

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000567-MR

JEFFERY WAYNE ROE

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 11-CR-00220

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Jeffery Wayne Roe appeals from a Carter Circuit Court judgment imposing a sentence of five years after a jury found him guilty of one count of sexual abuse in the first degree. He argues that he was denied a fair trial because of the admission of irrelevant bad acts and character evidence, and

improper bolstering of witnesses. Having reviewed the evidence under the palpable error standard, we affirm.

Roe lived in a home in Carter County with his long-time girlfriend, their minor son and daughter, and his girlfriend's daughter, T.T. According to T.T., who was fourteen years of age at the time of Roe's trial, she had repeatedly asked Roe and her mother to give her a cell phone, but they refused. One day, Roe suddenly offered to give her a cell phone if she would go to bed with him. She testified that he touched himself inappropriately "between his legs" when he made this proposition.

The next day, T.T. told a school friend what Roe had said, and her allegations were reported to law enforcement officials and a social worker, Keri Davis. T.T. told them that Roe had started sexually abusing her when she was six or seven years of age, and that multiple incidents of abuse had occurred. She stated that he rubbed his body against hers, turned off the lights and pushed her against the wall, and pressed his body against her while she was doing the dishes. She stated that these acts stopped when she was ten years old, although Roe continued to touch himself inappropriately if he thought she was looking at him, and at times when he was intoxicated.

She also told them that Roe tried to penetrate her vaginally with his penis when she was about eight years of age, and that, on another occasion, had licked her genitals. Her report of these two incidents led to Roe being charged with one count of sexual abuse in the first degree, for having sexual contact with a

person less than twelve years of age, and one count of sodomy in the first degree, for engaging in deviate sexual intercourse with a person less than twelve years of age.

During the period that the authorities were investigating T.T.'s allegations against Roe, a social worker interviewed Roe and T.T.'s mother. They developed a prevention plan under which Roe was to have no contact with T.T. or her siblings during the investigation. He promised to leave the home and return there only if the children were not present. The prevention plan was later converted into a court order.

Roe was indicted in late December 2011. The police could not immediately locate him, but eventually, in January, found him living in a camper located near the family home. When the police and a social worker arrived, Roe's young son was observed running barefoot from the camper, wearing a t-shirt and boxer shorts. It appeared that Roe had been living in the camper for some time, as there was a power cord running from the camper to the home. The social worker, Davis, observed a half-full can of beer inside the trailer. There was more trash, including beer cans, strewn about the area than there had been on an earlier visit. She also stated that the camper was warm inside, and looked lived-in. T.T.'s mother was subsequently arrested for hindering the prosecution of Roe.

Roe's defense consisted of denying that he had made the proposition about the cell phone to T.T., or that he had ever improperly touched her at any time. He admitted to living in the camper in defiance of the prevention plan and

court order, but denied having any contact with his children during that time. He attributed T.T.'s allegations to behavioral problems, lack of truthfulness and a headstrong and manipulative nature. His defense counsel elicited testimony from T.T. that she thought her house was nasty, that her parents never cleaned, that the house embarrassed her, and that she told her parents that she wanted to move to a nicer place. In his closing arguments, defense counsel stressed the significant inconsistencies between T.T.'s testimony and the testimony of the other witnesses, especially as to the dates and places where the two charged incidents were alleged to have occurred, and argued that T.T. had made up the allegations in order to get away from a home that she hated.

The jury found Roe guilty of the sexual abuse charge, and not guilty of the sodomy charge. This appeal followed.

Roe argues that the Commonwealth improperly and repeatedly introduced irrelevant and highly prejudicial evidence relating to: (1) uncharged acts of sexual abuse or other bad acts he allegedly committed against T.T.; (2) his alcohol use; and (3) his violation of the protection plan and court order. He acknowledges that these arguments are unpreserved by contemporaneous objection, and requests review under Kentucky Rules of Criminal Procedure (RCr) 10.26, which permits unpreserved error to be reviewed if it affected "the substantial rights" of a defendant and resulted in "manifest injustice."

Kentucky Rules of Evidence (KRE) 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person

in order to show action in conformity therewith.” However, such evidence is admissible if offered for another purpose, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” This list of other purposes is “illustrative rather than exhaustive.” *Colwell v. Commonwealth*, 37 S.W.3d 721, 725 (Ky. 2000).

A three-part test is used to determine whether KRE 404(b) evidence of other crimes, wrongs, or acts is admissible at trial: (1) Is the evidence of other crimes relevant for some purpose other than to prove the criminal disposition of the accused?; (2) Is evidence of the uncharged crime sufficiently probative of its commission by the accused to warrant its introduction into evidence?; and (3) Does the potential for prejudice from the use of other crimes evidence substantially outweigh its probative value? *Bell v. Commonwealth* 875 S.W.2d 882, 889-90 (Ky. 1994).

Roe argues that the admission of evidence of the other bad acts that he allegedly committed against T.T. was irrelevant and highly prejudicial. He points to the opening remarks of the Commonwealth’s attorney, who repeatedly referred to “related incidents” in addition to the charged offenses, and T.T.’s testimony describing the multiple inappropriate incidents of bodily contact that occurred from the time she was six or seven years of age, and her testimony that Roe had recently propositioned her in exchange for a cell phone. T.T. also testified that Roe physically abused all the children in the home.

It is a well-established principle of Kentucky law that “evidence of similar acts perpetrated against the same victim are almost always admissible[.]” *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002); see also *Driver v. Commonwealth*, 361 S.W.3d 877, 883-84 (Ky. 2012) (“[A]s a general rule prior bad acts of a similar nature committed by the defendant against the victim will usually be admissible[.]”); *Harp v. Commonwealth*, 266 S.W.3d 813, 822-23 (Ky. 2008) (evidence of uncharged sexual contact with victim was admissible as proof of at least identity and absence of mistake or accident.)

Evidence of the other acts perpetrated by Roe against T.T. was highly relevant and probative of an absence of mistake or accident on T.T.’s part. Her testimony served to show that the two charged offenses were not isolated episodes that T.T., as a child, may have misunderstood, but rather part of an ongoing series of inappropriate contacts. By contrast, T.T.’s brief and unelaborated testimony that Roe physically abused all the children was not directly related to the charged offenses, and hence of far less probative value. Nonetheless, its admission was not so prejudicial as to rise to the level of palpable error, which must be a “defect in the proceeding” which is “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Roe also argues that the Commonwealth failed to give adequate notice of its intent to introduce KRE 404(b) evidence, as required under KRE 404(c). This argument is unpreserved, and will not be addressed here. See *Mayo v. Commonwealth*, 322 S.W.3d 41, 51 (Ky. 2010) (refusing to address the argument

that the Commonwealth failed to provide adequate KRE 404(c) notice because it was unpreserved.).

Next, Roe argues that evidence of his alcohol use, in the form of the social worker's testimony that she observed a half-full beer can inside his camper, and empty cans strewn around it outside, and T.T.'s testimony that Roe was sometimes intoxicated, fails to meet the first "relevance" prong of the test, because there was no relationship between his use of alcohol, and the charges of sexual abuse and sodomy. He relies on *Chavies v. Commonwealth*, 374 S.W.3d 313 (Ky. 2012), in which the Kentucky Supreme Court held that the admission of evidence of the defendant's marijuana use, possession of pornography and his unemployment rose to palpable error because it was not linked in any way to the charged crimes of sodomy and sexual abuse.

Connected with this argument is Roe's contention that the evidence he had violated the prevention plan and court order by living in a camper near the family home was also extremely prejudicial and irrelevant.

As we have already noted, Roe's main defense was that T.T. fabricated her allegations against him in an attempt to escape a home and life that she hated. To counter this defense, the Commonwealth presented evidence that T.T.'s mother was aware of Roe's inappropriate actions towards T.T., but made no efforts to protect her, and that consequently, T.T.'s desire to escape from her home was well-founded. T.T.'s mother initially told law enforcement officers that T.T. had not told her of Roe's cell phone-for-sex proposition, but admitted on cross-

examination that she had lied, presumably in an effort to shield Roe. She also admitted that when the family was living together, she left the children's bedroom doors open to keep them "safe."

Thus, although the social worker's testimony about the beer cans inside and around the camper was prejudicial, as was the testimony that the young son came running out of the camper wearing his underclothes, it was also highly probative of the fact that Roe had disobeyed the terms of the prevention plan and court order by returning to live in the camper near the family residence, and had contact with the children, with the knowledge and assistance of T.T.'s mother. Furthermore, as to the evidence that Roe's young son came from the camper, the defense presented effective rebuttal testimony from T.T.'s mother that their son usually wore a t-shirt and boxer shorts around the house, and unambiguous and unchallenged testimony from the social worker that the child had denied any improper contact with Roe.

Roe's second major argument is that T.T.'s testimony was improperly bolstered by the testimony of Keri Davis, the social worker. Davis first interviewed T.T. at her school, and then later at Hope's Place. The Commonwealth's attorney elicited testimony from Davis that T.T. disclosed more at the Hope's Place interview than in the school interview, specifically, the facts of the incident that led to the sodomy charge. Roe argues that Davis's testimony was impermissible hearsay, and also includes a transcript from the trial of some comments by the trial court, cautioning the Commonwealth about the introduction

of prior consistent testimony. Roe relies on *Alford v. Commonwealth*, 338 S.W.3d 240 (Ky. 2011), to argue that allowing a witness to repeat an alleged victim's accusations through hearsay is palpable error. In *Alford*, a physician and a police detective simply answered in the affirmative to a series of questions from the Commonwealth's attorney that essentially summarized all of the victim's accusations at trial. 338 S.W.3d at 245-46. Davis's testimony did not rise to this level because her testimony did not directly bolster T.T.'s trial testimony. Furthermore, the Commonwealth's questioning was an attempt to explain inconsistencies in T.T.'s interviews with Davis that had been elicited by defense counsel. Thus, the statements were offered in an effort to rehabilitate T.T.'s credibility, "which had been attacked by the defense with claims that her story changed in the past and she had demonstrably lied." *James v. Commonwealth*, 360 S.W.3d 189, 206 (Ky. 2012). If anything, the testimony highlighted the contradictions in T.T.'s statements to Davis, and supported the defense theory that T.T.'s story had evolved over time and between the interviews with Davis. As the Commonwealth theorizes, the jury acquitted Roe of the sodomy charge that stemmed from the alleged tongue incident that was only disclosed by T.T. in her second interview with Davis, which strongly suggests that disputed testimony actually worked in Roe's favor.

Roe also argues that the testimony of two state troopers impermissibly bolstered other testimony. One of the troopers testified that Keri Davis had contacted the police post and told them that she had received an anonymous tip

about where Roe was staying. Roe argues that this was hearsay testimony used to bolster the social worker's hearsay testimony. The other trooper's testimony is also set forth; it concerns how he spoke with various people in an effort to locate Roe after he was indicted, but Roe does not explain why the testimony was particularly prejudicial. Under the palpable error standard, we find no manifest injustice resulting from either of these instances of testimony.

Finally, Roe argues that the multiple examples of inadmissible testimony, taken as a whole, constitute cumulative error warranting reversal. "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.) The errors alleged by Roe are not substantial enough in themselves to implicate cumulative error and thus to warrant a reversal of his conviction.

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

ALL CONCUR.

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