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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000798-MR

BRION ABPLANALP-BRYANT

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 15-CR-00834

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KRAMER, D. LAMBERT,¹ MAZE, JUDGES.

MAZE, JUDGE: Appellant, Brion Abplanalp-Bryant (“Bryant”), was convicted of first-degree sexual abuse following a jury trial. The victim was his sister, A.T. On appeal, Bryant argues the trial court committed three errors warranting reversal.

¹ Judge Debra Hembree Lambert concurred in this opinion prior to her accepting election to the Kentucky Supreme Court effective January 7, 2019.

First, he argues the trial court should have excluded testimony regarding prior bad acts he committed against A.T. and another sister, S.T. Second, Bryant argues the trial court should have granted a mistrial for prosecutorial misconduct during the Commonwealth's closing argument. Third, he contends a directed verdict should have been entered in his favor. For reasons stated below, we affirm Bryant's conviction.

A.T. was born in August of 2001. Until July of 2014, Bryant and A.T. resided together in a three-bedroom trailer along with their parents, Scott and Tammy; three sisters, S.T., I.T., and O.T., and two brothers. A.T. was taken to live with her aunt after the Cabinet for Health and Family Services ("the Cabinet") petitioned to have A.T. and her two sisters removed from Scott and Tammy's care "due to the enormous amount of neglect in the home." The Cabinet's investigation produced evidence that Scott and Tammy abused their daughters and forced them to live in unhygienic conditions. There was also evidence A.T. was specifically targeted for mistreatment. In addition to frequent verbal abuse, A.T. did not have any books or toys, was not allowed to use the bathroom without permission, was not allowed to play with her siblings, and was often forced to stay in her room while the rest of the family ate.

While residing with her aunt, A.T. saw a therapist on a weekly basis. The therapist asked A.T. if she had ever been sexual abused, and A.T. asserted she

had not. A.T. was eventually taken to a residential treatment facility where she disclosed to a therapist that she had been sexually abused by Bryant since she was nine years old. As a result, she was forensically interviewed. In this interview, A.T. described an incident in which Bryant cornered her in a bathroom, told her to look away, and touched her “privates.” A.T. also alleged that Bryant threatened to smack her if she told anyone. A.T. alleged she was nine years old when this incident occurred. A.T. also described an incident that occurred shortly before she was removed from her home. She alleged that Bryant entered her room while she was alone and forced her to “touch him.” Bryant then pushed A.T. to the floor and forcibly raped her. A.T. made further disclosures to an Assistant Commonwealth’s Attorney in which she provided additional details about the bathroom incident and alleged, for the first time, that Bryant actually pushed her to the bathroom floor and forcibly raped her.

Because of A.T.’s allegations regarding the bedroom incident, Bryant was indicted for first-degree rape, incest, and first-degree sexual abuse. He was not charged for any offenses relating to the alleged bathroom incident. The Commonwealth then filed notice, pursuant to KRE² 404(c), of its intent to introduce uncharged acts of sexual abuse Bryant allegedly perpetrated on A.T. and S.T. Following a hearing, the trial court ruled the Commonwealth could introduce

² Kentucky Rules of Evidence.

evidence of prior acts committed against A.T., noting there were few cases in which an alleged pattern of abuse against the same victim was not presented to the jury. The trial court ruled that S.T. could not testify about her own allegations of sexual abuse against Bryant. However, it concluded Bryant's previous statements to a police investigator regarding S.T. could be introduced.

The case proceeded to trial and Bryant previewed his defense during his opening statement. Bryant's counsel alleged the evidence would show that Bryant was not living in the home when A.T. alleged the abuse occurred. He also emphasized that the Commonwealth would not be able to produce witnesses to corroborate A.T.'s allegations, which he contended changed over time. The Commonwealth supported its case by establishing a narrative that A.T. was abused, isolated by the adults in her family, and therefore fearful of reporting Bryant's abuse when she resided in the home. To support this narrative, the Commonwealth called Karyn McKinley, an investigator for the Cabinet, who testified about the circumstances that caused the Cabinet to investigate the possible neglect of A.T. McKinley also described an incident in which she conducted an unannounced home visit and found Bryant alone with his sisters.

A.T. testified to being physically abused and neglected by her parents. She also testified about the bathroom incident and explained she did not initially report the incident because she was scared. A.T. alleged similar incidents occurred

“almost every night.” A.T. also testified to the 2014 bedroom incident. Although exhibiting considerable reluctance to provide explicit testimony, she explained that Bryant came into her bedroom while she was alone and pushed her to the ground. Bryant then removed his underwear, grabbed A.T.’s hand, and forced her to touch his penis. A.T. further testified that Bryant then sat on top of her, removed her underwear, and inserted his penis in her vagina. A.T. explained that she did not call for help or report the incident to her parents because they “wouldn’t have done anything.”

On cross-examination, Bryant focused on inconsistencies in A.T.’s various statements. He also questioned her about incidents in which she had the opportunity to report the abuse earlier and either failed to do so or outright denied that it occurred. Bryant’s defense was further supported by testimony from Tammy, who testified that Bryant left her home to live with his grandmother in November 2013 and resided there until he moved back to her home in June 2014. She also testified that Bryant was never alone with his sisters.

The Commonwealth sought to discredit this defense by presenting the testimony of Dennis McCarthy, formerly a detective with the Elsmere Police Department. McCarthy testified that he was first assigned to investigate the family in 2009. The nature of this investigation, and the event that triggered it, was not explained to the jury. However, McCarthy testified that he interviewed Bryant in

2009 and recalled that Bryant told him that he played a game with S.T. called “sexy,” which he knew was wrong and tried to stop but did not want to. McCarthy further testified that he interviewed Bryant a second time in September 2015 as a result of A.T.’s allegations. In the second interview, Bryant denied the allegations, claiming his access to his sisters had been restricted because of “sexual stuff” that occurred in 2009. Detective McCarthy testified that Bryant characterized this incident as “just looking.”

Bryant objected to this testimony and moved for a mistrial. The trial court ruled the testimony was admissible to prove opportunity because Bryant placed his access to A.T. at issue. It also determined this testimony was admissible to show the environment in A.T.’s home. However, the trial court did provide the jury with the following admonition:

“So, legal things. You are instructed that any evidence regarding or implicating the defendant in any other acts or offenses other than what is charged today against him in the indictment in this case cannot be considered for any other purpose other than context and complete setting of the [Commonwealth’s] case, and opportunity. All right. We’ll explain that later, or they will in argument.

The jury ultimately found Bryant guilty of first-degree sexual abuse and not guilty of first-degree rape and incest. The trial court followed the jury’s recommendation that he be sentenced to five years’ imprisonment. This appeal follows. Further facts will be developed as necessary.

1. Prior Acts Evidence

Bryant contends he was unfairly prejudice by evidence of his prior bad acts against A.T. and S.T. Under KRE 404(b), evidence of the accused’s “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” However, it may be introduced if “offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” *Id.* “[T]hat list of exceptions is illustrative, not exhaustive.” *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). However, the probative value of the prior act evidence must not be substantially outweighed by its inflammatory effect. *Daniel v. Commonwealth*, 905 S.W.2d 76, 78 (Ky. 1995). A trial court’s decision to admit prior bad acts is reviewed for an abuse of discretion. *Lopez v. Commonwealth*, 459 S.W.3d 867, 874 (Ky. 2015).

a. *Prior Acts Against A.T.*

The Kentucky Supreme Court has held in previous sex crimes cases that “evidence of similar acts perpetrated against the same victim [is] almost always admissible” under KRE 404(b). *Id.* at 875 (quoting *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002)). A.T.’s testimony about the prior abuse she suffered was offered to explain her isolation from her family and why she was fearful of disclosing Bryant’s sexual abuse while she remained in the

home. It also provided evidence of opportunity, despite testimony that Bryant was never around his sisters unsupervised. With A.T.'s credibility and Bryant's access to her central to the defense, the trial court did not abuse its discretion by permitting A.T. to testify Bryant abused her on prior occasions.

b. *Prior Acts Against S.T.*

The Commonwealth's introduction of Detective McCarthy's testimony regarding Bryant's prior acts against S.T. is a closer call. Sexual acts toward one person generally do not show opportunity to abuse a different victim years later. We are also mindful of the potentially inflammatory effect of evidence implying the defendant in a rape trial was involved in sexual misconduct with a different victim. However, the facts of this case are unique.

The Commonwealth's case was based on A.T.'s testimony and necessarily depended on her credibility. Bryant's defenses centered on his allegedly restricted access to A.T., the lack of corroborating witnesses, and A.T.'s delayed, and occasionally inconsistent, disclosures. This defense was bolstered by testimony from A.T.'s own mother. Detective McCarthy's testimony was offered to show Bryant's parents knew he needed to be supervised around his sisters but failed to do so. Accordingly, it impeached Tammy's credibility and the effectiveness of her testimony that Bryant was never alone with his sisters. It also furthered the Commonwealth's argument that Scott and Tammy were not

concerned with A.T.'s wellbeing, thereby bolstering its narrative that the abuse A.T.'s suffered isolated her from her family and made her fearful of reporting Bryant's abuse while she lived in the home. Based on the unique circumstances of this case, we believe Detective McCarthy's testimony relating to S.T. was permissibly admitted to show opportunity and the environment A.T. lived under so the Commonwealth could rebut Bryant's main attack on A.T.'s credibility.

Moreover, the trial court admonished the jury that evidence of other acts could not be considered for any purpose other than proving opportunity and providing a complete context for the Commonwealth's case. "A jury is presumed to follow an admonition to disregard evidence[,] and an admonition is presumed sufficient to cure errors." *Parker v. Commonwealth*, 291 S.W.3d 647, 658 (Ky. 2009) (internal quotation marks and citation omitted). The only circumstances when an admonition is insufficient are: "(1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was inflammatory or highly prejudicial." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) (emphasis original) (internal quotation marks and citations omitted). Neither scenario is present in this case. It was clear that much of the Commonwealth's evidence was introduced to show the

environment in A.T.'s home. Thus, we are unconvinced the jury could not have followed the trial court's admonition. Nor do we believe Detective McCarthy's testimony relating to S.T. was either devastating or inflammatory. Bryant's acts against S.T. were not, on their face, criminal and were dissimilar from the abuse A.T. experienced. Even if we were inclined to find an abuse of discretion, reversal would not be necessary.

2. Prosecutorial Misconduct

Bryant also argues the prosecutor committed misconduct during her closing statement that warranted reversal. In his closing argument, Bryant's counsel characterized the investigation into A.T.'s allegations as inadequate in order to bolster his argument the Commonwealth failed to prove the charges beyond a reasonable doubt. In response, the prosecutor told the jury the following in closing argument:

And there's one more distraction that I want to make sure I mention because [defense counsel] said, over and over, essentially, there was a faulty investigation by the police here, so I want to remind you what you actually heard. What you heard in this trial about the police investigation or, or about any investigation, you heard that the Cabinet first and foremost had an investigation ongoing since at least 2009. Ms. McKinley told you that she was assigned in 2014 but that the Cabinet had been involved, and [Tammy] told you, on and off, since 2009. You also heard that there was an ongoing police investigation since 2009.

Bryant objected to this statement about an *ongoing* police investigation and moved

for a mistrial. Bryant argued there was testimony about an investigation in 2009, but no proof the police had been continuously investigating him since 2009. The trial court declined to grant a mistrial but agreed the prosecutor's statement did not reflect the evidence presented at trial. It therefore directed the prosecutor to correct her statement. Accordingly, the prosecutor stated the following: "Members of the jury, we know there was an ongoing Cabinet investigation, and you can recall the testimony of Detective McCarthy regarding his investigating, not only of the defendant but of [A.T.'s] family since 2009."

Prosecutorial "misconduct can occur in a variety of forms, including improper closing argument." *Murphy v. Commonwealth*, 509 S.W.3d 34, 49 (Ky. 2017). The prosecutor must not make a statement during closing remarks that is not reasonably supported by the evidence. *Id.* at 54. When a defendant makes a timely objection to prosecutorial misconduct, the conviction shall be reversed if "proof of the defendant's guilt was not such as to render the misconduct harmless, and if the trial court failed to cure the misconduct with a sufficient admonition to the jury." *Id.* at 49. "In considering an allegation of prosecutorial misconduct, the Court must view that allegation in the context of the overall fairness of the trial." *Id.*

We agree that the prosecutor's statement about an ongoing police investigation did not reflect the trial testimony. However, the 2009 investigation

was a collateral matter. The Commonwealth's case depended on A.T.'s credibility, not the sufficiency of the government's investigation. In the context of the entire trial, the prosecutor's minor misstatement, quickly corrected, was harmless.

3. Directed Verdict

Finally, Bryant argues the trial court should have entered a direct verdict on the charge of first-degree sexual abuse. We disagree. The standard of review on a motion for a directed verdict was set forth in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), in which the Kentucky Supreme Court stated:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

The prosecution must produce more than a "mere scintilla of evidence" regarding the defendant's guilt. *Id.* at 188. However, "[t]he testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses

testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence.” *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002).

A person may be found guilty of first-degree sexual abuse when he or she “subjects another person to sexual contact by forcible compulsion[.]” KRS³ 510.110(1)(a). “‘Sexual contact’ means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]” KRS 510.010(7). “‘Forcible compulsion’ means physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter.” KRS 510.010(2). A.T. testified that Bryant grabbed her hand and forced her to grab his penis. This provided sufficient evidence for the jury to convict for first-degree sexual abuse. The trial court properly denied Bryant’s motion for a directed verdict.

Accordingly, the Judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

³ Kentucky Revised Statutes.

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