IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 20, 2009

STATE OF TENNESSEE v. JIMMY JOE STAPLETON

Appeal from the Criminal Court for Sullivan County
No. S47,559 Jon Kerry Blackwood, Senior Judge

No. E2008-01791-CCA-R3-CD - Filed June 29, 2009

The defendant, Jimmy Joe Stapleton, appeals from his Sullivan County Criminal Court convictions of attempted aggravated rape, aggravated assault, and two counts of assault. On appeal, the defendant alleges that the trial court erred in denying a new trial based on the prosecution's suppressing exculpatory evidence. The defendant also argues the trial court erred by sentencing him to the maximum allowable sentence for his Class B felony conviction of attempted aggravated rape on the basis that his sex offender evaluation wrongfully stated his conviction offense as aggravated rape instead of attempted aggravated rape. Discerning no error, we affirm the judgments of the Sullivan County Criminal Court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

David G. Mullins, Bristol, Tennessee, for the appellant, Jimmy Joe Stapleton.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Barry P. Staubus and William B. Harper, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On May 28, 2003, a Sullivan County grand jury indicted the defendant on one count of aggravated rape and four counts of aggravated assault. The indictment alleged that the defendant raped Christa Hart and assaulted Charley Dean, Michael Yarborough, Christa Hart, and Eugene "Tom" Keeler, III, during a September 24, 2002 incident at 289 Dunlap Road in Blountville, Tennessee. On January 29, 2008, after a two-day trial, a petit jury convicted the defendant of the attempted aggravated rape of Ms. Hart, *see* T.C.A. §§ 39-13-502, 39-12-101 (2000); the aggravated assault of Mr. Keeler, *see id.* § 39-13-102; the assault of Mr. Dean, *see id.* § 39-13-101; and the assault of Ms. Hart, *see id.* The jury acquitted the defendant of any assault against Mr. Yarborough.

The trial court held a sentencing hearing on April 29, 2008, and sentenced the defendant to 12 years' incarceration as a Range I, standard offender for the Class B felony, attempted aggravated rape conviction. The court imposed a sentence of five years' incarceration for the aggravated assault conviction and 11 months, 29 days' incarceration for each of the two misdemeanor assault convictions. The trial court ordered all the sentences to be served concurrently and entered the judgments of conviction on May 6, 2008. The defendant filed a timely motion for new trial on May 28, 2008, which the trial court denied on July 23, 2008. The defendant filed a timely notice of appeal on August 15, 2008.

The evidence adduced at trial established that, on the evening of September 23, 2002, a small group of people met at Mr. Yarborough's residence on Alabama Street in Kingsport. Mr. Yarborough, the defendant's stepfather, lived at the home with his wife, Ginger Yarborough, the defendant's mother. Joshua Bogle, who had been a friend of the defendant since 2000, arrived at the Alabama Street home at approximately 5:00 or 6:00 p.m. Mr. Yarborough, Ms. Hart, Sammy Dout, and the defendant were at the home drinking and socializing. Mr. Bogle testified that he had never met Ms. Hart and that she had never been involved with his group of friends before that evening. Mr. Dout, who allegedly brought Ms. Hart to the Alabama Street home, left the residence after an altercation with the defendant. Mr. Keeler, who lived with Mr. Bogle at the Dunlap Road residence, arrived later. Mr. Bogle and Mr. Yarborough then left the Alabama Street residence to search for Mr. Dout, leaving Mr. Keeler, Ms. Hart, and the defendant at the home.

Ms. Hart, Mr. Keeler, and the defendant sat together on a couch in the Alabama Street residence. Mr. Keeler stated that Ms. Hart then started showing attention "[m]ostly toward [the defendant]" and "[s]ome towards [him]." Ms. Hart "rubb[ed] around" on the defendant, and the defendant was aggressively "coming on" to Ms. Hart. Ms. Hart then started pushing the defendant away. This made Mr. Keeler uncomfortable, and he left the home to walk across the street to Mr. Dout's house to see if he was home. Mr. Keeler knew that Mr. Dout had some relationship with Ms. Hart, and he hoped Mr. Dout could diffuse the situation. Upon finding Mr. Dout was not home, Mr. Keeler returned to the Alabama Street residence.

Upon returning, Mr. Keeler witnessed the defendant and Ms. Hart fighting. He then saw the defendant and Ms. Hart go to the bathroom. Because the stereo was playing loudly, Mr. Keeler could only "kind of hear what was going on." He heard a female's voice say, "Leave me alone. Get off . . . ." Mr. Keeler knocked on the bathroom door, and the defendant opened the door. Mr. Keeler stated that Ms. Hart seemed upset and that the defendant "kind of blocked" her into the bathroom. Ms. Hart then left the bathroom, and Mr. Keeler noticed her underwear ripped and lying on the bathroom floor. Ms. Hart and the defendant then commenced "fighting and wrestling around" and damaging things in the home.

Mr. Keeler and Ms. Hart then went to the back porch of the home. Ms. Hart appeared scared, and she told Mr. Keeler something to which his response was to leave. Mr. Keeler entered his vehicle, and Ms. Hart entered the passenger-side seat. Mr. Keeler testified that he did not know that Ms. Hart was going to enter the vehicle. The defendant then entered the back seat of the vehicle. Mr. Keeler drove to his apartment on Dunlap Road. Upon their arrival, the apartment was empty.

Mr. Keeler began cooking some hamburgers. During this time, the defendant had stopped bothering Ms. Hart and was "pacing" in the kitchen area.

Mr. Keeler testified that Ms. Hart then started paying a "little more attention" to him. After they conversed, the two went to his bedroom and had sexual intercourse. Before going to the bedroom, Mr. Keeler called Mr. Bogle to inform him they had moved to the Dunlap Road apartment and to ask that someone take the defendant home. Mr. Keeler testified that the sex was consensual.

While Mr. Keeler and Ms. Hart were in the bedroom, the defendant ate Mr. Keeler's hamburgers, then used potting soil to make "mud burgers" to replace them. While in the bedroom with Ms. Hart, Mr. Keeler heard Mr. Bogle and Mr. Yarborough arrive at the apartment. Mr. Bogle observed the defendant making the "mud burgers."

At the completion of their sexual act, Ms. Hart left the bedroom, and Mr. Keeler went to speak with the defendant. He told the defendant he had finished having sex with Ms. Hart and said, "See, it's not that hard. I just met her a little while ago. All you got to do is be nice to them." Mr. Keeler testified that the defendant did not show much reaction to this.

Mr. Bogle and Mr. Keeler explained that Charley Dean, a friend of theirs who worked at a convenience store five minutes from their apartment, had arranged to stay on their couch that night. Mr. Dean called Mr. Keeler, and Mr. Keeler left the apartment to go pick up Mr. Dean from work at approximately 12:00 a.m. on September 24, 2002. Mr. Bogle testified that, after Mr. Keeler left, "we was just all sitting there. [Mr.] Yarborough was throwing darts. [The defendant] was walking around. [Ms. Hart was] just kind of standing there. And I was on the couch watching TV." Mr. Bogle explained that the defendant then grabbed Ms. Hart by her throat, dragged her into the bathroom, and slammed and locked the door. Mr. Bogle heard Ms. Hart "yelling and screaming," and he immediately called Mr. Keeler.

Mr. Bogle obtained Mr. Keeler's handgun from his bedroom and, once Mr. Keeler returned to the apartment with Mr. Dean, handed the firearm to Mr. Keeler. Mr. Keeler testified that he heard a female scream, "Help me. Get him off of me." Mr. Yarborough, Mr. Dean, Mr. Keeler, and Mr. Bogle assembled outside the bathroom door. Mr. Keeler and Mr. Bogle used either a dart or penny to unlock the bathroom door. Mr. Bogle said, "[A]s soon as we opened up the bathroom door we seen [the defendant] choking [Ms.] Hart. And he was raping [Ms.] Hart." Mr. Bogle testified that the defendant's penis had penetrated Ms. Hart's vagina and that Ms. Hart appeared "bruised up bad where he had beat her." Mr. Keeler testified to the same effect. Both Mr. Bogle and Mr. Keeler testified that, upon entering the bathroom, the defendant stood and complained, "You can get yours but I can't get mine."

The defendant then went to the kitchen window, grabbed his pocket knife, and returned to the group near the bathroom door. Mr. Keeler testified that the defendant approached Mr. Dean and said, "Me and Baldy here are going to play." The defendant then shoved Mr. Dean and chased him out of the apartment. Mr. Bogle ran outside of the apartment to call the police upon seeing the defendant's wielding his pocket knife. Mr. Keeler testified that Mr. Yarborough also went outside the apartment; however, Mr. Bogle could not recall seeing Mr. Yarborough outside.

Mr. Bogle stated that he witnessed the defendant chase Mr. Dean and cut his throat. Mr. Bogle and Mr. Dean then went to a neighbor's apartment on the other side of the apartment building to ask for help. The neighbor supplied Mr. Dean with a towel, and Mr. Bogle left the neighbor's apartment to observe the defendant. He watched the defendant walk back toward the direction of Mr. Bogle and Mr. Keeler's apartment. Mr. Bogle testified that he spoke with 9-1-1 operators on his cordless telephone during these events.

Mr. Keeler testified that after Mr. Bogle, Mr. Yarborough, Mr. Dean, and the defendant left the apartment, he shut and locked the door. He observed that Ms. Hart had been crying and was "red, swollen." He also called 9-1-1 on the portable telephone, and he was on the same telephone line as Mr. Bogle.[1] Ms. Hart then let Mr. Yarborough back into the apartment, and Mr. Keeler re-locked the door. Mr. Keeler testified that Mr. Yarborough's face was bleeding.

The defendant then kicked in the apartment door and entered the apartment. He was screaming and holding the knife in his hand, and he stepped toward Mr. Keeler. At that point, Mr. Keeler shot the defendant. Mr. Keeler's gun then jammed, and he retreated to the bathroom. Ms. Hart then left the apartment. The defendant went to the next-door neighbor's apartment. The defendant yelled through the apartment walls, "I'm going to get me a gun, too," and, "Tell my kids I love them." Mr. Keeler responded, "I can't believe you was [sic] going to try to stab me."

Mr. Bogle testified to hearing the apartment door being kicked in and the gunshot. He then helped walk Mr. Dean to police who had responded to the scene. Mr. Bogle and Mr. Keeler were arrested and then interviewed at the sheriff's department.

Mr. Keeler returned to his apartment sometime in the morning of September 24, 2002. Mr. Dean and Ms. Hart were at the apartment. Ms. Hart was "pretty red and bruised" and had a cut on her arm. Mr. Keeler drove her to her grandmother's house.

Detective Bobby Russell arrived at the Dunlap Road residence at approximately 1:00 a.m. on September 24, 2002. By the time he arrived, Mr. Yarborough, Mr. Dean, and the defendant had been transported to the hospital. Ms. Hart was not at the residence, either. He observed the kicked-in door and saw a black-handled pocket knife, a .380 caliber pistol, and an empty shell casing on the apartment floor. Detective Russell noted a dried substance that appeared to be blood on the knife. Detective Russell also observed a bullet hole through the bathroom door. He also observed a cordless telephone receiver outside the apartment.

Detective Russell interviewed Mr. Keeler and Mr. Bogle, and he testified that their accounts of the evening were similar. He testified that he spoke with Ms. Hart at approximately 6:00 p.m. on September 24, 2002, and that she "had multiple bruises all over her body." Detective Russell did not arrest Mr. Keeler for shooting the defendant because his investigation suggested Mr. Keeler acted in self defense.

---

[1] An audio-recording of Mr. Bogle and Mr. Keeler's joint 9-1-1 call was entered into evidence.

Doctor Kenton Goh treated Ms. Hart on September 24, 2002. Ms. Hart signed into the hospital at 8:43 p.m. She reported that she had been raped the previous night. Ms. Hart told Doctor Goh that she was at a house with her boyfriend and that after her boyfriend left, another man raped her. She reported that the man attempted to have oral and anal sex with her, but she refused his attempts. Ms. Hart stated that the man held her down, choked her, and had vaginal sex with her. Ms. Hart never identified her assailant by name.

Doctor Goh stated that Ms. Hart had defensive wounds to her hands and bruises around her neck, scalp, arms, and legs. He estimated that the bruising had occurred within 24 hours of the examination. He noted no vaginal trauma; however, he explained that it was common for a rape victim to not suffer vaginal wounds. He performed a rape kit on Ms. Hart for later analysis by the Tennessee Bureau of Investigation ("TBI"). The TBI laboratory found that spermatozoa in the victim's vagina did not match the defendant's deoxyribonucleic acid ("DNA") profile. Medical reports reflected injuries to Ms. Hart, Mr. Yarborough, and Mr. Dean.

The State did not call Mr. Dout, Mr. Yarborough, or Mr. Dean to testify. Ms. Hart was deceased by the time of trial due to causes unrelated to the case.

The defendant testified that he arrived at the Alabama Street residence at approximately noon on September 23, 2002. He was at the home with his mother and his stepfather, Mr. Yarborough. He stated that Mr. Bogle arrived at approximately 3:00 p.m. The defendant stated that Mr. Dout, Mr. Keeler, and somebody named Mitchell arrived later in the evening. The defendant stated that everybody began drinking liquor around 5:00 p.m. He said that "[s]ome lady" dropped Ms. Hart off at the house at approximately 5:00 p.m. and that he did not know Ms. Hart. The defendant recalled that Ms. Hart was "bruised up a little bit" upon arrival, and he asked her why. The defendant testified that Ms. Hart informed him that a former boyfriend had beaten her.

The defendant drank heavily and became intoxicated. He testified that he did not remember several details of the evening. He estimated that he and Ms. Hart drank two-thirds of a 750 milliliter bottle of liquor each. He remembered entering the front seat of Mr. Keeler's vehicle to travel from the Alabama Street residence to the Dunlap Road apartment. The defendant stated that, upon arriving at the apartment, he placed his keys, wallet, and pocket knife on the kitchen window sill because he thought he was staying the night there.

The defendant testified that Mr. Keeler began frying hamburgers when "something had come up," and Mr. Keeler and Ms. Hart went to the bedroom. The defendant stated that the bedroom door was cracked open and that he saw Mr. Keeler shove Ms. Hart on the bed and climb onto her. The defendant stated that Mr. Keeler noticed the door was partially opened and closed it. He testified that Mr. Keeler and Ms. Hart remained in the bedroom for 15 or 20 minutes.

While the two remained in the bedroom, the defendant, who was "drunk and hungry" ate the fried hamburger patties. He testified that he then used potting soil to create fake burgers to replace what he ate. Mr. Yarborough and Mr. Bogle arrived during this time. The defendant stated that Mr. Keeler then left the bedroom and that Ms. Hart went into the bathroom.

The defendant testified that he needed to urinate, and he opened the bathroom door and observed Mr. Yarborough and Ms. Hart engaged in "sexual activities." He stated that he then closed the door and waited outside and that he asked the two, "You guys about through?" The defendant testified that he could no longer wait so he went into the bathroom to urinate. He stated that upon entering the bathroom, Mr. Yarborough left and Ms. Hart stayed.

The defendant testified that he finished using the toilet and that Ms. Hart somehow fell into the bathtub. The defendant said, "I's just playing with her about turning the cold water on." He stated that Ms. Hart screamed in response to his "playing." The defendant said that Ms. Hart "kept asking" him if he wanted "a taste of her sexuality." He testified that Ms. Hart kissed him and "whatnot and whatever" and that the two fell to the floor. The defendant testified that he tried to get up and that Ms. Hart said, "You don't want to do this?" He responded, "No, I don't think I can, you know, really" because he was too intoxicated. The defendant stated that Mr. Yarborough then entered the bathroom. Mr. Yarborough asked the defendant what was happening, and the defendant responded, "I don't guess anything because . . . you guys are aggravating us you know." The defendant testified that he then stood up and pulled up his pants. He explained that his pants had remained down from when he had used the restroom earlier.

The defendant stated that he and Mr. Dean "started having words" after he exited the bathroom and that Mr. Dean represented that Ms. Hart was his girlfriend. The defendant explained that Ms. Hart told him that Mr. Dean had beaten her. The defendant said that Mr. Keeler was "romping around" because his hamburgers had been eaten and that everybody was "pressing up on [the defendant] a little bit." The defendant observed Mr. Bogle holding a handgun and giving it to Mr. Keeler. The defendant said that he then went to the kitchen to get his knife, wallet, and keys. He testified that he asked Mr. Keeler to drive him home, but Mr. Keeler refused. The defendant stated that he then told the group he would walk home and that Mr. Yarborough agreed to go with him. He asked Mr. Keeler for a ride one last time, then gave him "the last cussing."

The defendant testified that he next remembered being "laid out" outside the apartment. He said that he got back to his knees when someone hit him and pushed him back to the ground. He stated that he took protection beside a pickup truck in the parking lot. The defendant testified that he obtained his pocket knife from his pants and told anyone approaching that he would cut them. He stated that somebody grabbed him from behind and that, when he broke loose, he "swung wildly" with the knife and hit somebody in the neck. After that, everybody left.

The defendant stated that he then folded the knife and threw it into some trees "[b]ecause [he] didn't want to accidentally kill somebody a-fighting, being drunk, and spend the rest of [his] life in prison for something stupid." He stated that he then heard Ms. Hart yell, "[L]eave me alone," from inside the apartment. He kicked in the apartment door to find that Mr. Yarborough, Mr. Bogle, and Mr. Keeler had "ahold of her." The defendant testified that they released Ms. Hart when he entered the apartment.

The defendant stated that Mr. Keeler pulled his gun and that it "seem[ed] like he had pointed it at [Ms. Hart] first and I had stepped over." He said that Mr. Keeler held the gun to his face and threatened to shoot him and that Keeler then shot him in the abdomen. Mr. Keeler ran to the

bathroom after the shot. The defendant testified that he went to the next-door neighbor's apartment to seek help and that Ms. Hart aided him. He testified that Mr. Keeler attempted to get Ms. Hart to leave. The paramedics then came to the apartment and took him to the hospital. He testified that he remained in the hospital until October 3, 2002.

The defendant denied raping Ms. Hart, and he stated that he never intended to cut anybody.

Detective Russell took the stand in rebuttal of the defendant's testimony. He stated that the defendant's recollection of events was not consistent with his investigation and statements taken from Mr. Bogle, Mr. Keeler, and Ms. Hart.

Based on the evidence as summarized above, the jury convicted the defendant of the attempted aggravated rape of Ms. Hart, the aggravated assault of Mr. Keeler, and assault of both Mr. Dean and Ms. Hart. The defendant appeals on two issues. First, the defendant contends that "the State suppressed evidence that a witness no longer stated that it was the defendant who committed the crimes" in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). Second, the defendant argues that the trial court erred in relying upon misstatements in the defendant's Sex Offender Risk Assessment in sentencing the defendant.

I. Brady Issue

The defendant claims a *Brady* violation due to the State's failure to "disclose evidence that the defense could have used to impeach the [State's] witness." Following the hearing on the defendant's motion for new trial, the trial court found that the prosecutors met with Mr. Yarborough in Virginia, where he resided, prior to trial. Mr. Yarborough told the prosecutors that he no longer remembered the events of September 23 and 24, 2002, and the prosecutors told him he was not needed at trial. The trial court also found that the prosecutor told a reporter that Mr. Yarborough was not called to testify at trial because "his recollection was not the way it was." Further, the evidence showed that Mr. Yarborough gave two statements to the police immediately after the incident. In his first statement, Mr. Yarborough maintained that he did not know the man who wielded a knife and struck him. In the second statement, given approximately three hours later, Mr. Yarborough reported that the defendant locked Ms. Hart in the bathroom and that Mr. Yarborough heard her screaming. The second statement, much like the evidence adduced at trial, recounted that, upon forcing the bathroom door open, Mr. Yarborough witnessed the defendant with his pants down with Ms. Hart. The second statement also contained an allegation that the defendant used a knife to assault the victims. The defendant argued at the hearing that the State's failure to inform him that Mr. Yarborough no longer remembered the incident constituted a suppression of exculpatory evidence.

Defense counsel acknowledged that Mr. Yarborough gave two conflicting statements to law enforcement personnel, one exculpatory and one inculpatory. However, he argued at the hearing, "[O]ur contention today is that [Mr. Yarborough's] adoption of one over the other constitutes a statement in and of itself." He argued that Mr. Yarborough's silence constituted an "adoptive statement" of his first, exculpatory account to the police. Defense counsel argued that,

because Mr. Yarborough's silence adopted his first exculpatory statement, he was entitled to this information from the State. The trial court disagreed. In denying his motion for new trial, the court stated, "[T]here's been no showing . . . that Mr. Yarborough was in possession of any exculpatory evidence that was denied to [the d]efendant in this case," and it found no *Brady* violation.

In *Brady*, the United States Supreme Court held that the prosecution has a constitutional duty to furnish an accused with exculpatory evidence pertaining to either the accused's innocence or the punishment that may be imposed. *See Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. Failure to reveal exculpatory evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, 83 S. Ct. at 1196-97. To prove a *Brady* violation, a defendant must demonstrate:

> (1) that the defendant 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) that the State suppressed the information;
>
> (3) that the information was favorable to the [defendant]; and
>
> (4) that the information was material.

Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001) (citing *State v. Edgin*, 902 S.W.2d 387, 390 (Tenn. 1995)).

The duty to disclose exculpatory evidence extends to all "favorable information" irrespective of whether the evidence is admissible at trial. *State v. Robinson*, 146 S.W.3d 469, 512 (Tenn. 2004) (appendix); *Johnson*, 38 S.W.3d at 56. The prosecution's duty to disclose *Brady* material also applies to evidence affecting the credibility of a government witness, including evidence of any agreement or promise of leniency given to the witness in exchange for favorable testimony against an accused. *Johnson*, 38 S.W.3d at 56. Although *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). However, this 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 or another governmental agency. *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). Impeachment evidence is treated no differently than other evidence in terms of exculpatory significance. "Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985). Impeachment evidence is "'evidence favorable to an accused,' . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *Id.*, 105 S. Ct. at 3380.

In *Bagley*, the Supreme Court explained that constitutional error results from the withholding of "material" evidence, and materiality exists when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different." *Id.* at 682, 105 S. Ct. at 3383. The "materiality" of suppressed, favorable evidence was discussed at length by the United States Supreme Court in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995), and by our state's supreme court in *Johnson*, 38 S.W.3d 52. Four aspects are highlighted in those cases. First, materiality does not demand a showing by a preponderance that the suppressed evidence would have resulted in the defendant's acquittal. *Kyles*, 514 U.S. at 434, 115 S. Ct. at 1566; *Johnson*, 38 S.W.3d at 58. Second, materiality is not an evidence-sufficiency test. *Kyles*, 514 U.S. at 434, 115 S. Ct. at 1566; *Johnson*, 38 S.W.3d at 58. Third, once constitutional error has been found, there is no need for further harmless error review. *Kyles*, 514 U.S. at 435, 115 S. Ct. at 1566; *Johnson*, 38 S.W.3d at 63. Last, the "suppressed evidence [is to be] considered collectively, not item by item" to gauge materiality. *Kyles*, 514 U.S. at 436, 115 S. Ct. at 1567. Plainly stated, establishing materiality requires a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435, 115 S. Ct. at 1566; *see Johnson*, 38 S.W.3d at 58.

In his brief, the defendant alleges that Mr. Yarborough "cannot remember the events of the offense date" and that "it would have impeached [Mr.] Yarborough had he not testified in the same manner as his previously given statement." He further argues, "[Mr.] Yarborough's previously undisclosed lack of memory would have given the defendant the opportunity to adopt either his first statement, which identified the man wielding a knife as someone he did not know (therefore ruling out his stepson, the defendant), or the second statement, which identified the defendant as the perpetrator of the allegations." The defendant posits that had the jury been presented with "live testimony that cast doubt on the identity of the defendant," the jury would likely have doubted his guilt. The State disagrees, arguing that Mr. Yarborough's lack of memory five years after the incident is neither exculpatory nor prejudicial. We agree with the State.

First, we note that the defendant's argument is vague as to how Mr. Yarborough's fading memory would necessarily aid in his defense. His contention that such information "would have given the defendant the opportunity to adopt either his first statement . . . or second statement" is unsupported by any legal authority. We cannot say that Mr. Yarborough's fading memory was "favorable" to the defendant. Mr. Yarborough had given two conflicting statements--both of which the defendant possessed. His third "statement" to the State's prosecutor about being unable to remember the events of September 23 and 24, 2002, aided neither the defendant nor the State. His lack of memory neither casts any doubt upon the testimony of the State's witnesses nor does it tend to show the defendant's innocence. Further, even if Mr. Yarborough's inability to recall the incident was "exculpatory," we cannot say the State's failure to inform the defendant of this information was material. We disagree with the defendant's contention that, if the jury were presented with evidence of Mr. Yarborough's inability to remember the night in question, the jury would "put the whole case in . . . a different light." *See Kyles*, 514 U.S. at 435, 115 S. Ct. at 1566; *Johnson*, 38 S.W.3d at 58.

II. Sentencing

At the sentencing hearing, the State relied upon the presentence report, an addendum including statements of Ms. Hart's mother and grandmother, and the defendant's Sex Offender Risk Assessment. The State argued for sentence enhancement based on the defendant's criminal history and failure to comply with community sentences, the defendant's desire for pleasure or excitement

in committing the crime, and the defendant's disregard of risk to human life. The State also asked for consecutive sentencing.

Defense counsel argued that the defendant's Sex Offender Risk Assessment wrongly portrayed the defendant's amenability to correction because the evaluation was mistakenly based upon a conviction of aggravated rape as opposed to attempted aggravated rape. He argued that the defendant's denial of forcibly raping Ms. Hart should not be used against him because he was not convicted of actual rape. The State acknowledged the mistake but argued that "the gist of the report is correct; that this [d]efendant has no empathy."

The trial court found as an enhancement factor to the attempted aggravated rape conviction that the defendant had "a prior history and criminal behavior in addition to those necessary to establish the appropriate range, including assaults, evading arrest, escape, driving under the influence." *See* T.C.A. § 40-35-114(2). The court further found that the defendant had a history of noncompliance with community-based sentences. *See id.* § 40-35-114(9). The court found no mitigating factors applicable. It sentenced the defendant to 12 years' incarceration for the attempted aggravated rape conviction. The trial court applied the same enhancement factors to the defendant's aggravated assault conviction and sentenced him to five years' incarceration. The court sentenced the defendant to 11-month, 29-day sentences for his simple assault convictions, and it ordered all sentences to be served concurrently.

The defendant argues that the trial court erred by sentencing him to the maximum allowable 12-year term for his Class B felony conviction based upon the admitted errors in his Sex Offender Risk Assessment. We will not engage in a protracted analysis of this issue, however, because it is clear from the record that the trial court did not consider the faulty Sex Offender Risk Assessment in enhancing of the defendant's attempted aggravated rape sentence. The court clearly found only two enhancement factors: the defendant's extensive criminal history and failures at community sentencing. The proof of these enhancement factors came from the defendant's presentence report and not his Sex Offender Risk Assessment. Because the trial court did not use the Sex Offender Risk Assessment in enhancing the defendant's sentence, we cannot fathom how any errors in the assessment could have prejudiced the defendant.

We also note that the record before this court does not contain the allegedly-deficient Sex Offender Risk Assessment. When the record is incomplete and does not contain the relevant information documenting an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. *See State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988).

III. Conclusion

In light of the foregoing analysis, we affirm the judgments of the trial court.

_____

JAMES CURWOOD WITT, JR., JUDGE