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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001928-MR

J.V. APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 03-CR-00030 & 01-CR-00053

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

TACKETT, JUDGE: J.V. appeals from a judgment of the Clinton Circuit Court finding him guilty of three counts of second-degree rape, one count of third-degree rape, four counts of incest, and one count of first-degree sodomy and sentencing him

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to fifteen years' imprisonment. Appellant claims that the trial court denied him the ability to present a defense by disallowing certain evidence which may have accounted for his daughter's vaginal trauma. In addition, he complains that the evidence was insufficient to prove first-degree sodomy and that the jury instructions allowed the jurors to convict him of the remaining charges without reaching a unanimous verdict. We disagree and, thus, the judgment of the trial court is affirmed.

The Appellant did not learn of the existence of his daughter until she was nine or ten years old. Prior to obtaining custody of her, J.V. underwent rigorous counseling and parenting classes. His daughter, A.V., had allegedly been sexually abused by male family members as a young child and was placed in foster care when she was five. She had a history of touching other children inappropriately and had made claims of abuse against a foster parent. Nevertheless, after her mother's parental rights were terminated, Appellant took the girl into his home and attempted to raise her. Three years later, A.V. told a friend that she had been having sexual intercourse with her father. She then repeated the allegation to someone at school and to her therapist. A.V.'s complaints were reported to law enforcement for investigation. Dr. Betty Spivack examined A.V. and found several notches and a thinning in her hymen, coupled with a history of painful urination often referred to as

honeymoon cystitis. Her diagnosis was that A.V. had suffered from multiple penetrating traumas. During the course of the investigation, Appellant was interviewed by Detective Tony Wells. J.V. stated during the interview that, as far as he knew, his daughter was still a virgin, he was unaware of her having boyfriends and that she had never threatened to get even with him. As a result of the investigation, A.V. was once again placed in foster care and her father was charged with thirty-six counts of rape, thirty six counts of incest and one count of sodomy for the offenses committed against her.

Appellant filed a pretrial motion asking the trial court to declare the fifteen year-old A.V. incompetent to testify. After a hearing, the motion was denied. During the trial, Appellant unsuccessfully sought to introduce impeachment evidence from a friend of A.V.'s who was prepared to testify to being told about a sexual encounter between A.V. and a boy identified only by his initials, N.R. This testimony was preserved by avowal. The trial court also refused Appellant's request to introduce allegations of sexual abuse against one of A.V.'s foster fathers. Appellant's motion to grant a directed verdict based on the insufficiency of the evidence to prove that he used force to commit first-degree sodomy was also denied. At the close of the evidence, the Commonwealth moved to dismiss numerous counts of the indictment, and the jury was instructed

on only the following counts: two first-degree rape counts, one second-degree rape count, four incest counts, and one first-degree sodomy count. Appellant was convicted of all nine counts and sentenced to fifteen years' imprisonment. This appeal followed.

J.V. first contends that the trial court denied him his constitutional right to present a defense. He points to the trial court's refusal to allow him to introduce testimony from A.V.'s friend to the effect that A.V. had sex with N.R., as well as the denial of Appellant's request to introduce evidence regarding A.V.'s various foster home placements. Appellant's theory of the case was that A.V. had been sexually molested since she was a very young child and this in turn led her to engage in sexual activity as a teenager. J.V. intended to show that A.V. concocted her allegations of sexual abuse against him to teach him a lesson because he had restricted her from dating due to her sexual activity with older boys.

Appellant was allowed to present evidence supporting his defense that A.V. had fabricated the allegations against him. He introduced portions of letters A.V. wrote to him after she was removed from his home. In these letters, A.V. apologized for what she had done to him and stated that she had recanted the allegations, but her social workers would not listen. In addition, the jury heard that A.V. had told one of

her school friends that she made up the accusations against her father. A.V. testified that she had done so because this friend was telling other schoolmates that A.V. was lying about having sex with her father and A.V. was losing her other friends as a result. A.V. was extensively cross-examined about inconsistencies in the accounts she had given the investigating officer and her social worker. We note that Appellant's own statement to Detective Wells does not appear to tally with his defense strategy. The jury heard the taped statement wherein J.V. said his daughter had never threatened to get even with him and he believed her to still be a virgin. Further, Appellant asked the detective whether it would be possible to tell if A.V. had had sex with a boy or a man. The jury was also told that A.V. admitted having sex with two boys. On appeal, he argues that he should have been allowed to introduce additional evidence regarding A.V.'s sexual activity.

Kentucky Rule of Evidence (KRE) 412 limits admission of evidence regarding a rape victim's other sexual activity. One exception allows the defendant to introduce specific instances of sexual activity "offered to prove that a person other than the accused was the source of semen, injury. . ." Dr. Spivack's medical testimony indicated that A.V. had been vaginally penetrated repeatedly over a period of time. She expressed her opinion that more than one or two episodes of

sexual intercourse would have had to occur to cause the damage she observed to A.V.'s hymen. A.V. admitted that she had engaged in sexual intercourse with two boys, but after Dr. Spivack's testimony, Appellant sought to introduce testimony from one of his daughter's friends that A.V. had engaged in sexual intercourse, on one occasion, with a third boy. This girl testified on avowal that A.V. had told her about this sexual encounter; however, A.V. was never asked on cross-examination about this incident. Appellant argues that the evidence was relevant, under KRE 412, to show that he was not the source of the injury to her hymen and also to impeach testimony that, besides her father, she had only sex with two boys. We note that Appellant never attempted to ask A.V. about this incident when she testified. Thus, the trial court committed no error in refusing to allow the defense witness to give hearsay testimony to the effect that A.V. had an additional sex partner. He also argues that KRE 412 does not apply to minors, but we are unpersuaded by this contention.

In addition, Appellant attempted to ask A.V. about the foster placements prior to the time she was in his custody. J.V. claims that A.V. also accused one of her foster fathers of sexual abuse. He wanted to place this evidence before the jury to demonstrate that his daughter had a history of accusing people of sexual abuse to get what she wanted. The trial court

sustained the Commonwealth's objection to this line of questioning and Appellant made no attempt to place the evidence into the record by avowal. Since we have no record to review in determining whether the trial court erred in excluding this evidence, we are required to uphold its decision. Caudill v. Commonwealth 777 S.W.2d 924 (Ky. 1989).

Appellant next complains that the trial court erroneously denied his motion for a directed verdict on the charge of first-degree sodomy. Kentucky Revised Statute (KRS) 510.070 defines first-degree sodomy as follows:

> 1) A person is guilty of sodomy in the first degree when:
> (a) He engages in deviate sexual intercourse with another person by forcible compulsion; or
> (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:
> 1. Is physically helpless; or
> 2. Is less than twelve (12) years old.
>
> 2) Sodomy in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

The indictment charged that J.V. had engaged in sodomy by forcible compulsion. The evidence established that Appellant pulled A.V.'s head down and inserted his penis into her mouth against her will. KRS 510.010(2) defines forcible compulsion as

> physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to

> self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition[.]

Appellant argues that his actions did not place his daughter in fear of immediate death or physical injury; thus, he used no force to commit the offense. The language of the statute does not require that a victim be placed in fear if actual physical force was used, nor does it require physical resistance on the part of the victim. The test of a directed verdict on appeal is whether the evidence was sufficient to induce belief beyond a reasonable a doubt in the mind of a reasonable juror. Benham v. Commonwealth, 816 S.W.2d 186 (Ky. 1991). The evidence in this case, that J.V. pushed his daughter's head down and placed his penis in her mouth against her will, was sufficient to support the jury's decision to convict him of first-degree sodomy by forcible compulsion.

J.V.'s third argument is that none of the verdicts against him were unanimous. He likens his case to the practice condemned by the Kentucky Supreme Court in Miller v. Commonwealth, 77 S.W.3d 566 (Ky. 2002), wherein the trial court arrived at the number of counts to include in the jury instructions by multiplying the number of times per week the victim claimed her father had molested her by the number of weeks that she was in his home. In addition, the jury

instructions allowed guilty verdicts for first-degree rape based on the victim's age or the fact that she was subject to forcible compulsion. The Kentucky Supreme Court found that the trial court had erred by instructing the jury on two separate offenses: forcible rape, a Class B felony, and rape of a child under twelve, a Class A felony. The jury was not required to distinguish whether Miller was being convicted of forcible rape or statutory rape, and there was insufficient evidence to support convictions under both theories. The Miller Court also held that the number of offenses did not correlate to any specific acts testified to by the victim. One of offenses committed by J.V. occurred in 1999, the remaining offenses took place in August 2000. The jury was not instructed on alternate theories in this case as all of the rape counts were premised on A.V. being statutorily unable, due to her age, to consent to sex, and the incest counts were all premised on Appellant's knowledge at the time of the sexual contact that A.V. was his daughter. With regard to the August 2000 offenses, A.V. testified that Appellant had sex with her twice a day for five or six days in a row. However, her testimony also indicated that specific sex acts occurred each day. The number of offenses derived from A.V.'s testimony was not a "[m]ere mathematical extrapolation of a described offense based on such vague

testimony as "almost every other weekend," "about ten weeks per year," or "every other time".” Miller at 576.

Appellant next claims that the trial court erroneously refused to find A.V. incompetent to testify. KRE 601 states as follows:

> (a) General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.
> (b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:
> (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
> (2) Lacks the capacity to recollect facts;
> (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
> (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

J.V. argues that A.V. lacked the capacity to tell the truth due to her history of abuse as a very young child and somewhat low intelligence. He bases his argument on a conversation between A.V. and a counselor. A.V. explains that telling the truth means that, when you tell one person something, you tell others the same thing. Under questioning by her counselor, A.V. did not differentiate between sticking to a false story and being consistent in telling a true one. The trial court conducted a hearing to determine whether A.V. understood her obligation to testify truthfully. After obtaining truthful answers to several questions, the judge explained to A.V. that she must testify

truthfully regardless of others' feelings. It was apparent during the trial that A.V. understood her obligation to testify truthfully. More than once she explained discrepancies between her trial testimony and previous statements by explaining that she had taken an oath and had to testify truthfully.

Appellant's final two arguments concern statements made by the prosecutor. He first contends that the trial court should have declared a mistrial when the prosecutor identified Appellant's counsel as a public defender. Counsel requested and obtained an admonition to the jury to disregard the statement, and that is presumed to cure any error. Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987). Next, he claims that the Commonwealth unfairly shifted the burden of proof onto him during closing arguments. The prosecutor made remarks to the effect that J.V. was responsible for the injuries to his daughter's hymen and that, if someone else had caused them, why had the defense failed to subpoena the perpetrator. Appellant contends that the prosecutor acted in bad faith because he knew that there were allegations that A.V. had been sexually active with another boy besides the two testified about at trial. Defense counsel's closing argument attempted to paint A.V. as a promiscuous teen, pointing out that Dr. Spivack could not state when or by whom the injuries were inflicted. Appellant argued that A.V. had told the jury who damaged her hymen when she

testified that she had sexual intercourse with two different boys on one occasion each. This argument ignored the fact that Dr. Spivack had specifically excluded two incidents of sexual intercourse as being sufficient to account for A.V.'s injuries. While the Commonwealth may not comment on a defendant's failure to testify, it is permissible to question the defense's failure to produce other witnesses to support its arguments. The Commonwealth's arguments did not cause the trial to be fundamentally unfair to Appellant. Lynam v. Commonwealth, 565 S.W.2d 1414 (Ky. 1978).

For the foregoing reasons, the judgment of the Clinton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Astrida Liana Lemkins
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky