RENDERED: August 29, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001321-MR

GUS THEODOSIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
INDICTMENT NO. 00-CR-000038

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, JOHNSON, AND PAISLEY, JUDGES.

DYCHE, JUDGE. Gus Theodosis appeals from a final judgment and sentence of imprisonment entered by the Jefferson Circuit Court after a jury found Theodosis guilty of one count of sexual abuse in the first degree. Kentucky Revised Statutes (KRS) 510.110. Theodosis was sentenced to one year imprisonment, which was probated for five years. Having reviewed the record and the applicable law, we affirm.

Theodosis was indicted by the Jefferson County Grand Jury on four counts of sexual abuse in the first degree. The indictment stemmed from acts Theodosis was alleged to have committed against a brother and sister, G.P. and B.P.[1] G.P. was ten years old and his sister B.P. was eight years old at the time. The children alleged that the acts occurred at Theodosis' apartment.

The children's mother first overheard the children make the allegations while playing with friends. She then took the children to a pediatrician. The children were subsequently interviewed by detectives from the Jefferson County Crimes Against Children Unit (the Unit). Detective Carolyn Nunn then contacted Theodosis by leaving a message for him to contact her. Theodosis voluntarily came to the Unit office where he was advised of his rights and signed a waiver of rights form. Initially he denied the allegations but later confessed.

The case was tried on April 16-18, 2002. The jury found Theodosis guilty of the one count against B.P. and not guilty of the three counts involving G.P. At the conclusion of the sentencing phase, the jury recommended a one year sentence of imprisonment. On June 11, 2002, the court sentenced Theodosis to the jury-recommended sentence. The sentence was conditionally probated for five years.

[1] In order to protect the identity of the children, only their initials are used in this opinion.

Theodosis first alleges that it was error for the trial court to deny his motion for a directed verdict. The basis of this argument is that the Commonwealth failed to prove every element of the offense, in that they did not prove sexual contact occurred. KRS 510.110 states in pertinent part:

> (1) A person is guilty of sexual abuse in the first degree when:
>
> (a) He subjects another person to sexual contact by forcible compulsion; or
>
> (b) He subjects another person to sexual contact who is incapable of consent because he:
>
> 1. Is physically helpless;
> 2. Is less than twelve (12) years old; or
> 3. Is mentally incapacitated.

KRS 510.010(7) defines sexual contact as, "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." Theodosis argues that the Commonwealth failed to prove that sexual contact occurred because there was no proof that Theodosis touched the children for the purpose of gratifying his sexual desires. B.P. testified that Theodosis rubbed her on her chest area and her "private parts" inside her clothing. Evidence was presented that Theodosis confessed to having rubbed B.P.'s vaginal area outside her clothing. Contrary to Theodosis' argument, B.P. was not required to testify that Theodosis stated that he was receiving sexual gratification or that he "appeared" to be

receiving sexual gratification while touching or rubbing her chest and vaginal area under her clothing. In Tungate v. Commonwealth, Ky., 901 S.W.2d 41 (1995), the Kentucky Supreme Court held that a jury could infer that touching was done for sexual gratification when the evidence showed that little girls sat on the defendant's lap and he put his hands under their clothing and touched their vaginal areas. Id. at 42, citing Anastasi v. Commonwealth, Ky., 754 S.W.2d 860, 862 (1988). We see no distinction from the case sub judice.

> On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given.

Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Drawing all fair and reasonable inferences from B.P.'s testimony, the evidence was sufficient for the jury to believe beyond a reasonable doubt that Theodosis touched B.P. to receive sexual gratification.

Theodosis next argues that the trial court denied him his due process rights and his right to a fair trial, when it allowed Detective Nunn to testify to investigative hearsay to bolster the prior testimony of B.P. The Commonwealth argues that this error is unpreserved and we agree. The defense

repeatedly objected to Detective Nunn “reading” from her notes. However, counsel never objected to any of Detective Nunn’s testimony as investigative hearsay. In order to preserve an issue for appeal, a party must make objections specific enough to indicate to the trial court and this court the matter to which he objects. Bell v. Commonwealth, Ky., 473 S.W.2d 820, 821 (1971). Theodosis failed to preserve the issue. Theodosis asks in the alternative for review of the issue for palpable error pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. We may consider an unpreserved issue if we deem the error to be one which affects the defendant's "substantial rights" and results in "manifest injustice." RCr 10.26. However, there was no error in the admission of Detective Nunn’s testimony because it was admissible pursuant to Kentucky Rules of Evidence (KRE) 801A(a)(2). The rule allows for the admission of prior statements of witnesses,

> if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is . . . [c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

On cross-examination the following exchange occurred between defense counsel and B.P.:

> Counsel: And before we were here today, do you remember that you said that Gus only touched you one time?
>
> B.P.: No.
>
> Counsel: Do you remember that?
>
> B.P.: No.
>
> Counsel: Are you surprised that is what you said?
>
> B.P.: Yes, because I remembered 2 times at least.
>
> Counsel: Maybe 3 times?
>
> B.P.: I said I stayed over at his house 3 times. I don't know if it was the first night I stayed over there but I know it was the second and third.
>
> Counsel: Kim and Venus talked to you twice, Kim three times, Officer Nunn once or twice and Ms. Haney about three times and today suddenly you said it happened twice or maybe three times? Right? That wasn't the answer you gave before. Did you know that?
>
> B.P.: No.
>
> Counsel: Okay.

Counsel implied that B.P. had recently fabricated her story and that she changed her story as a result of improper influence by social workers, police officers, and the Commonwealth Attorney. This is exactly the situation to which KRE 801A(a)(2) applies. See Schambon v. Commonwealth, Ky., 821 S.W.2d 804, 810-811 (1991). To rebut the defense implication of recent fabrication, the prosecution asked Detective Nunn how many times

B.P. initially said that the abuse occurred. Detective Nunn responded that during the first interview with B.P., B.P. stated that, “it happened two times she stayed over at his house.” In answer to a follow up question, Detective Nunn testified that B.P. stated that, “he did it every night that she stayed over at his house.” The remainder of Detective Nunn’s testimony pertained to the actions she took in the case. Because the testimony was introduced to rebut the implied charge that B.P. had recently fabricated the number of times the sexual abuse had occurred and the fabrication was a result of improper influence, there was no error.

Theodosis next argues that the trial court erred when it denied his motion to suppress statements he made to the police. Theodosis arrived at the Unit office at 2145, was given a waiver of rights form at 2159, which he signed at 2202. Theodosis argues that, because the Commonwealth failed to account for the fourteen minutes between the time he arrived at the unit and the time he was read his rights, it failed to show by a preponderance of the evidence that no coercion occurred. Theodosis offers no caselaw to support his theory that the Commonwealth must account for every minute preceding a confession or coercion will be presumed. The trial court held an evidentiary hearing at which Detective Nunn and Theodosis testified. Theodosis acknowleged that his rights were read to

him and that he signed a waiver of those rights and gave a statement. We have carefully reviewed the testimony at the suppression hearing. The Commonwealth presented proof that Theodosis' rights were explained to him, he read the rights waiver form, and he initialed next to each right to indicate he understood each one. In Hayes v. Commonwealth, Ky., 25 S.W.3d 463, 464-466 (2000), the Kentucky Supreme Court held that if a defendant was apprised of his rights, even though he may lack "'a full and complete appreciation of all of the consequences flowing' from his waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum." Id. At 466, citing Oregon v. Elstad, 470 U.S. 298, 316-317, 105 S.Ct. 1285, 1296-1297, 84 L.Ed.2d 222 (1985).

The ruling of the trial court as to whether to suppress a defendant's statement is conclusive if supported by substantial evidence. RCr 9.78; Harper v. Commonwealth, Ky., 694 S.W.2d 665, 668 (1985). Detective Nunn's testimony was substantial evidence upon which the trial court could find that Theodosis knowingly and voluntarily waived his rights. Therefore, there was no error.

Theodosis' final argument is that he was entitled to relief based on cumulative error. Since we find no error,

cumulative error did not occur. See Sholler v. Commonwealth, Ky., 969 S.W.2d 706, 712 (1998).

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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