IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9510-CC-00314**
	)	
Appellee,	)	
	)	
	)	**BRADLEY COUNTY**
VS.	)	
	)	**HON. MAYO L. MASHBURN**
TREMAILE MALONE,	)	**JUDGE**
	)	
Appellant.	)	**(Direct Appeal)**

FOR THE APPELLANT:

ASHLEY L. OWNBY
180 North Ocoee Street
P. O. Box 176
Cleveland, TN 37364-0176

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

HUNT S. BROWN
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243

JERRY N. ESTES
District Attorney General

SHARI TAYLOE
Assistant District Attorney
P. O. Box 1351
Cleveland, TN 37364-1351

OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Bradley County Criminal Court jury found Appellant Tremaile Malone guilty of rape. As a Range I standard offender, he received a sentence of eight years in the Tennessee Department of Correction. In this direct appeal, Appellant presents the following issues for review: (1) whether the trial court erred in refusing to grant a mistrial following the State's use of a peremptory challenge to remove an African-American from the jury pool; and (2) whether the trial court erred in excluding evidence of the victim's prior sexual conduct.

After a review of the record, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

As accredited by the jury's verdict, the proof shows that, on September 12, 1994, N.W.,[1] a sixteen year old female, went to the Bachman Home for the purpose of visiting Joseph Tillman. While there, she was gang raped by Appellant, Anthony Comer, and Jabarr Simpson.

On December 14, 1994, a Bradley County Grand Jury indicted Appellant for two counts of aggravated rape, both in violation of Tennessee Code Annotated Section 39-13-502(a)(3)(A). On April 12, 1995, Appellant filed a motion to introduce evidence of the victim's prior sexual conduct. The motion was denied.

[1] It is the policy of this Court to refrain from referring by name to minor victims of sex offenses. The victim will be referred to by her initials.

On May 24 and 25, 1995, Appellant was tried before a jury in the Bradley County Criminal Court. During the jury selection phase of the trial, the State exercised a peremptory strike to remove an African-American from the jury pool. In response, defense counsel made a motion for a mistrial, arguing that the State's action was racially motivated. The motion was denied.

At the conclusion of the trial, the jury found Appellant guilty of one count of rape in violation of Tennessee Code Annotated Section 39-13-503(a)(1). Following a sentencing hearing on July 3, 1995, the trial court imposed a sentence of eight years.

II. PEREMPTORY CHALLENGES

Appellant first alleges that the trial court erred in refusing to grant a mistrial following the State's use of a peremptory challenge to remove an African-American from the jury pool. Appellant argues that the State's decision to strike this prospective juror was made on the basis of race.

The exercise of a peremptory challenge for purely racial reasons violates the Equal Protection Clause of the Fourteenth Amendment. Batson v. Kentucky, 476 U.S. 79, 89 (1986); State v. Jones, 789 S.W.2d 545, 548 (Tenn. 1990). However, the dismissal of one or more African-American jurors, without more, is not unconstitutional. State v. Bell, 759 S.W.2d 651, 653 (Tenn. 1988). The defendant must present a prima facie case of racial discrimination by showing that the totality of the relevant facts gives rise to an inference of a discriminatory purpose. Batson, 476 U.S. at 93-94. Once the defendant satisfactorily presents a prima facie case of discriminatory purpose,

the burden shifts to the prosecution to provide a rational, race-neutral explanation for the exercise of the peremptory challenge. Id. at 94.

Here, Appellant relies entirely upon the State's peremptory removal of one African-American from the jury pool as evidence of an unfair discriminatory practice. We do not believe that this incident, standing alone, is sufficient to make out a prima facie case of discrimination, especially in light of the fact that the State declined to use its final two peremptory challenges to remove two other African-Americans from the jury pool. See State v. Brown, 915 S.W.2d 3, 8 (Tenn. Crim. App. 1995). Moreover, the State offered the following rational, race-neutral explanation for the exercise of its peremptory challenge. The assistant district attorney said of the challenged juror:

> He seemed bored, not attentive. His facial expressions made him look like he resented being here, that he didn't really want to be here.

The totality of the circumstances indicate that this peremptory challenge was not exercised to further a discriminatory purpose. See State v. Bibbs, 806 S.W.2d 786, 789-90 (Tenn. Crim. App. 1991). Thus, we conclude that the trial court properly denied a mistrial.

III. PRIOR SEXUAL CONDUCT OF THE VICTIM

Appellant also alleges that the trial court erred in excluding evidence of the victim's prior sexual conduct. Appellant maintains that the following specific instances of N.W.'s alleged conduct establish a pattern of sexual behavior tending to prove that she consented to the sexual encounter in question:

(1) at the age of twelve, N.W. had consensual sex with a twenty year old and later claimed that it was aggravated rape;

(2) during the course of the past three years, N.W. has had numerous sexual encounters with men and admits to being extremely sexually active;

(3) on May 16, 1994, N.W. claims to have been raped by a friend; and

(4) N.W. has an ongoing sexual relationship with various black drug dealers.

The Tennessee Rules of Evidence provide as follows:

(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:

(1) Required by the Tennessee or United States Constitution, or

(2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

(3) If the sexual behavior was with the accused, on the issue of consent, or

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

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

Tenn. R. Evid. 412(c) (emphasis added). In order to introduce such evidence, the defendant must file a written motion ten days prior to trial, accompanied by an offer of proof describing the specific evidence and the purpose for introducing it. Id. 412(d)(1).

Here, Appellant filed a timely pretrial motion but failed to make an offer of proof that effectively substantiated his allegations, as required by Rule 412(d)(1)(iii). Cf. State v. Sheline, No. 03C01-9505-CR-00141, 1996 WL 325913, at *12 (Tenn. Crim. App. June 14, 1996), perm. app. granted, (Tenn. Jan. 6, 1997) (the defendant substantiated his allegations by presenting testimony from individuals who had engaged in sexual relations with the victim). The trial court concluded that the proffered instances of sexual conduct constituted "nothing more than just vague allegations . . . that cannot be supported." We agree. In light of Appellant's concession, both in his written motion and during pretrial discussions, that he could provide neither proof of these allegations nor the names of those involved, we do not believe that he has satisfactorily complied with subsection (d) of Rule 412. Furthermore, the record does not clearly demonstrate that the probative value of such evidence outweighs its prejudicial effect. See Tenn. R. Evid. 412(d)(4); see also State v. Stamps, No. 02C01-9301-CC-00002, 1994 WL 59451, at *8 (Tenn. Crim. App. Mar. 2, 1994), perm. app. denied, (Tenn. July

18, 1994). Thus, we conclude that the trial court acted properly in excluding these alleged instances of N.W.'s prior sexual conduct.

Accordingly, the judgment of the trial court is affirmed.

_____
JERRY L. SMITH, JUDGE

CONCUR:

_____
GARY R. WADE, JUDGE

_____
DAVID H. WELLES, JUDGE