IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

May 13, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	FOR PUBLICATION
_____	)	
_____Appellee,	)	
	)	
v.	)	Cumberland Criminal
	)	
DAREL G. BOLIN,	)	Hon. Leon Burns, Judge
	)	
Appellant.	)	No. 03S01-9508-CC-00096

DISSENTING OPINION

I dissent from the majority's holding that the admission of the social worker's testimony "probably did not affect the judgment . . . and . . . did not result in prejudice to the justice system as a whole." In my opinion the conclusion is fostered, not by a legal analysis of the effect of the clearly inadmissible testimony, but by the justified disgust over defendant's despicable offense.

The victim and her brother testified to acts which could constitute the offense of aggravated sexual battery.[1] They both admitted that they had told their mother, when she asked them to tell her the truth, that the events did not occur. Numerous other inconsistencies were developed in cross-examination of the victim, her brother, and her mother.

Defendant testified and denied the accusations. He presented

[1]Since the state elected to proceed on the incident in the bathroom, in which defendant allegedly forced the victim to perform fellatio, the victim was actually the only witness.

evidence that the victim had reported prior sexual abuse by her babysitter's son. Defendant also called a social worker and two doctors who described other details inconsistent with the victim's testimony.

Thus, as in most cases of this nature, the jury's task was to determine whether to believe the victim or the defendant. The victim's prior inconsistent statement and the numerous inconsistencies in the details of the offense, according to the jury instructions given by the trial judge, require the jury to weigh the evidence and entitle the jury to disregard the evidence and treat it as untrue, if it is not independently corroborated. See State v. Matthews, 888 S.W.2d 446, 449 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993).

This task of weighing conflicting evidence and ascertaining which evidence to accept is the jury's function. It is, in essence, the reason the jury system exists. See e.g., State v. Anderson, 880 S.W.2d 720, 726 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994); State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994); Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App.), cert. denied, (Tenn. 1978). Appellate courts often caution trial judges against invading that sacred province. See e.g., Morgan v. Tennessee Central Ry. Co., 216 S.W.2d 32, 37 (Tenn. 1948); State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994); Lorentz v. Deardan, 834 S.W.2d 316, 320 (Tenn. App.), perm. to appeal denied, (Tenn. 1992). We strictly apply the rules of evidence to assure that

credibility is attacked or bolstered only by appropriate, authorized means. See e.g., State v. Dutton, 896 S.W.2d 114, 118 (Tenn. 1995); State v. Morgan, 541 S.W.2d 385 (Tenn. 1976); State v. Walton, 673 S.W.2d 166, 169 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1984).

Trial lawyers are taught that the hallmark of a good impeachment cross-examination are attacks on accuracy of observation, memory, and truthfulness. See generally G. Lilly, An Introduction to the Law of Evidence, § 79, at 279 (1978). A witness who is discredited by his or her own contradictions or faulty or insufficient recollection is not as believable as one who fares well under cross-examination. Our acceptance of this proposition is recognized in our rules of evidence and our case law and repeated in jury instructions. See e.g., Tenn. R. Evid. 607-609; Johnston v. Cincinnati N. O. & T. P. Ry. Co., 240 S.W. 429, 436 (Tenn. 1922); Tennessee Pattern Jury Inst. Civil 2.20. These universally recognized and justified rules are among those most-remembered and often-cited by law students, professors, and lawyers in the context of virtually every kind of legal dispute. Yet in the context of child witnesses and sexual offenses prosecutions these familiar rules are all too often brushed aside. The desire to purge society of pedophiles, to minimize the trauma experienced by innocent child victims, and to prosecute and punish harshly those who commit sexual abuse is understandable. But accomplishing those desirable goals by stretching evidentiary rules beyond recognition is neither justified nor acceptable.

In this case, and all too often in cases of this nature, an unqualified witness was allowed to tell the jury who to believe and why. The social worker's testimony discounted all the familiar facets of impeachment. First, she told the jury that recollection and memory, often a first-line attack in credibility skirmishes, was not important with child victims and should not be considered. Secondly, she discounted the importance of details, another fertile basis for cross-examination and impeachment. Finally, and more subtly, she explained away the importance of inconsistencies in children's testimony.

In no other context in American jurisprudence do we allow a witness, of any type of skill or training, to tell a jury to disregard, in determining credibility, the very factors which we instruct them to consider. In no other type of case do we allow a witness, regardless of background or education, to explain to the jury the inconsistent, non-detailed sketchy testimony of another. Stated succinctly, in no other context, do we allow witnesses to invade the jury's sole province of determining the credibility of the witnesses and finding the facts.

Given the extremely limited evidence in this case, I disagree with the majority's conclusion that the case against defendant was "strong." The admissible evidence against defendant was that of the victim whose testimony was impeached by inconsistencies, lack of detail, and lack of memory. The majority states that this case does not rest on the unsubstantiated testimony of the victim. In fact, it does just that. Only one

witness, the victim, testified to the criminal act on which the state elected to proceed. No physical evidence could corroborate the act. In this context, the clearly inadmissible testimony of the social worker explaining the inconsistencies, sketchiness, and vagueries of the sole witness' testimony cannot be considered harmless.

Equally important to the analysis of the harmfulness of this evidence is the harm which this error casts on the administration of justice. Since the onset of efforts to relax the evidentiary rules in this context, we have steadfastly reminded the bench and bar that the rules must be applied uniformly despite undesired, disgusting results. See State v. Ballard, 855 S.W.2d 557 (Tenn. 1993). See also State v. Schimpf, 782 S.W.2d 186 (Tenn. Crim. App. 1989), perm. to appeal denied, (Tenn.1990). Notwithstanding the clarity of these rulings, the problems are recurrent and frequent. Upholding the verdict in this case despite error, through the harmless error escape hatch is, in my opinion, a disservice to the administration of justice and a relinquishment of our obligation to uniform application of the law. By rescuing prosecutors who use clearly inadmissible evidence, we encourage them to come closer and closer to the ethical line in their attempts to win these difficult cases. We should, in my opinion, apply the rules of evidence, the very skeleton of our system, consistently and uniformly, despite the dreaded result of overturning the conviction of one charged with a most despicable offense.

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Penny J. White, Justice

CONCUR:
Reid, J.