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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000855-MR

MICHAEL CURRY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CR-001738

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.

TACKETT, JUDGE: Michael Curry appeals from a judgment of the Jefferson Circuit Court convicting him of second-degree sexual abuse and sentencing him to twelve months' incarceration, six months to serve and six months probated. Curry was tried by a jury after S.H., a thirteen year-old girl, accused him of fondling her while she tried to sell him a newspaper subscription. At issue are the admissions of evidence regarding a similar act with a different victim, hearsay testimony from S.H.'s boss, and Curry's own statement to police given without

the officer warning Curry of his privilege against self-incrimination. After a careful examination of the arguments raised by Curry, we affirm the judgment of the trial court.

On June 5, 2001, Tom Cox drove a group of teenagers to the Shively area of Jefferson County to sell subscriptions to The Courier-Journal. S.H. was dropped off at the Heather Apartments where she knocked at the door to apartment #1. While she was standing there, two men approached and one of them, Curry, opened the door to the apartment and went inside with S.H. to get his checkbook and fill out a subscription form. Curry then began asking S.H. inappropriately suggestive questions and tried to hug and kiss her. As she was struggling to get away, Curry grabbed her buttocks and fondled her breasts. S.H. then kicked him, hit him with the apartment door and ran outside. She took shelter in a nearby apartment while waiting for Cox to pick her up. When he arrived, some twenty-five minutes after dropping her off, S.H. was visibly upset and had been crying. Cox overheard her telling the other teenaged employees what had happened to her so he called the police. Sergeant Steve Skaggs arrived at the Heather Apartments and took S.H.'s statement. He then knocked on the door to apartment #1 and left a card when no one answered.

After finding Skaggs' card attached to his door, Curry contacted Skaggs who asked him to come to the police station to

discuss S.H.'s accusations. Curry drove to the Shively Police Department and was taken into the criminal investigations office to be interviewed by Skaggs. The officer informed Curry that he was not under arrest and did not have to speak with police if he did not want to; however, Skaggs did not explicitly give Curry a standard warning pursuant to Miranda v. Arizona, 384 U.S.436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The interview was tape recorded without Curry's knowledge. Curry stated that he thought S.H. was fourteen or fifteen and he was thirty-two years old. He admitted being attracted to the girl, but denied kissing her. Curry said that he had touched her breasts and buttocks while they were both in the apartment's doorway; nevertheless, he claimed the contact was accidental. At the conclusion of the interview, Curry left the police station and drove himself home. Later that night, S.H.'s mother filed a criminal complaint against Curry on behalf of her daughter and he was arrested.

A Jefferson County Grand Jury indicted Curry on July 19, 2001, and charged with him one count of first-degree sexual abuse, a Class D felony. The case was tried by a jury on January 22-23, 2003. Although Curry did not testify, his statement to Skaggs was admitted into evidence after the trial court denied his suppression motion. In addition, evidence of a similar bad act, pursuant to Kentucky Rule of Evidence (KRE)

404(b), and Cox's hearsay testimony regarding S.H.'s account of the events to the other teenagers were admitted over Curry's objection. The jury convicted Curry of the misdemeanor offense of second-degree sexual abuse, and this appeal followed.

Curry first argues that the trial court erroneously failed to suppress Curry's statement to Skaggs due to the officer's failure to advise Curry of his rights under Miranda. Although he did not testify during his trial, Curry's statement, in which he admitted his attraction to S.H. and claimed that his inappropriate touches were accidental, was admitted as evidence. Curry did testify during his suppression hearing and stated that he voluntarily called Skaggs, drove himself to the police station, and was allowed to leave afterwards. Moreover, Curry stated he knew he could have called a lawyer and was familiar with his rights due to other experiences with the court system. The trial court correctly concluded that Curry's statement was admissible without a Miranda warning because it was not the result of a custodial interrogation. Little v. Commonwealth, Ky. App., 991 S.W.2d 141 (1999). Moreover, the trial court's rulings on evidentiary matters are not to be disturbed on appeal absent abuse of discretion. Commonwealth v. English, Ky., 993 S.W.2d 941 (1991).

In addition, Curry contends that the trial court erred in allowing the Commonwealth to introduce evidence in its case

in chief regarding another allegation of sexual misconduct. Prior to his trial, the Commonwealth filed a notice of its intent to introduce evidence of other bad acts pursuant to KRE 404(b). The trial court overruled Curry's objection and allowed evidence of an event which occurred in January 2002 when he babysat thirteen year-old K.R. and her younger brother. K.R.'s mother, Kelly, was evidently aware that Curry had previously been charged with sexual abuse and had reservations about allowing him to watch her children. Curry, in order to induce Kelly to leave K.R. and her brother in his care, falsely told Kelly that the charge regarding S.H. had been dismissed because he was innocent. While Curry was babysitting, he began asking K.R. inappropriately suggestive questions. He then kissed her on the mouth and she left the room. Later, he caught her in the hallway, pushed her against the wall and touched her breasts and buttocks. She escaped to her bedroom and remained there until her mother came home.

When Kelly returned home, K.R. went upstairs to spend the night in her grandmother's apartment. After hearing what Curry had done, the grandmother called Kelly to come up and K.R. told her mother what had happened. Kelly returned to her apartment in a rage and began hitting Curry. He stated that he "didn't do it" before Kelly even told him what the accusation

against him was. All of this evidence was admitted through the trial testimony of K.R. and her mother.

KRE 404(b) forbids the admission of evidence of other bad acts by a defendant in order to prove his character; however, subsection (1) allows such evidence "if offered for some other purpose such as proof of motive, opportunity, intent preparation, plan, knowledge, identity, or absence of mistake or accident." Curry argues that the evidence regarding his actions towards K.R. was not relevant except to show that he had a criminal disposition. We disagree. Both incidents involved thirteen year-old girls. On both occasions, Curry began with inappropriately suggestive questions, then progressed to kissing the girls and touching their breasts and buttocks. Moreover, since Curry did not testify at trial, the only account of the incident involving S.H from his perspective came from the taped statement that Curry made to Skaggs. In that statement, Curry claimed that the inappropriate physical contact with S.H. was an accident and apologized if he had inadvertently offended her in any way. The evidence of Curry's behavior toward K.R., which was remarkably similar to the allegations against him in the case involving S.H., was properly admitted pursuant to KRE 404(b)(1) to contradict his defense of accident in the case of S.H.

Finally, Curry claims that the trial court erroneously admitted the hearsay testimony of S.H.'s employer regarding her allegations against him. The trial court admitted Cox's testimony regarding S.H.'s accusations against Curry under the excited utterance exception to the rule excluding hearsay evidence. KRE 803 (2) describes this exception as allowing admission of a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Cox testified that he returned to Heather Apartments approximately twenty to twenty-five minutes after dropping S.H. off, that she was upset and crying when he picked her up, and that he overheard her describe a sexual assault to the other teenaged workers which prompted him to contact the police. Among the factors that trial courts will consider when determining whether hearsay evidence is admissible under the excited utterance exception is the length of time between the statement and the occurrence, the inducement to fabricate, the excitement of the declarant, the visible evidence of the occurrence, whether the statement was made in response to a question, and whether it is self-serving or against the interests of the declarant. Jarvis v. Commonwealth, Ky., 960 S.W.2d 466 (1998); Souder v. Commonwealth, Ky., 719 S.W.2d 730 (1986). Curry points out that there was no visible evidence that S.H. had been assaulted, that

she was old enough to fabricate a story of assault, that she waited for Cox inside another tenant's apartment and did not mention the assault or ask to contact police, and that Cox asked her what the matter was. However, the trial court also considered that twenty minutes was not too long to be under the stress of a sexual assault, that S.H. was visibly upset and crying when Cox picked her up, that she made the accusation against Curry as soon as she had contact with people whom she knew, and that she had nothing to gain from fabricating an assault by a total stranger. After weighing all of these factors, we are unable to say that the trial court's decision to admit Cox's brief testimony was clearly erroneous.

For the forgoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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