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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001422-MR

JAMES SINNOTT — APPELLANT

v. — APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 95-CR-00027

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment convicting appellant of tampering with physical evidence with regard to a blood sample to be used to prove paternity. Upon review of appellant's arguments in light of the record herein and the applicable law, we affirm the conviction.

In March of 1992, Kara Plummer became romantically involved with appellant, James Sinnott, a Kentucky State Trooper. In November 1993, Kara learned she was pregnant. The child was conceived in October 1993, and, according to Kara, at that time she was not sexually involved with anyone except Sinnott. When

Kara informed Sinnott, who had since gotten married to another woman, that she was pregnant and he was the father, Sinnott denied paternity and refused to pay any of Kara's medical expenses. On December 14, 1993, Kara sent Sinnott a letter stating that if Sinnott did not acknowledge his responsibility, she would file a paternity suit and have blood tests performed. Subsequently, Sinnott asked his attorney, Luke Bentley, to assist him in mediating the matter. After meeting with Sinnott and Bentley, Kara initially agreed not to seek a blood test when Sinnott offered to give her $1,600 toward her medical expenses. Thereafter, Sinnott still refused to acknowledge paternity. Consequently, Kara asked her employer, attorney Lloyd Spear, to represent her in a paternity action. On June 17, 1994, Kara gave birth to a girl, Alexia Plummer. On August 9, 1994, Spear sent a letter to Bentley stating that, "Once the test results are back showing Jim to be the father, we need to have the paternity confirmed by Court Order. This will be accomplished in the Lewis County District Court with Kara filing a petition, Jim entering his appearance, and there being an Agreed Judgment." Bentley responded that Sinnott continued to deny paternity but that blood tests could be performed at the office of Kara's obstetrician, Dr. Lee.

When Kara called Dr. Lee's office, she spoke to Vanessa Harrison, co-defendant, the phlebotomist at the office. Harrison told Kara that Dr. Lee did not get involved with paternity actions but that she would draw blood for the paternity test at

no charge. Harrison told Kara that having her do the blood tests would save Kara time, money, and embarrassment.

On September 8, 1994, Spear filed a complaint in the Lewis District Court seeking a determination of paternity. The paternity action was ultimately filed by the Commonwealth on behalf of Kara and Alexia. At the same time, Spear filed a custody action in the Lewis Circuit Court. On September 21, 1994, appellant filed his answer denying that he was Alexia's father. In another letter dated October 12, 1994, Bentley informed Spear that he would take care of arranging tests with Harrison. Spear testified that he was not involved in any way in selecting Harrison to conduct the blood tests.

The initial blood tests were administered on October 26, 1994. Harrison had never before taken blood for a paternity test. The night prior to the tests, Harrison called Kara and asked if it was alright to open the test kits. Kara gave her approval. Thirty minutes later, Harrison called Kara to inform her that some items were missing from the kits such as alcohol swabs, a tourniquet, and a camera.

On the morning of October 26, 1994, Harrison came to Kara's home to draw the blood from Kara and to obtain saliva swabs from Alexia. She drew three vials of blood from Kara. Kara testified that she saw six empty blood vials when Harrison opened the kit. While she was drawing the blood, Harrison told Kara that there had been rumors about Harrison and Sinnott being involved in a romantic relationship. Harrison told Kara that these rumors were not true.

Harrison then drove to Bentley's office. Bentley took Sinnott and Harrison downstairs to a conference room. Bentley left the two alone in the room and then closed the door and left so that Harrison could draw Sinnott's blood in private. The defense maintains that Harrison drew Sinnott's blood at this time. No one observed Harrison draw Sinnott's blood. A polaroid picture was taken of Sinnott by Harrison during that time, which was required to be sent with the blood samples as part of the kit. After the alleged blood tests had been completed, Sinnott and Harrison came back upstairs and talked with Bentley for a short time. Harrison then left.

Later that same afternoon, Harrison called Kara and told her that she had completed the blood draw on Sinnott and that she would bring the package containing all the blood samples and Alexia's saliva sample to Kara so that Kara could mail it to the testing company, Genetic Design, in North Carolina. At about 5:00 p.m., Harrison brought the package to Kara. It was a clear, sealed Federal Express mail bag which contained two smaller sealed plastic bags. These two smaller plastic bags, referred to by Genetic Design as the "chain of custody bags," were each sealed and contained brown cardboard boxes with the blood samples inside. The polaroid pictures of Kara and Sinnott were in a pocket on the outside of the smaller plastic bag containing their respective blood sample. Kara put the package on the clothes dryer in her house with the intention of mailing it the next morning from the office of her employer, the Commonwealth Attorney.

At about 6:00 p.m. that evening, Beth Plummer, Kara's twin sister who lived with Kara and who worked at Maysville Medical Clinic, returned home and saw the package on the dryer. Beth testified that she opened the large mailing bag because she wanted to see the photograph of Sinnott that was on the outside of the smaller bag inside. She testified that she wanted to see Sinnott's picture because she did not trust him and wanted to make sure he was actually the one who gave the blood sample. Beth testified that she did not open either of the smaller bags or the cardboard boxes inside the mailing bag. She claimed she never saw any blood. After looking at the picture, Beth maintained that she put the smaller bags inside an extra unused mailing bag that was sitting next to the package and sealed it. Apparently, there was an extra mailing container because Harrison should have put the two chain of custody bags in separate mailing bags. When Kara learned that her sister had opened the mail bag, she admonished her sister about tampering with the package but did not tell anyone until almost eight months later. The next morning, Kara mailed the package from the Commonwealth Attorney's office to Genetic Design.

One week after the blood draw, Harrison asked Kara to sign a document releasing Harrison from any liability regarding the results of the blood tests. Kara signed the release, which Harrison backdated to the date of the blood draw.

In November 1994, Spear received the results of the blood tests, which revealed that Sinnott could not be the father of Alexia. Because she knew this had to be wrong, she asked that

Spear move the court for an additional court-ordered blood test. The court ordered the blood test to be conducted on December 27, 1994. Sinnott failed to appear for this blood test and again failed to appear on a second scheduled date. It was not until the court threatened to hold Sinnott in contempt that he submitted to the second blood test. This blood test was conducted by a court-appointed phlebotomist in an empty courtroom with all the parties present. The results of this blood test showed that there was a 99.32% probability that Sinnott was the father of Alexia. The results also showed that the blood from the male in the first test and the blood from the male in the second test could not have come from the same person. Thereafter, a motion for summary judgment in the paternity case was granted, adjudging Sinnott to be Alexia's father.

On October 6, 1995, Sinnott and Harrison were indicted for tampering with physical evidence. Prior to trial, Sinnott moved to suppress the results of the first blood test due to the break in the chain of custody when Beth Plummer opened the package containing the blood tests. After a full hearing, the court denied the motion and allowed the results of the first blood test to be admitted into evidence. Sinnott and Harrison were tried together on March 17, 1997, and both were found guilty of tampering with physical evidence. Sinnott was sentenced to two years' imprisonment. This appeal by Sinnott followed.

Sinnott argues that the trial court erred when it denied his motion for directed verdict. On appellate review, the test of a directed verdict is, if under the evidence as a whole,

it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). Sinnott maintains that the Commonwealth failed to present sufficient evidence that he tampered with the blood samples. Sinnott was charged and convicted under KRS 524.100 which provides as follows:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; or
>
> (b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.

Although no one saw Sinnott substitute his blood sample with blood from someone else, there was substantial circumstantial evidence thereof. First and foremost, the fact that the blood sample in the first test was from a different person than in the second test wherein the test was performed under supervised conditions suggests that the sample in the first test had to be substituted with the blood of another individual. Also, the Commonwealth introduced proof that at the time Harrison was suggested by Bentley to perform the blood tests and at the time the blood tests were performed, Harrison and Sinnott were involved in a sexual relationship. In fact, one witness testified that Harrison told her that she and Sinnott had sex at

his house after they left Bentley’s office on the day of the supposed blood test. Further, the Commonwealth introduced phone records which showed: a total of 139 calls from Harrison’s place of employment to Sinnott’s home; one call from Sinnott’s home to Harrison’s home; 42 calls from Harrison’s residence to Sinnott’s home; 12 calls from Harrison’s employment to Dale Gee, a friend of Sinnott’s who had offered to help him with regard to the paternity matter; and nine calls from Gee’s home to Harrison’s place of employment. These calls were made between August 1994 and December 1994. Neither Sinnott’s wife nor Gee’s wife were patients of Dr. Lee. As stated above, neither Spears nor Kara had any involvement in selecting Harrison to draw the blood. It was Bentley that first suggested to Spears and Kara that Harrison perform the blood tests. Harrison had never before performed blood tests for purposes of a paternity test. There was also evidence that Harrison had access to blood samples through her employment. Circumstantial evidence is sufficient to support a criminal verdict as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt. Bussell v. Commonwealth, Ky., 882 S.W.2d 111 (1994), cert. denied, 513 U.S. 1174, 115 S. Ct. 1154, 130 L. Ed. 2d 1111 (1995). From our review of the evidence, we believe there was more than sufficient evidence from which a jury could find Sinnott guilty of tampering with physical evidence.

Sinnott also argues that there was not evidence that he knew that the blood test was to be used in an official proceeding. We believe this argument is wholly without merit.

The paternity action and the custody action had already been filed regarding this child at the time of the first blood test, and Sinnott had received notice of both actions. Further, Sinnott had retained an attorney to represent him in the paternity action. Sinnott surely knew that the results of the blood test were a determining factor in the paternity action.

Sinnott next argues that the court erred in denying his motion to suppress the results of the first blood tests on grounds of the break in the chain of custody by the actions of Beth Plummer. Sinnott contends that Beth Plummer's tampering with the package containing the blood tests destroyed the chain of custody and the integrity of that evidence.

Proof of chain of custody is required for blood samples. Robovsky v. Commonwealth, Ky., 973 S.W.2d 6 (1998); Calvert v. Commonwealth, Ky. App., 708 S.W.2d 121 (1986); Haste v. Kentucky Unemployment Insurance Commission, Ky. App., 673 S.W.2d 740 (1984). The purpose of requiring proof of the chain of custody of a blood sample is to show that the blood tested in the laboratory was the same blood drawn from the individual at issue in the particular case. Robovsky, 973 S.W.2d at 8. However, as was further stated in Robovsky, 973 S.W.2d at 8, quoting United States v. Cardenas, 864 F.2d 1528, 1532 (10th Cir. 1989):

> Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence

has not been altered in any material respect.'

Normally, gaps in the chain of custody go to the weight of the evidence. Robovsky, 973 S.W.2d at 8; United States v. Lott, 854 F.2d 244 (7th Cir. 1988). With respect to evidence that has been altered, it has been held that "so long as the relevant features remain unaltered, the evidence is admissible." Cardenas, 864 F.2d at 1532.

In the present case, the court conducted a full evidentiary hearing prior to trial on the suppression motion. During this hearing, chain of custody was established by the testimony of Harrison, Kara, Beth Plummer, and employees of Genetic Design, where the blood samples were sent for analysis. In our view, there was no break in the chain of custody insofar as the evidence was not unaccounted for in any significant way. However, the integrity of the evidence was called into question by the actions of Beth Plummer. From our review of the evidence regarding Beth Plummer's handling of the evidence, we cannot say that the court abused its discretion in allowing the evidence to nevertheless be admitted. See United States v. L'Allier, 838 F.2d 234 (7th cir. 1988). The testimony of Beth Plummer, Kara, and Joe Maggi of Genetic Design established that Beth only tore open the mailing bag and did not open the smaller plastic bags containing the blood samples. The seals on the smaller bags had not been broken. There was no evidence that the blood samples had been materially altered; thus, the relevant feature of the evidence (Sinnott's alleged blood sample) remained intact. In our view, the court properly allowed Beth Plummer's actions to go

to the weight of the evidence. If the jury had believed the defense theory of the case that Beth Plummer had somehow substituted another blood sample for Sinnott's, they were free to do so. Accordingly, the trial court did not err in denying Sinnott's motion to suppress.

Sinnott next argues that the court erred in failing to grant a mistrial because of juror bias. Sinnott maintains that a T-shirt worn by the foreman of the jury on the last day of trial which contained the message "I'm sleeping with a married woman" on the front, and "My wife" on the back, demonstrated this juror's bias. Counsel for Sinnott did not call the court's attention to the juror's T-shirt until after the jury had returned from deliberating Sinnott's sentence; counsel claimed that he did not see the shirt until the jurors were retiring to deliberate the sentence. The trial judge and the prosecutor both stated that they had not noticed the shirt. After the sentence had been announced and the jurors had returned to the jury room, the judge confronted the juror in question on the record and asked to him take off his jacket so that he could see the message on the shirt. The juror stated that his wife had bought him the shirt two years ago and that he did not mean anything by it. Two days after the judgment of conviction had been entered, Sinnott's counsel moved for a judgment NOV or new trial on the grounds of juror bias. The court denied said motion.

Upon reviewing the record, we do not see that Sinnott's counsel ever moved for a mistrial. At the time Sinnott's counsel first called the court's attention to the T-shirt, he

specifically stated that he was not making any motion at that time. Thus, Sinnott's argument that the court should have granted a mistrial was not preserved. See Jenkins v. Commonwealth, Ky., 477 S.W.2d 795 (1972). As to the court's failure to grant a new trial or judgment NOV on grounds of juror bias, it has been held that a defendant seeking to prove juror bias must demonstrate the actual existence of such an opinion in the mind of the juror as will raise a presumption of partiality. United States v. Howard, 752 F.2d 220 (6th Cir. 1985), cert. denied, 472 U.S. 1029, 105 S. Ct. 3506, 87 L Ed. 2d 636 (1985), vacated on other grounds, 770 F.2d 57 (6th Cir. 1985). It is within the trial court's discretion to determine partiality and bias from particular circumstances. Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997), cert. denied, _____ U.S. _____, 118 S. Ct. 451, 139 L. Ed. 2d 387 (1997). Given the juror's assurance that he had no ill intent in wearing the shirt and the fact that there was no evidence of prejudice resulting from the shirt, we cannot say the trial court abused its discretion in refusing to grant a new trial or a judgment NOV because of the shirt.

Sinnott's next assignment of error is that the court should not have admitted the records of the telephone calls between Sinnott, Harrison, and Gee. Sinnott maintains that the records were admitted in violation of KRE 803(6) because they were not admitted through the testimony of the original custodian of the records. The telephone records were admitted at trial through the testimony of Robert Chatum, an employee of General

Telephone (G.T.E.) in Lexington. Chatum testified that he was an in-house investigator and a custodian of records for G.T.E. He testified that the records are kept in Tampa, Florida, and were sent to him for review so that G.T.E. could comply with the subpoena for official records in this case. A document was admitted through the testimony of Chatum stating that the records were originally pulled by Jet Brantley, an employee of G.T.E. in Tampa, and sent to the Attorney General's Office and that the information was an accurate representation of the records that G.T.E. maintains in the normal course of business. At trial, Sinnott objected to the admission of the records on the grounds that the records were not authenticated by the original custodian of the records, Jet Brantley. KRE 803(6) states that records kept in the course of a regularly conducted business activity can be admitted "by the testimony of the custodian or other qualified witness". In our view, even if Chatum was not the actual custodian of the telephone records in this case, he certainly was a qualified witness. Accordingly, this argument is without merit.

Sinnott also complains that the telephone records were not materially relevant to any issue in the case. We disagree. The personal relationship and collusion between Sinnott and Harrison was a significant part of the circumstantial evidence in this case. The telephone calls at issue tended to prove the existence of this relationship and that they were communicating a great deal during the time the first paternity test was being

planned and administered. Thus, this evidence was clearly relevant. KRE 401.

Sinnott next claims that it was error to admit the evidence of sexual relations between Sinnott and various other women. During the course of the trial, it was revealed that Sinnott had sexual relationships with Kara, Harrison, and Tara Evans. It was obviously necessary to make reference to Sinnott's sexual relationship with Kara since the entire case centered around her paternity action against Sinnott. Likewise, as stated earlier, it was necessary to establish the personal relationship between Sinnott and Harrison, which included a sexual relationship. The relationship with Tara Evans was elicited during the testimony of Evans. Evans testified that one time during her relationship with Sinnott they went to Sinnott's home. While there, she heard a message on his answering machine from Harrison's husband questioning Sinnott about his relationship with Harrison's wife. The purpose of this testimony was not to prove the sexual relationship between Evans and Sinnott but rather to prove the relationship between Sinnott and Harrison, which we have already adjudged to be warranted. As we do not believe that the evidence of the sexual relationship between Evans and Sinnott was unduly prejudicial, it was not error to admit this testimony. KRE 403.

Sinnott's next assignment of error is with regard to one witness's testimony about a photograph of a nude male. The polaroid photograph in question, which was not produced at trial, was purportedly of a dark-skinned nude male from the waist down

with an erection. Apparently, no part of the man's head could be seen in the photo. Patricia Logan, one of Harrison's co-workers, testified that Harrison showed said picture to her at work and told her the male in the picture was the father of her friend's baby. According to Logan, Harrison asked her to tell Harrison's husband that the photograph was of Logan's husband if Harrison's husband called and asked Logan about the picture. The Commonwealth then showed Logan the polaroid picture of Sinnott taken for the first blood test and asked Logan if there were any resemblances in the pictures. Logan replied that they appeared to be pictures of the same person and the backgrounds were similar. Sinnott objected to this testimony, arguing that it was irrelevant, unreliable, untrustworthy, and lacked credibility.

There was no evidence that Logan knew Sinnott or that she could even identify him with clothes on. Thus, we do not know how she could then say with any certainty that the male in the headless nude photograph was the same person as in the other photograph (of Sinnott) wherein the male was fully clothed and she could see his face. Hence, we agree that the testimony was inherently unreliable and lacked credibility. See Pickard Chrysler, Inc. v. Sizemore, Ky. App., 918 S.W.2d 736 (1995); Askew v. Commonwealth, Ky., 768 S.W.2d 51 (1989). The next issue we must now determine is whether this error was reversible or harmless.

RCr 9.24 provides that no error in the admission of evidence will be grounds for reversal unless it affected the substantial rights of the complaining party. In our view,

Sinnott was not unduly prejudiced by the admission of the testimony at issue because there was other evidence of the relationship between Sinnott and Harrison, which was apparently the reason the Commonwealth proffered the testimony regarding the nude photograph (to show that Harrison and Sinnott were intimately involved at the time of the paternity test.) There was the evidence of telephone calls between Harrison and Sinnott. Further, there was testimony from three other witnesses indicating that Harrison and Sinnott were intimately involved. Tara Evans testified about the message on Sinnott's answering machine from Harrison's husband questioning the relationship between the two. Brie Frye testified that she saw Harrison's car at Sinnott's house and that Harrison had told her that she was involved with Sinnott. Finally, Sherry Jordan, a co-worker of Harrison's, testified that Sinnott came to visit Harrison at the medical center at least four times. On one occasion, they left together for about thirty minutes. On two occasions, Harrison took a shower after he left. Accordingly, we believe the admission of Logan's testimony was harmless error.

Sinnott's remaining argument claiming cumulative error must fail since we have determined only one error was committed, which we deemed to be harmless. For the reasons stated above, the judgment of the Lewis Circuit Court is affirmed.

ALL CONCUR.

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