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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002319-MR

BRADLEY ALLEN DAY — APPELLANT

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 04-CR-00009

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: On April 1, 2004, a Bracken County grand jury returned an indictment charging Bradley Allen Day ("Day") with one count of first-degree sodomy involving R.F., a child less than twelve years of age. The trial court conducted a jury trial on July 9-14, 2007. At the conclusion of trial, the jury found

Day guilty of the lesser-included offense of first-degree sexual abuse. The jury fixed Day's sentence at three-years' imprisonment, which the trial court imposed.

On appeal, Day raises four grounds for error: (1) that the trial court improperly denied his motion to exclude the documentation concerning physical evidence due to the Commonwealth's failure to timely produce that evidence as required by the pretrial discovery orders; (2) that the Commonwealth improperly introduced evidence of his move to West Virginia as evidence of flight; (3) that the prosecutor made improper comments during cross-examination and closing argument; and (4) that the trial court erred by answering the jury's question during deliberations in the guilt phase about the sentence range for the lesser included offense. On these issues, we hold: (1) Day has not shown that he suffered any unfair prejudice from the discovery violations; (2) the trial court did not abuse its discretion by allowing the Commonwealth to introduce evidence of flight; (3) Day has not shown that the improper comments affected the overall fairness of his trial; and (4) the trial court did not err by answering the jury's question concerning the sentencing range for first-degree sexual abuse. Hence, we affirm the conviction.

Relevant Facts

The charges against Day arose from an incident which occurred on February 7, 2003. Prior to that date, Day had been a friend of R.F.'s family and had lived with the family for a short period of time. On February 7, 2003, Day asked R.F., who was then five years old, if she would like to accompany him on a trip to his new home in Augusta, Kentucky. When R.F. returned home later that

evening, she told her mother that Day had taken her to his bedroom and asked her to remove her jeans and panties. R.F. also reported that Day then knelt down at the foot of the bed and kissed her on her legs and vagina.

Before taking R.F. to the hospital, the mother changed R.F.'s panties and put new panties on the child. At the hospital, R.F. was examined by a doctor and a rape kit was prepared. In addition, both R.F. and her mother spoke with a Kentucky State Police ("KSP") trooper. The trooper collected and bagged the panties R.F. was wearing at the hospital. He also told the mother to put the jeans and panties R.F. had been wearing earlier into a brown paper bag. Upon returning home, the mother did as the trooper directed. However, the trooper did not return to collect the clothes until several weeks later. Furthermore, the trooper did not file a supplemental report regarding the second set of panties and the blue jeans. The trooper initially sent these clothes for testing. However, the trooper apparently became confused about the two sets of clothes and asked the laboratory to return them untested.

Violation of Discovery Orders

The first issue in this case concerns the Commonwealth's production of the jeans and panties R.F. was wearing at the time of the incident. The panties collected at the hospital were sent to a KSP forensic laboratory for testing. David Hauber ("Hauber"), who conducted the initial testing, testified that the panties tested negative for saliva and semen. He also testified that he identified four sperm

cells on the panties under a microscope. However, additional testing revealed no DNA foreign to R.F.

On the originally scheduled trial date, the Commonwealth informed the defense about the panties and jeans collected at R.F.'s home. Based on this disclosure, the trial court continued the trial date. This set of panties and jeans were sent for testing. Three cuttings from the panties each revealed the presence of a small number of sperm cells under a microscope. DNA testing on one of the cuttings came back as a positive match to Day. However, one cutting came back negative for any foreign DNA, and another cutting indicated the presence of DNA from three different individuals.

Day presented expert testimony by Stephanie Beine ("Beine") of Genetic Technologies, a private DNA testing laboratory in Missouri. She stated that she found no semen on any of the samples or any DNA that matched Day. She also testified that the very small number of sperm cells found by the KSP laboratories could indicate an accidental transfer. In addition, she explained how testing results might be erroneous and how sperm cells could be misidentified. Finally, she testified that the presence of unknown DNA on the panties could indicate that the sample was contaminated through tampering or improper handling.

Approximately a month before trial, Day moved to exclude the jeans and panties collected at R.F.'s home because the Commonwealth had failed to provide the chain-of-custody documentation. The trial court had previously

entered several pretrial orders which required the KSP laboratories to produce, among other things, chain-of-custody documentation for the physical evidence. The laboratories had provided the documentation only to the Commonwealth.

Upon receiving the motion, the prosecutor provided the documentation to the defense. The trial court denied the motion to exclude the documentation, concluding that the defense had not been prejudiced because the Commonwealth bore the burden of proving the chain of custody for the evidence. At trial, the court found that, while the Commonwealth had not established a perfect chain of custody, it had presented sufficient evidence to show a reasonable probability that the evidence had not been altered in any material respect.

In addition, Day moved to exclude the testing notes prepared by Hauber because they had not been produced during discovery. The trial court denied the Commonwealth's request to introduce the notes. However, the court allowed Hauber to testify from his notes to refresh his memory.

Day's discovery arguments can be narrowed down to two main points. First, Day contends that the trial court should have excluded the panties and jeans collected at R.F.'s home because the Commonwealth failed to provide the chain-of-custody documentation in a timely manner. And second, Day argues that Hauber's testing notes should have been excluded due to the Commonwealth's failure to provide them in discovery. Although we have concerns about the handling of the evidence and the omissions by the Commonwealth during

discovery, we conclude that the trial court's decisions regarding the evidence did not amount to an abuse of discretion.

The Commonwealth attributes the delay in producing the items to the forensic laboratories. But for whatever reason, the defense did not receive the chain-of-custody documentation within the time provided by the discovery orders. The trial court correctly noted that the omissions by the Commonwealth appeared to violate the court's discovery orders and that Day's motion to exclude the evidence was well-taken.

Nevertheless, a trial court has broad remedial powers for discovery violations under Kentucky Rules of Criminal Procedure ("RCr") 7.24(9). Furthermore, "[a] discovery violation justifies setting aside a conviction only where there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different." *Weaver v. Commonwealth*, 955 S.W.2d 722, 725 (Ky.1997) (Internal quotations omitted). In this case, Day does not identify how he was unfairly prejudiced by admission of the chain of custody documentation.

The Commonwealth provided the documentation to the defense nearly a month before trial. While Day suggests that the Commonwealth's failure to timely produce the documentation impaired his ability to challenge the chain-of-custody evidence at trial, he does not explain how the untimely disclosure affected his trial strategy. Furthermore, he does not argue that the Commonwealth failed to prove a sufficient chain-of-custody for the evidence. Consequently, the trial court

did not abuse its discretion by allowing the Commonwealth to introduce the documentation to prove the chain of custody. *See Commonwealth v. King*, 950 S.W.2d 807, 809 (Ky. 1997).

Similarly, we find no abuse of discretion with respect to Hauber's testing notes. As the Commonwealth correctly points out, the trial court sustained Day's motion to exclude the notes due to the Commonwealth's failure to produce them before trial. Day did not request any additional relief before the trial court. *See* RCr 9.22. His failure to do so indicates that the relief was satisfactory. *Howell v. Commonwealth*, 163 S.W.3d 442, 447 (Ky. 2005). Furthermore, Day does not argue that Hauber's testimony was inadmissible, nor does he present any authority to suggest that the trial court erred by allowing Hauber to use the notes to refresh his memory as provided by Kentucky Rules of Evidence ("KRE") 612. Consequently, Day has not shown that he is entitled to relief due to the Commonwealth's failure to provide the notes earlier.

Admission of Evidence of Flight

Day next argues that the trial court erred by allowing the Commonwealth to introduce Day's move to West Virginia because the circumstances surrounding his move were not indicative of consciousness of guilt and thus were inadmissible as evidence of flight. The Commonwealth correctly notes that proof of flight to elude capture or to prevent discovery is admissible because "flight is always some evidence of a sense of guilt." *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 218 (Ky. 2003), quoting *Hord v.*

Commonwealth, 227 Ky. 439, 13 S.W.2d 244, 246 (1928). But Day points out that the cases which have allowed such evidence have involved clear evidence that the defendant was attempting to flee the police or prosecution. For example, in *Rodriguez v. Commonwealth*, *supra*, the defendant fled the scene within minutes of the charged crime in a stolen car. And in *Jackson v. Commonwealth*, 199 S.W.3d 763 (Ky. App. 2006), the defendant fled the jurisdiction immediately after posting bond.

In contrast, Day argues that the circumstances surrounding his move do not clearly evidence a consciousness of guilt. On February 9, 2003, the day after the incident, a KSP trooper contacted Day and told him about R.F.'s allegations. Day denied the allegations. The trooper met with Day again several weeks later. But at some time during mid-March, Day quit his job and moved to West Virginia. Day points out that there were no charges pending or even imminent at the time he left. He had not been told to remain in the community or in contact with the police while the allegations were being investigated. Day was not under a lease and his job was not a permanent position. Day states that he moved to West Virginia to be near friends. Finally, Day did not attempt to conceal his identity following his move. As a result, Day contends that his move to West Virginia was not admissible as evidence of flight.

On the other hand, the Commonwealth asserts that there were other facts about the move which supported an inference of flight. Day knew about R.F.'s allegations and had been questioned by the police several times. He did not

notify his employer, landlord, the police, friends or family of his move before he left. In addition, Day did not take all of his possessions on the move, leaving behind a truck, a television and a stereo. Furthermore, he did not have any work lined up in West Virginia.

We question the trial court's suggestion that Day had some duty to remain in the area or to keep the police informed of his whereabouts. There were no charges pending at the time Day left Bracken County, and the police had not told him to remain in the area while the charges were being investigated. Furthermore, we agree with Day that the circumstances surrounding his move are ambiguous and do not clearly show a consciousness of guilt.

Some of the circumstances surrounding his departure are consistent with innocence. And, as noted above, Day had no legal obligation to stay or to notify the police about his move. However, there are other circumstances which would suggest flight. Most notably, Day left the area suddenly, without notifying his friends, family, employer or landlord. In addition, Day left behind a significant amount of personal property.

Given these circumstances, we agree with the Commonwealth that the evidence would support evidence of flight. Furthermore, Day had the opportunity to rebut this inference and explain the circumstances surrounding his move. *Hamblin v. Commonwealth*, 500 S.W.2d 73, 74 (Ky. 1973). Although this is a close case, we conclude that the trial court did not abuse its discretion by allowing

the Commonwealth to introduce Day's move to West Virginia as evidence of flight.

Prosecutorial misconduct

In his next argument, Day alleges two incidents of prosecutorial misconduct. First, during his cross-examination of a defense investigator, the prosecutor attempted to refer to the earlier suppression proceedings involving the panties. The trial court denied Day's motion for a mistrial. However, the trial court sustained his objection and advised the prosecutor not to get into the suppression issues. Day argues that he was entitled to a mistrial due to the prosecutor's attempt to place irrelevant procedural matters before the jury.

We disagree. A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. *Greene v. Commonwealth*, 244 S.W.3d 128, 138 (Ky. App. 2008). No such necessity existed in this case. In fact, the trial court cut off the prosecutor's question before it was completed. Consequently, we cannot find that Day was unfairly prejudiced by the prosecutor's partial reference to the earlier suppression proceedings.

And second, Day points to a comment during the Commonwealth's closing argument in which the prosecutor referred to the testimony of Day's expert witness, Stephanie Beine, by stating, "Of course, we all know the lady in Missouri says nobody in Kentucky knows what a sperm cell looks like."

Day contends that the comment unfairly characterized Beine's testimony as suggesting that people from Kentucky are dumb. In response, the Commonwealth contends that the comment was not improper because the prosecutor merely referred to the fact that Beine was from Missouri and had criticized the KSP laboratory's identification of sperm cells on the panties.

We agree with Day that the prosecutor's comment suggested that Beine's testimony should be afforded less weight because she is from Missouri and is criticizing the work of a Kentucky expert. Such appeals to local or sectional prejudices are highly improper and are not to be condoned. *Taulbee v. Commonwealth*, Ky., 438 S.W.2d 777, 779 (1969).

However, the rest of the prosecutor's argument was focused on defending Hauber's testimony from Beine's substantive criticisms. "[W]hen reviewing claims of prosecutorial misconduct, we must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) citing *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004). Although the prosecutor's comment was arguably inappropriate, the attempt to appeal to local prejudices was fairly subtle. Moreover, the statement was only a small part of an appropriate commentary on the evidence. Under the circumstances, we cannot find that this isolated improper comment compels reversal of Day's conviction.

Informing Jury of sentencing range of lesser included offense during guilt phase

Finally, Day contends that the trial court improperly informed the jury about the sentencing range for the lesser included offense while it was deliberating on the guilt phase. Four hours into the jury's deliberations, the jurors sent out a note asking the court about the penalty for first-degree sexual assault. The trial court provided this information to the jury over Day's objection. Day argues that a court may never inform the jury of the sentencing range on a lesser included offense during the guilt phase. Citing *Carter v. Commonwealth*, 782 S.W.2d 597, 601 (Ky. 1990).

However, the Kentucky Supreme Court subsequently modified this hard-line rule in *Norton v. Commonwealth*, 37 S.W.3d 750 (Ky. 2001). In *Norton*, the Supreme Court "remain[ed] adamant that sentencing issues must not be raised prior to the penalty phase of trial as a means to impermissibly influence the jury to convict based on the desired penalty rather than on the elements of each given offense." However, they noted that there may be legitimate and appropriate reasons to inform the jury about the range of penalties which it may be called upon to impose. *Id.* at 753. Here, the trial court was responding to a specific and unprompted question from the jurors. We find no indication that the trial court gave this information to the jurors to impermissibly influence them to convict based on a desired penalty. Therefore, we find no basis for reversal.

Accordingly, the judgment of conviction by the Bracken Circuit Court is affirmed.

ALL CONCUR.

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