

RENDERED: NOVEMBER 4, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002422-MR

FLOYD MIKE JONES, III

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE SAM H. MONARCH, JUDGE  
ACTION NO. 01-CR-00117

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: Floyd Mike Jones appeals from a judgment convicting him of incest, thirteen counts of third-degree sodomy, eight counts of third-degree rape and one count of bribing a witness for which he was sentenced to a total of ten years' imprisonment. In support of his contention that he is entitled to a new trial, appellant argues that the trial judge erred in limiting the trial testimony of his DNA expert

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and in allowing the Commonwealth to introduce irrelevant and highly prejudicial pornographic images into evidence. Finding no reversible error in either contention, we affirm the judgment of conviction.

The charges against appellant were predicated upon allegations by his step-daughter that he had subjected her to oral sex and intercourse on several occasions commencing when she was fifteen years old and continuing at least monthly for approximately one year. After the final episode of abuse, the victim informed her mother who took the child to Hardin Memorial Hospital where she was examined by a doctor and ultimately interviewed by a detective with the Kentucky State Police. Two Commonwealth experts and one defense expert testified at trial concerning the evidence collected in the physical examination of the victim. A forensic examiner for the Kentucky State Police stated that his examination of vaginal swabs and a vaginal smear taken from the victim revealed the presence of semen on those items. The Commonwealth's DNA expert testified that DNA testing using the "PCR" method enabled him to recover male DNA from one of the vaginal swabs and that comparison of that DNA with a sample supplied by appellant produced a match. The expert also stated that the probability of obtaining such a match was approximately one in 15 million. Appellant attempted to rebut this testimony by calling its own DNA expert, Dr. Yuri

Melekovets. However, prior to his taking the stand, the trial judge admonished Dr. Melekovets to limit his testimony to the one page report disclosed to the Commonwealth prior to trial.

Dr. Melekovets testified that his lab also performed DNA testing on the samples which led him to conclude that there was no male DNA on the vaginal swabs taken from the victim. By avowal, Dr. Melekovets offered his opinion that Y-chromosome typing must be utilized when examining a mixed DNA sample and that the failure to utilize this procedure would produce unreliable results. Relying solely upon his review of a one page report from the Fairfax Laboratory which conducted the DNA testing for the Commonwealth, Mr. Melekovets also expressed the opinion that the Commonwealth's expert had failed to use the Y-chromosome typing procedure.

The other evidence pertinent to this appeal involves certain pornographic images retrieved from appellant's computer. After the victim testified that it was appellant's practice to show her pornographic material prior to each episode of abuse in order to get her to relax so that she would enjoy the experience, pornographic images taken from the hard drive of his desktop and laptop computers were introduced into evidence. After being forced to concede that these images might be relevant because of the victim's testimony as to how the abuse occurred, the defense sought to limit the amount of the material

admitted due to its highly prejudicial nature. Although the trial judge concluded that the probative value of the evidence outweighed its potential for prejudice, he agreed to monitor the evidence as it was presented and to cut off the viewing if it continued too long or became abusive. As previously noted, the limitations placed upon the testimony offered by appellant's DNA expert and the introduction into evidence of certain pornographic material taken from his computers form the basis of this appeal.

Review of the substantial record in this case makes clear that, long before commencement of the trial, discovery problems were a matter of concern to the trial judge. After discovery problems had caused the trial to be postponed on two occasions, the trial judge made both sides well-aware of their disclosure responsibilities and the fact that violations would not be tolerated. Although the defense provided the Commonwealth with a copy of Dr. Melekovets' report on his DNA analysis, it gave no indication of an intent to utilize his statements criticizing the testing procedures employed by the Commonwealth's expert. After the Commonwealth released its expert to return to Virginia, defense counsel disclosed the true scope of the testimony it intended to elicit from Dr. Melekovets. We are convinced that the trial court's decision to exclude the undisclosed opinion evidence falls squarely within

the analysis of RCr 7.24 by which the Supreme Court of Kentucky concluded that a similar violation was cause for exclusion:

All things considered, we conclude that the serologist's conclusion [that faint traces of blood found on the defendant's hands and arms was attributable to his having washed away the blood that could have been expected from the victim's wounds] was admissible as opinion evidence, but the appellant was entitled under RCr 7.24 to be confronted with the fact that this opinion would be presented against him before the trial started so that he had a reasonable opportunity to defend against the premise. RCr 7.24(1)(b) requires that on motion the Commonwealth must produce "results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case." The appellant moved for this discovery and was provided a report which did not include this significant piece of information, the expert's opinion as to what the physical findings indicated.<sup>2</sup>

We perceive the requirement for pre-trial disclosure of the substance of expert testimony to be a matter of fundamental fairness which has been codified in RCr 7.24 in order to provide each side with a reasonable opportunity to defend against the premise of the testimony and to avoid being ambushed through deliberate non-disclosure. It therefore appears clear to us that to allow appellant, with no prior notice, to attempt to discredit the testimony of the Commonwealth's expert, who had been discharged and had left the state, would have been

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<sup>2</sup> Barnett v. Commonwealth, 763 S.W.2d 119, 123 (Ky. 1988).

tantamount to countenancing sandbagging. The trial judge acted well within his authority under RCr 7.24(9) to preclude such a result. The jury was allowed to hear Dr. Melekovets' testimony as to the procedure he utilized in determining that no male DNA was present on the swab he examined. Appellant was simply prevented from gaining a tactical advantage by his violation of RCr 7.24.

Next, we turn to appellant's complaint that the introduction of pornographic images retrieved from his computers was barred by KRE 402 and 403. Arguing that many of the images shown the jury were irrelevant, appellant submits 1) that they should have been excluded in that they did not conform to the description of the pornographic images the victim claimed to have been forced to view immediately prior to the abuse; and 2) that the images of perverted sexual acts were so highly prejudicial that they could not withstand the balancing test required by KRE 403. We disagree.

First, we find no indication that this argument was ever presented to the trial judge for decision and thus has not been properly preserved for our review. In Garrett v. Commonwealth,<sup>3</sup> the Supreme Court rejected as unpreserved a complaint concerning the prejudicial impact of the failure to introduce the entirety of the victim's diary where that

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<sup>3</sup> 48 S.W.3d 6 (Ky. 2001).

particular theory for exclusion had not been presented to the trial court. In this case, appellant's arguments to the trial judge centered upon the volume of the images and the impact that would have upon the jury. Our review of the record disclosed no complaint that certain images were outside the scope of the victim's testimony as to how the abuse occurred. We will not predicate error on an alleged error which the trial judge had no opportunity to correct.

Furthermore, in light of the totality of the evidence presented, we find no reasonable probability that the result of the trial would be different had the disputed images been excluded. The jury had before it the victim's testimony that at the commencement of each incident of abuse, appellant would force her to view pornographic images, many of which were of young Asian women engaging in various sexual activities. Thus, most of the images shown the jury directly corroborated the testimony of the victim, who is of Asian descent. A forensic examiner testified to the presence of semen on a vaginal swab taken from the victim at the emergency room and a DNA analyst testified that the DNA on the swab matched appellant's profile. The jury also had before it a letter in which appellant offered the victim's mother a bribe in the form of financial incentives to end the prosecution. We therefore agree with the Commonwealth that based upon the totality of the evidence, any

error in the admission of images which did not technically support the victim's testimony must be considered harmless.

The judgment of the Meade Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alec G. Stone  
Brandenburg, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Wm. Robert Long, Jr.  
Assistant Attorney General  
Frankfort, Kentucky