

The defendant was convicted of one count of solicitation to commit first degree murder and was sentenced to serve ten years. He was also convicted of two counts of solicitation to commit especially aggravated kidnapping and sentenced to serve six years on each count. The sentences were ordered to run concurrently.

The defendant raises the following issues on appeal:

I. The trial court erred in excluding the testimony of the defendant's expert witness on the entrapment issue in violation of TENN. R. EVID. 702 and in failing to give a diminished capacity instruction based upon such testimony.

II. The trial court erred in allowing evidence of prior bad acts and in failing to adhere to the requirements of TENN. R. EVID. 404(b).

III. The trial court erred in failing to either exclude evidence which was the subject of discovery violations or to grant a continuance to allow preparation of an adequate defense in light of the discovery violation.

IV. The trial court erred in failing to either exclude the testimony of the new witnesses which the state announced at the eleventh hour or in failing to continue the trial based upon the inability of the defense to prepare for such witnesses and the testimony they would offer.

V. The evidence was insufficient as a matter of law to support the defendant's conviction of the solicitation crimes charged because no reasonable juror could find that the defendant was predisposed to commit the crimes and that he was not induced by the government agent.

VI. The trial court erred in failing to grant a continuance, especially in light of the pending indictment in Hamblen County which pre-dated the Cocke County indictment and the Cocke County criminal activities.

VII. The trial court abused its discretion and imposed an excessive sentence upon the defendant based upon improperly applied enhancement factors. (Capitalization altered.)

The judgment is reversed, and the case is remanded for further proceedings.

The offenses in this case had their inception when a woman named Kathy Waters became an employee of the defendant. The defendant is a veterinarian; he hired Ms. Waters to work at his clinic commencing in February 1992.

During the year of 1992, the defendant and Ms. Waters apparently developed a relationship beyond that of employer-employee. In time, Ms. Waters and her husband, David Waters, divorced, and the record shows the defendant became

proprietary towards Ms. Waters. This attitude led the defendant to commit acts of violence against her.

Robert Cadman developed a social relationship with Ms. Waters. The defendant learned that Ms. Waters and Mr. Cadman were seeing each other, and he began a course of entering their apartments unannounced and berating the two of them. On May 18, 1993, the defendant broke into Mr. Cadman's apartment and attempted to forcibly remove Ms. Waters.

Lawrence Myers, news editor of a local newspaper, and the target for murder, wrote three front-page stories during August and September 1993 detailing the actions of the defendant toward Mr. Cadman and the abuse of Ms. Waters.

Because the defendant was a city councilman in Morristown, the police turned the investigation over to the district attorney's office. An investigator was assigned to the case in September 1993. An employee of the defendant was interviewed by the investigator concerning any knowledge the employee might have concerning this matter.

The employee, sometime after the interview, notified the investigator that the defendant had made statements that could be construed as threats against Waters. The employee agreed to wear a body wire in order to record any statements concerning the defendant's intentions.

The employee wore the wire for some five weeks, and several conversations came up concerning Ms. Waters and the other two victims. The discussions between the defendant and the employee led to a decision by the defendant to hire a hit-man to kill Ms. Waters, her ex-husband and Mr. Myers. Many of these discussions were initiated by the employee and gave rise to one inference the employee was inducing the defendant to act as he did.

On December 2, 1993, the defendant offered to forgive the employee a debt she owed him if she would help him "get rid of" Ms. Waters. The investigator contacted the Tennessee Bureau of Investigations for an undercover agent to pose

as a possible hit man. Meanwhile, the defendant made statements that indicated he was talking to someone in Cocke County about killing Ms. Waters. Because the district attorney's office feared for Ms. Waters' life, the employee, on advice from the district attorney's office, arranged for the defendant to meet the hit man she had suggested. The person with whom the defendant was to meet was a T.B.I. agent rather than a hit man.

On December 16, 1993, the defendant met with the agent in Cocke County. The defendant hired the agent to kill Mr. Myers and kidnap the other two. The agent was to bring Ms. Waters and Mr. Waters to the defendant, and the defendant would then kill them by insertion of drugs.

Issue I [Expert witness]

The defendant relies upon the case of *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984) to assert the admissibility of the testimony of its expert witness, a neuropsychologist, to show the defendant was especially susceptible to being induced to commit a crime he had no predisposition to commit.

In *United States v. Newman*, 847 F.2d 156 (5th Cir. 1988), the Circuit Court discussed a number of cases which dealt with the admissibility of expert testimony on the issue of entrapment, including the *McLernon* case. From *Newman* and the cases discussed therein, we conclude that a psychiatrist or other qualified expert may testify on the issue of entrapment, if the substance of the expert testimony rises to a reasonable level of medical certainty. The expert must show the accused suffers a mental disease, defect or subnormal intelligence that makes the accused more susceptible to inducement than a person without this defect would be.

The cases hold that the admissibility of such testimony is within the discretion of the trial judge after a review of the qualifications of the expert and the relevancy and competency of the evidence, *State v. Ballard*, 85 S.W.2d 557 (Tenn. 1993), and the review of the exercise of discretion by the trial judge would be whether there was an abuse of this discretion.

Although these cases are not necessarily controlling in Tennessee, they are persuasive on this issue. They are particularly persuasive because Tennessee has adopted a "subjective test" approach to entrapment, the same approach taken by the federal courts. TENN. CODE ANN. § 39-11-505.

The trial judge held that the defendant had raised a viable defense of entrapment and instructed the jury on that defense.

Dr. Engum's testimony is before us in an offer of proof. The witness would have testified before the jury, if permitted to do so, that the defendant suffered from a cognitive disorder, which reflected impairments in learning, in problem-solving and in information-processing. Further, the witness would have testified the defendant suffered a personality disorder with narcissistic and compulsive personality traits, with a suggestion of an underlying organic personality syndrome. Dr. Engum was not positive of the last finding but testified that clinical observation, interviews with the defendant's family members, etc. suggested that condition also.

The report from the Department of Mental Health showed the defendant suffered from memory deficit and exhibited organicity. There was no finding, on testing by the Department, that the defendant had any neurological deficits.

Dr. Engum would have testified that because of his finding of a significant deterioration of mental ability that the defendant was more susceptible to the persuasion of others to commit a crime. He further testified that the defendant was more susceptible to persuasion by a trusted employee and confidante than by a stranger. This falls within the holdings of the cases above and, under those cases, the testimony of Dr. Engum was admissible. In the cases relied on, the rule is established that the expert may not draw a conclusion that the accused was induced to commit the crime or lacked predisposition. Dr. Engum was not attempting to say the defendant was induced or lacked predisposition to commit these crimes. He was prepared to testify that the defendant by reason of his defects would be more susceptible to inducement than the average person and was of the view that his role

was to testify about his findings for the consideration of the jury in determining whether the defendant was entrapped.

We find the testimony of Dr. Engum is admissible. It meets the requirements of the cases above, and it is our view that the rule should be applied in cases of this nature in this State.

There was enough evidence introduced in this case to cause the trial judge to hold a defense of entrapment was raised. This being so, the exclusion of the expert evidence was error. The defendant was entitled to have the jury consider this evidence along with the other evidence in the case on the question of entrapment.

The State insists that exclusion of this evidence was harmless error if error at all. The State argues there is evidence of predisposition by the defendant to commit the crime and thus, under *State v. Jones*, 598 S.W.2d 209 (Tenn. 1980), the error is harmless.

We are unable to find the exclusion of relevant evidence on the issue of entrapment is harmless. We are unable to say what the jury would have found had they been given the opportunity to consider this evidence. We conclude the defendant was entitled as a matter of due process to have the jury consider this evidence.

There is no evidence to support an instruction on diminished capacity as it is used under Tennessee law. The trial court correctly refused to so instruct the jury.

Other Issues

We have examined the other issues raised by the defendant in this case and find they do not give any other basis for granting the defendant a new trial.

Costs are assessed to the State of Tennessee.

John K. Byers, Senior Judge

CONCUR:

William M. Barker, Judge

F. Lee Russell, Special Judge