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Commonwealth of Kentucky

Court of Appeals

NO. 2000-CA-002700-MR

CURTIS FITCH — APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 99-CR-00033

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

REVERSING AND REMANDING

** ** ** ** ** ** ** **

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE[1]

POTTER, SPECIAL JUDGE: Curtis Fitch appeals from a jury verdict convicting him of first-degree sexual abuse and second-degree persistent felony offender. Fitch contends that the trial court erred by permitting three witnesses to testify regarding hearsay statements bolstering the testimony of the complaining witness; erred in admitting a report prepared by the examining physician;

[1] Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

erred by permitting the prosecutor to impeach Fitch's wife by showing the particular felonies of which the appellant had been convicted; erred by denying the appellant the opportunity to cross-examine the examining physician regarding the healing time-frame for a hymenal tear; that the prosecutor exceeded the permissible limits in cross-examining Fitch and in his closing arguments; and that the trial court violated ex post facto when it required a sex offender presentence evaluation pursuant to KRS 17.554 when there was no proof that the crime occurred after the effective date of the statute.

Because the trial court erred by permitting inadmissible hearsay statements bolstering the testimony of the complaining witness, and because the error was not harmless, we reverse and remand for a new trial. We also address those allegations of error which may recur upon retrial.

On February 15, 1999, Ernistine Wakeland, the paternal grandmother of the child, was returning the child, K. W., to the Fitch residence following a visitation with her father. Upon arriving at the residence K. W. expressed reluctance to be left alone with Fitch, and stated that Fitch had previously made her disrobe for him. The grandmother left the child with Fitch but reported the incident to the police the next day. On February 16, 1999, Detective Glenn Caudill of the Kentucky State Police interviewed the child at school, had her removed from the home,

and asked Dr. Elizabeth Spencer Allen to examine her. On February 26, 1999, Dr. Spencer-Allen examined the child and determined that she had been sexually abused. In the course of the examination K. W. identified Fitch as the perpetrator of the abuse.

On August 26, 1999, Fitch was indicted for first-degree sexual abuse (Kentucky Revised Statutes (KRS) 510.110) and first-degree persistent felony offender (KRS 532.080).

The trial was held on October 9 and 10, 2000. Six witnesses were called to testify. In addition to the child and Fitch, the witnesses at trial were Detective Caudill, the investigating officer; Ernestine Wakeland, the child's paternal grandmother; Dr. Spencer-Allen, the doctor who examined the child at Detective Caudill's request; and the child's mother, Wanda Sue Wakeland Fitch.

According to the trial testimony, at the time of the alleged abuse, in July 1998, Fitch was married to, and living with, the child's mother Wanda Sue. The child occasionally visited with her natural father, who resided with his mother, Ernestine Wakeland. Fitch did not contest the Commonwealth's assertion that the child had been sexually abused. Rather Fitch asserted that, as his lawyer put it in opening, "at the end of the day we are going to ask you to find Mr. Fitch not guilty because this didn't happen on his watch." The defense theory

was that the perpetrator was a neighbor who babysat the child at her father's home.

In support of this defense, Wanda Sue testified that in 1997, prompted by K. W.'s problems at school, she had asked her if anything was wrong. The child responded that a babysitter at her father's house had sexually abused her. The mother did not believe the accusation and took no action. When interviewed by Detective Caudill in relation to the charges against Fitch, the child acknowledged having made this previous accusation against the sitter. At trial, however, the child denied having previously made the allegations against the sitter.

At the conclusion of the trial, the jury found Fitch guilty of first-degree sexual abuse and second-degree persistent felony offender. He was sentenced to ten years imprisonment. This appeal followed.

HEARSAY ISSUES

Fitch contends that the trial court erred by failing to exclude hearsay statements of K. W. offered by the examining physician, the grandmother, and the investigating detective. On appeal the Commonwealth acknowledges that the out-of-court statements identified by Fitch are hearsay and that Fitch's

objections would be well taken unless Fitch failed to timely object, the statements were admitted under an exception to the hearsay rule, or the statements were introduced by Fitch himself.

DISCUSSION

We first address whether the hearsay issues are properly preserved. Fitch made few, if any, contemporaneous objections to the hearsay statements he now cites were erroneously admitted. However, in written pretrial motions, oral argument before trial, and objections during the trial, Fitch objected to the examining physician, the paternal grandmother, and the lead detective testifying regarding the child's prior out-of-court statements implicating Fitch as her abuser. Though not raised on appeal, at trial Fitch even objected to the child herself testifying as to her prior out-of-court statements implicating Fitch. Particular effort was directed against the examining physician testifying to such statements. Fitch maintained that K. W.'s out-of-court statements were hearsay not subject to any exception.

Further, prior to trial Fitch filed a memorandum that raised the issue and cited Miller v. Commonwealth, Ky., 925 S.W.2d 449 (1996), Sharp v. Commonwealth, Ky., 849 S.W.2d 542 (1993), Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990), and

Souder v. Commonwealth, Ky., 719 S.W.2d 730 (1986). Both before trial and during an in-chambers discussion during trial the hearsay issues were argued and these cases produced, read and argued over. In addition it appears that the argument in this case duplicated similar arguments between defense counsel and prosecutors that had been made in related cases. Therefore, despite the absence of contemporaneous objections, it cannot be said that Fitch waived any objection to the admission of the hearsay statements. Kentucky Rules of Criminal Procedure (RCr) 9.22; Kentucky Rules of Evidence (KRE) 103(a)(1); O'Bryan v. Hedgespeth, Ky., 892 S.W.2d 571 (1995).

The Commonwealth's primary argument in response to Fitch's allegations of error is that the hearsay statements were admissible under KRE 801A(a)(2), which provides that prior consistent statements are admissible to rebut a charge of recent fabrication. In this case, however, there was simply no charge of recent fabrication and no facts to support such an inference. K. W. first raised the allegations against Fitch with her grandmother on February 15, 1998, and, subsequently, her allegation that Fitch was the perpetrator remained consistent. For KRE 801A(a)(2) to apply, the prior consistent statement would have had to have predated her original round of allegations to show that her initial reports were not a recent fabrication. Tome v. United States, 513 U.S. 150, 115 S.Ct.

696, 130 L.Ed.2d 574 (1995); Noel v. Commonwealth, Ky., 76 S.W.3d 923, 928 (2002).

The Commonwealth also contends that Fitch elicited the hearsay statements himself. While it is true that Fitch himself elicited testimony from the Detective regarding the child's earlier allegation against the alternative suspect, the former babysitter, and in so doing may have opened the door to related testimony, the door was not opened to other hearsay statements repeated by the Detective. Further, no such claim can be made regarding the hearsay statements repeated by the child's paternal grandmother or the examining Doctor.

HEARSAY TESTIMONY BY EXAMINING PHYSICIAN

Turning first to the examining physician's recitation of hearsay statements made by K. W., after testifying as to her physical finding indicating digital penetration, the following questioning of the physician transpired:

> Q. Doctor, did [K. W.] tell you what caused this?
>
> A. Yes, she did.
>
> Q. What did she tell you?
>
> A. She told me that on three, approximately three occasions her stepfather had stuck his finger up in her and that it hurt--- it felt really bad. And when she said the word "bad," she emphasized it greatly.

In Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990), the Kentucky Supreme Court acknowledged that the modern approach to the issue (as represented by Rule 803(4) of the Federal Rules of Evidence) “blurs the distinction between treating and testifying physicians. . . . " but made it clear that the distinction had not been abolished. Drumm recognized the desirability of a more flexible approach to the determination of whether such evidence should be admitted or excluded but acknowledged that statements made to a physician who is consulted for a purpose other than treatment have less inherent reliability than such statements made to a treating physician.

As such, Drumm directed application of a prejudicial effect versus probative value analysis. The rule required a trial court to begin with the view that statements made to a physician who lacks treatment responsibility have less inherent reliability than traditional patient history. With this view in mind, the trial court was required to then decide whether from the totality of the circumstances the probative value of the evidence outweighed its prejudicial effect. This approach was reiterated in Sharp v. Commonwealth, Ky., 849 S.W. 2d 542 (1993); Bell v. Commonwealth, Ky., 875 S.W.2d 882 (1994); and Miller v. Commonwealth, Ky., 925 S.W.2d 449 (1995).

The Drumm rule was the rule in effect at the time of the trial in this case. Based upon the application of the Drumm rule, we are persuaded that the hearsay statements related by K. W. to Dr. Spencer-Allen, who was clearly a non-treating physician, were not admissible as the prejudicial effect of the hearsay statement outweighed its probative value. [2]

In Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001), a case decided by the Supreme Court after the trial in this case, the Supreme Court held that the Drumm rule did not survive the adoption of KRE 803(4), which was effective July 1, 1992. Garrett held that the adoption of KRE 803(4) abolished the distinction between treating and examining physicians and that inquiry for admissibility following the adoption of the rule was threefold. First, whether the hearsay statement fits within KRE 803(4) in that the statement "was made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Second, whether the statement is admissible as relevant evidence

[2] In an in limine ruling the trial court held "It seems that Dr. Spencer-Allen would be an evaluating, rather than a treating, physician . . . . Therefore she would not be permitted to testify as to the history." We note two things. The trial court did not apply the probative value versus prejudice prong of the Drumm test and, second, the testimony by the Doctor's repeating of K. W.'s hearsay statements violated the in limine ruling.

under KRE 402. And thirdly, whether, pursuant to KRE 403, the statement's "probative value is substantially outweighed by the danger of undue prejudice [not if its prejudicial effect merely outweighs its probative value per Drumm], confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Garrett at 13 – 14.

We are persuaded that the doctor's testimony that "She told me that on three, approximately three occasions her stepfather had stuck his finger up in her and that it hurt--- it felt really bad. And when she said the word "bad," she emphasized it greatly" does not meet the new test as set-forth in Garrett. Dr. Spencer-Allen's function in this case is unmistakable. The record reflects that Dr. Spencer-Allen is a member of a "Multi-Disciplinary Team" which consists of a Commonwealth Attorney, a police officer, a social worker, a victim's advocate, and a physician. Dr. Spencer-Allen was the physician on this team; her report in this case is captioned "Child Advocacy Clinic"; and the report begins with the statement "[K. W.] is brought to me for evaluation of purported sexual abuse." Our conclusion is further supported by the following factors: K. W. was referred to Dr. Spencer-Allen for the specific purpose of determining whether she had been sexually abused, not for treatment; the suspected abuse had

occurred some seven months prior to the examination; the injuries were described by Dr. Spencer-Allen as "well-healed; and, in fact, Dr. Spencer-Allen did not provide medical treatment with regard to the injuries.

In summary, the statements made by K. W. during the examination were not given for the purpose of medical diagnosis and treatment and do not satisfy the hearsay exception prescribed by KRE 803(4). Since the hearsay statements directly implicated Fitch as the perpetrator of the abuse, the statements were highly prejudicial.

HEARSAY TESTIMONY BY GRANDMOTHER

Turning next to the grandmother, Ernestine Wakeland, on the Commonwealth's direct-examination of the witness, the only substantive testimony contributed by the grandmother was the child's hearsay accusation made when she returned the child after the February 1999 visitation with her father when K. W. objected to being left alone with Fitch. The exchange between the prosecutor and the grandmother took place as follows:

> Q. Would you describe to the jury what took place.
>
> A. Well, she - - Curt was standing at the window talking to us and [K. W.] kept asking where her mommy was. Curt didn't answer her. Then he told us that she went to the doctor to get some medicine. Then she wanted to know where Shana was. And he said that she went with some girls or something.

> He said that Sue had took her with them and took some girls back that had stayed all night with them. And [K.W.] just started crying and asking me not to leave her with Curt. And I told her, I said "well, baby, you'll be all right." I said "he didn't whip you or nothing the other time, did he, when I left you here." And she said no, but he wanted her to take her clothes off and show him - - show herself to him in the living room. And I promised her - - she cried and held onto me and told me not to leave her. And we stayed with her for a long time. And I promised her I would help her. And I stayed awake all night that night and I cried. The next morning I called the social workers and asked them to go to the school and talk with her because there was something wrong. That's all I did. (Emphasis added).

While K. W.'s statement to the effect that she did not want to be left alone with Fitch was admissible as a nonhearsay utterance reflecting the state of mind of the declarant, see Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 887 (1997), *cert. denied* 523 U.S. 1052, 118 S.Ct. 1374, 140 L.Ed.2d 522, (*citing* L.K.M. v. Department for Human Resources, Ky. App., 621 S.W.2d 38 (1981) and R. Lawson, The Kentucky Evidence Law Handbook § 8.05, pp. 364-65 (3rd ed., Michie, 1993)), it was error for the Commonwealth to introduce through the grandmother K. W.'s hearsay statement to the effect that Fitch "wanted her to take her clothes off and show him - - show herself to him in the living room." See Souder v. Commonwealth, Ky., 719 S.W.2d 730 (1986). The grandmother's repetition of K. W.'s out-of-court

statement was unadulterated hearsay not subject to any exception.

HEARSAY TESTIMONY BY DETECTIVE

Turning next to the testimony of the investigating Detective, Glenn Caudill, the Commonwealth's first witness, it is apparent that the hearsay line, albeit indirect hearsay,[3] may have been crossed from the outset. With its first substantive question to the Detective the Commonwealth elicited the following answer:

> Yes, I was notified by Social Services to meet them at the school and conduct an interview at the school with this child. As a result of that investigation, based on my findings and conclusions, I removed this child from the residence that same day. This day was on February the 16th of 1999. (Emphasis added).

The implied hearsay contained in this response is that K. W. stated to the Detective that Fitch sexually abused her. "The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information

[3] If the apparent purpose of offered testimony is to use an out-of-court statement to evidence the truth of facts stated therein, the hearsay objection cannot be obviated by eliciting the purport of the statements in indirect form. Thus evidence as to the purport of 'information received' by the witness, or a statement as the result of investigation made by other persons, offered as evidence of the facts asserted out of court, have been held to be hearsay. Sherley v. Commonwealth, Ky., 889 S.W.2d 794, 802 (1994) (citing *McCormick on Evidence*, Sec. 249, p. 593 (Cleary ed. 1972)).

and the taking of that action is an issue in the case." Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988). "Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did." Id. "It is admissible *only* if there is an issue about the police officer's action." Id. The information that the Detective had recommended that K. W. be removed from the Fitch home, which tended to bolster the allegations against Fitch, was not an issue in the case. Again, as the testimony identified Fitch as the perpetrator of the abuse, this testimony was highly prejudicial.

Later, on re-direct examination, the prosecutor, in the form of a question, read from the trooper's investigation report and repeated statements made by the victim:

> Q. I would like to read this to you and see if this is a correct portion of your uniform offense report. It says "she", and it is referring to [K. W.], "told me it happened at least twice in the living room on the chair. He would have her promise not to tell. On one occasion she says that she told her mom about it, but she did nothing about it. She says her mother told her it wasn't Curt, it was the same little boy. This is in regard to a boy named Heath who used to live next to [K. W.] She told me that Heath never touched her, but that it was Curt." (Emphasis added.)
>
> A. Correct.

Pursuant to Smith v. Commonwealth, Ky., 920 S.W.2d 514 (1995), it was error for the Commonwealth to introduce evidence of the child's hearsay statements through the testimony of the investigating trooper. In Smith, at trial, the prosecution called the victim, who testified in detail as to many things she had already conveyed to the lead detective and others. On cross-examination, the defense tried to bring out inconsistencies between the victim's statements at trial and her statements to the detective. Subsequently, the Commonwealth called the detective whose extensive testimony reiterated the victim's testimony. The appellant objected to the detective's testimony as it was not within the limited scope of hearsay admissible under KRE 801A(a)(2) as a prior consistent statement.

Analogizing to the long line of cases which have held that hearsay testimony of social workers is inadmissible and constitutes reversible error because it unfairly bolsters the testimony of the alleged victim (see Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 546 (1993); Brown v. Commonwealth, Ky., 812 S.W.2d 502, 503-504 (1991); Mitchell v. Commonwealth, Ky., 777 S.W.2d 930 (1989); Reed v. Commonwealth, Ky., 738 S.W.2d 818, 821-822 (1987); Hester v. Commonwealth, Ky., 734 S.W.2d 457 (1987); and Bussey v. Commonwealth, Ky., 697 S.W.2d 139, 141 (1985)), the Supreme Court held that "[t]he rationale behind prohibiting hearsay testimony in situations involving social

workers is appropriately applicable to the present case of a police detective relating prior statements by the victim." Smith at 516. The Supreme Court held the admission of the child's hearsay statements through the testimony of the Detective to be reversible error. We are unable to distinguish the bolstering effect of the hearsay testimony of Detective Caudill in this case from the bolstering hearsay testimony in Smith.

HARMLESS ERROR

We have reviewed the erroneous admission of the foregoing hearsay statements for harmless error; however, the importance of this hearsay to the prosecution's case becomes apparent when one looks at the limited testimony given by K. W. The entire testimony covers only nine pages of the transcript, three pages of which is consumed by colloquy between the court and counsel. In the remaining six pages the victim answers only three questions which incriminate Fitch.

> Q. . . . Did Curtis Fitch ever do anything to hurt you?
>
> A. Yes.
>
> Q. Was there anybody else around but you and Curtis when he did this?
>
> A. No.
>
> Q. Just you and Curtis?

A. Uh-Huh.

Q. What did he do to hurt you, dear?

A. He stuck his finger in my middle.

Q. Okay. Can you say that a little bit louder, dear.

A. Stuck his middle.. stuck his finger in my middle.

Q. Can you take the doll and pull the doll's dress up and show the jury where he stuck his finger. Okay. That's very good dear.

In his testimony, Fitch vigorously denied that he had sexually abused K. W. Hence it was Fitch's word against K. W.'s. Further, while it is undisputed that K. W. was abused, Fitch had identified an alternative perpetrator through the testimony of his wife. In light of this evidence, we cannot say that the erroneous admission of hearsay statements was harmless. RCr 9.24.

CONCLUSION

The issue presented here is a difficult one for the courts, both trial and appellate. Many trial judges would agree with the prosecutor below when he stated "I have never seen an area of the law that is more weighted in favor of the defendant than these sex abuse [cases]. . .[the law] needs to be changed because they have absolutely silenced these children with court

rulings on child sex abuse cases." Nearly every Supreme Court decision we have cited excluding the child's hearsay testimony contains a dissent, often passionate. However, in the cases cited above, the Supreme Court has made its position clear regarding the admission of hearsay statements in sexual abuse cases. In reaching our decision herein, we have only attempted to follow those decisions.

ISSUES WHICH MAY RECUR ON RETRIAL

Since we have determined that this case requires reversal, we next consider the appellant's remaining allegations of error which may recur upon retrial.

ADMISSIBLITY OF MEDICAL REPORT

We first consider Fitch's objection to the trial court's admission of the report prepared by Dr. Spencer-Allen. Specifically, Fitch contends that the report should not have been admitted because it contained the statement "I recommended that the child not be placed back in the maternal home for the time being and that she remain with the maternal [sic] grandmother, aunt, and biological father." Fitch also contends that he was entitled to a mistrial because the jury was informed that a significant portion of the report had been deleted.

Fitch, himself, submitted a redacted version of Dr. Spencer-Allen's medical report. Based upon our review of the record it appears that the trial court accepted the redactions as proposed by Fitch with the exception that the trial court included the language to the effect that Dr. Spencer-Allen recommended that the child not be placed back in the custody of her mother and Fitch, but, rather, that she be placed with her paternal grandmother and her biological father. To make matters worse, the language was singled out during the Commonwealth's direct examination of Dr. Spencer-Allen as follows:

> Q. . . . Would you read that recommendation to the jury?
>
> A. Okay. All right. She should not be placed back in the home where she could be in contact with this man, her stepfather.
>
> . . . .
>
> . . . I was significantly worried about this child and I did something which I only do in about ten percent of the cases and that was as soon as I finished my evaluation of her I sat down and contacted Social Services in Knott County and Detective James Caudill. I recommended at that time that the child not be placed back in the [Fitch home]. . .

Fitch contends that this language is wholly irrelevant and serves to reflect favorably on the testimony of the child that Fitch, and not the alternative suspect, was responsible for the sexual abuse.

Kentucky Rules of Evidence (KRE) 402 sets out the general rule that all relevant evidence is admissible and evidence which is not relevant is inadmissible. KRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 403 provides the following exception to KRE 402:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

A trial judge's decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an abuse of discretion standard. Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id. (citations omitted).

The transcript does not disclose the trial court’s reasoning for including Dr. Spencer-Allen’s recommendation to the effect that K. W. should be immediately removed from the Fitch household. In our view, however, Dr. Spencer-Allen’s recommendation and her apparent absolute belief in the child’s

identification of Fitch as the perpetrator is of minimal relevance, while the prejudicial effect was great. Actions speak louder than words. While Dr. Spencer-Allen is an expert medical witness, her medical expertise does not extend to qualifying her to express an opinion on whether K. W. was telling her the truth when she identified Fitch. KRE 602; KRE 703. To the extent that there is any relevance, the prejudicial effect of a respected physician vouching for the truthfulness of K. W.'s allegation that Fitch was the perpetrator substantially outweighs its probative value. Upon retrial, upon proper motion by Fitch, the statement should be excluded from the medical report.[4]

Fitch also contends that he was entitled to a mistrial because, as the medical report was being submitted into evidence, Dr. Spencer-Allen commented that a significant portion of the report had been redacted. This statement was not so significant as to require a manifest necessity for a mistrial. See Lynch v. Commonwealth, Ky., 74 S.W.3d 711, 714 (2002); Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 863 (2002); and Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002). We note, however, that the trial court sustained Fitch's objection to Dr. Spencer-Allen's statement regarding the deletions to the report.

[4] While we have discussed this issue as an issue likely to recur on retrial, we have also considered the prejudicial effect of this evidence, in conjunction with the hearsay issues, in concluding that reversal is required.

Presumably the trial court will rule the same way on retrial, and Dr. Spencer-Allen need only to be informed beforehand not to make a reference to the redactions.

INTRODUCTION OF SPECIFIC FELONIES

Next, Fitch contends that the trial court erred when it permitted the Commonwealth to impeach the appellant's wife by showing the particular felonies of which Fitch had been convicted.

As an element of his defense, Fitch contended that he was incarcerated at the time that K. W. was sexually abused. In his direct-examination of Fitch's wife (K. W.'s mother), Wanda Sue Wakeland Fitch, the following exchange occurred between defense counsel and Wanda Sue:

> Q. Okay. At the time that [K. W.] told you this story about Heath Murray, where was Curtis?
>
> A. Floyd County Detention Center.
>
> Q. What was he in jail for?
>
> A. Possession of Drugs.

On cross-examination the Commonwealth questioned Wanda Sue to the effect that wasn't Fitch also incarcerated during this time for trafficking and possession of a handgun by a convicted felon. Defense counsel objected and it was determined that the charges were, in fact, possession of a controlled

substance and possession of a handgun by a convicted felon. The actual charges were clarified for the jury.

Fitch opened the door to the actual charges by asking Wanda Sue what the charges were that resulted in Fitch's incarceration. The Commonwealth then merely sought to clarify a misstatement by Wanda Sue regarding the charges. "[T]he appellants, having opened the book on the subject, were not in a position to complain when their adversaries sought to read other verses from the same chapter and page." Harris v. Thompson, Ky., 497 S.W.2d 422, 430 (1973). Hence it was proper for the Commonwealth to clarify the actual charges and correct the record of Wanda Sue's misstatement of the charges.

On retrial, if the same testimony were to occur on direct examination, the Commonwealth would again be entitled to correct Wanda Sue's misstatement of the charges. On the other hand, if the defense does not open the door by questioning Wanda Sue regarding the specific charges for which Fitch was incarcerated, the specific felonies would be inadmissible under KRE 404 and KRE 609.

RESTRICTION OF CROSS-EXAMINATION

Next, Fitch contends that the trial court erred when it denied him the opportunity to effectively cross-examine the

examining doctor regarding the healing time-frame for a hymenal tear.

The attempted impeachment occurred in conjunction with cross-examination of Dr. Spencer-Allen concerning the healing time of a hymenal tear. When Dr. Spencer-Allen had conducted her examination of K. W., K. W. had been in the custody of her paternal grandmother the previous ten days. Dr. Spencer-Allen's examination showed extreme redness of the hymen, which the Doctor described as "much more than what you normally see," and as "remarkable." Defense counsel then sought to establish that hymenal tears can heal in as little as a week, and the following exchange occurred with Dr. Spencer-Allen:

> Q. . . . My next question has to do with the healing. This was a healed hymen, wasn't it?
>
> A. Yes, totally healed.
>
> Q. How long does it take to heal?
>
> A. Those structures heal very fast.
>
> Q. A week?
>
> A. No.
>
> Q. No?
>
> A. It still – the edges still would have been red at that time and would have looked a little bit raw. I would say two to three weeks. Frankly, you're dealing with something that would heal completely in two to three weeks. Thereafter it would remain. So this injury could have been three weeks

> old or it could have been three months old or it could have been six months old. You just really don't know. It was a well-healed injury.
>
> Q. Okay, but you take issue that it could not heal in a week, because I got that from you, Doctor. Everything I know about this I have learned from you.
>
> A. Well, it would do most of its healing in a week, yes. But I think you would still see some redness there. Some increased vascularity to the tissue.
>
> Q. Do you remember trying to explain it to me saying that these things can heal in a week. Try to think of . . .
>
> . . .
>
> A. No, I don't think I said completely in a week. Huh-uh. Not absolutely completely in a week.

At this point the Commonwealth objected and the parties approached the bench. Defense counsel explained that he was seeking to impeach Dr. Spencer-Allen with testimony she had given in another sexual abuse trial to the effect that a hymenal tear could heal in a week. The trial court sustained the prosecution's objection to the impeachment, but permitted defense counsel to submit the prior testimony into the record by avowal. The testimony defense counsel sought to use to impeach Dr. Spencer-Allen was as follows:

> Q. You described – in your medical report you described this injury as an old injury.

A. By that I mean it was healed. These things can even heal in a week sometimes.

Q. In a week?

A. In as soon as a week. In two weeks having had this injury occur, unless the child was re-injured, that it would be healed.

Q. Well, this really goes against what I've learned in the eighth grade about cherries, that's what we called them then. A hymen can heal?

A. Sure. But I mean, when it heals, in this case, because it was ripped all the way through and through, when it healed it didn't go back together. It healed torn apart. The edges each healed.

Q. But it's still torn?

A. Yeah, yeah. It doesn't knit itself back.

Q. But the edges were no longer –

A. Raw.

Q. Raw.

A. And bleeding.

Q. And that could have occurred in as little as two weeks?

A. A week.

Q. Or as long as? Do you have a guess on that?

A. No. A week to two weeks. I'm not going to specify it anymore than that. It's basically similar to the tissue inside your mouth. Think about how fast that heals. Let's say you go to the dentist and get an

> injection of novocaine and then you happen to chew your cheek as a hamburger and it's nasty for a couple of days but then it heals fast.

In this case the abuse was alleged to have occurred "on or about July 1998." K. W. was removed from the Fitch home and placed with her paternal grandmother on February 16, 1999. Dr. Spencer-Allen performed her examination on February 26, 1999. Because at the time of the examination K. W. still had "extreme redness" of the hymenal area, the defense was apparently attempting to pursue a theory that the hymenal injury, as evidenced by the extreme redness, was not healed and, since hymenal injuries can heal within a week, the injury Dr. Spencer-Allen observed may have occurred during the ten days that K. W. was in the custody of her grandmother immediately preceding the examination.

The trial court properly excluded the testimony as the proffered impeachment was impeachment on a collateral issue. In the present case, Dr. Spencer-Allen testified that the hymenal injury was a "well--healed injury" which could have been anywhere from three weeks to six months or more old.[5] As we construe the testimony, Dr. Spencer-Allen's opinion was that, although there was still extreme redness, the hymenal injury was completely healed at the time of the examination. It follows

[5] Later in the testimony Dr. Spencer-Allen testified that the age of the hymenal injury could be "[s]everal months up to a couple of years."

that if the injury was completely healed, then there was no underpinning to the defense theory that an unhealed injury had occurred within the previous ten days. In other words, even if Dr. Spencer-Allen had conceded that a hymenal injury could heal within a week,[6] this would not have supported the defense theory that the redness Dr. Spencer-Allen observed on February 26, 1999, was associated with an unhealed injury which had occurred during the previous ten days.

Under these circumstances, defense counsel's attempted impeachment of Dr. Spencer-Allen with her previous testimony that a hymenal tear can heal within a week was a collateral issue. Impeachment by contradiction regarding collateral facts is prohibited. Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 705 (1994) (citing Lawson, The Kentucky Evidence Law Handbook (3d Ed.1993) § 4.10.). Hence it was proper for the trial court to exclude Fitch's attempted impeachment of Dr. Spencer-Allen with her testimony from the prior trial.

PROSECUTORIAL MISCONDUCT

Next, Fitch contends that the trial court erred by permitting improper cross-examination of him, that the prosecutor exceeded the permissible limits in his closing

[6] Later in the cross-examination Dr. Spencer-Allen essentially concedes the point when she testifies, "Let's say there is a hymen. Okay. You make a little cut here. And I might agree with you that something that small might be pretty darn well healed in a week."

arguments, and that the prosecution improperly argued for jury nullification in the penalty phase. Fitch raises eight instances of alleged improper conduct by the prosecution. As noted by the Commonwealth in its brief, few, if any, of these alleged errors are preserved. As no objection was made to these alleged errors, there is no indication that the trial court would not make the proper rulings on retrial, and we need not review these issues individually. Upon retrial, Fitch should direct his objections concerning these issues to the trial court.

EX POST FACTO APPLICATION OF KRS 17.544

Finally, Fitch contends that the trial court violated ex post facto when it applied KRS 17.554 by requiring Fitch to undergo a pre-sentence sex offender risk assessment when there was no proof that the crime occurred after the effective date of the statute.

KRS 17.544 establishes a procedure for the establishment of a comprehensive sex offender pre-sentence evaluation. The indictment alleged that the sexual abuse in this case occurred in July 1998. The evidence presented at trial was consistent that the crime occurred during this time period; however, it was not ascertained whether the crime occurred before or after the effective date of July 15, 1998.

However, because Fitch was not incarcerated or sentenced until after the effective date of the statute, the statute applies.

The annotations to KRS 17.544 note that "1998 c 606, § 199, eff. 7-15-98, reads: The provisions of Sections 138 through 155 of this Act shall apply to persons individually sentenced or incarcerated after the effective date of this Act." Hence, the legislative intent was for the statute to apply to any persons incarcerated or sentenced subsequent to the effective date of the statute without regard to when the crime actually occurred.

As to whether ex post facto was violated, we first note that the record does not reflect that Fitch gave notice to the Attorney General of a constitutional challenge to the statute. CR 24.03; Brashars v. Commonwealth, Ky., 25 S.W.3d 58, 65 (2000). Further, in Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002), the Supreme Court held that the application of the registration for sexual offense registration was not an application of ex post facto. Based upon the rationale stated in Hyatt, the presentence evaluation required under KRS 17.544 is likewise not an improper application of ex post facto.

For the foregoing reasons the judgment of the Knott Circuit Court is reversed, and the case is remanded for a new trial.

McANULTY, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT.

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