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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001633-MR

MARION FRANKLIN MCCANE — APPELLANT

v.

APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 08-CR-00019 & 10-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Marion McCane, appeals from a Trimble Circuit Court judgment convicting him of first-degree rape[1] and first-degree sexual assault[2] of M.C., a minor child. McCane asserts that the circuit court improperly excluded evidence, abused its discretion in granting a mistrial, retried him in violation of

[1] Rape in the first degree, Kentucky Revised Statute (KRS) 510.040(1)(a).

[2] Sexual assault in the first degree, KRS 510.110(1)(c)(1).

double jeopardy, and erred in allowing the Commonwealth to amend count nineteen of his indictment. We disagree and affirm.

McCane was married to M.C.'s paternal grandmother. In April of 2008, M.C. reported that McCane engaged in inappropriate sexual conduct with her at her grandmother's house on April 7, 2008. Shortly thereafter, M.C.'s stepmother alerted the authorities and McCane was asked to submit to an interview. A "rape kit" examination was performed on M.C., but only revealed a white hair that could not be positively identified as belonging to McCane. On April 9, 2008, Detective Sergeant Harwood of the Kentucky State Police interviewed McCane, but McCane denied the allegation. During subsequent interviews, however, McCane admitted to raping and sexually assaulting M.C. on April 7, 2008. Shortly thereafter, McCane was indicted for first-degree rape.

During the two years subsequent to the indictment, M.C. came forward with additional allegations claiming the abuse began in 2002, on her eighth birthday, and did not stop until the April 7, 2008, incident. On May 20, 2010, the Commonwealth sought a second indictment containing nineteen counts: five counts of rape in the first degree[3] and five counts of sodomy in the first degree[4] (class A felonies) for conduct allegedly occurring between 2002 and 2006, when M.C. was under the age of twelve; two counts of rape in the first degree[5] (class B felonies) for conduct that allegedly occurred by forcible compulsion; five counts of

[3] KRS 510.040(a)(b)(2).

[4] KRS 510.070(1)(b)(2).

[5] KRS 510.040(1)(b)(2).

sexual abuse in the first degree[6] (class C felonies) for conduct allegedly occurring when M.C. was under twelve years of age; one count of sodomy in the second degree[7] (class C felony); and one count of sexual abuse in the first degree[8] (class D felony) for conduct allegedly occurring after M.C. reached twelve years of age, but before she was sixteen years of age. The original charge, rape in the first degree (class B felony) for conduct occurring on April 7, 2008, was included as count twelve in the second indictment.

Prior to McCane's first trial, defense counsel filed a motion in limine seeking to admit evidence that M.C. made similar allegations of sexual abuse against her paternal grandfather, of which he was acquitted by a jury verdict. On November 5, 2010, the circuit court conducted a hearing on the motion, during which McCane provided evidence that M.C.'s paternal grandfather had been charged with two counts of aggravated child molestation in the Superior Court of Brooks County, Georgia for conduct allegedly occurring between January 1, 2001 and March 1, 2001.[9] The charges were allegedly made by M.C. after learning her grandmother and grandfather were getting divorced. McCane claimed the allegations against him were also made after M.C. learned he had asked for a divorce from her grandmother. For the reasons set forth in further detail below, the

[6] KRS 510.110(1)(b)(2).

[7] KRS 510.080(1)(a).

[8] KRS 510.110(1)(c)(1).

[9] The Commonwealth claims that McCane failed to file certified copies of the Georgia indictment and acquittal and, as a result, did not preserve the issue for review. However, the court agreed to accept the documents after the hearing and the record contains copies of the documents certified by the clerk's office in the Superior Court of Georgia.

court denied the motion and instructed that the "[d]efendant shall not be allowed to cross examine the prosecuting witness … or to introduce extrinsic evidence relating to any prior allegations of sexual abuse."

McCane's first trial commenced January 10, 2011. During cross-examination of the Commonwealth's second witness, Detective Harwood, defense counsel asked if he had investigated M.C.'s background. Detective Harwood responded, "as much as I could to get started on the investigation." To which defense counsel inquired, "[o]kay. Did that include the fact that she has accused her grandfather—other grandfather?" At this point, the Commonwealth objected. Defense counsel and the Commonwealth retreated to discuss the objection in chambers. Defense counsel explained that he misunderstood the court's order on the motion in limine and claimed the question was not an attempt to get in inadmissible evidence. The circuit court indicated that it was inclined to grant a mistrial as a result of the prejudice that might result from the question, but the Commonwealth expressed concern that the delay would negatively impact M.C.. In response, the circuit court instructed the Commonwealth to discuss the option with M.C. and to determine if she wanted a new trial. Then the judge returned to the courtroom, admonished the jury not to consider the question, and excused them for the day. The following morning, the Commonwealth requested a mistrial. The circuit court asked defense counsel if he would like to respond, but he did not. In fact, defense counsel did not make any comments regarding the mistrial and entered no objections, thus, the mistrial was granted.

A second trial ensued from March 21-24, 2011. Defense counsel entered a motion for directed verdict at the close of the Commonwealth's case in chief and renewed the objection at the close of the defense's case. The circuit court granted a directed verdict on nine of the nineteen counts, including count nineteen. However, the court retracted its verdict as to count nineteen and allowed the Commonwealth to amend the indictment and jury instruction to provide a specific date, April 7, 2008. McCane was ultimately convicted of one count of rape in the first degree (count 12) and one count of sexual abuse in the first degree (count 19), for acts that occurred on April 7, 2008. This appeal followed.

On appeal, McCane asserts that: (1) the evidence of the M.C.'s prior allegations was admissible; (2) the court should not have granted a mistrial; (3) the second trial resulted in a violation of McCane's right against double jeopardy; (4) the court erred when it allowed the Commonwealth to amend the indictment; and lastly, (6) the cumulative effect of the errors requires reversal. We disagree.

McCane's first argument is that the circuit court erred when it prohibited McCane from attacking M.C.'s credibility with evidence that she made similar allegations of abuse against her paternal grandfather, who was charged and acquitted. As a general rule, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." KRE[10] 404(a). However, a defendant may attack an accuser's credibility pursuant to KRE 608 and "under KRE 608(b)

[10] Kentucky Rule of Evidence.

that attack may take the form of cross-examination about specific instances of conduct if, in the court's judgment, the specific instances are probative of truthfulness or untruthfulness." *Dennis v. Commonwealth*, 306 S.W.3d 466, 471 (Ky. 2010) (quotation omitted). However, when the credibility of an individual alleging a criminal sexual act is at issue, an examination under the rape shield law, KRE 412, is required. *Id.* at 471-72. "The rape shield provision in KRE 412 prohibits, except in carefully delineated circumstances, the admission of evidence (1) offered to prove that any alleged victim engaged in other sexual behavior or (2) offered to prove any alleged victim's sexual predisposition." *Id.* at 471 (quotations omitted). However, the prohibition against evidence of "other sexual behavior" does not include "demonstrably false" allegations of prior abuse. *Id.* at 471-72. That being said, even if the evidence falls within a delineated exception, the evidence may still be excluded pursuant to KRE 403 "if its probative value is substantially outweighed by the danger of undue prejudice . . . ."

The circuit court determined that the evidence was highly prejudicial and excluded it pursuant to KRE 403. The circuit court also noted that the allegations were not, in its opinion, "demonstrably false," and thus could be excluded pursuant to KRE 412. The decision to exclude evidence pursuant to KRE 403 is within the sound discretion of the circuit court. *Webb v. Commonwealth*, 387 S.W.3d 319, 324 (Ky. 2012). We are unable to say that the circuit court abused its discretion by determining that the evidence was unduly prejudicial given the striking similarities between the allegations and importance of M.C.'s testimony to the prosecution's

case.[11] Because the evidence was properly excluded via KRE 403, we need not address whether the allegations were admissible under KRE 412. Regardless, even if the circuit court erred in excluding the evidence, any error was harmless in that McCane's two convictions were only for the counts as to which the Commonwealth had a taped confession. *See* RCr[12] 9.24 ("No error in either the admission or the exclusion of evidence . . . is ground for . . . disturbing a judgment or order unless . . . the denial of such relief would be inconsistent with substantial justice.").

Next, we consider the circuit court's grant of a mistrial and, in turn, McCane's argument regarding double jeopardy. We will not disturb the circuit court's grant of a mistrial absent an abuse of discretion. *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009). If manifest necessity for a mistrial exists, or the mistrial is consented to, then the second trial is not barred by double jeopardy. *Id.* at 647. On appeal, McCane asserts that no manifest necessity for a mistrial existed and the circuit court's admonition to the jury was a suitable remedy. However, McCane remained silent while the Commonwealth and the circuit court engaged in discussions regarding the mistrial. The circuit court judge specifically asked McCane if he wished to respond to the motion, but he declined.

Kentucky case law acknowledges that silence cannot equal consent to a mistrial if the defendant is not given the opportunity to object. *See, e.g.*, *Radford*

[11] We are inclined to note that the prejudicial impact of the prior allegations of abuse were not extremely prejudicial to the Commonwealth's case regarding the counts for which they had a taped confession.

[12] Kentucky Rule of Criminal Procedure.

v. Lovelace, 212 S.W.3d 72, 77 (Ky. 2006) (silence did not equal consent because the record provided no evidence that the mistrial was discussed, or requested by the Commonwealth, before dismissing the jury), overruled on other grounds by *Cardine*, 283 S.W.3d at 641. However, silence can amount to consent in certain instances. *See Bennett v. Commonwealth*, 217 S.W.3d 871, 875 (Ky. App. 2006) (a defendant who joins a codefendant's motion for a mistrial, but fails to withdraw the motion and fails to expressly object to the grant of a mistrial, is precluded from raising the issue on appeal). Indeed, the United States Court of Appeals for the Sixth Circuit recognized that a defendant's consent to a mistrial can be implied "if the sum of the surrounding circumstances positively indicates [that] silence was tantamount to consent." *United States v. Gantley*, 172 F.3d 422, 429 (6th Cir. 1999). The Sixth Circuit noted that the trial court discussed possible alternatives to a mistrial and "invited an objection by asking counsel if there was 'anything else' to address." *Id*. Likewise, in this case, the circuit court invited objection and McCane's failure to respond was tantamount to consent. As a result, even if the court incorrectly excluded the prior allegations of abuse, his double jeopardy rights were not implicated.

Next, we turn to McCane's argument regarding the amendment to count nineteen of his indictment. The circuit court has the discretion to amend the indictment pursuant to RCr 6.16. *Baker v. Commonwealth*, 103 S.W.3d 90, 94 (Ky. 2003). RCr 6.16 states:

> The court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

The circuit court initially granted a directed verdict on count nineteen. However, the Commonwealth objected to the directed verdict, and moved to the court to amend the indictment. The circuit court subsequently withdrew the directed verdict as to count nineteen and allowed the Commonwealth to amend the indictment and jury instructions to conform to the evidence. Originally, count nineteen alleged sexual abuse in the first degree for a continuing course of conduct that occurred between January 1, 2007, and December 31, 2007, but was amended to refer to the specific incident that occurred on April 7, 2008.

In *Blane v. Commonwealth*, 364 S.W.3d 140, 150-51 (Ky. 2012), the Supreme Court of Kentucky recognized that the grant of a directed verdict precludes a subsequent amendment to an indictment. The Court went on to explain that "for an amendment to have been permissible, the directed verdict would first have to have been set aside." *Id.* at 151. That is exactly what occurred here. Thus, so long as the amendment did not add additional or different offenses, and McCane's substantial rights were not violated, the court did not abuse its discretion.

McCane's substantial rights were not violated by amending count nineteen to conform to McCane's taped confession because he had the opportunity to present a defense to the allegations and no new or different offenses were added.

See Anderson v. Commonwealth, 63 S.W.3d 135, 140-41 (Ky. 2001) (changing the date on the indictment did not add additional or different offenses). Indeed, McCane was fully aware that the Commonwealth would play summaries of McCane's confessions, during which he confessed to raping and sexually assaulting M.C. on April 7, 2008.

Having found no errors, we disagree with McCane's contention that the trial suffered from the cumulative effect of the court's mistakes and for all the foregoing reasons, we affirm the judgment and conviction of the Trimble Circuit Court.

ALL CONCUR.

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