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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002875-MR

HUGH APPLEBY, JR. — APPELLANT

V.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 98-CR-00065 AND 98-CR-00066

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; KNOPF and McANULTY, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Russell Circuit Court. Appellant was convicted by a jury of first-degree sexual abuse and of being a second-degree persistent felony offender (PFO II). The jury recommended and the court imposed a ten-year sentence. On appeal, appellant contends (1) that the court erred by admitting certain evidence and by failing to properly instruct the jury, (2) that prosecutorial misconduct occurred, and (3) that the verdict was coerced. For the reasons stated hereafter, we affirm.

The parents of a ten-year-old boy, A.B., reported his suspected sexual abuse to the Kentucky State Police. Detective Lisa Rudzinski interviewed the child, his parents, and appellant.

As a result of her investigation, Detective Rudzinski presented the case to the Russell County Grand Jury, which returned an indictment charging appellant with first-degree sexual abuse.

At trial, A.B. testified regarding particular events that occurred while he was at his grandmother's home during the early spring of 1998. The child recalled an occasion when appellant entered the bathroom and lowered his pants while the child was seated on the commode. The child described to the jury how appellant instructed him to spread his legs and touched his "private area." According to the child, while appellant kept his hand bearing down on the child's shoulder, "[s]omething just shot out of him. I don't know what it was . . . . [c]ame from his private." Detective Rudzinski also testified regarding the portion of her investigative report which concerned the "bathroom" incident. At the conclusion of the trial the jury convicted appellant, and he was sentenced to serve ten years' imprisonment. This appeal followed.

First, appellant contends that the trial court erred by failing to instruct the jury as to the lesser included offense of attempt to commit first-degree sexual abuse. Appellant argues that the evidence would have supported a finding that something other than a completed act of sexual abuse occurred, or that he had contemplated such an act but stopped short of carrying his plan to fruition. Thus, he urges that an attempt instruction was warranted. We disagree.

We agree with the trial court that the testimony at trial was not so equivocal that it left a lingering doubt as to

whether appellant merely started but did not complete the charged offense. We are mindful that

> [o]ur law requires the court to give instructions "applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony." Lee v. Commonwealth, Ky., 329 S.W.2d 57, 60 (1959). It is irrelevant that the evidence from the parties does not indicate the need for a particular instruction. The determination of what issues to submit to the jury should be made based upon the totality of the evidence.

Reed v. Commonwealth, Ky., 738 S.W.2d 818, 822 (1987).

Here, appellant denied ever having touched the child in a sexual manner or entered the bathroom wherein A.B. claimed to have been sexually abused. In short, appellant effectively denied having engaged in any criminal act and, at the close of the Commonwealth's case-in-chief, he moved the court for a directed verdict of acquittal, claiming that the evidence was insufficient to establish that any offense occurred.

During a bench conference regarding the motion, the trial judge paraphrased the substance of the victim's testimony as follows:

> Alright, here's what he said, I took copious notes as always. It was related it was in the Spring, he was at his grandmother's house and he was using the bathroom, the defendant walked in on him, asked him to spread his legs. He touched him around his stomach and he touched a little bit in the private area. Then . . . the testimony the defendant ejaculated. Some activity and something shot out of him from the private area, he felt a grasp.
>
> I believe, of course, the appropriate definition that's set forth for sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desires of

> either party, and so forth. It did, if you accept that testimony. I'm not saying it's the gospel truth or anything but I think there's sufficient evidence to proceed. The motion for a directed verdict is hereby overruled.

The court's summary of the facts is fully supported by the record. It is therefore clear that the court did not err by failing to instruct on the lesser included offense of attempt, as the evidence established either that no offense occurred, or that the charged offense was completed. There was simply no basis in the evidence to support an instruction on the lesser included offense of attempt.

Next, appellant contends that the trial court erred by admitting certain evidence which was previously ordered excluded. We disagree.

As noted earlier, A.B. testified that appellant entered the bathroom, commanded him to spread his legs, touched his "private parts" and then, while holding A.B. by the shoulder, sexually gratified himself. However, Detective Rudzinski's written report did not include a specific reference to the "touching of private parts" in the paragraph addressing the "bathroom" incident, although it made such references in regard to other incidents. The detective concluded her report with the following statement:

> The victim alleged that the suspect fondled the victim's penis while the victim was staying at the suspect's residence. The suspect also exposed his genitals to the victim and asked the victim to put his penis in the suspect's butt. The victim did not.

Detective Rudzinski further reported the date and time of the alleged occurrences to be "[b]etween March 28, 1998, and April 4, 1998, at various times."

Prior to trial, the court ruled that the portions of Detective Rudzinski's notes that did not specifically address the "bathroom" incident were inadmissible. Accordingly, her testimony on direct was confined to the specific paragraph dealing with the bathroom incident. However, when the detective was called as a witness by the defense, she was presented with her entire report and counsel asked whether, "[a]t any time, at least on that investigation, that you have there, that you typed up and you reported, and in the grand jury concerning the bathroom, at any time, in there, was there any mention from [A.B.] to you about being touched on any of his private areas?" (Emphasis added.) Although the detective limited her response specifically to the statements regarding the "bathroom" incident, upon cross-examination the Commonwealth delved further into the report's contents as a whole:

> COMMONWEALTH: Is anywhere in there in your report does it refer to him touching his private part . . . ?
>
> DEFENSE: Objection Your Honor.
>
> COURT: You can approach.
>
> COMMONWEALTH: He's opened the door judge.
>
> COURT: I'm going to permit the question.
>
> DEFENSE: Again we would strongly, object . . . for the record.
>
> COURT: Overruled.

COMMONWEALTH: Does, stated in your report anywhere that he touched his private area or anything to that effect?

. . . .

COMMONWEALTH: Did [A.B.] state that the defendant touched his private part?

DEFENSE: Judge, it's hearsay, it hasn't been . . . .

COURT: Overruled, it's been opened, you opened the door. Overruled.

DETECTIVE: It does state that in my report, yes.

COMMONWEALTH: Could you read that?

COURT: No, sustained. Objection sustained as to the reading of it.

COMMONWEALTH: Okay, did you state in your report that [A.B.] stated Appleby touched my private . . . ?

DEFENSE: Judge?

COURT: Objection sustained.

COMMONWEALTH: No further questions.

Appellant argues the trial court erred by permitting the Commonwealth to pursue the quoted line of questioning, in contravention to its own prior ruling. However, appellant's counsel clearly opened the door for the Commonwealth to inquire whether the report, as a whole, contained any reference to A.B. having stated that appellant had touched his private areas by asking the detective whether, "at any time, in [her report], was there any mention from [the victim] to you about being touched on any of his private areas?" To conclude otherwise would sanction the defense in misleading the jury to believe that A.B. never made any allegations to the detective of conduct of this nature.

Moreover, our supreme court "has repeatedly held that, when the defendant only introduces part of a document or record, the Commonwealth can introduce other portions to refute that offered by the defendant." Crane v. Commonwealth, Ky., 833 S.W.2d 813, 817 (1992), cert. denied, 506 U.S. 1069, 113 S.Ct. 1020, 122 L.Ed.2d 167 (1993). As such, we believe that when appellant advanced a wide-open inquiry into the contents of the detective's report, the Commonwealth became entitled to pursue that line of examination on cross-examination. In other words, since appellant chose to delve into the report's entire contents on direct examination, it was entirely proper for the trial court to then permit the Commonwealth, on cross-examination, to inquire into other matters included within the report and relevant to the issues at trial.

Next, appellant contends that the Commonwealth engaged in prosecutorial misconduct by impermissibly bolstering and rehabilitating Detective Rudzinski's testimony. However, since this argument merely reiterates the above-addressed contention, that the trial court erred in ruling that appellant opened the door to further inquiry into the detective's written report, we need not readdress this issue in a different context.

Next, appellant contends that the trial court erred by failing to grant his motion for a mistrial, resulting in the jury being coerced to reach a verdict. We disagree.

After deliberating for three hours, the jury sent a note to the judge stating "[w]e're at a dead-end. What happens if we never agree on a verdict?" The court responded by reading the jury the charge set forth in RCr 9.57(1), and the jury

retired for further deliberations. Approximately one hour later, the jurors informed the court they were "deadlocked." At this point, appellant made a motion for a mistrial which the court denied. Instead, the court sent the jury out for dinner. Following dinner and further deliberations, the jury returned a guilty verdict.

RCr 9.57(1) states that the court may give a special instruction to a jury if it is unable to reach a decision and the court determines that further deliberations might be useful. Here, we perceive no abuse of discretion in the court's determination that deliberations after dinner might be useful. Certainly, nothing about the court's decision smacks of coercion. Moreover, the instruction given to the jury conformed to RCr 9.57(1). Hence, we conclude that there is no basis for appellant's claim of coercion.

Finally, appellant argues that the cumulative effect of the complained-of errors prejudiced his substantial rights. However, we disagree since we have concluded there is no merit in any of appellant's contentions. Thus, there was no infringement on his right to due process. See McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 701 (1986), cert. denied, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987).

The court's judgment is affirmed.

ALL CONCUR.

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