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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 8, 2022 Session

STATE OF TENNESSEE v. FRANK M. GREEN

Criminal Court for Davidson County
No. 2018-A-241

No. M2021-01438-CCA-R3-CD

Robert H. Montgomery, Jr., Judge, Dissenting

I agree with the majority's conclusion that the State's election of the offenses was flawed and that the trial court erred in instructing the jury pursuant to the State's faulty election. *Cf. State v. Ellis*, 89 S.W.3d 584, 596 (Tenn. Crim. App. 2000) ("[B]ecause the election requirement is 'fundamental, immediately touching the constitutional rights of an accused,' a trial court has a duty even absent a request by the defendant to ensure the timely election of offenses by the State and to properly instruct the jury concerning the requirement of a unanimous verdict." (quoting *Burlison v. State,* 501 S.W.2d 801, 804 (Tenn. 1973)). I part ways with the majority regarding the remedy to which the Defendant is entitled for the double jeopardy issue which resulted from the State's flawed election and the court's reliance upon the election in its jury instructions.

As the majority concludes, the flawed election subjected the Defendant to multiple convictions, and thereby multiple punishments, for two sets of identical offenses. The majority aptly notes, as well, that constitutional harmless error analysis is generally the appropriate course for an appellate court to pursue in the wake of a defective election, and that in the typical case, the charged offense involves a single incident involving a single offense.

Prosecutors sometimes choose to charge an offense in multiple counts, each describing an alternative means of committing the offense. Thus, a prosecutor might charge an act of murder as first degree premeditated murder in one count and first degree felony murder in a second count. If the jury convicted the defendant of the charged or a lesser-included offense on both counts, the trial court would merge the convictions. *See, e.g.*, *State v. Zirkle*, 910 S.W.2d 874, 889 (Tenn. Crim. App. 1995). In the present case, however, the faulty election required the jury to consider twice, for Counts 1 and 3, whether the Defendant was guilty of the same oral rape committed without consent and to consider

twice, for Counts 2 and 4, whether he was guilty of the same vaginal rape committed by force or coercion. Conversely, the faulty election failed to put before the jury the questions of the Defendant's guilt of oral rape committed by force or coercion and vaginal rape committed without consent. Thus, as a result of the election, the Defendant was tried twice for each of two offenses, and the questions of his guilt for two other offenses, oral rape committed by force or coercion and vaginal rape committed without consent, were never put before the jury.

By all accounts, the jury's verdicts unequivocally reflected findings of guilt for oral rape committed without consent for Counts 1 and 3 and findings of guilt for assault by offensive or provocative contact for Counts 2 and 4 as a lesser-included offense of vaginal rape committed by force and coercion. The record contains evidence of a single occurrence of oral rape and a single occurrence of vaginal rape. Thus, no possibility exists that the jury reached a non-unanimous verdict: the evidence did not show multiple oral rapes and multiple vaginal rapes which might have prevented the jury from agreeing unanimously upon which rape acts formed the basis for the two findings of guilt which it returned. In my view, the erroneous election and the instructional error, though egregious, were harmless beyond a reasonable doubt as to Counts 1 and 2, and I would affirm those convictions.

That said, I believe double jeopardy bars convictions or a retrial of the Defendant for oral rape committed by force or coercion and vaginal rape committed without consent in Counts 2 and 4. In reaching this conclusion, I am guided by this court's decision in *State v. Ellis*, 89 S.W.2d 584 (Tenn. Crim. App. 2000), which involved a multi-count indictment charging various offenses related to assault and sexual assault of a child. In Count 1 of the indictment in *Ellis* related to the defendant's statement that he had rubbed his penis against the victim's vagina twenty or thirty times, and Count 6 related to conduct, which by all accounts, occurred on June 4, 1997. *Ellis*, 89 S.W.3d at 594. The evidence included the victim's statement to a forensic interviewer that "she had been touched 'on her front private . . . with a private'" several times, including on June 4. *Id.* The State failed to make an election which identified a specific incident for Count 1. *Id.* The jury returned guilty verdicts for both Counts 1 and 6. *Id.* at 597. This court determined that, as a result of the State's failure to elect a specific incident for Count 1 and the jury's findings of guilt for both Counts 1 and 6, "the appellant may very well have been convicted twice of aggravated sexual battery based upon a single act that occurred on June 4, 1997." *Id.* Thus, this court determined that the defendant's convictions for both Counts 1 and 6 violated double jeopardy. *Id*. Because the election had not specified a single event of the "twenty to thirty" incidents, the court reversed the conviction and remanded for a new trial on Count 1 with the instruction that the State was barred from relying up on evidence related to the June 4 incident at the new trial. *Id.*

In the present case, the Defendant went to trial for four offenses. Jeopardy for those offenses attached when the jury was empaneled and sworn in the trial court. *See Crist v.*

Brez, 437 U.S. 28 (1978); *State v. Knight*, 606 S.W.2d 593, 595 (Tenn. 1981). The jury returned verdicts for each count. Despite the State's faulty election and the trial court's erroneous instructions, I believe that the Defendant cannot be retried for Counts 3 and 4, having previously been placed in jeopardy for them. In addition, they are based upon identical facts and means as Counts 1 and 2 and do not represent findings of guilt based upon a single incident involving alternative means of committing the charged offense. Therefore, merger is not appropriate.

Thus, I dissent from the majority's decision to remand all counts of the indictment for a new trial. I would affirm the judgments for Counts 1 and 2, and I would vacate the convictions and dismiss the charges for Counts 3 and 4.

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ROBERT H. MONTGOMERY, JR., JUDGE