Rel: March 13, 2020

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0593

S.E.

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-16-4814 and CC-16-4815)

COLE, Judge.

S.E. appeals his convictions for second-degree rape, a violation of § 13A-6-62(a)(2), Ala. Code 1975,[1] and incest, a

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[1]Under the version of the statute in effect at the time of the offense, § 13A-6-62(a)(2) defined second-degree rape as "engag[ing] in sexual intercourse with a member of the

violation of § 13A-13-3, Ala. Code 1975, and his concurrent sentences of 15 years' imprisonment on each conviction.

Facts and Procedural History

S.E. was accused of having sexual intercourse with T.D., his "mentally defective," adult half sister. (C. 13.) At the time of the offense in November 2015, S.E. was 46 years old and T.D. was 43 years old. (R. 147, 349.) A.D., who is T.D.'s sister, testified that T.D. has the mind of an eight- or nine-year-old child. (R. 128.) T.D.'s parents learned that she was intellectually disabled around the time she was in the first grade. (R. 160-61.) T.D. lives with her parents; she cannot live on her own and cannot drive, but she is capable of dressing herself, washing her clothes, and preparing some foods. (R. 128, 161.)

On November 5, 2015, A.D. went to her parents' home to drop off her laundry. After a delay, T.D. opened the front door. A.D. noticed that S.E. was also present, which she said was unusual because S.E. came to her parents' house only for special occasions or when invited by her father. (R. 132-34,

opposite sex who is incapable of consent by reason of being mentally defective." Section 13A-6-62 was subsequently amended by Act No. 2019-465, Ala. Acts 2019.

143.) A.D. telephoned her father, C.D., and asked if S.E. was supposed to be there; C.D. said, "No." (R. 133, 167.)

After S.E. left, A.D. asked T.D. how long S.E. had been at the house and asked T.D. what had happened. T.D. eventually told A.D. that she and S.E. had had sex. (R. 135.) A.D. called the police, who responded shortly thereafter.

At trial, T.D. testified that S.E. told her to go to the bedroom, that she had taken off her pants and underwear, and that S.E. had "raped" her. She said that she did not want to have sex with S.E. (R. 152-56.) Afterwards, T.D. said she had gone to the bathroom to wash up and she had washed between her legs. (R. 155-56.)

Shortly after S.E. left the house, C.D. telephoned him and told him about T.D.'s accusation. C.D. told S.E. that he needed to meet with the police and clear himself. S.E. returned to the house, where he was detained by the police and taken to the police station for questioning. After waiving his Miranda[2] rights, S.E. spoke with police. An audio recording of the interview was admitted into evidence and played to the jury. (R. 346-405.) S.E. acknowledged that

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[2]Miranda v. Arizona, 384 U.S. 436 (1966).

T.D. "almost has the mind of a child." (R. 359.) He admitted that he was at the house earlier that day and that he and T.D. had sat on the couch together and talked. He denied having sex with T.D. (R. 365-70, 385.) After the interview, the police retained S.E.'s clothes for forensic testing and retained his cellular telephone to check for text and phone messages. (R. 390-95.)

After speaking to police, C.D., his wife, and A.D. took T.D. to the hospital to be examined. Mary Todd, a sexual-assault nurse examiner, testified that she conducted an examination of T.D., including the collecting of tissue and fluid samples. (R. 215-39.) Nurse Todd found no physical injury, which she said was not unusual in cases of rape (R. 230), and she did not find any semen. Nurse Todd noted that T.D.'s cervix was seeping blood from the beginning of her menstrual period. (R. 228-29.)

The State presented forensic evidence, including testimony that the inside front groin area of S.E.'s underwear tested positive for the presence of blood and that the underwear contained DNA from at least three individuals. T.D. was included as a "possible contributor" to the major portion

of the mixture, and S.E. was excluded from being a "possible contributor" to that major portion.[3] (R. 313-15.) The State's expert testified that the probability of a random unrelated person being a possible contributor of the DNA found in S.E.'s underwear is 1 in 183 trillion for Caucasian individuals and 1 of 23.6 trillion for African-American individuals. (R. 315.)

The State presented expert psychological testimony from Jessica Duncan, a Ph.D. student in clinical and counseling psychology, who evaluated T.D., and from Dr. James Stefurak, Ph.D., her supervisor. Duncan testified that T.D. has a "full scale IQ" of 48 and that T.D. "is moderately intellectually disabled." (R. 261.) As part of her evaluation, Duncan had T.D. complete a sexual-knowledge questionnaire. She determined that T.D. was below average with respect to sexual knowledge, even compared to adults with intellectual disabilities. (R. 262.) Duncan testified that T.D. does not have the critical-thinking ability to understand complex situations like sex, that she lacks the knowledge to consent,

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[3]The record reflects that, when there is a mixed DNA profile, forensic analysts do not use the term "match" but use the phrase "included as a possible contributor." (R. 318-19.)

and that she does not have the communication and interpersonal skills or the cognitive maturity to protect herself in complex situations. (R. 265.) Duncan concluded that T.D. did not have the capacity to consent to sexual activity. (R. 266.) Dr. Stefurak testified that he had reviewed Duncan's evaluation and found the various test results to be reliable. (R. 273-88.) Dr. Stefurak agreed with Duncan's assessment that T.D. lacked the capacity to consent. (R. 288-89.)

After the State rested, S.E. moved for a judgment of acquittal on the ground that the State failed to prove a prima facie case. (R. 430-31.) The trial court denied the motion. The defense presented the testimony of S.E. and M.D. (the wife of C.D. and the mother of A.D. and T.D.). At the close of the defense's case, S.E. renewed his previous motions, and the trial court denied them. (R. 475.)

The jury convicted S.E. of second-degree rape and incest. (C. 38, 45; R. 546-47.) On March 15, 2019, the trial court sentenced S.E. to 15 years' imprisonment on each count, to run concurrently. (C. 64; R. 567.) S.E. was also required to register as a sex offender and was barred from contact with T.D. and her family.

Limitation of Cross-Examination of Expert Witness

S.E. argues first that the trial court denied his constitutional right to confront and cross-examine witnesses when it refused to allow him to cross-examine Duncan, the State's expert witness, about T.D.'s sexual activity with other persons. He contends that this evidence was necessary to rebut the expert's conclusion that T.D. did not have the mental capacity to consent to sexual intercourse. (C. 13.)

> "'The admission or exclusion of evidence is a matter within the sound discretion of the trial court.' Taylor v. State, 808 So. 2d 1148, 1191 (Ala. Crim. App. 2000), aff'd, 808 So. 2d 1215 (Ala. 2001). 'The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion.' Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000)."

Hinkle v. State, 67 So. 3d 161, 164 (Ala. Crim. App. 2010).

> "'"'"The scope of cross-examination in a criminal proceeding is within the discretion of the trial court, and it is not reviewable except for the trial judge's prejudicial abuse of discretion. The right to a thorough and sifting cross-examination of a witness does not extend to matters that are collateral or immaterial and the trial judge is within his discretion in limiting questions which are of that nature. Collins v. State, [Ala. Crim. App., 364 So. 2d 368 (1978).]"'"'"

McMillan v. State, 139 So. 3d 184, 224–25 (Ala. Crim. App.

2010) (quoting Moore v. City of Leeds, 1 So. 3d 145, 151 (Ala. Crim. App. 2008), quoting in turn other cases).

Duncan testified that, in her expert opinion, T.D. was not mentally capable of consenting to sexual activity. (R. 266.) S.E. attempted to cross-examine Duncan as to whether she had obtained information during her evaluation of T.D. regarding prior incidents of voluntary sexual activity by T.D. (R. 267-69.)

The record reflects the following:

> "Q. [By Defense counsel]: Okay. Let me just ask you this because this is something--did you talk to her if she had ever had intercourse before?
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> "[Prosecutor]: Judge, I'm going to object.
>
> "THE COURT: Yes.
>
> "[Prosecutor]: Rule 412.
>
> "THE COURT: I'll sustain the objection.
>
> "[Defense counsel]: Can I rephrase it another way, Judge?
>
> "Q. Had she ever--did she tell you that she had ever had consensual--
>
> "THE COURT: Hold on a second. Let's--
>
> "(Bench conference.)
>
> "[Prosecutor]: The victim's sexual history is not permitted under Rule 412.

"THE COURT: Yes.

"[Defense counsel]: Judge, for understanding purposes she's believed to consent, she's agreed to do it. They're saying that she's not able to consent, which is fine, but she's had consensual intercourse that she has run to her parents about and said somebody's done something.

"THE COURT: What would it--I'm going to sustain the objection."

(R. 267-69.)

S.E. correctly argues that he has a constitutional and statutory right to a thorough and sifting cross-examination of the witnesses called against him. See Ala. Const. 1901, Article I, § 6; § 12-21-137, Ala. Code 1975. See also C. Gamble, McElroy's Alabama Evidence § 136.01 (4th ed. 1991) ("[T]he cross-examining party has the absolute right on cross-examination, not only to inquire as to matters relevant to the issues ... but also to inquire into the conduct and circumstances of the witness which have measurable bearing upon his credibility.").

The State objected, on the basis of Rule 412, Ala. R. Evid., to any testimony regarding T.D.'s prior sexual activity. Rule 412 provides, in part:

"(a) Evidence Generally Inadmissible. The following evidence is not admissible in any

> prosecution for criminal sexual conduct except as provided in sections (b) and (c):
>
> > "(1) evidence offered to prove that any complaining witness engaged in other sexual behavior.
> >
> > "(2) evidence offered to prove any complaining witness's sexual predisposition.
>
> "(b) Exceptions. The following evidence is admissible, if otherwise admissible under these rules:
>
> > "(1) evidence of specific instances of sexual behavior by the complaining witness offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> >
> > "(2) evidence of specific instances of sexual behavior by the complaining witness with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
> >
> > "(3) evidence the exclusion of which would violate the constitutional rights of the defendant."

S.E. asserts that Rule 412(b)(3), which provides an exception for "evidence the exclusion of which would violate the constitutional rights of the defendant," applies to this case. He argues (1) that he had a constitutional right to challenge Duncan's expert opinion with respect to whether T.D. had engaged in prior sexual activity and (2) that such

activity would be relevant to the issue of T.D.'s ability to consent and to the reliability of Duncan's expert opinion. S.E. argues that if Duncan had obtained information that T.D. had engaged in sexual activity with others, that information could have impacted the jury's assessment of Duncan's expert opinion regarding T.D.'s mental capacity to consent to sexual intercourse.

The State argues that S.E. did not preserve this issue for appellate review because he did not raise this specific claim in the trial court. S.E.'s response to the State's objection did not refer to Rule 412(b)(3) or to the constitutional right to a thorough and sifting cross-examination. On appeal, S.E. does not address the preservation issue. We agree with the State that S.E. has not preserved the issue.

Further, S.E.'s argument is without merit. Rule 412 excludes evidence of a complaining witness's sexual history or predisposition, subject to three narrow exceptions. S.E. argues that the trial court's ruling violated his constitutional right to a thorough cross-examination on the

critical issue of T.D.'s capacity to consent, which is an element of the charged offense of second-degree rape.

S.E. does not, however, explain how T.D.'s prior sexual activity would be probative of her capacity to consent. In State v. Frost, 141 N.H. 493, 501, 686 A.2d 1172, 1178 (1996), the New Hampshire Supreme Court rejected a similar argument, stating:

> "The fact that the complainant engaged in prior sexual activity is not probative of her legal capacity to consent, any more than her sexual relationship with the defendant bears on that same issue. Her capacity to engage physically in sexual activity is not probative of her mental capacity to appraise the nature of her conduct."

See also State v. Cuni, 159 N.J. 584, 602, 733 A.2d 414, 424 (1999)("Prior acts of intercourse that appear consensual and do not implicate any incapacity to refuse sexual advances cannot demonstrate that the victim had the actual ability to consent to the charged sexual assault ....").

On appeal, S.E. does not make an adequate argument as to how T.D.'s prior sexual activity, if any, was probative of her mental capacity to consent to sexual intercourse. He argues only that the expert testimony of Duncan and Dr. Stefurak

> "could have been impeached if Duncan had gathered and investigated information obtained during the

course of her evaluation that T.D. had engaged in sexual intercourse with one or more other persons. S.E. had a right to have the jury hear and consider this evidence, as it was relevant to the credibility and weight of the expert opinion testimony presented by the State. It was a violation of S.E.'s constitutional right to cross-examine for the trial court to refuse to allow this inquiry. S.E. is entitled to a new trial."

(S.E.'s brief, p. 27.)

That argument does not explain how T.D.'s prior sexual activity was relevant to her capacity to consent to sexual activity with S.E. or to the credibility of the expert opinions. Accordingly, we conclude that the trial court did not exceed its discretion in excluding this evidence.

Failure to Corroborate T.D.'s Testimony Regarding Incest

S.E. next argues that the incest charge should have been dismissed because T.D.'s testimony was not corroborated. Section 13A-13-3, Ala. Code 1975, provides:

"(a) A person commits incest if he marries or engages in sexual intercourse with a person he knows to be, either legitimately or illegitimately:

"....

"(2) His brother or sister of the whole or half-blood or by adoption;

"....

> "(b) A person shall not be convicted of incest or of an attempt to commit incest upon the uncorroborated testimony of the person with whom the offense is alleged to have been committed."

Although the issue of preservation is not required to be addressed to resolve this issue, this Court questions whether this issue was adequately preserved for appellate review. S.E. made a motion for a judgment of acquittal at the close of the State's case "on the grounds that [the State] failed to prove a prima facie case of the corpus delicti." (R. 431.) That motion was denied by the trial court. S.E. renewed all "motions" at the close of the defense's case. S.E. also filed a pro se motion for new trial alleging a "lack of evidence" and that the evidence "should have exonerated" him, but the issue of corroboration of T.D.'s testimony was never argued in the trial court.

It does not appear that the appellate courts of Alabama have specifically addressed the issue of how to preserve for appellate review the argument that an individual's testimony was insufficiently corroborated to prove incest, but the courts have addressed the similar issue regarding the requirement that an accomplice's testimony must be corroborated. Just as the corroboration requirement for

incest is specifically listed in § 13A-13-3, the requirement that accomplice testimony be corroborated is also a statutory requirement. Section 12-21-222, Ala. Code 1975, states that

> "[a] conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

In addressing whether a defendant is required to specifically address the issue of corroboration of an accomplice in his or her motion for a judgment of acquittal, this Court held in Marks v. State, 20 So. 3d 166, 172 (Ala. Crim. App. 2008), that,

> "pursuant to Ex parte Weeks, [591 So. 2d 441 (Ala. 1991),] we hold that a motion for a judgment of acquittal that challenges the sufficiency of the evidence only generally, i.e. that the State failed to prove a prima facie case or words to that effect, does not properly preserve for review the specific claim that an accomplice's testimony was not sufficiently corroborated."

Just as a specific objection is required to preserve for appellate review the issue of corroboration of an accomplice's testimony, a specific objection is also required to preserve the issue whether an incest charge should be dismissed based upon the State's failure to present sufficient corroboration

of the alleged victim's testimony. Because S.E. did not assert a lack of corroboration in his motion for a judgment of acquittal or in his motion for new trial, this issue was not properly preserved for appellate review.

Although the issue of the corroboration of T.D.'s testimony was not preserved for review, S.E.'s argument that there was no corroboration of T.D.'s testimony that she engaged in sexual intercourse with him is also without merit. On appeal, S.E. discusses several items of evidence that, he contends, do not corroborate T.D.'s testimony, and he asserts that "the State did not corroborate T.D.'s testimony that penetration occurred, a key element of incest charged against S.E." We do not find S.E.'s argument to be persuasive.

In Rodgers v. State, 554 So. 2d 1123, 1123–24 (Ala. Crim. App. 1989), this Court discussed the corroboration required for the testimony of an accomplice, which, as noted above, is a similar standard to the one required in this case by § 13A-13-3(b):

> "According to § 12-21-222, Code of Alabama (1975), the test for sufficiency of corroborating evidence of accomplice testimony requires other evidence 'tending to connect the defendant with the commission of the offense.' Ex parte Bell, 475 So. 2d 609, 613 (Ala. 1985), cert. denied, 474 U.S.

> 1038, 106 S. Ct. 607, 88 L. Ed. 2d 585 (1985). 'Such corroborative testimony need not be sufficiently strong in itself to support a conviction. "[I]t is sufficient if it legitimately tends to connect the accused with the offense." Isbell v. State, 57 Ala. App. 444, 329 So. 2d 133, 139 (1976, per Bookout, J.).' Senn v. State, 344 So. 2d 192, 193 (Ala. 1977). 'The corroboration which is sufficient to support the accomplices' testimony must be of some fact tending to prove the guilt of the defendant.' (Emphasis in original.) Id."

"[C]orroborative evidence need not be strong, nor sufficient of itself to support a conviction, the criterion being that it legitimately tend to connect the accused with the offense." Andrews v. State, 370 So. 2d 320, 322 (Ala. Crim. App. 1979). "Corroboration need only be slight to suffice." Ingle v. State, 400 So. 2d 938, 940 (Ala. Crim. App. 1981). Section 12-21-222 "does not require corroborative testimony as to material elements of the crime; it only requires other evidence 'tending to connect the defendant with the commission of the offense.'" Ex parte Bell, 475 So. 2d 609, 613 (Ala. 1985). See also Green v. State, 61 So. 3d 386, 393 (Ala. Crim. App. 2010) (holding that it is not necessary that corroboration establish all the elements of the offense). Therefore, it is not necessary that the State corroborate T.D.'s testimony that penetration occurred.

Here, T.D.'s testimony was corroborated by evidence indicating that there was an extremely high likelihood that T.D. was a contributor to a DNA mixture found in the inside front groin area of S.E.'s underwear. That evidence, when combined with evidence that a vaginal swab from T.D. was positive for the presumptive presence of blood, was sufficient to corroborate T.D.'s testimony.

T.D.'s testimony was further corroborated by A.D.'s testimony (1) that S.E. was present at her parents' house at an unusual time and (2) that S.E. was "sweaty" when she arrived at the house. That evidence was sufficient to corroborate T.D.'s testimony that S.E. had engaged in sexual intercourse with her; therefore, the trial court did not err in denying S.E.'s motion for a judgment of acquittal.

Conclusion

Based on the foregoing, the trial court's judgment is affirmed.

AFFIRMED.

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