IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1999 SESSION

FILED

November 23, 1999

Cecil CROWS ON, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9808-CR-00324
	)	
	)	Carter County
v.	)	
	)	Honorable Arden L. Hill, Judge
	)	
DAVID CALLOWAY,	)	Aggravated sexual battery (five counts) and
	)	rape of a child (twenty-four counts)
	)	
Appellant.	)	

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OPINION FILED:_____

REVERSED AND REMANDED

Joseph M. Tipton
Judge

OPINION

The defendant, David Calloway, appeals as of right from his convictions by a jury in the Carter County Criminal Court for five counts of aggravated sexual battery, a Class B felony, and twenty-four counts of rape of a child, a Class A felony.

The defendant received a total sentence of one-hundred twenty-one years to be served in the Department of Correction. The defendant presents the following issues for our review:

> (1) whether the evidence is sufficient to sustain the convictions;
>
> (2) whether the trial court erred by allowing testimony from the victim's psychologist relating to the victim's credibility;
>
> (3) whether the trial court erred by allowing fresh-complaint testimony from the victim's mother;
>
> (4) whether the trial court erred by allowing testimony from an investigating officer regarding statements made by the victim; and
>
> (5) whether the trial court properly sentenced the defendant.

Although not raised by the defendant, we reverse his convictions because the state failed to elect the particular offenses it presented to the jury. The state concedes this error. Also, the trial court erred in admitting the evidence relating to issues (2) and (3).

I. ELECTION OF OFFENSES

The defendant was indicted for five counts of aggravated sexual battery and twenty-six counts of rape of the ten-year-old male victim. The aggravated sexual battery indictments all allege that on or about the spring or summer of 1992, the defendant had unlawful sexual contact with the victim. The child rape indictments allege that the defendant unlawfully sexually penetrated the victim, with counts six and seven specifying the spring or summer of 1992, counts eight through eleven specifying the fall of 1992, counts twelve and thirteen specifying the winter of 1992-93, counts fourteen through twenty-one specifying the spring or summer of 1993, counts twenty-six and twenty-seven specifying the winter of 1993-94, and counts twenty-eight through thirty-one specifying the spring of 1994.

The victim's family were neighbors and close friends of the defendant. The victim and one of the defendant's daughters often played together at the defendant's home. The victim would also spend time with the defendant.

The victim testified that the first instance of sexual contact occurred when the defendant touched the victim's penis through the victim's clothing and that this

occurred five times. The victim testified that his encounters with the defendant progressed, and eventually the defendant would perform oral sex on the victim and have the victim perform oral sex on him. The victim testified that the encounters occurred primarily in the defendant's work shed but that they also occurred in the defendant's house and on his boat. The victim testified that the sexual activity continued for approximately two years and occurred "a number of times" each month. Regarding when the offenses occurred, the victim testified that the activity began in 1992 when it was warm and continued for two years with the encounters being less frequent in the colder months.

The trial court presented all thirty-one counts to the jury. Neither the state nor the trial court instructed the jury on the specific counts to be considered or the facts to be considered for each count. In closing argument, the prosecutor stated as follows:

> [The victim] said he was certain it happened twenty-five or more times. He also said it happened at least three times a month. If you're talking about one month–one year, that's thirty-six times. If you're talking about two years, that's sixty-two times–no, seventy-two times. I'm not a mathematician. That's seventy-two times. Point being, I have more than covered– the State has more than presented sufficient proof for you to find him guilty of all twenty-six counts of rape of a child.

In Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1973), our supreme court held that the trial court has a duty "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." The court articulated three reasons for requiring an election: (1) to enable the defendant to prepare a defense for specific charges, (2) to protect the defendant from double-jeopardy, and (3) to ensure that the jury's verdict is unanimous. Id. at 803.

Our supreme court has recognized that the third reason, assuring verdict unanimity, is the most significant. See State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993). Thus, the trial court must ensure that the jury deliberates over a particular charged offense or risk assembling a "patchwork verdict" based on the different

offenses in evidence. Tidwell v. State, 922 S.W.2d 497, 501 (Tenn. 1996) (citing Shelton, 851 S.W.2d at 137). "When . . . a jury is permitted to select for itself the offenses on which it will convict, the court cannot be assured of jury unanimity." Tidwell, 922 S.W.2d at 501.

The jury in the present case was presented with five counts of aggravated sexual battery and twenty-six counts of rape of a child. No testimony was presented to link the offenses with any specific facts or times. Furthermore, the prosecutor's closing argument reflects a "grab-bag" theory that is impermissible. Id. Thus, it is impossible to conclude that the jurors all considered the same conduct for each count in finding the defendant guilty.

Our supreme court has recognized the difficulties involved in prosecuting child sexual abuse cases. However, the court has stated that "the constitutional protections guaranteed a criminal defendant . . . cannot be suspended altogether because of the victim's age . . . . [T]he state must either limit the testimony of prosecuting witnesses to a single event, or prepare the case so that an election can be made before the matter is submitted to the jury to decide." Shelton, 851 S.W.2d at 139. In the present case, the state's failure to elect the specific incidents upon which it sought convictions requires us to reverse the convictions and remand the case for a new trial.

II. REMAINING ISSUES

A full analysis of the defendant's remaining issues is unnecessary in light of our holding with respect to the election issue. However, we will briefly address the issues, with particular attention to those issues likely to resurface at a new trial.

A. Sufficiency of the Evidence

The defendant contends that the evidence is insufficient to support his convictions, the crux of his argument being that the victim's testimony was inconsistent. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing 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, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Viewing the evidence in the light most favorable to the state, the evidence is sufficient to support convictions for aggravated sexual battery and rape of a child. The victim testified that the defendant placed his arm around the victim and touched the victim's penis through his clothing. He testified that the defendant told him not to tell anyone because the victim would get in trouble and that the touching occurred at least five more times. The victim testified that the defendant then began removing the victim's pants and touching the victim's penis. He testified that this occurred more than five times. The victim testified that the defendant then began performing oral sex on him and that he performed oral sex on the defendant. He testified that this continued for two years and occurred at least twenty-five times. Although the defendant argues that the victim's testimony was not credible, the credibility of a witness is a determination made by the jury, not by this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987).

B. Dr. Grubb's Testimony

The defendant contends that the trial court erred by admitting the testimony of the victim's psychologist, Dr. Grubb, to bolster the victim's testimony. He specifically takes issue with (1) Dr. Grubb's testimony that no indicators existed to show that the victim was fabricating and (2) Dr. Grubb's testimony relating to his "classical" profile of child sexual abuse victims, which involves the child minimizing the events in the beginning but gradually describing the full extent of the trauma. The state contends that Dr. Grubb merely testified about the process he uses to treat child sexual abuse victims and that his testimony did not bolster the victim's credibility.

In State v. Schimpf, 782 S.W.2d 186, 193 (Tenn. Crim. App. 1989), this court held that an expert's testimony regarding whether a child sexual abuse victim's case is similar to other cases of child sexual abuse was inadmissible because it "invaded the

jury's province by offering testimony which ultimately went to credibility. Credibility of witnesses is a matter only for the jury." In State v. Anderson, 880 S.W.2d 720, 730 (Tenn. Crim. App. 1994), this court held that "child sex abuse cases may not be proven by evidence that the victim exhibited residual characteristics or behavioral traits similar to other victims of such abuse."

The testimony about which the defendant complains in this case is exactly the type prohibited by Schimpf and Anderson. Dr. Grubb testified that certain indicators exist to determine whether a child is fabricating and that these factors were not present in the victim's case. The trial court ruled the testimony to be admissible because "an expert in the field of psychology can testify as to opinion whether a person is telling the truth or not." Schimpf and Anderson illustrate that the trial court's admission of Dr. Grubb's testimony and its reasoning were erroneous. The gist of Dr. Grubb's testimony is that the victim was telling the truth, which is an impermissible comment on the victim's credibility.

The same is true for Dr. Grubb's testimony regarding the "normal" behavior of child sexual abuse victims. Dr. Grubb stated as follows:

> It's normal for a child to have both fear of condemnation from whomever the child is talking to and with those twin issues developing trust and giving the child a safe atmosphere where the child can talk to at least one adult to get this trauma out. It's very classical that a child will start with one thing to test the waters, to see if you can take this, and then over the course of therapy will add another thing and test the waters again to see if you believe, if you're going to react in horror, if the child will feel shame. And over the course of time the child will relate to the therapist the full description of the trauma.

Dr. Grubb later testified that in the beginning, it is not unusual for some children to minimize the trauma. Pursuant to Schimpf and Anderson, this testimony is reversible error.

C. Testimony of Victim's Mother

The defendant contends that the trial court erred by allowing the victim's mother to testify that the victim told her that the defendant "has touched me in my privates." He argues that the evidence is inadmissible as a fresh complaint or as an exception to the hearsay rule. The state agrees that the evidence is inadmissible as a

fresh complaint or as an exception to the hearsay rule, arguing instead that the

testimony was not hearsay because it was not offered as substantive evidence but rather to show why the victim's mother reported the abuse to the police.

Pursuant to State v. Livingston, 907 S.W.2d 392, 395 (Tenn. 1995), the testimony in the present case is not admissible as a fresh complaint. In Livingston, our supreme court held that "in cases where the victim is a child, neither the fact of the complaint nor the details of the complaint to a third party is admissible under the fresh complaint doctrine." Id. Furthermore, the testimony is not admissible as a hearsay exception, and we are unpersuaded by the state's argument that the testimony was admissible as nonhearsay. We fail to see the relevance of offering the testimony to explain why the victim's mother reported the abuse to the police. The testimony bolsters the victim's credibility and should not have been admitted under the reason claimed by the state.

D. Testimony of Lieutenant Huffman

The defendant contends that the trial court erred by allowing Lieutenant Huffman to testify regarding a conversation he had with the victim in which they discussed the victim's knowledge of the word "cum." He also contends that the trial court erred by allowing Lieutenant Huffman to testify that the victim told him that the defendant touched the victim's naked penis. He argues that the statements are inadmissible under the fresh complaint doctrine. First, the state asserts that this issue is waived because the defendant failed to object to the testimony at the time it was admitted. Otherwise, the state agrees with the defendant's assertion, but it argues that the testimony is admissible as a prior consistent statement.

We conclude that the defendant has waived complaint about Lieutenant Huffman's testimony. The failure to object contemporaneously in this case constitutes a waiver. See Hill v. State, 513 S.W.2d 142, 143 (Tenn. Crim. App. 1974).

Moreover, we see no plain error regarding this issue. The victim had previously been extensively cross-examined about whether he learned the word "cum" from someone at the Boys Club, which he visited after the events in this case are

supposed to have happened. Also, the defendant specifically questioned the victim about whether he had previously told anyone before his testimony that the defendant had said the word. Thus, this testimony was admissible. See Livingston, 907 S.W.2d at 398 (holding that testimony of the victim's cousin relating the victim's complaint of abuse was admissible as a prior consistent statement for corroborative purposes because the victim's credibility had been attacked on cross-examination). As for Lieutenant Huffman's testimony that the victim told him that the defendant touched the victim's naked penis, we do not believe that it constitutes plain error.

E. Sentencing

The defendant contends that the trial court erred in sentencing by enhancing his sentence because the offense was committed to gratify the defendant's desire for pleasure and excitement, Tenn. Code Ann. § 40-35-114(7), and by applying consecutive sentences. Our review of the record shows that the trial court applied factor (7) to the aggravated sexual battery convictions and the child rape convictions. The application of this factor to the aggravated sexual battery convictions was error. Intent to gratify a desire for pleasure and excitement is necessarily included in an element of aggravated sexual battery. See State v. Kissinger, 922 S.W.2d 482, 489-90 (Tenn. 1996). However, the trial court's application of this factor to the child rape convictions and its imposition of consecutive sentencing are supported by the record. See Tenn. Code Ann. § 40-35-115(5).

In consideration of the foregoing and the record as a whole, we reverse the defendant's convictions and remand the case to the trial court for a new trial.

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Joseph M. Tipton, Judge

CONCUR:

_____
John Everett Williams, Judge

_____
Alan E. Glenn, Judge