	**MARSHALL COUNTY**
	)	
VS.	)	**HON. CHARLES LEE, JUDGE**
	)	
PHILLIP FRANKLIN MOORE,	)	
	)	(Aggravated Rape)
Appellant.	)	
	)	

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OPINION FILED: _____

REVERSED AND REMANDED

REX HENRY OGLE,
Special Judge

O P I N I O N

The defendant, Phillip Franklin Moore, was indicted on six counts each of rape of a child, aggravated rape, and incest. After a jury trial on the six counts of aggravated rape,[1] he was convicted of all six counts. The trial court imposed an effective sentence of forty-five years.

On appeal, the defendant contends that the evidence was insufficient to support his convictions. In conjunction with this contention, he argues that his confession was not made after a knowing and voluntary waiver of his constitutional rights and should therefore not have been admitted into evidence. Finding plain error in the State's failure to elect which offenses it was prosecuting, we reverse the judgment below and remand this matter for a new trial.

Half of the indicted counts for aggravated rape against the defendant alleged that, "on a day in 1992," the defendant engaged in unlawful sexual penetration of E.M.[2] The other half of these counts were identical except they alleged that the penetration was of J. M., E. M.'s younger sister. Both of these victims were daughters of the defendant and both children were under the age of thirteen at the time the alleged offenses occurred.

The victims had lived with their father at a residence on Hill Street in Lewisburg, Tennessee, for some period of time including 1991 until March 24, 1992.

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[1]Although the defendant had filed a motion to compel the State to elect which theory of criminal conduct it intended to prosecute, the trial court did not enter an order dismissing twelve of the eighteen counts until after the sentencing hearing. The record does not reflect which counts were read at the beginning of the trial; nor are opening statements reflected. However, the trial court's charge to the jury, included in the technical record only, begins, "The defendant is charged with three counts of Aggravated Rape of one person and three counts of Aggravated Rape against another person." Moreover, each of the verdict forms references only the offense of aggravated rape. Finally, the judgments each reflect the indicted offense as aggravated rape.

[2]In order to protect the privacy of victims who are minors, it is the policy of this Court to refer to them by initials only.

Ten-year-old E.M. testified that on more than ten occasions the defendant made her perform fellatio on him. Her testimony contained multiple inconsistencies about when and where each of these incidents took place; however, she stated at least three times that they had all occurred while she lived on Hill Street. She also testified that it had always been warm outside when it occurred there.

Nine-year-old J.M. testified similarly. Like her sister, she testified that the defendant had made her perform fellatio upon him more than ten times. She further testified that these incidents had taken place at her Hill Street home. Her testimony about when these events occurred was inconsistent, and at one point she admitted that she didn't really know when they happened.

Detective Roger Fagan of the Lewisburg Police Department, testified that he had interviewed the defendant on July 22, 1993, and that the defendant had confessed to three incidents of fellatio with each of the two victims. The defendant subsequently wrote, "I Phillip made [E] and [J] suck my d--k 3 time[s] each child" and signed the writing. This written statement was introduced into evidence.

Eric Moore, the defendant's twelve-year-old son, testified that his sisters had told him that the defendant had molested them. He, however, had never witnessed these occurrences.

The defendant, who suffers from a brain injury, testified that the victims had created their stories at their mother's behest. He related that he and their mother had been separated for a time, but had been back together for approximately three weeks when she called the police and informed them that the defendant had molested E.M. and J.M. The defendant claimed that he had made a confession to Detective Fagan because he was afraid of the detective and because he was taking pain medication.

The jury had before it, then, testimony from each of the two victims that each had been raped by her father more than ten times. However, the victims' testimony about when each rape occurred was vague and nonspecific. The most specific testimony E. M. gave about any particular rape was that it had occurred in the bathroom on a Saturday, that she had been inside watching cartoons, that her brother and sisters were outside, that she had been wearing shorts and a tee-shirt, and that the weather had been sunny.[3] However, she couldn't remember who had gone into the bathroom first, how long she had been in the bathroom, or how long the episode took. The only detail about any particular incident that J. M. positively testified to was that the defendant had asked her to lie down with him in his bedroom, she had, and then he told her what to do.

The only other non-hearsay evidence of the rapes was the defendant's own confession to having each of the victims perform fellatio three times. However, this confession was completely nonspecific as to when or where any of these offenses occurred.

Our Supreme Court recently considered a post-conviction petition in which the petitioner alleged that he had received ineffective assistance of counsel because his lawyer had not required the prosecutor to elect the particular offenses upon which convictions would be sought. Tidwell v. State, 922 S.W.2d 497 (Tenn. 1996). The petitioner had been charged with having fourteen sexual encounters with his minor daughter over a fourteen month period, each occurring on the "____" day of a named

[3]This testimony raises questions about whether this particular incident occurred in 1992, because the family left the residence at which the alleged rape took place on March 24 of that year. That the victim was wearing shorts and a tee-shirt implies that the incident may have occurred during the summer months of 1991. The indictment referred only to 1992. While we recognize that "the exact date, or even the year, of an offense need not be stated in an indictment or presentment unless the date or time 'is a material ingredient in the offense,' " State v. Byrd, 820 S.W.2d 739, 740 (Tenn. 1991) (citation omitted), we are concerned that the discrepancy here may not afford the defendant adequate protection from double jeopardy. See, e.g., State v. Hardin, 691 S.W.2d 578, 580-81 (Tenn. Crim. App. 1985) ("[T]he indictments and proof are sufficient to protect [the defendant] from further prosecution for acts of this nature committed against this victim within the times alleged in the indictments.") (emphasis added). Here, if the defendant were acquitted under the present indictment, it appears possible that the State could reindict him for offenses allegedly occurring during 1991, and then present this same testimony at the trial of those offenses.

month. He was subsequently convicted by a jury of forty-two offenses: fourteen counts each of rape, incest, and contributing to the delinquency of a minor.

The victim had testified that she engaged in sexual activity with her father approximately once a week over the fourteen month period covered by the indictment. However, she was able to identify only two discrete incidents with any particularity, including time and place. Also introduced at trial was the petitioner's confession that he had engaged in sexual intercourse with the victim.

In considering the Tidwell petition, our Supreme Court reiterated its prior holding in Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1973): "it [is] the duty of the trial judge to require the State, at the close of its proof-in-chief, to elect the particular offense of carnal knowledge upon which it would rely for conviction, and to properly instruct the jury so that the verdict of every juror would be united on the one offense." In the Tidwell trial, this election was not performed. Thus, the Court found:

> When, as here, a jury is permitted to select for itself the offenses on which it will convict, the court cannot be assured of jury unanimity. Hence, when asked to function as "thirteenth juror" and assess the weight of the evidence to support the jury's verdict, the trial court cannot be certain which evidence was matched by the jury to which count. Moreover, absent an election, an appellate court reviewing the legal sufficiency of the evidence can hardly be confident that it has discharged its function properly.

Tidwell, 922 S.W.2d at 501 (citation omitted).

The State argued in Tidwell that jury unanimity had been attained because, although the jury may not have been able to distinguish between the various acts, it had been capable of unanimously agreeing that they had taken place in the number and manner described in the indictment. Similarly, the State could make the identical argument here: that, although the jury may not have been

able to distinguish between the various acts that the victims testified occurred at least ten times each, it was capable of unanimously agreeing that they each took place at least three times to each victim, thereby corresponding to the number of times to which the defendant confessed and the number of indicted counts. However, the Supreme Court rejected this argument in Tidwell, finding:

> This approach, in our view, is akin to a "grab-bag" theory of justice. To illustrate the operation of this theory, in any given case the State could present proof on as many offenses within the alleged period as it chose. Because all such offenses will have been "proven," the jury may, in effect, reach into the brimming bag of offenses and pull out one for each count. Even when done by this method, the argument goes, each offense will have been proven beyond a reasonable doubt. We acknowledge that the illustration is an extreme one, but we think it makes the point: such an approach is contrary to our law.

Tidwell, 922 S.W.2d at 501.

In the instant case, the State indicted the defendant for three aggravated rapes against each daughter, each occurring "on a day in 1992." Each of the girls testified to having been raped at least ten times by the defendant, although the testimony was not at all clear as to the year in which each of these incidents occurred. The defendant confessed to six rapes; however, he indicated no time period whatsoever as to when these offenses occurred. Accordingly, the jury was given the option here of reaching into a "grab-bag" of twenty-six offenses and pulling one out for each of six counts. Under our Supreme Court's reasoning in Tidwell, these convictions cannot stand.

Because of our ruling on the issue of election, we decline to address the issue of the sufficiency of the evidence. With respect to the defendant's argument concerning the admissibility of his confession, we find that he waived his right to suppress his statement by failing to make the proper pre-trial motion to suppress evidence pursuant to Tennessee Rule of Criminal Procedure 12(b)(3). See State v. Davidson, 606 S.W.2d 293, 295 (Tenn. Crim. App. 1980). He has shown no good cause for his failure

to timely raise the objection. Id. He repeated this waiver when he failed to raise this ground in his motion for new trial. T.R.A.P. 3(e); see State v. Clinton, 754 S.W.2d 100, 103 (Tenn. Crim. App. 1988). Accordingly, and in light of our disposition of this case, we need not decide this issue.

For the reasons set forth above, the defendant's convictions are reversed and this matter is remanded for a new trial.

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REX HENRY OGLE, Judge

CONCUR:

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GARY R. WADE, Judge

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JOHN H. PEAY, Judge