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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000039-MR

EDGAR A. SCOTT

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 03-CR-00666

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

KNOPF, JUDGE: Edgar Scott appeals from a judgment of the Fayette Circuit Court, entered December 16, 2003, sentencing him to five years in prison for the crime of first-degree sexual abuse as outlawed by KRS 510.110(1)(b). A jury found that Scott

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

had subjected a child under twelve to sexual contact. Scott maintains that he did not receive a fair trial because the trial court permitted one of the physicians who examined the child to testify that a normal exam was "consistent" with the allegations of abuse, and because the child's mother testified that she believed the child's allegations. Convinced that the physician's testimony was not improper and that the mother's testimony, to which there was no objection, did not render the trial manifestly unfair, we affirm.

The evidence at Scott's trial established that in April 2003 Scott was involved in romantic relationships with two women, R.P. and Z.T., and that he lived intermittently with each woman and with his mother. During the night of April 9 and the morning of April 10, 2003, Scott was staying with R.P. at her Lexington home. R.P. testified that when she came downstairs between 7:00 and 8:00 that morning she found her seven-year-old daughter, T.P., in the room where Scott slept, dressed in her nightgown but holding her underwear in her hand. She found Scott, clad in nothing but a robe, in the kitchen preparing food for the child. Her suspicions aroused, R.P. examined the child's pubic area and discovered what she believed to be unnatural redness.

Later that day, R.P. took her daughter to the emergency room at the University of Kentucky Medical Center

where she was examined by Dr. Travis Sewells. T.P. told Dr. Sewells, and later testified at trial, that early that morning Scott had awakened her and led her downstairs to the sofa-bed where he slept. There he had removed her underwear, applied Vaseline to his penis, had her lie on her stomach upon pillows he had arranged on the bed, placed his penis against her "bottom" and "shook" her. When he finished he kissed her on the cheek and told her he would get her something to eat. Shortly after that, her mother had come downstairs. Dr. Sewells noted an erythema, or patch of reddened skin, near the opening of T.P.'s vagina. He testified that such redness was a non-specific indicator of sexual abuse, because although it could have been caused by abuse such as T.P. described it could also have resulted from other things, such as an infection.

Based on statements by T.P. and R.P. and on Dr. Sewells's exam, the police arrested Scott on charges of rape, sodomy, and abuse. The grand jury indicted him for those offenses on June 3, 2003. In the meantime, about a week after Dr. Sewells's exam, T.P. was examined by a second physician, Dr. Deborah Stanley, a pediatrician who specializes in diagnosing and treating sexual abuse. She testified that aside from a couple of congenital variations, T.P.'s exam was normal. In particular, the redness noted by Dr. Sewells had resolved. When the Commonwealth asked Dr. Stanley if T.P.'s normal exam was

nevertheless consistent with a history of sexual abuse, Scott objected, on the ground that Dr. Stanley was being asked to give an opinion on the ultimate issue. The trial court overruled the objection, but the Commonwealth rephrased the question anyway and asked Dr. Stanley whether a normal exam ruled out the possibility of sexual abuse. The doctor answered that it did not; that in fact sexual abuse rarely resulted in an abnormal exam.

The Commonwealth's proof also included testimony by a forensic chemist who analyzed swabs taken within and near the opening of T.P.'s vagina. Neither swab indicated the presence of semen, but the exterior swab did indicate the presence of a lubricant such as Vaseline.

Scott presented evidence tending to show that his relationship with R.P. had been volatile and that she had been angry about his relationship with Z.T. That anger, he argued, had led her to fabricate the charges against him.

The trial court granted Scott's motion to dismiss the charges that he had sodomized or digitally abused T.P., and submitted only the rape charge to the jury. The jury convicted him of the lesser included offense of sexual abuse. Scott maintains that the trial court erred when it overruled his objection to Dr. Stanley's testimony to the effect that T.P.'s normal exam was consistent with the alleged abuse. He concedes

that a medical expert may offer an opinion that an injury or abnormality is "consistent with" an alleged history, but he insists that the rule should be different if the medical findings are normal. Otherwise, he claims, by a sort of legal legerdemain the negative finding of normality is made to seem positive evidence of the alleged crime. At least with respect to the facts of this case, we disagree.

In Stringer v. Commonwealth,² our Supreme Court abandoned the "ultimate issue" rationale for limiting expert testimony and held that a medical expert could offer an opinion that a given condition was consistent with an alleged history provided the testimony met the Daubert³ reliability standard, was relevant, and was likely to assist the trier of fact. Here Scott did not challenge the reliability of Dr. Stanley's findings or her opinion. Her findings were clearly relevant, moreover, as the normal exam tended, to some extent, to support an inference that no abuse had occurred. The Commonwealth was entitled, therefore, to attempt to counter such an inference by eliciting testimony concerning its strength, and in particular by eliciting testimony denying that the inference was conclusive. That was the import of the doctor's testimony that

² 956 S.W.2d 883 (Ky. 1997).

³ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

a normal exam did not rule out, or was consistent with, the alleged abuse. This testimony played exactly the same role as Dr. Sewells's testimony, in response to Scott's question, that the redness he had observed was not conclusive evidence of abuse, but was only consistent with it. Both testimonies were relevant and were likely to assist the jury as it sought to weigh the physical evidence. The trial court did not err, therefore, when it admitted Dr. Stanley's testimony over Scott's objection.

Soon after Scott's arrest and before his indictment, R.P. sent a letter to the district court judge who had set Scott's bail, in which she attempted to excuse Scott's alleged abuse, claimed to forgive him for it, and sought the judge's leniency on Scott's behalf. During R.P.'s direct examination, the Commonwealth asked her whether she had written such a letter and why. When R.P. admitted that she had written such a letter and explained that at the time she had been upset and confused, the Commonwealth asked whether the letter meant that she had doubted T.P.'s allegations. R.P. testified that the letter did not mean that; she had always believed that T.P. was telling the truth. When she wrote the letter, however, she was still under the influence of her relationship with Scott. Scott did not object to this line of questioning or to R.P.'s testimony vouching for T.P.'s honesty, but on appeal he contends that

R.P.'s vouching constitutes a palpable error that rendered his trial manifestly unfair. Again, we disagree.

As our Supreme Court has recently reiterated, we may grant relief for unpreserved evidentiary errors under either KRE 103(e) or RCr 10.26 only if the error was obvious and so serious as to manifestly affect the fairness, integrity, and public reputation of the proceeding. A palpable error must be more egregious than a reversible error, and its seriousness must be judged in light of the entire record. Generally this means that relief will not be available unless there is a substantial possibility that absent the error the result would have been different.⁴ The error Scott alleges does not meet this standard.

It is true, as he notes, that "[g]enerally, a witness may not vouch for the truthfulness of another witness."⁵ But even assuming that R.P.'s testimony violated this rule, we are not persuaded that the violation undermined either the integrity or the result of Scott's trial. This was not simply a swearing match between T.P. and Scott, wherein improper bolstering of T.P.'s testimony might have made a difference. Rather, T.P.'s testimony was substantiated by Dr. Sewells's finding of external

⁴ Ernst v. Commonwealth, 160 S.W.3d 744 (Ky. 2005); Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003).

⁵ Stringer v. Commonwealth, 956 S.W.2d 883, 888 (Ky. 1997); Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005); Moss v. Commonwealth, 949 S.W.2d 579 (Ky. 1997).

vaginal irritation, by the lab finding that a lubricant was present where T.P. said it should be present, and by R.P.'s testimony that she found T.P. near Scott's bed with her underwear removed. In light of this evidence we do not believe that the result would have been different even had R.P.'s vouching not occurred.

Because Scott's trial was thus not marred by palpable error, and because the trial court properly admitted Dr. Stanley's testimony opining that a normal physical exam was consistent with a claim of illegal sexual contact, we affirm the December 16, 2003, judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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(Mr. Lewter subsequently
withdrew as Scott's counsel,
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