6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00511 COA

WILLIAM RAINER A/K/A WILLIAM FRANCIS RAINER A/K/A "WILL"

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT W. BAILEY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF KEMPER COUNTY

ATTORNEY FOR APPELLANT:

GAIL P. THOMPSON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNNDISTRICT ATTORNEY: BILBO MITCHELL

NATURE OF THE CASE: SEXUAL BATTERY

TRIAL COURT DISPOSITION: CONVICTED OF SEXUAL BATTERY AND SENTENCED TO A TERM OF 10 YEARS IN THE MDOC

MANDATE ISSUED: 7/8/97

BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

William Rainer appeals his conviction of sexual battery, raising the following issues as error:

I. THE VERDICT OF THE JURY WAS CONTRARY TO THE LAW AND WEIGHT OF THE EVIDENCE IN THIS CASE.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR NEW TRIAL FILED IN THIS CASE.

III. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT REFUSED TO ALLOW MELINDA WINDHAM TO TESTIFY AS AN IMPEACHMENT WITNESS, BECAUSE SUCH WITNESS HAD NOT BEEN INCLUDED IN VOIR DIRE TO THE JURY, WHEN HER TESTIMONY AT THE BOND HEARING REVEALED THAT SHE COULD DIRECTLY CONTRADICT PROSECUTRIX Y.B.'S TESTIMONY THAT SHE HAD NOT TOLD ANYONE DEFENDANT DID NOT COMMIT THE CRIME.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ALLOWED THE LESSER INCLUDED OFFENSE OF SEXUAL BATTERY WHERE THERE WAS NO EVIDENCE TO SUBSTANTIATE OR SUPPORT SEXUAL BATTERY AND SUCH CHARGE HAD NOT BEEN PRESENTED TO AND CONSIDERED BY THE GRAND JURY WHICH RETURNED THE INDICTMENT IN THE CASE.

V. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN GRANTED INSTRUCTION S-6 OVER THE OBJECTIONS OF THE DEFENSE.

VI. THE TRIAL COURT HAD NO STATUTORY OR OTHER SENTENCING AUTHORITY TO ALLOW CONSIDERATION OF OR IMPOSITION OF A SENTENCE "WITHOUT THE POSSIBILITY OF ANY TYPE OF PROBATION OR PAROLE OR ANY TYPE OF EARLY RELEASE."

VII. THE CUMULATIVE EFFECT OF THE AFORESAID ERRORS DEPRIVED APPELLANT OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

As the third issue is dispositive of this case, we will discuss only this issue. Finding merit in Rainer's assertion, we reverse and remand.

FACTS

Rainer was indicted in March of 1994 on the charge of capital rape of Y.B., the ten-year-old granddaughter of his live-in girlfriend. Y.B. testified that she came to her grandmother's home after school on December 7, 1993, with her brother and teenage uncle. While the two boys were playing basketball outside, Rainer came over to the couch where Y.B. was sitting and pulled her clothes off and raped her. Y.B. testified she tried to push Rainer off, kicked him and was finally successful in getting away and running outside. Y.B.'s brother testified that Rainer was present at the home when they arrived after school, but Y.B. never told her brother about the assault. Y.B.'s mother found blood in Y.B.'s panties on December 8, 1993, and questioned Y.B. about it after the child got home from school. Y.B. would not tell her parents how the blood got in her panties, and she received a

spanking for not telling. Y.B.'s mother told her that she did not have to tell because she was taking Y.B. to the doctor the next day. Y.B. told her mother the next morning that Rainer had raped her. Y.B.'s mother then took her to the Greater Meridian Health Clinic on December 9, 1993. At the clinic, Y.B. was examined by Dr. Vibha Vig. Dr. Vig testified that she found crusted blood on the labia of Y.B., indicating trauma to the vaginal area. She further testified that Y.B.'s hymen was not intact and that she tested positive for chlamydia, a sexually transmitted disease. Dr. Vig also stated that the condition of the vagina showed that sex had occurred within a week of the examination.

Rainer did not testify on his own behalf, but produced two alibi witnesses who testified that Rainer had been in the woods on a logging job, chopping wood until after 6:00 p.m on the day the rape allegedly occurred. Bertha Little, Rainer's girlfriend and Y.B.'s grandmother, testified that Rainer left for work on the logging job at about 6:00 a.m., Rainer was not at home when she came in from work at 5:00 p.m., and that Rainer did not arrive at the home until sometime between 7:30 and 8:00 p.m.

At a bond reduction hearing held prior to the trial on May 9, 1994, testimony was given by Melinda Windham, a defense witness and schoolmate of Y.B. Melinda Windham testified that she asked Y.B. if William Rainer had raped her, and that Y.B. answered "no" to that question.

During Rainer's trial, Y.B. was asked on cross examination if she had ever told anyone that Rainer had not raped her. She was then specifically asked if she ever told Melinda Windham that Rainer had not raped her. She answered "no" to both questions. During Rainer's case-in-chief, he attempted to call Melinda Windham to the stand to impeach the testimony of Y.B. Melinda Windham's name was not provided as a witness to the State in discovery and had not been listed when the names of the witnesses were read to the jury on voir dire. Rainer's counsel offered to tender the witness to the State for questioning and also offered to provide proof to the State as to what her testimony would be. Melinda Windham was the only witness available who could testify as to the statement made by Y.B. The trial judge did not allow Melinda Windham to testify at the trial stating, "I will not let the girl testify because she testified at the bond hearing. She was not listed as a witness. And this was certainly not a surprise to anybody. She was not voir dired before the jury. I don't know -- I just remember her testifying to that. So that is no surprise at all." The trial court did allow Rainer to impeach two State witnesses with the testimony of Connell Henderson. Henderson's name was not provided to the State in discovery and was not provided for voir dire purposes. The jury found Rainer guilty of the lesser included offense of sexual battery and he was sentenced to a term of ten years in the Mississippi Department of Corrections.

ANALYSIS

III.

THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT REFUSED TO ALLOW MELINDA WINDHAM TO TESTIFY AS AN IMPEACHMENT WITNESS, BECAUSE SUCH WITNESS HAD NOT BEEN INCLUDED IN VOIR DIRE TO THE JURY, WHEN HER TESTIMONY AT THE BOND HEARING REVEALED THAT SHE COULD DIRECTLY CONTRADICT PROSECUTRIX Y.B.'S TESTIMONY THAT SHE HAD NOT TOLD ANYONE DEFENDANT DID NOT COMMIT THE CRIME.

Rainer argues that Melinda Windham's proposed testimony was proper impeachment testimony which the trial court should have allowed to be presented to the jury. Rainer states that it was fundamental error to deprive the defense the right to call impeachment witnesses, and the trial court compounded this error when it infringed upon Rainer's constitutional rights by attempting to and actually choosing what testimony Rainer would be allowed to impeach. The State argues that the trial judge acted within the discretion given him by Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice in denying Melinda Windham's testimony as a discovery violation.

In *Houston v. State*, 531 So. 2d 598 (Miss. 1988), the supreme court, in order to promote the twin goals of (1) utilization of all relevant and otherwise admissible evidence and (2) fairness to the opposing party, discussed the proper procedures for discovery violations under Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice. The court stated:

The essence of that procedure is that, where faced with a discovery violation, technical or otherwise, in a criminal proceeding, the Circuit Court should--pre-trial or during trial

(1) Upon objection by a party, give that party a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witnesses, inspecting the physical evidence, etc.

(2) If, after this opportunity for familiarization, the objecting party believes that it may be prejudiced by lack of opportunity to prepare to meet the evidence, it must request a continuance. Failure to do so constitutes an acquiescence that the trial may commence or proceed and that the discovery rule violator may use the evidence as though there had been no discovery violation.

(3) If the objecting party requests a continuance, the discovery violator may choose to proceed with trial and forego using the undisclosed evidence. If the discovery violator is not willing to proceed without the evidence, the Circuit Court must grant the requested continuance.

Houston, 531 So. 2d at 611-12. *See also Skaggs v. State*, 676 So. 2d 897, 903 (Miss. 1996); *Box v. State*, 437 So. 2d 19, 23-24 (Miss. 1983) (Robertson, J., specially concurring).

The *Houston* court then stated that "*the radical sanction of exclusion of a substantial portion of the defendant's evidence is one that should rarely be used*. Generally, it ought to be reserved for cases in which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage." *Houston*, 531 So. 2d at 612 (emphasis added). *See also Taylor v. Illinois*, 484 U.S. 400, 414-15 (1988); *Skaggs*, 676 So. 2d at 903; *Harrison v. State*, 635 So. 2d 894, 898 (Miss. 1994). The Mississippi Supreme Court in *Houston* and *Skaggs* followed the rationale of the United States Supreme Court case of *Taylor*. In *Taylor*, the Supreme Court noted that when a discovery violation is neither willful nor motivated by a desire for a tactical advantage, the sanction of preclusion of the evidence is so drastic that a less drastic sanction is available for use. *Taylor*, 484 U.S. at 413. "Prejudice to the prosecution could be minimized by granting a continuance or a mistrial to provide time for further investigation; moreover, further violations can be deferred by disciplinary sanctions against the defendant or defense counsel." *Id.*

Our supreme court was faced with a similar situation in *Ivy v. State*, 641 So. 2d 15 (Miss. 1994). In

Ivy the prosecution's main witness testified on the stand that he purchased drugs from the defendant. *Id.* at 17. The witness was then questioned if he had ever made a written statement in direct contradiction to his earlier testimony. *Id.* The written statement provided that he had never purchased drugs from the defendant. *Id.* Defense counsel, who obtained the written statement, requested that he be allowed to testify in order to corroborate the second statement. *Id.* The court refused to allow counsel to testify, stating that counsel knew there were two conflicting statements prior to trial and that defense counsel should have disclosed itself as a potential witness to the State. *Id.* at 18. In reversing and finding error in excluding counsel's proposed testimony, the *Ivy* Court stated "[a] literal reading of [Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice] fails to disclose a requirement that a defendant give discovery of statements made by the state's witnesses." *Id.*

Ivy seems to hold that Rainer's counsel may not have had an obligation to disclose Windham. Nonetheless, in the case *sub judice*, the testimony of Melinda Windham had been known to the trial judge, the District Attorney and defense counsel for over a year. Windham's testimony was not a surprise to anyone involved with the case. The failure by trial counsel to place Windham's name on the discovery list hardly appears to be willful or motivated by a desire to obtain a tactical advantage over the State, because the State was aware of the testimony. *See Taylor*, 484 U.S. at 414-17; *Hall v. State*, 546 So. 2d 673, 676-77 (Miss. 1989)*; Houston*, 531 So. 2d at 612. The State knew about the contradiction in Y.B.'s testimony, and this would, therefore, eliminate trial by ambush or surprise. *Fuselier v. State*, 468 So. 2d 45, 56 (Miss. 1985). Further, defense counsel proposed to allow the State to question Windham about her testimony and also proposed to offer proof to the State as to what her testimony would entail. For these reasons, a sanction less harsh than the exclusion of Melinda Windham's impeachment testimony should have been imposed on Rainer. Given the fact Y.B. was the only witness who could identify Rainer as the one that assaulted her, and given the fact Rainer did not confess, but had an alibi, we are unable to say that the exclusion of Windham's testimony was harmless error as such evidence reflected on the credibility of Rainer's accuser. *Skaggs*, 676 So. 2d at 903. Reversal is warranted.

THE JUDGMENT OF THE KEMPER COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. ALL COSTS ARE ASSESSED AGAINST KEMPER COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION.

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v.

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PAYNE, J., CONCURRING:

Although I am loath to reverse in this case, I am faced with no other alternative. I concur and write separately to express both my agreement with the result under the law and to express my frustration with the result. My initial reaction upon reading the majority opinion was that surely reversal could be avoided as the evidence against Rainer was substantial. Furthermore, it was Rainer who failed to follow the discovery rules--rules that clearly state that a defendant has a duty to provide the prosecution with the names of any witnesses he intends to call. Unif. Crim. R. Cir. Ct. Prac. 4.06.The current version of this rule is contained at Rule 9.04 of the Uniform Rules of Circuit and County Court Practice which was adopted on May 1, 1995. At first glance, it would seem that the trial judge was acting well within his authority in literally applying the discovery rules even to the detriment of the defendant. After all, rules are rules. However, such is not the law, and it is with great displeasure that I must admit that my own research led me to the same conclusion as that of the majority, albeit I arrived there on a somewhat different path.

More than a decade ago, the Mississippi Supreme Court decided *Coates v. State*, 495 So. 2d 464, 467 (Miss. 1986), in which the court indicated that a trial judge had the authority to exclude material evidence of the defense based solely on a technical violation of discovery. Were this still the law, reversal would not be necessary in the case before us. However, in 1988, following the lead of the United States Supreme Court in *Taylor v. Illinois*, 485 U.S. 983 (1987), the Mississippi Supreme Court held that the exclusion sanction is limited to cases where the defendant's discovery violation was "willful and motivated by a desire to obtain a tactical advantage." *Darghty v. State*, 530 So. 2d 27, 32 (Miss. 1988). The *Darghty* court also held that the *Box* guidelines are as applicable when the defense violates discovery as when the prosecution violates discovery. *Id.* The court stated:

In this case the circuit judge did not recess court in order for the State to interview Loveberry, and inform the court whether it would be prejudiced by lack of opportunity to interview him. And, of course, the State made no motion for a continuance. The court simply excluded Loveberry's testimony. Even-handed application of the Rule requires the same procedure to be followed when the State objects to testimony because of a defendant's violation as when the defendant objects for the same reason. Such proffered evidence cannot be rejected out of hand.

Id. Still, this position has been modified. The Mississippi Supreme Court in *Darby v. State*, 1168, 1176 (Miss. 1989), indicated that the trial court may exclude the undisclosed evidence even if the

State does not request a continuance but only if the discovery violation was willful. *Carraway v. State*, 562 So 2d 1199, 1203 (Miss. 1990).

In the present case, while the State did not move for a continuance, the trial judge still could not exclude the evidence as Rainer's discovery violation was clearly not willful nor motivated by a desire to obtain a tactical advantage. The record indicates that everyone including the judge and the prosecutor were aware prior to trial that Melinda Windham possessed information that would contradict the victim's testimony.

Here, we must reverse because of a mistake that should have and could have been avoided. It is unfortunate, to say the least, for the victim in this case as she must now face another trial. I can only imagine the trauma our decision will cause to this child. Nevertheless, justice, if you will, requires that we protect a defendant's right to receive a fair trial. Despite my frustration with the result of this case and my genuine sympathy for the child victim, I am bound by the law, and the law dictates that we must grant the Appellant a new trial.