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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001280-MR

THEODORE H. TISDALL — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 07-CR-00062

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: This appeal is from a final judgment of the Monroe Circuit Court sentencing Appellant to seven years in prison for sexual abuse in the first degree. Finding no error, we affirm.

FACTUAL BACKGROUND

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Appellant was convicted of first-degree sexual abuse resulting from an incident that took place inside the family's van while stopped at a gas station on July 12, 2007, at around 9:30 p.m. Suzanne Tisdall, Appellant's wife, was in the driver's seat of the vehicle, and Appellant was seated behind the passenger seat. The couple's seventeen-year-old son sat in the front passenger seat, and their three-year-old daughter sat in the seat behind Ms. Tisdall and next to Appellant. The van was parked facing the street, and the gas station's lights reflected through the rear window of the vehicle.

Before pumping any gas, Ms. Tisdall remained in the car to count change. As she was counting, the couple's daughter made a sound, and Ms. Tisdall turned to look at her. Ms. Tisdall saw Appellant with his right hand underneath their daughter's car seat, beneath her right thigh and underneath her pants and diaper, near her anus or vagina. Ms. Tisdall watched for approximately two to five seconds. When Appellant saw Ms. Tisdall looking at him, he gasped and jerked his hand away from their daughter.

Ms. Tisdall became angry and exited the van, but, after determining that the gas station was not a proper place to deal with the situation, she drove the family home. When they arrived, Ms. Tisdall examined her daughter for any injuries and found none. After arguing with Appellant for two to two and one-half hours, Ms. Tisdall called the police. Officer T.J. Hestand and another officer arrived and took Ms. Tisdall and her daughter to the hospital for an examination.

Around 5:00 or 6:00 a.m. that morning, Officer Hestand and a social worker, Joy Harlan, returned to Appellant's home. Appellant indicated that he knew why Officer Hestand was there. Both Officer Hestand and Ms. Harlan testified that Officer Hestand read Appellant his *Miranda* rights, while Appellant testified that he did not remember Officer Hestand reading him his *Miranda* rights at his home. Although Officer Hestand testified that he gave Appellant the *Miranda* warnings, Officer Hestand stated that, at that time, Appellant was not under arrest and was free to terminate the interview if he desired.

During the interview, Appellant initially denied any misconduct. However, approximately ten to fifteen minutes later, he acknowledged touching his daughter. Officer Hestand stated that Appellant told him he did it for "the thrill of the moment," and that he was trying to get a reaction from his daughter. Thereafter, Officer Hestand arrested Appellant and took him to the Monroe County Jail.

After Appellant was taken to jail, Ms. Tisdall and her daughter returned home, and Ms. Tisdall provided a written statement to the police stating the events that had transpired, and that she had suspected improper behavior from her husband for approximately a month before the incident. She based this suspicion on the fact that her daughter did not want to be in the same room with Appellant, and did not want Ms. Tisdall to change her diapers. She also suspected Appellant of molesting her daughter in 2006, at which time she threw Appellant out of the house for three to four months. She did not report anything to the

authorities, but Appellant testified that the incident in 2006 was investigated by Child Protective Services and that nothing was uncovered.

Officer Hestand later returned to the jail with Ms. Harlan to get a written statement from Appellant. Officer Hestand gave Appellant a *Miranda* waiver form, which Appellant signed. Appellant then wrote a statement in which he confessed to fondling his daughter in "the vagina area," and that it had been an ongoing problem for the past three to four months.

At trial, Appellant changed his story, stating that he did not inappropriately touch his daughter. He testified that he was merely playing with his daughter, and that although he touched his daughter on her side and tickled her arm, he never touched her on the thigh. Appellant also testified that, at the time of the incident, he and Ms. Tisdall were having marital problems, involving arguments about their financial situation and other matters not revolving around the sexual abuse accusations. Appellant felt that his wife accused him of the inappropriate touching in order to remove him from the house.

The jury found Appellant guilty of first-degree sexual abuse, and recommended a sentence of seven years in the penitentiary. This sentence was ultimately imposed by the trial court.

Other facts will be given as they become relevant to each of Appellant's arguments.

ANALYSIS

Appellant first argues that the trial court erred when it failed to grant defense counsel's motion for a mistrial when Officer Hestand testified that Appellant had gone to "KCPC," or the Kentucky Correctional Psychiatric Center, to be evaluated for his competency to stand trial. Appellant claims the consequential implication that Appellant was "crazy" or "unstable" violated his rights under the Fifth, Sixth, and Fourteenth amendments to the United States Constitution and Sections Two, Seven, and Eleven of the Kentucky Constitution.

During the trial, Officer Hestand stated, in response to a question as to whether he made any promises of aid to Appellant, that:

> I told him that we would see about getting him some help, and you know I'm not a . . . not trying to be smart or anything, but I'm not a psychiatrist. I can't evaluate him, and he did go for some evaluation to KCPC.

There was an immediate objection from both counsel. The trial court sustained the objection and admonished the jury not to consider the statement for any purpose. Thereafter, defense counsel moved for a mistrial. The trial court denied the motion, but offered to further admonish the jury, which both parties declined. In denying the motion for a mistrial, the trial court noted that there was a joint objection to the statement, the objection had been sustained, the statement was limited in its effect, the jury had been admonished, and the trial court had offered to further admonish the jury.

A trial court has discretion in determining whether to grant a mistrial, and its ruling will not be overturned on appeal absent an abuse of that discretion.

Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005) (citing *Woodard v. Commonwealth,* 147 S.W.3d 63, 68 (Ky. 2004)). Granting a mistrial is "an extreme remedy and should be resorted to only where there appears in the record a manifest necessity for such an action or an urgent or real necessity." *Id.* (citing *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985)). Moreover, "the error must be 'of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way [except by grant of a mistrial].'" *Id.* (quoting *Gould v. Charlton Co., Inc.,* 929 S.W.2d 734, 738 (Ky. 1996)).

Kentucky courts have further held that "[a] jury is presumed to follow an admonition to disregard evidence; thus, the admonition cures any error." *Combs v. Commonwealth*, 198 S.W.3d 574, 581 (Ky. 2006) (citing *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999)). There are only two situations in which the presumption of the effectiveness of an admonition fails:

> (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; and (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial."

Combs, 198 S.W.3d at 581-582 (citing *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003)).

The Kentucky Supreme Court has held that recurring prejudicial remarks made by a sheriff during trial, including the statement that the defendant

"lied to us like a dog," could not be cured with an admonition. *Brison v. Commonwealth*, 519 S.W.2d 833, 837 (Ky. 1975). Further, in *Brown v. Commonwealth*, 892 S.W.2d 289, 290 (Ky. 1995), the Kentucky Supreme Court held that an admonition to the jury not to consider hearsay evidence implicating defendant in a crime was "insufficient to cure the prejudicial impact."

Given the stringent standard for granting a mistrial and the curative admonition given to the jury, the trial court in this case did not abuse its discretion in denying the motion. Appellant claims this case falls under both situations described in *Combs*. This claim fails. The average lay juror is most likely not familiar with the term "KCPC," and therefore, in all probability, the jury did not realize what Officer Hestand meant when he stated Appellant went for an evaluation there. Officer Hestand never stated the words "Kentucky Correctional Psychiatric Center." Moreover, the statement was not in response to questioning regarding Appellant's competency, and did not allude to the type of evaluation that took place.

Further, this is not a situation involving the introduction of recurring inflammatory remarks or a substantial amount of prejudicial evidence against Appellant. Unlike in *Brison,* Officer Hestand's statement was in passing, was only said once, and was likely not entirely understood by the jury. The hearsay evidence in *Brown* implicated the defendant in a crime and was easily understood by the jury. Therefore, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial.

Appellant next argues that the trial court erred when it admitted a *Miranda* waiver form signed by Appellant before making his written statement at the jail when the Commonwealth did not provide defense counsel with the waiver until the morning of the trial. The Commonwealth explained that the copy of the waiver had unintentionally been left out of the discovery materials, and that the mistake had only been realized that morning. Officer Hestand's police report, which was timely included with the other discovery material, indicated that a waiver had been executed. Defense counsel objected to the waiver's late admission. The trial court ruled that the waiver could be introduced, given that there was no improper motivation behind the Commonwealth's failure to produce the document and that Officer Hestand's police report had made reference to the waiver's existence and execution. Defense counsel did not ask for a continuance or for additional time to examine the *Miranda* waiver.

The standard of review for a court's ruling on these issues is whether the trial court abused its discretion. *Penman v. Commonwealth*, 194 S.W.3d 237, 249 (Ky. 2006) (citing *Beaty v. Commonwealth*, 125 S.W.3d 196, 202 (Ky. 2003)). The test for abuse of discretion is whether a trial court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

A discovery violation does not automatically mandate that evidence be excluded or that a trial should be continued. In *Penman*, 194 S.W.3d at 249, the Kentucky Supreme Court determined that trial courts may use their own judgment

under Kentucky Rules of Criminal Procedure (RCr) 7.24(9) to cure discovery violations. That rule states:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, *or it may enter such other order as may be just under the circumstances*.

(Emphasis added).

Appellant cites *Barnett v. Commonwealth*, 763 S.W.2d 119, 123 (Ky. 1989), in which the Kentucky Supreme Court reversed the defendant's conviction in part for the Commonwealth's failure to provide certain discovery before the trial. A key witness testified to seeing the defendant and the defendant's vehicle at the crime scene on several occasions before the crime. The Commonwealth, however, omitted the witness's name and statement from the discovery provided to defense counsel. Defense counsel only became aware of the witness five days after the trial started. Defense counsel claimed a breach of pre-trial discovery orders and procedures. The Court noted that "[t]his is a case where the jury first reported that it was deadlocked, and only returned a verdict after it was directed by the court to resume deliberation and 'try' to reach a verdict." *Id.* at 123. Therefore, the Court could not "say that failure to discover [the witness's] statement until the fifth day of trial . . . did not result in the guilty verdict." *Id.*

Although in this situation a discovery violation did occur, we cannot say that the trial court abused its discretion in admitting the waiver form into evidence. Appellant argues that, as in *Barnett*, the late disclosure interfered with his right to present a defense and had an impact on his defense strategy, and denied him the right to adequately prepare for cross-examination. Unlike *Barnett*, however, the omission did not involve discovery as vital as an eyewitness's incriminating statement. In addition, the late disclosure had little impact on the defense strategy. Whether the waiver was admitted or not, defense counsel would have presented essentially the same defense theories – that Ms. Tisdall made up the accusation because of the couple's marital discord, that Appellant was not given the *Miranda* warnings before his oral confession at his residence, that the confession at his residence was not voluntary, and that the written statement later given at the jail should be suppressed as "fruit of the poisonous tree."

Moreover, although Appellant may have had to cross-examine Officer Hestand differently at trial than he had at the suppression hearing that morning, the Constitution "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Barroso v. Commonwealth*, 122 S.W.3d 554, 559 (Ky. 2003) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)).

Finally, unlike in *Barnett*, it cannot be said that the omission of the waiver resulted in the guilty verdict. The jury deliberated a mere ten minutes

before returning the verdict. Even if the waiver had been excluded, Appellee could still have introduced the testimony of Ms. Tisdall regarding the events of that night, as well as the testimony of Officer Hestand and Ms. Harlan regarding Appellant's oral confession at the residence. Therefore, the trial court did not err when it admitted the *Miranda* waiver at trial.

Appellant's final argument is that the trial court erred when it did not suppress his oral statements to police made at his residence because the statement was involuntarily given.[2] At trial, Appellant asserted that he felt intimidated by Officer Hestand's tone of voice, body language, and facial expressions at his house, and that he did not feel free to leave because Officer Hestand stood in front of the exit. Appellant further testified that, at one point, Officer Hestand would not let him leave to go to his bedroom. He also indicated that he had had little sleep before he was interviewed by the officer, and that Officer Hestand said he wanted to help him, and told him "you don't need prison." Appellant testified that he did not want to jeopardize the deal, and by confessing at his home, signing the *Miranda* warning waiver, and writing the statement at the jail, he was trying to cooperate with law enforcement. He stated that nothing in the statement was true.

[2] Appellant states in his brief that the trial court failed to specifically rule on whether Appellant was given *Miranda* warnings prior to making the oral confession in his residence. However, in ruling on the motion to suppress the statements, the trial court underscored the fact that Officer Hestand testified to giving Appellant the *Miranda* warnings. The trial court's inclusion of this evidence in the ruling is the equivalent of making such a finding. Further, the trial court's finding that Appellant was given the *Miranda* warnings was supported by substantial evidence, as both Officer Hestand and Ms. Harlan testified that the warnings were given before Appellant made any statements.

Officer Hestand testified that Appellant agreed to talk after hearing the *Miranda* warnings, and that Appellant did not ask for an attorney. He further testified that Appellant was free to terminate the interview or leave the room. It was only after Appellant confessed that Officer Hestand refused to allow him into the bedroom, as he was concerned for the safety of Ms. Harlan and himself.

Following a hearing, the trial court denied the motion. The court found that the statement was voluntary under the totality of the circumstances as there was no evidence of coercive tactics, intimidation, or threatening.

A trial court's determination that a statement is voluntary can only be overturned on appeal if the ruling is clearly erroneous. *Allee v. Commonwealth*, 454 S.W.2d 336, 341 (Ky. 1970). The trial court's findings of fact cannot be disturbed "[i]f supported by substantial evidence." RCr 9.78.

The Due Process Clause of the Fourteenth Amendment does not allow the admission of confessions if a defendant's "will has been overborne and his capacity for self-determination critically impaired." *Bailey v. Commonwealth*, 194 S.W.3d 296, 300 (Ky. 2006) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973)). The court must analyze the totality of the circumstances when looking at the voluntariness of a confession. *Soto v. Commonwealth*, 139 S.W.3d 827, 847 (Ky. 2004). The Kentucky Supreme Court has recognized three elements in reviewing the voluntariness of a confession:

> 1) whether the police activity was 'objectively coercive'; 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant demonstrated that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession.

Henson v. Commonwealth, 20 S.W.3d 466, 469 (Ky. 1999).

Because the trial court was faced with contradictory testimony as to the circumstances surrounding the confession, we will give due deference to its opportunity to evaluate the credibility of the witnesses, and find that the trial court's determination was supported by substantial evidence. Even if Appellant felt intimidated by Officer Hestand, the police activity must be objectively coercive. Looks, body language, and Officer Hestand's statement that he would try to get Appellant help somewhere down the line are not objectively indicative of coercive police activity. The trial court's determination that Appellant's confession was voluntary is supported by substantial evidence and is therefore affirmed.

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

ALL CONCUR.

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