

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1995

<p>FILED</p> <p>October 4, 1995</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,)
)
 Appellant,)
)
 v.)
)
 ROBERT SCOTT,)
)
 Appellee.)

No. 01C01-9409-CC-00326
 Rutherford County
 Hon. James K. Clayton, Judge
 (Aggravated Sexual Battery)

CONCURRING AND DISSENTING OPINION

I concur in vacating the order granting a new trial, but I disagree with the majority opinion's decision to reinstate the judgment of conviction without a remand to the trial court. This case comes to us with a record on appeal that is rather unclear about why the trial court ordered a new trial. There are two orders in the record that grant a new trial, with the last one signed by counsel for both parties and stating that a new trial was granted "because the State failed to turn over exculpatory evidence before the trial and pursuant to the court's ruling as set forth in the transcript of the hearing held on August 29, 1994, said transcript being filed in the record [of] this case and being incorporated within this order as though written verbatim." (Emphasis added). It is that transcript that concerns me.

At the hearing, the trial court expressed various concerns about the case including the following one:

But, certainly, as the 13th juror in the case, I would have liked to have known about those inconsistencies, which might affect the weight to be given to the testimony that I had heard.

Of course, at a new trial the complete picture can be

made, can be given. And if the witness is believed, then the jury will find Mr. Scott guilty

What is unclear is that the record does not otherwise show that the trial court approved of the verdict as the thirteenth juror nor does it even indicate that the motion for new trial was denied in all other respects. Under these circumstances, I do not believe that we can merely impose or reinstate the judgment of conviction upon our concluding that the trial court's exculpatory evidence ruling was wrong. We should only vacate the new trial order and remand the case for further consideration and action by the trial court that will be in conformity with its obligations under the law. In this respect, further piecemeal litigation will be avoided.

Joseph M. Tipton, Judge