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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000297-MR

SAMUEL ISAACS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 14-CR-00248

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: This case arises from a jury trial in the Franklin Circuit Court.

The Appellant, Samuel Isaacs, was found guilty of first-degree assault and was sentenced to eighteen years' imprisonment. The Appellant raises two issues on appeal: (1) that the Commonwealth's questioning of the jury during *voir dire* denied the Appellant an impartial jury and (2) that the trial court denied the

Appellant the right to present a defense by excluding certain evidence. As the trial court did not abuse its discretion, and there was no palpable error resulting from the *voir dire*, we affirm.

Background

The facts underlying the assault charge are not in significant dispute. The Appellant's granddaughter came to stay with him and his wife during the summer of 2014. After his granddaughter had returned home, the Appellant's daughter, who is the mother of the Appellant's granddaughter, called and spoke with the Appellant's wife. His wife was told by his daughter that his granddaughter had sex with a neighborhood boy while she stayed at the Appellant's home. Upon the Appellant's return home that same afternoon, his wife told him what his daughter had said, and so the Appellant called his daughter. Although there is some dispute over how exactly the sexual conduct was characterized, the Appellant testified that his daughter told him that his granddaughter had been raped. The Appellant also testified that his daughter told him that he would never see his granddaughter again because it happened while she was under his care. The Appellant contends that his daughter told him about explicit text messages that his granddaughter and the boy had exchanged.

The Appellant picked up his handgun and left his house to look for the boy. He testified that he was bewildered by the thought of never seeing his twelve-year-old granddaughter again and that it was like he was in a nightmare. He stated

that he went looking for answers from the boy, who he believed to be sixteen or seventeen years old. The boy was actually fourteen years old. The testimony between the Appellant and the boy differ as to exactly what happened when they met, but in any event, the Appellant admits that he shot the boy several times. Shortly after the shooting, the Appellant told the police that he intended to kill the boy. The Appellant was arrested after a five-hour stand-off with the police away from the scene of the shooting in which they successfully convinced the Appellant to not shoot himself and to surrender. He was arrested and charged with assault.

The Commonwealth filed a motion *in limine* to exclude risqué text messages that had been exchanged between the granddaughter and the boy, claiming that the texts did not have any probative value and would only prejudice the jury. The motion was granted in part by the trial court, and an order was entered. The order stated that there was to be no reference to text messages or photographs exchanged between the granddaughter and the boy unless counsel first approached the bench and made a good faith representation demonstrating the relevance and probative value thereof.

At trial, the Appellant did not contest that he shot the boy. Instead, the Appellant presented a case of extreme emotional disturbance (“EED”) to the jury in an attempt to mitigate the charge to assault under extreme emotional disturbance, a Class D Felony which carries a sentence of one to five years. EED is characterized by a reasonable explanation or excuse, the reasonableness of

which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. KRS¹ 507.020(1)(a). The jury was instructed on EED and was given the option to find the Appellant guilty of either first-degree assault or assault under extreme emotional disturbance. The jury returned a guilty verdict on first-degree assault. This appeal follows.

1. **The Commonwealth's questioning during *voir dire* did not result in palpable error.**

The Appellant first contends that the prosecutor engaged in prejudicial questioning of the jury during *voir dire* in an attempt to encourage the jury to determine the main issue of EED prior to any testimony. Both the Appellant and the Commonwealth agree that the issue is not properly preserved because there was no objection to the questioning nor any admonition of the jury requested. Accordingly, the Appellant requests that this Court review the issue for palpable error pursuant to RCr² 10.26.

RCr 10.26 allows an appellate court to review unpreserved errors only when the error is palpable. An error is palpable when it affects the substantial rights of a party and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error. RCr 10.26. To determine whether manifest injustice has occurred, an appellate court must find that on the whole case

¹ Kentucky Revised Statutes.

² Kentucky Rules of Criminal Procedure.

there is a substantial possibility that the result would have been different had the error not occurred. *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011).

Analysis

The purpose of *voir dire* questioning is to obtain a fair and impartial jury whose minds are free and clear from all interest, bias, or prejudice that might prevent their finding a just and true verdict. *Newcomb v. Commonwealth*, 410 S.W.3d 63, 86 (Ky. 2013). Questions are not competent when their evident purpose is to have jurors indicate in advance or commit themselves to certain ideas and views upon final submission of the case to them. *Id.* The Appellant cites a series of thirteen questions posed by the prosecutor to the *venire* that the Appellant claims were designed to encourage the jury to decide the issue of EED prematurely. We do not find that the prosecutor's questions resulted in palpable error.

The trial court has wide discretion in regulating *voir dire*. *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985); *Woodall v. Commonwealth*, 63 S.W.3d 104, 116 (Ky. 2001). In both *Ward* and *Woodall*, the *voir dire* questions directly implicating the proof that would be put on at trial were not allowed by the trial courts. In *Ward v. Commonwealth*, the Kentucky Supreme Court found that the trial court did not abuse its discretion by not allowing the defendant to ask jurors if they could consider a deal made between a witness in the case and the Commonwealth in assessing a witness's credibility. *Ward*, 695 S.W.2d at 407.

The defendant went so far as to say to the jurors, “[y]ou have a right as a jury, if you are selected as a juror, to hold those deals against the Commonwealth.” *Id.* In *Woodall*, the defendant tried to commit jurors to either accepting or rejecting a specific mitigator that would be presented by having jurors indicate in advance what their views were regarding his I.Q. of 74. *Woodall*, 63 S.W.3d at 116. These questions implicating the evidence not yet presented were disallowed in both cases.

In *Newcomb*, the appellant appealed an alleged, unpreserved error that the prosecutor sought to prejudice the jury by describing the crime of rape as “a particularly ugly crime that is about power, control, and dominating and humiliating the victim.” The court held that the prosecutor sought to commit jurors to a *characterization* of rape but did not seek to commit them to a governing view of the specific evidence to be presented or the elements of the crime upon final submission of the case. The *Newcomb* court observed that this type of questioning during *voir dire* approaches impermissibility, so it is this limit set by the Kentucky Supreme Court in *Newcomb* that controls. *Id.*

The prosecutor’s question regarding the characterization of rape in *Newcomb* was permissible because the specific evidence and elements of the crime were not submitted to the jury during *voir dire*. *Id.* When a party uses *voir dire* to obligate jurors to a view of the *specific* evidence to be presented or elements of the crime, the substantial rights of the parties have been affected. *See Id.* The jury must have been asked in such a way that, regardless of the circumstances

surrounding the whole case, some jurors are obligated or convinced in advance that some element of the crime is or is not met or that some piece of evidence is or is not relevant to the elements of the crime. *See Id.*

Here, the prosecutor did not seek to commit the jury to a view of the specific elements or evidence of the crime. The prosecutor's questions were asked in a way that can fairly be said to be searching for pre-existing biases and prejudices that may prevent finding a just and true verdict. For example, the prosecutor asked, "If someone told you that your twelve-year-old daughter had had sex with a fourteen-year-old boy, would you hesitate to try to find out what happened, or would you just go out and shoot somebody?" This question searches for a juror that is inclined to agree with the Appellant's actions absent any of the circumstances surrounding what drove the Appellant to shoot the boy. No mention is made of the mistaken age of the boy or that the Appellant believed his granddaughter was raped. No mention is made that the Appellant was told that he would never see his granddaughter again.

While at first glance this question does strike near the heart of the matter, all of the circumstances that may justify the application of the EED mitigator in this particular case are absent from the prosecutor's statement. This question leaves the determination of the EED mitigator's applicability to the jury. At the same time, it allows the prosecutor to identify those who might have a pre-existing inclination to find in favor of the Appellant given so few facts. Most

importantly, no objection was made to the question and no admonition to the *venire* was requested.

The other questions were more tame. If the question above is permissible, the other questions cannot be reasonably presumed to bias the entirety of the *venire*. Accordingly, we do not find that the prosecutor's questioning resulted in palpable error.

II. The trial court did not abuse its discretion when it issued its order regarding the text messages.

The Appellant contends that the trial court denied him the right to present a defense by excluding certain evidence relevant to his defense. The parties seem to disagree as to whether or not this issue is preserved.

We find that the issue is properly preserved. At the evidentiary hearing held ten days before the trial, the Commonwealth argued that the Appellant did not know about the text messages and thus their content could not be relevant to his EED defense. The Commonwealth further argued that the exact messages could not be relevant for any purpose because no one involved in the shooting knew the exact content of the messages until three days after the shooting occurred. The Appellant admitted that he did not see the text messages himself, but he made it clear to the trial judge that he had been told that text messages existed, and the Appellant contended that the existence of the text messages were part of what formed his belief that his granddaughter and the boy had sex.

According to the Commonwealth's brief, the Appellant does not contest that he was unaware of the text messages. However, the record shows that he did represent to the trial court that he was aware of the text messages through the phone call with his daughter shortly before the shooting. This issue is properly preserved because the trial court entered an order limiting the use of the texts as evidence and because the trial court sustained the Commonwealth's objection when the texts were mentioned at trial.

The Appellant contends that (1) the text messages were important for the jury to understand how the Appellant's daughter knew that the granddaughter and the boy had sex, and (2) the texts were relevant and credible evidence that impeached the witnesses for the prosecution. The trial court found that the text messages had very little probative value and would be prejudicial to both sides. In its order, the trial court presumptively excluded the evidence absent a showing of relevance prior to eliciting testimony from any particular witness regarding the texts. It is the prosecutor's sustained objection at trial that the Appellant now appeals.

We review the trial court's evidentiary decisions for abuse of discretion. *Commonwealth v. Prater*, 324 S.W.3d 393, 399-400 (Ky. 2010). Abuse of discretion exists when a trial court's ruling is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Analysis

A. The text messages were properly excluded because establishing how the Appellant's daughter knew that the granddaughter and the boy had sex is not relevant to the determination of the action.

Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” KRE³ 401. Relevance is established by any showing of probativeness, however slight. *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999).

The Appellant now contends that he sought to introduce the text messages for two purposes: to show the jury how his daughter knew that his granddaughter and the boy had sex and to demonstrate that the Appellant's daughter knew about the texts when she spoke to the Appellant on the day of the shooting. The Appellant's daughter testified that she knew about the text messages. The Appellant contends that his daughter had told him about the text messages on the day of the shooting. While the content of the text messages could be relevant to establish that the children had sex, that question is not a fact of consequence in this case. Rather, the Appellant argues that his knowledge of the text messages is a fact relevant to establish the EED mitigator.

As discussed above, the EED mitigator is applicable to charges of assault. KRS 508.040. EED is characterized by a reasonable explanation or

³ Kentucky Rules of Evidence.

excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. KRS 507.020(1)(a). The Appellant believed the children had sex. That belief, along with his belief that the boy was sixteen or seventeen years old and the belief that his granddaughter had been raped, contributed to his viewpoint of the circumstances at the time of the shooting. His subjective belief is relevant evidence in favor of EED mitigation, but establishing the fact that the children had sex provides no evidence of the Appellant's viewpoint of the circumstances as he believed them to be.

The fact that the Appellant's daughter told him that the children had had sex is undisputed. All that matters for purposes of presenting the EED mitigator is that the Appellant *believed* the children had sex when he shot the boy. It is then up to the defense to convince the jury that he did in fact believe so. Since the Appellant had not actually seen the texts, their actual existence or contents were not relevant to establish that he believed what his daughter had told him to be true. Because the Appellant's defense depended on establishing his viewpoint of the circumstances and not the fact that the children had sex, the trial court's decision to exclude the text messages was not an abuse of discretion. The text messages were properly excluded on the basis that they do not provide evidence for the jury establishing the Appellant's viewpoint of the circumstances.

B. The text messages were properly excluded for purposes of impeachment.

Finally, we agree that the trial court properly excluded the text messages for the purpose of impeaching the boy. Even though the boy testified that he did not have sex with the Appellant's granddaughter and the text messages could have impeached the boy, the trial court found the issue of whether the children had sex to be collateral for the reasons discussed above regarding the EED mitigator's application. The trial court has discretion to determine whether or not to permit impeachment on collateral issues. *Commonwealth v. Prater*, 324 S.W.3d 393, 399 (Ky. 2010). The trial court's decision to not permit the evidence for purposes of impeachment is reviewable for abuse of discretion. *Id.* at 400. The trial court found that the probative value of the text messages as applied to the impeachment of the boy was not enough to overcome the prejudice against both the Commonwealth and the Appellant that would result from the text messages' introduction. The trial court did not abuse its discretion in this case because, as discussed above, the Appellant was able to present sufficient testimony regarding the Appellant's viewpoint of the circumstances in support of the EED mitigator.

The only remaining probative value the defense argued that the text messages would have had is to impeach the boy as to the number of times he and the granddaughter texted during the summer of 2014. The boy testified they texted once a week, and the Appellant contends they texted more than that. Again, the

trial court found that the actual text messages went to a collateral issue and would not permit the defense's attempt to elicit testimony from the daughter that the children texted more often than what the boy had testified to. *See Id.* at 399. The trial court did allow the defense the opportunity to recall the boy to testify to the number of text messages if the defense desired, but the boy was not recalled.

The trial court has discretion to determine whether or not to permit impeachment on collateral issues. *Id.* By allowing the boy to be recalled to testify to the number of text messages, the trial court cannot be said to have abused its discretion. The defense was not deprived of the ability to impeach the boy.

Conclusion

We do not find palpable error resulting from the Commonwealth's questioning during *voir dire*. We also find that the Franklin Circuit Court did not abuse its discretion in excluding the text message evidence. Therefore, we affirm.

ALL CONCUR.

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