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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001784-MR

JAMES PAUL NEVITT — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 01-CR-00138

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: James Paul Nevitt was found guilty by a Bullitt Circuit Court jury of six counts of sodomy and two counts of sexual abuse. He was sentenced to serve three years' imprisonment for each of the six counts of sodomy and ninety days in the county jail for each of the counts of sexual abuse. He appeals his conviction. Finding no error, we affirm.

On August 7, 2001, Nevitt was accused of molesting M.C., a minor (fifteen years of age), who was periodically left

in his care.[1] Authorities began a formal investigation, and on the morning of August 10, 2001, Detective Rick Melton of the Kentucky State Police and Mary Ellen Murray of the Cabinet for Families and Children visited Nevitt's home. Detective Melton and Murray introduced themselves and were invited inside.

Nevitt was immediately advised of the nature of the allegations made against him. Detective Melton indicated to Nevitt that M.C.'s allegations were sufficient to justify charging him but that no charges had yet been filed. He assured Nevitt that he was not under arrest. Detective Melton said that he "may have" told Nevitt that "he could cooperate . . . or he could be having lunch down at the jail." Nevitt and his wife, Wilma, agreed to be interviewed about M.C.'s allegations.

Nevitt initially denied that anything of a sexual nature had ever occurred with M.C. When Melton told Nevitt that he believed M.C.'s accusations, Nevitt admitted that he had sodomized and sexually abused M.C. on numerous occasions. He emphasized, however, that the sexual contact had been consensual. Nevitt also volunteered that he had sexual intercourse with his stepdaughter several times while she was a minor and also admitted to having had sexual contact with another minor, a friend of M.C.. When Nevitt asked whether he

[1] According to the testimony of Kentucky State Police Detective Rick Melton, Nevitt explained to police that M.C. is his godchild and may be his biological daughter.

needed an attorney, Detective Melton told him that that decision was his alone.

The interview proceeded for approximately thirty-five minutes before Detective Melton asked permission from Nevitt to record the remainder of the conversation. Nevitt repeated his incriminating statements. He never asked to terminate the interview, and he indicated unequivocally that his confession had been freely and voluntarily given. **At no point** during the interview was Nevitt advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694 (1966).

Detective Melton completed his investigation by interviewing M.C. again and by contacting the other victims identified by Nevitt. On August 16, 2001, Nevitt was arrested and charged with multiple counts of sodomy, attempted rape, and sexual abuse. He was indicted by a Bullitt County grand jury on October 31, 2001.

One year later, on October 31, 2002, Nevitt filed a motion to suppress his confession, arguing that he had not been properly advised of his constitutional rights before making the incriminating statements to Detective Melton and to Murray. Ruling that Nevitt's statements had not been made during a custodial interrogation, the trial court denied the motion by determining that Miranda did not apply. Nevitt was tried and convicted. This appeal followed.

Nevitt first contends that the trial court erred by failing to suppress the incriminating statements that he made to Detective Melton and to Murray. Nevitt claims that he was essentially **in custody** during the August 10 interview and that he accordingly was entitled to Miranda warnings. Since the warnings had not been given before the interview, he argues that his confession should have been excluded from evidence. We disagree.

The holding of Miranda is expressly limited to custodial interrogations, and "the threshold issue in this case (and in any case involving a perceived violation of Miranda rights) is whether the defendant was subject to a custodial interrogation at the time he claims he was denied any of his Miranda rights." Jackson v. Commonwealth, ___ S.W.3d ___ (Ky. 2006)(Rendered March 23, 2006); Miranda, supra, at 444, 86 S.Ct. at 1612. Therefore, only statements made during custodial interrogations are subject to suppression pursuant to Miranda. Jackson, supra.

The warnings required by Miranda are triggered only because of the potential of a custodial environment to "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda supra, at 467, 86 S.Ct. at 1624; see Callihan v. Commonwealth, 142 S.W.3d 123 (Ky. 2004), citing Moran v. Burbine, 475 U.S.

412, 420, 106 S.Ct. 1135, 1140, 89 L.Ed.2d 410 (1986). Kentucky historically and consistently has adhered to the custodial interrogation requirement. Farler v. Commonwealth, 991 S.W.2d 141 (Ky.App. 1999); Little v. Commonwealth, 991 S.W.2d 441 (Ky.App. 1999); Welch v. Commonwealth, 149 S.W.3d 407 (Ky. 2004); Callihan v. Commonwealth, 142 S.W.3d 123 (Ky. 2004).

Absent an abuse of discretion, we may not overturn on appeal the determination of the trial court that Nevitt was **not in custody** during the August 10 interview and that he was not, therefore, entitled to Miranda warnings. RCr[2] 9.78. The trial court's findings are conclusive if supported by substantial evidence. Id.

The undisputed testimony presented at the suppression hearing indicated that Detective Melton informed Nevitt that he was not currently under arrest but that the matter was being fully investigated pursuant to the serious allegations made against him. While the meeting was undoubtedly uncomfortable for Nevitt, nothing about the environment suggests that Nevitt thought (or that a reasonable person in his situation should have thought) that he was in custody.

Of particular interest is Detective Melton's comment that Nevitt could have "lunch down at the jail" if he so chose. Since Nevitt was being interviewed in his own home, we are not

[2] Kentucky Rules of Criminal Procedure.

persuaded that this comment (though questionable) converted the interview into a custodial interrogation. Arguably, the comment confirmed the fact that Nevitt was not presently in custody.

Despite the obviously intimidating nature of the questions, Nevitt's responses appear to have been given freely and voluntarily. He remained in his own home and was subject only to preliminary investigative questioning. He was at liberty to terminate the interview at any time and to ask Melton and Murray to leave his home. Since he was not under custodial interrogation, he was not entitled to Miranda warnings prior to making his confession to Detective Melton. The trial court did not err by refusing to suppress the incriminating statements.

Nevitt next argues that his convictions must be reversed because the Commonwealth failed to introduce evidence sufficient to identify the separate offenses charged. He contends that the number of offenses upon which the trial court instructed the jury was dependent upon the number of counts alleged in the indictment rather than upon the evidence. He claims that the indictment was based solely upon a mathematical extrapolation from M.C.'s vague recounting of the facts underlying her allegations. Nevitt argues that there "was never any evidence presented about any individual, identifiable, act of sodomy or rape." Appellant's Brief at 15. We disagree.

We have carefully reviewed the evidence presented at trial in its entirety. M.C. never wavered in her testimony. She gave a graphic, credible account of the acts that Nevitt had perpetrated against her. She testified that Nevitt had "performed oral sex on me and had me perform oral sex on him, and he had anal sex with me or attempted to have anal sex with me, and he fondled me." She explained specifically that Nevitt had performed oral sex on her "[f]ive or six times"; that he had had her perform oral sex on him perhaps three times; that he had attempted to have sexual intercourse with her "three times at the most." M.C. indicated that Nevitt had fondled her breasts on numerous occasions. She described the abuse as having occurred in Nevitt's home -- mostly in his bedroom but perhaps more than once in a guestroom upstairs. While M.C. was unable to provide specific dates for the abuse, she indicated that it had occurred intermittently over a ten-month period beginning in September 2000 and ending in July 2001.

During a portion of Detective Melton's testimony, the Commonwealth played Nevitt's taped statement for the jury. Nevitt admitted that during 2001, he had kissed M.C.'s breasts; that he had performed oral sex on her "[a]bout three or four times;" that he had had her perform oral sex on him "[t]wice maximum;" and that he had sexually abused her by having her lie upon him and "rub around" while they were both naked. In his

taped statement, Nevitt admitted that he had also taken M.C. out in his truck, had stopped, and “kissed on” her; and that on another occasion, he “rubbed on” her while he was driving her home. Finally, he admitted to having taken photographs of her while her breasts were partially out of her blouse. Nevitt denied having had sexual intercourse with M.C. by offering as a defense that he had not been able to maintain an erection.

Drawing all inferences in favor of the Commonwealth, the evidence presented to the jury appears to have been more than sufficient to induce reasonable jurors to believe beyond a reasonable doubt that Nevitt was guilty of the charged crimes. It was not unreasonable for the jury to find him guilty, and he was not entitled to a directed verdict of acquittal. See Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

As an alternative to this argument on the sufficiency of the evidence, Nevitt contends that he was deprived of a unanimous jury verdict. He claims that the court’s instructions failed to distinguish the offenses in any meaningful way and that there was no method to insure that all of the jurors were convicting on each of the same alleged offenses. We are persuaded that Nevitt is not entitled to relief on this ground.

Nevitt’s trial counsel prepared and tendered the very instructions about which Nevitt now complains. He failed to comply with RCr 9.54 by not presenting to the trial court the

argument or legal theory that he now presents on appeal for the first time. Moreover, counsel "cannot deliberately forego making an objection to a curable trial defect when he is aware of the basis for an objection." Salisbury v. Commonwealth, 556 S.W.2d 922, 927 (Ky.App. 1977). Counsel either invited or acquiesced in the error, if any, and there are no grounds for reversal. See Gibson v. Thomas, 307 S.W.2d 779 (Ky. 1957); Futtrell v. Commonwealth, 437 S.W.2d 487 (Ky. 1969).

Finally, Nevitt argues that "the same general facts were necessarily used by the jury over and over in arriving at its guilty verdicts." He contends that since this process resulted in a violation of the constitutional prohibition against double jeopardy, it constitutes an error warranting reversal of his conviction. We disagree.

As our summary of the evidence indicates, the jury was presented with essentially matching accounts of the many separate crimes perpetrated against M.C. After being instructed on the multiple crimes, it returned one guilty verdict. Nevitt was not placed in jeopardy twice with respect to any of the counts, and he is not entitled to the relief he seeks.

The judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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