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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000063-MR

MICHAEL J. FOLEY

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT I. GALLENGSTEIN, JUDGE
ACTION NO. 01-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Michael J. Foley has appealed from the final judgment and sentence entered by the Mason Circuit Court on December 12, 2001, which convicted him of rape in the first degree¹ and sentenced him to 15 years' imprisonment. Having concluded that there was no reversible error and that Foley was not entitled to a directed verdict of acquittal, we affirm.

Foley and his wife, Sherri, resided in an apartment above Jason and Maria Meadows. On or about February 19, 2001,

¹ Kentucky Revised Statutes (KRS) 510.040.

Foley's wife asked him to go downstairs to the Meadowses' apartment and to borrow some movies.² Upon Foley's arrival, Maria was preparing to leave the apartment to deliver a baseball cap to her husband at work. After Maria left, Foley was alone in the apartment with C.M. Maria and C.M. are sisters and C.M. had been staying with the Meadowses for two and one-half months. C.M. was 24-years-old, developmentally delayed, and sexually inexperienced.³ She had graduated from high school under a special education curriculum.

At his jury trial, Foley claimed that he began talking to C.M. and "asked her if she wanted to fool around and she said yes." Foley testified that he believed C.M. "pushed [her panties] down with her pants." Foley admitted that he pushed his pants down to his knees and knelt in front of C.M., but he claimed that he was wearing a pair of Nike basketball shorts and a pair of boxer shorts underneath his pants, and that he never removed his penis from these undergarments. Once C.M.'s pants were down, Foley licked his fingers and inserted them into her vagina. After C.M. informed Foley that she was a virgin, Foley

² The record is unclear as to whether this incident occurred late Sunday night, February 18, or early Monday morning, February 19. However, as the record indicates that Foley was arrested on February 19, 2001, that will be the date of the incident for our purposes.

³ Detective Andy Muse, a police officer investigating the alleged attack, commented that C.M. possessed the mentality of a ten-year-old. While Detective Muse is apparently not an expert on this subject, this testimony is not an issue on appeal. The record also reflects that C.M. has a hearing disability.

"told her to relax and [that he] would be gentle." Foley testified that he pushed his fingers in and out of C.M. "a time or two." Foley conceded that he intended to have sexual intercourse with C.M., but he contended that the entire incident was consensual.

Sherri Foley testified that she went downstairs to the Meadowses' apartment to determine what Foley was doing because he had been gone approximately five minutes. Outside the apartment door, Sherri overheard Foley tell C.M. to "just lay back and relax." Sherri became angry, abruptly kicked in the apartment door, and saw C.M. in the recliner.⁴ Sherri testified that Foley was on the floor in front of C.M. and that C.M. was "laid back [in the recliner] chilling with it." Although his pants were down to his knees, Sherri testified that Foley's Nike basketball shorts were still up.

As soon as Sherri opened the door, both Foley and C.M. began dressing hastily. Sherri testified that she "just walked in and ruined their plans." Sherri left the apartment, but returned shortly and confronted C.M.⁵ Sherri testified that she banged on the apartment door a couple of times and observed C.M. peer through the blinds. Sherri told C.M. that if she did not open the door within three seconds she was going to break it in.

⁴ Although Sherri was unsure as to whether C.M. was completely naked, Sherri did observe that C.M. was not wearing pants or panties.

⁵ Foley had left the Meadowses' apartment.

After C.M. unlocked the door, Sherri pushed it open and shoved C.M. across the room. Sherri's shove knocked C.M. into the next room where she landed on her back and C.M. began to cry. Sherri instructed C.M. to get up; and after she did, Sherri knocked her down again. As C.M. lay upon the floor crying, Sherri "thanked her for ruining [her] marriage and called her a few choice words[.]" Sherri testified that C.M. then told her that Foley "forced himself upon [her]."

C.M. testified at trial regarding her family background, age, and mental and physical characteristics. C.M. testified that she attended special education classes in both middle school and high school. C.M. graduated from high school in 1996, but she was not employed because she was on disability.⁶ C.M. admitted that she does not have a very good memory. C.M. testified that she first saw Foley on the Saturday night before the incident occurred when he stopped in the Meadowses' apartment to use the telephone.⁷

C.M. alleged that on the night of the incident Foley had approached her and "asked [her] if [she] wanted to do it [but] she said 'no' because [she] was scared." C.M. testified that she shook her head, indicating "no." She testified that

⁶ C.M. testified that she graduated "[b]ack in 1996, I think."

⁷ However, during cross-examination, C.M. testified that she had in fact met Foley on other occasions before that Saturday night.

even though she shook her head, Foley unfastened her pants. C.M. testified that she "was trying to keep [Foley] from getting too close," by zipping and buttoning her pants back up as he tried to unbutton them. Although C.M. acknowledged that she never verbally told Foley "no," she did shake her head and tell him that she was scared. C.M. testified that Foley next

scrunched me down in the chair, got on his knees, pulled down his pants, and he pulled it out [and] he was sticking it halfway in. It didn't go all the way in. He took it out and he licked his finger and touched me down there, and then he put it back in. And, his wife, Sherri Foley, come down and hollered his name. He hurried up and got his pants and ran out the door. Before my leg -- my leg -- one of my legs was out of my pants leg, and my underwear was the same way. After she hollered out his name, like I said he got his pants and he ran out -- he ran out the door after -- then, I put that leg back in my underwear and my pants on.

C.M. explained that she then closed and locked the apartment door. C.M. testified that she experienced pain as a result of Foley's insertion of his penis halfway into her vagina. C.M. further testified that she told Foley that she "didn't want to do it," and that she "took both [her] hands and tried to push him away from [her] and he just kept at it." Although C.M. did not remember whether Foley had his pants on or off, or whether they were pulled down, or whether his underwear was pulled down, she testified that all she knew was that his pants were undone and his penis was exposed. After Maria

returned from her husband's workplace, she found C.M. crying and shaking. C.M. told Maria what happened and Maria called Jason at work. C.M. was then taken to a regional medical center for an examination.

Bonnie Jett, a social worker at the regional medical center, described C.M. as having "childlike manners in the emergency room," that she "was very scared," and that she "would cover her eyes as a child would to kind of block out what was happening to her." Kay Foreman, a registered nurse at the regional medical center and a sexual assault examiner, examined C.M. after the incident. Foreman testified that C.M. had bruising on various parts of her body, a good bit of bleeding on the pelvic examination, a torn hymen, a tear below her vagina, bruising on both sides of her vagina, and bruising inside her vagina. Foreman also testified that C.M.'s injuries were consistent with vaginal penetration.

A few hours after the incident, C.M. gave the following handwritten statement to the police:

Michael Foley came into my sister's apartment, but first he knocked on the door. My sister went to answer the door to see who it was. Then he came in here and asked to borrow some movies. Then my sister went to where her husband works at. Then he waited until she left. Then he came over and he put the movies down and he pulled my pants down and got on his knees and pulled my pants down to try to stick his thing in me and I tried to push him away from me and he

was trying to finger me, but also asked me if I wanted to do it and I told him no. Then his wife came in and Sherri seen him on his knees and yelled his name and got mad and walked out. Then a minute later Sherri came knocking on the door, so I went to see who it was and she came in and pushed me in the dirt room. Then started crying a minute or two later.

During cross-examination, C.M. admitted that she was not looking at what was occurring during the incident. In addition, the following exchange transpired between Foley's counsel and C.M.:

Q. So, from the time you first wrote your statement that was just your memory to the time that you gave all these other statements, your story kind of -- your story changed a lot in there due to the questions [the police and regional medical center employees] asked you, right?

A. Well, not too much, but a little bit.

Q. Some details got added and some things disappeared and all that sort of thing, right?

A. Yes.

Foley was arrested and charged with rape in the first degree and sexual abuse in the first degree.⁸ On March 16, 2001, the grand jury indicted Foley on one count of rape in the first degree for engaging in sexual intercourse with C.M. by forcible compulsion and one count of sexual abuse in the first degree for

⁸ The first-degree rape charge concerned C.M.'s allegations. The first-degree sexual abuse charge concerned an allegation made by Maria Meadows that, on a date prior to C.M.'s alleged rape, Foley grabbed her (Maria's) breast.

subjecting Maria Meadows to sexual contact by forcible compulsion. Foley pled not guilty and a jury trial was held on October 16, 2001. Foley was convicted of rape in the first degree and sentenced to 15 years' imprisonment.⁹ This appeal followed.

Foley claims the trial court erred to his substantial prejudice by denying him his Sixth Amendment right to be present at every stage of the proceedings because the trial court allowed the jury to take C.M.'s police statement back to the jury room while it deliberated. Foley alleges that, albeit perhaps inadvertently, the trial court permitted the jury to take C.M.'s handwritten police statement back to the jury room, despite his objection and the trial court's ruling that the statement would not be made available to the jury during deliberations.

Foley concedes that the record does not disclose whether the jury had access to C.M.'s handwritten statement during its deliberations. However, he speculates that the jury

⁹ An amended judgment was entered on December 17, 2001, which provided as follows:

This matter coming on to be heard on the Court's review of its judgment dated December 7, 2001 and ENTERED on December 12, 2001, and the Court having made oral findings that the victim suffered serious physical injury, IT IS ORDERED that the written judgment is amended to reflect the Court's oral finding that the victim suffered serious physical injury.

did have access to C.M.'s statements during its deliberations due to the trial court's inadvertence. The record does not support Foley's contention. The record reveals that after the jury returned its verdict Foley failed to make any objection based on his claim that it had improperly obtained C.M.'s handwritten statement during its deliberations. "[RCr] 9.22 requires a party to render a timely and appropriate objection in order to preserve an issue for review."¹⁰ Not only was there no evidence in the record to support an irregularity, but no objection was raised.¹¹ This issue is meritless.

Foley next claims that the trial court erred to his substantial prejudice by denying him due process of law because it denied his motion for a continuance after the Commonwealth in violation of RCr 7.26 produced a written witness statement less than 48 hours before the start of the trial. As previously mentioned, C.M. gave a handwritten statement to the police after the incident. C.M.'s handwritten statement was dated February 19, 2001, and was given at 1:25 a.m. However, C.M. gave a second statement to the police on February 19, 2001, at 2:36 a.m., one hour and eleven minutes after she provided her first handwritten statement. This second statement was an audiotaped interview between Detective Andy Muse and C.M. approximately

¹⁰ Collett v. Commonwealth, Ky.App., 686 S.W.2d 822, 823 (1984); see Blanton v. Commonwealth, Ky., 429 S.W.2d 407, 410 (1968).

¹¹ Bowman v. Commonwealth, Ky., 290 S.W.2d 814, 817 (1956).

five minutes in length. The interview was transcribed and both the transcript and audiotape were provided to Foley's counsel on October 15, 2001, one day before the trial began.

On the morning of the trial, October 16, 2001, Foley's counsel made a motion for a continuance. Foley's counsel requested a continuance due to the Commonwealth's alleged failure to provide her with any and all of C.M.'s mental health records and its failure to provide her with the transcript of C.M.'s second police statement. Foley's counsel insisted that material differences existed between C.M.'s first handwritten statement and the interview conducted an hour and eleven minutes later. Foley's counsel argued that

listening to [the audiotape] and reviewing the transcript, it [was] [her] opinion that the defense [had] not been able to adequately investigate [the] case [] -- as that tape provided extra information that would need to be investigated. It also provided extra information that the defense would have used. It provides part of the minimal showing for a -- for the request for medical records and mental health records.

Foley's counsel further claimed that the inconsistencies between C.M.'s statements would have possibly required a hearing as to C.M.'s competency on both mental grounds and her memory and perception of the alleged crime. Foley's counsel claimed that a reading of the interview transcript of C.M.'s second statement reveals that Detective

Muse asked C.M. very leading questions, which in turn raised questions of C.M.'s competency. The trial court denied the motion.

RCr 7.26(1) provides:

Except for good cause shown, not later than forty-eight (48) hours prior to the trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

"This rule was enacted for the purpose of allowing defense counsel a reasonable opportunity to inspect any such previous statements, before the witness is called, to enable counsel an opportunity to fully cross-examine the witness concerning any contradictory statements made by [her]."¹²

C.M.'s second statement clearly fell within the purview of RCr 7.26, and the Commonwealth failed to comply with RCr 7.26.¹³ Although Detective Muse interviewed C.M. on February

¹² Hicks v. Commonwealth, Ky.App., 805 S.W.2d 144, 148 (1990) (citing Wright v. Commonwealth, Ky., 637 S.W.2d 635 (1982); and Commonwealth v. Jackson, Ky., 281 S.W.2d 891 (1955)).

¹³ The Commonwealth contended in its brief that "[c]ontrary to [Foley's] argument, the defense counsel moved for a continuance based upon her request for more victim medical records (mental health records) and moved for a competency hearing based upon the taped statement." However, the trial transcript reflects that Foley's request for a continuance was based upon the taped statement and the affect, if any, its timely production would have had

19, 2001, the Commonwealth alleged that it only became aware of the audiotape on October 15, 2001. "Regardless of whether the Commonwealth's Attorney was personally aware of the statement, the Commonwealth was obliged to produce this statement under RCr 7.26(1)."¹⁴ Furthermore, the Commonwealth may not retort that it was unaware of C.M.'s statement "if the statement was taken by the investigating officer in charge of the case."¹⁵ "In such circumstances the knowledge of the detective is the knowledge of the Commonwealth."¹⁶

"However, even if the forty-eight hour rule is violated, automatic reversal is not required."¹⁷ "Some prejudice must be found, or the error, if any, is harmless."¹⁸ In order to justify reversal, Foley must demonstrate that he was prejudiced by the Commonwealth's violation of RCr 7.26. Foley was prejudiced "if as a result of the error, he was denied access to

upon C.M.'s competency to testify as a witness. Furthermore, the trial court specifically denied Foley's motion for a continuance based upon the failure of this argument that material differences existed between C.M.'s two statements. The trial court stated: "This Court has reviewed the tape and the witness statement and finds there is no material difference and [Foley's] motion for a continuance is overruled, and [Foley's] renewed motion for the Commonwealth to provide medical and mental health records of [C.M.] is also overruled."

¹⁴ Anderson v. Commonwealth, Ky., 864 S.W.2d 909, 912 (1993).

¹⁵ Id. at 912.

¹⁶ Id.

¹⁷ Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 905 (2000) (citing McRay v. Commonwealth, Ky.App., 675 S.W.2d 397, 400 (1984)).

¹⁸ Gosser, supra at 905 (citing McRay, 675 S.W.2d at 400). See also RCr 9.24.

information which, had he possessed it, would have enabled him to contradict or impeach the witness or established some other fact which might reasonably have altered the verdict."¹⁹ "RCr 9.24 provides however that errors which do not affect substantial rights shall be disregarded."²⁰ "Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial."²¹ Foley alleges that a comparison of C.M.'s two statements indicate that her "second statement was the product of leading questions and suggestion." Foley complains that once he received C.M.'s audiotaped interview, his counsel "noticed that C.M.'s account had become richer in detail, coaching was suspected, and leading questions had been employed."

C.M.'s handwritten statement, previously reproduced verbatim, was her first statement to the police. C.M. wrote that Foley pulled her pants down, got on his knees, tried to insert his penis into her vagina, she tried to push him away from her, he tried to insert his finger(s) into her vagina, and

¹⁹ Haynes v. Commonwealth, Ky., 657 S.W.2d 948, 950 (1983) (citing Maynard v. Commonwealth, Ky., 497 S.W.2d 567, 570 (1973)).

²⁰ Id. at 950 (citing Maynard, supra at 570).

²¹ Gosser, supra at 903 (citing Abernathy 439 S.W.2d at 952).

he asked her if she wanted to have sex and she said no. The transcript of C.M.'s second police statement evidences that she told Detective Muse that Foley asked her if she wanted to have sex, his pants were down and his penis was exposed, he pulled down her pants and underwear, she told him a couple of times that she did not want to have sex, he attempted to insert his penis into her vagina, she experienced pain, and after Sherri opened the apartment door Foley pulled up his pants and underwear. Foley's counsel conceded that the Commonwealth's transcript of C.M.'s interview was "relatively accurate" to the audio recording.²²

To reiterate, the trial court denied Foley's motion for a continuance because it found that no material difference existed between C.M.'s two statements. We conclude that even though the Commonwealth failed to comply with CR 7.26 by not providing Foley with C.M.'s second police statement, the failure was "not prejudicial since the [statement] would not have established some other fact which might reasonably have altered the verdict."²³ Although C.M.'s second statement was not furnished to Foley until one day before trial, his counsel nevertheless used it to fully and effectively cross-examine

²² The audiotape of C.M.'s interview is not part of the record on appeal.

²³ Haynes, 657 S.W.2d at 950.

C.M.²⁴ Therefore, the jury was aware of any discrepancies between the two statements. Further, the trial court correctly ruled that there were no material differences between the two statements. From our review of both statements, we have not discovered any disparity that would have altered the verdict. C.M. provided strikingly similar accounts of the incident in both of her statements. The Commonwealth's failure to comply with RCr 7.26 was non-prejudicial because there is no substantial possibility that the result would have been any different.²⁵ The Commonwealth's failure "to comply with RCr 7.26 does not constitute reversible error."²⁶

Foley also claims that the trial court erred to his substantial prejudice by denying him due process of law because it denied his motion for a competency hearing after it was disclosed that C.M. made her allegations of rape during an interview in which leading questions were used and that C.M. had graduated from a special education program. Foley alleges that the trial court's denial of his request for a competency hearing was violative of "his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 2, 3, 10, and 11 of the Kentucky Constitution[.]"

²⁴ Hicks, 805 S.W.2d at 149.

²⁵ Gosser, 31 S.W.3d at 903.

²⁶ Hicks, 805 S.W.2d at 149.

On the morning of the trial and before it began, Foley's counsel moved the trial court to reconsider providing her with any and all of C.M.'s mental health records. After the trial court observed that Foley's motion was untimely, the trial court considered her motion for a continuance premised upon the same argument. The Commonwealth replied that it had provided Foley with all information it possessed about C.M.'s mental health months earlier, including the fact that C.M. graduated from a special education high school. Furthermore, the Commonwealth's Attorney asserted that

I am not aware of any mental health records. I am not aware of whether [C.M.] has been seen by a state facility or a private facility or any other type of facility whatsoever. All I know is that she is apparently, in somebody's opinion, slow and has had special education classes.

Foley's counsel responded that

[a]s far as the statement goes, due to the inconsistencies and the fact that it was in interview form, this changes -- this changes things greatly in the sense that the defense would have moved to have possibly a hearing on the competency of [C.M.] prior to that, not necessarily competency, just on mental grounds, but also competency in the form of memory and perception based on other people being involved and the statements given by the victim. If you look at the transcript, it is a very leading interview.

The trial court denied Foley's motion for the Commonwealth to provide C.M.'s medical and mental health records and his motion for a competency hearing for C.M.

KRE 601 provides as follows:

(a) General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.

(b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:

(1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;

(2) Lacks the capacity to recollect facts;

(3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or

(4) Lacks the capacity to understand the obligation of a witness to tell the truth.

Foley argues that C.M. lacked the capacity to recollect facts²⁷ because she "testified about an event that was shaped by the influence of a police detective, a nurse, a social worker, and the Commonwealth Attorney, [and] not from her own memory as she readily admitted at trial." Foley also claims that the alleged inconsistencies between C.M.'s statements demonstrate her incompetence to testify. Consequently, Foley

²⁷ KRE 601(b)(2).

asserts that a competency hearing was required to evaluate whether C.M. was capable of testifying at trial.

"KRE 601 recognizes a presumption of competency and permits disqualification of a witness only upon proof of incompetency."²⁸ Furthermore, the commentary to KRE 601 explains as follows:

This provision serves to establish a minimum standard of testimonial competency for witnesses. It is designed to empower the trial judge to exclude the testimony of a witness who is so mentally incapacitated or so mentally immature that no testimony of probative worth could be expected from the witness. It should be applied grudgingly, only against the "incapable" witness and never against the "incredible" witness, since the triers of fact are particularly adept at judging credibility.²⁹

The record supports the trial court's allowing C.M. to testify at trial. C.M. promptly reported the sexual assault and her handwritten statement was lucid. Her second statement reveals that she fully and coherently answered Detective Muse's questions. Her two statements were consistent and sensible. Moreover, the trial transcript of her testimony reveals that she understood the facts and comprehended what had happened to her. C.M. admitted on cross-examination that she did not have a very good memory; however, "[t]hough she could not recollect all of

²⁸ Price v. Commonwealth, Ky., 31 S.W.3d 885, 891 (2000).

²⁹ Id. at 891 (citing Commentary to KRE 601, Evidence Rules Study Committee, Final Draft (1989)).

the specific details surrounding her [attack] by [Foley], that affected only the credibility of her testimony, not her competency to testify."³⁰ It was within the trial court's sound discretion to determine whether a competency hearing was required. C.M. was presumed competent to testify and Foley has failed to produce any evidence of her incompetency. There was no error.

Foley's final claim is that the trial court erred to his substantial prejudice by denying him due process of law because it denied his motion for a directed verdict of acquittal on the charge of rape in the first degree even though the evidence was so incredible that no rational trier of fact could have found guilt and the Commonwealth failed to prove penile, rather than digital, penetration. Foley argues that although C.M. testified that his penis was inserted halfway into her vagina, she was not looking when this allegedly occurred; as C.M. had no sexual experience, she would have been unable to differentiate between a finger and a penis; Kay Foreman, C.M.'s examining nurse, was unable to determine whether C.M.'s penetration was caused by a finger, penis, or foreign object; Foreman did not know whether C.M.'s penetration and injuries were consistent with more than one finger; Sherri observed that Foley's Nike shorts were still up even though his pants were

³⁰ Price, 31 S.W.3d at 891.

pulled down; C.M. did not allege that she had been raped until after Sherri attacked her; and that the jury requested the results of the rape kit.³¹

C.M. testified as follows: she knew that Foley inserted his penis, rather than his finger, into her vagina; Foley's insertion of his penis "felt different" than when he inserted his finger(s); and it felt strange and uncomfortable. Additionally, Foreman testified that C.M.'s injuries, which included bruising and abrasions, were not consistent with the use of a finger, her injuries were consistent with the insertion of something wide, and her penetration was consistent with a penis.

As a reviewing court, our duty is not to reevaluate the proof; rather, this Court's "only function is to consider the decision of the trial judge in light of the proof presented."³² The standard for a directed verdict is as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should be given. For the purpose of ruling on the motion, the trial court must assume

³¹ The trial court refused to provide the jury with the results of the rape kit because it was never introduced as evidence. Additionally, Foley's counsel agreed with the trial court's decision. As such, this is irrelevant.

³² Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.³³

Foley was obviously not entitled to a directed verdict of acquittal because, under the evidence as a whole, it was not clearly unreasonable for a jury to find guilt.³⁴ The Commonwealth "produced evidence that was considerably more than a mere scintilla and the case was properly presented to the jury for determination."³⁵

For the foregoing reasons, the judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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³³ Id. at 187.

³⁴ Id. at 187.

³⁵ Id. at 188.