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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001175-MR

ANTHONY DOYLE LUCKETT — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
INDICTMENT NO. 03-CR-00305

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

MINTON, JUDGE: An exception to the Rape Shield Rule, KRE[2] 412, permits the introduction of evidence of specific instances of sexual behavior by the alleged victim with respect to the accused of sexual misconduct when this evidence is offered by the accused to prove consent on the occasion charged. Charged

[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.

[2] Kentucky Rules of Evidence.

with having raped the victim by forcibly engaging in vaginal intercourse with her, Anthony Doyle Luckett tried to introduce evidence at trial that on prior occasions, the alleged victim had performed oral sex on him in exchange for drug money. The circuit court refused to admit Luckett's proffered evidence reasoning that the fact that the victim may have consented to oral sex with Luckett on other occasions did not tend to prove that she consented to vaginal sex on the occasion charged in the indictment. We agree with the circuit court's application of KRE 412, and we affirm.

On or around the evening of January 20, 2003, Luckett, the victim, the victim's boyfriend, and two other men were at Luckett's apartment. According to the victim, at some point, Luckett forced her into his bedroom where he had vaginal intercourse with her. Although her boyfriend allegedly tried to stop Luckett, the other two men at the apartment, apparently, restrained him.

Luckett's version of the story was quite different. According to Luckett, he and the victim were involved in a money-for-sex exchange. Luckett claimed that on two prior occasions, he gave the victim money to buy drugs; in exchange, she performed oral sex on him. He also asserted that on the night of the alleged rape, the victim again performed oral sex; however, this time, the act was gratuitous. Luckett concedes

that the parties had vaginal sex later that evening but asserts that it was consensual.

Luckett filed a pretrial motion under KRE 412 to introduce evidence of the victim's past sexual behavior. Specifically, Luckett intended to offer proof at trial that he and the victim had previously engaged in money-for-sex exchanges; he argued that evidence that the victim had willingly performed oral sex in the past was relevant to prove that the vaginal sex was consensual.

After the hearing on Luckett's notice, the judge ruled that evidence of the first two alleged incidents of oral sex was not admissible at trial. The judge ruled that evidence that Luckett and the victim had previously engaged in oral sex was not relevant to prove that the victim consented to vaginal sex on the particular occasion charged in the indictment. With regard to the third incident, the alleged voluntary oral sex on the night of the alleged rape, the judge decided to reserve her ruling until the trial. The judge stated:

> And the only reason I'm a little bit finding this hard to rule on is I think the facts about what was in exchange for what needs to be testified to. So I'm going to reserve ruling on that last . . . alleged oral sex that evening probably until I hear the testimony at trial. But I feel pretty confident that you can draw a line there that says that because a person is willing to engage in oral sex, you cannot make an inference that they're willing to engage in

> vaginal sex. The only reason I'm hesitant about this is he needs to set up the evening in order to say that the consent that he's going after, consent given in exchange for the cocaine, is what happened that evening, it's a series of events. So I'll have to listen to that, and we'll take that up at trial.

Following the ruling, Luckett entered a conditional guilty plea to an amended charge of first-degree sex abuse, a Class-D felony, with a recommendation of two years by the Commonwealth. In its final judgment, the court accepted the Commonwealth's recommendation and sentenced Luckett to two years but probated the sentence for five years. It is from the pretrial evidentiary ruling denying the admissibility of evidence of past sexual contact that Luckett appeals.

Luckett asserts that in excluding his proffered evidence, the court applied the wrong version of KRE 412 to his motion and that the court improperly differentiated between oral and vaginal sex. We disagree.

Initially, we note that it does not appear that this issue was properly preserved for appeal. RCr[3] 8.09 states that "a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion." As the Commonwealth states in its brief, Luckett

[3] Kentucky Rules of Criminal Procedure.

failed to reserve "in writing" the specific pretrial motion upon which his guilty plea was conditioned. In his Waiver of Further Proceedings With Petition to Enter Plea of Guilty, Luckett stated in paragraph 17 that the plea was conditional; but no more precise language specified the issues Luckett reserved for appeal.

Despite this omission, we are not precluded from reviewing Luckett's appeal. RCr 10.26 provides that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review . . . ." Therefore, even though Luckett failed properly to preserve the issue under RCr 8.09, we will nevertheless review his argument to determine if his substantial rights were affected.

KRE 412, commonly referred to as the "Rape Shield" rule, states that "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" and "[e]vidence offered to prove any alleged victim's sexual predisposition" is inadmissible in any civil or criminal proceeding, except as provided in subsections (b) and (c) of the rule. Subsection (b)(1) reads:

> In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) any other evidence directly pertaining to the offense charged.

KRE 412 was amended in July 2003. In the pre-amendment version of the statute, subsection (b)(2) stated that a victim's past sexual behavior was admissible if the evidence was "offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which an offense is alleged."

The rationale behind KRE 412 is "'to protect alleged victims of sex crimes against unfair and unwarranted assaults on character.'"[4] As the Kentucky Supreme Court has stated, "'[t]he purpose of the Rape Shield Statute . . . is to insure that [the victim] does not become the party on trial through the admission

[4] Robert G. Lawson, The Kentucky Evidence Handbook, §2.30[3] (4th ed.).

of evidence that is neither material nor relevant to the charge made.'"[5]

Luckett argues that the trial court improperly denied his motion by distinguishing between oral and vaginal sex. He states:

> Nowhere does it say, under either version [of KRE 412], that the prior "sexual behavior" must be of the exact same nature as the charged behavior, the way the Commonwealth and the trial court interpreted the rule. There is no definition provided for "sexual behavior" in either version of the rule, but if it were intended that the behavior must be identical to the behavior involved in the alleged offense, it would have been easy to so define it.
>
> Certainly the term "sexual" has a general definition that would include oral or vaginal action. Also, the term "behavior" is broad enough to cover, in a sexual matter, activities which include both oral and vaginal action. Isn't it obvious that oral sex is "sexual behavior?" It is sexual, and it is behavior. What could be more obvious?

We agree with Luckett's contention that KRE 412 does not require the prior sexual behavior to be of the same nature as the charged behavior, and we agree that both oral sex and vaginal sex constitute "sexual behavior." But Luckett's argument fails to take into account the issue of "consent," which we believe to be the most pertinent factor of KRE 412.

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[5] Anderson v. Commonwealth, 63 S.W.3d 135, 139 (Ky. 2001), *quoting* Barnett v. Commonwealth, 828 S.W.2d 361, 363 (Ky. 1992)

As the circuit court reasoned, evidence that a victim may have consented to one form of sexual behavior in the past is not necessarily indicative of consent to another form of sexual behavior. In this case, we agree with the circuit court's reasoning that the fact that the victim may have consented to oral sex with Luckett on an earlier occasion does not tend to prove that she consented to vaginal sex on the occasion charged in the indictment. Regardless of which version of KRE 412 the court relied upon in denying Luckett's motion, we hold that the decision to exclude evidence of the victim's past sexual behavior was proper. The previous incidents fail to prove the victim's consent and are both irrelevant and highly prejudicial under KRE 402 and 403. Had the court admitted the evidence, the victim would have become the "party on trial," in clear contradiction of the stated purpose behind KRE 412.

The denial of Luckett's motion did not affect his substantial rights; therefore, we affirm the judgment of the circuit court.

ALL CONCUR.

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