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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000146-MR

LIONEL MOORE — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 15-CR-00073

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

JONES, JUDGE: Lionel Moore appeals from the Hardin Circuit Court's judgment and sentence following a jury trial. A jury convicted Moore of third-degree rape and first-degree sexual abuse and sentenced Moore to a total of 8 years. After careful review, we affirm.

I. Factual and Procedural Background

In December 2014, T.C. was at her friend's mother's house in Radcliff, Kentucky. Appellant, Lionel Moore, and his three children were also at the home. Moore was dating T.C.'s friend's mother.[1]

On the night in question, T.C., her friends, Moore, and his children were all in the mother's bedroom watching a movie. At some point, T.C.'s friends left the room, leaving Moore alone with T.C. and his three children in the room. During this time Moore rubbed T.C.'s buttocks and she rolled away from him. Next, Moore rubbed her pants in between her genital area. Moore then placed his fingers inside her vagina. Moore then pulled T.C.'s pants down and put his penis inside her vagina. T.C. repeatedly told Moore to stop, but he did not.

T.C. immediately told her friends what happened. T.C. waited in her friend's room for the mother to return home from work. About an hour after the incident, the mother returned home from work and called the police, who dispatched officers to the scene.

Detective James Lark[2] from the Radcliff Police Department responded to the scene. Detective Lark spoke with the officers at the scene and took an initial statement from T.C. Detective Lark followed-up with more extensive interviews at the Police Department. There, Detective Lark interviewed Moore about the incident. Moore initially denied any sexual contact, but later confessed to rubbing

[1] The mother was working while everyone was at her home.

[2] By the time of trial, James Lark had been promoted to Sergeant.

T.C.'s vagina with his fingers and his penis; he further admitted that his penis could have penetrated T.C.'s vagina.

Detective Lark also interviewed T.C. at the Police Department. T.C. detailed the events described above. Detective Lark then collected T.C.'s pants for evidence as she was wearing the same pants that she had been wearing at the time of the alleged assault. Detective Lark sent T.C.'s pants to the Kentucky State Police crime lab. The pants were determined to have Moore's semen on them.

At trial, T.C. testified consistent with her previous statements. Her two friends who were at the house, but were not in the same room as T.C. when the incident occurred, also testified.

Next, Detective Lark testified. He testified that when he arrived at the scene, both T.C. and Moore were present. He explained that he conducted interviews with T.C. and Moore at the Radcliff Police Department. He explained that Moore admitted to the alleged acts consistent with T.C.'s story. Detective Lark explained his interviewing techniques, and Moore's interview was played for the jury.

Detective Lark also testified about his decision not to have a sexual assault examination performed on T.C. Detective Lark testified that he felt that the sexual assault examination was not needed due to Moore's confession, T.C.'s timely statement, and the submission of T.C.'s pants for DNA evidence. Detective Lark explained that he balanced the weight of the evidence with the intrusive nature of the sexual assault examination. Because he felt that T.C. had already

been through enough with the assault, he felt that the sexual assault examination was not needed. Further, he testified that he asked T.C. if she felt any pain or bleeding and she did not, which contributed to his decision not to have the sexual assault examination performed. Defense counsel did not object to this line of questioning, and questioned Detective Lark about his decision further during cross-examination.

Following closing arguments, the jury retired to deliberate. Ultimately, the jury found Moore guilty of both third-degree rape and first-degree sexual abuse. The trial court sentenced Moore to serve a total of 8 years. This direct appeal by Moore followed.

II. ANALYSIS

Moore raises two main issues on appeal. First, he claims that Detective Lark's testimony improperly expressed a legal conclusion that Moore was guilty of rape and sexual abuse. Second, Moore claims that his convictions violate the double jeopardy clause and KRS[3] 505.020(c). Moore concedes that he did not raise either one of these claimed errors during the trial. As such, he requests we review these issues for palpable error.

Not all errors are palpable. To be palpable, an error "must have been apparent to the parties and the court, and must have resulted in 'manifest injustice,' *i.e.*, it probably, not just possibly, affected the outcome of the proceeding, or so fundamentally tainted the proceeding as to 'threaten [the] defendant's entitlement

[3] Kentucky Revised Statutes.

to due process of law.'" *Bartley v. Commonwealth*, 400 S.W.3d 714, 728 (Ky. 2013) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)). "Implicit in the concept of palpable error correction is that the error is so obvious that the trial court was remiss in failing to act upon it *sua sponte*." *Lamb v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017).

A. ***Detective Lark's Testimony***

At trial, the Commonwealth questioned Detective Lark as to why he did not have a sexual assault examination performed on T.C. In response, Detective Lark explained that Moore's confession, T.C.'s testimony, and DNA from T.C.'s pants made him decide to forego the sexual assault examination for T.C.'s sake because of the intrusive nature of the sexual assault exam. Detective Lark explained that he did not want to subject T.C. to the intrusive sexual assault examination in light of the evidence of the case. Detective Lark also testified that T.C.'s story was consistent and that her statement matched Moore's statement. Moore argues Detective Lark essentially vouched for T.C.'s credibility through his testimony. It is well established that an opinion vouching for the truthfulness of another witness is improper. *Stringer v. Commonwealth,* 956 S.W.2d 883, 888 (Ky. 1997) (citing *Hall v. Commonwealth,* 862 S.W.2d 321, 323 (Ky. 1993)). For example, physicians may give an opinion concerning their patients' medical diagnosis, but they may not give an opinion as to the truthfulness of their patient. *Hall,* 862 S.W.2d at 323.

Our Supreme Court found improper bolstering in *Hoff v. Commonwealth,* 394 S.W.3d 368 (Ky. 2011). In *Hoff,* a physician who treated the child victim of an alleged rape testified that he "had no reason not to believe" what the victim told him, reasoning that the child's explanation of the events was "within [a] reasonable medical probability" of being an actual account of what had happened. *Id.* at 375. Upon review, the Court determined that while the physician's testimony regarding his medical diagnosis was proper, his statement that he did not disbelieve the victim's story was improper bolstering culminating in palpable error. *Id.*

This case is quite different than *Hoff*. Detective Lark was asked why he elected not to have a sexual assault examination performed on the alleged victim. In explaining his rationale, Detective Lark noted that T.C.'s statements were consistent with Moore's statements regarding the events as well as the fact that her clothing was available for testing. This is substantially different than the doctor in *Hoff*, who testified that he believed the child correctly identified the defendant as the one who sexually abused her. While the jury could have inferred that Detective Lark was indirectly vouching for T.C.'s credibility, "the fact that a jury may have been able to infer that a witness was, at most, indirectly vouching for the credibility of another witness is simply not the stuff from which palpable errors are made." *Harp v. Commonwealth*, 266 S.W.3d 813, 824 (Ky. 2008). Additionally, as the court noted in *Tackett v. Commonwealth*, 445 S.W.3d 20, 36-37 (Ky. 2014), even where a Detective's testimony may implicitly bolster

testimony, a Detective would not have undertaken his investigation if he did not believe an individual's allegations to some extent. That is true of most police investigations. The Court explained that to some extent all testimony by police officers regarding their investigations would be impermissible bolstering, which would be an absurd result. *Tackett*, 445 S.W.3d at 38.

Moreover, unlike in *Hoff*, the evidence against Moore was comprised of far more than T.C.'s testimony. Moore's DNA was found on T.C.'s underpants; he also confessed to rubbing his penis on T.C.'s vaginal area and admitted that it could have penetrated her. These facts alone could have led the jury to convict Moore. Accordingly, we hold that any error in Detective Lark's testimony was not palpable.

B. Double Jeopardy

Next, we address Moore's contention a double jeopardy violation occurred pursuant to KRS 505.020(1)(c) because he was convicted of both third-degree rape and first-degree sexual abuse. More specifically, he contends that the allegations of touching T.C.'s vagina and inserting his penis into her vagina constitute one event, uninterrupted by legal process. Consequently, he argues that such events cannot support two separate crimes under KRS 505.020(1)(c).

The Commonwealth responds that there is no double jeopardy violation here because there was a sufficient break in the conduct and time such that the acts constituted separate offenses. KRS 505.020 expresses our statutory

structure for analyzing whether multiple convictions for the same course of conduct are permissible as follows:

> (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:
>
> > (a) One offense is included in the other, as defined in subsection (2); or
> >
> > (b) Inconsistent findings of fact are required to establish the commission of the offenses; or
> >
> > (c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.
>
> (2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
>
> > (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
> >
> > (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
> >
> > (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
> >
> > (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

KRS 505.020 does not bar the prosecution or conviction upon multiple offenses arising out of a single course of conduct when the facts establish that two or more separate and distinct attacks occurred during the episode of criminal behavior. *Welborn v. Commonwealth,* 157 S.W.3d 608, 611–12 (Ky. 2005). However, in order for multiple convictions to be proper, there must have been a cognizable lapse in the course of conduct during which the defendant could have reflected upon his conduct, if only momentarily, and formed the intent to commit additional acts. *Kiper v. Commonwealth,* 399 S.W.3d 736, 746 (Ky. 2012) (citing *Welborn,* 157 S.W.3d at 612); *see also Terry v. Commonwealth,* 253 S.W.3d 466, 474 (Ky. 2008)).

We find the circumstances here are analogous to *Van Dyke v. Commonwealth*, 581 S.W.2d 563 (Ky. 1979), where the court found that criminal sexual acts that occurred in a span of 15 minutes on the same day did not prohibit multiple convictions. In *Van Dyke*, the defendant argued that his convictions of rape and sodomy should be merged into a single conviction because they occurred during one continuous sexual assault against the same victim. However, the court found that the fact that the acts occurred in a brief period of time with the same victim and in a continuum of force does not protect the defendant from prosecution and conviction on each separate offense. *Id.* at 564.

Here, the Commonwealth argues that Moore's removing of T.C.'s underpants created the necessary lapse in time between the sexual abuse and the

rape to avoid any double jeopardy violation. We agree. T.C. stated that Moore rubbed her genital area and started to place his fingers in her vagina. Next, T.C. stated that Moore pulled her pants down and then penetrated her vagina with his penis. We find that this was a sufficient break for Moore to reflect on his conduct of sexual abuse and then form the intent to commit another crime, the rape. Additionally, unlike other cases where our Supreme Court has found a double jeopardy violation, the jury instructions in this case differentiated the two crimes. The jury was instructed that the act of sexual intercourse was the predicate for the rape charge and Moore's act of touching T.C.'s vagina with his fingers was the predicate for the sexual abuse charge. *See Clack v. Commonwealth*, No. 2010-SC-000793-MR, 2012 WL 601265, at *5 (Ky. Feb. 23, 2012) ("[O]f course there may be a conviction for both rape and sexual abuse as a result of the same general episode if there are two independent acts of criminal conduct and the instructions sufficiently differentiate between the two criminal acts.").[4] As such, no double jeopardy violation occurred that constituted palpable error.

IV. CONCLUSION

For these reasons, we affirm the judgement and sentence of the Hardin Circuit Court.

ALL CONCUR.

[4] We recognize that unpublished opinions are non-binding on this panel. In accordance with Kentucky Rules of Civil Procedure 76.28(4)(c), however, we may consult such opinions for guidance.

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