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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001029-MR

ERNEST SANDERS — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 06-CR-00419

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Ernest Sanders, was convicted in the Bullitt Circuit Court of first-degree sexual abuse and sentenced to ten years' imprisonment. He appeals to this Court as a matter of right. Finding no error, we affirm.

[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's conviction stems from an incident that occurred on September 16, 2006, involving his then-seven-year-old stepdaughter, D.C. Appellant's wife and D.C.'s mother, Brinne Sanders, testified that she walked into the couple's bedroom to find Appellant lying over the bed with his shorts and underwear around his ankles. D.C. was lying naked on the bed with her legs spread. According to Brinne, Appellant had an erection and was kissing D.C. on her naked breast.

D.C. was subsequently interviewed by Valerie Mason, a forensic interviewer with Family and Children First, a private children's advocacy center. During the interview, D.C. recounted the incident and told Mason that among other things, Appellant's mouth and "peepee" touched her "peepee." As a result, Appellant was indicted on November 8, 2006 with first-degree sodomy and first-degree sexual abuse.

Appellant's first trial ended in a mistrial after Brinne testified to statements made by Appellant that were not disclosed to the defense. Following a second trial in February 2008, a jury found Appellant guilty of first-degree sexual abuse, but not guilty of sodomy. The jury recommended a sentence of ten years' imprisonment and the trial court entered judgment accordingly. Following the denial of his motion for a new trial, Appellant appealed to this Court as a matter of right. Additional facts are set forth as necessary in the course of the opinion.

Appellant first argues that the trial court erred by refusing to strike for cause two jurors whom he believes were unable to be fair and impartial. Appellant

claims the alleged error is reversible because he was required to use two of his peremptory challenges to remove both jurors.

CR 9.36(1) provides that if there are reasonable grounds to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, he shall be excused as not qualified. "A trial court's decision about whether to strike a challenged juror for cause is reviewed under the standard of abuse of discretion." *Allen v. Commonwealth*, 278 S.W.3d 649, 652 (Ky. App. 2009). Such decision is based upon the totality of the evidence, with the trial court weighing the probability of bias or prejudice based on the entirety of the challenged juror's responses and demeanor. *Id.* However, although the trial court is vested with considerable discretion in determining who to remove for cause, "if it is later determined that a juror should have been excused and was not, such would be reversible error because the defendant had to use a peremptory challenge and was thereby deprived its use otherwise." *Mabe v. Commonwealth*, 884 S.W.2d 668, 670 (Ky. 1994).

During voir dire, the prosecutor asked members of the venire if there was any reason that they could not sit as a juror. Juror 193 approached the bench and stated that his neighbor's child had been molested ten years earlier and that his own granddaughter had also been molested fifteen years earlier. When first asked by the trial court whether those experiences would prevent him from listening to the evidence in the case, Juror 193 indicated that he was unsure. And in fact, Juror 193 commented that he didn't have much patience for child molesters. However,

he then stated that the incidents had occurred in the past and that he believed he could hold the Commonwealth to its burden of proof and render a decision on the evidence. Nevertheless, Appellant moved to strike Juror 193 for cause. The Commonwealth responded that no one on the venire likely had any patience for child molesters and that alone was insufficient to strike Juror 193 for cause. The trial court found that Juror 193 could be fair and impartial, and denied Appellant's motion.

Juror 265 also approached the bench and expressed concern because she was a very emotional person. She explained that it was very difficult for her not to show her emotions and that she did not want to be the juror "bawling her eyes out" during the proceedings. However, Juror 265 clarified that she was under the impression that jurors were not allowed to show any emotion. Further, contrary to Appellant's claim, at no time did Juror 265 express concern about her ability to be fair and impartial. In fact, she clearly acknowledged that she could render a fair and impartial decision based upon the evidence and testimony presented. Again, the trial court denied Appellant's motion to strike for cause.

The decision to exclude a juror for cause is based upon the totality of the circumstances, not on a challenged juror's response to any one question. *Allen*, 278 S.W.3d at 652. After reviewing the video of the voir dire proceedings, we conclude that the trial court did not abuse its discretion in refusing to strike for cause either Juror 193 or Juror 265.

Next, Appellant argues that the trial court erred in permitting the Commonwealth to introduce evidence that bolstered D.C.'s testimony. Specifically, Appellant takes issue with the prosecutor's statements during voir dire and also the admission of the taped interview between Valerie Mason and D.C.

During voir dire, the prosecutor explained to the venire that it would hear testimony from the victim who was only nine years old. When the prosecutor asked if anyone would expect a child's recollection to be that of an adult, Appellant objected, claiming that D.C.'s competency to testify had already been established and that the prosecutor was suggesting that D.C. should not be held to the same standard as any other competent witness. The trial court overruled the objection.

The extent and appropriateness of questioning during voir dire are matters within the sound discretion of the trial court. *Pollini v. Commonwealth*, 172 S.W.3d 418, 422 (Ky. 2005), and its determinations will not be overturned absent an abuse of that discretion. *Thompson v. Commonwealth*, 147 S.W.3d 22, 53 (Ky. 2004), *cert. denied*, 545 U.S. 1142 (2005); *Tamme v. Commonwealth*, 973 S.W.2d 13, 25 (Ky. 1998), *cert. denied*, 525 U.S. 1153 (1999). We cannot conclude that the trial court abused its discretion in overruling Appellant's objection. The Commonwealth was properly attempting to discern any bias by the potential jurors toward child testimony. We certainly do not perceive how the questioning bolstered D.C.'s subsequent testimony.

We likewise reach the same conclusion with respect to the admission of the forensic video interview. During the second trial, D.C. testified that Appellant had touched her vaginal area with his mouth. During cross-examination, defense counsel played D.C.'s testimony from the first trial wherein she made no mention of such. Counsel then asked D.C. who she had talked to about the case, implying that someone had instructed her on what to say during the second trial because her testimony was different from that at the first trial. Thereafter, the Commonwealth moved to admit the forensic interview, conducted prior to either trial, wherein D.C. specifically stated that Appellant had touched her vaginal area with his mouth. The trial court ruled that the video was admissible to rebut an implied charge of recent fabrication.

KRE 801A states in pertinent part:

> (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
>
> (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of a recent fabrication or improper influence or motive[.]

Recently, in *Allen v. Commonwealth*, 278 S.W.3d 649, 655 (Ky. App. 2009), a panel of this Court noted,

> Where a witness has been assailed on the ground that the story is a recent fabrication or that she has some motive for testifying falsely, it is permissible to show that she

> gave a similar account when the motive did not exist, before the effect of such an account could have been foreseen, or when the motive or interest would have induced a different statement.

D.C.'s prior consistent statement was not offered to prove the truth of its content or, as Appellant contends, to bolster D.C.'s testimony, but rather to refute the charge of recent fabrication. *See Noel v. Commonwealth*, 76 S.W.3d 923, 928-29 (Ky. 2002). Once the defense played D.C.'s prior testimony and specifically asked her who she had talked to thereafter, it created the implication that her testimony at the second trial was fabricated or the result of improper influence. As such, it was within the trial court's discretion to allow the video of the forensic interview to rebut the implication. *Allen*, 278 S.W.3d at 655; s*ee also Goodyear Tire and Rubber Company v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

Appellant next argues that he was entitled to a directed verdict because there was insufficient evidence of sexual abuse and D.C.'s testimony was "highly incredible." Interestingly, Appellant fails to articulate in what manner the evidence was insufficient, but rather simply argues the applicable standard for granting a directed verdict.

In ruling on a directed verdict, the trial court is required to consider all of the evidence in the light most favorable to the Commonwealth. *Dishman v. Commonwealth*, 906 S.W.2d 335 (Ky. 1995); *see also Baker v. Commonwealth*, 973 S.W.2d 54 (Ky. 1998). Furthermore, the trial court must consider not only the actual evidence, but also "must draw all fair and reasonable inferences from the

evidence in favor of the Commonwealth." *Lawson v. Commonwealth*, 53 S.W.3d 534, 548 (Ky. 2001) (*Quoting Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)) "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal." *Benham*, 816 S.W.2d at 187.

To convict Appellant of first-degree sexual abuse, the jury had to find that he subjected "another person to sexual contact who is incapable of consent because he or she: . . . 2. Is less than twelve (12) years old[.]" KRS 510.110(1)(b); 2. "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]" KRS 510.010(7). The jury heard evidence that Appellant's wife walked into the bedroom to find Appellant standing over seven-year-old D.C., who was naked and laying on the bed. Appellant's pants were around his ankles, and he had an erection as he was kissing D.C. on her chest. Even Appellant conceded that his erection was the result of seeing D.C. naked.

Without question, there was sufficient evidence from which a jury could find beyond a reasonable doubt that Appellant was guilty of first-degree sexual abuse. Further, contrary to Appellant's contention, the fact that he was acquitted of sodomy had absolutely no bearing as to his entitlement to a directed verdict on the sexual abuse charge. As such, the trial court did not abuse its discretion in denying his motion for a directed verdict.

Appellant also challenges the trial court's refusal to instruct the jury on indecent exposure. Appellant believes that the evidence was such that the jury could have found him not guilty of sexual abuse but guilty of only the lesser offense of indecent exposure. We conclude that the evidence herein did not warrant the instruction.

KRS 510.148 provides, in relevant part that "[a] person is guilty of indecent exposure in the first-degree when he **intentionally** exposes his genitals under circumstances in which he knows or should know that his conduct is likely to cause affront or alarm to a person under the age of eighteen (18) years." (Emphasis added). Clearly, the offense has a *mens rea* element in that one has to intentionally expose his genitals. Yet, Appellant maintained throughout the proceedings that the circumstances were not as they seemed. He claimed that he grabbed a shirt in an attempt to cover up as soon as he realized D.C. was in the room.

An instruction on a lesser offense is only warranted when the evidence is such that a jury could entertain doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense. *Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992). We discern no basis in the record to conclude that a reasonable jury could have found Appellant not guilty of sexual abuse but guilty of indecent exposure. Consequently, no error occurred.

Finally, Appellant argues that the prosecutor offered misleading statements regarding parole eligibility during the penalty phase of trial. Appellant contends that the erroneous information encouraged the jury to recommend a lengthier sentence than otherwise might have been imposed.

During the penalty phase, Nick Rayley, an assistant Commonwealth's attorney explained that the basic parole eligibility for a Class C felony was twenty percent, and he set forth the calculation for each sentence ranging between five and ten years. On cross-examination, Rayley testified that a person charged with a sexual offense, like Appellant, must complete a two-year sex offender treatment program before becoming eligible to meet with the parole board.

In the closing arguments that followed, the prosecutor asked the jury to return the maximum sentence, noting that if Appellant only received the minimum he would be "eligible for parole" in one year. Defense counsel immediately objected on the grounds that the prosecutor had misconstrued Rayley's testimony. Counsel requested that the trial court instruct the jury to disregard the prosecutor's statements regarding Appellant's parole eligibility. Accordingly, the trial court admonished the jury to only consider the evidence that it heard from witnesses and that closing arguments were not to be considered in reaching their verdict.

We are of the opinion that Appellant received all the relief that he requested. A jury is presumed to follow an admonishment to disregard evidence. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). Furthermore, if a

party fails to move for a mistrial after objecting and receiving an admonition from the trial court, such failure indicates that party's satisfaction with the admonition. *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989). As Appellant took no further action after the trial court's admonition, he is presumed to be satisfied with the remedy. Thus, no error occurred.

The judgment and sentence of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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