

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002047-DG

J. W., A CHILD UNDER EIGHTEEN

APPELLANT

v.

DISCRETIONARY REVIEW
FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS CLARK, JUDGE
ACTION NO. 05-XX-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION REVERSING

** ** * ** * ** *

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: J.W., a minor, seeks reversal of his conviction for sexually molesting an infant. Because we find that the evidence of J.W.'s guilt does not meet the requirements of RCr 9.60, we reverse his conviction.

The Commonwealth's circumstantial proof of the crime charged came from the testimony of the infant's mother, who is J.W.'s sister. She indicated that the infant had slept in a crib in J.W.'s room the night before she discovered an unusual red rash on the

infant. She testified that, in her experience, the redness did not seem consistent with diaper rash. But she could not say that the rash was definitively indicative of sexual abuse. The overall import of testimony was that the extremeness of the rash gave rise in her mind to a suspicion that J.W. may have molested her baby the night before. No expert medical evidence was offered at trial, and counsel advised the Court at oral argument that emergency-room doctors found no trauma to the infant when she was eventually presented for examination.

We reverse J.W.'s conviction because it fails to meet the corroboration requirements of RCr 9.60. Even assuming that J.W. did confess to sexually abusing the infant, which is doubtful, the Commonwealth nevertheless failed to offer sufficient corroborating evidence indicating a crime was actually committed. Indeed, RCr 9.60 requires that, before a conviction may be obtained on an extrajudicial confession, “other proof” of the crime charged must be offered. The Supreme Court of Kentucky has held that, “the proof required by RCr 9.60 to corroborate an extrajudicial confession need not be such that, independent of the confession, it would establish the *corpus delicti* . . . beyond a reasonable doubt.” *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky. 1998). Rather, the proof need only corroborate the confession. *Id.*; see also *Lofthouse v. Commonwealth*, 13 S.W.3d 236, 242 (Ky. 2000). Furthermore, the corroborating proof may be considered together with the confession in deciding whether RCr 9.60's “other proof” requirement has been met. *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky.

1998). Still, the “other proof,” when considered together with the confession must indicate that the crime charged was actually committed.

Given the indefiniteness of the “other proof,” the Commonwealth's case relied largely upon the purported confessions of J.W. And, as the case law interpreting RCr 9.60 requires us to consider the “confessions” together with the “other evidence,” we must look at the facts and circumstances of the confessions as well as the content of the “other proof.” In so doing, we note that both J.W.'s “confession” and the “other proof” fail to provide any confidence a crime was ever committed.

First, the parties agreed at oral argument that J.W. has a very low verbal I.Q. and that his purported out-of-court admission made to the mother of the infant is ambiguous and need not be construed as a confession of guilt. Indeed, his statement, “How did you know,” could either indicate (1) that J.W. was curious about his sister's basis for believing that the infant had been molested at all; or (2) that J.W. was curious as to how his sister knew he molested the infant. Given that the statement was made by a juvenile with a very low verbal I.Q. and then only after his sister had addressed him with about a 20-minute monologue in which she variously indicated concern that her baby may have been molested and that J.W. may have been the perpetrator, it hardly evinces confidence that the remark was a solemn admission of guilt.

Second, the police confession obtained from J.W. occurred only after lengthy interrogation by the questioning officer. Though J.W. initially maintained his innocence, the officer continued to question him for a lengthy amount of time, using

tactics often applied in adult interrogations, such as deception and suggestion.

Eventually, when the officer eliminated the option of maintaining his innocence and gave J.W. only the choice to admit to either the relatively less serious offense of sexual abuse or the more serious offense of rape, did J.W. confess. But, especially in light of his low verbal I.Q. and the fact that, contrary to normal practice, J.W. had no parent or guardian present with him during the interrogation, the police confession also fails to evince confidence in the reliability of a guilty verdict.

Third, we find that the “other proof,” even considered in conjunction with the confession, simply fails to establish that any sexual crime occurred at all. Indeed, the “other proof” in this case shows a concerned mother's suspicion that her infant may have been molested because she had never observed as severe a rash on her baby as she did the day after the baby slept in a crib in the same room with her brother. But even the discovery of this rash only occurred around midday, not in the morning when she first changed the baby's diaper. And no medical evidence whatsoever indicates that the infant was sexually molested. Thus, we take this evidence for what it is: the legitimate concerns of a caring mother -- not proof of sexual abuse.

Consequently, based on the foregoing reasons, we hold that the Commonwealth's case failed to meet the requirements of RCr 9.60 and, therefore, the verdict of conviction below is reversed.

STUMBO, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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