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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001845-MR

CHRISTOPHER J. RUSHING

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 07-CR-00458

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Christopher Rushing appeals from a judgment of conviction by the Christian Circuit Court finding him guilty of first-degree burglary, first-degree sexual assault, and fourth-degree assault. He argues that his trial was tainted by the trial court's limitation on his right to present exculpatory evidence, by improper

questions by the Commonwealth, and by the cumulative effect of these errors.

Finding no error, we affirm.

On June 22, 2007, a Christian County grand jury indicted Rushing on one count each of first-degree burglary (Kentucky Revised Statute (“KRS”) 511.020), first-degree sexual abuse (KRS 510.110), second-degree assault (KRS 508.020), and first-degree unlawful imprisonment (KRS 509.020).

The charges in this case arose when O.S., an 11-year old girl, identified Rushing as the person who entered her family’s apartment and sexually assaulted her. On May 1, 2007, O.S. returned to her family’s apartment in Oak Grove, Kentucky, around 3:12 p.m., shortly after getting off the school bus. She lived in the apartment with her mother, stepfather, and three brothers, but they were not home at the time. Rushing lived with his brother in the same apartment complex. On entering the apartment, O.S. states that she heard a noise like a closet door opening at the end of the hall. O.S. heard footsteps and then saw someone peeking around the corner. O.S. further testified that, after she screamed, the attacker grabbed her by her hair, dragged her into the bedroom, threw her on the bed, and got on top of her. When she tried to push him off, the attacker punched her in the forehead, briefly knocking her unconscious.

While she was out, the attacker wrapped a sleeping bag around her head tightly. O.S. testified that she felt the attacker’s hand go under her skirt and briefly touch her crotch beneath her underwear. At that point, she felt the attacker move away from her, then a sharp object cutting her leg and hand.

O.S. kicked the attacker off, pulled the sleeping bag from her head, and ran down the hall. While fleeing, she noticed that the attacker had dropped her mother's eyebrow razor. As she ran away, the attacker tried to catch her. But at that point, a neighbor had heard the commotion and was trying to get into the apartment. Upon hearing the neighbor, the attacker fled through the back door.

While calling the police, another neighbor, Shondolyn Carter, saw Rushing driving his truck into the parking lot. Rushing jumped out of his truck and ran into his apartment. Carter stated that Rushing was wearing blue jeans and dark shoes but did not have a shirt on. Carter also stated that Rushing was disheveled and appeared nervous. Carter relayed this information to the police, who then went to Rushing's apartment and arrested him.

O.S. was initially so distraught by the attack that she was unable to talk to the police. However, she identified Rushing as her attacker when the police asked her to look out the window of Carter's apartment. At trial, O.S. described the attacker as a shirtless man who wore blue jeans and black shoes with stripes. Rushing's appearance at his arrest matched the description given by Carter and O.S. O.S. further testified that she had seen Rushing before. She also testified that she recognized his voice as that of the attacker because he had called her a few days earlier. However, she did not know his name at the time.

Rushing denied any involvement in the attack. At the scene, Rushing told the police that he had been at the store all day. At trial, he initially testified that he had been drinking most of the day and that he had been in his apartment

with his brother Mark since about 11 a.m. Likewise, Mark testified that he and Rushing had been drinking and watching videos since about 11 in the morning. But on cross-examination, Mark admitted that they had left the apartment about the time of the attack. After this testimony, Rushing recalled making the trip to the store to buy beer.

At the conclusion of the evidence, the trial court directed a verdict of not guilty on the charge of unlawful imprisonment. Thereafter, the jury found Rushing guilty of first-degree burglary, first-degree sexual abuse, and fourth-degree assault. The jury fixed his sentence at 15 years for burglary, 10 years for sexual abuse, and 12 months for assault. The trial court imposed the jury's verdict, directing that the sentences be served concurrently for a total of 15 years. Rushing now appeals. We will set out additional facts as necessary later in this opinion.

Rushing first argues that the trial court improperly limited his ability to present exculpatory evidence. After the attack, the police collected the comforter and sleeping bag from O.S.'s bed. The lab report revealed that semen was located on the comforter, but it did not match Rushing's DNA. Prior to trial, the Commonwealth moved to exclude any reference to the DNA report because there were no allegations of intercourse or any discharge of fluids by either Rushing or O.S. The trial court apparently granted the motion. Rushing states that his counsel was not present when the Commonwealth made this motion and the proceeding was not recorded.¹

¹ Since these portions of the pretrial motions were not recorded, the trial court's original ruling on this issue is not in the record. Rushing's trial counsel further stated that he was not present

During his opening statement, Rushing's counsel mentioned that the police took DNA samples but they did not match Rushing's DNA. At the conclusion of opening statements, the trial court asked counsel about the reference to the DNA report. Counsel stated that he did not recall any discussions about excluding the report. The court stated that it did not believe the DNA report was relevant. Nevertheless, the court allowed Rushing to introduce and refer to the report. However, the court told Rushing's counsel not to "emphasize" the evidence.

On appeal, Rushing maintains that the DNA report was relevant exculpatory evidence. Consequently, he argues that the trial court's ruling was an unreasonable limitation on his right to present a defense. We disagree.

As an initial matter, we agree with Rushing that the DNA report was relevant to the defense, albeit in a limited way. The absence of Rushing's DNA on the comforter does tend to support his claim that he was not in the apartment. But it does not strongly support Rushing's defense either. As the Commonwealth correctly notes, there was no evidence of any discharge of fluids by either Rushing or O.S. In fact, there was no testimony that the attacker ever removed his pants. The Commonwealth also noted that O.S. shared the bedroom with her teenage brothers. Thus, questions about the origin of the semen could lead to irrelevant

for the Commonwealth's motion. Although this is not determinative to the outcome of this appeal, we emphasize that this again demonstrates the importance of recording all relevant proceedings. Furthermore, we would also note that *ex parte* contact between the trial court and the Commonwealth is generally not proper.

matters. Further, as the Commonwealth pointed out, the DNA evidence could not be used to suggest that O.S. had any prior sexual conduct. Kentucky Rule of Evidence (“KRE”) 412.

Thus, to the extent that the DNA report may have been relevant to the defense, undue emphasis on the evidence would also have opened the door to irrelevant and inadmissible matters. The trial court’s instruction to defense counsel could have been clearer on this point. Nevertheless, the trial court did not abuse its discretion by indicating that the evidence was admissible for the limited purpose of impeaching O.S.’s identification of Rushing. See KRE 403.

Moreover, Rushing does not allege that the trial court’s ruling inhibited his defense in any way. He was allowed to introduce the lab report. He was permitted to present evidence from the police officers that the semen DNA results did not match him. And his counsel argued in closing argument that there was no physical evidence connecting Rushing to the apartment.

On appeal, Rushing suggests that he could have presented expert testimony to explain the scientific terms in the report. But he does not allege that the trial court’s ruling prevented him from presenting such testimony at trial. And he does not explain how such testimony would have pointed to a different assailant. Thus, Rushing has not shown that he was unfairly prejudiced as a result of the trial court’s ruling

Rushing next argues that the trial court improperly denied his motion for a mistrial after a police witness referred to his silence upon questioning

following his arrest. Detective Elizabeth Ann Bequette of the Oak Grove Police Department testified about her investigation of the attack. During the direct examination, the Commonwealth asked Detective Bequette if she ever interviewed Rushing. Detective Bequette replied, “No, he refused.” Rushing’s counsel immediately moved for a mistrial, arguing that the response was an improper reference to Rushing’s exercise of his Fifth Amendment right to remain silent. The trial court denied the motion for a mistrial, noting that Detective Bequette’s response was a “fleeting reference.” However, the trial court admonished the Commonwealth not to refer to the evidence again.

We agree with Rushing that the Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody. *See, e.g., Romans v. Commonwealth*, 547 S.W.2d 128, 130 (Ky. 1977); *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). However, not every isolated instance referring to post-arrest silence will be reversible error. It is only reversible error where post-arrest silence is deliberately used to impeach an explanation subsequently offered at trial or where there is a similar reason to believe the defendant has been prejudiced by reference to the exercise of his constitutional right. *Wallen v. Commonwealth*, 657 S.W.2d 232, 233 -234 (Ky. 1983). Given that Detective Bequette made only a fleeting reference to Rushing’s exercise of his right to remain silent, we agree with the trial court that there was no

manifest necessity for a mistrial. *See Greene v. Commonwealth*, 244 S.W.3d 128, 138 (Ky. App. 2008).

Furthermore, Rushing did not request that the court admonish the jury to disregard Detective Bequette's statement. His failure to request an admonition precludes relief on appeal. *Allen v. Commonwealth*, 286 S.W.3d 221, 225-226 (Ky. 2009). (Holding that failure to request specific relief after objection waives preservation of issue for appeal). Thus, we find no reversible error.

Rushing next contends that the prosecutor's questions to him and his brother improperly asked them to characterize the testimony of other witnesses. During the Commonwealth's cross-examination of Mark Rushing, the prosecutor asked about the conflicting account which Rushing had initially given about their activities that day. The prosecutor specifically asked Mark "So if [Rushing] said that you didn't go anywhere, he would be lying?" A minute later, the prosecutor asked, "So if [Rushing] said that you didn't watch any movies, he'd be lying about that?" Rushing's counsel objected at that point, and the trial court sustained the objection. On the following day, the prosecutor asked Rushing, "Do you know of any reason that [O.S.] would have to lie against you?" Rushing's counsel objected, and the trial court sustained the objection.

Again, we find no error. It is well established that a witness should not be required to characterize the testimony of another witness as lying. *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). However, Rushing did not object to the first question, and his failure to object precludes relief. *Id.*

While Rushing objected to the second and third questions, he failed to request additional relief once the objections were sustained by the trial court. Finally, the prosecutor's third question does not go to the credibility of another witness as prohibited by *Moss*, but rather inquires about any bias that might exist between O.S. and Rushing. Consequently, we find no basis for relief on this issue.

Lastly, Rushing argues the aforementioned trial errors resulted in cumulative error violating his constitutional right to a fair trial. Having found no error, we likewise find no cumulative error justifying relief. *Simmons v. Commonwealth*, 191 S.W.3d 557, 568 (Ky. 2006).

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

ALL CONCUR.

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