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Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000625-MR

JOSEPH L. BROOKS

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE DAVID L. WILLIAMS, JUDGE
ACTION NO. 17-CR-00067

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2018-CA-000626-MR

JOSEPH L. BROOKS

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE DAVID L. WILLIAMS, JUDGE
ACTION NO. 16-CR-00067

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

DIXON, JUDGE: Joseph Brooks appeals the Cumberland Circuit Court’s order entered March 13, 2018, denying his motion to introduce evidence under KRE¹ 412² and its final judgments entered March 20, 2018, finding him guilty of sodomy in the third degree³ in indictment numbers 16-CR-00067 and 17-CR-00067. After careful review of the record, briefs, and applicable law, we affirm.

The actions underlying these indictments occurred during a hunting trip on November 13 and 14, 2014. At the time, Brooks was 44 years old and his nephew (“AH”) was 15 years old. On November 13, 2014, Brooks performed oral sex on AH, and AH performed oral sex on Brooks. On two separate occasions on November 14, 2014, Brooks performed oral and anal sex on AH, and AH performed oral sex on Brooks. Neither Brooks nor AH disclosed these actions until AH was later investigated for his own separate offenses committed while still a juvenile in Russell County, Kentucky.

On December 15, 2015, Brooks was charged by the Cumberland grand jury with sodomy in the third degree, in indictment number 16-CR-00067. During discovery, Brooks viewed the recorded forensic interview in which AH made the statement which led to this indictment and claimed it contained “many

¹ Kentucky Rules of Evidence.

² Also called “Jenna’s Law” or the “Rape Shield Law.”

³ Kentucky Revised Statutes (KRS) 510.090, a Class D felony.

other statements relative to the sexual activities of AH.” Brooks moved the court to permit introduction of evidence of the “sexual behavior of A.H.,” claiming such evidence fell within the exceptions to inadmissibility of KRE 412 under (b)(1)(B) and (C), for:

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) any other evidence directly pertaining to the offense charged.

Brooks further requested an in-camera colloquy with the trial court and Commonwealth “for the reason that he is uncertain whether he can even list the specific conduct in this motion as would otherwise be required under KRE 412(c).” Brooks then proposed “[a]t that time”—during the in-camera colloquy—“to detail the proffered evidence and obtain a ruling on whether it can be made part of the public record.” Brooks made preliminary oral arguments in support of this motion on April 27, 2017, but offered little, if any, further detail or specificity of the evidence sought to be introduced. The trial court set a hearing date for the motion and requested Brooks file a memorandum in support of his motion. He obliged.

In his memorandum, Brooks baldly asserted the appropriateness to cross-examine whether AH had spoken to others about sexual acts he had performed, including what he had said about his sexual acts with Brooks, claiming

the “import of this cross examination is [Brooks’s] ability to show motivation to lie, particularly about those crimes with which he was charged.” Brooks further argued that prohibition of his ability to introduce such testimony violates his confrontation clause rights under the Sixth Amendment to the United States Constitution as made applicable to the Commonwealth of Kentucky through the Fourteenth Amendment. However, Brooks offered no facts to support these assertions. Although Brooks claimed he put his best arguments in this written memorandum at oral argument, review reveals arguments that are extremely bare-boned, conclusory, and wholly unsupported.

During oral argument on his motion on May 25, 2017, Brooks claimed this case was “different” because the juvenile victim was being investigated as a criminal perpetrator at the time the initial allegations of Brooks’s actions were made. Brooks asserted that the statements AH made to others concerning the “activities” with Brooks and “litany of other sexual activity” of AH provided reason to show the statements of Brooks’s actions “may be false.” Once again, Brooks failed to offer any factual support for this theory. From the bench, the trial court pointed out that none of the other statements concerning AH’s sexual activity had been proven to be false; therefore, it was impermissible to introduce them to question his veracity. The court further found evidence of AH’s other

sexual activity did not fit within the exceptions of KRE 412 and was, therefore, inadmissible.

During the pendency of trial, the grand jury made a second charge of sodomy in the third degree against Brooks in indictment number 17-CR-00067. The cases were consolidated, and trial was held on February 5, 2018. At a bench conference during trial, Brooks moved to have evidence that AH was “convicted of a crime,” by way of his juvenile adjudication in the unrelated Russell County case where AH was a perpetrator, admitted under KRE 609. The trial court denied this motion on the strength of *Manns v. Com.*, 80 S.W.3d 439 (Ky. 2002).

The jury found Brooks guilty of the charges in each indictment, recommending a sentence of one year’s imprisonment for each count to run consecutively. On March 13, 2018, the trial court entered its written order denying Brooks’s motion to permit introduction of evidence pursuant to KRE 412. One week later, on March 20, 2018, the trial court entered its final judgment in each action imposing the jury’s recommended prison sentence. These appeals followed.

As an initial matter, in contravention of CR⁴ 76.12(4)(c)(iv) and (v), which require ample references to the trial court record supporting each argument, Brooks’s brief contains no such references in the argument section. This simply does not constitute ample citation to the record.

⁴ Kentucky Rules of Civil Procedure.

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Brooks's brief or dismiss the appeal for his failure to comply. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

Brooks presents two arguments on appeal: (1) the trial court erred in denying his motion to introduce evidence pursuant to KRE 412(b); and (2) the trial court erred in denying his motion to introduce evidence pursuant to KRE 609. Unsurprisingly, Brooks's arguments consist of only tangential theories with little or no application of the facts to any legal precedence. We will not search the record to construct Brooks's argument for him, nor will we go on a fishing expedition to find support for his underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). Brooks's failure to accept the trial court's evidentiary rulings, which perfectly coincide with the applicable law concerning admission of evidence of a victim's character and behavior in rape and similar cases and

impeachment by evidence of a conviction of a crime, changes neither the facts nor the law. Regardless, for the reasons discussed below, we discern no error.

The standard of review concerning a trial court's evidentiary rulings is for abuse of discretion. *Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969).

“The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound reasonable principles.”

Penner v. Penner, 411 S.W.3d 775, 779-80 (Ky. App. 2013) (citation omitted).

We first address Brooks's argument that the trial court erred in denying his motion to permit admission of certain evidence under exceptions found in Rule 412. As noted above, the exceptions Brooks asserted the evidence of AH's sexual behavior fell under are for “specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution” and “any other evidence directly pertaining to the offense charged.”

KRS 510.090 provides in pertinent part:

- (1) A person is guilty of sodomy in the third degree when:
 - (a) Being twenty-one (21) years old or more, he or she engages in deviate sexual intercourse with another person less than sixteen (16) years old[.]

Consent is neither required nor can it be given by a minor under the age of 16; therefore, evidence of AH's sexual conduct could not be offered to prove consent and, as such, does not fall under that exception.

Concerning the other exception, the Supreme Court of Kentucky has held:

evidence of a sexual offense victim's prior sexual behavior pertains directly to the charged offense and thus is admissible under the KRE 412(b)(1)(C) residual exception if, and only if, exclusion of the evidence would be arbitrary or disproportionate with respect to KRE 412's purposes of protecting the victim's privacy and eliminating unduly prejudicial character evidence from the trial.

Montgomery v. Com., 320 S.W.3d 28, 43 (Ky. 2010). However, Brooks has failed to demonstrate with any specificity how any evidence of AH's sexual activity "directly pertain[s] to the offense charged." The trial court found:

Simply because the allegations against the Defendant were made during the course of an investigation into another matter does not necessarily suggest that the other matter directly pertained to the instant charges. The Defendant made no further argument connecting the two, which leads this Court to believe that the proffered evidence was being attempted to be used for the prohibited purpose of showing the victim's alleged sexual predisposition.

We agree. The trial court further noted, "[e]ven if this Court found that proffered evidence did directly pertain to the specific offense charged, the test for admissibility does not end there," and quoted *Montgomery*, 320 S.W.3d at 43,

above. The trial court then concluded, “even if the evidence did pertain to the charged offense, the probative value of such evidence did not outweigh the undue prejudice to the victim.” We also agree.

The factual and legal analyses in *Montgomery*, 320 S.W.3d 28, provide insight to the case at hand. In that case, the court rejected Montgomery’s argument that excluded evidence of the victim’s other sexual behavior was probative of the victim’s motive to fabricate her allegations against him. The court found Montgomery had ample opportunity to develop his conspiracy theory at trial and the victim’s other sexual activity evidence was merely cumulative. Similarly, in the case at hand, Brooks stated his intention to introduce such evidence was to show AH had motive to make up the charges against Brooks. However, evidence of AH’s other sexual behavior—which has not even been specifically described and, therefore, cannot be said with any certainty to be probative—at best, is cumulative since AH testified at trial that he had an increase in sexual behavior, stealing, and fire-setting after his sexual contact with Brooks. Brooks had ample opportunity to make his argument regarding AH’s motive to lie to the jury. Blame for Brooks’s failure to develop his conspiracy theory does not lie with the trial court or its evidentiary rulings.

Brooks also failed to comply with the proper procedures concerning his motion under KRE 412. KRE 412(c) provides:

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least fourteen (14) days before trial **specifically describing the evidence and stating the purpose for which it is offered** unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(Emphasis added.) Review of Brooks's written motion, memorandum in support thereof, and of his arguments before the trial court show a complete failure to specifically describe the evidence sought to be introduced. Brooks only used vague statements including "sexual behavior of A.H.," "sexual acts he has performed with others, including particularly what he has said about sexual acts with the defendant," and acts of a sexual nature in which the victim was the perpetrator. Furthermore, Brooks failed to identify any permissible purpose for the introduction of such evidence. Brooks proposed to introduce the evidence to "show a motivation to lie"; however, no proof was offered to show any of AH's

statements were false. The fact that AH was a minor at the time of the offenses did not prevent Brooks from proffering specific facts of the evidence sought to be admitted in the record, either under seal or in any other acceptable manner. Likewise, Brooks's argument that he was not provided a hearing as required by Rule 412 is not borne out by the record, especially in light of having at least two opportunities to present oral arguments on this motion to the trial court. Without more, it cannot be said that the trial court erred by denying Brooks's motion to admit this otherwise unidentified and inadmissible evidence.

Concerning Brooks's argument that evidence of the investigation into AH's juvenile criminal record should have been admitted for impeachment purposes, KRE 609(a) provides:

General rule. For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

The Supreme Court of Kentucky has observed:

By both case law and statute, a juvenile adjudication is not a criminal conviction, but an adjudication of a status.

Coleman v. Staples, [446 S.W.2d 557, 560 (Ky. 1969)] (citing *Cotton v. United States*, 355 F.2d 480, 481 (10th Cir. 1966)). KRS 635.040 provides:

No adjudication by a juvenile session of District Court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication.

....

... On the basis of case law, statute, and the history of KRE 609, it is clear that there was never an intent that a juvenile adjudication would equate to a felony criminal conviction for purposes of the rule.

....

Accordingly, the judgment of conviction and the sentence imposed upon Appellant are reversed, and this matter is remanded to the Jefferson Circuit Court for a new trial at which the records of Appellant's prior juvenile adjudication shall be admissible only during the penalty phase of the trial, if there is one, and shall not be admissible during either phase of the trial for the purpose of impeachment.

Manns, 80 S.W.3d at 445-46. The trial court correctly relied on this case in its decision. Therefore, we hold the trial court did not err in disallowing admission of evidence of AH's unidentified juvenile offenses for the impermissible purpose of his impeachment.

Brooks concedes in his brief “the current rule does not include a portion that would allow the introduction of the juvenile adjudications in cross examination of AH. That is the essence of the *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2002) case, it would appear.” Brooks then proceeds to introduce a new—and unsupported—argument that was never presented to the trial court. Brooks asserts, “this case is different in a very narrow way: the fact that AH is an ADULT for the purpose of giving consent to sexual contact should also render him an adult for the purposes of impeachment and denial of the contact he claims. To deny this reality is to deprive the defendant of the right to make an effective defense.” For this Court to have authority to review a claim, the trial court must have had an opportunity to correct its alleged error. *Harrison v. Leach*, 323 S.W.3d 702, 708-09 (Ky. 2010). We lack authority to review unpreserved issues unless palpable error review is requested. RCr⁵ 10.26. Here, palpable error review was not requested.

For the foregoing reasons, the order of the Cumberland Circuit Court is AFFIRMED.

ALL CONCUR.

⁵ Kentucky Rules of Criminal Procedure.

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