

RENDERED: MARCH 24, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

MODIFIED: DECEMBER 22, 2017; 10:00 A.M.

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001016-MR

W. M.

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
INDICTMENT NO. 03-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: DYCHE, MCANULTY, AND TACKETT, JUDGES.

DYCHE, JUDGE: W. M. was employed as a youth minister at the Clarksburg Christian Church in Lewis County, Kentucky, from late 2002 to early 2003. In this capacity, W. M. became acquainted with the family of M. G. and her two sons, A. D., and D.H., who was fourteen years of age at that time. W. M. had almost daily contact with D.H. in connection with either church or home schooling activities including time spent at W. M.'s residence alone and overnight.

In January 2003, D.H. told his mother about two instances of mutual oral sex that had occurred between W. M. and himself at W. M.'s residence. D.H. admitted that he later denied and recanted his story because he believed himself to be in love with W. M. Nevertheless, following a police investigation, W. M. was brought to trial in Lewis Circuit Court on two counts of third degree sodomy. The jury found W. M. guilty on both counts and the trial court imposed the recommended sentence of three years on each count to run consecutively for a total of six years' imprisonment. This appeal follows.

First, W. M. argues that the trial court erred by allowing the Commonwealth to introduce evidence of other bad acts that the court had previously ruled inadmissible.

Prior to trial, the Commonwealth provided notice that it intended to present evidence of other uncharged sexual misconduct between W. M. and D.H. that had allegedly occurred in London, Kentucky, and in North Carolina. The trial court ruled that this evidence was inadmissible under Kentucky Rule of Evidence (KRE) 404(b). However, during direct examination, W. M.'s trial counsel asked the following question.

Counsel: You were here when other things were said and different allegations were made by D.H. You heard what he said in the courtroom, did those things occur in Lewis County, anything like that happen at all?
W. M.: No.

The trial court ruled that W. M.'s statement left the jury with the impression that no sexual contact had occurred between D.H. and himself at any time or any place. In explaining its ruling, the court referred to the three part analysis used to determine admissibility under KRE 404(b): 1) relevancy, 2) probativeness, and 3) prejudicial effect. Purcell v. Commonwealth, 149 S.W.3d 382, 400 (Ky. 2004). Consequently on rebuttal, the Commonwealth was allowed to present DNA evidence obtained from W. M.'s semen that was collected from D.H.'s shorts following the trip to North Carolina.

The standard of review concerning the admissibility of this type of evidence is abuse of discretion. Commonwealth v. English, 993 S.W.2d 941 (Ky. 1999). Although the question is close, we cannot conclude that the trial court acted erroneously in admitting this evidence given the fact that W. M.'s statement was elicited on direct examination and that the DNA evidence tended to demonstrate a course of conduct between W. M. and D.H. that W. M. had denied. Reversal is unwarranted.

Next, W. M. argues that the trial court erred by allowing the Commonwealth to present rebuttal evidence out of sequence. Specifically, the Commonwealth was permitted to present its rebuttal evidence during W. M.'s case-in-chief.

Trial courts are granted broad discretion in determining when rebuttal evidence may be received. Pilon v. Commonwealth, 544 S.W.2d 228, 231 (Ky. 1976). Our review of the record indicates no abuse of discretion.

Finally, W. M. argues that he is entitled to a new trial because of the possibility that the jury could not follow the admonitions given by the trial court regarding evidence and allegedly improper argument. Under the circumstances of this case, we find there is no reason to assume that the jury could not follow the admonitions of the trial court. Furthermore, there is no indication that fundamental fairness was compromised in this case.

Therefore, the judgment of the Lewis Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Mussetter
Ashland, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky