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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000604-MR

MARK DAMIAN YARMEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 08-CR-001191

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: Mark Damian Yarmey appeals from his conditional guilty plea in the Jefferson Circuit Court to the use of a minor in a sexual performance. On appeal, Yarmey challenges the introduction of several photographs at trial and the trial court's refusal to provide a limiting instruction therefore, and the trial court's refusal to allow cross-examination of the victim concerning a rape occurring after the commission of the crime herein.

History

On March 25, 2008, Erin Michelle Brannick (Michelle) went to the Louisville Metro Police Department (LMPD) and asked to speak with a detective. Michelle met with Detective Angela Merrick of LMPD's Crimes Against Children Unit. During that meeting, Michelle relayed to Detective Merrick that approximately ten years prior, Yarmey had taken nude photographs of her and sodomized her.

On one evening between the years of 1998 and 2000, Michelle's mother, Cindy Brannick, contacted Yarmey for the alleged purpose of taking pictures of Michelle for a modeling portfolio. Michelle was, at that time, only eleven years old. Yarmey was not a professional photographer. Indeed, the camera in question was a Polaroid camera.

Nonetheless, Michelle was taken to Yarmey's home for the photographs to be taken. In some of the pictures, Michelle wore a leopard-print bikini, which she testified did not belong to her but was given to her by Yarmey. In others, she was wearing one of Yarmey's own dress shirts, unbuttoned, where the side of her breasts and a substantial part of her legs and midsection were showing. Other pictures were taken of Michelle in an oversized men's tank top that belonged to Yarmey. Michelle testified that when some of the photographs were taken, Yarmey placed cologne bottles beneath her breasts to enhance her cleavage.

Michelle testified that her mother was present for some of the pictures.¹ She testified that Cindy removed her bathing suit top and was present for photographs where Michelle was topless, although both Yarmey and her mother explained to her that you would only be able to see a silhouette or “shadow” of her breasts in these shots. Michelle testified that Yarmey manipulated her breasts for these photographs and posed her to his liking.

Michelle stated that her mother eventually had a conversation with Yarmey in another room of the house, after which point her mother left Yarmey’s residence. At the point in time when her mother left, Michelle recounted that she was topless and wearing only a bathing suit bottom. She testified that Yarmey had her completely disrobe and took several completely nude photographs of her, including photographs of her genitalia, while requiring her to pose in certain positions. Michelle further testified that after her mother left, Yarmey asked her if she had ever performed oral sex on a man. She testified that he then forced her to her knees and made her perform oral sex on him. Michelle stated that, even after this occurred, Yarmey continued to take pictures of her.

According to Michelle’s testimony, Yarmey then took the Polaroid photographs into another room with a computer scanner and scanned at least one of the photographs of her into his computer. Seeing that Michelle was upset, Yarmey told her that he could use a computer program to draw clothes on her in the nude photographs. He then allowed her to dress and took her home. Michelle testified

¹ Cindy Brannick was also being prosecuted in connection with the events of this night.

that before they left his house, he grabbed her by the arm and told her not to tell anyone what happened or she would get into trouble. Michelle testified that she never returned to Yarmey's house again, despite her mother's encouragement to maintain a relationship with him, and she was never alone with him again.

In 2004, when Michelle was fourteen years old, she told her mother about events that occurred at Yarmey's house that night several years prior. Cindy took Michelle to LMPD and the pair met with a detective from the Crimes Against Children unit. Michelle testified that she informed the detective of the events which occurred in 1999 or 2000 at Yarmey's home. Michelle stated that the detective told them a controlled telephone call ought to be conducted and that she would need to return the following week to participate in such a call. Michelle testified that when she asked her mother about taking her back to the police to do the controlled call, her mother refused to take her. The file was subsequently closed.

Then, in 2008, Michelle told her boyfriend (now husband) Gary Spies about what happened in Yarmey's home that night. Michelle testified that the only reason she told Gary about the events was because she was having nightmares and he questioned her about them. After she conveyed what happened to him, he took her back to the Crimes Against Children Unit at LMPD to report the crimes.

Once at LMPD, it was explained to Michelle that controlled calls would need to be made because of lapse in time and because of the lack of other evidence. Thereafter, Michelle participated in a controlled call to her mother,

whom she had a strained relationship with. Cindy was on disability and lived in Michelle's home. Michelle testified that she believed the photographs to still be in existence due to certain things that her mother said during the controlled call.

After the call, Michelle and Gary searched her mother's room and found seven of the photographs in her mother's lingerie drawer. Michelle then turned the photographs she discovered over to detective Merrick.

Michelle then participated in a controlled call to Yarmey, during which conversation he did not admit to any of the above events. However, based upon Michelle's statement, the photographs, and the calls, the Crimes Against Children Unit obtained a warrant of arrest for Yarmey and a search warrant for his home. Police confiscated various cameras and computer equipment from Yarmey's residence during the search. A forensic search was later conducted on the computer, although no photographs of Michelle or other evidence of child pornography were found.

Yarmey spoke with police after his arrest and denied inappropriately touching Michelle or taking nude photographs of her. He, at first, denied even having a specific recollection of her being at his house. He claimed that he often told children in the neighborhood that they could come and swim in his pool. He stated that he believed Michelle had come to his house to swim, but he couldn't recall.

When asked whether he took photographs of Michelle, he denied having any recollection of ever doing so. Then, after being presented with the

actual photographs, he eventually conceded that he was left alone with Michelle and took the pictures presented to him by the detectives. Yarmey still denied ever taking completely nude photographs of Michelle or sodomizing her. After the interrogation, Yarmey was indicted for one count of sodomy in the first degree and one count of use of a minor in a sexual performance.

Yarmey's counsel filed a motion *in limine* before the trial to exclude the seven photographs. The motion was denied by the trial court. After a jury trial, Yarmey was found guilty of the use of a minor in a sexual performance, although the jury did not reach a unanimous verdict on the charge of sodomy in the first degree. Rather than facing retrial, Yarmey entered a conditional guilty plea to the charge of the use of a minor in a sexual performance. Under the terms of the agreement, the sodomy charge was dismissed by the Commonwealth without prejudice. Yarmey was sentenced to fifteen years' imprisonment for the use of a minor in a sexual performance.

He now appeals to this Court.

Analysis

On appeal, Yarmey alleges that the trial court committed reversible error by admitting the seven Polaroid photographs of Michelle into evidence, by refusing to use the limiting instruction tendered by him for those photographs, and by refusing to allow him to explore another rape on cross-examination.

Admission of the Photographs

We first consider the trial court's admission of the seven Polaroid photographs of Michelle into evidence. Evidentiary issues are reviewed by this Court for abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). Thus, we will not reverse a trial court's evidentiary ruling unless it is found to be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*, quoting *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Yarmey argues on appeal that the seven photographs admitted into evidence, while not showing actual nudity, were suggestive enough that they unfairly prejudiced him. He argues that his conviction for the use of a minor in a sexual performance is a direct result of the admission of these photographs, which he alleges, only served to inflame the jury's prejudices and "fill gaps in the Commonwealth's evidence."

Kentucky Rules of Evidence (KRE) 403 provides that:

relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Thus, when considering whether the pictures were properly admitted into evidence we first assess the probative worth of the evidence, we next assess the probable impact of the evidence, and finally, we ask "whether the probative worth is substantially outweighed by the undue prejudice of the evidence." *Little v. Com.*, 272 S.W.3d 180, 187 (Ky. 2008); KRE 403.

In light of the offenses charged in the present case, we find Yarmey's claim that the pictures were unduly prejudicial to be without merit. Indeed, the fact that certain photographic evidence of a crime may be disturbing "does not make the evidence inadmissible." *Little*, 272 S.W.3d at 188. The Commonwealth has a right to "present a complete, unfragmented picture of the crime and investigation." *Adkins v. Com.*, 96 S.W.3d 779, 793 (Ky. 2003). In addition, the Commonwealth is allowed to introduce evidence in order "to create a context for the events . . . leading up to" a crime. *Bratcher v. Com.*, 151 S.W.3d 332, 350 (Ky. 2004). Here, Michelle's testimony concerning the events occurring just prior to the crimes at issue, serve to put these photographs into context.

The photographs reflected the events which took place in Yarmey's living room immediately before the commission of the crimes he was charged with.² Michelle testified that the photographs accurately depicted events that took place in Yarmey's living room, including what the room looked like, what she was wearing, and positions she was posed in. The probative nature of these photographs, in creating a context for the events that took place leading up to the crime, was not outweighed by the danger of unfair prejudice.

Trial Court's Refusal to Issue Limiting Instruction

² And also, arguably, during the commission of said crimes. Michelle testified that between photographs, she was changing clothes in front of Yarmey and walking around the room naked, or half naked, at the direction of Yarmey and her mother.

Next, we consider Yarmey's claim that the trial court erred by denying his proposed limiting³ instruction for the photographs. Defense counsel proposed to the trial judge that a "curative instruction" was necessary, in light of the fact that the trial court allowed the photographs into evidence. Defense counsel asked that the trial court instruct the jury it could not find the defendant guilty on the basis of those seven photographs alone.

The trial court ruled from the bench that it did not believe Yarmey was entitled to a "curative instruction," but that defense counsel could certainly make the argument to the jury that a conviction could not be based on the photographs alone. Defense counsel did, in fact, argue extensively to the jury during his closing arguments that they could not convict Yarmey of the "use of a minor in a sexual performance" based solely on the seven photographs in evidence. Indeed, defense counsel stated as follows during closing arguments:

Those photographs themselves do not constitute a sexual performance by a minor.

.....

Without the exposure of her breasts, her genitals in those pictures– they do not fit as a sexual performance under this statute.

.....

It's up for our legislature to determine what's criminal and what's not criminal. The legislature has determined in this situation with regard to these seven photographs that in order for a photograph to show a sexual conduct by a minor you're going to have to show –there's going

³ Although counsel's wording at trial was "curative" instruction.

to have to be an exhibition of genitalia, or the exhibition of buttocks – topless –etc. You don't have that in this case.

(*Video Record of Closing Arguments*, VR 12/14/09 at 10:28-10:35). Counsel spent approximately nine minutes during closing arguments explaining to the jury that the photographs themselves did not show a sexual performance by a minor, but that the sexual performance was alleged to have occurred between and after the photographs in evidence.

We agree with the trial court that defense counsel was not entitled to a curative instruction. Typically “curative” or “limiting” instructions are used for the purpose of explaining to the jury that certain evidence was inadmissible or to explain that evidence is admissible for one purpose but not another, or otherwise, to explain an improper remark by counsel or a witness. We have already held that the trial court did not err in the admission of the photographs into evidence in this case, thus they were properly relied on by the jury in making their determination.

Moreover, a “bare bones” approach to jury instructions is practiced in the Commonwealth. *Baze v. Com.*, 965 S.W.2d 817, 823 (Ky. 1997); *McGuire v. Com.*, 885 S.W.2d 931, 936 (Ky. 1994). Under the “bare bones” approach, “instructions must be given with the understanding that they are merely a framework for the applicable legal principles . . . counsel . . . to flesh out during closing argument[.]” *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 230 (Ky. 2005). Instructions like those requested by Yarmey in the present case, “tend to overemphasize particular aspects of the evidence.” *Hodge v. Com.*, 17 S.W.3d

824, 850 (Ky. 2000). Rather, the “supplementation, elaboration and detailed explanation” of jury instructions “fall[s] within the realm of advocacy.” *Collins v. Galbraith*, 494 S.W.2d 527, 531 (Ky. 1973). Indeed,

[c]ontrary to the practice in some jurisdictions, where the trial judge comments at length to the jury on the law of the case, the traditional objective of our form of instructions is to confine the judge’s function to the bare essentials and let counsel see to it that the jury clearly understands what the instructions mean and what they do not mean.

Collins, 494 S.W.2d at 531.

Thus, the trial court did not err in refusing a curative or limiting instruction, and, regardless, any error would have been harmless as defense counsel spent substantial time during closing arguments explaining to the jury that the photographs themselves did not portray a sexual performance. Kentucky Rules of Criminal Procedure (RCr) 9.24.

Limitation on Cross-Examination

Yarmey’s last argument is that the trial court erred by refusing to allow him to cross-examine Michelle concerning a rape that occurred in Florida after the crime at issue in the present case. During the investigation into the case by LMPD, Gary mentioned in passing that Michelle was raped in the seventh grade while the family was briefly living in Florida. Yarmey contends that Michelle may have been “transferring” her anger about the rape in Florida when she made the allegations against him in the present case because she never reported the rape that happened in Florida to police.

On this basis, defense counsel sought to question Michelle about the rape which occurred in Florida. The Commonwealth objected on the basis of the “rape shield” protections under KRE 412. Defense counsel argued that they were not attempting to “impugn” her character, but that they believed the testimony would be relevant as to why the allegations against Yarmey came “eleven years after the fact.” The trial court ruled that questions surrounding the incident were not admissible under KRE 412 and were otherwise not relevant. The trial court’s ruling is reviewed for abuse of discretion as evidentiary rulings are judged under the abuse of discretion standard. *Anderson*, 231 S.W.3d at 119.

We find that the trial court did not abuse its discretion in refusing to allow the defense to cross-examine Michelle about the rape in Florida. Moreover, we find it unnecessary to even reach a discussion of the rape shield protections of KRE 412 because the testimony could have been disallowed solely on the basis of relevance under KRE 402. Indeed, “[i]n determining the scope of cross-examination on collateral issues, the trial court must first determine if the proposed cross-examination is relevant pursuant to KRE 402.” *Davenport v. Com.*, 177 S.W.3d 763, 772 (Ky. 2005).

Despite Yarmey’s argument that he was trying to “raise doubt as to [Michelle’s] reasons for coming forward against” him, and that there was some sort of “transference of her anger against her attackers in Florida” onto him, we are unpersuaded of the evidence’s relevance. To be sure, bare assertions by defense counsel that the above is true does not “make” the evidence relevant. While our

courts have recognized that a criminal defendant is afforded wide latitude in conducting cross-examination, “a connection must be established between the cross-examination proposed to be undertaken and the facts in evidence.” *Com. v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). Indeed, “[a] defendant is not at liberty to present unsupported theories in the guise of cross-examination and invite the jury to speculate as to some cause other than one supported by the evidence.” *Id.* Here, there is no indication that defense counsel established a satisfactory connection between the proposed cross-examination and the facts in evidence.⁴

Had defense counsel hired an expert to testify about some psychological theory of “transference” which would have connected the dots here, or if there was otherwise evidence in the record which supported the defense’s theory, it may have been admissible. As it stands, this Court does not see how the fact that the victim was subject to another attack by a different perpetrator, later in time, has any bearing on the events of this case which occurred prior thereto. This is especially so in consideration of the evidence presented below as to the exceptionally poor parenting and protection provided to the child⁵ by her mother.

Accordingly, we hereby affirm the judgment and order of the Jefferson Circuit Court.

⁴ Indeed, the avowal testimony showed only that Michelle was raped in Florida and that neither she nor her mother reported the crime to the police. The only other testimony elicited by avowal was that it was “a traumatic experience” for her. We fail to see how these two facts, which were essentially the sum and total of the avowal testimony, tended to show that she accused Yarmey because she was “transferring” her anger against her attackers in Florida.

⁵ Michelle would have only been approximately twelve years old at the time of the rape in Florida.

ALL CONCUR.

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