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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001430-MR

ROBERT MARION SMITH

APPELLANT

V. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHILIP R. PATTON, JUDGE
INDICTMENT NO. 02-CR-00113

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: GUIDUGLI, JOHNSON, AND MINTON, JUDGES.

MINTON, JUDGE: Robert Marion Smith was tried for sex crimes involving two alleged victims in a single jury trial. The jury convicted him of the charges related to one but acquitted him of the charge related to the other. Smith raises on appeal the trial court's denial of his motion for separate trials on the charges relating to each victim. For a single trial on all of these charges to be appropriate, a striking factual similarity must exist between the alleged victim's accounts. We hold that

the two victims' accounts lacked sufficient similarity for the charges to be combined in one trial. So we reverse the convictions and remand the case for a new trial.

The charges against Smith were brought in a single, four-count indictment. The indictment charged Smith with first-degree sexual abuse¹ (Count 1) involving his girlfriend's son, T.J. It also charged Smith with third-degree sodomy² (Count 2) and third-degree sexual abuse³ (Count 3), and both involved a teenaged boy named J.C. The final count (Count 4) charged Smith with being a second-degree persistent felony offender (PFO)⁴ for a prior sodomy conviction.

On the morning of trial, Smith's counsel filed a written motion to sever the count relating to T.J. from the counts relating to J.C. The motion cited Ky. R. Crim. P. (RCr) 9.16 as authority for severance and stated: "Defendant states as grounds for this Motion that he will be prejudiced by a joinder of these Counts for trial." Minutes before the trial began, the court heard the motion in chambers and denied it. The court noted that the indictment had been pending for some 15 months and ruled the motion to sever as made too late.

¹ Kentucky Revised Statutes (KRS) 510.110

² KRS 510.090.

³ KRS 510.030.

⁴ KRS 532.080.

T.J. and J.C. both testified at trial. T.J. stated that during the summer of 1999, while he was eight years old, Smith twice touched his genital area through his clothing. Both of these incidents occurred at the motel where Smith was living. One incident occurred in the yard while Smith and T.J. were sitting together on a riding lawnmower. The second incident occurred while they were in the motel swimming pool. J.C. testified that on January 27, 2002, while he was 14 or 15 years old, he stayed overnight with Smith in the motel room. Smith first gave J.C. enough beer for J.C. to become intoxicated. Smith touched J.C.'s genitals, and engaged in anal intercourse with and oral sodomy of J.C.

The jury convicted Smith of the charges relating to J.C. and acquitted him of the charges relating to T.J. The jury also found Smith to be a PFO and fixed an enhanced penalty. In the final judgment, the Court imposed the penalty recommended by the jury: confinement for up to ten years. Smith appeals to this court as a matter of right.

RCr 6.18 provides for joinder of two or more offenses as separate counts in the same indictment if they are "of the same or similar character." RCr 9.16 requires a separate trial for counts joined in an indictment if it appears that a joinder would be prejudicial to the accused or to the Commonwealth. Under the latter rule, the severance motion is timely if made

before the jury is sworn. As the Commonwealth concedes, Smith's motion here was not untimely.⁵

We recognize that the trial judge has broad discretion in deciding if a motion for separate trials should be granted or denied, and its decision will not be overturned absent a showing of clear abuse of that discretion.⁶ The question is whether the joinder of the offenses resulted in undue prejudice to the accused.⁷ "The primary test for determining whether joinder constitutes undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other."⁸ Evidence of other sex crimes committed by the accused may be admissible at trial if offered to show intent, motive, identity, knowledge, absence of mistake, or common scheme or plan.⁹ In order for evidence of prior sexual misconduct to be relevant and not unduly prejudicial, the acts must be sufficiently similar and not too remote in time to one another.¹⁰

⁵ Brief for Appellee at 16.

⁶ Violett v. Commonwealth, Ky., 907 S.W.2d 773, 775 (1995).

⁷ Roark v. Commonwealth, Ky., 90 S.W.3d 24, 28 (2002).

⁸ *Id.*

⁹ Commonwealth v. English, Ky., 993 S.W.2d 941, 943 (1999).

¹⁰ *Id.*

In the case at hand, we are not so much concerned with the temporal remoteness issue as we are with the lack of striking similarity between the versions related by the two alleged victims. In Rearick v. Commonwealth,¹¹ our Supreme Court held that it was error not to sever charges of sexual touching, indecent exposure to, and removal of the clothing of a female friend's daughter from charges of multiple acts of anal intercourse with a son and from charges of indecent exposure to and sexual touching of a six-to-eight-year-old girl. And in Billings v. Commonwealth,¹² the court held that it was error to admit evidence that the defendant sexually touched and indecently exposed himself to the victim's younger sister and that he encouraged a younger sister to watch sexually explicit movies in the trial of an indictment charging him with oral sodomy of his thirteen-year-old stepdaughter.

The Commonwealth argues sufficient similarity lies in the fact that both victims were males, all incidents happened inside or outside a motel where Smith stayed, and all allegations involved some form of sexual touching. We disagree. Evidence of Smith's touching of the prepubescent T.J. on the outside of his clothing while riding on a lawnmower or while scuffling in the swimming pool would not have been admissible

¹¹ Ky., 858 S.W.2d 185, 188 (1993).

¹² Ky., 843 S.W.2d 890, 894 (1992).

evidence of *modus operandi* in a separate trial for the touching, anal intercourse, and oral sodomy perpetrated upon the drunken J.C. during the overnight stay in the motel room. To admit T.J.'s version of events as evidence in a separate trial for charges arising out of J.C.'s version of events would impermissibly serve to prove Smith's criminal disposition. The failure to sever fails the primary test for prejudice. Thus, we hold that the trial court erred when it denied the motion to sever the trial of Count 1 from Counts 2 and 3.

Accordingly, we reverse Smith's third-degree sodomy, third-degree sexual abuse, and PFO convictions; and we remand this case to the trial court for a retrial on these charges. Because Smith was acquitted of first-degree sexual abuse, he cannot be retried on that charge. Because we have resolved the case in this manner, we do not reach Smith's other arguments.

ALL CONCUR.

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