

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1997 SESSION

<p>FILED</p> <p>November 14, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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CHARLES RAY CLEM,)
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 Appellant,)
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 VS.)
)
 STATE OF TENNESSEE,)
)
 Appellee.)

C.C.A. No. 01C01-9612-CC-00519
 WILLIAMSON COUNTY
 HON. DONALD P. HARRIS,
 JUDGE
 (Post-Conviction)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

Petitioner, Charles Ray Clem, appeals the dismissal of his petition for post-conviction relief by the Circuit Court of Williamson County. Petitioner presents the following issues for our review: (1) whether medical testimony was improperly admitted at his original trial under the fresh complaint doctrine; and (2) whether the indictment was fatally deficient for failure to properly allege the *mens rea* elements of aggravated rape and rape. We affirm the judgment of the trial court.

PROCEDURAL HISTORY

Petitioner was convicted of ten (10) counts of aggravated rape and three (3) counts of rape and received an aggregate sentence of eighty (80) years. The convictions and sentences were affirmed by this court. See State v. Charles Ray Clem, C.C.A. No. 01C01-9207-CC-00207, Williamson County (Tenn. Crim. App. filed March 18, 1993, at Nashville). Application for permission to appeal to the Tennessee Supreme Court was subsequently denied. Petitioner timely filed a petition for post-conviction relief. The petition was dismissed after an evidentiary hearing. It is from that dismissal that petitioner seeks this appeal.

FRESH COMPLAINT TESTIMONY

Petitioner contends his constitutional right to due process was violated by the admission at trial of testimony of a physician. The physician testified that “[he] was aware of an allegation or a complaint of continuing anal sex” and that his medical examination was not inconsistent with such complaints.

Dr. Joe Moss, a pediatrician, testified at trial concerning his examination of the minor victims at the request of authorities. Petitioner now attacks the admissibility of the following testimony:

Q. Were you aware of an allegation or a complaint of continuing anal sex?

- A. That's correct.
- Q. That these children had been anal [sic] penetrated on numerous occasions?
- A. Yes.
- Q. Doctor, is that claim or that allegation inconsistent with your findings, your physical exam findings?
- A. No.
- Q. Why not?
- A. Because a vast a [sic] majority of sexually abused children have a normal physical exam. And the vast majority being probably sixty to eighty percent on most of the medical studies we do.

There was no objection at trial to this testimony.

At the time of trial the fresh complaint doctrine was viable. Under that doctrine statements made by child victims after sexual abuse were admissible as confirmation of their credibility. See State v. Brown, 871 S.W.2d 492, 493 (Tenn. Crim. App. 1993). The fresh complaint doctrine was subsequently abolished in its entirety and held not to apply to cases involving child victims. See State v. Livingston, 907 S.W.2d 392 (Tenn. 1995). Nevertheless, the court noted that evidence in the nature of fresh complaint may be admissible as (1) substantive evidence if it satisfies some hearsay exception, or (2) corroborative evidence if it satisfies the prior consistent statement rule. Id. at 395.

The questioned testimony is not a violation of Livingston. Firstly, the testimony was not admitted for the truth of the allegation, but rather was admitted to establish why the examination was being conducted. See Tenn. R. Evid. 801(c). Obviously, the whole purpose of the examination related to the allegations of sexual abuse. Secondly, petitioner was not prejudiced simply because the physician testified he was examining the children with regard to allegations of sexual abuse. Thirdly, the doctor's testimony does not state that the child victims made these allegations to him.

Most importantly, there is no showing of any violation of constitutional dimensions. Such a showing is necessary to secure post-conviction relief. See

Tenn. Code Ann. § 40-30-203.

Since the questioned testimony was admissible and did not prejudice petitioner, we need not reach the issue as to whether Livingston should be applied retroactively.

This issue is without merit.

MENS REA REQUIREMENT

Petitioner alleges the indictment charging him with aggravated rape and rape was fatally deficient due to the failure to allege the requisite *mens rea* element of the offenses. The counts charging aggravated rape alleged that the defendant “unlawfully and feloniously” sexually penetrated a child under thirteen (13) years of age,¹ and the counts charging rape alleged that the defendant “unlawfully and feloniously and with force and coercion” sexually penetrated the victim.

Since the statutes under which the petitioner was prosecuted does not contain a specific *mens rea*, failure to allege a culpable mental state in the indictment does not invalidate the indictment so long as (1) the indictment language sufficiently meets the constitutional requirements of notice, adequate basis for entry of a proper judgment, and protection from double jeopardy; (2) the indictment form satisfies Tenn. Code Ann. § 40-13-202; and (3) the mental state can be logically inferred. State v. Hill, ___ S.W.2d ___ (Tenn. 1997). The various counts clearly meet the Hill requirements.

This issue is without merit.

For the above reasons, the judgment of the trial court is affirmed.

¹The statute has now been amended to make rape of a child less than thirteen (13) years of age a totally separate offense. See Tenn. Code Ann. § 39-13-522.

JOE G. RILEY, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

WILLIAM M. BARKER, JUDGE