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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001714-MR

JOSHUA D. GREEN — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CR-00651

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Joshua D. Green brings this appeal from an August 25, 2010, judgment of the Kenton Circuit Court adjudging him guilty of sexual abuse in the first degree, victim less than twelve years of age, and sentencing him to ten-years' imprisonment. We affirm.

Green was indicted upon the offense of sexual abuse in the first degree, victim less than twelve years of age (Kentucky Revised Statutes 510.110). The indictment alleged that Green sexually abused the eight-year-old daughter of his paramour between May 1, 2007, and August 25, 2007. Green was thirty-two years old at the time of the indictments. The specific allegation was that on two occasions Green digitally penetrated the victim's vagina while she was sleeping at Green's house and while her mother was at work. Green and the victim's mother lived together for several years.[1] Following a jury trial, Green was found guilty of sexual abuse in the first degree, victim less than twelve years of age, and ultimately sentenced to ten-years' imprisonment. This appeal follows.

Green contends that the circuit court erred by excluding evidence that the acts of sexual abuse against the victim were perpetrated by another person, or an alternative perpetrator. Green initially sought to introduce records evidencing that the victim's paternal uncle was a registered sex offender. Green sought to introduce such evidence through the testimony of a police detective who was testifying for the Commonwealth. The detective had conducted the investigation into the victim's allegations of abuse.[2] Green argued that the uncle was the perpetrator of the abuse without offering any additional evidence connecting the

[1] Although Joshua D. Green was not the victim's biological father, the victim believed Green was her father until after the abuse had occurred. Sometime after the abuse but before trial, the victim was informed of her biological father's identity and began to visit with him.

[2] Green attempted at trial to show the police detective documents evidencing the uncle's sex offender status and intended to illicit testimony from the detective concerning the content of the documents.

uncle to the alleged abuse. Green relied upon a recent Supreme Court opinion supporting the admission of evidence under the theory of an alternative perpetrator defense. *See Beaty v. Com.,* 125 S.W.3d 196 (Ky. 2003). The Commonwealth objected to the introduction of such evidence. After a bench conference, the trial court ruled that the records evidencing the uncle's status as a registered sex offender were inadmissible as the detective was not qualified to testify upon such subject. The trial court did not, however, address whether the records were otherwise admissible. Green then sought to introduce the records evidencing the uncle's registered sex offender status through an officer from probation and parole. The trial court ultimately ruled that the documents evidencing the uncle's status as a registered sex offender were inadmissible under the alternative perpetrator theory. Under this theory, the court opined that Green must introduce evidence that the uncle had both the motive and the opportunity to commit the alleged sexual abuse against the victim. As the evidence was lacking as to opportunity and scant as to motive, the trial court held that any evidence regarding the uncle's status as a registered sex offender was inadmissible.

It is well-established that the Due Process Clause of the Fourteenth Amendment provides a criminal defendant the right to present a defense. *Harris v. Com.*, 134 S.W.3d 603 (Ky. 2004); *Beaty*, 125 S.W.3d 196. And, the right of a criminal defendant to present a defense includes the right to present evidence that an alternative perpetrator may have committed the offense. *Harris*, 134 S.W.3d 603; *Beaty*, 125 S.W.3d 196. However, such right is not absolute. *Beaty*, 125

S.W.3d 196. Before evidence of an alternative perpetrator may be admissible, the defendant must "offer evidence of *both* motive *and* opportunity by an [alternative perpetrator]." *Beaty*, 125 S.W.3d at 208. And, there must exist some "direct connection" between the alternative perpetrator and the crime. *Harris*, 134 S.W.3d at 609.

In the case *sub judice*, the evidence demonstrating the uncle's motive was weak, at best. Green suggests that the mere fact the uncle was a registered sex offender is sufficient. However, even if we were to agree that the uncle's status as a registered sex offender demonstrates motive, there is no evidence concerning the uncle's opportunity to commit the acts of abuse that were perpetrated upon the victim. The record clearly reflects that the victim had only recently met the uncle and had only been in his presence on two occasions. And, neither of those two occasions involved similar circumstances to the incidents of abuse in this case. There was also lacking any evidence of a "direct connection" between the uncle and the particular acts of abuse. Most troubling, Green merely attempted to introduce records of the uncle's status as a registered sex offender without introducing any other evidence explaining the significance of such revelation. Undoubtedly, the mere introduction of such fact without additional evidence connecting the uncle to the offenses would certainly have misled and biased the jury. Upon the whole, we believe the circuit court properly excluded evidence that the victim's uncle was a registered sex offender under the theory of an alternative perpetrator.

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

ALL CONCUR.

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