

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 9, 2002 Session

STATE OF TENNESSEE v. WILLIE J. MILLER, JR.

**Direct Appeal from the Circuit Court for Williamson County
No. II-600-200 Timothy L. Easter, Judge**

No. M2001-01868-CCA-R3-CD - Filed May 22, 2002

The defendant appeals from his conviction for child rape rendered after a jury trial. On appeal, the defendant claims: (1) the trial court erred in denying the defendant's request for an appointed DNA expert; (2) the victim, who was five years old at the time of trial, was not competent to testify; and (3) the evidence was insufficient to support his conviction because the victim's testimony should not have been presented. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOE G. RILEY, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

John H. Henderson, District Public Defender; and Gene Honea, Assistant District Public Defender, for the appellant, Willie J. Miller, Jr.

Paul G. Summers, Attorney General and Reporter; Elizabeth T. Ryan, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Derek K. Smith, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The state's proof revealed the following. On January 16, 2000, the five-year-old victim, L.D.,¹ was visiting in the home of her great aunt Clara Miller and the defendant, who was Miller's son. The victim testified the defendant entered her bedroom while she was sleeping, woke her, and put his penis in her mouth, which made her throw up. The victim said the defendant told her not to tell anyone. The victim identified the gown she was wearing at the time of the offense; it bore a picture of the cartoon character Pocohantas.

¹Because of the age of the victim, we will refer to her by her initials, "L.D."

According to Miller, she, the defendant, and the victim were the only persons in the home at the time of the offense. She further testified that on the morning of January 17, 2000, the victim told her the defendant had “put his thing in her mouth real hard” and she threw up. Miller stated the victim showed her a pink stain on the floor of the victim’s bedroom; it smelled like vomit. According to Miller, the victim had eaten cherry cake the night before. Miller also testified the victim was wearing her Pocohantas nightgown. Miller said that after the victim told her about the incident, she confronted the defendant with the victim’s allegations. They had a loud argument in which she told him to move out. Miller said she did not hear from the defendant for months thereafter. She testified she later had a conversation with him in which he said he was sorry.

Detective Sharon Lambert testified she spoke with the defendant on February 24, 2000, and he agreed to provide a blood sample. Detective Lambert stated they agreed to meet later that afternoon at the medical center, but the defendant did not appear. She said that despite numerous efforts to contact the defendant, she was unable to do so until he was located in Arizona on June 7, 2000, and was returned to Tennessee by the sheriff’s department.

TBI forensic scientist Michael Turbeville testified he found sperm on the victim’s nightgown. He further testified the DNA from the sperm on the gown was a “perfect match” to the defendant’s DNA, which was taken from a blood sample. Turbeville calculated the probability of finding a DNA profile matching the defendant’s, who was African-American, would be 1 in 1.2 quadrillion in the African-American population and 1 in 211 trillion in the Caucasian population. Turbeville opined the probability of even a related person, such as one of the defendant’s brothers, having DNA identical to the defendant’s would exceed the current world population.

The defense presented no proof. The jury found the defendant guilty of rape of a child.

INDEPENDENT DNA EXPERT

The defendant moved the court for the appointment of an independent DNA expert to assist him. The trial court conducted a hearing and denied this motion nearly four months prior to trial. However, the record on appeal does not contain a transcript or recording of the motion hearing. Thereafter, on December 11, 2000, the Tennessee Supreme Court filed its opinion in State v. Scott, in which it held that a trial court erred in failing to appoint an independent DNA expert. 33 S.W.3d 746, 755 (Tenn. 2000).

On February 13, 2001, just prior to the start of the defendant’s trial, the trial court, *sua sponte*, brought the Scott opinion to the attention of the parties and allowed them to present renewed argument on the merits of the defendant’s motion. The trial court again concluded the defendant was not entitled to the appointment of an independent DNA expert, finding the defendant failed to demonstrate a particularized need.

The defendant contends the trial court erred in denying his motion, or, in the alternative, the trial court should have granted his request for a continuance to afford him the opportunity to demonstrate a particularized need. The defendant argues the subject matter of DNA analysis is so complex as to be beyond the understanding of most attorneys, and, at the time of the motion hearing, there was no standard for determining particularized need for a non-psychiatric expert.

A determination of particularized need for appointed non-psychiatric expert assistance, such as a DNA expert, requires the trial court to conduct a fact-specific analysis of (1) whether the defendant will be deprived of a fair trial without the assistance, and (2) whether there is a reasonable likelihood that the expert will materially assist in the preparation of the case. Scott, 33 S.W.3d at 753. A defendant must demonstrate need by reference to the facts and circumstances of the case. *Id.* (citing State v. Barnett, 909 S.W.2d 423, 431 (Tenn. 1995)). Therefore, for appellate review of a trial court's denial of a request for non-psychiatric expert assistance to be possible, we must be able to review the evidence presented to the trial court regarding this issue.

In this case, the record does not include a transcript or recording of the proof submitted to the trial court during the hearing on the defendant's motion for a DNA expert. It is the duty of the accused to provide a record which conveys a fair, accurate, and complete account of what transpired with regard to the issues which form the basis of the appeal. Tenn. R. App. P. 24(b); *see State v. Taylor*, 992 S.W.2d 941, 944 (Tenn. 1999). Therefore, the defendant has waived this issue.

Regardless of waiver, defendant failed to demonstrate in the trial court and in this court a particularized need for expert assistance. In Scott, our supreme court noted the defendant had demonstrated particularized need in "meticulous detail," including an allegation of inconsistent DNA results. *Id.* at 753-54. Here, defendant contends expert DNA assistance was necessary to effectively cross-examine the state's DNA expert and to combat the prejudicial DNA evidence offered by the state. If defendant is correct in his argument, then Scott would require DNA expert assistance in any case where the state's DNA evidence incriminates the defendant. We do not believe Scott contemplates such a result.

Defendant contends the trial court should have granted his request for a continuance to allow more time to develop a particularized need. He does not cite to the record where he made such a request. Contrary to defendant's assertion, we have found no such request for a continuance by the defendant. The issue is waived. Tenn. R. App. P. 36(a). Furthermore, the alleged failure to grant a continuance is not in the motion for new trial; the issue is waived for this reason also. Tenn. R. App. P. 3(e). In addition, defendant has made no showing that a continuance would have accomplished his desired result. This issue is without merit.

VICTIM'S COMPETENCE TO TESTIFY

The defendant also contends the trial court erred in ruling the five-year-old victim was competent to testify at trial. We disagree.

Rule 601 of the Tennessee Rules of Evidence provides that "every person is presumed competent to be a witness." No one is automatically prohibited from testifying because of age or mental status. State v. Caughron, 855 S.W.2d 526, 537-38 (Tenn. 1993). "So long as a witness is of sufficient capacity to understand the obligation of an oath or affirmation, and some rule does not provide otherwise, the witness is competent." *Id.* at 538. To understand the obligations of an oath, the witness must be aware of and sensitive to the obligation to tell the truth under oath. *See State v. Jackson*, 52 S.W.3d 661, 667 (Tenn. Crim. App. 2001). The question of competency is a matter left to the discretion of the trial court. Caughron, 855 S.W.2d at 538. The trial court's determination on competency will not be overturned absent a showing of an abuse of discretion. State v. Howard, 926 S.W.2d 579, 584 (Tenn. Crim. App. 1996).

In the instant case, the trial court, just prior to the start of the trial, conducted a hearing on the victim's competency. In response to the trial judge's questions, she acknowledged that telling the truth was good and not telling the truth was bad. She recognized that if the judge said he was ten years old or that his black robe was green, such statements would be false. At the request of the defendant, the trial judge also questioned the victim as to whether she understood the difference between true stories and untrue stories. The victim responded she did. She said she liked to make up stories, but did not like to make up stories that were not true. The victim responded she knew it was important to tell true stories in the courtroom. The trial court ruled the victim was competent to testify.

At trial, the victim was again examined as to her awareness of the obligation to be truthful, and she gave similar responses to those given at the earlier hearing. She further stated she would be punished if she were not truthful. Defense counsel cross-examined the victim regarding fairy tales she had heard, such as Little Red Riding Hood and Goldilocks and the Three Bears. The victim testified these stories were true. The defendant contends this testimony established the child was incompetent to testify. We disagree.

The trial judge properly based his decision on the victim's competency to testify upon the victim's testimony. Pursuant to Rule 601, the five-year-old victim was presumed competent to testify. Her testimony showed she understood the meaning and importance of telling the truth. Although the trial court could have asked more probing questions relating to the victim's competency, the trial court did not abuse its discretion in allowing her to testify. While the testimony solicited from the victim during cross-examination could be considered by the jury in its determination of her credibility and in weighing the evidence, it does not require the reversal of the trial court's decision to allow her to testify. This issue is without merit.

SUFFICIENCY OF THE EVIDENCE

The defendant does not maintain the evidence presented at trial was insufficient to support his conviction; instead, he argues the trial court erroneously allowed the child victim to testify and that, absent her testimony, the evidence was insufficient to support the conviction. Defendant

misperceives our standard of review. On appeal, we must determine “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, 61 L. Ed. 2d 560 (1979). Accordingly, we will not reweigh the evidence, but instead we will presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). We must consider all evidence admitted at trial, and we may not limit our analysis to only the evidence that is determined upon review to be admissible. State v. Longstreet, 619 S.W.2d 97, 100-01 (Tenn. 1981); State v. Alley, 968 S.W.2d 314, 316 (Tenn. Crim. App. 1997). Accordingly, the issue, as framed by defendant, is without merit as a matter of law. Furthermore, we have concluded the victim’s testimony was properly admitted.

In addition to the victim’s testimony, which alone is sufficient to support the conviction, the state presented proof the victim told Clara Miller the defendant put his “thing” in her mouth and she threw up; proof Miller observed a stain on the floor where the victim had apparently vomited; proof the defendant’s sperm was found on the victim’s nightgown; proof the defendant apologized to Miller; and proof the defendant fled to Arizona while the investigation was pending. This evidence was indeed sufficient to support the defendant’s conviction.

Accordingly, we affirm the judgment of the trial court.

JOE G. RILEY, JUDGE