

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2003-CA-0000467-MR

CHARLES MORGAN

APPELLANT

v. APPEAL FROM LESLIE CIRCUIT COURT  
HONORABLE R. CLETUS MARICLE, JUDGE  
INDICTMENT NO. 00-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: In February 2000, a Leslie County grand jury returned an indictment charging Charles Morgan with one count of rape in the first degree,<sup>1</sup> two counts of sodomy in the first degree,<sup>2</sup> and one count of unlawful transaction with a minor in the first degree.<sup>3</sup> The indictment charged that, in April of 1995, Morgan had raped his six-year old daughter, J.M.,<sup>4</sup> that Morgan had sexual contact with J.M. and with C.M., his nine-year

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<sup>1</sup> KRS 510.040.

<sup>2</sup> KRS 510.070.

<sup>3</sup> KRS 530.064.

<sup>4</sup> In accordance with this Court's policy, the children shall be referred to only by their initials.

old son, and that Morgan had forced C.M. and J.M. to engage in sexual activity with each other. The matter proceeded to a jury trial in July of 2001. At the close of proof, the trial court directed a verdict for Morgan on the two sodomy counts and dismissed the unlawful-transaction charge. Subsequently, the jury acquitted Morgan on the rape charge, but convicted him of sexually abusing J.M. The jury fixed Morgan's sentence at five years imprisonment, which the trial court imposed.

On appeal, Morgan argues that the trial court erred by allowing hearsay testimony from a psychologist and a police officer which bolstered the victim's testimony. He also asserts that the psychologist and the police officer improperly testified about post-incident behavioral symptoms as indicators of child sexual abuse. Lastly, Morgan contends that the Commonwealth failed to prove that the offenses occurred in Leslie County and that he was entitled to a directed verdict. Finding no error, we affirm.

The central issue in this case concerns the hearsay testimony by Dr. Sherry Baker, a psychologist who evaluated J.M. in 1995 and 1997, and by Detective James Glenn Caudill, a Kentucky State Police officer who investigated J.M.'s allegations against Morgan. At trial, J.M. testified that she was sexually abused by her father when she was five or six years old. Her brother, C.M., testified that while he had never witnessed Morgan

abusing J.M., Morgan had ordered him to have intercourse with J.M. and he did. C.M. recalled that this occurred when the family lived in a trailer by Stinnett School in Leslie County.

In mid-1995, J.M and C.M.'s mother left Kentucky with the children and took them to Ohio. Shortly thereafter, the children were placed in foster care under the auspices of the Ohio children's services agency. In September of 1995, J.M. was referred to Dr. Baker, a psychologist specializing in the evaluation and treatment of sexually abused children. According to Dr. Baker, J.M. made "tentative disclosures" of sexual abuse, but would then minimize it and give a benign explanation. Dr. Baker also observed that J.M. appeared completely unfeminine and used crude slang for private parts. Following this initial interview, Dr. Baker believed that J.M. had been sexually abused, but based on the inconclusive evidence she deferred an explicit diagnosis of sexual abuse.

In July of 1997, J.M. was removed from her foster-care placement in Ohio because of allegations of domestic abuse. She had also accused C.M. of sexually abusing her, and a medical examination at Cincinnati Children's Hospital revealed signs that J.M. had been recently abused. Shortly thereafter, Dr. Baker evaluated J.M. again. Dr. Baker testified that J.M.'s appearance during this interview was similar to her appearance during the 1995 evaluation, but J.M. did not use crude slang for private

parts. However, during this evaluation, J.M. made specific allegations of sexual abuse by both Morgan and C.M. J.M. reported that when she was six or seven years old, her father raped and sexually abused her. J.M. also told Dr. Baker that Morgan had forced C.M. and J.M. to engage in sexual activity with each other. At trial, Dr. Baker testified to her observations of J.M. and the statements made by J.M. during the evaluations. Dr. Baker also stated her opinion, based on her experience, observations and the other medical evidence, that J.M. had been sexually abused.

After J.M. made these allegations against Morgan, Detective Caudill was assigned to investigate the charges in Kentucky. At trial, Detective Caudill stated that he specializes in the field of child sexual abuse, that he had received specialized training in this subject, and that he had investigated over 2,000 such cases. Upon receiving the report, Detective Caudill met with the social workers and J.M. in Ohio. He testified that he was unable to pinpoint an exact date of the abuse because children usually have difficulty in remembering such details. However, based upon his interview with J.M., Detective Caudill testified that he was able to locate the trailer described by J.M. in Leslie County.

Morgan argues that the trial court improperly allowed Dr. Baker's testimony because it was based on cumulative hearsay

and constituted improper bolstering of J.M.'s trial testimony. He also objects to Dr. Baker's testimony regarding J.M.'s use of crude slang, physical appearance and "tentative disclosures" as indicators of sexual abuse. He asserts that this evidence was an attempt to introduce evidence of post-incident behavioral symptoms without any scientific foundation for showing that they are reliable indicators of sexual abuse. Similarly, he argues that Detective Caudill improperly bolstered J.M.'s trial testimony. Morgan also contends that Detective Caudill was not qualified to give an opinion about the memory of children.

At trial, however, Morgan only objected to Dr. Baker's and Detective Caudill's testimony on the grounds that it included hearsay and constituted improper bolstering of J.M.'s trial testimony. Thus, his other objections are not preserved for review.<sup>5</sup> Furthermore, we cannot find that admission of Dr. Baker's or Detective Caudill's testimony constituted "manifest injustice" so as to rise to the level of palpable error.<sup>6</sup> Our courts have consistently held that an accuser's post-incident behavioral symptoms are not scientifically reliable indicators of sexual abuse. The evidence is inadmissible when the expert testifies about the habit of a class of individuals either to

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<sup>5</sup> RCr 9.22.

<sup>6</sup> RCr. 10.26.

prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class because he or she acted the same way under similar circumstances.<sup>7</sup>

Nevertheless, a qualified expert may testify regarding accepted techniques for diagnosing sexual abuse, provided that the evidence is relevant in determining the cause of a physical condition in order to understand the evidence and determine the ultimate fact in issue and that the prejudicial effect of such evidence does not outweigh its probative value.<sup>8</sup> In this case, Dr. Baker did not testify that J.M.'s behavior was consistent with other children who have been sexually abused. Rather, Dr. Baker testified regarding her methods in diagnosing sexual abuse in children, and to her observations regarding J.M.'s appearance, demeanor, and conduct during the evaluation. Similarly, Detective Caudill testified that, in his experience, young children have difficulty remembering the specific dates when abuse occurred unless it can be associated with particular events or seasons. In the absence of a specific objection to this testimony, we cannot find that this evidence rendered Morgan's trial manifestly unfair.

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<sup>7</sup> Miller v. Commonwealth, Ky., 77 S.W.3d 566, 572 (2002).

<sup>8</sup> Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 890 (1997).

Morgan's motions *in limine* preserved his objections to the hearsay testimony in Dr. Baker's and Detective Caudill's testimony. Nevertheless, we find no error. Hearsay testimony of social workers, psychologists, and police officers is inadmissible to the extent that it unfairly bolsters the testimony of the alleged victim.<sup>9</sup> However, KRE 801A(a)(2) permits admission of a prior consistent statement if it is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." The exception generally applies only if the prior consistent statement predated the improper motive or influence alleged to have produced it.<sup>10</sup>

Morgan asserts that he never alleged that J.M.'s accusations of sexual abuse were recently fabricated. But he did argue that J.M. had mistakenly identified him as the perpetrator, and that J.M.'s trial testimony had been coached by her adoptive mother. J.M.'s prior consistent statements in 1997 would tend to

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<sup>9</sup> Smith v. Commonwealth, Ky., 920 S.W.2d 514 (1995); 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); Bussey v. Commonwealth, Ky., 697 S.W.2d 139, 141 (1985).

<sup>10</sup> Smith v. Commonwealth, Ky., 920 S.W.2d 514, 517 (1995); *citing* Tome v. United States, 513 U.S. 150, 167, 115 S. Ct. 696, 705, 130 L. Ed. 2d 574 (1995) (interpreting FRE 801(d)(1)(B)).

refute Morgan's insinuation that J.M.'s testimony was coached. To this extent, Dr. Baker's testimony about J.M.'s accusations was properly admitted as a prior consistent statement. Furthermore, we agree with the Commonwealth that KRE 803(4) permits introduction of hearsay "[s]tatements 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." Under the circumstances, we cannot find that the prejudicial effect of this testimony outweighed its probative value.<sup>11</sup>

As for Detective Caudill's testimony, we question whether it even implicated the hearsay rule. Detective Caudill testified that he had received a report from the Ohio social workers that J.M. had accused Morgan of sexually abusing her, that J.M. had corroborated those accusations during his interview with her, and that based upon her statements he had located the trailer described by J.M. in Leslie County. Detective Caudill merely explained what he did during the course of his investigation without referring to what J.M. had told him except in general terms.

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<sup>11</sup> See Garrett v. Commonwealth, Ky., 48 S.W.3d 6, 14 (2001).

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 and the taking of that action is an issue in the case. 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, and then only if there is an issue about the police officer's action.<sup>12</sup> We conclude that Detective Caudill's testimony was properly admitted.

Finally, Morgan asserts that the trial court erred by denying his motion for a directed verdict because the Commonwealth failed to prove that the charged offenses were committed in Leslie County. As noted above, the indictment charged that Morgan committed the offenses in Leslie County around April of 1995. There was evidence that the family had lived in Leslie County in 1994. However, there also was considerable evidence that they had moved to Laurel County in late 1994 or early 1995. In addition, Morgan presented evidence that he was incarcerated for most of April of 1995. Morgan also points out that J.M. was not sure whether the trailer where the abuse occurred was located in Leslie County. Thus, he contends

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<sup>12</sup> Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988).

that the Commonwealth could not prove that any abuse occurred in Leslie County.

As Morgan correctly notes, the Commonwealth bears the burden of proving each element of the charged offense, including venue.<sup>13</sup> We would also point out that the purpose of an indictment is to inform an accused individual of the essential facts of the charge against him so he will be able to prepare a defense.<sup>14</sup> Due process and fundamental fairness require the Commonwealth to give a defendant adequate notice of the time frame when the charged offenses are alleged to have occurred. Otherwise, a defendant would be unable to adequately prepare for trial.

Nonetheless, the Commonwealth is not required to prove the specific date of the offense unless time is a material element of the offense.<sup>15</sup> J.M. testified that the abuse occurred in the trailer; C.M. testified that he remembered that the trailer was located near the Stinnett School; and Detective Caudill testified that he located a trailer meeting that description near Stinnett in Leslie County. Although it appears unlikely that any abuse occurred in Leslie County during April of

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<sup>13</sup> Miller v. Commonwealth, 77 S.W.3d at 576; Brown v. Commonwealth, Ky., 890 S.W.2d 286, 288 (1994).

<sup>14</sup> Malone v. Commonwealth, Ky., 30 S.W.3d 180, 182 (2000).

<sup>15</sup> Stringer, 956 S.W.2d at 886.

1995, there was substantial evidence to support the jury's conclusion that Morgan sexually abused J.M. in Leslie County. The testimony concerning when the abuse occurred was not so vague as to deprive Morgan of a reasonable opportunity to present a defense or to cast doubt on the integrity of all of the evidence. Therefore, the trial court did not err in denying the motion for a directed verdict.<sup>16</sup>

Accordingly, the judgment of conviction by the Leslie Circuit Court is affirmed.

ALL CONCUR.

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<sup>16</sup> Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).