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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001183-MR

CHRISTOPHER GENE SLOAS — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 14-CR-00049

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, D., JUDGE: Christopher Sloas ("Sloas") appeals the criminal conviction and sentence imposed by the Letcher Circuit Court following a jury trial. Sloas alleges the trial court erred by: (1) allowing the victim to look at Sloas and state her testimony had been truthful; (2) allowing a witness to comment on the veracity of another witness' testimony; and (3) imposing court costs against

him. After thorough review of the record, we find no reversible error. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Sloas was convicted in relation to an incident that took place during the early morning hours of New Year's Day 2014. On New Year's Eve, the victim in this case ("K.P.")[1] and her husband ("J.P.") went out to a couple of local bars to celebrate. By their own accounts they were drinking that night but were not "falling down drunk." At 2:13 a.m. on New Years' Day, K.P. and J.P. returned to their apartment with a couple of friends. Sloas, who lived across the hall from K.P. and J.P., also entered their apartment at this time. Both sides acknowledge Sloas was not a close friend of the couple. Sloas claimed the couple would invite him to their apartment whenever they had social gatherings. J.P., on the other hand, testified Sloas would invite himself.

Once in the apartment, an argument that started between K.P. and J.P. earlier in the evening was reignited.[2] The friends they brought back from the bar left around 2:45 a.m., leaving K.P., J.P., and Sloas in the apartment. At some point

[1] The names of the victim and her husband will be abbreviated to protect their privacy.

[2] For the sake of clarity, we note that the argument concerned another woman approaching J.P. while they were at a bar.

during the argument, K.P. locked herself in the bedroom.[3] Wanting to get away from the situation, J.P. called his parents to ask them to pick him up. At 3:59 a.m. J.P., his mother, his stepfather, and Sloas all left the apartment, leaving K.P. therein. Between 4:05 a.m. and 5:51 a.m., Sloas returned to and left the couple's apartment three times. This fact is indisputable due to time-stamped footage from a security camera in the apartment building's hallway. Sloas claimed he did so because J.P. asked him to check on K.P. when he left. J.P. denies this.

The third and final time Sloas entered the apartment was 5:31 a.m. K.P. testified she woke up around 5:50 a.m. because she felt something inside her shirt. She realized that her bra was unsnapped, and Sloas' hands were on her breasts. Her underwear and pajama pants were pulled down, and her tampon had been removed from her vagina and was sitting on her nightstand. K.P. screamed and ran to the kitchen to get a knife to defend herself. Sloas fled the apartment and returned to his own apartment at 5:51 a.m. K.P. left her apartment at 6:00 a.m. She frantically tried to contact J.P. but was unable to do so. J.P. testified he had about twenty missed calls from K.P. that started coming in at 6 a.m. When she was finally able to reach him at about 8 a.m., she told him what happened, and they called the police.

[3] J.P. testified that the bedroom door lock is a push-button lock that can be unlocked with a paperclip.

Sloas was indicted on one count of first degree sexual abuse[4] and one count of second degree burglary.[5] At trial, the jury found Sloas guilty of first-degree sexual abuse but did not convict him of second-degree burglary.

More facts are discussed below as necessary.

II. ANALYSIS

A. STANDARD OF REVIEW

We begin by noting that evidentiary determinations of a trial court, including relevancy, are reviewed for abuse of discretion. *Smith v. Commonwealth*, 454 S.W.3d 283, 286 (Ky. 2015); *see also Engles v. Commonwealth*, 373 S.W.3d 456, 457 (Ky. App. 2012). "The Supreme Court of Kentucky has defined abuse of discretion as a court's acting arbitrarily, unreasonably, unfairly, or in a manner unsupported by sound legal principles." *Engles*, 373 S.W.3d at 457 (internal citations omitted).

B. THE TRIAL COURT DID NOT ERR BY ALLOWING THE VICTIM TO LOOK AT SLOAS AND STATE HER TESTIMONY WAS TRUTHFUL

[4] Kentucky Revised Statutes (KRS) 510.110: "(1) A person is guilty of sexual abuse in the first degree when: (a) He or she subjects another person to sexual contact by forcible compulsion; or (b) He or she subjects another person to sexual contact who is incapable of consent because he or she: 1. Is physically helpless[.]"

[5] KRS 511.030: "(1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling."

Sloas' primary argument on appeal is that the trial court committed reversible error by allowing the following testimony during the Commonwealth's direct examination of K.P.:

> **COMMONWEALTH:** Under our laws and Constitution, a defendant has the right to confront witnesses. That's why you had to be here to testify.
>
> **K.P.:** Right.
>
> **COMMONWEALTH:** Can you confront the defendant and look him squarely in the eyes and tell him whether or not you have in any way exaggerated, fabricated, or in any way not told exactly as you recall the events?
>
> **K.P.:** Yes.
>
> **DEFENSE:** May we approach, judge?
>
> **COURT:** You may.
>
> [**SIDE BENCH]:**
>
> **DEFENSE**: Judge that's not a proper question. To say I didn't lie about anything, look him in the eye. She took an oath that she wasn't going to lie about anything. That's not relevant.
>
> **COMMONWEALTH**: It's part of the Confrontation Clause and I think, uh, typically they'll say "I want you to look the jury in the eye." Well, we'd rather she look at him to let him

know she's told exactly what she recalls. That she's not afraid of him.

COURT: Objection overruled. Continue.

[DIRECT]:

COMMONWEALTH: And as I asked you, [K.P.], can you look at the defendant, and confront him, and let him know that everything that you have told today has been the truth as far as you can best and possibly tell it.

K.P.: Yes. (looking at defendant) I've said nothing but the truth.

Sloas asserts three arguments against this testimony: (1) that it was not relevant; (2) that it used the confrontation clause to improperly bolster K.P.'s credibility; and (3) that it was unduly prejudicial.

1. THE TESTIMONY WAS RELEVANT

Sloas first argues that the testimony was not relevant because it did not help the jury decide whether he committed first degree sexual abuse. Kentucky Rule of Evidence ("KRE") 401 defines relevant evidence as "evidence having 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." In a criminal case, evidence is relevant if it tends to prove or disprove an element of an alleged offense, and only a slight increase in

probability must be shown. *Harris v. Commonwealth*, 134 S.W.3d 603, 607 (Ky. 2004). Further, relevancy is a matter that "rests largely within the discretion of the trial court." *Reece v. Nationwide Mut. Ins. Co.*, 217 S.W.3d 226, 232 (Ky. 2007).

In this case, there was no physical evidence of sexual abuse. Because of this, the trier of fact had to rely heavily on witness credibility to make its determination. Thus, K.P.'s statement that her testimony was truthful was relevant. Accordingly, the trial court did not act "arbitrarily, unreasonably, unfairly, or in a manner unsupported by sound legal principles" by allowing it.

2. THE TESTIMONY DID NOT USE THE CONFRONTATION CLAUSE TO IMPROPERLY BOLSTER K.P.'S CREDIBILITY

Sloas' next argument is that the Commonwealth improperly used the Confrontation Clause[6] to bolster K.P.'s credibility. He goes on to argue that the Confrontation Clause allows a defendant to cross-examine witnesses against him and is sometimes a shield to protect a witness from having to face a defendant, but that it should not have been used as a sword to allow K.P. to bolster her testimony.

We understand how Sloas arrived at this unique argument. The Commonwealth argued against defense counsel's objection by stating, *supra*, that K.P. had the right to look at Sloas and state her testimony was truthful "under the Confrontation Clause." This argument, of course, was incorrect. The primary

[6] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. CONST. amend. VI.

right secured by the Confrontation Clause of both the U.S. and Kentucky Constitutions[7] is a defendant's right to cross-examine witnesses against him. *Sparkman v. Commonwealth*, 250 S.W.3d 667, 669 (Ky. 2008) (emphasis added); *see also Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Further, our case law says nothing about a witness having the right to look at a defendant and state that her testimony was truthful under the Confrontation Clause.

The trial court in this case did not make any specific findings regarding its decision to allow the testimony. However, the testimony was relevant given the specific circumstances of this case. Therefore, although the Commonwealth's supporting argument for it was insufficient, we cannot find that the trial court abused its discretion by allowing the testimony.

We also disagree with Sloas' argument that K.P.'s testimony was improper self-bolstering because her credibility had not been previously attacked. "The rule which permits rehabilitation of a witness is limited to those circumstances in which the credibility of the witness is attacked on the basis of a prior inconsistent statement, recent fabrication, improper influence, or some circumstance which impairs his present ability to recall and narrate the event."

[7] "The Sixth Amendment to the United States Constitution provides that a criminal defendant has the right 'to be confronted with the witnesses against him.' Similarly, the Kentucky Constitution, in section 11, states that the accused has the right 'to meet witnesses face to face.' Although the language of the two constitutional confrontation clauses is different, this Court has held that the underlying right is 'basically the same.'" *Sparkman v. Commonwealth*, 250 S.W.3d 667, 669 (Ky. 2008).

Bussey v. Commonwealth, 797 S.W.2d 483, 484 (Ky. 1990). However, we do not agree that K.P.'s testimony was self-bolstering in the first place. All she did was state that her testimony had been truthful. In our view it would be no different if the Commonwealth had asked if her testimony had been truthful, and she answered in the affirmative.

Further, even assuming it was in fact error to allow the testimony, the error would have been harmless. Under Kentucky Rule of Criminal Procedure ("RCr") 9.24:

> No error in either the admission or the exclusion of evidence…is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

The Supreme Court has found that an evidentiary error is harmless if the reviewing court can say that the judgment was not substantially swayed by the error. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). "The inquiry is not simply whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had a substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Winstead v. Commonwealth, 283 S.W.3d 678, 689 (Ky. 2009) (internal quotations omitted).

Here, we cannot say that the complained-of testimony had a substantial influence on the outcome of the case. The jury chose to acquit Sloas of the burglary charge, therefore it is clear that the jury was not blindly prejudiced against him. Further, K.P. stating that her testimony had been truthful was merely a reiteration of the oath she had already sworn prior to testifying. Finally, the evidence presented to the jury was sufficient to support Sloas' conviction. That evidence included but was not limited to: video evidence of Sloas entering and exiting the couple's apartment three times after J.P. left, and leaving hastily the final time after the sexual abuse occurred; video evidence of K.P. leaving the apartment quickly shortly after Sloas left the final time; J.P.'s testimony that he never asked Sloas to return to the apartment to check on K.P.; and K.P.'s testimony about what Sloas did to her. For the foregoing reasons, we decline to find the trial court committed reversible error in allowing K.P. to look at Sloas and state her testimony was truthful.

3. THE TESTIMONY WAS NOT UNDULY PREJUDICIAL

Finally, Sloas urges us to find that the testimony was unduly prejudicial under *Taulbee v. Commonwealth*,[8] because the maximum sentence was

[8] 438 S.W.2d 777 (Ky. App. 1969).

imposed against him. The Kentucky Supreme Court has found *Taulbee* to stand for the rule that any time the maximum sentence is imposed, a reviewing court must presume prejudice. *See West v. Commonwealth*, No. 2011-SC-000629-MR, 2013 WL 3155835, at *7 (Ky. June 20, 2013); *see also Gaunt v. Commonwealth*, No. 2011-CA-000132-MR, 2012 WL 876770, at *6 (Ky. App. Mar. 16, 2012).

Here, Sloas argues that his five-year sentence was the maximum possible sentence he court have received, and therefore we must presume the jury was prejudiced against him because of K.P.'s testimony. However, the maximum possible sentence was not imposed against Sloas. He was facing a potential sentence of fifteen years: five years for the first-degree sexual abuse charge, and ten years for the second-degree burglary charge. But he only received five years for the first-degree sexual abuse conviction and was acquitted of the second-degree burglary charge. Therefore, he did not receive the maximum available sentence and prejudice is not presumed.

C. **THE TRIAL COURT DID ERR BY ALLOWING A WITNESS TO COMMENT ON THE TRUTHFULNESS OF ANOTHER WITNESS' TESTIMONY**

Sloas concedes this error was not preserved for appellate review by contemporaneous objection. Therefore, we review it for palpable error in

accordance with RCr 10.26.[9] The Supreme Court of Kentucky discussed palpable error review in depth in *Brewer v. Commonwealth*:

> For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. A palpable error must involve prejudice more egregious than that occurring in reversible error[.] A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis boils down to is whether the reviewing court believes there is a substantial possibility that the result in the case would have been different without the error. If not, the error cannot be palpable.

206 S.W.3d 343, 349 (2006) (internal citations omitted).

Here, Sloas alleges that allowing following exchanges constituted palpable error by the trial court:

> **COMMONWEALTH**: If [J.P.] says 'I never asked [Sloas] to check on my wife,' you're saying that's not accurate?
>
> **SLOAS**: That's right.
>
> **…**
>
> **COMMONWEALTH**: [J.P.] said he never asked you to come over, are you saying that's not true?

[9] RCr 10.26: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

SLOAS: That's right.

Sloas argues that allowing this is reversible error under *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997). In *Moss*, during the Commonwealth's cross-examination of the defendant, the defendant was "badgered" into saying that a police officer, who was a leading witness for the Commonwealth, was lying. *Id.* at 583. As in this case, the court reviewed for palpable error. *Id.* The Supreme Court of Kentucky noted that it believed requiring a witness to characterize the testimony of another witness was improper. *Id.* However, it declined to find that it was palpable error, and the defendant was therefore not entitled to relief. *Id.*

Given the factual similarity between the circumstances of this case and that of *Moss*, we are bound by the finding of the Supreme Court in that case. We therefore find no palpable error.

D. THE TRIAL COURT DID NOT ERR BY LEVYING COURT COSTS AGAINST SLOAS

Sloas' final claim is that the trial court erred by ordering him to pay $130.00 in court costs within ninety days after serving his five-year sentence. Sloas argues this imposition violates Kentucky Revised Statute (KRS) 23A.205. Under KRS 23A.205,[10] imposing court costs against a defendant is mandatory

[10] The General Assembly has since made several amendments to KRS 23A.205 and KRS 453.190, *infra*, which became effective June 28, 2017. We have used the version of the statute in effect at the time Sloas committed the crime under review.

unless the court finds the defendant is a "poor person" under KRS 453.190(2),[11] and is "unable to pay court costs and will be unable to pay court costs in the foreseeable future."

Sloas contends that the trial court must have presumed he was unable to pay court costs "immediately or in the near future" because it ordered him to pay court costs within ninety days after serving a five-year sentence. From that conclusion, he urges us to find the trial court was in violation of KRS 23A.205(3). That section provides that if the court does not find the defendant is a poor person under KRS 23A.205(2), but nonetheless finds the defendant is unable to pay court costs at the time of sentencing, it may set up an installment plan for payment of court costs. "All court costs under the installment plan shall be paid within one (1) year of the date of sentencing." KRS 23A.205(3). Therefore, Sloas argues the court imposed an illegal sentence by ordering his court costs to be paid within five years and ninety days of his sentencing date. We disagree.

We begin by noting that this error is unpreserved. However, because "sentencing is jurisdictional," we have "inherent jurisdiction to correct an illegal sentence." *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011). In other words, "an appellate court is not bound to affirm an illegal sentence just because

[11] KRS 453.190(2): "A 'poor person' means a person who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing." (amended 2017).

the issue of illegality was not presented to the trial court." *Id.* at 27. But, to have this inherent jurisdiction, the error alleged must be a true sentencing issue. *Grigsby v. Commonwealth*, 302 S.W.3d 52, 54 (Ky. 2010). A true sentencing issue refers to a claim that a sentencing decision was contrary to statute or was made without fully considering what sentencing options were allowed by statute. *Id.* Here, Sloas claims that the sentencing error was made in violation of a statute: KRS 23A.205. Therefore, we have inherent jurisdiction to review the alleged error.

This case is substantially similar to *Nunn v. Commonwealth*, 461 S.W.3d 741 (Ky. 2015). In *Nunn* the defendant argued, as Sloas does here, that the trial court erred by imposing court costs to be paid within ninety days of his release from prison despite his indigent status. *Id.* at 752. The Supreme Court of Kentucky clarified that the status of a "poor person" under KRS 23A.205 is different from that of a "needy person" under KRS 31.100, which allows for the appointment of counsel for an indigent criminal defendant. *Id.* at 752. It further quoted from its recent findings in *Spicer v. Commonwealth*:

> If a trial judge was not asked at sentencing to determine the defendant's poverty status and did not otherwise presume the defendant to be . . . [a] poor person before imposing court costs, then there is no error to correct on appeal. This is because there is no affront to justice when we affirm the assessment of court costs upon a defendant whose status was not determined. It is only when the defendant's poverty status has been established,

> and court costs assessed contrary to that status, that we have a genuine "sentencing error" to correct on appeal.

442 S.W.3d 26, 35 (2014). Ultimately the Court in *Nunn* found that the trial court did not impose court costs "contrary to its findings." *Nunn*, 461 S.W.3d at 753. It therefore found that "the assessment of court costs was facially valid and did not constitute error." *Id.* In this case, the defense did not ask the court to establish Sloas' poverty status, and the court made no finding to that effect. Therefore, we find the trial court did not err by imposing court costs against him.

III. CONCLUSION

Having thoroughly reviewed the record, we find that Sloas has failed to present grounds for reversal. The trial court did not err by allowing K.P. to state her testimony was the truth, by allowing Sloas to comment on the truthfulness of J.P.'s testimony, or by levying court costs against Sloas. Accordingly, we affirm the Letcher Circuit Court.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

JONES, JUDGE, CONCURS IN RESULT ONLY.

JONES, JUDGE: Respectfully, I concur in result only with respect to the Commonwealth's direct examination of the victim, K.P. On *direct* examination, the trial court permitted the Commonwealth to question K.P. regarding whether she told the truth during the earlier part of her direct examination. She had not yet been cross-examined by defense counsel or otherwise impeached.

In *Brown v. Commonwealth*, 313 S.W.3d 577, 627 (Ky. 2010), the Kentucky Supreme Court held that this type of questioning is improper *unless* and *until* the witness has been impeached or her credibility called into question. *Id.* at 628 ("Nor is a witness allowed to bolster his or her own testimony unless and until it has been attacked in some way."). In *Brown*, our Supreme Court favorably cited *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994). In *Skipper*, the North Carolina Supreme Court held that the trial court properly refused to allow defense counsel to ask a witness on redirect if his direct testimony had been truthful because the witness had not been impeached or had his credibility attacked directly during cross-examination. The *Skipper* court explained that "whether this witness, who was affirmed to tell the truth, was actually telling the truth was something the jury was to decide, not the witness." *Id. See also Greenwade v. Commonwealth*, 2015-CA-000705-MR, 2016 WL 7324293, at *3 (Ky. App. Dec. 16, 2016) (applying *Brown* and holding that it was improper for the Commonwealth to ask witnesses on direct examination if they were telling the truth).

Based on *Brown*, I cannot agree that the trial court was correct to allow K.P. to answer the Commonwealth's question regarding whether she had given truthful testimony. While the issue of credibility was relevant, it was a determination to be made by the jury. *Brown* makes clear that this type of

testimony is improper bolstering testimony that cannot be elicited unless and until the witness's credibility has been called into question. In this case, it had not been.

Even though I disagree with the majority that this line of questioning was proper, I agree that error was harmless. Therefore, I concur with ultimate outcome reached by the majority.

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