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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001000-MR

RICK BELL — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 04-CR-00088

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, AND SCHRODER,[1] JUDGES; HUDDLESTON,[2] SENIOR JUDGE.

ACREE, JUDGE: Rick Bell (Bell) appeals the judgment of the McCreary County Circuit Court sentencing him to two (2) years in prison. On February 23, 2005, the jury returned a verdict finding Bell guilty of the first degree sexual abuse of R.W. For the reasons stated hereafter, we affirm.

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[1] Judge Wilfrid A. Schroder completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] 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.

Bell and his wife, Jean Bell (Mrs. Bell), have a daughter, Jennifer. Jennifer is mentally handicapped and has a physical illness that has rendered her completely disabled. Jennifer is bedridden and breathes with the assistance of a ventilator. Due to her illness, Jennifer requires twenty-four (24) hour respiratory and nursing care. To assist them with Jennifer's care, the Bells utilized private duty nurses/respiratory therapists through Lifeline Home Health (Lifeline). For sixteen hours each day, during two eight-hour shifts, one of five Lifeline nurses/therapists spent time in the Bell home.

R.W. was employed by Lifeline and began working the day shift in the Bell home in June 2003. During her shift, Bell was usually home and Mrs. Bell was not. R.W. testified that she began having problems with Bell during the last few weeks she worked in his home. During those weeks, Bell began making sexually suggestive comments to R.W. Initially, she did not tell anyone.

On June 15, 2004, while R.W. was at Jennifer's bedside, Bell came into the room and began discussing his sex life. He then left the room. R.W. continued her work and Bell again came into Jennifer's bedroom. Bell bent over towards the floor near R.W. R.W. testified that she thought he was adjusting the position of Jennifer's air mattress. However,

Bell grabbed the lower part of R.W.'s leg from behind and began moving his hand up towards her genital region. R.W. told Bell to stop and tried to break free of him. Bell did not stop and continued moving his hand up her leg and grabbed her behind and crotch area. R.W. was finally able to free herself from Bell's grasp. Bell threw his hands into the air and said, "Okay, okay, okay." Bell then left the room.

R.W. remained in the Bell home for approximately thirty minutes. She left when a delivery person arrived at the house and was able to accompany her to her car. She drove to her husband's business and told him about the incident. R.W. then drove to Lifeline to inform Rosalyn Allison (Allison), her supervisor, of what had occurred.

At trial, three other Lifeline nurses employed at the Bell home testified to incidents in which Bell engaged in similar behavior they deemed inappropriate. Also, during rebuttal, Allison testified that when confronted with the allegations against her husband, Mrs. Bell stated "he may have done it, but they always left with a smile on their faces."

Bell denied all of the allegations made by R.W. and the other testifying nurses. He and his wife expressed their belief that the nurses were retaliating against them because of complaints Mrs. Bell made to Lifeline about each of them.

The jury returned a verdict finding Bell guilty of first degree sexual abuse. Pursuant to a plea bargain with the Commonwealth, Bell received a sentence of two years. This appeal followed.

On appeal, Bell raises five issues: (1) the trial court erroneously denied him access to the employment records of prosecution witnesses; (2) the employment records should have been admitted into the record on avowal for appellate review; (3) the Commonwealth failed to provide proper notice of its intention to introduce evidence of prior bad acts; (4) evidence of prior bad acts were wrongly admitted at trial, and; (5) the trial court's jury instructions failed to define the term “forcible compulsion.”

Prior to trial, in October 2004, Bell filed a Motion to Allow Release of Employment and Complaint Records. Bell sought to inspect the personnel records of two prosecution witnesses R.W. and another Lifeline nurse who worked in the Bell home. The Commonwealth never had these records, they were in the possession of Lifeline. The motion generally listed possible uses of any potential evidence, but it did not state why the records were being sought or what information would be found that was material to this case. The motion was denied. Bell filed a Renewed Motion to Allow Release of Employment and Complaint Records in January 2005. Again he sought the records

of R.W. and her fellow caregiver in addition to two other Lifeline nurses employed in the Bell home and potential prosecution witnesses. Bell provided no further reasoning for requesting the records. The renewed motion was denied.

Bell states that it was his belief that the nurses testifying in this case made it a practice to accuse clients of impropriety when they believed the clients were dissatisfied with their work, hoping that later complaints by the clients would not be believed by the employer. He sought the records hoping to find evidence to support this theory and use when cross-examining the women. However, Bell gives no basis for his theory or support for his assertion that evidence of this kind would have been found in the records.

Bell has failed to offer anything other than his supposition that this scheme existed. There is nothing in the record that suggests these women accused other clients of inappropriate behavior, had other clients who were dissatisfied with their work, or had complaints filed against them by other clients.

Bell cites *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1995), in support of his position. However, *Eldred* dealt with a defendant's right to discover witnesses' mental health records, not employment records. More importantly, *Eldred* was abrogated by *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003). In

Barroso, the Supreme Court held in-camera review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence. *Id.* at 564. Even if we were to treat employment records on a par with mental health records, Bell's argument fails. Bell did not establish a reasonable belief that the nurses' employment records contained exculpatory evidence. He presented no evidence to support such a belief. Consequently, the trial court did not err by denying either motion.

We also disagree with Bell's contention that the trial court erred by refusing to allow him to "put disallowed evidence [of the employment records] on the record through avowal." For support, Bell relies on Kentucky Rules of Evidence (KRE) 103(a)(2), which states in pertinent part:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
> . . . .
> (2) Offer of Proof. In case the ruling is one excluding evidence, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.

KRE 103(a)(2) allows a party to preserve disallowed oral evidence in the record so that upon review, an appellate court can determine whether the trial court erred in excluding

the evidence. Again, this rule of evidence does not apply in this case. Whether the information contained in the employment records was admissible evidence to be heard before a jury, was never at issue. The trial court deemed the records undiscoverable. Bell offers no procedure and this court knows of none that allows undiscoverable materials to be entered into the record. We find Bell's line of reasoning to be without merit.

Bell next challenges the admission into evidence of testimony concerning prior bad acts. Again, we perceive no error. Bell claims testimony from the three other nurses employed at the Bell home was outside the parameters of KRE 404(b). Each nurse testified to similar occurrences of unwanted sexual advances by Bell.

KRE 404(b) proscribes introduction of other crimes, wrongs or bad acts "to prove the character of a person in order to show action in conformity therewith" subject to exceptions such as those delineated in subsection (1) of that rule. Evidence of this type may be admissible however:

> If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994), the Supreme Court of Kentucky reaffirmed its prior holding that:

> [E]vidence of criminal conduct other than that being tried, is admissible only if probative of an issue independent of character or predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character.

Quite recently, the Supreme Court cited *Bell v. Commonwealth* in reiterating the criteria for admission of such evidence: "In determining the admissibility of other crimes evidence, three inquiries need to be separately addressed: (1) relevance, (2) probativeness, and (3) prejudice." *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005).

Applying the *Bell* criteria to the admission of the allegedly improper evidence in Bell's case, we find no abuse of the discretion afforded the trial court. The testimony was directed to proving that Bell's actions were part of an on-going course of conduct. Each incident involved a female Lifeline employee working in Bell's home. Each act occurred in Bell's home when the nurse was on duty. All but one instance, involved Bell engaging in inappropriate sexual conversation with his victim. Each act involved Bell taking the victim by surprise and inappropriately touching her. The evidence is sufficiently similar and denotes commonality necessary to fit the exception

of KRE 404(b)(1). This evidence constitutes proper KRE 404(b) plan or "course of conduct" evidence and as such was properly admissible. Obviously it is prejudicial to Bell, however the relevance and probative value of the testimony clearly outweighed its prejudicial impact.

Bell further argues that the Commonwealth failed to comply with the requirement in KRE 404(c) that the prosecution give "reasonable pretrial notice" of its intention to use evidence of the defendant's prior acts. Appellant's argument is without merit, as he raised objections to this exact issue (1) by filing and arguing a motion in limine prior to trial; and (2) when the evidence was offered at trial. *Soto v. Commonwealth*, 139 S.W.3d 827, 858 (Ky. 2004) ("KRE 404(c) is satisfied if the accused is provided 'with an opportunity to challenge the admissibility of this evidence through a motion in limine and to deal with reliability and prejudice problems at trial.'") (citation omitted); see also *Tamme v. Commonwealth,* 973 S.W.2d 13, 31-32 (Ky. 1998).

Finally, Bell argues that the trial court erred by not defining the term "forcible compulsion" in the jury instructions. Because this issue is unpreserved, we must review this matter, if at all, under the palpable error rule of RCr 10.26, which provides:

> 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, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

The palpable error rule "is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review . . . . In determining whether an error is palpable, 'an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.'" *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002)(citation omitted). In the present matter, we must determine whether the jury would have found Bell not guilty had the definition of forcible compulsion been included.

Pertaining to the instruction on sexual abuse, the jury was given the following instruction:

> You will find the Defendant guilty of First-Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
> A. That in this county on or about June 15, 2004, and before the finding of the Indictment herein, he subjected Robin Warrick to sexual contact; AND
> B. That he did so by forcible compulsion.

The trial court did not include in the instructions the following definition of "forcible compulsion" found in KRS 510.010:

> Physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition.

R.W. testified that Bell grabbed the back of her leg and fondled her as she physically resisted and verbally protested. Bell continued his assault on R.W. until she was able to physically push him away from her. This act of physical force is sufficient to meet the definition of forcible compulsion. We agree with Bell that including the definition would have offered the jury further guidance in its decision-making. However, we do not believe that doing so would have changed the outcome of the jury's deliberations, and we find no error.

For the foregoing reasons, we affirm the judgment of the McCreary County Circuit Court.

ALL CONCUR.

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