

REL: August 16, 2019

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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

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CR-18-0156

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**Tim Odus Clevenger**

**v.**

**State of Alabama**

**Appeal from Blount Circuit Court  
(CC-15-75)**

McCOOL, Judge.

Tim Odus Clevenger appeals his convictions for (1) producing obscene matter containing a visual depiction of a person under the age of 17 years, a violation of § 13A-12-197, Ala. Code 1975; and (2) possessing, with intent to

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disseminate, obscene matter containing a visual depiction of a person under the age of 17 years, a violation of § 13A-12-192, Ala. Code 1975. Clevenger was sentenced to 18 years' imprisonment for the production-of-obscene-matter conviction and 7 years' imprisonment for the possession-of-obscene-matter-with-intent-to-disseminate conviction, the sentences to be served concurrently.

#### Facts and Procedural History

Because Clevenger does not challenge the sufficiency of the evidence supporting his convictions, a brief recitation of the facts will suffice. In February 2015, Clevenger, who at the time was an assistant principal at a high school in Blount County, submitted his school-issued laptop computer to the technology department of the Blount County School System for repairs. While attempting to repair the computer, employees of the technology department discovered that the computer contained two video recordings of M.R. that had been filmed while M.R., who was a friend of Clevenger's daughter, was spending the night at Clevenger's house. M.R. was 14 years of age when the videos were filmed, and, according to an investigator with the Blount County Sheriff's Department, the

videos had been filmed "through some blinds and a window into a bathroom" and depicted M.R. "undressing for taking a shower. It depicted breast and genital nudity on the first video and breast nudity on the second video." (R. 159.)

At trial, after the State rested, defense counsel informed the trial court that it intended to call Clevenger's son to testify. Defense counsel proffered that it expected the son, who was 10 years of age when the videos of M.R. were filmed, to testify that he filmed the videos and that he then uploaded the videos to Clevenger's computer. However, outside the presence of the jury, the son informed the trial court that, if he was called to testify, he would assert his Fifth Amendment right against self-incrimination with respect to any questions regarding who had filmed the videos or who had then uploaded the videos to Clevenger's computer.<sup>1</sup> (R. 235.) In response, defense counsel requested that it be allowed to elicit the son's invocation of the Fifth Amendment in the presence of the jury and argued that the failure to do so would result in "a fundamental unfairness to [Clevenger]

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<sup>1</sup>The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."

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whereby a fair trial will not be possible." (R. 315.) Although the trial court permitted the son to testify to matters that would not be self-incriminating, it refused to allow defense counsel to elicit the son's invocation of the Fifth Amendment in the presence of the jury.

The son briefly testified during Clevenger's case-in-chief but, pursuant to the trial court's ruling, was not asked any incriminating questions and thus was not required to invoke the Fifth Amendment in the jury's presence. Clevenger also took the witness stand in his own defense and testified that his son "told me that he videoed [M.R.] outside the bathroom window"; that Clevenger "asked [his son] why he did it"; and that his son "said he was curious." (R. 405.)

On June 15, 2018, the jury returned guilty verdicts on both charges, and the trial court sentenced Clevenger on September 18, 2018. Clevenger filed a motion for a new trial, which the trial court denied, and Clevenger subsequently filed a timely notice of appeal.

#### Discussion

The sole issue Clevenger raises on appeal is that the trial court erred by not allowing him to elicit the son's

invocation of the Fifth Amendment right against self-incrimination in the presence of the jury. Clevenger concedes that the trial court's ruling was "consistent with general Alabama law," Clevenger's brief, at 14, noting that "Alabama law generally prohibits calling a witness to testify when the intent is to have that witness invoke [his or her] Fifth Amendment privilege against self-incrimination." Id. at 15. See Gobble v. State, 104 So. 3d 920, 956-57 (Ala. Crim. App. 2010); and Rule 512(b), Ala. R. Evid. (providing that "proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury"). However, Clevenger also notes that a defendant has a right, grounded in due-process principles, "'to put on a defense and that that right includes the opportunity to present evidence proving that another person committed the offense for which [the defendant] has been charged.'" Clevenger's brief, at 18 (quoting Ex parte Griffin, 790 So. 2d 351, 353 (Ala. 2000)). Relying on that principle, Clevenger argues that, if the son had invoked the Fifth Amendment in the presence of the jury, the jury could have inferred that the son, not Clevenger, had filmed the

videos of M.R. and then uploaded the videos to Clevenger's computer. In fact, Clevenger argues that "the only way to demonstrate -- in an effective manner -- the possibility of [the son's] guilt was to call him as a witness and have him invoke his Fifth Amendment privilege in front of the jury." Clevenger's brief, at 21-22. As a result, Clevenger argues, by refusing to allow him to elicit the son's invocation of the Fifth Amendment in the presence of the jury, the trial court deprived Clevenger of evidence crucial to his defense and, in doing so, violated his right to a fair trial. Thus, although Clevenger concedes that the trial court's ruling was technically correct, he essentially argues that his right to present evidence proving the son's guilt trumps the rule prohibiting a party from calling a witness solely to have the witness invoke the Fifth Amendment right against self-incrimination.

Clevenger relies on Chambers v. Mississippi, 410 U.S. 284 (1973), and Griffin, supra, in support of his argument. The Supreme Court of Alabama in Acosta v. State, 208 So. 3d 651 (Ala. 2016), aptly summarized the facts and holdings of Chambers and Griffin:

"In Chambers, the United States Supreme Court held that 'where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.' 410 U.S. at 302. In Chambers, the trial court's application of the rules of evidence prohibited Leon Chambers, the defendant, from presenting evidence of a third party's culpability. Chambers was charged with killing Aaron Liberty. At trial, Chambers maintained that he did not shoot Liberty. In support of his defense, Chambers presented testimony from Gable McDonald, who had given a sworn statement to Chambers's counsel, that McDonald had shot Liberty. On cross-examination by the State, McDonald repudiated his confession and testified that he did not shoot Liberty and that he confessed to the crime in order to receive favorable treatment from law enforcement. When Chambers attempted to challenge McDonald's renunciation of his confession by having him declared an adverse witness, the trial court, applying Mississippi's rules of evidence, denied Chambers's request. Additionally, the trial court, applying Mississippi's rules of evidence, refused to admit testimony from individuals to whom McDonald had admitted that he shot Liberty. In reaching its conclusion that the trial court's application of the rules of evidence prevented Chambers from developing his defense that another, not he, shot Liberty, the United States Supreme Court stated that the evidence the trial court refused to admit was critical to Chambers's defense. The United States Supreme Court reasoned that because the strict application of Mississippi's rules of evidence had prohibited the admission of critical evidence in Chambers's defense, the trial court's strict application of those rules to exclude the critical evidence denied Chambers a trial that complied with due process. 410 U.S. at 302, 93 S. Ct. 1038.

"In Ex parte Griffin, 790 So. 2d 351 (Ala. 2000), this Court applied Chambers. In Ex parte Griffin, the State charged Louis Griffin with the murder of Christopher Davis after he had admitted, while pleading guilty to various offenses in federal court, that he had participated in the murder. At trial, Griffin's defense was that he did not kill Davis and that he had lied to the federal court in his allocution to receive favorable treatment. To support this defense, Griffin attempted to present evidence indicating that two other men had been charged with killing Davis; that one of the men, Anthony Embry, had admitted under oath in court that he had killed Davis; that Embry had been convicted of Davis's murder; that Embry had been incarcerated for the conviction; and that a state court had dismissed Embry's conviction ex mero motu. The trial court, applying the Alabama Rules of Evidence, refused to admit the evidence of Embry's culpability. This Court, recognizing that the evidence of Embry's confession and conviction was critical in establishing Griffin's defense that another, not he, killed Davis, held that the trial court's ruling excluding the evidence with regard to Embry's confession and conviction prohibited Griffin from presenting his defense to the jury and violated his due-process rights under the 5th and 6th Amendments.

"The holdings in both Chambers and Griffin rest upon the fact that the trial court's strict application of the rules of evidence excluded critical evidence proffered by the defense, and the exclusion of the critical evidence resulted in the defendants' being denied their constitutional right to a fair trial and due process. Critical evidence is defined as '[e]vidence strong enough that its presence could tilt a juror's mind.' Black's Law Dictionary 674 (10th ed. 2014). In both Chambers and Griffin, the excluded evidence was critical to the defense because each defendant had denied participation in the offense and the excluded



evidence indicated that another individual had admitted to committing the offense. When a defendant denies participation in an offense, evidence indicating that someone else has admitted to committing the offense and that that admission excludes the defendant as the offender, as it did in Chambers and Griffin, may be strong enough to influence a juror. Thus, depending on the facts of the case, the strict application of the rules of evidence to exclude critical evidence may render a trial fundamentally unfair."

Acosta, 208 So. 2d at 655-56. Thus, as the Alabama Supreme Court concluded, Chambers and Griffin provide that a defendant is potentially denied a fair trial, depending on the facts of the case, if the trial court excludes evidence that, although technically inadmissible, is critical to the defendant's case in that the excluded evidence indicates that another person committed the offense for which the defendant is on trial.

Chambers and Griffin do not help Clevenger, however, because the son's invocation of the Fifth Amendment right against self-incrimination was not evidence from which the jury could have inferred, as Clevenger suggests, that the son filmed the videos of M.R. and then uploaded the videos to Clevenger's computer. Rule 512(a), Ala. R. Evid., expressly provides:

"(a) Comment or Inference Not Permitted. In a criminal case, the claim of a privilege, whether in

the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom."

(Emphasis added.) Thus, because a jury is permitted to draw all reasonable inferences from the evidence, Horace v. Waters, 615 So. 2d 74, 75 (Ala. 1993), and because a jury is not allowed to draw an inference from a claim of privilege, the unavoidable conclusion is that a claim of privilege is not evidence and therefore does not provide a basis upon which a jury can conclude that someone other than the defendant committed the offense for which the defendant is on trial. See McKaine v. State, 170 S.W.3d 285, 293 (Tex. Ct. App. 2005) ("A witness's assertion of his or her Fifth Amendment rights and refusal to testify is not evidence and the jury is not allowed to draw any inferences from such actions." (emphasis added)); State v. Augustine, 298 P.3d 693, 698 (Utah Ct. App. 2013) ("A witness's 'exercise of the [Fifth Amendment] privilege is not evidence to be used in the case by any party.'" (emphasis added; citation omitted)); and People v. Mincey, 2 Cal. 4th 408, 441, 827 P.2d 388, 408, 6 Cal. Rptr. 2d 822, 842 (1992) (noting that "inferring guilt from the mere exercise of the [right against self-incrimination] would be

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improper and is at best based on speculation, not evidence" (emphasis added)).

Because the jury would not have been permitted to draw any inference from the son's invocation of the Fifth Amendment right against self-incrimination, the trial court's refusal to allow Clevenger to elicit the son's invocation of that right in the presence of the jury did not deprive Clevenger of evidence indicating that someone other than Clevenger filmed the videos of M.R. and then uploaded the videos to Clevenger's computer. In fact, had the son invoked the Fifth Amendment in the presence of the jury, the State would have been entitled to have the trial court instruct the jury that it could not draw the very inference Clevenger sought to have the jury draw. See Rule 512(c), Ala. R. Evid. ("Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."). Thus, contrary to Clevenger's contention, allowing the son to invoke the Fifth Amendment in the presence of the jury would not have been "an effective manner" of proving that someone other than Clevenger was guilty of the offenses for which Clevenger was on trial.

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Accordingly, Clevenger's reliance on Chambers and Griffin is misplaced.

Conclusion

Clevenger has not demonstrated error in the trial court's refusal to allow him to elicit the son's invocation of the Fifth Amendment right against self-incrimination in the presence of the jury. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.