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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002391-MR

SHANE PARIDO — APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 09-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, LAMBERT AND THOMPSON, JUDGES.

ACREE, JUDGE: Ernest Shane Parido appeals the November 18, 2009 order of the Powell Circuit Court sentencing him to five years' imprisonment following conviction on two counts of first-degree sexual abuse. Parido contends four trial errors require that we vacate his sentence and remand the matter for a new trial. Finding Parido was entitled to severance of the charges raised by each victim, we

reverse the circuit court's denial of his motion to sever the charges, vacate the sentence, and remand for new trials.

Facts and procedure

The allegations against Parido involve two of his nieces, D.R., who was fifteen years old at the time of the trial, and M.P., age six at trial.[1] Parido was tried for sodomy in the first degree and sexual abuse in the first degree of D.R. Both incidents were alleged to have occurred in 2000, when D.R. was approximately six years old. Parido was also tried for one count of sexual abuse of M.P. alleged to have occurred in 2009. Both children testified against Parido.

D.R. first reported Parido's inappropriate conduct to her mother in January 2009. Although slightly different versions of events were presented at trial, the allegations are, generally, that while D.R. was babysitting four children in the care of Parido, who was then recovering from an illness, Parido made unwelcome sexual advances toward her and engaged in inappropriate touching. Not long after D.R. reported the January 2009 incident to her mother, she also informed her mother that when D.R. was approximately six years old, Parido had taken her into a bedroom in her grandmother's house, "started licking" D.R's "privates," and began "rubbing all over" her inner thighs. The allegations were not reported to police until April 21, 2009, when D.R.'s father first heard of them.

[1] D.R. never lived in the same home as Parido, though M.P. did for several years, including the time she was allegedly abused. Parido's brother, M.P.'s father, was married to M.P.'s mother for all times relevant to this appeal. The couple became estranged, and M.P.'s mother cohabitated with Parido and her four children for some time.

In the course of the investigation into D.R.'s claims, accusations arose about an incident involving Parido and M.P. M.P. testified at trial that Parido had "touched [her] private" while the two were in his bedroom.

Parido was indicted on five counts. Those involving D.R. included one count of first-degree sexual abuse and one count of first-degree sodomy, both for the alleged conduct in 2000, and one count of unlawful transaction with a minor, for the incident which occurred in January 2009. With respect to the allegations regarding M.P., Parido was indicted for one count of first-degree sodomy and one count of first-degree sexual abuse. The sodomy charge relating to M.P. was dismissed prior to trial, as was the charge that he had engaged in an unlawful transaction with D.R. This left only one count of first-degree sexual abuse and one count of first-degree sodomy stemming from Parido's conduct in 2000 related to D.R., and one count of first-degree sexual abuse stemming from conduct in 2009 related to M.P.

After denying Parido's motion that he be tried separately for the charges concerning the two girls, the circuit court tried Parido for all three counts at the same trial. The jury acquitted Parido of the sodomy count relative to D.R., but convicted him on both counts of sexual abuse, one each as to D.R. in 2000 and as to M.P. in 2009. Accordingly, Parido was sentenced to two five-year terms of incarceration to run concurrently. This appeal followed.

Parido now asserts a number of trial errors: (1) that the charges against him should have been severed because they concerned two separate incidents against

different victims which were purported to have occurred some nine years apart; (2) he was entitled to a directed verdict because the evidence did not support his conviction for sexual abuse of M.P.; (3) the circuit court improperly deemed M.P. competent to testify; and (4) testimony of a pediatrician constituted improper bolstering of M.P.'s testimony. Finding the severance issue dispositive, we need not address all the assertions of error.

The charges were improperly joined

Parido argues the circuit court abused its discretion in declining to order separate trials for the charges regarding D.R. and M.P. He points to their temporal distance and other dissimilarities as warranting severance. The Commonwealth replies that Parido has not demonstrated that he was prejudiced by joinder of the charges, and therefore the convictions should stand.

The rules governing joinder and severance of criminal charges are codified in Kentucky Rule of Criminal Procedure (RCr) 6.18 and RCr 9.16, respectively.

> Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

RCr 6.18. On the other hand, RCr 9.16 provides in relevant part:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall

> order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires.

RCr 9.16. The circuit court "has broad discretion with respect to joinder, and will not be overturned absent a showing of prejudice and clear abuse of discretion." *Rearick v. Commonwealth,* 858 S.W.2d 185, 187 (Ky. 1993).

In determining whether two charges were sufficiently similar to be tried together, "[a] significant factor . . . is the extent to which evidence of one offense would be admissible in a trial of the other offense." *Berry v. Commonwealth,* 84 S.W.3d 82, 87 (Ky. App. 2001) (citing *Commonwealth v. English,* 993 S.W.2d 941, 944 (Ky. 1999)). Further, "[e]vidence that is remote in time may only be admitted when the prior alleged activity indicates a common and continuing pattern of conduct on the part of the accused, and evidences not merely an isolated incident which occurred a long time ago . . . but rather the first in a series of sexual assaults." *Id.* at 87-88 (quotation marks omitted).

We consider the circumstances underlying the charges now before us. First, the two offenses for which Parido was convicted were remote in time, approximately nine years apart. A nine-year span alone might not lead to a conclusion that the allegations were too remote in time to be joined at trial.[2] Such

[2] *E.g., Berry*, 84 S.W.3d 82 (Joinder of charges arising from 1977 to 1986, involving six different victims was not improper when the defendant was alleged to have committed various sexual acts with the victims on several occasions, and the conduct occurred twelve times from 1977 to 1980, and twice from 1982 to 1986).

a conclusion is appropriate here, though, because the facts reveal only two isolated incidents of sexual abuse rather than a continuing course of conduct.

Further, the facts underlying the two convictions, while similar, are not so strikingly similar that evidence of one would be admissible at the trial of another. In other words, they are not "so similar . . . as to constitute a so-called signature crime." *Rearick,* 858 S.W.2d at 187 (citing *Billings v. Commonwealth,* 843 S.W.2d 890 (Ky. 1992)).

According to D.R., the abuse occurred as follows: (1) she was six years old; (2) when Parido, her uncle, took her into a bedroom at her grandmother's home; (3) while other members of the family were present at the home, but had all gone outside; (4) D.R. could not go outside with the others because she was ill; (5) once in the bedroom, Parido laid D.R. on the bed, licked her vagina, and rubbed her inner thighs.

M.P. testified that Parido acted as follows: (1) at some time prior to the trial date;[3] (2) in the bedroom Parido shared with M.P.'s mother; (3) Parido, her uncle, touched her "private." M.P. gave conflicting testimony about whether anyone else was in the home and did not testify that she was ill at the time of the incident.

There are certainly some similarities between the two accounts. The victims were both approximately six years old at the time of the sexual touching, they

[3] In her trial testimony, M.P. did not indicate how old she was when the alleged sexual abuse occurred. The jury believed, however, according to the jury instructions and verdict form, that it happened "sometime around January, 2009."

shared the same relationship with Parido, and the abuse was alleged to have occurred in a bedroom.

The differences between the two accounts, however, render the similarities less than striking. *Cf., Violett v. Commonwealth,* 907 S.W.2d 773 (Ky. 1995). The alleged abuse occurred in different locations and involved different types of contact: while Parido was accused of licking and touching D.R. inappropriately, he was accused of only the inappropriate touching of M.P. Further, Parido gained access to M.P. because they were members of the same household, but was alone with D.R. as the result of a larger family gathering.

We conclude that Parido was prejudiced by the joinder of these two charges and echo the conclusion of the Supreme Court in *Rearick, supra*: although the two offenses "bore a general resemblance to [one another], any probative worth which such resemblances might have endured was diminished by the remoteness of the events." 858 S.W.2d at 188 (Ky. 1993).

The two charges for which Parido was convicted should have been tried separately. Accordingly, we reverse the circuit court's denial of the motion to sever charges, vacate the convictions, and remand for a new trial on each count.

ALL CONCUR.

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