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RENDERED: AUGUST 29, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000258-MR

OSCAR UMAR GONZALEZ — APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
NO. 11-CR-00289

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On May 4, 2011, Appellant, Oscar Umar Gonzalez, was indicted for sexually abusing Sally, his then seventeen-year-old step-daughter; Emily, his then ten-year-old biological daughter; and Jamie, his then eight-year-old biological daughter.[1] All three victims stated that Appellant forced them to engage in oral, vaginal, or anal sex on numerous occasions.

Appellant was found guilty by a Daviess Circuit Court jury of five counts of first-degree sexual abuse, seven counts of first-degree sodomy, and three counts of incest. The jury recommended a sentence of 320 years imprisonment. The trial court sentenced Appellant to the maximum 70 years

[1] Pseudonyms are being used to protect the anonymity of the victims.

imprisonment allowed under KRS 532.110(c). Appellant now appeals his conviction and sentence as a matter of right pursuant to Ky. Const. § 110(2)(b).

KRE 404(b) Evidence

Appellant first argues that the trial court abused its discretion in allowing Sally and Emily to testify about prior uncharged acts of sexual abuse. In accordance with KRE 404(b), the Commonwealth properly filed notice of its intent to introduce such evidence and the defense timely filed an objection. The trial court held a hearing on the matter and concluded that the evidence was admissible pursuant to KRE 404(b).

Accordingly, Sally and Emily recounted the first time Appellant sexually abused them. Since both acts of sexual abuse occurred in Florida, they were not included in the indictment. Sally stated that Appellant first sexually abused her when she was nine years old. Sally explained that after Appellant asked to see her pubic hair, she showed it to him. Emily's first account of sexual abuse occurred when she was three or four years old when Appellant attempted to anally sodomize her. Sally and Emily also mentioned other uncharged sexual acts. For example, Sally testified that Appellant had sex with her approximately thirty times. Emily also estimated that Appellant orally and anally sodomized her approximately thirty times.

KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, evidence of prior bad acts may be admissible if the evidence falls within one of the exceptions set forth in KRE 404(b)(1).

Such evidence must also pass the balancing test of KRE 403. *Lanham v. Commonwealth,* 171 S.W.3d 14, 31 (Ky. 2005). The admissibility of KRE 404(b) evidence is within the sound discretion of the trial court. *Clark v. Commonwealth,* 223 S.W.3d 90, 96 (Ky. 2007).

We held in *Noel v. Commonwealth,* 76 S.W.3d 923, 931 (Ky. 2002) that a victim's testimony that the defendant sexually abused her on more than one occasion was properly admitted "to prove intent, plan, or absence of mistake or accident." Moreover, this Court has stated that "evidence of similar acts perpetrated against the same victim are almost always admissible . . . ." *Harp v. Commonwealth,* 266 S.W.3d 813, 822 (Ky. 2008) (citing *Noel,* 76 S.W.3d at 931). Accordingly, the trial court was correct in admitting evidence of other uncharged sexual acts between the victim and Appellant. However, the trial court simply offered a general ruling that the evidence was admissible as proof of each exception listed in 404(b)(1). To make clear, we specifically hold that the evidence was admissible to prove at least Appellant's identity, intent, and absence of mistake in sexually abusing the victims. *See Harp,* 266 S.W.3d at 822 ("[E]vidence of other sexual contact [between the victim and the defendant] . . . was admissible as proof of at least identity and absence of mistake or accident.").

Furthermore, the cumulative effect of the evidence was not overtly prejudicial. The Commonwealth issued a sixteen-count indictment against Appellant, including a variety of sex abuse charges against three different victims. Hearing additional instances of sexual abuse cannot be said to have

prejudiced the Appellant in any significant way. Furthermore, any resulting prejudice was mitigated by the trial court's admonition to the jury that the evidence was only to be considered to establish knowledge, intent, general course of dealing, pattern of conduct, or plan for the charges at issue and for no other purpose. Thusly, we find that the trial court did not abuse its discretion in allowing Sally and Emily to testify about other uncharged acts of sexual abuse.

Closed Circuit Television

Appellant next contends that the trial court abridged his constitutional rights to a fair trial and to confront witnesses against him by allowing Emily to testify via closed circuit television. During its case-in-chief, the Commonwealth called Emily to testify. Emily, however, was removed from the stand after she began crying, was unable to answer questions, and asked for her mother. The trial judge conducted an *in camera* interview to determine Emily's ability to testify in open court. Emily explained to the trial judge that she was unable to testify due to the presence of the jury and her father, the Appellant. The trial court determined that there was a compelling need for allowing Emily to testify by way of a closed circuit television from a nearby room without Appellant's presence.

KRS 421.350 provides that a trial court can order a witness, who is a victim of sexual abuse and is twelve years of age or younger when the abuse occurred, to testify by way of a closed circuit television. The purpose of this rule is to "allow[] the utilization of modern technology so as to enhance the

truth determining qualities of a trial." *Commonwealth v. Willis*, 716 S.W.2d 224, 228 (Ky. 1986). We have previously stated that KRS 421.350 passes constitutional muster when properly applied if a compelling need is found. *See Willis,* 716 S.W.2d at 228. KRS 421.350(5) defines a compelling need as "the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence." Some non-exclusive factors a court may consider in determining the existence of a compelling need are "the age and demeanor of the child witness, the nature of the offense and the likely impact of testimony in court or facing the defendant." *Willis*, 716 S.W.2d at 230.

In the case *sub judice*, Emily was unable to fully communicate her allegations of sexual abuse due to the mental stress associated with testifying in front of Appellant and the jury. The Commonwealth, for example, asked Emily to tell the jury about the first time her father sexually abused her. Emily immediately became visibly upset and it took her approximately two minutes to gather enough courage to even speak. Emily continued crying uncontrollably and was only able to communicate after the Commonwealth directed her through the use of leading questions.

Based on Emily's age, the sensitive nature of her testimony, and her behavior while on the stand, there is no doubt that a compelling need existed. If forced to testify in front of Appellant, Emily's testimony would have most likely been hindered. As a result, we find that the trial court did not abuse its discretion in allowing Emily to testify via closed circuit television.

Golden Rule

Appellant also urges this Court to find that his constitutional right to a fair trial was violated when the prosecutor put forth a "Golden Rule" type of argument during his closing address to the jury. In a criminal case, as we explained in *Lycans v. Commonwealth*, 562 S.W.2d 303, 306 (Ky. 1978), a golden rule argument is one that "urges the jurors collectively or singularly to place themselves or members of their families or friends in the place of the person who has been offended and to render a verdict as if they or either of them or a member of their families or friends was similarly situated."

Specifically, the prosecutor was recounting to the jury one instance of sexual abuse perpetrated upon Jamie. This account was of the time Appellant forced Jamie to perform oral sex on him while he was on the phone with Jamie's mother. The prosecutor reenacted Appellant's actions whereby Appellant, while still on the phone, pointed to his genitals and mouthed to Jamie to "suck it." The prosecutor then stated: "I may have just looked like a fool up here doing that for you. I don't care. Why don't you think about instead how it looked to [Jamie] when it was happening to her?" Appellant immediately objected, maintaining that this statement was an attempt to impassion the jury by asking them to place themselves in the victim's shoes. The trial court overruled Appellant's objection and allowed the Commonwealth to proceed.

On appeal, we must consider whether the prosecutor's statements rose to the level of prosecutorial misconduct which "cajole[d] or coerce[d] [the] jury

to reach [its] verdict." *Id.* Such misconduct will not justify reversal unless it is so egregious that it renders the entire trial fundamentally unfair. *Stopher v. Commonwealth,* 57 S.W.3d 787, 805 (Ky. 2001).

We examined a similar statement made by the Commonwealth during closing arguments in *Caudill v. Commonwealth,* 120 S.W.3d 635 (Ky. 2003). Particularly, we found that it was not error for the prosecutor to state: "What must [the victim] been thinking that night, this seventy-three-year-old woman, by herself, basically afraid anyway? What panic she must have felt confronted by this woman and this stranger at three o'clock in the morning." Similar to *Caudill,* the prosecutor in the present case made an isolated statement asking the jury to consider the victim's state of mind while experiencing the crime to which the Appellant was charged. As in *Caudill,* we find no error here.

Testimony of Dr. Crick

Lastly, Appellant argues that the trial court committed reversible error by allowing Dr. Larry Crick to repeat, within his own testimony, statements made by Emily and Jamie. Dr. Crick physically examined all three of the victims and testified to his medical findings. Several of Dr. Crick's statements are at issue in this appeal. We will examine each in turn.

Emily's statements to Dr. Crick

Dr. Crick testified that, during his examination of Emily, she stated that "he" put his private parts into her "butt." Shortly thereafter, Dr. Crick also testified that Emily told him that "he" put his "private parts on her private parts." Appellant objected to both comments on the grounds that the

statements constituted inadmissible hearsay. The trial court overruled the objection, finding that the testimony concerned medical diagnosis and treatment.

We agree with the trial court that both of Dr. Crick's statements fall into the hearsay exception detailed in KRE 803(4), which allows "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history . . . insofar as reasonably pertinent to treatment or diagnosis."

"[T]he general rule is that the identity of the perpetrator is not relevant to treatment or diagnosis" and is, therefore, not admissible under KRE 803(4). *Colvard v. Commonwealth,* 309 S.W.2d 239, 244 (Ky. 2010) (citing *Souder v. Commonwealth*, 719 S.W.2d 730, 735 (Ky. 1986)). However, as the trial court aptly found, Dr. Crick did not use Appellant's name, rather he used the pronoun "he." Since Dr. Crick did not identify Appellant, we believe the trial court was correct in finding that these statements were admissible statements made pursuant to KRE 803(4).

Jamie's statements to Dr. Crick

Dr. Crick also testified that, during his examination of Jamie, she stated that "he tried to stick his private part in my bottom when mommy went to Kohl's to go shopping." Appellant objected on the grounds that the statement was hearsay and improperly bolstered Jamie's testimony. The trial court overruled the objection in regards to the portion of Jamie's statement referring to what "he" physically did to her. However, the trial court found that the rest of Jamie's statement, indicating that her mother was shopping at Kohl's when

the abuse occurred, was inadmissible since it had no relevance to her medical diagnosis or history. Yet the trial court found the statement to be harmless.

As we found with Emily's statements to Dr. Crick, Jamie's statement that "he tried to stick his private part in my bottom" falls squarely within the hearsay exception of KRE 803(4). Furthermore, Dr. Crick did not identify Appellant as the perpetrator. We do not believe that the mere statement that Jamie's mother was shopping at Kohl's when she was abused is the functional equivalent of identifying Appellant as the abuser. While the vast majority of abuse did occur while the mother was away from the home shopping, it was never stated that she was specifically shopping at Kohl's when any one act of abuse occurred.

In addition, we agree with the trial court that the statement indicating that Jamie's mother was shopping at Kohl's when the abuse occurred is irrelevant to Jamie's medical history and diagnosis. Nonetheless, we question whether it was actually hearsay. It is unclear what the Commonwealth's purpose was in introducing the statement. The statement seems to have come in as part of a larger conversation between Jamie and Dr. Crick, and not necessarily to assert the truthfulness that Jamie's mother was actually shopping at Kohl's when the abuse occurred. However, since the mother's absence from the home makes the commission of the crime more convenient, we will resolve this dilemma in favor of Appellant. Even so, we find that the error was harmless pursuant to RCr 9.24.

"A non-constitutional evidentiary error may be deemed harmless, the United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth,* 283 S.W.3d 678, 688-89 (Ky. 2009) (citing *Kotteakos v. United States,* 328 U.S. 750 (1946)). Considering the substantial amount of evidence pointing to Appellant's guilt, it is unlikely the statement had any effect on the jury's ultimate verdict. As a result, we believe the error was harmless.

Conclusion

For the forgoing reasons, the Daviess Circuit Court's judgment is hereby affirmed.

Minton, C.J., Abramson, Cunningham, Keller, Noble and Scott, JJ., concur. Venters, J., concurs in result only.

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