IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1996 SESSION

FILED

June 20, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9508-CC-00267**
Appellee,	)	
	)	**WAYNE COUNTY**
VS.	)	
	)	**HON. JAMES L. WEATHERFORD,**
ROGER DALE HILL, SR.,	)	**JUDGE**
	)	
Appellant.	)	(Aggravated sexual battery)

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OPINION FILED:_____

REVERSED AND DISMISSED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for aggravated rape. After a jury trial, he was convicted of aggravated sexual battery. Following his sentencing hearing, the defendant was sentenced as a Range I, standard offender, to twelve years. He was also assessed a twenty-five thousand dollar ($25,000) fine.

The defendant now appeals as of right, raising the following six issues:

1. The indictment was fatally deficient so as to deprive the trial court of jurisdiction;

2. The trial court erred in ruling admissible for impeachment purposes the defendant's prior conviction under the habitual motor vehicle offender statute;

3. He was denied a fair trial when the State elicited testimony that he had refused to make a statement and had requested a lawyer;

4. The trial court erred in ruling admissible a photograph of the victim;

5. The State failed to disclose exculpatory information in violation of Brady v. Maryland, 373 U.S. 83 (1963); and

6. His sentence is excessive.

Because we find merit in the first of the defendant's grounds for this appeal, we reverse the conviction and dismiss the charge against him.

On or about June 22, 1991, the victim, M.H.[1] and her older sister were spending the night with their paternal grandmother. M.H. was about eight years old at the time. The victim's father, the defendant, also spent the night at the house.

The victim slept on the floor of the living room with her sister and the

[1] It is the policy of this Court to use the initials of minor victims of sex crimes.

defendant; the defendant slept between the two girls. The victim's grandmother slept on a couch nearby in the same room. The victim testified that, while they had all been lying there, but after her sister and grandmother had gone to sleep, the defendant had pulled her nightgown up, pulled her panties over, put "[h]is finger in my private," and then "got on top of me and . . . started putting his private part into mine." According to the victim, the defendant had then started moving "[u]p and down." The victim testified that this had hurt her and that she had told the defendant "to quit," which he then did.

The victim told no one about the incident until she returned home within a few days.[2] That evening, as she was getting ready to take a bath, she told her mother, Lois Rockwell, that she hurt "down there," in her "privacy." Her mother testified that she had then examined her daughter and saw that "she was all red, bruised looking down in her privates." Rockwell testified further that M.H. had said to her, " 'Mama, my daddy touched me in my privates in the wrong way.' "

Rockwell then took M.H. to the hospital. The nurse who was present while M.H. was examined by a doctor testified, and read to the jury the notes she had made following her observations of M.H. upon her admission. These notes reflected the date as Tuesday, June 25, 1991.

Bridget Massey, a Department of Human Services ("DHS") employee, testified that she had been in the hospital with M.H. on June 25, 1991, and that she had taken a photograph of M.H. while she was there. This photograph revealed the condition of the victim's labia.

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[2] It is unclear from the record whether the incident occurred on a Friday or a Saturday night, and whether the victim returned home on the following Sunday or Tuesday.

The defendant did not testify, but called his mother and sister to the stand. The defendant's mother testified that she was "a very light sleeper" and that she hadn't heard any noises during the night in question "except the kids a turning, you know, like they'd turn over or something." She also testified that she took the children to her daughter's house on Sunday afternoon. The defendant's sister testified that her mother had dropped the children off at her house on Sunday afternoon and that M.H.'s mother and step-father picked them up there that same day.

In his first issue, the defendant asserts that the indictment against him is insufficient because it does not include an essential element of the offense charged. The indictment states, in pertinent part, that the defendant "on or about the 22nd day of June, 1991, in Wayne County, Tennessee and before the finding of this indictment, did unlawfully sexually penetrate [M.H.] a person less than thirteen (13) years of age, in violation of Tennessee Code Annotated [§] 39-13-502." The defendant contends that this language is fatally insufficient because it contains no allegation of the requisite mens rea element of aggravated rape.

We first note that the defendant did not raise this issue until his motion for new trial. Ordinarily, a failure to raise an objection based on a defect in the indictment results in a waiver of that issue. Tenn. R. Crim. P. 12(f). However, "the waiver rule does not apply when the indictment fails to assert an essential element of the offense. In that circumstance, no offense has been charged. In consequence, subsequent proceedings are a nullity." State v. Perkinson, 867 S.W.2d 1, 6 (Tenn. Crim. App. 1992). Thus, the defendant has not waived this issue and we therefore must examine the efficacy of the indictment.

Our code sets forth the general guidelines for establishing the culpable mental state required for the commission of a criminal offense. T.C.A. § 39-11-301. Subsection (c) provides, "If the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge, or recklessness suffices to establish the culpable mental state." The aggravated rape statute in force at the time the defendant was indicted provided, in pertinent part, as follows:

> Aggravated rape is unlawful sexual penetration of a victim by the defendant . . . [where t]he victim is less than thirteen (13) years of age.

T.C.A. § 39-13-502(a)(4) (1991 Repl.).

This Court has previously recognized that "[t]his statute and the applicable definitions neither specifically require nor 'plainly dispense' with the requirement of a culpable mental state. Thus, the terms of § 39-11-301(c) apply." State v. Parker, 887 S.W.2d 825, 827 (Tenn. Crim. App. 1994) (footnote omitted). Accord State v. Jones, 889 S.W.2d 225, 229 (Tenn. Crim. App. 1994). The terms of T.C.A. § 39-11-301(c) also apply to the lesser included offense of aggravated sexual battery.[3] State v. Parker, 887 S.W.2d at 827. Thus, the defendant argues, the indictment is fatally defective because it does not allege that he sexually penetrated M.H. intentionally, knowingly, or recklessly.

In State v. White, this Court considered an indictment which provided that the defendant "did unlawfully possess a controlled substance," to wit, marijuana. The defendant was subsequently convicted of misdemeanor marijuana possession. He appealed, challenging the efficacy of the indictment on the ground that it did not specify the requisite mental element of "knowing." We agreed with the defendant, finding that

[3] "Aggravated sexual battery is unlawful sexual contact with a victim by the defendant . . . [where the victim is less than thirteen (13) years of age]." T.C.A. § 39-13-504 (1991 Repl.).

" 'Unlawfully' does not, in the ordinary use of the term, connote mental culpability. One cannot logically infer that an accused acting 'unlawfully' necessarily acts 'knowingly.' " State v. Nathaniel White, No. 03C01-9408-CR-00277, Sullivan County (filed June 7, 1995, at Knoxville). Accordingly, we reversed the defendant's conviction and dismissed the charge.

Consistent with our holding in White, we find the use of the term "unlawful" in the present indictment to be insufficient as an allegation that the defendant here acted knowingly. We find ourselves constrained by logical extension to also hold that the term "unlawful" is equally inadequate as an allegation that the defendant acted either intentionally or recklessly. Therefore, as we did in White, we find that the indictment against the defendant in this case is fatally defective and that his conviction must be reversed and the charge dismissed.

The defect in this case is magnified because the defendant was acquitted of the aggravated rape charge, but was found guilty of the lesser included offense of aggravated sexual battery. Aggravated sexual battery not only requires the general mens rea element that the defendant acted "intentionally, knowingly or recklessly," but also the specific mens rea included in the definition of "sexual contact:" "the intentional touching of the victim's . . . intimate parts . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T.C.A. § 39-13-501(6) (1991 Repl.) (emphasis added).

The fatal defect from which this indictment suffers is the type of "technicality" which, when it results in the dismissal of charges as in this case, causes significant public consternation and frustration with our system of criminal justice. We are equally

frustrated because this "technicality" is easily avoided. Accordingly, we remind prosecutors of their responsibility to ensure that indictments are properly drafted. "Tennessee necessarily requires that the factual allegations [in an indictment] must relate to all the essential elements of [the] offense including that of scienter." State v. Marshall, 870 S.W.2d 532, 537 (Tenn. Crim. App. 1993). "A lawful accusation is an essential jurisdictional element without which there can be no prosecution." State v. Perkinson, 867 S.W.2d at 5. These are not new concepts in Tennessee jurisprudence. See, e.g., State v. Cornellison, 59 S.W.2d 514 (Tenn. 1933); State v. Hughes, 371 S.W.2d 445 (Tenn. 1963); State v. Smith, 612 S.W.2d 493, 497 (Tenn. Crim. App. 1980).

Although we reverse the conviction and dismiss the charge based on our resolution of this first issue, we will also address the remaining grounds of the defendant's appeal.

In the defendant's second issue he complains that the trial court erred in ruling admissible his 1988 conviction for violating the habitual traffic offender statute. He contends that the probative value of this conviction on his credibility was minimal and outweighed by its unfair prejudicial effect. He also contends that this error by the trial court was not harmless.

Tennessee Rule of Evidence 609 governs the admissibility of prior convictions to impeach the credibility of criminal defendants. In making its ruling the trial court "must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues." Tenn. R. Evid. 609(a)(3). The trial court in this case specifically found "for the purposes of impeachment that the probative value [of the defendant's prior conviction] would outweigh the prejudicial effect." We

agree with the trial court's ruling. The defendant was declared to be an habitual motor vehicle offender in 1985. In spite of this, he obviously persisted in violating the motor vehicle laws. The defendant's willingness to continue violating these laws is probative of his credibility because it may indicate a willingness to likewise disregard the laws of perjury. We find no abuse of discretion in the trial court's ruling. This issue is without merit.

In his third issue the defendant complains that the State elicited testimony about his refusal to make a statement after his arrest and his request for a lawyer. The defendant contends that this testimony violated his right not to incriminate himself, and that the error is not harmless.

The State called Tommy Workman, a criminal investigator for the District Attorney General, during its case in chief. Workman first saw the defendant in November 1991. The State asked Workman if he had questioned the defendant about the instant incident, to which Workman responded, "Yes." The State then continued, "Let me just ask you this. This is concerning -- this is the incident in which there was a written statement, right?" Workman replied, "He refused to give a statement." The State said, "Okay," and Workman continued, "He wanted a lawyer." The defendant's counsel immediately objected and the trial court instructed the jury to "disregard the last statement made by this witness." The defendant's lawyer did not request any further remedy.

We first note that the defendant did not object following the State's initial question about the written statement. Nor did the defendant request that the witness's response to this first question be stricken. Nor was any issue with respect to this particular question and answer raised in the defendant's motion for new trial. Accord-

ingly, the defendant's complaint about this question and response is waived. Tenn. R. App. P. 3(e), 36(a); State v. Caughron, 855 S.W.2d 526, 538 (Tenn. 1993); State v. Dobbins, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988).

The defendant did object to the witness's statement that the defendant had indicated that he wanted a lawyer, and the trial court issued a curative instruction. The jury is presumed to have followed the trial court's instruction. State v. Harris, 839 S.W.2d 54, 72 (Tenn. 1992). Moreover, this testimony by the witness does not "affirmatively appear to have affected the result of the trial on the merits," Tenn. R. Crim. P. 52(a). Accordingly, any error that occurred as a result of this witness's unsolicited statement was harmless.

In his fourth issue the defendant contends that the trial court committed prejudicial error when it allowed into evidence the photograph of M.H. which displayed the condition of her genitals on the night she was taken to the hospital. We disagree. Our Supreme Court has repeatedly held that "a trial court's decision regarding the admissibility of photographs will not be reversed on appeal absent a clear showing of an abuse of discretion." State v. Cazes, 875 S.W.2d 253, 262-63 (Tenn. 1994). See also State v. Stephenson, 878 S.W.2d 530, 542 (Tenn. 1994). Here, no such abuse of discretion has been shown. The photograph corroborated the victim's testimony as well as that of her mother and the examining nurse, and was not so graphic or gruesome that its probative value was "substantially outweighed by the danger of unfair prejudice." Tenn. R. Evid. 403. This issue is without merit.

In his fifth issue the defendant contends that he is entitled to a new trial because the State failed to disclose exculpatory information to him prior to trial in violation

of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, the defendant complains that the DHS file on this matter was never turned over to him.

The defendant filed two motions before trial in an attempt to gain access to the DHS file and/or information contained therein. The trial court issued an order requiring the State to "procure said records and produce them to the court for its in camera review in aid of reviewing same in order to disclose exculpatory evidence and potential witness[es] to defendant" (italicization added). However, the technical record contains no other motions or orders reflecting whether the State did in fact produce these documents, whether the trial court did then conduct an in camera review, or whether the trial court subsequently determined that any of the information was to be disclosed to the defendant.

At the hearing on the defendant's motion for new trial, the defendant's lawyer admitted that he had "no idea to this day whether this file was ever given to the Court" or "[w]hether it was the judge who reviewed it and determined there was no exculpatory evidence." It is apparent, therefore, that after making the relevant motions, the defendant's counsel did not follow up to make sure that the DHS file was turned over as ordered and reviewed by the court for exculpatory information. The defendant went to trial without the benefit of this information. The defendant could have requested a continuance of the trial had it been determined that the trial court's order had not been complied with. Tenn. R. Crim. P. 16 (d)(2). No such continuance was requested.

The defendant's conduct in proceeding to trial without having determined the status of the DHS file constitutes a waiver of any violation of Brady and Rule 16 which may have occurred. The defendant had ample opportunity to address this matter before

trial and chose not to do so. He will not be heard to complain now. This issue is without merit.

In his final issue the defendant complains about the length of his sentence and the fine imposed upon him by the trial judge. When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the minimum sentence within the range is the presumptive sentence for B, C, D and E felonies. The presumptive sentence for A felonies is mid-range. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the

enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The Act further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

After a sentencing hearing, the lower court found, “considering the entire record in this case, the pre-sentence report, the prior criminal record of this defendant, the nature of this crime, of course, this is one of the most despicable crimes that we have in this state, I’m going to impose a sentence of twelve years and a fine of $25,000.” The record does not preponderate against these findings or against the maximum sentence of twelve years. Therefore, we find no merit to the defendant’s complaint about the length of his sentence.

The lower court did, however, err when it imposed a fine on the defendant. The maximum fine for aggravated sexual battery, a Class B felony, is twenty-five thousand dollars ($25,000). T.C.A. § 40-35-111(b)(2). Accordingly, the jury must have fixed any fine unless waived by the defendant. T.C.A. § 40-35-301. The jury fixed no fine in this

case and the record contains no such waiver by the defendant. Accordingly, the sentencing court was without authority to impose any fine upon the defendant at the sentencing hearing. Even if authorized by proper waiver, the trial judge failed to make findings based on consideration of all necessary factors. See State v. Bryant, 805 S.W.2d 762, 765-66 (Tenn. 1991).

For the reasons set forth above, the defendant's conviction is reversed and the charge against him is dismissed.

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JOHN H. PEAY, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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DAVID G. HAYES, Judge