IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1995

FILED

April 26, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01C01-9411-CC-00374
	)	
	)	Cheatham County
v.	)	
	)	Hon. Robert E. Burch, Judge
	)	
TERRY TAYLOR,	)	(Statutory Rape)
	)	
Appellant.	)	

For the Appellant:

Peter M. Olson
114 Franklin Street
Clarksville, TN 37040

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
Sharon S. Selby
Assistant Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37243-0493

Dan Mitchum Alsobrooks
District Attorney General
and
Wally Kirby
Assistant District Attorney General
105 Sycamore Street
Ashland City, TN 37015

OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Terry Taylor, appeals from his conviction in the Cheatham County Circuit Court, following a bench trial, for statutory rape, a Class E felony. He received a sentence of one year as a Range I, standard offender to be served in the Cheatham County Workhouse. In this appeal as of right he presents the following issues:

> (1) whether T.C.A. § 39-13-506 should be held unconstitutional because its definition of promiscuity is void due to vagueness,
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> (2) whether T.C.A. § 39-13-506 should be held unconstitutional because it violates due process guaranties concerning the presumption of innocence and the burden of persuasion, and
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> (3) whether there is sufficient proof to support a conviction for statutory rape.

The state's proof in this case consists primarily of the testimony of the victim, T.L.B., her brother and the investigating officer. T.L.B. testified that she was sixteen years old on July 16, 1993, when the defendant approached her at a local market where she had walked to buy a Coke. She stated that she had known the defendant all of her life and that she agreed to go riding around with him. She said that they rode around, stopped at his mother's house for a few minutes and then rode to a creek where he raped her. She recounted that while they were riding around the defendant told her that he had a gun in his car but that he did not show it to her. She stated that when they arrived at the creek they talked for awhile and then the defendant began to kiss her. She said that he pulled her pants down and that they had sexual intercourse. She stated that she did not resist because she did not know whether the defendant had a gun. She testified that after they both got dressed, the defendant took her back to the market and told her not to tell anyone. She testified

that the events occurred at night and that the defendant picked her up around 9:00 p.m. and dropped her off around 9:45 p.m.

T.L.B. testified that she walked home, found her brother, Lee, and told him that the defendant had raped her. She said that her brother went to look for the defendant and eventually found him at his trailer. She said that she also told her mother about the rape and her mother took her to the hospital for an examination the next day. The victim admitted that she had sexual intercourse twice before July 1993. She stated that she had sexual intercourse once with John Hopkins about three years ago and that she had sexual intercourse with Chris Allen once sometime before the rape. She admitted that she consented to sexual intercourse with the defendant because of the gun and that she was scared.

On cross-examination, the victim identified a letter she had written to the defendant about a week before trial. She also admitted that she had kissed the defendant in the week preceding the trial. She said that she had sexual intercourse with John Hopkins when she was fourteen years old and that it was her first sexual experience. She also stated that she had sexual intercourse with Chris Allen when she was sixteen. She denied having sex with Kevin Wright, Neal Worthington, J.J. Santulli, Quincy Snipes, Ricky Collins, Chad Harrison and Kevin Payne and stated that if they were to testify that she had sexual intercourse with them that it would be a lie. She denied ever sleeping in the same bed with her brother. She denied telling her sister, Lanell Kennedy, and Donny Hensley that she had sexual intercourse with a twenty-nine-year-old man sometime before July 1993. She admitted that, in the letter to the defendant, she wrote that Donny Hensley better not tell anyone about her and the defendant unless he wanted his wife to find out that he was trying “to mess around” with her also. On redirect examination, the victim recalled testifying at the preliminary

hearing that she had admitted to having sexual intercourse twice before July 1993. She said that those two times were with John Hopkins and Chris Allen.

Officer Michael A. Phillips of the Fairview Police Department testified that he responded to a call about a fight at a restaurant near the victim's home on July 17, 1993. The defendant had called the police and, upon his arrival, Officer Phillips learned that there had not been a fight but that there had been some accusations between the defendant and Lee Bateman, the victim's brother. Officer Phillips testified that this was the first time he heard of the alleged rape. He stated that the defendant told him that several people were trying to gang up on him and accusing him of raping the victim. He stated that he then talked to the victim who told him what had happened. He stated that the defendant never said what happened between him and the victim and only discussed the allegations that were made against him. Officer Phillips testified that he issued a warrant for the defendant's arrest for rape based upon the victim's statement.

Lee Bateman testified that he was at Chad Harrison's house on July 16, 1993, when the victim arrived crying and told him that the defendant had raped her. He stated that the victim did not tell him about the gun until about a week after the rape. He stated that he and Chris Allen went looking for the defendant. He stated that he found the defendant on the 16th but that no confrontation occurred. He testified that he was living at home at the time and that he and the victim shared a room with two beds. On cross-examination, he stated that his family lived with his aunt, Louise Rose, at one time and that he and the victim slept on the floor on separate pallets while staying there. He said that he had no personal knowledge of the number of sexual partners the victim has had.

Several witnesses testified for the defendant regarding the victim's sexual activity. John Hopkins testified that he and the victim had sexual intercourse once at a party about two and one-half years ago and that he is now nineteen years old. Kevin Wright testified that he and the victim had sexual intercourse once in her yard before July 1993 and that he is about three years older than the victim. On cross-examination, he stated that he and the victim were not really dating and that he had not told anyone about them having sexual intercourse until testifying at the trial. Chris Allen testified that he and the victim had sexual intercourse once at his house before July 1993 and that he did not know of anyone else that she has had sexual intercourse with. He stated that Amanda Rosenbaum made a list of several boys with whom the victim was friends but that the list was not of boys with whom the victim had had sexual intercourse. Chris Allen said that he was sixteen years old. He also said that he and the victim had been together a long time before having sexual intercourse and that it was his first and only time. Chad Harrison testified that he is seventeen years old. He denied having sexual intercourse with the victim.

Amanda Rosenbaum testified that Chris Allen, Neal Worthington and Phillip Taylor were at her house and made a list of boys' names. She identified the list and stated that Phillip asked her to write them down. She said that Phillip and Neal told her the names. She could not recall the reason they made the list. She said that she did not know the victim.

Phillip Taylor, the defendant's brother, testified that he met with Chris Allen and Neal Worthington at Amanda Rosenbaum's house and that he asked them about the boys the victim had been with. He said that Neal and Chris gave Amanda the list of names to write down. He said that Neal and Chris also pointed to each other when asked if there was anyone else the victim had had sexual intercourse with. On cross-examination, Phillip admitted that Chris and Neal did not have any actual

knowledge that the victim had sexual intercourse with the listed boys, but that the list was based on what they had heard.

Justin (J.J.) Santulli testified that he and the victim were friends and that he picked on her concerning her relationships with boys and about sex. He denied having sexual intercourse with the victim and stated that he had no personal knowledge of any individuals with whom she has had sexual intercourse. He stated that they joked about sex but that she never told him who were her sexual partners.

Walter Steven Taylor, the defendant's brother, testified that on the night before the rape, the defendant and victim were at his house holding hands. He said he left the room for a minute and when he came back they were kissing. He stated that the kissing appeared to be consensual and that the victim was groping the defendant. On cross-examination, Walter stated that he did not say anything to his brother about his relationship with the victim. He testified that his brother was thirty years old.

Donny Hensley testified that he and the defendant are friends. He stated that he and the defendant were at the victim's sister's house one night while the victim's sister was on the telephone trying to set up a date between him and the victim. He denied being interested in dating the victim. He stated that he saw the victim hugging and kissing the defendant in a restaurant parking lot one night. Lanell Kennedy, the victim's sister, testified that Donny Hensley was at her house that night and wanted to talk to the victim.

I

The defendant contends that T.C.A. § 39-13-506(b) is unconstitutionally vague in violation of the due process clause of the 14th Amendment of the United

States Constitution and Article 1, Section 8 of the Tennessee Constitution. The defense to statutory rape found in T.C.A. § 39-13-506(b)[1] provides:

> It is a defense to prosecution under this section that the victim was at the time of the alleged offense at least fourteen (14) years of age and had, prior to the time of the alleged offense, engaged promiscuously in sexual penetration.

The defendant argues that the statute's failure to define promiscuity allows a trial court to define the defense arbitrarily and that the trial court's view of of promiscuity in this case is so vague as to deprive persons of common intelligence of adequate warning as to what constitutes a defense under the statute. The state argues that any issues regarding the unconstitutionality of T.C.A. § 39-13-506 have been waived by the defendant's failure to raise the issue prior to trial. In the alternative, the state argues that the statutory defense of promiscuity is not unconstitutionally vague and that any apparent vagueness has been cured by recent judicial construction.

In State v. Rhoden, 739 S.W.2d 6, 10 (Tenn. Crim. App. 1987), this court held that the failure to raise a constitutional challenge to a statute in a pretrial motion results in a waiver of the issue on appeal. Tenn. R. Crim. P. 12(b)(2). See also State v. Farmer, 675 S.W.2d 212, 214 (Tenn. Crim. App. 1984). Our review of the record reflects that the defendant did not attack the constitutionality of the statute until his motion for a new trial. Therefore, this issue is waived. Rhoden, 739 S.W.2d at 10. However, we will address the issue on its merits.

Due process does not require that a statute be drafted with absolute precision. State v. McDonald, 534 S.W.2d 650, 651 (Tenn. 1976), cert. denied, 425 U.S. 955, 96 S. Ct. 1733, 1748 (1976). "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Rose v. Locke, 423 U.S. 48, 50, 96 S. Ct. 243, 244 (1976). In

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[1] For crimes committed after July 1, 1994, the defense under T.C.A. § 39-13-506(b) has been removed from the statutory rape statute and is no longer available. See T.C.A. § 39-13-506 (1994 Supp.).

State v. Hood, 868 S.W.2d 744, 747 (Tenn. Crim. App. 1993), this court stated that promiscuity "denotes not only multiple partners, but indiscriminate, casual [sexual] conduct not involving love or a similar emotionally intimate aspect." This definition of the promiscuity sufficiently alerts individuals to the proof that is required to show the defense. Therefore, we conclude that the promiscuity defense found in T.C.A. § 39-13-506(b) is not unconstitutionally vague.

As applied to this defendant , the trial court's definition of promiscuity is consistent with this court's holding in Hood. The trial court held that promiscuous sexual intercourse denotes a variety of sexual partners but stated that evidence of numerous partners may not justify a finding of promiscuity. It also stated that the conduct must have some casual aspect to it and not merely result from a dating relationship in which sexual intercourse often occurs. Therefore, we conclude that the trial court's definition of the promiscuity defense was not unconstitutionally vague as applied to the defendant's case.

II

The defendant also contends that T.C.A. § 39-13-506 should be held unconstitutional because the promiscuity defense shifts the burden of persuasion to the defendant in violation of due process. He argues that the trial court's ruling that the defense had not been established by proof of the victim's three prior acts of unchastity unconstitutionally shifted the burden of persuasion to the defendant to prove his innocence. The state argues that this issue has been waived by the defendant's failure to raise the issue prior to trial. In the alternative, the state argues that the statutory defense of promiscuity does not impermissibly shift the burden of persuasion but merely places a burden of production upon the defendant before the state is required to negate the defense.

As with the defendant's first challenge to the constitutionality of the statute, the defendant failed to raise this objection prior to trial and the issue is waived. Rhoden, 739 S.W.2d at 10. Furthermore, we agree with the state that the defense of promiscuity does not unconstitutionally shift the burden of persuasion to the defendant. As this court explained in Hood, the defense of promiscuity is

> a general defense which must only be fairly raised by the proof before being considered by the trier of fact and any reasonable doubt on the issue requires an acquittal. . . . [O]nce the defense is at issue, "the state must prove beyond a reasonable doubt that the defense does not apply."

Hood, 868 S.W.2d 748 (citations omitted).

Also, the record reflects that the trial court gave appropriate consideration to the defense of promiscuity as a general defense. At the close of proof the defendant asked for a clarification of the trial court's ruling regarding the defense of promiscuity. The trial court stated that there was no reasonable doubt regarding the victim's promiscuity. It found that even assuming the victim had three sexual partners before the present incident, these instances occurred in the context of dating relationships and did not show any casual activity. There is nothing in the record to reflect that the trial court's consideration of the victim's promiscuity unconstitutionally shifted the burden of persuasion to the defendant to prove his innocence.

III

The defendant contends that there is insufficient evidence to support his conviction for statutory rape. He argues that the state failed to present any evidence of the defendant's age and that reasonable doubt exists concerning the victim's promiscuity. The state argues that proof of the defendant's age was shown through the testimony of the defendant's brother and that the trial court had ample opportunity to observe the defendant on the day of trial and to infer that the defendant was at least

four years older than the victim, as required by T.C.A. § 39-13-506. The state also argues that there was no reasonable doubt of the victim's promiscuity.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); T.R.A.P. 13(e). As Rule 13(e) indicates, this standard applies to a finding of guilt resulting from either a jury trial or a bench trial. See State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978); State v. Frahm, 737 S.W.2d 799, 801 (Tenn. Crim. App. 1987). This means that we may not reweigh the evidence, but must accredit all the testimony in favor of the state's position and view all the evidence in the light most favorable to the state, giving it the benefit of all reasonable inferences. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Regarding the defendant's argument that the state failed to prove that he was four years older than the victim we note that, during the state's case-in-chief, the victim testified that she and the defendant had sexual intercourse when she was sixteen years old. During the defendant's proof, the state elicited the defendant's age from the defendant's brother during cross-examination when he testified that the defendant was thirty years old. Under T.C.A. § 39-11-201(d), evidence produced during direct examination or cross-examination may be used by either party. In the light most favorable to the state, the state presented sufficient proof of the defendant's age to support a finding that a statutory rape occurred beyond a reasonable doubt. T.R.A.P. 13(e).

Based upon the findings of the trial court and our standard of review, we hold that the trial court could have found that the victim had not engaged in

promiscuous sexual intercourse. The trial court found that the victim had had sexual intercourse on two occasions prior to the rape, accrediting the testimony of the victim. It stated that it did not really believe the testimony of the third witness who claimed to have had sexual intercourse with the victim. We will not reweigh the credibility of the witnesses on appeal. Furthermore, even if the trial court had found that, as the defense proof indicated, the victim had had sexual intercourse three times, this could still lead to a conclusion that the victim had not engaged in promiscuous sexual intercourse. Hood, 868 S.W.2d at 748. The victim in this case had sexual intercourse twice during a period of two years before the event at issue. As the trial court noted, the incidents seemed to have occurred in the context of a dating relationship and were not particularly casual in nature. Therefore, we conclude that the evidence in this case could rationally lead to a finding beyond a reasonable doubt that the victim had not engaged in promiscuous sexual intercourse.

In consideration of the foregoing and the record as a whole, the judgment of conviction is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

(Not participating)
Jerry Scott, Presiding Judge

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David G. Hayes, Judge