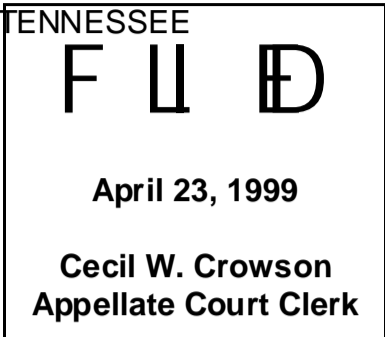


IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1998 SESSION



JACK JOSEPH EADS and )  
 CHRISTINE EADS, )  
 )  
 Appellants, )  
 )  
 v. )  
 )  
 STATE OF TENNESSEE, )  
 )  
 Appellee. )

No. 01C01-9710-CC-00485  
 Williamson County  
 Honorable Donald P. Harris, Judge  
 (Post-Conviction)

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OPINION FILED: \_\_\_\_\_

AFFIRMED

Joseph M. Tipton  
 Judge

## OPINION

The petitioners, Jack Joseph Eads and Christine Eads, appeal as of right from the Williamson County Circuit Court's denial of their petition for post-conviction relief. The petitioners seek relief from their 1992 convictions for aggravated rape and attempted aggravated sexual battery, for which Jack Eads received concurrent sentences of twenty-five years and two years, and Christine Eads received concurrent sentences of fifteen years and one year, respectively. Both petitioners were fined three thousand dollars for the attempted aggravated sexual battery convictions. This court affirmed the judgments of conviction in State v. Jack Joseph Eads and Chris Eads, No. 01C01-9307-CC-00229, Williamson County (Tenn. Crim. App. June 28, 1995). The petitioners now contend that they received the ineffective assistance of trial and appellate counsel, arguing that:

(1) counsel for Jack Eads was ineffective on appeal for failing to raise the sufficiency of the evidence, and counsel for Christine Eads was ineffective on appeal for failing to argue that the evidence was insufficient because of lack of medical proof;

(2) counsel for both petitioners were ineffective at trial and on appeal for failing to argue that the petitioners were denied a unanimous jury verdict;

(3) counsel for both petitioners were ineffective at trial and on appeal for failing to argue that the indictments were invalid and that they were amended after jeopardy attached and without the petitioners' consent;

(5) counsel for both petitioners were ineffective at trial and on appeal for failing to argue that the jury instruction on reasonable doubt was erroneous.

We affirm the post-conviction court's dismissal of the petition.

This case involved sexual encounters between the petitioners and the minor victim, who is Jack Eads' granddaughter and Christine Eads' step-granddaughter. The two incidents for which the defendants were convicted were described in this court's opinion on direct appeal as follows:

The victim recounted that . . . Mr. Eads introduced a vibrator into their encounters. She stated that during one of the encounters her grandfather rubbed her with the vibrator and penetrated her vagina with the vibrator until she screamed. She testified that her step-grandmother was present while this occurred and “just watched.”

. . . She stated that on one occasion Mrs. Eads tried to get her to fellate her grandfather. The victim recounted that Mrs. Eads demonstrated and tried to convince her to participate but she refused. Then Mrs. Eads told the victim that she “can do it with her hand instead” and encouraged her to participate in that manner.

State v. Jack Joseph and Chris Eads, slip op. at 3-4.

At the post-conviction hearing, Lionel Barrett testified that he represented Jack Eads at trial and in the direct appeal. He testified that the two main issues he raised in his appellate brief were the propriety of the convictions based upon the uncorroborated testimony of an accomplice and the propriety of the length of the sentences. He admitted that he did not raise the sufficiency of the evidence as an issue because he believed that the issue had no chance of prevailing and that it was not in Jack Eads’ best interest to raise the issue. He admitted that the state presented no medical proof at trial, but he said he remembered making a strategic decision not to raise the issue on appeal. He said that the fact that the state presented no medical proof of the offense did not mean that the offense did not occur.

Mr. Barrett admitted that he did not challenge the indictments or any amendment to the indictments. He said that his method for determining what issues to raise on appeal was to examine the arguments that might have legitimate success on appeal, and limit the issues raised to those arguments. He said he thought the evidence against Mr. Eads was strong. He said he thought the accomplice testimony issue and the sentencing issue were his strongest arguments for appeal. He admitted that he did not object to the language of the reasonable doubt jury instruction at trial nor did he challenge the unanimity of the verdict.

John Henderson testified that he represented Christine Eads at trial and on appeal. He testified that the two main issues he submitted in his appellate brief were the sufficiency of the evidence and the propriety of the verdicts in light of the uncorroborated accomplice testimony. He admitted that the state presented no medical proof of the victim's injuries at trial, but he said that he did not recall raising that issue on appeal as a part of the sufficiency argument. He stated that he did not attack the indictments or any amendments to the indictments, he did not raise the issue of the unanimity of the verdicts, and he did not challenge the language of the reasonable doubt jury instruction. He said that his process for determining which issues to raise on appeal was to evaluate the case and decide which issues might be most successful with the appellate court. At the conclusion of the hearing, the trial court denied the petition.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is upon the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). The Strickland standard has been applied, as well, to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn.), cert. denied, 493 U.S. 874 (1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir.

1974) and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (counsel's conduct will not be measured by "20-20 hindsight"). Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See Hellard, 629 S.W.2d at 9; DeCoster, 487 F.2d at 1201.

Also, we note that the approach to the issue of the ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The burden is on the petitioner in the trial court to prove the factual allegations that would entitle him to relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (1995). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). In this respect, the petitioner, as the appellant, has the burden of illustrating how the evidence preponderates against the judgment entered. Id.

## **I. SUFFICIENCY OF THE EVIDENCE**

\_\_\_\_\_ Jack Eads contends that his attorney was ineffective for failing to raise the sufficiency of the evidence on appeal. Christine Eads contends that her attorney was ineffective because, although he did raise the sufficiency of the evidence on appeal, he

did not argue the fact that there was no medical proof of the victim's injuries. The state argues that the petitioners received the effective assistance of counsel.

Initially, we note that there is no constitutional requirement that an attorney argue every issue on appeal. Jones v. Barnes, 463 U.S. 745, 750-51, 103 S. Ct. 3308, 3312 (1983); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993). Attorneys have discretion to make tactical decisions regarding what issues to raise on appeal, and their decisions should not be second-guessed by the appellate courts. Cooper, 849 S.W.2d at 747.

We conclude that the petitioners have failed to show that the evidence preponderates against the trial court's determination that their attorneys were not ineffective for failing to raise the sufficiency of the evidence on appeal. We note that both a jury and a panel of this court on direct appeal found the evidence sufficient, despite the fact that there was no medical evidence. The petitioners have failed to show how their attorneys' failure to raise this issue on appeal constitutes ineffective assistance or how they were prejudiced.

## **II. JURY UNANIMITY**

Next, the petitioners contend that their attorneys were ineffective at trial and on appeal for failing to argue that they were denied a unanimous jury verdict. Specifically, the petitioners argue that their attorneys were ineffective for failing to object at trial and raise on appeal the fact that the state never elected which petitioner was the principal and which was the aider and abettor.

We conclude that there is no requirement that the state elect between a theory of prosecution of each petitioner as either a principal or an aider and abettor. Under the law applicable to this case, aiders and abettors were deemed principal

offenders. See Tenn. Code Ann. § 39-1-303 (1982) (repealed). The liability of both for an offense is the same. The exact role played by each defendant is inconsequential as long as the jury finds that both had the requisite mental state and were involved in the commission of the crime.

In State v. Williams, 920 S.W.2d 247 (Tenn. Crim. App. 1995), Williams was convicted of aggravated rape when the victim identified him as one of her assailants, although she was unsure which of her assailants sexually penetrated her. The defendant claimed that he was denied his constitutional right to a unanimous jury verdict because the verdict did not indicate whether the jury found him to be the actual perpetrator of the offense or only criminally responsible for the conduct of another. This court affirmed the conviction. It noted that jury unanimity problems generally relate to the failure to elect among different offenses. See, e.g., State v. Shelton, 851 S.W.2d 134 (Tenn. 1993); State v. Hoyt, 928 S.W.2d 935 (Tenn. Crim. App. 1995). However, it distinguished Williams' case in that it involved one particular offense occurring during one criminal event. Williams, 920 S.W.2d at 257-58. It concluded that Williams' constitutional right to a unanimous jury verdict was not violated.

In the present case, the state elected two separate offenses upon which to proceed. The state's failure to elect which petitioner was the principal and which was the aider and abettor did not deny the petitioners their right to a unanimous jury verdict. Because the state was not required to elect and the trial court was not required to instruct the jury that whether a defendant was a principal or an aider and abettor must be decided by a unanimous verdict, the petitioners have not demonstrated that their attorneys were ineffective for failing to raise the issue at trial or on appeal.

### III. VALIDITY OF INDICTMENTS

The petitioners contend that their attorneys were ineffective for failing to argue at trial and on appeal that (1) the indictments against them were invalid and (2) the indictments were amended without their consent and after jeopardy had attached. Specifically, the petitioners contend that at the time the offenses took place, aggravated rape and attempted aggravated sexual battery were general intent crimes. The petitioners argue that the indictments failed to state the proper mens rea and that the trial court essentially amended the indictments by instructing the jury that it had to find that the petitioners acted knowingly or intentionally. The state argues that the issues are waived because the petitioners failed to raise them at trial, and it further argues that the petitioners have failed to show prejudice.

First, we note that the petitioners have not waived the issues for failing to raise them at trial. Waiver might be an appropriate argument if this were a direct appeal, but now, in post-conviction proceedings, the petitioners argue that the failure to raise the issues at trial resulted in ineffective assistance of counsel. These issues have not been waived for purposes of considering the effectiveness of the petitioners' counsel.

Nevertheless, the issues are without merit. First, the petitioners argue that the indictments "failed to state a mens rea consistent with the law applicable at the time of the alleged incidents." The indictments charged the petitioners with "unlawfully and feloniously" committing the offenses. The offenses occurred in 1987 and 1988. At that time, aggravated rape was defined as the "unlawful sexual penetration of another" accomplished under certain aggravating circumstances. See Tenn. Code Ann. § 39-2-603 (1982) (repealed 1989). In Dykes v. Compton, 978 S.W.2d 528 (Tenn. 1998), our supreme court considered an aggravated rape indictment worded the same as the one before us under the same aggravated rape statute. The court held that the indictment



sufficiently alleged aggravated rape. Thus, the aggravated rape allegations before us are sufficient.

Aggravated sexual battery was defined as “unlawful sexual contact.” Tenn. Code Ann. § 39-2-606 (1982) (repealed 1989). “Sexual contact” requires “the intentional touching of the victim’s or 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.” Tenn. Code Ann. § 39-2-602 (1982). This reflects a specific intent. Obviously, the attempt to commit a sexual battery requires a specific intent. However, historically, the word “feloniously” has meant “[p]roceeding from an evil heart or purpose; done with a deliberate intention of committing a crime.” Black’s Law Dictionary (6th ed. 1990). As our supreme court has previously noted, “one meaning attached to the word is: ‘In a legal sense, done with the intent to commit a crime.’” State v. Smith, 119 Tenn. 521, 526, 105 S.W. 68, 70 (1907). We believe that the indictments in the present case sufficiently allege the offenses.

Next, the petitioners argue that the trial court’s instruction to the jury that the petitioners must have acted intentionally or knowingly amended the indictment without their consent. Again, the petitioners have failed to demonstrate how their attorneys’ failure to object to the instruction resulted in any prejudice. We agree with the trial court that, if anything, the instruction helped the petitioners by requiring the state to prove a more culpable mental state than was actually required. This issue is without merit.

#### **IV. JURY INSTRUCTION**

The petitioners contend that their attorneys were ineffective at trial and on appeal for failing to argue that the trial court’s reasonable doubt instruction was

erroneous because it included the phrase “moral certainty.” The state contends that the trial court correctly determined that the instruction was proper, thus counsel did not err by not raising the issue. We agree.

The trial court instructed the jury as follows:

Reasonable doubt is that doubt engendered by an investigation of all proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

This is a correct statement of the burden of proof for criminal trials in Tennessee. See State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994); State v. Sexton, 917 S.W.2d 263, 266 (Tenn. Crim. App. 1995); Pettyjohn v. State, 885 S.W.2d 364, 366 (Tenn. Crim. App. 1994). Thus, the trial court correctly determined that the attorneys’ failure to object at trial and to raise the issue on appeal did not result in ineffective assistance of counsel.

In consideration of the foregoing and the record as a whole, we affirm the judgment of the trial court.

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Joseph M. Tipton, Judge

CONCUR:

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Joe G. Riley, Jr., Judge

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Thomas T. Woodall, Judge