IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

FILED

March 13, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	No. 01C01-9602-CC-00055
	)	
Appellee	)	
	)	CHEATHAM COUNTY
V.	)	
	)	HON. ROBERT E. BURCH,
HERSCHEL PEACHER,	)	JUDGE
	)	
Appellant.	)	(Rape of a Child; Incest)
	)	
	)	

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OPINION FILED: _____

REVERSED AND REMANDED

William M. Barker, Judge

OPINION

The appellant, Herschel Peacher, appeals as of right his convictions in the Cheatham County Circuit Court for rape of a child and incest. As a Range I standard offender, appellant was sentenced to twenty-two (22) years for the rape of a child offense and six (6) years for the incest conviction. The sentences were ordered to be served concurrently.

On appeal, the appellant argues that he was denied a fair and impartial jury when his father was tried before the same venire on similar charges the previous day. Second, he challenges the sufficiency of the convicting evidence. After a careful review of the record, we conclude that the appellant was deprived of his constitutional right to a fair and impartial jury. Accordingly, appellant's convictions are reversed and a new trial is ordered.

The background leading to the appellant's trial is unique, to say the least. The appellant was scheduled to be tried on June 29, 1995, on two three-count indictments. In one indictment, the appellant was charged with the rape of his seven-year-old nephew, incest and aggravated sexual battery, likewise involving his nephew. In another indictment, the appellant was charged with having committed the same three offenses against a four-year-old niece. The appellant's trial did not commence on June 29, 1995, for the reason that the father of the appellant was standing trial, which commenced on June 27, 1995, for similar sexual offenses, and his trial did not conclude until sometime on June 29, 1995. Therefore, the appellant's trial was delayed until his father's trial concluded. Appellant's father was on trial for having committed sexual offenses against some of his grandchildren. Although the charges against the appellant were in no way connected with his father's charges, the victims in each case were all grandchildren of the appellant's father. Therefore, although the offenses occurred at separate times and involved separate victims, the participants in both trials were within the same family.

Although unclear on the record, the appellant's trial and his father's trial originally had been scheduled to be tried jointly. Although no motion to sever the trials is included in this record on appeal, it is apparent from comments made in open court, that, prior to trial, appellant's counsel had moved for a severance before a different trial judge and the motion was granted. Accordingly, the two men were scheduled to be tried separately.

As a result of the docket setting the appellant's trial to commence on the day following his father's trial, the same jury venire was used for both trials. Appellant objected to the use of the same venire and requested a new panel, or in the alternative, a continuance to the next term. The trial court reserved its ruling on the motion until the completion of voir dire.

All jurors in the voir dire were aware of the father's case. Several of them had served on that petit jury. Others who did not serve had been present in the courtroom during the presentation of evidence and argument in the father's trial. At the outset of voir dire, the trial judge questioned the entire venire about its ability to be impartial and to judge the appellant independently of his father. The trial court emphasized the need to separate the evidence and conviction of appellant's father in order to give the appellant a fair trial. In response, three jurors were excused for cause. The forelady of the appellant's father's jury announced her inability to be impartial. Another juror stated his inability to be fair in appellant's case in light of evidence in the father's case. The third juror stated her inclination to favor a child's testimony over an adult. Although it is unclear from the transcript of the record on appeal, it appears that the ultimate jury seated for appellant's trial included at least some jurors who had sat the previous two days as jurors in the appellant's father's trial. Nevertheless, after voir dire, the trial court found that the appellant could be given a fair trial and expressed its belief that the jurors would be impartial.

During voir dire, the entire jury panel was advised that the appellant had been charged in separate indictments with the same offenses against two victims, a seven-

year-old nephew and a four-year-old niece. Later, in response to a juror's inquiry about the anticipated length of the trial, the district attorney general told the trial court, in the presence of the jury, that the offenses involving the four-year-old victim might have to be dropped due to his uncertainty of her ability to testify because of her age. Later, following the noon recess, again in open court and in front of the jury, the following colloquy occurred:

> GENERAL KIRBY: Your Honor, before I call the next witness, I need to make an announcement that we're proceeding only on the case wherein [J.G.] is the victim. I'd move to nolle the others. I'm not going to put that four-year-old girl on the witness stand.
>
> THE COURT: All right.
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> Docket number 12-106 is nollied.
>
> Ladies and gentlemen, what that means is that there were two cases and allegedly two victims. The State is only proceeding on one. So the only case that you will be considering is the case of wherein [J.G.] is the alleged victim.
>
> Thank you.

At trial, the victim J.G.,[1] who was then eight (8) years old, testified to the events that occurred. He stated that at the time of the incident he was living with his grandfather (the defendant in the previous trial). Present at the home that day was J.G., his father, the appellant, and Dwayne Broad, a friend of J.G.'s father. While J.G. was watching cartoons on television, he stated that his father entered the room and inserted a pornographic movie into the VCR. Upset by this, J.G. went to the bathroom and shut the door. He stated that shortly thereafter, the appellant entered the bathroom and pushed him facedown onto the floor. J.G. testified that appellant then "put his weanie [private part] up -- up my bottom." He said that it hurt him and he told appellant to stop. However, appellant ceased only when he heard a car pull into the driveway. J.G. stated that the men had been drinking beer and whiskey that day and he believed the appellant was drunk when this event occurred. He also testified that

[1] It is the policy of this Court to refer to minor victims of sexual abuse by their initials only. State v. Schimpf, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989).

he never told anyone about this incident because his father threatened to physically abuse him if he did so.

On cross-examination, J.G. admitted that his father's girlfriend had told him to accuse the appellant or he would never see his mother again. However, he stated that he said these things about the appellant because they really happened and not at the urging of his father or the girlfriend. He reiterated that he was not lying about the appellant. Finally, J.G. testified that Dwayne Broad also sexually abused him that same day, as well as on a previous occasion.[2]

Barbara Wallace, a social worker with the Department of Human Services, also testified for the State. She stated that in November of 1994, she interviewed J.G. after receiving a referral from local law enforcement officials. In that interview, J.G. described to her what happened in the bathroom and she stated that it was consistent with anal rape. Wallace further testified that in a second interview, J.G. used anatomically correct dolls in demonstrating explicitly what had occurred. He also implicated others in the abuse. A law enforcement official, Floyd Duncan, was also present during the interviews of J.G. and testified similarly about the incident as J.G. related it to them. In addition, both Wallace and Duncan stated that J.G.'s story had remained consistent and that they had spoken with him about it on more than three occasions.

Wallace also conducted an interview of the appellant. She stated that appellant was very upset when she spoke with him. He told her that if he said anything he feared that the Department of Human Services would keep J.G. away from him. Appellant denied abusing the victim, but told Wallace that he had a problem and needed help. On cross-examination, Wallace stated that a medical exam of J.G. some months after the incident did not reveal any rectal trauma.

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[2]There was some reference in the record that Broad pled guilty to charges for sexual abuse of J.G.

The defense pursued various theories at trial: (1) that the bathroom was not large enough for the events to have occurred; (2) that the victim had confused appellant with Dwayne Broad; and (3) that the victim had been prompted to lie by his father's girlfriend. As part of the defense proof, appellant testified in his own behalf. He stated that he was not living at his father's house (where the incident occurred) at the time of the events. He said he went over to the house that morning to visit. While there, he stated that Dwayne Broad came by to see the victim's father. He denied any knowledge of a pornographic movie being played that day. He stated that he saw the victim go into the bathroom and that Broad followed him in about thirty (30) minutes later. He forced open the locked bathroom door and witnessed Broad sexually abusing J.G. He denied any role in the abuse and stated that the bathroom was not large enough for him to lie down on the floor. Appellant also stated that the girlfriend of J.G.'s father may have coached J.G. in making these accusations to get back at him.[3] Furthermore, appellant stated his belief that J.G. was simply confusing him with Broad.

Appellant confirmed that he was upset during the interview Wallace conducted because he was afraid that he would never see the children again. Appellant also stated that he did tell Wallace that he wanted treatment, but "not that kind of help." His attorney asked if it was related to abusing children and he responded "yes." Then the appellant said "I just wanted to help -- Sometimes I drink and sometimes I get drunk." He finished his testimony by stating that he was not a sex abuser and he had never abused any child.

Three other witnesses testified for the defense. The sum of their testimony repeated different conversations they each had with the victim when he stated that he had lied about the incident with appellant. The victim also told them that he did this

[3]The record indicates that this woman had previously been the appellant's girlfriend.

because his father's girlfriend threatened him. On cross-examination, the State impeached each witness by disclosing their relationship to the victim's mother.[4]

In rebuttal, Marc Coulon, a police investigator testified. He stated that he was present when Barbara Wallace interviewed the appellant. Coulon said that appellant was crying and shaking his head when Wallace told him of the victim's allegations. He also stated that the appellant told him that Broad abused the child. Also, Coulon stated that he had examined the bathroom where the incident took place. He testified that although it was small, the bathroom was large enough for appellant to lie down.

After deliberating for twenty (20) minutes, the jury returned a verdict convicting the appellant of all three charges in the indictment. At the sentencing hearing, the aggravated sexual battery conviction was merged with the rape of a child conviction. The trial court imposed a twenty-two (22) year sentence for rape of a child and a concurrent sentence of six (6) years for the incest conviction.

Appellant first contends that the jury panel was tainted because appellant's father was tried two days earlier for similar offenses. He argues that he could not have been tried by a fair and impartial jury when the jurors in his case had either deliberated on his father's case or had heard the evidence and arguments in that case. We agree.

The right to a fair and impartial jury is a constitutional right guaranteed to every person tried by a jury of his peers. See U.S. Const. amend. VI; Tenn. Const. art. 1, §9. This precept is fundamental to our concept of justice and should remain unimpaired because of its extreme importance in "the security of the life, liberty, and property of the citizen." See McLain v. State, 18 Tenn. 241 (1937). This right, secured by both the federal and state constitutions, promises a trial by an impartial jury *"free of even a reasonable suspicion of bias and prejudice."* Hyatt v. State, 430 S.W.2d 129, 130 (Tenn. 1967) (emphasis added). Our supreme court later reinforced

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[4]The record reveals that charges were pending against the victim's mother for failure to protect her child from this conduct. The State's cross-examination revealed that each of these three witnesses knew the victim's mother in some way, i.e. boyfriend, sister and friend. In suggesting bias, the State pointed out that if appellant were acquitted, the charges against the mother would likely be dropped.

this idea when it stated that to be impartial, a jury must have an impartial frame of mind from the beginning of trial, it must be influenced by legal and competent evidence produced during trial, and it must base its verdict upon evidence connecting the defendant with the commission of the crime charged. Durham v. State, 188 S.W.2d 555, 558 (Tenn. 1945) (citation omitted).

We are unable to say that the jury seated in appellant's case was free of a reasonable suspicion of prejudice, that is was impartial from the beginning, or that it based its verdict solely upon evidence produced during the appellant's trial. It is apparent that appellant's trial was originally severed from that of his father because it was deemed "necessary to achieve a fair determination of the guilt or innocence of one or more [of] the defendants." Tenn. R. Crim. P. 14(c)(2)(ii). However, the severance sought and obtained was hollow indeed when the appellant was tried using the same jury venire as in his father's trial. Although every juror stated a belief that he or she could try the case fairly and impartially, we find it impossible to conclude that the taint was successfully erased. In a trial where the issue of guilt was hotly contested, we cannot conclude that the jury was not influenced by the facts and circumstances surrounding appellant's family that directly related to the criminal actions in his case. It is true that the charges against appellant's father involved a separate incident and a different victim. However, the nature of the crimes was virtually identical and the risk of prejudice was simply too great. When weighed against the corrective measure available - continuing the case until the next term when a new jury venire was seated - we believe the appellant was unnecessarily deprived of his right to a fair and impartial jury.

The jury was likely influenced in another manner. During voir dire, the venire was advised that appellant had been charged in separate indictments for the same offenses against two victims, a seven-year-old nephew and a four-year-old niece. Later when discussing how long the trial would take, in the presence of the jury, the district attorney told the trial court that the offenses involving the four-year-old victim might have to be dropped due to the age of the victim. After the testimony of the

victim, in the presence of the jury, the State advised the trial court that the second indictment would be dismissed because the victim was simply too young to testify. Information of this nature should never have reached the jury. To avoid the risk of prejudice, these questions should have been resolved outside its presence. In addition to having extensive information about the appellant's father and similar offenses that he committed, the jury was also advised of crimes allegedly committed by appellant that were not proven at trial. In effect, this irrelevant, extraneous information disclosed to the jury created an extremely prejudicial atmosphere which deprived the appellant of his right to an impartial jury. Even though no extraneous evidence was actually admitted regarding offenses by the appellant against his four-year-old niece, we conclude that the statements made by the prosecutor regarding that case came perilously close to a violation of Rule 404(b) of the Tennessee Rules of Evidence. See State v. McCary, 922 S.W.2d 511 (Tenn. 1996).

It is irrelevant that appellant did not exhaust his peremptory challenges. The trial judge noted, as we do, that using peremptory challenges would have been pointless. Every person in the jury venire was tainted by evidence from the earlier trial. Any juror removed by such a challenge would have been replaced with someone who had similar knowledge. It was effectively impossible for appellant to obtain an impartial jury under these circumstances. This constitutional violation cannot be held harmless. See State v. Bobo, 814 S.W.2d 353, 358 (Tenn. 1991) (holding that any errors affecting the constitutional right to trial by jury will result in such prejudice to the judicial process that automatic reversal is required). Therefore, deprivation of this fundamental right entitles the appellant to a new trial with an untainted jury.

Appellant's second issue challenging the sufficiency of the evidence would normally be waived for failure to cite any authority. See Ct. Crim. App. R. 10(b) and State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988). Appellant does nothing more than make a blanket assertion. However, for the benefit of the trial court on remand, we will address this issue.

In our review, we must consider the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record, as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). We further note that a guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). In light of these considerations, we find the evidence was sufficient.

The evidence presented by the State included the testimony of the victim. This eight-year-old child painfully recounted the details of his abuse to the jury. His version of the events was corroborated by testimony from two other witnesses who emphasized that the boy's story had not changed throughout this ordeal. Although the defense submitted testimony to contradict the victim's statements, the jury obviously accredited the testimony given by the State's witnesses. As the exclusive judge of the credibility of witnesses, we defer to the jury's decision in that regard. Cabbage, 571 S.W.2d at 835. The evidence was sufficient for the jury to find that appellant unlawfully penetrated J.G., who was child less than thirteen (13) and that such action constituted incest by virtue of their familial relationship. See Tenn. Code Ann. §39-13-522 (Supp. 1995) and Tenn. Code Ann. §39-15-302 (1991).

We note that the recent holding of State v. Livingston, 907 S.W.2d 392 (Tenn. 1995) will be applicable to appellant's case on remand. Although not stated in the record, the testimony of Barbara Wallace and Floyd Duncan repeating statements of the victim presumably was admitted under the fresh-complaint doctrine. The supreme court in Livingston held that the fresh-complaint doctrine no longer applies to statements made by child victims of sexual abuse. Id at 395. However, in a new trial, such statements may be properly admitted as prior consistent statements if the

victim's credibility is attacked on cross-examination. See Livingston, 907 S.W.2d at 398; State v. Meeks, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993), cert. denied, 510 U.S. 1168, 114 S.Ct. 1200, 127 L.Ed.2d 548 (1994); and State v. Robert J. Burton, Sr., No. 02C01-9507-CC-00193 (Tenn. Crim. App. at Jackson, June 10, 1996).

After a thorough review of the record, we find that appellant was deprived of his constitutional right to a fair and impartial jury. The convictions must be reversed and new trial is ordered.

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William M. Barker, Judge

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Joe B. Jones, Presiding Judge

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J. Steven Stafford, Special Judge