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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-002112-MR

STEVEN LYNN HEARLD — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 04-CR-00146

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Steven Lynn Hearld, was convicted in the Ohio Circuit Court of first-degree sexual abuse and for being a first-degree persistent felony offender. He was sentenced to a total of sixteen years' imprisonment and appeals to this Court as a matter of right. Finding no reversible error, we affirm the convictions and sentence.

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

On January 6, 2004, Appellant and his girlfriend, Rebecca Stevens, spent the day at the Budget Inn in Beaver Dam, Kentucky. With them was the couple's 22-month-old daughter, A.H. Evidence at trial established that Appellant was in and out of the motel throughout the day visiting with friends. That evening, however, the couple had an argument and Stevens thereafter left the motel to retrieve her vehicle, leaving A.H. in Appellant's care for approximately twenty to thirty minutes. When Stevens returned, Appellant advised her that he thought someone had "messed with" A.H. Upon examining A.H., Stevens discovered that there was blood in her diaper. Appellant objected to taking A.H. to the local hospital, instead suggesting that they take her to Evansville the next day. Nevertheless, Stevens immediately took A.H. to a hospital in Ohio County that evening.

An investigation revealed that A.H. had suffered perirectal bruising and tears measuring from one-half to one centimeter in length at the twelve o'clock and six o'clock positions. Also, during a search of the motel room, police seized a towel, which was tested and found to have Appellant's sperm on it.

On July 26, 2004, Appellant was arrested on charges of first-degree sodomy, second-degree assault, and first-degree sexual abuse. Following a trial in June 2005, a jury found

Appellant guilty of first-degree sexual abuse. However, at the conclusion of the sentencing/persistent felony offender phase of the trial, the jury informed the court that it could not reach a decision on a sentencing recommendation. The trial court thereafter sentenced Appellant to five years (with three years of conditional discharge) on the sexual abuse charge, enhanced to sixteen years by virtue of the PFO conviction.

Appellant subsequently appealed to this Court claiming that nine errors warrant reversal of his conviction. Additional facts are set forth as necessary.

I.

Appellant first claims that the prosecutor engaged in misconduct by improperly releasing subpoenaed witnesses. Specifically, several doctors and nurses who examined and treated A.H. at Kosair Children's Hospital had been subpoenaed by the Commonwealth to appear at trial. However, following several continuances, the witnesses were ultimately not present at trial.

Appellant's reliance on Anderson v. Commonwealth, 63 S.W.3d 135 (Ky. 2002), is misplaced. In Anderson, the Commonwealth had subpoenaed a doctor for trial and, knowing that the defense was relying upon that subpoena, subsequently released the doctor without disclosing such to the defense. The defense was unsuccessful in serving its own subpoena on the

doctor and as a result of the Commonwealth releasing him, was unable to present his testimony at trial. On appeal, our Supreme Court noted:

> Though we decline to reverse on this issue, . . . we find it appropriate to comment on the behavior of the Commonwealth's Attorney in this case. It appears that he knew the defense was relying on the Commonwealth's subpoena and purposefully did not disclose that he intended to, or had already, released Dr. Cunningham. In its own defense, the Commonwealth argues that the defense cannot rely on the Commonwealth's subpoenas, and cites Commonwealth v. Calloway, Ky., 737 S.W.2d 691, 693 (1987) for this dubious proposition. In Calloway, however, the witness had not been subpoenaed. The defendant simply relied on the Commonwealth's Attorney's promise to make the witness available. Unfortunately, the witness "absquatulated," Id. at 692, and the Commonwealth was unable to produce him. That is quite different from a situation where, as here, the witness was subpoenaed and was available for trial, but was excused sua sponte by the party who had requested the subpoena.
>
> Witnesses are not subpoenaed by parties, but by the circuit court clerk. RCr 7.02(1). Indeed, the subpoena issued for Dr. Cunningham was issued by the Clerk of the Wayne Circuit Court, albeit at the request of the Commonwealth. We believe that once subpoenaed, the witness is answerable to the court and can only be excused by the court. In affirming a contempt order against an absent subpoenaed witness in Otis v. Meade, Ky., 483 S.W.2d 161 (1972), we held that "the subpoena created a continuing obligation on his part to be available as a witness until the case was concluded or until he was dismissed by the court." Id. at 162 (emphasis added).
>
> Anderson, supra at 142.

Unlike Anderson, we find no subterfuge in this case. While the medical personnel had been subpoenaed for trial dates in January and March 2005, the record indicates that the trial court again rescheduled the trial for late June 2005. The Commonwealth simply did not re-subpoena the witnesses for the June trial date, a fact that was easily discoverable from a cursory review of the record. See Commonwealth v. Calloway, supra. In fact, during a bench conference concerning various pretrial motions in limine, the prosecutor disclosed that he had not re-subpoenaed the individuals in question. Defense counsel neither objected nor moved to have the witnesses subpoenaed. As such, we do not conclude that the prosecutor engaged in any misconduct.

II.

Appellant next complains that the prosecutor committed misconduct by excluding from discovery five photographs of A.H. taken at Kosair hospital that Appellant claims may have been exculpatory. We note that Appellant does not dispute that the prosecutor never viewed the photographs or was even aware of their existence. Notwithstanding, Appellant contends that the prosecutor has a duty to learn of any exculpatory evidence in the hands of his agents. Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1994), cert. denied, 516 U.S. 1154 (1996), abrogated by Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003).

We are of the opinion that Appellant's argument is not only unpersuasive but also unpreserved. A review of the record reveals that it was during the cross-examination of KSP Lab Serologist, Tabithia Bullock, when defense counsel learned that a disc containing several photos of A.H. had been forwarded by Bullock to Dr. Betty Spivak, a medical examiner. Bullock explained that the disc was forwarded from the hospital to the Kentucky State Police Lab and then released to Dr. Spivak, all without Bullock having viewed the contents of the disc. Notably, defense counsel did not object, did not ask for a bench conference, and did not request any form of relief. As Appellant did not raise the issue in the trial court, he cannot now seek redress in this Court. West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989).

III.

Appellant argues that the prosecutor engaged in misconduct by failing to disclose evidence regarding an allegation that another foster sibling that lived with A.H. had been accused of sexual misconduct. Appellant contends that such evidence was relevant to showing that another individual may have inflicted the injuries to A.H.

A.H.'s maternal grandmother, Wanda Farmer, testified during cross-examination that she had several foster children living in her household around the time that A.H. was sexually

abused. Defense counsel sought to question her about whether one of the foster boys named Shawn had been accused of sexual misconduct by another sibling. During a bench conference, Farmer explained that the boy who had accused Shawn had the mind of a six-year-year old and that she had dismissed his claim that Shawn had harassed him. Farmer further noted that, as far as she knew, Shawn had never been accused of any sexual misconduct before being placed in her home.

After hearing Farmer's explanation and the arguments of counsel, the trial court ruled that the information concerning Shawn was inadmissible. Later during the trial, defense counsel requested leave of court to subpoena the foster children, but withdrew such request the following day.

We note that the issue presented at trial concerned the admissibility of the evidence, rather than a claimed discovery violation on the part of the Commonwealth. To borrow Justice Lukowsky's oft-cited acerbity, "Appellant will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976). Regardless, a trial court's ruling on admissibility, if supported by substantial evidence, is dispositive of the question. Harris v. Commonwealth, 793 S.W.2d 802 (Ky. 1990), cert. denied, 499 U.S. 924 (1991); RCr 9.78.

The leading case in Kentucky concerning an alleged

alternative perpetrator or "aaltperp" is Beaty v. Commonwealth, 125 S.W.3d 196 (Ky. 2003). Therein, our Supreme Court reiterated that "[i]t has been uniformly held by this court that one accused of a crime may introduce evidence tending to prove that the crime was committed by another, subject, however, to the right of the commonwealth to rebut such evidence." Id. at 207. (Quoting Harvey v. Commonwealth, 266 Ky. 789, 100 S.W.2d 829, 830 (1937)). However, the Court noted that evidence of opportunity alone is insufficient to guarantee admissibility. See e.g., Karvonen v. State, 205 Ga.App. 852, 424 S.E.2d 47, 49 (1992) (affirming child sexual abuse conviction when excluded evidence merely showed babysitter had opportunity to commit abuse). Furthermore, "[s]imply showing that the 'aaltperp' was at the scene of the crime, without also showing some connection between the 'aaltperp' and the crime, would generally not be allowed." Beaty, supra at 208. (Citations omitted).

We find Appellant's allegation that Shawn could have abused A.H. extremely speculative. There is absolutely no evidence that any of the children were around A.H. on the day in question, and certainly none of them were present at the motel. Farmer testified that she changed A.H.'s diaper shortly before Appellant and Stevens took her to the motel with them, and that there was no blood at that time. Accordingly, we conclude that

the trial court acted within its discretion in ruling that the evidence was inadmissible.

IV.

During the testimony of Dr. Peter Reeves, the Commonwealth introduced two pictures taken of A.H.'s genital area during the examination at Kosair Hospital. Defense counsel objected on the grounds that Dr. Reeves had not taken the photographs. The Commonwealth responded that Dr. Reeves could testify to their authenticity since he examined A.H. and the photographs accurately depicted her injuries. No further objection was raised.

Appellant now argues that he was prejudiced by the inability to cross-examine the photographer or anyone that was present when the photographs were taken. Appellant focuses on the fact that Dr. Reeves testified he observed bruising on A.H.'s genital area, yet the photographs only showed redness. Thus, Appellant concludes that the photographs do not, in fact, accurately depict what Dr. Reeves observed. We disagree.

It is well settled that a condition precedent to the admission of a photograph is evidence that it is a correct and accurate portrayal of the scene or condition that it purports to represent. Gosser v. Commonwealth, 31 S.W.3d 897 (Ky. 2000). However, there is no requirement that the testifying witness be the photographer, or that he or she have personal knowledge of

the time or method of taking the photograph. "The witness is only required to state whether the photograph fairly and accurately depicts the scene about which he is testifying . . . ." Litton v. Commonwealth, 597 S.W.2d 616, 618 (Ky. 1980). That Dr. Reeves testified he also observed bruising does not negate the foundation for the admissibility of the photographs. Rather, it was within the province of the jury to determine what weight to give the photographs in light of Dr. Reeves' testimony. No error occurred.

V.

Appellant also claims that he was entitled to a mistrial after two jurors admitted to reading a newspaper article concerning his trial. Specifically, on the third morning of trial, defense counsel brought it to the attention of the court that the local newspaper had run an article about Appellant. In response to questioning by the court, two jurors admitted to having read the article.

During the bench conference that followed, Juror Jordan stated that she did not believe the paper "got the story straight," and assured the court that it would have no influence on her ability to reach a fair and impartial decision. Juror Eskridge similarly stated that she had not paid much attention to the article and that she too could base her decision solely upon the evidence presented at trial. Based upon the jurors'

responses, the trial court allowed the trial to continue. Defense counsel made no further objection and did not request a mistrial.

Notwithstanding the total lack of preservation, Appellant now claims that because the two jurors in question exposed themselves to media coverage despite being admonished not to do so, he was entitled to a mistrial. We disagree.

A mistrial is an extraordinary remedy and should be granted only where it is demonstrated that manifest injustice will result in its absence. Maxie v. Commonwealth, 82 S.W.3d 860 (Ky. 2002). Furthermore, the weight to be given to the trial court in such matters was aptly stated in Haight v. Commonwealth, 938 S.W.2d 243, 246 (Ky. 1996), cert. denied, 522 U.S. 837 (1997), wherein our Supreme Court stated, "We can hardly conceive of a circumstance in which greater deference should be granted to the findings of the trial court . . . . [I]t would be utterly extraordinary for an appellate court to disregard his view as to questions of candor and impartiality of a juror." (Citing Riley v. Commonwealth, 271 S.W.2d 882 (Ky. 1954). We conclude that the trial court was well within its discretion in determining that Appellant was not prejudiced by the jurors' exposure to the newspaper article. As such the trial court did not err in failing to sua sponte grant a mistrial.

VI.

Appellant's next allegation of error concerns the introduction of a prior statement by Commonwealth witness Angie Deweese Estep. The Commonwealth tendered Estep's prior statement pursuant to KRE 801A(a) to rebut defense counsel's impeachment tactics. During a bench conference, however, it was discovered that there were several sentences on the back of the last page that had not been photocopied and provided to the defense. As a result, the trial court granted the defense time to review the last part of the statement and thereafter ruled that Estep could not read that portion to the jury. However, the Commonwealth and defense counsel were afforded the opportunity to question Estep about such. And, in fact, in response to the prosecutor's questions, Estep testified that A.H. acted fearful of Appellant in the hospital waiting room on the day in question.

Appellant claims that Estep's statement constituted inadmissible hearsay and the introduction of the information not previously disclosed denied him the opportunity to effectively confront Estep. Clearly, Estep's statements fell within the scope of KRE 801A(a) as they were offered "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . ." KRE 801A(a)(2). And while we are inclined to agree that the portion of Estep's statement

that the Commonwealth failed to provide should not have been introduced, we are not convinced the Commonwealth intentionally withheld such information. Nor do we conclude that the trial court abused its discretion in allowing the contents to be introduced solely through questioning by both parties. As defense counsel sought no further relief, we hold that no reversible error occurred.

VII.

Appellant argues that the trial court erred by instructing the jury on first-degree sexual abuse as a lesser-included offense of sodomy where the evidence did not support the lesser charge. Again, we disagree.

It is the duty of the trial court to instruct on the law applicable to every state of the case supported to any extent by the evidence, including any lesser-included offenses. Rogers v. Commonwealth, 86 S.W.3d 29 (Ky. 2002). See also 1 Cooper Kentucky Instructions to Juries (Criminal), § 1.05(A), pp. 14-15 (4th ed. 1999). Here, the jury could have determined that A.H.'s injuries were the result of penetration, bringing the conduct within the scope of the sodomy statute, KRS 510.070, or the result of "sexual contact" as defined in KRS 510.010(7) thus bringing the conduct within the guise of the lesser-included offense of first-degree sexual abuse, KRS 510.110.

Thus, we conclude that the trial court properly instructed the jury on both offenses.

VIII.

Appellant next claims that the prosecutor engaged in misconduct by charging Appellant with sodomy knowing that the evidence would only support a lesser offense. We note that this argument directly contradicts Appellant's previous contention that the jury should not have been instructed on first-degree sexual abuse since the Commonwealth's evidence only supported a theory of sodomy.

Notwithstanding, we find this argument to be completely without merit. So long as a prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether to prosecute and what charges to bring generally rests entirely in his or her discretion. United States v. Armstrong, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). And prosecutors are entitled to a presumption of regularity in the performance of their office absent clear evidence to the contrary. Id. The medical evidence herein established that A.H.'s injuries were consistent with penetration. Appellant makes an erroneous and certainly circuitous argument that because the jury found him not guilty of sodomy, it was error for him to be charged with such offense. We disagree. The evidence supported the charging of the higher

offense as well as his conviction of the lesser-included crime. See Baker v. Commonwealth, 973 S.W.2d 54 (Ky. 1998). No error occurred.

IX.

Appellant's last allegation of error concerns the trial court's sentencing him following the jury's inability to reach a recommendation. A review of the record confirms that Appellant failed to preserve this issue as he did not object to the sentencing procedure. However, as we are mindful of the rule established in Wellman v. Commonwealth, 694 S.W.2d 696, 698 (Ky. 1985), which provides that "sentencing is jurisdictional · · · [and] cannot be waived by failure to object," we will address the merits of the issue.

Appellant relies on the pre-Truth-in-Sentencing case of Commonwealth v. Crooks, 655 S.W.2d 475 (Ky. 1983), in which the Kentucky Supreme Court permitted Crooks's retrial on a PFO charge after the jury at his first trial unanimously agreed that Crooks was a First-Degree PFO, but could not agree upon a penalty. Id. at 476. The Court opined:

> We agree with the Court of Appeals that this was reversible error and adopt the following from the opinion by Judge Howerton as an appropriate statement of the law:
>
> "KRS 532.080 specifically provides that the jury 'shall' fix the sentence to be imposed in a PFO conviction. The statute and the commentary require the jury not only to find

> guilt but to fix the sentence. It is only after the jury has fixed the penalty that the judge may proceed to enter judgment sentencing the defendant · · · (citation omitted.) [I]n PFO proceedings, the finding of guilt and the fixing of an appropriate sentence are inextricably linked, and no final action has been taken until the jury performs both functions."

Id.

Subsequent to the Crooks decision, the Legislature enacted KRS 532.055, commonly referred to as the Truth-in-Sentencing statute. Subsection (3) of that statute provides that, "All hearings held pursuant to this section shall be combined with any hearing provided for by KRS 532.080 [Persistent Felony Offender Sentencing]". KRS 532.055(4) further states, "In the event that the jury is unable to agree as to the sentence or any portion thereof and so reports to the judge, the judge shall impose the sentence within the range provided elsewhere by law."

We are of the opinion that the language in KRS 532.055(4) authorizes the trial court to sentence a persistent felony offender when a jury has found guilt on the offense but is unable to reach a sentencing recommendation. See also RCr 9.84(1) ("the court may fix the penalty . . . (b) in cases where the court is otherwise authorized by law to fix the penalty."). In fact, we believe that our Supreme Court recently recognized such a procedure in Lawson v. Commonwealth, 85 S.W.3d 571 (Ky.

2002), wherein Justice Keller commented that "the trial court could have sentenced Appellant to a twenty (20) year term of imprisonment even if the jury was unable to agree upon sentences for the offenses after it determined Appellant's PFO status. KRS 532.055(4)" Id. at 582 (fn. 33).

Without question, the sixteen-year sentence Appellant received herein is within the range provided for a first-degree persistent felony offender who stands convicted of a Class D felony. KRS 532.080(6)(b). Accordingly, we cannot conclude that Appellant was prejudiced by the sentencing procedure employed by the trial court.

Accordingly, we affirm the judgment and sentence of the Ohio Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cher R. Eaves
Hartford, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky