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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000156-MR

CECIL HAGER — APPELLANT

v.

APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 11-CR-00043

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, NICKELL, AND TAYLOR, JUDGES.

MAZE, JUDGE: Cecil Wayne Hager appeals from a Garrard Circuit Court judgment sentencing him to serve five years after a jury convicted him of one count of second-degree rape and one count of first-degree sexual abuse. Hager raises numerous claims of error relating to venue, the sufficiency and admissibility

of evidence, alleged prosecutorial misconduct, and ineffectiveness of defense counsel. Having reviewed the record and applicable law, we affirm.

Background

Hager lived in his home with his girlfriend, J.U., her daughter, M.U., and her son. Hager was married at the time, but separated from his wife. According to J.U., she awoke one morning and went to her daughter's room. There, she found Hager in bed with M.U., who was thirteen years of age at the time. J.U. went outside to the barn and called Hager on her cell phone, but he did not answer. She then phoned her son, who was sleeping on the couch, and told him to tell Hager to come to the barn. When Hager arrived at the barn, she confronted him with what she had seen. Hager explained that he had just been giving M.U. a hug. J.U. called M.U. to the barn. M.U. told her mother that Hager had fondled her and that they had sexual intercourse on one occasion.

Rell Littral, a friend of Hager's, arrived to pay a visit and asked what was going on. Hager told him, "I've done something wrong. I've done something wrong. I've really messed up." Hager also told Littral that "They're going to put me in jail." Everyone left the barn and Hager went to his truck, got out a pistol and put it to his head. Littral wrestled the gun away from Hagar, who kept repeating that he was guilty and had "done wrong." Hager then drove away.

J.U. called 911. Kentucky State Police Trooper Keaton was able to call Hager, who told him that he had "messed up" and could handle this himself. The police were finally able to locate Hager at a friend's house. According to the

friend, Hager told him, "They've got me in a mess." Hager surrendered voluntarily to the police.

According to Hager, his relationship with J.U. had become strained after he told her that unless her son's behavior improved, she and her children would all have to move out of his home. Hager claimed that J.U. then forced M.U. to make the allegations of sexual abuse against him in order to steal expensive items from his home. When Hager left after the confrontation with J.U. and M.U., J.U. and her family tried to remove possessions from his home, including his guns, and were told by the state trooper to return them. After Hager was arrested, J.U. and her family did remove several valuable items from the home and sold them.

Following a two-day trial, the jury found Hager guilty of one count of second-degree rape and one count of first-degree sexual abuse. He received a total sentence of five years under the jury's recommendation, and this appeal followed.

Analysis

I. Venue and jurisdiction

Hager argues that the Commonwealth failed to present any proof that the rape occurred in Garrard County, or even within the Commonwealth of Kentucky, thereby violating his constitutional right to a speedy trial and his statutory entitlement to be tried in the county in which the offense occurred. *See Commonwealth v. Cheeks*, 698 S.W.2d 832, 834-36 (Ky. 1985); Constitution of Kentucky § 112(5); § 11; Kentucky Revised Statutes (KRS) 425.510.

Venue is defined as

> merely a statutory prescription that the prosecution be in the county in which the offense has been committed and that the prosecution is in a court which has "jurisdiction" to preside over the case, i.e., the circuit court of that county. The statutory prescription also requires proof by the prosecutor that the offense did in fact occur in the county in which the case is being prosecuted. It has generally been held in this state that it is not necessary to show by direct evidence that the crime occurred in the county of its prosecution, but the fact may be inferred from evidence and circumstances which would allow the jury to infer where the crime was committed.

Cheeks, 698 S.W.2d at 835.

"The presumption is that a trial was held in the appropriate county. Only slight evidence is required to sustain the venue." *Bedell v. Commonwealth*, 870 S.W.2d 779, 781 (Ky. 1993) (internal citations omitted).

J.U. testified that she and Hager initially lived together in Georgetown, and then in February 2010, moved together to his home in Garrard County. Her testimony established that she, Hager, and her children lived together in the Garrard County residence until July 7, 2011, the date that J.U. discovered Hager in M.U.'s bedroom. Although there was no direct testimony that the rape occurred in M.U.'s bedroom in the Garrard County residence, M.U. testified that it occurred in the fall of 2010, and that Hager had a habit of coming into her room every other night. Thus, the Commonwealth offered more than sufficient circumstantial evidence to enable the jury to infer that the rape took place in Garrard County, Kentucky, for purposes of venue and jurisdiction.

II. Alleged Admission of Improper Evidence

Hager argues that the trial court made several prejudicial errors during trial, compelling reversal of his conviction under the palpable error standard, as the errors were largely unpreserved. Kentucky Rules of Criminal Procedure (RCr) 10.26 permits review of unpreserved errors if they affected "the substantial rights" of a defendant and resulted in "manifest injustice." For palpable error to exist, there must be a "defect in the proceeding" which is "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Hager's first allegation of palpable error concerns J.U.'s hearsay testimony regarding out-of-court statements made by her daughter, M.U. J.U. testified that after she confronted Hager in the barn, she called M.U. to join them. J.U. questioned M.U., who told her that Hager "touched her private parts all the time" and had sexual intercourse with her on one occasion. Hager's friend Rell Littral testified that when he arrived at the barn, J.U. told him Hager had been molesting her daughter. Hager contends that J.U. and Littral's testimony was impermissible hearsay that improperly bolstered the victim's credibility.

The Commonwealth concedes that J.U.'s recitation of what M.U. told her about the sexual abuse and Littral's repetition of J.U.'s statement that Hager had been molesting her daughter do not fall under a hearsay exception, but asserts that the admission of these statements does not rise to the level of palpable error.

We have reviewed the testimony of J.U. and Littral in light of several cases cited by Hager, in which the admission of bolstering testimony was deemed palpable error by the Kentucky Supreme Court, and conclude that the testimony in

this case did not rise to that level. In *Bussey v. Commonwealth*, 797 S.W.2d 483 (Ky. 1990), the Supreme Court held that the admission of the testimony of four police officers regarding the victim's allegations was palpable error. The Court explained that "[t]o arrive at a conviction, it was necessary for the jury to believe the victim and disbelieve appellant. As such, the jury was required to determine the credibility of all fact witnesses. This process was flawed when four law enforcement witnesses were permitted to bolster the victim's testimony by repeating what he had told them." *Bussey*, 797 S.W.2d at 485.

In *Chavies v. Commonwealth*, 374 S.W.3d 313 (Ky. 2012), the Commonwealth called as a witness a friend of the victim, a schoolgirl. The prosecutor asked the friend whether the victim had told her that the appellant was sexually abusing her. The friend testified that she had. The friend also answered in the affirmative when the prosecutor asked her if she believed the victim, and again replied affirmatively when she was asked if the victim "seemed very trustworthy and believable." *Chavies*, 374 S.W.3d at 322. The Supreme Court held that the admission of her testimony was palpable error because it unfairly bolstered the credibility of the alleged victim, and allowed one witness to vouch for the truthfulness of another witness. *Id*.

Finally, in *Alford v. Commonwealth*, 338 S.W.3d 240 (Ky. 2011), the Supreme Court held that the testimony of a detective from the Kentucky State Police repeating at length and in detail everything the alleged victim of sexual abuse had told him was palpable error. The Court emphasized that these

statements were the only evidence linking the appellant to the crime, and allowing the detective to repeat them unfairly bolstered the victim's credibility. The injustice was further compounded by the fact that a medical expert witness had also provided inadmissible hearsay testimony bolstering the alleged victim's statements. *Alford v. Commonwealth*, 338 S.W.3d at 246-47.

In Hager's case, the witnesses repeating the allegations were not police officers, nor were they, as in the *Chavies* case, friends who expressly vouched for M.U.'s credibility. The repetition of M.U.'s allegations by her mother did not carry the same weight as those allegations testified to by a police officer, because the mother's credibility was itself at issue in this trial. Similarly, Littral's testimony that J.U. had told him Hager was molesting her daughter did not directly bolster the victim's credibility. Nor, as in the *Alford* case, was there the additional problem of inadmissible expert hearsay testimony bolstering the victim's allegations. Taken as a whole, the hearsay testimony in Hager's case did not serve to bolster the victim's credibility to such an extent as to constitute palpable error.

Hager further argues that J.U.'s testimony that her daughter has trouble remembering, with reading comprehension and math, was in "special ed." in fifth grade, and was a little slow constituted "victim impact" evidence that is impermissible in the guilt phase of the trial.

> The Commonwealth may introduce background evidence regarding victims because such evidence is relevant to understanding the nature of the crime. *Ernst v. Commonwealth*, 160 S.W.3d 744, 763 (Ky. 2005). Such evidence is not unduly prejudicial to a defendant unless

> the victim is "glorified or enlarged," *id*. (quoting *Bowling v. Commonwealth*, 942 S.W.2d 293, 302–03 (Ky. 1997)), or unless the evidence is "generally intended to arouse sympathy" for the victims or their families, *id*. (quoting *Bennett v. Commonwealth*, 978 S.W.2d 322, 325–26 (Ky. 1998)).

Brown v. Commonwealth, 297 S.W.3d 557, 561 (Ky. 2009).

The information that M.U. attends special education classes for reading comprehension and math, and has trouble remembering what she just read, could have aroused the sympathy of the jury, but could also have worked to Hager's advantage by casting doubt on the reliability of M.U.'s recollection of what had occurred, and her ability and capacity to understand what had occurred. On the other hand, evidence of her mental state was also potentially probative in explaining why she did not inform her mother of Hager's behavior earlier. The admission of this evidence was not palpable error.

Hager also claims palpable error in the admission of J.U.'s testimony that she believed Hager was divorced when they met, but discovered that he was still married after they began a relationship. Hager argues that this was improper character evidence that served no purpose but to impugn his character. This proves unpersuasive. Although J.U.'s testimony was prejudicial, J.U. testified almost immediately afterwards that Hager told her that he was unhappily married and that he and his wife were separated. Furthermore, an important aspect of Hager's defense was that J.U. forced her daughter to make false allegations against him so that she could abscond with property from his home. His wife, Carol, was part

owner of the home and she testified as to what items were in the home when Hager was accused of the crimes, and what items (including appliances) were subsequently missing. Thus, the jury learned that Hager was married as part of his own defense strategy. Under these circumstances, J.U.'s testimony regarding his failure to disclose his marital status did not rise to the level of palpable error.

III. Admission of the Unauthenticated 911 Call

This issue is also unpreserved for appeal. At the opening of the Commonwealth's case, the prosecutor played a recording of the 911 call made by J.U. reporting that her daughter had been sexually abused by Hager. In the call, J.U. repeated out-of-court statements made by Hager and M.U. Hager argues that the admission of the recording was palpable error because it was hearsay, it was never authenticated, and it was used only to elicit the sympathy of the jury. The Commonwealth concedes that the call was not properly authenticated, but argues that its admission did not rise to the level of palpable error.

The admission of the recording was prejudicial to Hager insofar as J.U.'s voice was distraught and tearful during the call, lending credibility to her accusations against him. Nonetheless, its admission does not rise to the level of palpable error because, later in the trial, J.U. repeated the statements she made in the call, and was very emotional. The call was essentially cumulative evidence, and did not contain anything new that could have affected the outcome of the trial.

IV. Alleged Prosecutorial Misconduct

Hager raises several unpreserved claims of prosecutorial misconduct. In order to justify reversal under these circumstances, the misconduct of the prosecutor must be flagrant. *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002). First, Hager argues that the Commonwealth attorney's cross-examination of him was rude, sarcastic, abusive, and riddled with testimonial comments. We have reviewed the cross-examination and conclude that the tone and content of the prosecutor's questions did not rise to the level of palpable error.

Next, Hager argues that the prosecutor improperly asked various witnesses to comment on the truthfulness of other witnesses. For instance, the Commonwealth asked Hager to comment on the honesty of his friend, Rell Littral, and Hager's brother to comment on that of a police officer who testified regarding items missing from Hager's home. In *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), the prosecutor "asked and badgered" the defendant into stating that a police officer, a leading witness for the Commonwealth, was lying. On appeal, the Kentucky Supreme Court stated that the questioning was improper because

> [a] witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differs without resort to blunt force.

Moss, 949 S.W.2d at 583. Even so, the Supreme Court refused to deem this questioning palpable error. The instances cited by Hager do not rise to the level of

misconduct that occurred in *Moss*; therefore, under the holding of that case, they were not palpable error.

Hager also argues that the prosecutor's closing statement constituted misconduct because he gave his personal opinion, bolstered and vouched for the testimony of the victims, quoted the Bible, and engaged the jury's sympathy for the victim by referencing victim impact evidence. For instance, he referred to Hager's statements to J.U. and Rell Littral as a "confession," and stated that Hager had admitted to sexually abusing M.U. He referred to J.U. crying during her testimony, and described her as a good woman whom he liked. He described M.U. as a slow learner, and commented that "she's having a hard time with this," and "she's kinda pitiful." In describing Rell Littral's testimony, he repeated that he was Hager's "best friend in the whole wide world" several times and opined that Littral testified truthfully and "knows more than he's telling us." He made references to two passages from the Bible, Proverbs 28:01 and Mark 4:22, stating that "The wicked flee, the righteous are bold as lions," followed by the comment that if Hager were innocent he would have been as bold as a lion, and "whatever is in the darkness is meant to come into the light," followed by the comment that Hager's actions came into the light that day.

These comments in the prosecutor's closing statement were not sufficiently egregious to constitute palpable error, bearing in mind that "[o]pening and closing statements are not evidence and wide latitude is allowed in both. Counsel may draw reasonable inferences from the evidence and propound their

explanations of the evidence and why the evidence supports their particular theory of the case." *Wheeler v. Commonwealth*, 121 S.W.3d 173, 180-81 (Ky. 2003) (internal citations and quotation marks omitted). "A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). Furthermore, the use of Biblical passages did not compel the jury to convict Hager on the basis of their religious beliefs rather than on legal grounds. *See Estes v. Commonwealth*, 744 S.W.2d 421, 426 (Ky. 1987). Rather, the quotations were used to suggest that Hager had behaved in a guilty and covert manner. Taken as a whole, the closing remarks did not rise to the level of palpable error.

V. Alleged Improper Questioning of Rell Littral

This argument is preserved. On direct and redirect examination by the Commonwealth, Littral was questioned about a comment he made to Trooper Keaton that "he [Hager] wanted me [Littral] to believe it was consensual." He used the words "he wanted me to believe it was consensual." Hager argues that Littral should not have been allowed to express his view of what Hager meant, or to testify regarding his interpretation of Hager's comments. Littral was asked repeatedly what statement of Hager's made him think that Hager wanted him to believe the relationship with M.U. was consensual. Littral was unable to state anything specific that Hager had told him which would have made him believe it was consensual. If anything, the examination and cross-examination weakened Littral's credibility, since he could not point to or repeat any statement of Hager's

that was intended to make him believe it was consensual. Thus, although Littral's statement to the trooper was prejudicial to Hager, the subsequent examination and cross-examination showed that he had no factual foundation for making the statement. The admission of his testimony was not reversible error.

VI. Cumulative Error

Hager argues that we should reverse his conviction on the basis of cumulative error. He contends that the absence of physical evidence meant that the verdict was entirely based on the jury's assessment of the witnesses' credibility, and that the numerous evidentiary errors, as well as prosecutorial misconduct, improperly influenced that assessment. While there may have been errors in Hager's trial, they were not substantial. Thus, they do not combine to form prejudice.

"We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial. If the errors have not individually raised any real question of prejudice, then cumulative error is not implicated." *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012) (internal quotations marks and citations omitted). Because the individual errors in this case did not raise any questions of real or substantial prejudice to the Appellant, the theory of cumulative error is not applicable.

VII. Ineffective Assistance of Counsel

Hager argues that his counsel was ineffective in clarifying the victim's vague testimony and eliciting from her statements that actually proved elements

the Commonwealth had failed to establish. He also argues that counsel bolstered the Commonwealth's case by playing M.U.'s interview at the Child Advocacy Center, and by waiving an opening statement. However, "[a]s a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal ... because there is usually no record or trial court ruling on which such a claim can be properly considered." *Stacy v. Commonwealth*, 396 S.W.3d 787, 793 (Ky. 2013) (internal citations omitted). We will review such a claim on direct appeal only if "there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue." *Id*. (internal citations omitted).

No such record or ruling exists in this case; therefore, it cannot be addressed on direct appeal. "Appellate courts review only claims of error which have been presented to trial courts." *Humphrey v. Commonwealth*, 962 S.W.2d 870, 873 (Ky. 1998). "[A]s it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, . . . and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings[.]" *Humphrey* at 872. Because of the availability of collateral attack proceedings at which a proper evidentiary record may be developed, these issues are not suitable for review on direct appeal.

VIII. Amendment of the Indictment

Hager argues that the indictment was impermissibly amended. The original indictment alleged the offenses to have occurred between November 1, 2010, and December 31, 2010. The jury instructions state that the offenses

occurred in the much lengthier period between February 1, 2010, and July 30, 2011. The final judgment states that Hager pleaded not guilty to charges committed between the dates in the original indictment. There is no motion to amend the indictment in the record, nor is there an order by the trial court amending the indictment. Hager argues that without proper notice of the charges, he was unable to prepare a defense and was consequently deprived of a fair trial.

The video record contains a conference in chambers during the trial at which the judge and attorneys discussed amending the indictment. The judge inquired why the amended date range was so broad when there were only two charges. The Commonwealth responded that the victim suffered from developmental issues and consequently could not remember the exact dates the events occurred, but that they did occur while she lived at the Garrard County address. Hager's counsel told the judge that the change in dates would work to Hager's advantage because he could prove that J.U. and M.U. did not live at that address at that time. Counsel not only did not object, but agreed to amendment of the dates. Under these circumstances, palpable error review is not appropriate.

IX. Sufficiency of the Evidence

Finally, Hager argues that he was entitled to a directed verdict due to insufficient evidence. He argues that the victim and her mother made inconsistent, contradictory and implausible statements, and that there was no physical evidence to corroborate any of their allegations, or even to show that the victim had ever had

sexual intercourse. He also reiterates his jurisdictional argument that there was no evidence to show the alleged sexual intercourse occurred in Garrard County.

"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 the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky.1991). The evidence presented by the prosecution must be more than a mere scintilla. *Id*. at 188.

Although there was no physical evidence and there were some inconsistencies in the testimony of J.U., M.U., and Littral, when the evidence is taken as a whole, it was not unreasonable for the jury to find Hager guilty. "It is the job of the jury to evaluate the credibility of witnesses and lend to that evaluation the relative weight they deem fit." *Hatfield v. Commonwealth*, 250 S.W.3d 590, 596 (Ky. 2008). Furthermore, we have already determined that there was sufficient circumstantial evidence to prove venue and jurisdiction. Hence, there was sufficient evidence to overcome Hager's motion for a directed verdict.

The final judgment of the Garrard Circuit Court is affirmed.

ALL CONCUR.

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