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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001508-MR
AND
NO. 2017-CA-001509-MR

STANLEY JERVIS — APPELLANT

v.

APPEALS FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NOS. 16-CR-00097 AND 16-CR-00362

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, K. THOMPSON, AND L. THOMPSON, JUDGES.

TAYLOR, JUDGE: Stanley Jervis brings Appeal No. 2017-CA-001508-MR and Appeal No. 2017-CA-001509-MR from an August 10, 2017, judgment of the Floyd Circuit Court upon a jury verdict finding Jervis guilty of first-degree sodomy, second-degree burglary, and two counts of first-degree sexual abuse. We affirm.

Jervis was initially indicted by the Floyd County Grand Jury on April 19, 2016, and by superseding indictment on December 20, 2016.[1] He was indicted upon the offenses of first-degree sodomy "by engaging in deviate sexual intercourse with [B.L.] by forcible compulsion," first-degree sexual abuse "by having sexual conduct by forcible compulsion" with B.L., second-degree burglary "when with intent to commit a crime he knowingly entered or remained in the dwelling" of B.L., and first-degree sexual abuse by subjecting P.H. to sexual contact. The record reveals that Jervis was born on May 27, 1963; B.L. was born on November 6, 2001; and P.H. was born on October 6, 2003. The Commonwealth alleged that B.L. was less than fourteen years old and that P.H. was less than twelve years old at the time of the offenses. Jervis was 52 years old at that time.

On the morning of trial, Jervis moved the trial court to sever the offenses related to B.L. from the offense related to P.H. and to conduct separate trials. The court denied the motion. The jury ultimately found Jervis guilty of all charged offenses. The court sentenced him to ten-years' imprisonment for first-degree sodomy, one year upon each of the two counts of first-degree sexual abuse, and five-years' imprisonment for second-degree burglary. The sentences were

[1] The original indictment was assigned Action No. 16-CR-00097, and the superseding indictment was assigned Action No. 16-CR-00362. Stanley Jervis filed a notice of appeal from both Action No. 16-CR-00097 and Action No. 16-CR-00362.

ordered to be served concurrently for a total of ten-years' imprisonment by judgment entered August 10, 2017. These appeals follow.

Jervis contends that the trial court committed reversible error by failing to sever the offenses related to B.L. from the offenses related to P.H. Jervis maintains that he was entitled to two separate trials and that joinder of the offenses as to B.L. and P.H. was prejudicial error. In particular, Jervis argues:

> In considering the courts ruling, each aspect of the rule should be considered. Joinder is proper if the offenses are of the same or similar character. While both offenses involved allegations of sexual abuse, the extreme event of a sexual attack alleged by [B.L.] bears no resemblance whatsoever to the testimony of [P.H.]. While the Commonwealth attempted to put forth the proposition that because both girls suggested [Jervis] tried to kiss them that they created enough commonality to satisfy the rule, it is clear that there was very little actual commonality involved other than the general accusations.
>
> . . . .
>
> The Commonwealth, as stated, previously went to great pains to point out the alleged similarities between both witnesses statements, even referring to them as "remarkably similar." In fact, other than stating that [Jervis] tried to kiss them, there was no similarity of any kind in the testimony. This falls far short of the necessary similarity or commonality which would allow the Commonwealth to present the two cases together. In fact the Commonwealth, in trying both cases together, benefited from the admission of inadmissible other crimes evidence, which was extremely prejudicial to [Jervis] herein.

Jervis's Brief at 7-8.

The joinder of two or more offenses is permitted under Kentucky Rules of Criminal Procedure (RCr) 6.18, which provides:

> Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

And, RCr 8.31 provides for severance of joined offenses if prejudice would result:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received. No reference to the motion shall be made during the trial. In ruling on a motion by a defendant for severance the court may order the attorney for the Commonwealth to deliver to the court for inspection in camera any statements or confessions made by the defendants that the Commonwealth intends to introduce in evidence at the trial.

Multiple offenses may be joined "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." RCr 6.18; *Peacher v. Commonwealth*, 391 S.W.3d 821, 837 (Ky. 2013). The trial court is vested with

"great discretion" in deciding whether offenses should be joined or severed. *Cherry v. Commonwealth*, 458 S.W.3d 787, 793 (Ky. 2015). To reverse a trial court's decision, it must be demonstrated that the court abused its discretion and that defendant suffered actual prejudice. *Peacher*, 391 S.W.3d at 838; *Smith v. Commonwealth*, 520 S.W.3d 340, 353 (Ky. 2017). To demonstrate actual prejudice, defendant must show that "the jury's belief as to either offense was 'substantial[ly] like[ly] [to have been] tainted' by inadmissible evidence of the other." *Peacher*, 391 S.W.3d at 839 (quoting *Rearick v. Commonwealth*, 858 S.W.2d 185, 188 (Ky. 1993)).

In the case *sub judice*, the joinder of the offenses as to B.L. and P.H. was proper. The evidence indicated that both B.L. and P.H. were young girls, who were only two years apart in age, and that both lived about one-half mile from Jervis's residence. Jervis also used his relationship with both B.L.'s and P.H.'s parents as a means to gain access to the girls without arousing suspicion. In both instances, the girls testified that Jervis would frequent their homes to allegedly visit their respective parents and would inevitably attempt to kiss or grab them. He would also make secretive comments to them, and both girls felt intimidated by him. In short, Jervis pursued both girls in a strikingly similar manner and engaged in a continuing and common pattern of conduct as to both. Additionally, Jervis

perpetrated the crimes against B.L. and P.H. close in temporal proximity, between July 2015 and January 2016.

Jervis has also failed to demonstrate actual prejudice by joinder of the offenses as to B.L. and P.H. The evidence underlying the offenses demonstrated a continuing and common course of conduct by Jervis that would be admissible in separate trials under Kentucky Rules of Evidence 404(b). Moreover, Jervis did not prove a substantial likelihood that the jury's verdict as to one of the charged offenses was tainted by evidence of the other charged offenses. *See Peacher*, 391 S.W.3d at 839. Accordingly, we conclude that the trial court did not abuse its discretion by joining the offenses as to B.L. and P.H. for trial or that any actual prejudice resulted therefrom.

Jervis next asserts that the jury instruction upon sexual abuse in the first-degree as to P.H. was erroneous. Jervis's argument upon this assertion consists of four sentences and does not include any citation to legal authority. *See* Kentucky Rules of Civil Procedure 76.12(4)(c)(v). Jervis, however, concedes that the error was unpreserved and request palpable error review. Jervis cursorily argues:

> Given the testimony of the witness [P.H.] that the events in her case happened in the Fall of 2015, and given her birthdate of October 6, 2003, there is no way that the instruction which was submitted should have been given to the Jury.

> While counsel would concede that the Jury could have reasonably concluded that the alleged acts occurred before October 6, 2003, the impact of having the range from July 2015 through January, 2016 is obvious. . . .

Jervis's Brief at 9.

An erroneous jury instruction may be reviewed for palpable error. *Martin v. Commonwealth*, 409 S.W.3d 340, 345-46 (Ky. 2013). Under RCr 10.26, an error is deemed palpable if it "affects the substantial rights of a party," and "manifest injustice has resulted from the error." So, to be entitled to relief under RCr 10.26, the error must be prejudicial and must also "so seriously affect[ ] the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

In this case, we are not convinced that the jury instruction was erroneous. The instruction specifically required the jury to find "[t]hat at the time of such conduct, [P.H.] was less than 12 years of age." In any event, the alleged error certainly did not result in manifest injustice as required by RCr 10.26. Therefore, we hold that Jervis failed to demonstrate that the jury instruction upon first-degree sexual abuse as to P.H. constituted palpable error.

For the foregoing reasons, the August 10, 2017, judgment of the Floyd Circuit Court is affirmed.

L. THOMPSON, JUDGE, CONCURS.

K. THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Timothy A. Parker
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

William Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky