RENDERED: NOVEMBER 2, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000572-MR

TIMOTHY RAY LOVING — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 03-CR-00418

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: Timothy Ray Loving (hereinafter "Loving") appeals the judgment entered by the Christian Circuit Court on March 9, 2006, convicting him of rape[2] and sodomy,[3] both in the first degree. Following his conviction at a jury trial, Loving was sentenced to thirteen years for each offense. The terms were ordered to be served

[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 Kentucky Revised Statutes (KRS) 21.580.

[2] Kentucky Revised Statutes (KRS) 510.040.

[3] KRS 510.070.

concurrently with one another, "but consecutive to all other felony convictions."[4] This direct appeal followed.

The charges resulted from sexual activity occurring in a Hopkinsville, Kentucky, motel room rented by Loving on May 8, 2002. Only H.M., the fifteen-year-old victim, and Loving, a forty-year-old convicted felon, were in the motel room and their accounts of what transpired varied greatly. Loving admitted having vaginal intercourse with H.M., whom he believed to be at least 16 or 17 years old. He claimed it was consensual and H.M. was an active, willing participant. In contrast, H.M. did not even know she and Loving had engaged in sex until Det. Scott Mayes (hereinafter "Det. Mayes"), a thirteen year veteran of the Hopkinsville Police Department, told her that semen and DNA samples collected from her anal and vaginal cavities matched that of Loving. H.M. did not recall much of the event because Loving had given her brandy. Originally charged with only unlawful transaction with a minor in the third degree[5] for providing alcohol to H.M., upon receipt of the DNA results, Loving was also charged with rape and sodomy, both in the first degree.

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[4] An unofficial version of Loving's criminal history appears in the record documenting criminal activity dating back to 1982. While the judgment references "other felony convictions," we are not provided details about them.

[5] KRS 530.070. This charge was dismissed October 20, 2003, as part of a guilty plea pursuant to *Alford v. North Carolina,* 39 U.S. 956, 89 S.Ct. 1306, 22 L.Ed.2d 558 (1969) in Christian County Indictment 02-CR-00234. At the hearing, Loving pled guilty to terroristic threatening (KRS 508.080) and attempted criminal abuse in the second degree (KRS 508.110). The charge of unlawful transaction with a minor in the third degree was dismissed by the Commonwealth because it was subsumed within the case *sub judice*.

A trial was set for October 24, 2005. However, a juror shortage[6] caused the court to postpone trial for three days. Before leaving the courtroom on October 24, 2005, the Commonwealth asked the court to recognize five witnesses and require them to return to court on October 27. Immediately after the court swore these witnesses, the prosecutor made the following request:

> COMMONWEALTH ATTORNEY: Your Honor, I'd also like to get on to the record that the Commonwealth may excuse any and all of its witnesses under subpoena from the medical – uh - from the Jennie Stuart or any medical provider that obtained samples that were subsequently used for DNA testing, as well as - uh – uh - Tabitha, Sabrina and the other guy from the lab as it relates to the lab report of the DNA analysis that was conducted in this case and that there will be a stipulation to the reports coming in and they'll come in as records through the – uh - detective and there will be no necessity for live testimony as it relates to those reports.
>
> DEFENSE COUNSEL: As I understood it, I was agreeing to stipulate to the - to the - um - labs and that there was semen found and that it matched him, not that - I - I'm not stipulating to the medical exam.
>
> COMMONWEALTH ATTORNEY: No, no, no, no, no, no.
>
> DEFENSE COUNSEL: You understand that . . . Okay.
>
> COMMONWEALTH ATTORNEY: We're not stipulating. All we're talking about is the underlying collection of evidence to allow for the analysis of the DNA.
>
> DEFENSE ATTORNEY: Yes (shaking head affirmatively).
>
> COMMONWEALTH ATTORNEY: That's all we're taking about.

[6] According to the trial court, many potential jurors with connections to Ft. Campbell were not receiving or picking up mail in a timely fashion due to the military deployment in Iraq.

CIRCUIT COURT: All right.

This stipulation concluded the proceedings on October 24 and was noted in the court's docket for that day. Three days later, on October 27, 2005, the court and the parties reconvened, a jury was seated, and testimony commenced. Only two witnesses, H.M. and Det. Mayes, testified for the Commonwealth. Loving took the stand in his own defense but offered no other evidence.

H.M. testified first. She stated she was living at the home of her future mother-in-law[7] on May 8, 2002, when she saw Loving arrive at the home. Loving told H.M. that Lisa,[8] his estranged wife, was upset and wanted to talk to her. H.M. told her fiance's mother that she was going with Loving and left with him in his car. Loving drove to a trailer park where he and H.M. waited. Lisa arrived and entered a trailer. Loving flew into a rage, perhaps because Lisa was not alone. H.M. described Loving as being mad at Lisa and recalled him saying he was going to get her back.

Loving began driving from store to store. He bought Sprite at a Raceway convenience store. He bought brandy at a liquor store. Then he turned into a Travel Inn parking lot. Although scared, H.M. did not try to escape when Loving went inside the motel office to register for a room. She did not try to run away because Loving "eyeballed" her.

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[7] The victim subsequently married on November 27, 2002.

[8] It had recently been revealed that Lisa and the victim might be half-sisters. There was quite an age difference between the two women as Lisa was twenty-eight years old while the victim was just fifteen. The victim testified she was not mad at Lisa; to the contrary, she wanted to develop a relationship and make a life with Lisa.

Loving and H.M. entered the motel room where they resumed talking about Lisa. While H.M.'s memory was fuzzy, she remembered drinking a plastic motel-type cup of brandy and two cups of Sprite. She actually recalled two cups of brandy being poured but she had no clear recollection of who drank the second cup. She stated she was under the influence of alcohol that night and she was still under the influence the next morning.

H.M. testified she passed out at some point from the alcohol and awoke three separate times while inside the motel room. The first time she awoke, she was dressed and on the floor. She felt sick, looked for a trash can and vomited. Loving cleaned up the vomit. H.M. began crying and begged to go home and to contact her family. The second time she awoke she was naked and in the shower. She fell while in the shower and hit her head. The third time she awoke was around 5:00 a.m. on May 9, 2002. She was dressed and laying on the bed but she did not know who had dressed her. From the motel window she saw a police car in the parking lot. When she told Loving the police were outside he told her to run down the road. Instead, H.M. opened the door and ran straight to the police.

H.M. stated she was placed in a police cruiser and driven to the police station where she began to sober up and gave a statement to the police. When she saw the brandy bottle at the station she told the police she wanted to go home. Her mother and her future-mother-in-law met H.M. at the police station and drove her to the hospital.

H.M. testified that while at the hospital, vaginal and anal swabs were collected from her. She stated the swabs were inserted into her vagina and anus and it "hurt very badly."

H.M. testified she never told Loving she wanted to have sex with him. Because of the brandy she had consumed that night she did not remember declining or rejecting a sexual advance from Loving. In fact, she did not even know she had engaged in sex with Loving.

On cross-examination, H.M. testified she was still under the influence when she gave her statement to police around 6:00 a.m. on May 9, 2002. On recross-examination, H.M. stated she did not recall consenting to any sex act with Loving. She also testified she did not remember everything that happened in the motel room because she was passed out from the brandy.

Det. Mayes testified next for the Commonwealth. He stated that a rape kit was collected from H.M. and sent to the lab for testing. Sometime later, samples were collected from Loving and analyzed. When the Commonwealth moved to introduce the lab report, defense counsel objected saying it was cumulative since Loving was going to testify later and admit he had vaginal sex with H.M. The prosecutor argued the lab report would be cumulative only if Loving testified and since the Commonwealth had to prove the charges during its case-in-chief, the report was not cumulative and therefore was admissible. The trial court agreed with the Commonwealth and admitted the lab results.

Reading from the report, Det. Mayes testified that DNA found on both the vaginal and anal swabs collected from H.M. matched Loving's DNA. Defense counsel

objected however, when the prosecutor tried to elicit from Det. Mayes that Loving's DNA and semen were found inside H.M.'s anal and vaginal cavities since he had not personally collected or analyzed the samples. In response to questioning from the trial court, Det. Mayes testified he was familiar with the procedures used in collecting evidence in sexual assaults and stated he had no reason to believe those procedures were not followed by the hospital personnel who collected the specimens in this case.

Because Loving claimed H.M. consented to the vaginal intercourse, the prosecutor asked Det. Mayes whether Loving had ever told him the sex was consensual. Det. Mayes said he had not. When the Commonwealth asked Det. Mayes whether H.M. had ever told him it was consensual, defense counsel objected on grounds of hearsay and the trial court sustained the objection. As a follow-up question, the prosecutor asked Det. Mayes if he had discussed with H.M. whether the sex with Loving was consensual. Again, defense counsel objected and the court sustained the objection. The prosecutor was ultimately allowed to ask Det. Mayes if he had inquired of H.M. whether the sex was consensual since that question went only to whether Det. Mayes had made a particular inquiry and not to whether H.M. had given him a particular answer. Det. Mayes responded, "Yes, she was asked and she could not remember." The court immediately admonished the witness not to reveal H.M.'s answer and to restrict his testimony to the specifics of his inquiry. There was no request for an admonition or a mistrial.

Later, on redirect, the Commonwealth asked Det. Mayes to describe H.M.'s reaction when he told her the lab results. Defense counsel objected saying H.M. had

testified earlier and could have described her own reaction to the DNA results but no one asked her. The trial court overruled the objection and allowed Det. Mayes to testify about his personal observations. Det. Mayes stated that when he first met with H.M. that day she was happy and cheerful. Then, when he revealed the test results to her "she dropped her head, uh, very sad, uh, very emotional, almost cried." Thereafter, Det. Mayes filed the rape and sodomy charges against Loving.

Loving testified in his own defense. He said H.M. helped him search for Lisa and when they did not find her, he drove her home. However, she returned to his car saying she had told her future mother-in-law that she was going out to eat with Loving and Lisa. Loving drove H.M. to a spot where he had previously dropped her off with her boyfriend. Loving then went to the Travel Inn where he had rented a room for the day to relax alone. He drank liquor and watched television. Soon there was a knock at the door; it was H.M. asking to come inside. Loving did not know how H.M. found him at the motel but once inside the room, she told him she knew Lisa was messing around and said he might as well do the same thing. Loving continued drinking and mixed a brandy and Sprite for H.M. when she asked for a drink. According to Loving, H.M. began touching and kissing him and told him he had a nice body. Loving admitted having vaginal sex with H.M. but denied having anal sex with her. He also testified she was awake during the sex and fully participated in it. He denied forcing her to have sex or having sex with her while she was unconscious. Loving testified he had been told H.M. was older than

sixteen; he testified she could have been older than twenty-one. Jurors ultimately convicted Loving of raping and sodomizing a physically helpless victim.[9]

Loving's first series of contentions is that the trial court wrongly admitted DNA results because no chain of custody was established; the test results were introduced via a police detective instead of a DNA examiner; and the results were never authenticated. He claims these allegations are preserved for our review because trial counsel objected to the lab report as being cumulative and that the report could not be introduced by a police officer who neither collected nor analyzed the swabs. Alternatively, he urges us to undertake palpable error analysis as allowed by Kentucky Rules of Criminal Procedure (RCr) 10.26 and review the trial court's admission of the lab results. Citing *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976), the Commonwealth argues Loving's current complaints were not presented to the trial court and he should not be permitted to argue them for the first time on appeal to this Court.

We affirm the trial court's ruling, but not for the reason advanced by the Commonwealth. We affirm because any question about the admissibility of the lab results was expressly waived when defense counsel stipulated all the medical witnesses subpoenaed by the Commonwealth, including the DNA examiner, could be released because the lab report would be would be introduced via Det. Mayes. While it is true that

[9] Loving was indicted on one count of rape in the first degree on a theory of "engaging in sexual intercourse with [H.M.], a minor, through the use of forcible compulsion." However, as the proof developed at trial, the Commonwealth chose to proceed instead on the theory that Loving raped H.M. by engaging in sexual intercourse with a person who could not consent because she was "physically helpless" as prohibited by KRS 510.040(1)(b). A similar change was made regarding the charge of sodomy in the first degree.

no chain of custody was ever established for the report, it was introduced by a police officer instead of the DNA examiner, and it was never authenticated, trial counsel stipulated that live testimony was unnecessary to prove any of these items. Appellate counsel cannot now argue to the contrary.

It is curious to us, but the oral stipulation we find dispositive of this issue was never mentioned in the briefs submitted by either party. Nonetheless, the stipulation is clearly stated on the videotape record and it was also noted on the trial court's October 24, 2005, written docket. In the stipulation, the Commonwealth explained that the lab results would be introduced at trial through Det. Mayes thus eliminating the need for live testimony to authenticate them. Defense counsel stated on the record that she was not stipulating "to the medical exam," but said "yes" when the Commonwealth clarified their agreement was limited to "the underlying collection of evidence to allow for the analysis of the DNA." In light of this stipulation, ***appellate*** counsel cannot now claim the trial court erred in admitting evidence that ***trial*** counsel clearly and unequivocally stipulated was admissible. While there is a preference for stipulations to be written, lack of a writing is not fatal. *Clark v. Commonwealth,* 418 S.W.2d 241, 242 (Ky. 1967). The prosecutor stated the parameters of the stipulation on the record and in the presence of defense counsel. Defense counsel clarified one portion of the stipulation but otherwise agreed with it. Trial counsel never asked to be relieved from the stated terms of the stipulation. Thus, Loving was bound by its terms and cannot now be heard to complain.

Additionally, Loving says only Sabrina Christian, the DNA examiner, could have introduced the lab results. Again, Loving's argument is inconsistent with the record. Christian is one of several medical witnesses the Commonwealth specifically asked the court to release on October 24 when trial was postponed. Trial counsel did not object to Christian's release and indeed agreed to the stipulation and the Commonwealth's statement that the stipulation obviated the need for live testimony from the examiner to authenticate the results. Loving "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy, supra.* Our resolution of this issue punctuates the need for communication between attorneys when one lawyer represents a client at trial and a different attorney prepares the appeal.

Loving's second and final contention is that Det. Mayes should not have been allowed to testify about H.M.'s reaction upon learning the DNA results. Until Det. Mayes revealed the lab results to her, H.M. did not know she had engaged in sex with Loving. Appellate counsel would have us reverse Loving's conviction and order a new trial based upon testimony that he admits "while arguably not a statement under the hearsay definition of a statement, was comparable to a statement." Again, we decline to do so.

Preservation, or rather the lack thereof, is again the deciding factor in this claim. While admitting that "[a]rguably this issue is not preserved," Loving asks that we again invoke RCr 10.26 and grant palpable error review to determine whether Det.

Mayes's description of H.M.'s reaction to the test results constituted hearsay and therefore should have been excluded from trial.

As an appellate court, we review only those allegations of error that are properly preserved for our consideration. *Kennedy, supra; See* RCr 10.12. In cases of manifest injustice we will review an unpreserved error, but only upon a showing that a party's substantial rights have been affected. RCr 10.26. In other words, for us to undertake palpable error review in this case, we must believe there is a "substantial possibility" that Loving would have been acquitted of rape and sodomy, both in the first degree, but for the admission of the alleged hearsay. *See Schoenbachler v. Commonwealth,* 95 S.W.3d 830, 836 (Ky. 2003) (quoting *Abernathy v. Commonwealth,* 439 S.W.2d 949, 952 (Ky. 1969)). Since we do not believe that to be the case, we shall not undertake palpable error review.

A review of the record shows Loving received the relief he requested at trial. Twice he objected to the prosecutor's questions about whether H.M. ever told Det. Mayes she agreed to have sex with Loving. Twice the trial court sustained the hearsay objections. Had the testimony been admitted, it likely would have been cumulative as H.M. had testified on direct that she never told Loving she wanted to have sex with him. Since counsel's objections were sustained and no additional relief, such as an admonition or a mistrial, was requested, we must assume Loving was satisfied with the relief granted. *Baker v. Commonwealth,* 973 S.W.2d 54, 56 (Ky. 1998). From a practical standpoint, H.M. testified she did not even know she had engaged in sex with Loving until sometime

later when the lab results were revealed to her. It is thus rather unlikely she could have consented to having sex with Loving, especially since she was under the influence of alcohol that even Loving admitted providing to her. Since Loving received all that he requested, there is no basis for a finding of any error.

Finally, there was no error in Det. Mayes describing H.M.'s reaction upon hearing the DNA results because a police officer may testify to his personal observations and that is all Det. Mayes did. *Young v. DeBord,* 351 S.W.2d 502, 505 (Ky. 1961). Thus, reversal for a new trial based upon testimony from Det. Mayes is unwarranted.

For the foregoing reasons, the judgment is affirmed.

ALL CONCUR.

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