IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1999 SESSION

FILED

October 25, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. No. 03C01-9803-CR-00121 C.C.A. No. 03C01-9803-CR-00122
Appellee,	*	
		SULLIVAN COUNTY
VS.	*	
		Hon. R. Jerry Beck, Judge
BOBBY G. GODSEY and ALLEN HOYLE,	*	(Aggravated Rape, Criminal Conspiracy to Commit Aggravated Rape)
Appellants.	*	

For Appellants:

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For Appellee:

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendants, Bobby G. Godsey and Allen Hoyle, were convicted of aggravated rape and conspiracy to commit aggravated rape. The trial court imposed twenty-five and nine year sentences respectively for each defendant and ordered the sentences to be served concurrently.

The appeals of each defendant have been consolidated pursuant to Tenn. R. App. P. 16(b). The following issues have been presented for our review:

> (I) whether the state failed to reveal exculpatory evidence;
>
> (II) whether double jeopardy principles preclude the conspiracy convictions; and
>
> (III) whether the trial court properly allowed the state to cross-examine the defendants regarding prior convictions.

We affirm the judgment of the trial court.

On November 7, 1996, the victim, Robert Wayne Isbell, an inmate in the Sullivan County Jail, was playing poker with another inmate "for money." Subsequently, the defendant Allen Hoyle joined the game. After a few hands the victim incurred a debt to Hoyle of $4.80. At trial, the victim testified that when he promised to pay the debt after his family brought him money, Hoyle suggested the victim could pay off his debt by performing "four slow hand jigs" (manual sexual stimulation). The victim testified that when he refused, Hoyle appeared to be angry and then spoke with the defendant Bobby Godsey and two other inmates; after a brief discussion, Hoyle returned and said, "Instead of four slow hand jigs you owe me, why don't you just suck all four of us off and get it over with." The victim testified that he again refused and that Hoyle "started getting real mad" and "kept picking on me, kept coming over there and bothering me." According to the victim,

Hoyle warned that "somebody [could] get killed" for refusing to perform the requested acts. The victim stated that because he feared for his life, he performed as directed.

The victim testified that he was instructed to sit down on the toilet and place a white bag over his head. The bag had a picture of a woman taped to it with a hole cut out at the location of the woman's mouth. The victim recalled that the defendants and the other inmates first discussed and then decided upon the order of the rapes. The two other inmates went first. Each placed his penis through the hole in the bag and then ejaculated in the victim's mouth. The victim related that he washed out his mouth after each assault, he re-positioned the bag over his head, and the process was repeated. Godsey committed the third rape and Hoyle the final rape. The victim explained that he did not seek assistance from correctional officers because he was afraid.

The victim testified that after the incident, he repeatedly attempted to move from his cell in H block where the rape allegedly occurred. He asked another inmate, Melvin Murphy, to write a note requesting a transfer. The note was thrown into the hall and discovered by Officer Richard Lane, who moved the victim to another cell. The victim explained that he did not report the rape or press charges at that time because he felt he was in danger as long as he was in the same cell as Hoyle, Godsey, or the other assailants. After his transfer, the victim, feeling "more or less out of danger," reported the incident to the authorities and sought to file charges.

I

The defendants initially argue that the state failed to disclose

exculpatory information in violation of Brady v. Maryland, 373 U.S. 83 (1963). They specifically allege that the state did not inform the defense that the victim had a financial interest in the outcome of the trial because he later filed a claim for compensation against Sullivan County for their failure to provide adequate protection. Additionally, the defendants contend that although the state was fully aware of this claim, it allowed the victim to testify that he had no financial interest in the outcome of the trial.

The evidence in the record establishes that the victim's attorney, Gil Torbett, contacted the county executive, Gilbert Hodges, by telephone to establish a protocol for discussing a potential claim on behalf of one of his clients against Sullivan County. The record further establishes that attorney Torbett never revealed the name of his client, that he represented three other individuals who had potential claims against the county, that he did not inform prosecutors of a claim, and that he took no further action until after the criminal trial.

As a result of the conversation, the county executive mistakenly informed the county attorney, Dan Street, that a civil claim had been brought against the county by the victim. Although the victim's attorney had not mentioned the name of his client, attorney Street testified at trial and at the motion for a new trial that he and the county executive clearly understood the identity of the claimant. Attorney Street then sent a letter to the county's insurance carrier and the sheriff indicating that a claim had been made against the county. The county attorney also contacted the district attorney general's office in order to obtain information regarding the criminal trial. The county attorney erroneously informed the office of the district attorney general that the victim had given notice of a civil claim.

At trial, defense counsel called attorney Street as a witness. Attorney Street testified that the business records of Sullivan County indicated that a claim had been made against the county on behalf of the victim. On cross-examination, attorney Street admitted that there had been no actual written notice or a lawsuit filed at the time. At the motion for a new trial, attorney Torbett, who was not called as a witness during trial, testified that prosecutors had told him his testimony might be needed at trial depending on the testimony of the county attorney.

In the landmark case of Brady v. Maryland, the United States Supreme Court ruled that the prosecutor has a duty to furnish exculpatory evidence to the defendant. 373 U.S. at 87. Exculpatory evidence may pertain to the guilt or innocence of the accused and/or the punishment which may be imposed if the accused is convicted of the crime. State v. Marshall, 845 S.W.2d 228 (Tenn. Crim. App. 1992). The Supreme Court in Brady reasoned that a fair trial and a just result could not be obtained when, at the time of trial, the prosecution suppressed information favorable to the accused. Brady, 373 U.S. at 87-88.

Any "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. This duty to disclose extends to all favorable information irrespective of whether the evidence is admissible. Branch v. State, 469 S.W.2d 53 (Tenn. Crim. App. 1969). Information useful for impeaching a witness is considered favorable information that the prosecutor may not withhold. Giglio v. United States, 405 U.S. 150 (1972). And, while Brady does not require the state to investigate for the defendant, it does burden the prosecution with the responsibility of disclosing statements of witnesses favorable to the defense. State v. Reynolds, 671 S.W.2d

854, 856 (Tenn. Crim. App. 1984). The duty does not extend to information that the defense already possesses or is able to obtain or to information not in the possession or control of the prosecution. Banks v. State, 556 S.W.2d 88, 90 (Tenn. Crim. App. 1977).

Before this court may find a violation under Brady, the following elements must be established:

> (1) the defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
>
> (2) [t]he State must have suppressed the information;
>
> (3) [t]he information must have been favorable to the accused; and
>
> (4) [t]he information must have been material.

State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995) (as amended on rehearing).

In Edgin, our supreme court adopted the following standard for materiality:

> [T]here is constitutional error "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ...
>
> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Edgin, 902 S.W.2d at 390 (quoting Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995)).

The record shows the defendants formally requested exculpatory evidence, including evidence that would tend to impeach any witness that would be called by the state. The request satisfies the first requirement set forth in Brady. Assuming that the state suppressed favorable information, the defendants must still demonstrate the materiality of the evidence. Evidence is not material unless it creates "'reasonable probability' of a different result." Edgin, 902 S.W.2d at 390 (quoting Kyles v. Whitley, 115 S. Ct. at 1566). In Kyles, 115 S. Ct. at 1566, the United States Supreme Court held that, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial." The court then stated that a fair trial is one which results "in a verdict worthy of confidence." That is, it is not material unless the defendant can show "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict." Id.

Generally, a civil claim by a victim for injuries inflicted by a criminal defendant is relevant to witness bias. Cribbs v. State, 205 Tenn. 138, 139, 325 S.W.2d 567 (1959); State v. Russell, 735 S.W.2d 840, 842-843 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); State v. Horne, 652 S.W.2d 916, 918-919 (Tenn. Crim. App.), per. app. denied (Tenn. 1993). Those decisions are consistent with the general rule as to claims made by the victim directly against the defendant. The only difference here is that the civil claim by the victim is against Sullivan County, a third party.

It does appear that the prosecution did withhold information which may have been favorable to the defense. The county attorney telephoned the district attorney general's office and informed them that a claim had been filed on behalf of

the victim against Sullivan County. The fact that the information was technically erroneous (no claim had actually been filed) does not relieve the prosecution from the duty established in Brady to disclose exculpatory information.

The sanction to be applied for non-compliance with a request for pre-trial discovery must fit the circumstances of the case. Tenn. R. Crim. P. 16 (a)(2). The grant of a continuance of the trial might be appropriate or, after conviction, the grant of a new trial. State v. Cadle, 634 S.W.2d 623 (Tenn. Crim. App. 1982). Here, that is not necessary. The prosecution is not required to disclose information that the accused already possesses or is able to obtain. State v. Caldwell, 656 S.W.2d 894, 897 (Tenn. Crim. App. 1983); see e.g., State v. Gwendolyn D. Walls, Shelby County, No. 02C01-9307-CR-00140 (Tenn. Crim. App., at Jackson, Nov. 15, 1995).

Because defense counsel questioned the county attorney at trial as to a civil claim filed on behalf of the victim, defense counsel obviously acquired the information at issue, although from another source, by the time of the trial. The jury was made aware of the possible bias of the victim. They nonetheless chose to accredit his testimony. Under these circumstances, there is not a reasonable probability of a different result had the state properly provided the information.

II

The defendants next argue that double jeopardy considerations bar convictions for both aggravated rape and conspiracy to commit aggravated rape. Because the aggravating factor in the rape was that the defendants were aided or abetted by one or more persons, they claim that an additional conviction for conspiracy violates double jeopardy.

The double jeopardy clauses of the United States and Tennessee Constitutions protect against multiple convictions or punishments for the same offense. The offenses supporting the convictions must be "wholly separate and distinct." State v. Goins, 705 S.W.2d 648, 650 (Tenn. 1986); State v. Pelayo, 881 S.W.2d 7,10 (Tenn. Crim. App. 1994). In State v. Denton, our supreme court observed that "[t]he key issue in multiple punishment cases is legislative intent." 938 S.W.2d 373, 379 (Tenn. 1996). The court suggested a Blockburger analysis as the first step:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Denton, 938 S.W.2d at 379 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

Blockburger, however, "is not conclusive." Denton, 938 S.W.2d at 379. Courts should also consider whether the same evidence is used to prove both offenses. In Duchac v. State, 505 S.W.2d 237 (Tenn. 1973), our supreme court stated the rule as follows:

> One test of identity of offenses is whether the same evidence is required to prove them. If the same evidence is not required, then the fact that both charges relate to, and grow out of, one transaction, does not make a single offense where two are defined by the statutes.

Denton, 938 S.W.2d at 380 (quoting Duchac, 505 S.W.2d at 239).

Finally, courts should examine other factors relative to legislative intent:

> (1) whether there were multiple victims involved;
>
> (2) whether several discrete acts were involved; and

> (3) whether the evil at which each offense is directed is the same or different.

Denton, 938 S.W.2d at 381 (footnote omitted).

An analysis of the statutes applicable in the instant case reveals no similarities. Under Tenn. Code Ann. § 39-13-502 aggravated rape requires proof of (1) a rape, and (2) aiding or abetting by one or more persons. Under Tenn. Code Ann. § 39-12-103, conspiracy requires an agreement by two or more people to promote or facilitate any offense. An agreement is not an element of the statute for aggravated rape. Similarly, a rape is not an element in a conspiracy offense. Tennessee courts have consistently held that by use of the Blockburger test, one can be convicted of both conspiracy and the offense which is the object of the conspiracy without violating double jeopardy principles. See e.g., Turner v. State, 698 S.W.2d 90 (Tenn. Crim. App. 1990).

Application of the "same evidence test" to this case also favors the state. The convictions were not necessarily based upon the same evidence. The state proved that the defendants had developed in advance a plan to require oral sex of the victim and the order in which the four assaults would occur. This evidence alone, coupled with an overt act, would have been sufficient to constitute a conspiracy.

The crime of conspiracy is statutorily defined, in pertinent part, as follows:

> (d) No person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired.

Tenn. Code Ann. § 39-12-103(d) (emphasis added). In order to commit the offense

of conspiracy, the state must prove that (1) each conspirator had the culpable mental state to commit the offense; (2) each conspirator must act for the purpose of promoting or facilitating the offense; and (3) at least one of the conspirators must commit an overt act in furtherance of the agreement. State v. Perkinson, 867 S.W.2d 1, 4 (Tenn. Crim. App. 1992).

Our court has confirmed that an overt act in furtherance of the conspiracy is an element of the crime. In State v. William A. "Buddy" Reese, No. 01C01-9010-CC-00272 (Tenn. Crim. App., at Nashville, Oct. 11, 1991), the omission was deemed fatal to the indictment. In State v. Mencer, 798 S.W.2d 543 (Tenn. Crim. App. 1990), this court held that the requirement that an indictment allege all essential elements of the offense would apply to the crime of conspiracy. The allegation of an overt act was deemed necessary under the following rationale:

> To allow a prosecutor or court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection that the grand jury was designed to secure, because a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him.

United States v. Cecil, 608 F.2d 1294, 1297 (9th Cir. 1979) (quoting United States v, Keith, 605 F.2d 462, 464 (9th Cir. 1979)).

The conspiracy count of the indictment against the defendants provides, in pertinent part, as follows:

> . . .Allen Hoyle and Bobby Godsey. . .on November 8, 1996. . .did unlawfully, intentionally, and feloniously agree that one or more of them would engage in conduct that constituted the offense of aggravated rape and the said Allen Hoyle,. . .and Bobby Godsey did each intentionally act for the purpose of promoting or facilitating the commission of the said offense and as a result of the conspiracy, an over act was committed in furtherance of the conspiracy, to-wit: Allen Hoyle and Bobby Godsey did each penetrate with his penis the

> mouth of Robert Isbell,. . .contrary to T.C.A. Sections 39-12-103 and 39-13-502, a Class B felony, and against the peace and dignity of the State of Tennessee.

(Emphasis added.)

The indictment alleged the required mental state for the conspiracy. The requisite notice of facilitation or procurement was present and the indictment alleged that the defendants committed "an overt act in pursuance of [the] conspiracy," as required by the statute. Additional evidence was necessary in order for the state to support the charge of aggravated rape.

Finally, the aggravated rape and conspiracy statutes do not have similar legislative purposes. By elevating rape to aggravated rape when there were multiple assailants, the legislature intended to deter the evils attendant to gang rapes. Tenn. Code Ann. § 39-13-502. The purpose of the conspiracy statute is to deter agreements of any kind which would violate the laws of Tenn. Code Ann. § 39-12-103. By this final test, the state would prevail.

Because different elements are required under each statute, the same evidence was not used to prove both offenses, and the statutes have different legislative purposes, the convictions for both aggravated rape and conspiracy to commit aggravated rape meet constitutional guidelines.

III

As their final claim, the defendants argue the trial court erred by refusing to allow them to stipulate their prior convictions, thereby avoiding impeachment by the state based on those convictions. The state points out this argument applies only to defendant Hoyle because there was no impeachment of

Godsey based upon any prior record.

Our supreme court has held that "[s]tipulations are a matter of mutual agreement and not a matter of right by one party or the other in an adversary proceeding." State v. Morris, 641 S.W.2d 883, 889 (Tenn. 1982). Additionally, the United States Supreme Court has ruled that "a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it." Old Chief v. United States, 117 S. Ct. 644, 653 (1997).

In Old Chief, the Supreme Court held that a stipulation should be accepted by the trial court "only when the record of conviction would not be admissible for any purpose beyond proving status..." 117 S. Ct. at 654. In that case, the defendant was indicted for possession of a deadly weapon by a felon and the state sought to introduce evidence of a prior felony conviction. The defendant sought to stipulate his prior conviction for assault causing serious bodily injury. The Supreme Court held the defendant should have been allowed to stipulate his prior conviction because there was a risk of unfair prejudice and the prior conviction served no other purpose than as an element of the offense. Id. at 655-6.

Here, the state sought to use defendant Hoyle's prior convictions for impeachment purposes after he testified. Under those circumstances the ruling in Old Chief does not apply. More than the status of the offense was at stake. The trial court properly instructed the jury to consider the prior convictions for an assessment of Hoyle's credibility and for that purpose alone. As a result, the trial court did not err by refusing to allow the defendants to stipulate their prior convictions as a method of avoiding cross-examination.

Accordingly, the judgment of the trial court is affirmed.

_____
Gary R. Wade, Presiding Judge

CONCUR:

_____
Norma McGee Ogle, Judge

_____
Cornelia A. Clark, Special Judge