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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-001502-MR

DEREK PARSON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 13-CR-00506

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Derek Parson appeals from a Kenton Circuit Court judgment sentencing him to seven years in prison after a jury convicted him of first-degree sexual abuse. On appeal, Parson claims (1) the trial court should have granted his motion for a directed verdict; (2) the trial court should have limited the date range on the jury instructions; (3) the Commonwealth improperly bolstered the testimony of the victim through hearsay evidence; and (4) the trial court incorrectly ordered

him to register as a sex offender for life. Having reviewed the record and the parties' arguments, we reverse and remand for a new trial due to improper hearsay testimony.

## FACTS AND PROCEDURAL HISTORY

On July 11, 2013, Parson was indicted for first-degree sexual abuse arising out of an alleged incident that occurred in April 2013, in which he subjected T.T.,[1] a six-year-old child, to sexual contact. In April 2013, Parson and his fiancée, Crystal, lived with Parson's mother, Lisa Talbott, and her husband Ray, in a three bedroom, one bathroom apartment in Covington. Parson and Crystal slept on a mattress on the floor in the living room of the apartment. Seven children also lived in the apartment, one of which was T.T. T.T. was Ray's son's girlfriend's daughter and a foster child of the Talbotts. The alleged incident occurred while Parson and T.T. were alone in the living room playing on Parson's bed.

At trial, T.T. told the jury that she was in Kindergarten when she lived with the Talbotts. She agreed that there are parts of the body that no one is supposed to touch and that those were her private parts. She stated that one day, she and four other children were in the living room of the Talbott residence playing with Parson on Parson's bed. After a while, the other children went into one of the bedrooms to play, leaving her alone with Parson. Shortly thereafter, Parson reached under her pants and underwear, inserted his finger in her private area, and asked, "Does it

[1] T.T. is a pseudonym.

feel good?" T.T. testified that the day after the incident, while visiting her mom at a drug treatment facility, she told her mom what happened.

In addition to the testimony from T.T., the Commonwealth presented testimony from Jarrod Williamson, a social worker with the Cabinet for Health and Family Services, and Detective Justin Bradbury, a detective with the Covington Police Department who was the lead investigator in this case. On direct examination, both witnesses relayed what T.T. had told them about what had occurred. Through cross-examination of each of these witnesses, Parson established that T.T. visited her mother at the drug treatment facility on April 27, 2013.

When it was the defense's turn to present evidence, Parson submitted testimony from his mother, Lisa; his step-father, Ray; his wife, Crystal; and his mother-in-law, Janet. Each witness testified as to Parson's whereabouts on April 26, 2013. Crystal testified that she woke up at 6:30 a.m. that day and dropped her son off at school. When she returned home, she went back to bed with Parson until about 9:30 a.m. At 2:00 p.m., she and Parson picked their son up at school and went to the zoo. She identified two zoo tickets dated April 26, 2013, and time stamped 2:49 p.m. She stated that they left the Zoo at around 5:00 p.m. and went to McDonald's to eat. At McDonalds, Crystal received a call from her mother, Janet, who asked to borrow a car seat. Crystal, Parson, and their son then went to Crystal's mother's house and stayed until around 10:00 p.m.

Ray and Lisa both testified that they were certain that Parson was not home on April 26, 2013. Crystal's mother Janet corroborated Crystal's testimony that Crystal and Parson were at her house for a few hours on the evening of April 26, 2013. Janet stated that she remembered the date because she was on probation and had to call her parole officer that day. Parson declined to take the stand to testify on his own behalf.

The jury ultimately found Parson guilty of one count of sexual abuse in the first degree. After deliberations, the jury recommended that Parson be committed to the Department of Correction for a term of seven years. The trial court sentenced Parson accordingly. Parson brings this appeal from that judgement and sentence.

**WITNESS BOLSTERING**

Parson claims that the trial court erred by allowing improper bolstering of T.T.'s testimony. Parson concedes that this claim of error was not properly preserved for appellate review, but seeks palpable error review in accordance with Kentucky Rules of Criminal Procedure (RCr) 10.26. "In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Allen v. Commonwealth,* 286 S.W.3d 221, 226 (Ky. 2009) (footnote omitted).

The victim testified on direct-examination as to her recollection of the sexual abuse. On cross-examination, Parson attempted to establish the date T.T. went to

see her mother in relation to the alleged incident. On re-direct, the Commonwealth asked T.T. whether her testimony was truthful and whether the incident really happened, to which T.T. responded in the affirmative. Parson argues that T.T.'s testimony on re-direct amounted to impermissible bolstering of her direct testimony. We agree.

The Commonwealth argues that improper bolstering only occurs when the Commonwealth attempts to establish the credibility of a victim or one of its witnesses by asking *other* witnesses to repeat what the witnesses had said. However, settled case law proves Parson correct that "a witness is not permitted to bolster *his own* testimony until his credibility has been attacked." *Tackett v. Commonwealth*, 445 S.W.3d 20, 33 (Ky. 2014) (citing *Brown v. Commonwealth*, 313 S.W.3d 577, 628 (Ky. 2010)) (emphasis added). Here, Parson never attempted to imply that T.T. had fabricated her testimony - he merely attempted to establish a timeline so that he could later defend himself based on an alibi. He in no way attacked T.T.'s credibility; therefore, it was improper for the Commonwealth to ask T.T. on re-direct if she was being truthful.

Parson also objects to hearsay testimony from social worker Jarrod Williamson and Detective Bradbury, the lead investigator. Williamson's testimony consisted primarily of things that T.T. told him and others about the incident. He testified that T.T. "disclosed to her mother that a Derek who lives in the home with her had touched her private parts." He also stated that T.T. told him that "Derek had touched her private part and stopped, and then did it again and stopped."

Detective Bradbury, when asked how he got involved with the case, stated that "T.T. had reported sexual abuse at the hand of Derek Parson." Later, Bradbury testified that he attended a forensic interview conducted by social services where T.T. again "disclosed sexual abuse at the hands of Derek Parson." There was also a statement made by the prosecution that Parson was the person whom T.T. continually accused of sexual abuse, to which the detective answered "Correct." Parson contends that it was error for the trial court to permit the social worker and police officer to testify to prior consistent statements made by T.T., because their hearsay testimony unfairly bolstered T.T.'s testimony. Again, we agree.

"[A] witness cannot vouch for the truthfulness of another witness." *Hoff v. Commonwealth*, 394 S.W.3d 368, 376 (Ky. 2011) (citation omitted). Our Supreme Court has long held that "hearsay testimony of social workers is inadmissible and constitutes reversible error because it unfairly bolsters the testimony of the alleged victim." *Sanderson v. Commonwealth*, 291 S.W.3d 610, 616 (Ky. 2009) (internal quotations and citation omitted). This same reasoning extends to police officers as well. *See Alford v. Commonwealth*, 338 S.W.3d 240, 246 (Ky. 2011); *Smith v. Commonwealth*, 920 S.W.2d 514, 516-17 (Ky. 1995).

The contested statements in this case were clearly made out of court and were offered into evidence to prove the truth of the matter asserted. There is no recognized hearsay exception for statements made by an alleged victim to social workers or police officers. *Sanderson*, *supra*; *Alford*, *supra*. Moreover, there was no charge of a recent fabrication; therefore, the statements were not admissible as

prior consistent statements. *See Smith*, 920 S.W.2d at 517. Accordingly, it was error to admit T.T.'s prior consistent hearsay statements through Williamson and Detective Bradbury's testimony.

While it was clearly error to admit the bolstering testimony of all three of the Commonwealth's witnesses, because Parson failed to object, reversal will only be granted if a manifest injustice resulted from the error. Our Supreme Court has recognized that the type of hearsay that was permitted here is highly prejudicial because it unfairly bolsters the credibility of the victim. *Alford*, 338 S.W.3d at 246.

In *Alford v. Commonwealth*, the thirteen-year-old victim, while on a visit with her biological father, told her step-sister and step-mother that she was being sexually abused by her mother's boyfriend in her mother's home, sometimes while her mother was in another room. The medical exam revealed evidence of sexual contact, however, there was no evidence of trauma. Two of the Commonwealth's witnesses - a police officer and a doctor - testified to prior consistent statements related to them by the victim. During the police officer's testimony, the Commonwealth read the victim's entire statement detailing specific instances of abuse to the police officer and asked if he recalled her making those statements. The doctor testified at length to various acts of oral, vaginal, and anal intercourse, and sexual touching that the victim had related to him. Both the police officer and doctor testified that the victim stated that the defendant was the one who perpetrated the abuse.

In *Alford*, our Supreme Court found manifest injustice, noting that the victim's testimony was the only evidence linking the defendant to the sexual abuse; therefore, her credibility was crucial to the Commonwealth's case. It ultimately found that the admission of the extensive and highly prejudicial hearsay testimony of the police officer and doctor unfairly bolstered the victim's credibility to the extent that it rose to the level of palpable error.

This case is similar to *Alford* in that the testimony of the victim was the only evidence linking Parson to the sexual contact. Also like *Alford*, hearsay evidence was introduced showing that T.T. had previously stated Parson was the person who abused her. *Alford* being directly on point, we find that the hearsay testimony of Detective Bradbury and Mr. Williamson in which they state the child made out-of-court statements which identified Parson as her abuser was highly prejudicial. These hearsay statements, coupled with T.T.'s impermissible testimony that she was telling the truth, amount to palpable error; therefore, we reverse and remand for a new trial.

We must also address those issues which may recur on retrial.

**Jury Instructions**

During T.T.'s cross-examination, Parson asked T.T. if she remembered what day she visited her mother. T.T. responded that she thought it was a Saturday. Parson asked T.T. if she thought the incident occurred the day before, the day of, or the day after. T.T. responded that she thought it was the day after. Parson then

rephrased the question and asked if T.T. thought she went to see her mother the day after the incident. T.T. responded affirmatively.

Detective Bradbury testified that his report specified the violation date as April 26, 2013. However, he clarified that the sexual abuse did not necessarily occur on April 26, 2013. He only listed the violation date as April 26, 2013, because that was the day before the investigation began and the abuse was alleged to have occurred the day before the start of the investigation.

Before the sexual abuse instruction was given to the jury, Parson requested that the trial court limit the date range to April 26, 2013, instead of the entire month of April 2013. The trial court denied Parson's request. Parson argues that a particular date was important to him because his case only involved one allegation of sexual abuse, and he was not home on that date. He believes that the trial court's failure to limit the date range violated his due process right to present a defense. We disagree.

The Sixth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution require that the Commonwealth prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 2356, 147 L.Ed.2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 2313, 132 L.Ed.2d 444 (1995); *Newby v. Commonwealth*, 255 Ky. 597, 75 S.W.2d 25, 29 (1934). However, "[a]n erroneous instruction that omits an element of the offense . . . is subject to harmless-error analysis, though the Commonwealth bears the burden of this

assertion[.]" *Young v. Commonwealth*, 426 S.W.3d 577, 585 (Ky. 2014) (internal quotations and citations omitted).

Our Supreme Court has recognized that Kentucky case law regarding the proper standard of review when reviewing alleged errors in jury instructions is inconsistent. The Court has reviewed under both an abuse of discretion standard and a *de novo* standard. *Goncalves v. Commonwealth*, 404 S.W.3d 180, 193 n.6 (Ky. 2013). In this case, it is not necessary to choose under which standard we review, because there is no error under either standard.

> KRS[2] 510.110 provides in pertinent part:
>
> (1) A person is guilty of sexual abuse in the first degree when:
> . . .
>
> (b) He or she subjects another person to sexual contact who is incapable of consent because he or she:
> . . .
>
> 2. Is less than twelve (12) years old[.]

In Kentucky, "[o]ur approach to [jury] instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire." *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974). Further, our Supreme Court has long held that in "sexual abuse cases, especially those involving children, if time is not a material ingredient of the offense ..., all that is necessary in the indictment in this respect is that it should appear from its averments that the offense was consummated before the finding of the indictment."

[2] Kentucky Revised Statute.

*Applegate v. Commonwealth*, 299 S.W.3d 266, 270-71 (Ky. 2009) (citing *Salyers v. Commonwealth*, 255 S.W.2d 605, 606 (Ky. 1953)) (internal quotations omitted). Here, the sexual abuse instruction given to the jury read as follows:

> You will find the defendant, Derek Parson, guilty of SEXUAL ABUSE IN THE FIRST DEGREE under this instruction, if and only if, you believe from this evidence beyond a reasonable doubt the following:
>
> (a) That in this county on or about April 2013 and before the finding of the indictment, the Defendant subjected T.T. to sexual contact, AND
>
> (b) That the time T.T. was less that twelve (12) years old.

We believe that the jury instructions were proper for the offense charged. The instructions adequately described each element of the crime and the appropriate legal standard. In sexual abuse cases, temporal distinctions are typically only necessary when there are multiple criminal acts involving the same conduct, or when the age of the victim at the time of the act is in question. *See Martin v. Commonwealth*, 456 S.W.3d 1, 7 (Ky. 2015) (failure to distinguish one instruction from another creates a unanimous verdict violation); and *Stringer v. Commonwealth*, 956 S.W.2d 883, 886 (Ky. 1997) (the critical question is the victim's age at the time of the offense). However, specific dates are rarely required. Our Supreme Court has stated that "it is not necessary that a child victim of sexual abuse give specific dates that the offenses occurred. In fact, [i]t would be wholly unreasonable to expect a child of such tender years to remember specific dates[.]" *Applegate*, 299 S.W.3d at 270 (internal citations and quotations omitted).

Here, Parson was charged with only one count of sexual abuse and the victim was obviously under twelve at the time of the act as she was only seven when she testified. The date on which the incident occurred was not a necessary element of the charged offense.

Moreover, Parson was not denied an opportunity to present a defense. He argued during trial that the evidence pointed to a specific offense date, April 26, 2013, and that he could not have committed the offense because he was not at home. However, just because Parson alleged an alibi on a certain date did not make that date an element of the offense of sexual abuse in the first degree. The trial court did not err when it refused to amend the jury instructions to include a specific date.

**Sex Offender Registry**

At his sentencing, the trial court informed Parson that he would have to register as a sex offender for twenty years. Accordingly, the final judgment stated that Parson "has been informed of his duty to register as a sex offender for a period of twenty (20) years." However, in the same final judgment, Parson was "ORDERED to register with the local Probation and Parole Office in the county in which he resides as a sex offender for a period of lifetime[.]" Although this appears to be a clerical error, we will address the merits of the argument.

KRS 17.520(2)(a)(3) requires, in pertinent part, lifetime registration for any person convicted of a sex crime who has one or more prior convictions for a felony criminal offense against a victim who is a minor, or who has one or more prior sex

crime convictions. Under KRS 17.520(3), all other registrants, which would include Parson, are required to register for twenty years following "discharge from confinement" or twenty years following the "maximum discharge date on probation, shock probation, conditional discharge, parole, or other form of early release, whichever period is greater." The record indicates that Parson had one prior conviction for disorderly conduct and failure to produce insurance; therefore, Parson does not meet any of the requirements for lifetime registrant under KRS 17.520(2) and should have been sentenced under KRS 17.520(3).

We decline to address Parson's directed verdict argument because it may not necessarily recur on remand.

Based on the foregoing, we reverse and remand for a new trial.

ALL CONCUR.

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