

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000260-MR

GEORGE SIMPSON

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 08-CR-00248

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

KELLER, JUDGE: A jury found George Simpson (Simpson) guilty of Sexual Abuse in the First Degree. On appeal, Simpson argues that the prosecution withheld discoverable information and, after conducting an *in camera* review of

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

that information, the trial court should have set aside the jury's verdict and granted a new trial. Having reviewed the record, we affirm.

FACTS

In October 2008, T.C., her mother, Melissa Shaw (Shaw), and her brother attended a party at the Simpson's farm. Because Shaw had too much to drink, she decided to spend the night with her children at the Simpson's house. T.C. slept in a bedroom with the Simpson's daughter; Shaw and her son slept in another bedroom; and the Simpsons slept in their bedroom with their son.

T.C. alleged that, during the night, Simpson came into the bedroom and lay beside her. He then rubbed her back, touched her legs, and tried to touch her "between her legs." Simpson admitted that he went into the bedroom during the night, but stated that he did so to comfort his daughter, who was having a nightmare. He stated that he might have inadvertently touched T.C. but denied touching her in any inappropriate way.

Based on T.C.'s allegations, the grand jury indicted Simpson on one count of Sexual Abuse, First Degree, involving a minor. Simpson subsequently filed a "Motion for Bill of Particulars" asking the court to direct the Commonwealth to provide, in pertinent part, "[a]ny psychological evaluations performed by mental health professionals with [T.C.] by any agency of the Commonwealth" and "[a]ny conversations or statements made by [T.C.] to any private mental health professional or social worker" Simpson did not notice the motion for a hearing. Furthermore, despite a number of court appearances

before trial, Simpson took no other steps to obtain the requested order from the trial court.

On direct examination during trial, T.C. testified consistent with her allegations. Additionally, T.C. and her mother both testified that T.C. underwent counseling following this incident. Simpson did not object, did not renew his motion asking the Commonwealth to produce the counseling records, or otherwise ask the court for relief. Following presentation of Simpson's evidence, the Commonwealth recalled T.C., who again testified that she underwent counseling. At that point, Simpson objected, noting that the Commonwealth had not produced the records he had requested in his motion. The Commonwealth stated that it did not have the records, had not reviewed the records, and did not know where T.C. had undergone counseling until T.C. testified at trial. The court noted that Simpson had not sought an order requiring the Commonwealth to obtain the records, had not filed a motion to compel, and had not objected to the testimony on direct examination. Therefore, the court overruled Simpson's objection.

As noted above, the jury ultimately found Simpson guilty, and Simpson timely filed a motion for a new trial. In that motion, Simpson argued, in pertinent part, that he was "denied access to potential exculpatory evidence when counseling records of the child were not disclosed . . . after being requested in a Bill of Particulars filed with the Court." The court ultimately ordered production of those records, permitted the parties to review them, and conducted an *in camera* review. Following that review, the court denied Simpson's motion because

Simpson had not appropriately pursued production of the records before trial. Furthermore, the court noted the records indicated that, while T.C. had received counseling before this incident, that counseling occurred five or six years earlier and was "stale." In addition to being stale, the court noted that the information in the records was not particularly relevant and, for the most part, would not have been admissible. Therefore, the court denied Simpson's motion for a new trial. This appeal followed.

STANDARD OF REVIEW

"Upon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." Kentucky Rules of Criminal Procedure (RCr) 10.02. We review a trial court's denial of a motion for a new trial for abuse of discretion. *Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky. App. 2003).

ANALYSIS

On appeal, Simpson argues that the trial court erred when it denied his motion for a new trial because of the Commonwealth's failure to provide records related to T.C.'s counseling. In support of that argument, Simpson notes that the Commonwealth failed to respond to his motion for a bill of particulars. Furthermore, he argues that, if he had been supplied with the requested records, he would have been better able to impeach T.C.'s credibility. Simpson noted in his brief a number of references to T.C.'s lack of credibility in the counseling records.

The Commonwealth argues that it had no obligation to provide the requested records because Simpson failed to obtain an order from the trial court. Furthermore, the Commonwealth argues that the documents, even if provided, would not have been beneficial to Simpson's case. For the following reasons, we agree with the Commonwealth.

We first note that a defendant may seek a bill of particulars at any time and that the court "for cause shall direct the filing of a bill of particulars." RCr 6.22. The purpose of a bill of particulars is to furnish "the accused with the details supporting the *charged offense*." *Combs v. Commonwealth*, 198 S.W.3d 574, 580 (Ky. 2006) (emphasis in original). The records at issue herein would not have provided any details regarding the charged offense but rather would have provided information about the victim. Thus, Simpson's avenue for obtaining those records would have been through discovery, as provided in RCr VII, not through a bill of particulars.

Furthermore, as noted by the Commonwealth, "[i]t is the duty of one who moves the trial court for relief to insist upon a ruling, and a failure to do so is regarded as a waiver." *Dillard v. Commonwealth*, 995 S.W.2d 366, 371 (Ky. 1999). Simpson did not schedule or request a hearing for his motion, did not follow-up with the Commonwealth when he did not receive a response to his motion, and did not follow-up with the court when he did not receive an order addressing his motion. Furthermore, Simpson did not raise any issue regarding the counseling records the first time T.C. and her mother mentioned that T.C. had been

to counseling. In fact, Simpson did not raise any issue with regard to the counseling records until T.C. and her mother testified on re-direct at the end of the trial. Therefore, Simpson waived any right he had to complain about any failure by the Commonwealth to produce the requested records.

We note Simpson's argument that, regardless of any motions he may have made, the Commonwealth was required to provide the requested records under the trial court's general discovery order. A copy of that order is not in the record and Simpson did not attach a copy to his brief. However, Simpson does cite to the order in his brief. Assuming that Simpson's recitation of the order is correct, the Commonwealth is only required to provide to a criminal defendant documents and/or statements that the Commonwealth has. It is not required to search for and obtain documents. The Commonwealth has steadfastly maintained that it did not have the requested documents and that it had no knowledge concerning the specifics of T.C.'s counseling until trial. Therefore, Simpson's argument that the Commonwealth violated the trial court's standing discovery order is without merit.

Finally, we note that, even if Simpson had not waived this issue, we would be constrained to affirm the trial court on the merits. As noted above, Simpson, the Commonwealth, and the trial court reviewed the requested counseling records. The trial court determined that the majority of those records would not have been admissible because they reflected treatment that was five to six years old. The only record that would have been admissible referred to T.C.'s propensity to "act out" in order to get her father's attention. However, the trial

court determined that record, even if admitted, would not have had any impact on the result at trial.

We do not have copies of T.C.'s counseling records; therefore, we must rely on the summaries of those records by the parties and the trial court. Based on those summaries, we cannot say that the trial court abused its discretion in determining that the majority of the records would not have been admissible. Furthermore, we discern no abuse of discretion in the trial court's determination that the only admissible record would not have had any impact on the result.

CONCLUSION

For the foregoing reasons, we discern no error and affirm the trial court's denial of Simpson's motion for a new trial.

ALL CONCUR.

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