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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2001-CA-002519-MR

CHARITY LYNN WERNIGK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CR-00254

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE.¹

POTTER, SPECIAL JUDGE: Charity Lynn Wernigk appeals from a jury verdict convicting her of two counts of third-degree rape.

Wernigk contends that the trial court erred when it failed to conduct a competency hearing; that the trial court erroneously excluded evidence that her accuser, E. E., a juvenile, had previously been charged with sodomizing Wernigk's five-year-old

¹ Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

son; that the trial court erred by failing to suppress her confession; that a manifest injustice occurred when the trial court allowed the introduction of evidence regarding statements made by E. E. to his brother; and that the trial court erred by permitting the introduction of evidence concerning prior bad acts involving Wernigk. For the reasons stated below, we affirm.

Prior to the allegations being brought against Wernigk, Wernigk and her husband had reported to Lexington Police detectives that E. E. had sexually abused the Wernigk's five-year old son. During the subsequent juvenile proceedings, E. E. admitted that he had sodomized the child. However, also in the course of the juvenile proceedings, E. E. alleged that he had participated in sexual intercourse with Wernigk when he was 14 years old. During the subsequent police investigations of E. E.'s allegations, Wernigk confessed to having had sexual intercourse with E. E. on three separate occasions, and that she knew that he was under the age of sixteen on two of those occasions.

On March 5, 2001, Wernigk was indicted for two counts of third-degree rape, Kentucky Revised Statutes (KRS) 510.060.² A jury trial was held on January 21, 2001. The evidence at trial was straightforward. The Commonwealth called E. E. and

² For reasons not entirely clear from the record, on August 14, 2001, the Fayette Grand Jury returned a superceding indictment on the same charges.

introduced Wernigk's taped confession along with several letters Wernigk had written to E. E. Wernigk's defense was that E. E. had made-up the allegations against her in retaliation for the Wernigks pursuit of the sexual abuse charges against him, and explained her confession as the product of police pressure and Wernigk's lowered mental abilities.

Following a jury trial, Wernigk was found guilty of two counts of third-degree rape. On November 6, 2001, in accordance with the jury verdict and sentencing recommendation, the trial court entered final judgment convicting Wernigk of two counts of third-degree rape and sentencing her to a total of two and one-half years imprisonment. Imposition of sentencing was suspended, and Wernigk was placed on probation for a period of five years. This appeal followed.

First, Wernigk contends that the trial court erred when it failed to follow the requirements of KRS 504.100 by failing to conduct a hearing to determine the competency of Wernigk to stand trial.

KRS 504.100(1) requires a court to appoint a psychologist or psychiatrist "to examine, treat and report on the defendant's mental condition" whenever "the court has reasonable grounds to believe that the defendant is incompetent to stand trial." Thompson v. Commonwealth, Ky., 56 S.W.3d 406, 408 (2001). Criminal prosecution of a defendant who is

incompetent to stand trial is a violation of due process of law under the Fourteenth Amendment. Id. (*citing Medina v. California*, 505 U.S. 437, 439, 112 S.Ct. 2572, 2574, 120 L.Ed.2d 353 (1992)).

"Once facts known to a trial court are sufficient to place a defendant's competence to stand trial in question, the trial court must hold an evidentiary hearing to determine the question." Mills v. Commonwealth, 996 S.W.2d 473, 486 (1999), *cert. denied*, 528 U.S. 1164, 120 S.Ct. 1182, 145 L.Ed.2d 1088 (2000) (*citing Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975) and Pate v. Robinson, 383 U.S. 375, 385-86, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966)). The standard of review in such a case is, "[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." Id.

On April 10, 2001, Wernigk filed a motion seeking funds for a psychological examination and evaluation. At a subsequent hearing on the motion, in an exchange that lasted less than a minute, Wernigk's counsel advised the trial court that her client had been seeing a therapist as part of her bond requirements in District Court, and that although the therapist did not feel competent to evaluate Wernigk the therapist felt

that Wernigk should be evaluated. The trial court later entered an order approving payment to Dr. Douglas D. Ruth, M.D., a forensic psychiatrist, to conduct a psychological examination and evaluation.

Later in the proceedings, at a suppression hearing regarding Wernigk's confession, the issue of Wernigk's competency was briefly addressed when Wernigk's husband testified that Wernigk had a "special education background" and functioned at the level of a 15 or 16-year old. In addition, at the suppression hearing, the trial court had the opportunity to observe Wernigk testify.

As previously noted, the trial court is only obligated to hold a hearing if it "has reasonable grounds to believe the defendant is incompetent to stand trial." Here the court had no such grounds. Though funds for an evaluation were approved, no expert opinion was presented regarding Wernigk's competency and, based upon our review of her suppression hearing and trial testimony, there was nothing in Wernigk's demeanor on those occasions which would have suggested that she was not competent to stand trial. Perhaps it would have been best if the court had asked to see Dr. Ruth's report,³ but the court was entitled

³ Although no competency hearing was ever held and Dr. Ruth's report is not in the record, the sex offender evaluation performed after the conviction refers to Dr. Ruth's evaluation.

to assume that if the report had indicated that Wernigk was incompetent her attorney would have raised the issue.

In summary, a reasonable judge, situated as was the trial court judge, would not have experienced doubt with respect to Wernigk's competency to stand trial.

Next, Wernigk argues that the trial court erred when it denied her motion to introduce into evidence that E. E. had been charged with, and admitted guilt in juvenile court to, sodomizing the Wernigk's five-year-old son. We agree with the Commonwealth that this issue is not properly preserved for appellate review.

On September 5, 2001, Wernigk filed a motion pursuant to Kentucky Rules of Evidence (KRE) 412(b)(3) "to allow evidence of the complaining witness' past criminal sexual behavior which involved the minor child of the defendant[.]" The motion further stated that "[t]his evidence is necessary to impeach the complaining witness' credibility and to show bias."

On September 7, 2001, a hearing was held to determine whether evidence of the victim's past criminal sexual behavior would be admitted at trial. Following the hearing, the trial court ruled that Wernigk could introduce evidence that the Wernigk's had brought charges against the juvenile and that the juvenile first reported the sexual allegations against Wernigk while being investigated on those charges; however, the trial

court ruled that Wernigk could not introduce evidence concerning the exact nature of the crime.

After the trial court's ruling, the Commonwealth indicated that it might want all of the evidence concerning the charges against the juvenile to come in rather than to proceed under the trial court's ruling. The trial court stated that the parties could of course agree to allow all of the evidence to come in.

The Commonwealth subsequently moved the trial court to reconsider its ruling and either keep out all of the evidence concerning the charges against E. E., or allow it to introduce evidence concerning the nature of the charges and to present evidence regarding how the juvenile's sexual contact with Wernigk might have caused E. E. to sexually abuse the Wernigk's child. At this point Wernigk accepted the trial court's prior ruling and argued against allowing evidence concerning the exact nature of the crime. Presumably Wernigk reasoned that if the exact nature of the crime were to be admitted, the Commonwealth would be entitled to introduce evidence linking E. E.'s sexual contact with Wernigk to his abuse of the Wernigk's child, thereby negating Wernigk's attempt to show bias and enhancing the consequences of her crime to include corrupting E. E. into sexually abusing the Wernigk child.

A point of error not raised in the lower court cannot be raised on appeal. Taylor v. Commonwealth, Ky., 461 S.W.2d 920, 923 (1970) *cert. denied* 92 S.Ct. 126, 404 U.S. 837, 30 L.Ed.2d 70. While Wernigk initially raised the argument that she should be allowed to present evidence concerning the nature of the crime, she subsequently abandoned the argument. An appellant is not permitted to argue one way to the trial court and another way to the appellate court. Henson v. Commonwealth, Ky., 20 S.W.3d 466, 470 (1999). Inasmuch as Wernigk abandoned her argument to introduce evidence of the exact nature of E. E.'s crime before the trial court, this issue is not properly preserved for our review.

Next, Wernigk contends that the trial court erred by failing to suppress her confession to having sexual contact with the juvenile on the basis that (1) the confession was not voluntary and (2) on the basis that the confession was not properly corroborated as required by Kentucky Rules of Criminal Procedure (RCr) 9.60.

To determine whether a confession is the result of coercion, one must look at the totality of the circumstances to assess whether police obtained evidence by overbearing the defendant's will through making credible threats. Arizona v. Fulminante, 499 U.S. 279, 286-88, 111 S.Ct. 1246, 1252-53, 113 L.Ed.2d 302 (1991); Allee v. Commonwealth, Ky., 454 S.W.2d 336,

341 (1970). The three criteria used to assess voluntariness are 1) whether the police activity was "objectively coercive;" 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police activity was the "crucial motivating factor" behind the defendant's confession. Morgan v. Commonwealth, Ky., 809 S.W.2d 704, 707 (1991)(adopting federal due process standards of McCall v. Dutton, 863 F.2d 454 (6th Cir.1988). Any statement that was not the product of the defendant's free choice at that time was not voluntary. Henson v. Commonwealth, Ky., 20 S.W.3d 466, 469 (1999).

The issue of voluntariness of a confession is a mixed question of fact and law. Id. When the trial court is faced with conflicting testimony regarding the voluntariness of a confession, its determination, including its evaluation of credibility, if supported by substantial evidence, is conclusive. Id. (*citing* Crawford v. Commonwealth, Ky., 824 S.W.2d 847, 849 (1992); Harper v. Commonwealth, Ky., 694 S.W.2d 665 (1985); Edwards v. Commonwealth, Ky., 500 S.W.2d 783 (1973); and RCr 9.78).

At the suppression hearing, Detective Harris testified that he interviewed Wernigk on January 31, 2001. Prior to discussing the allegations of Wernigk's improper sexual relationship with the juvenile, Detective Harris read Wernigk

her Miranda rights. In addition to reading Wernigk her rights, Detective Harris showed her a Miranda warning card and Wernigk signed the back of the card to indicate that she had been informed of those rights and that she understood those rights. Detective Harris further testified that Wernigk did not appear to be incapacitated in any way and that her behavior indicated that she did understand her rights.

Detective Harris also testified that, before asking Wernigk to give a taped statement, he briefly went over the allegations with her and gave her the opportunity to respond. Wernigk at first denied the allegations, but after Detective Harris confronted her with two letters she had written to the juvenile, she admitted that she had had sexual contact with E. E.

Harris testified that when he was confident that Wernigk understood her situation and was willing to honestly explain her relationship with the juvenile, he asked her to give a taped statement, to which Wernigk agreed. Detective Harris then played a portion of the tape indicating that Wernigk had affirmatively stated that she understood her Miranda rights and was willing to give a taped statement.

Upon our examination of the record and according appropriate deference to the trial judge's superior opportunity to observe the demeanor of the witnesses, we conclude

that Wernigk's January 31, 2001, confession was voluntary. There was no lengthy period of detention or repeated rounds of interrogation. There was no indication of any physical abuse. Wernigk was informed of her constitutional rights, signed a card acknowledging that she understood those rights, and verbally acknowledged that she understood her rights. Based upon these factors, we are bound by the principle that, if supported by substantial evidence, the factual findings of the trial court are conclusive.⁴ Henson at 469 - 470.

With regard to Wernigk's claim that the trial court should not have admitted her confession because it was not corroborated as required by RCr 9.60, this argument is without merit. Wernigk's confession to sexual contact with E. E. when he was under sixteen years of age was corroborated by the testimony of E. E.

Next, Wernigk contends that the trial court erred when it allowed the introduction of evidence regarding statements by E. E. to his brother, who did not testify at trial.

⁴ Wernigk also contends that the trial court "was apprised that the appellant has a mental disability that causes her to operate on the cognitive level of a thirteen year old." However, the actual testimony to which the appellant refers came from her husband and merely indicated that he believed his wife functioned on the educational level of a sixteen or seventeen year old. We are not convinced that his layman's testimony was sufficient to raise the issue regarding whether Wernigk was an impressionable youth or lacking in intelligence or knowledge of the criminal process.

Specifically, Wernigk contends that it was a violation of the hearsay rules to permit E. E. to testify that he had told his brother about his sexual contact with Wernigk prior to the Wernigks bringing their allegation that E. E. had sexually abused their son.

As previously noted, Wernigk sought to attack E. E.'s credibility by asserting that he wrongly accused her of a crime because she and her husband had initiated charges against him. It was relevant that E. E. mentioned having sex with Wernigk before his own problems came to the attention of the police as this would rebut the defense charge of recent fabrication. As we view the testimony, the testimony was admitted not to prove the truth of the matter, i.e., that E. E. had had sexual contact with Wernigk, but, rather, to prove that E. E. had mentioned the sexual contact before he told the police. Under these circumstances, the reference to the prior consistent statement was nonhearsay. KRE 801(c); Berry v. Commonwealth, Ky. App., 84 S.W.3d 82, 89 (2001). Moreover, even if the statement could be construed as hearsay, we are persuaded that the exception provided by KRE 801A(a)(2) would apply. This rule permits a prior consistent statement to be introduced if the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Recent fabrication and improper motive by E. E. were central to Wernigk's defense.

Without citation to the trial videotape, Wernigk contends that the trial court had ruled that the statement had to come in through the brother. Our review of the videotape does not confirm this; however, though undoubtedly the Commonwealth would have had a stronger case had it called the brother to corroborate E. E.'s testimony, it was not required to do so, and the trial court was wrong if it ruled that the statement had to come in through the brother or not come in at all. If the trial court made the ruling that the statement had to come in through the brother, the introduction of the statement in violation of the trial court's ruling was harmless error. RCr 9.24.

Next, Wernigk challenges the court's ruling that the Commonwealth could introduce evidence of other sexual encounters and uncharged conduct involving her and E. E. Specifically, the trial court granted a pretrial KRE 404(b) motion by the Commonwealth to introduce evidence concerning two uncharged occasions of sexual intercourse; evidence that Wernigk had shown E. E. pornographic movies and nude pictures of herself; and that Wernigk had provided E. E. with alcohol to the victim one evening and that they kissed on that occasion.

KRE 404(b) prohibits the evidence from being introduced "to prove the character of a person in order to show action in conformity therewith." However, it is admissible "[i]f so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." KRE 404(b)(2). Clearly the evidence the of the uncharged sexual encounters the Commonwealth sought to introduce fell into this category. Further, the evidence were part of a continuing course of conduct which raised reasonable inferences bearing on motive, opportunity, intent, and common plan or scheme. KRE 404(b)(1). The whole trial was about the relationship between Wernigk and the victim. The proffered evidence sought to flesh out this relationship and was admissible. Lear V. Commonwealth, Ky., 884 S.W.2d 657 (1994); Roberson v. Commonwealth, Ky., 913 S.W.2d 310 (1994); Commonwealth v. English, Ky., 993 S.W.2d 941 (1999).

For similar reasons the evidence concerning the pornographic movies, the nude pictures, the alcohol, and the kissing were admissible.

Wernigk also objects to the timeliness of the Commonwealth's motion to present the evidence under KRE 404(b), which was made two days before trial. However, at trial Wernigk never objected on this ground and it is obvious from the

objections that were made that the motion and its contents came as no surprise.

Finally, Wernigk contends that the cumulative effect of the errors made in the trial require reversal.

Wernigk received a fundamentally fair trial and there was insufficient harmless error to create a cumulative effect which would mandate reversal for a new trial. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 40 (1998); *Compare* Funk v. Commonwealth, Ky., 842 S.W.2d 476, 483 (1993).

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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