

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001387-MR

CHARLES F. HOWARD

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 08-CR-00361

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Charles F. Howard, was convicted in the Boyd Circuit Court of first-degree rape and sentenced to twelve years' imprisonment. He appeals to this Court as a matter of right. After reviewing the record herein, we conclude that the trial court erred in permitting the Commonwealth to introduce impermissible hearsay. Thus, Appellant is entitled to a new trial.

On August 31, 2008, Appellant, the then-Elliott County Jailer, was responsible for transporting Sarah Senters from the Elliott County courthouse to the Boyd County jail.¹ After being booked into the jail, Senters informed a female guard that during the transport, Appellant had stopped the vehicle on a dead-end road and raped her. The Kentucky State Police were immediately contacted and Senters was taken to a local hospital. Both the guards and the police officers who spoke with Senters at the hospital noted that she was very upset and crying most of the time. Results of the rape kit performed at the hospital revealed the presence of semen on Senters' panties and body.

Kentucky State Police Detective Eric Kouns was thereafter assigned to the case. Based upon the results of the rape kit, Detective Kouns obtained a search warrant for Appellant's official cruiser. When Detective Kouns went to execute the warrant, he recorded his interaction with Appellant. Although Appellant acknowledged transporting Senters to Boyd County, he denied having sex with her. Later, however, Appellant provided a second taped statement to Detective Kouns wherein he claimed that Senters' started to "come onto" him during the transport and the two had consensual sex. The Kentucky State Police Forensics Laboratory subsequently determined that the semen taken from Senters matched Appellant. Further, Appellant's semen was also found in his cruiser.

On September 12, 2008, Appellant was indicted by a Boyd County grand jury on one count of first-degree rape. Following a trial in June 2009,

¹ Apparently, Elliott County no longer has a functioning full-time jail and prisoners are transported to surrounding counties.

Appellant was convicted and sentenced to twelve years' imprisonment. He now appeals to this Court as a matter of right. Additional facts are set forth as necessary.

Appellant argues on appeal that the trial court committed reversible error by permitting Detective Kouns to testify about prior consistent statements by Senters and by playing Senters' taped interview for the jury. Specifically, during Detective Kouns' testimony, the Commonwealth questioned him about the recorded statement he took from Senters the day after the rape occurred. Defense counsel objected on hearsay grounds. However, the trial court ruled that Senters' prior statements were admissible as evidence of why Detective Kouns took the actions that he did. Thereafter, Detective Kouns essentially read from the transcript of his interview with Senters. Again, defense counsel objected and the trial court ruled that Detective Kouns could not read the transcript, but determined that the "best evidence" of Senters' statement was the recording itself. The taped interview was thereafter played for the jury.

Appellant contends that Senters' prior statements, introduced through Detective Kouns and the tape itself, were impermissible hearsay and served only to bolster Senters' trial testimony. The Commonwealth, on the other hand, contends that the trial court properly ruled that Senters' statements were not being offered for the purpose of the truthfulness, but rather to demonstrate why Detective Kouns took the actions that he did. Further, the Commonwealth asserts that any error in

admitting the evidence was harmless as Senters' testimony at trial was substantially the same as her prior statements.

Under KRE 802, the hearsay rule, out-of-court statements offered in evidence to prove the truth of the matter asserted are generally inadmissible at trial.

Nevertheless, KRE 801A provides, in pertinent part:

(a) A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:

(1) Inconsistent with the declarant's testimony;

(2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or

(3) One of identification of a person made after perceiving the person.

For purposes of KRE 801A(a)(1), a statement is inconsistent when the witness either contradicts or denies the prior statement or claims to be unable to remember it. *Brock v. Commonwealth*, 947 S.W.2d 24 (Ky. 1997).

Nothing contained in the facts herein supports the trial court's ruling.

First, we simply cannot agree that reciting and/or playing Senters' taped statement was admissible for the purpose of explaining Detective Kouns' investigative actions.

The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as

a result of this information *and* taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officers' action.

Sanborn v. Commonwealth, 754 S.W.2d 534, 541 (Ky. 1988), *overruled on other grounds in Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006); *see also Bussey v. Commonwealth*, 797 S.W.2d 483, 485 (Ky. 1990). Clearly, Detective Kouns' actions were not an issue in the case as required by *Sanborn*.

Second, as conceded by the Commonwealth, Senters' trial testimony was substantially the same as her out-of-court statement. Thus, there was no contention of inconsistency or recent fabrication. "Merely challenging the truthfulness of a witness's testimony does not open the door to a parade of witnesses who repeat the witness's story as told to them." *Bussey*, 797 S.W.2d at 485. As observed by Kentucky's then-highest court in *Eubank v. Commonwealth*, 210 Ky. 150, 275 S.W. 630, 633 (1925):

As a general rule, a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony. Where, however, a witness has been assailed on the ground that his story is a recent fabrication, or that he has some motive for testifying falsely, proof that he gave a similar account of the matter when the motive did not exist, before the effect of such an account could be foreseen, or when the motive or interest would have induced a different statement, is admissible.

See also Winstead v. Commonwealth, 283 S.W.3d 678, 688 (Ky. 2009).

To convict Appellant, it was necessary for the jury to believe Senters and disbelieve Appellant. As such, credibility of the witnesses was crucial. The process was flawed, however, when Senters' credibility was bolstered not only by the testimony of Detective Kouns but also by the playing of her out-of-court interview. The party claiming a hearsay exception has the burden of proof that the exception applies. *Noel v. Commonwealth*, 76 S.W.3d 923, 926 (Ky. 2002); *Jarvis v. Commonwealth*, 960 S.W.2d 466, 470 (Ky. 1998). Because the Commonwealth failed in its burden of proof, the trial court's ruling on admissibility was not supported by substantial evidence and was, therefore, clearly erroneous.

We find no merit in the Commonwealth's argument that any error in the admission of the challenged evidence was harmless because Senters' trial testimony was essentially the same as her prior out-of-court statements. RCr 9.24 requires us to disregard an error if it is harmless. A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *Winstead*, 283 S.W.3d at 688-89. However, the inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos*, 328 U.S. at 765, 66 S.Ct. at 1248; *see also Winstead*, 283 S.W.3d at 688-89.

Had Appellant denied that *any* sexual contact had occurred, this may be a closer call, in light of the DNA evidence clearly implicating him. However, because he admitted the sexual encounter with Senter, but claimed that such was consensual, Senter's credibility was crucial to the Commonwealth's case. As such, we are compelled to find that the error could have had a substantial influence on the verdict and was, accordingly, reversible.

Appellant has raised several other claims of error. However, because we have concluded that a new trial is warranted, we decline to address the other issues not likely to occur during retrial.

The judgment and sentence of the Boyd Circuit are reversed and this matter is remanded for a new trial.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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