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RENDERED: JANUARY 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0282-MR

FINAL
DATE 2-13-03 Ella Gravitt, D.C.

JOE MORRIS APPELLANT

V.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
2000-CR-0048

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Joe Morris, was convicted of one count of First-Degree Rape and two counts of First-Degree Sexual Abuse. He was sentenced to thirty-five years' imprisonment on the rape charge and five years' imprisonment on each sexual abuse charge, with the sentences to be served consecutively for a total of 45 years. He appeals to this Court as a matter of right. We reverse and remand.

Morris was convicted of sexually abusing his biological daughter, C.M., and C.M.'s friend, S.M. Morris's conviction for rape was in connection with an incident that occurred about 16 years earlier. This incident involved D.F., the daughter of a woman with whom Morris was living. C.M. and S.M. made statements to the police alleging that Morris had touched them inappropriately. D.F. found out about these allegations and

went to the Commonwealth's Attorney and alleged that Morris had raped her on at least eight occasions.

At trial, C.M. testified that, when she was nine years old, Morris touched her vagina and breast one night in Morris's room when only Morris and C.M. were present. C.M. testified that Morris called her to his room and told her to shut the door behind her and take off her pants. Morris then touched her private areas and forced her to touch his private areas. This molestation continued until C.M.'s mother returned home, at which time C.M. put back on her pants and went to bed. C.M. stated she told her mother about this event and her mother, Diana Morris, confronted Appellant about it.

S.M., a friend of C.M., testified that sometime prior to Christmas, during the month of December 1999, Morris touched her inappropriately. S.M. was also nine years old at the time. On this particular occasion, S.M. came to spend the night at C.M.'s house. S.M. and C.M. originally fell asleep in C.M.'s room. Sometime during the night both children moved to Morris's room to sleep on the floor. S.M. testified that while she was sleeping on the floor, Morris touched her buttocks and also her chest area. S.M. testified that she awoke to find Morris touching her inappropriately. She told Morris that she was sick and wanted to go home, but Morris would not let her call her mother to come pick her up. S.M. testified that she told C.M. about the incident the next day.

C.M.'s mother, Diana Morris, testified that sometime in April of 2000, C.M. told her what Morris had done to her and S.M. Mrs. Morris testified that she confronted Appellant about his sexual contact with C.M. and S.M. Soon after, she contacted the police, who arrested Morris on April 6, 2000.

Prior to review of the case by the Breckinridge County grand jury, Mrs. Morris testified that she called D.F. and advised her of the charges against Appellant. D.F. then notified police that she had known Morris as a child; D.F.'s mother was Morris's aunt.

At trial, D.F. testified that, after her parents separated, Morris moved in with her mother. Soon afterwards, Morris began to fondle D.F., who was nine years old at the time. This fondling took place whenever D.F.'s mother was not home. D.F. testified that this occurred while the family lived in Breckinridge County, Kentucky. Upon moving to another city in Breckinridge County, D.F. testified that Morris forced her to have sexual intercourse with him once a week until she left her mother's home and went to live with her father. D.F. testified that the sexual intercourse occurred over a four-year period until she turned 13.

I. Introduction of Witness Statements

Morris argues that he was denied due process of law and his constitutional rights to be heard and represented by counsel when the trial court allowed the Commonwealth to enter two transcribed witness statements into evidence for the purpose of allowing the jury to consider the statements during deliberations. We agree and, therefore, reverse and remand for a new trial.

At trial, defense counsel recalled C.M. and S.M. in an attempt to impeach their testimony with what were alleged to be prior inconsistent statements made during police interviews. A small portion of C.M.'s taped statement to the police was played to the jury to point out an inconsistency in the victim's live trial testimony. S.M.'s taped statement was not played.

After laying a foundation for their introduction, the Commonwealth moved in rebuttal to introduce transcribed versions of the taped statements that C.M. and S.M. gave to the police. In response, defense counsel apparently agreed that the statements could be read to the jury in open court, but objected to allowing the statements to be sent with the jury to consider during its deliberations. The trial court granted the Commonwealth's motion and admitted the statements into evidence as substantive exhibits. During its deliberations, the jury had access to the statements, which were never read in open court, and thus, never subjected to adversarial testing.

Pursuant to RCr 9.74, no information may be given to the jury after the jury has retired for deliberation except in open court in the presence of the defendant and the entire jury. In Mills v. Commonwealth, Ky., 44 S.W.3d 366, 371 (2001), this Court held that this rule was clearly violated when the jury was allowed to play witness interview tapes in the privacy of the jury room, where those tapes were not played for the jury in open court. In the case at bar, although it is not ascertainable whether the jury actually reviewed the statements, the introduction of the transcribed statements as substantive exhibits making them available to the jury for review, outside of open court, was reversible error regardless of whether Morris can show prejudice. Id. at 372, citing Lett v. Commonwealth, 284 Ky. 267, 144 S.W.2d 505, 509 (1940).

II. Severance of Charges

Morris argues the trial court denied him his right to a fundamentally fair trial when it refused to sever the rape counts of the indictment from the sexual abuse counts of the indictment. Morris argues that because the alleged rape occurred 16 years before the alleged sexual abuse, the remoteness of the two crimes indicates that they are not so similar to constitute a common scheme or plan or modus operandi; thus, the joinder

of the two crimes prejudiced Morris. We disagree. We address this issue because it is likely to recur at retrial.

"The trial court has broad discretion with respect to joinder of charges and will not be overturned absent a showing of prejudice and clear abuse of discretion." Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 187 (1993). A significant factor in determining whether a defendant has been prejudiced is the extent to which the evidence of one offense would be admissible in the trial of the offense charged. Spencer v. Commonwealth, Ky., 554 S.W.2d 355 (1977). Therefore, if the evidence of prior sexual misconduct is inadmissible, joinder is not appropriate. See RCr 9.16.

In Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985), we held that "evidence of other crimes, wrongs or acts [is] admissible if it tend[s] to show motive, identity, absence of mistake or accident, intent, or knowledge, or common scheme or plan." Id. at 552.

In the case at bar, the trial court relied on Commonwealth v. English, Ky., 993 S.W.2d 941 (1999), in ruling that the evidence of Morris's prior acts of sexual misconduct was admissible as modus operandi. In English, the defendant was convicted of sexually abusing his wife's two grandnieces. Id. at 942. At trial, two adult nieces of defendant's wife testified that the defendant similarly abused them when they were children. Id. In holding that this evidence was properly admitted, we determined that because it was offered to show a modus operandi for the purpose of proving motive, intent, knowledge, and the absence of mistake or accident, it was not prejudicial to the defendant and there was no abuse of discretion by the trial judge. Id. at 945.

"In order to prove the elements of a subsequent offense by evidence of modus operandi, the facts surrounding the prior misconduct must be so strikingly similar to the

charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same mens rea. If not, then the evidence of prior misconduct proves only a criminal disposition and is inadmissible." Id., quoting Billings v. Commonwealth, Ky., 843 S.W.2d 890, 891 (1992).

In English, we found that the testimony of the two adult nieces proved the defendant "knew what he was doing (knowledge), he did it on purpose (intent, absence of mistake or accident), and he did it for his own sexual gratification (motive)." Id.

Similarly, in the case at bar, we find that the evidence of Morris's prior sexual misconduct is similar enough to prove modus operandi. A jury could find with "reasonable probability" that Morris committed both the rape and sexual abuse crimes alleged and that these acts were accompanied by the same mens rea. In all of the incidents, Morris was in a position of authority, they all involved young girls around the age of nine, whom he knew, and although the allegation made by D.F. involved sexual intercourse, D.F. testified that the events in question began, like the others, with inappropriate touching. The similarities between the alleged rape and the alleged sexual abuse tended to prove that Morris committed both acts (identity), knew what he was doing (knowledge), did it on purpose (intent), and did so for his own sexual gratification (motive).

"The test of relevancy having been satisfied by proof of a modus operandi, the evidence of Appellant's prior sexual misconduct was properly admitted unless its probative value was substantially outweighed by the danger of undue prejudice." Id. It is at this point that the issue of remoteness becomes a factor. "However, [remoteness] is not the sole determining factor." Id. "[It] is less significant when the issue is modus operandi than when the issue is whether both crimes arose out of a common scheme or

plan." Id. at 944. Likewise, in English we held that remoteness is not a bar to the introduction of evidence of a defendant's prior sexual misconduct, particularly where the evidence is offered to prove modus operandi.

Accordingly, we find that the trial judge did not abuse his discretion. Therefore, because the evidence of the alleged rape was admissible to prove a modus operandi, the trial court did not err in denying Morris's motion to sever.

III. Directed Verdict

Morris was indicted on eight counts of first-degree rape, one count for each season during 1978 and 1979. After both sides rested their respective cases, the trial judge granted Morris's motion for directed verdict on seven of the eight first-degree rape counts, but left intact the count of first-degree rape occurring in or about the winter of 1979. On appeal, Morris argues that the trial court erred in denying his motion for a directed verdict on the remaining count that went to the jury. We address this issue, which concerns the sufficiency of the evidence against Morris, because, if correct, double jeopardy principles would bar retrial of the first-degree rape charge. See Crawley v. Kunzman, Ky., 585 S.W.2d 387, 388 (1979).

Morris argues that there was insufficient evidence to support his conviction for first-degree rape. Specifically, he argues that there was no evidence that he had intercourse with D.F. before her twelfth birthday. This same argument was made to the trial court, which disagreed. The trial court found that there was a four-month period in which Morris lived in the same household as D.F. while she was still under the age of twelve and that the alleged intercourse could have occurred during this time. As these findings are supported by substantial evidence in the record, they are conclusive on the issue. See, e.g., Diehl v. Commonwealth, Ky., 673 S.W.2d 711, 712 (1984). Thus,

there was sufficient evidence to support the conviction, and there is no double jeopardy bar to retry Morris on the first-degree rape count.

For the reasons set forth above, the judgment of the Breckinridge Circuit Court is hereby reversed and this case is remanded for a new trial consistent with this Opinion.

Lambert, C.J.; Graves and Johnstone, JJ., concur. Cooper, J., concurs in part and dissents in part by separate opinion, with Keller and Stumbo, JJ., joining. Wintersheimer, J., dissents without opinion, and would affirm the conviction in all respects.

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Supreme Court of Kentucky

2001-SC-0282-MR

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COMMONWEALTH OF KENTUCKY APPELLEE

OPINION BY JUSTICE COOPER

CONCURRING IN PART AND DISSENTING IN PART

I concur in the majority opinion's conclusion that it was reversible error to permit the jury to take the transcripts of Officer Pace's audiotaped interviews of C.M. and S.M to the jury room for consideration during deliberations. However, I would go further and hold that it was error even to admit those transcripts into evidence. I dissent from the majority opinion's failure to require a severance of the trial of D.F.'s allegations of first-degree rape from the trial of C.M.'s and S.M.'s allegations of first-degree sexual abuse. I also dissent from the conclusion that there was sufficient evidence to support Appellant's conviction of first-degree rape under Count 10 of the indictment, i.e., sexual intercourse with a child under twelve "in or about the winter of 1979." (The trial judge correctly dismissed the other seven counts of first-degree rape.)

I. INTERVIEW TRANSCRIPTS.

C.M. and S.M. testified that Appellant sexually abused them on separate occasions when each was under twelve years of age. Officer Pace interviewed C.M. and S.M. separately about their respective allegations and an audiotape was made of each interview. The audiotapes were subsequently reduced to written transcripts by the Commonwealth's Attorney's office. (Appellant does not contest the accuracy of the transcripts.) During the course of her interview, C.M. made the following statements with respect to Appellant's sexual assault on S.M.:

> Q. How do you know he did that to her?
>
> A. Because he got on the floor with her and turned over her way and he had his hands on her.
>
> Q. Okay, did you see that or is that just what she told you?
>
> A. I heard that, I saw it.
>
> Q. You saw it? Where did he have his hands on her?
>
> A. On her private part.

At trial, C.M. testified that she did not see Appellant abuse S.M. but only knew what S.M. had told her. To impeach C.M.'s credibility as a witness, defense counsel introduced and played for the jury that portion of the audiotape of C.M.'s interview quoted above. He did not introduce any portion of S.M.'s audiotaped interview. Nevertheless, the Commonwealth was permitted to introduce and mark as exhibits the typed transcripts of Pace's entire interviews of both C.M. and S.M., and the jury was permitted to take those transcripts to the jury room for consideration during their deliberations.

KRE 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. [Emphasis added.]

That does not mean that if one party introduces an excerpt from a writing or recorded statement that the adverse party is entitled to introduce the entire remaining portion thereof.

> [T]he rule does not require introduction of the entire writing or recorded statement, but only so much thereof "which ought in fairness to be considered contemporaneously with it," i.e., that portion which concerns the specific matter introduced by the adverse party. White v. Commonwealth, 292 Ky. 416, 166 S.W.2d 873, 877 (1942). The issue is whether "the meaning of the included portion is altered by the excluded portion." Commonwealth v. Collins, Ky., 933 S.W.2d 811, 814 (1996). The objective of KRE 106 "is to prevent a misleading impression as a result of an incomplete reproduction of a statement." Id. (quoting R. Lawson, The Kentucky Evidence Law Handbook § 1.20, at 48 (3d ed. Michie 1993)). See Gabow v. Commonwealth, supra [Ky., 34 S.W.3d 63 (2000)], at 68 n.2. Thus, Young would not have been permitted to play the audiotapes in their entirety even if he had so requested.

Young v. Commonwealth, Ky., 50 S.W.3d 148, 169 (2001).

A review of the entire transcript of C.M.'s interview discloses no other statements with respect to whether C.M. did or did not actually see Appellant sexually abuse S.M. Thus, "the meaning of the included portion" was not altered by anything in the remainder of the interview. Id. In fact, other than the one prior inconsistent statement of C.M., KRE 801A(a)(1), the transcript consists of (1) C.M.'s description of what she saw Appellant do to S.M. (which C.M. neither testified to nor denied under oath, KRE 801A(a), KRE 613); (2) C.M.'s repetition of S.M.'s prior consistent statements (which were not offered for rebuttal purposes, KRE 801A(a)(2)); and C.M.'s own prior consistent statements of what Appellant did to her (same). Id. Because none of this

evidence falls within an exception to the hearsay rule, KRE 106 was misused to bootstrap inadmissible evidence into the trial of this case.

It goes without saying that since Appellant did not introduce any portion of S.M.'s interview, KRE 106 provides no basis whatsoever for the admission of the transcript of that interview.

As the majority correctly points out, the error was then compounded when the jury was permitted to take the transcripts to the jury room for consideration during deliberations.

> Generally, a jury is not permitted to take even a witness's sworn deposition to the jury room. The primary reason for the rule is that jurors may give undue weight to testimony contained in such a deposition and not accord adequate consideration to controverting testimony received from live witnesses. . . . It is even worse to permit the jury to take with them to the jury room an unsworn statement of a witness, . . . that not only bolsters the witness's trial testimony but also contains facts and opinions to which the witness did not testify.

Berrier v. Bizer, Ky., 57 S.W.3d 271, 277 (2001) (citations omitted).

II. SEVERANCE.

The indictment charged Appellant with two counts of sexual abuse in the first degree, i.e., sexual contact with C.M. and S.M. in December 1999 (Counts 1 and 2), and eight counts of rape in the first-degree, i.e., sexual intercourse with D.F., then a child under the age of twelve, in the spring, summer, fall, and winter of 1978, and in the spring, summer, fall, and winter of 1979 (Counts 3 through 10). The majority opinion correctly observes that the primary test for improper joinder is whether evidence of one offense would be admissible at the trial of the other. Price v. Commonwealth, Ky., 31 S.W.3d 885, 889 (2000). I agree that Commonwealth v. English, Ky., 993 S.W.2d 941 (1999), holds that mere temporal remoteness does not preclude introduction of

evidence of a prior offense to show modus operandi per KRE 404(b)(1). Id. at 944-45. However, regardless of temporal proximity, evidence of a prior offense is admissible to prove modus operandi only if "the facts surrounding the prior misconduct [were] so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same mens rea. If not, then the evidence of prior misconduct proves only a criminal disposition and is inadmissible." Id. at 945. In English, the defendant was charged with touching the vaginal areas of two of his wife's grandnieces and the prior misconduct consisted of touching the vaginal areas of two of his wife's nieces.

> In each instance the victim was a prepubescent female relative of Appellee's wife. In fact, the familial relationship with each victim was the same, except for the generational gap. Each incident occurred while the victim was a visitor in Appellee's home and either on a couch or in a chair, presumably in a living room area as opposed to, e.g., a bedroom. Each incident occurred while Appellee's wife was also present in the home. Finally, each incident consisted of Appellee touching the victim's vaginal area.

Id. See also Violett v. Commonwealth, Ky., 907 S.W.2d 773, 775-76 (1995) (severance not required where the defendant was charged with sexually abusing and raping both his daughter and stepdaughter when the girls were eleven and twelve years of age, including digital penetration and rape of both); Lear v. Commonwealth, Ky., 884 S.W.2d 657, 660 (1994) (evidence that the defendant had raped and sodomized other young female step relatives over a period of years was properly admitted in the trial of an indictment charging him with the rape and sodomy of his pre-teenage stepdaughter and step niece). Compare Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 188 (1993) (holding that it was error not to sever charges of sexual touching, indecent exposure to, and removal of the clothing of a female friend's daughter from charges of multiple acts

of anal intercourse with a biological son and from charges of indecent exposure to and sexual touching of a six-to-eight-year-old clothed female child); Billings v. Commonwealth, Ky., 843 S.W.2d 890, 894 (1992) (holding that it was error to admit evidence that the defendant sexually touched and indecently exposed himself to the victim's younger sister and that he encouraged the younger sister to watch sexually explicit movies, in the trial of an indictment charging him with oral sodomy of his thirteen-year-old stepdaughter).

Here, the acts committed against C.M. and S.M. were sufficiently similar in nature and close in time to be probative of intent and modus operandi; thus it was proper to consolidate those charges for trial. Likewise, pursuant to English, supra, evidence that Appellant had engaged in sexual touching of D.F. several years earlier when she was about the same age as C.M. and S.M. would have been admissible to prove intent and modus operandi with respect to the charges pertaining to C.M. and S.M. However, evidence of Appellant's multiple acts of sexual intercourse with D.F. would not have been admissible at the trial of the sexual abuse charges involving C.M. and S.M.; and, since Appellant was not indicted for first-degree sexual abuse of D.F., evidence of his sexual abuse of C.M. and S.M. eight-to-ten years later, would not be admissible at the trial of the indictment for first-degree rape of D.F. Thus, the eight counts of the indictment charging Appellant with first-degree rape of D.F. should have been severed from Counts 1 and 2 for purposes of trial.

III. SUFFICIENCY OF EVIDENCE OF FIRST-DEGREE RAPE.

D.F.'s date of birth is December 15, 1968, and she was thirty-two years old when she testified at the trial of this case. The indictment charged Appellant with eight counts

of rape in the first degree for having sexual intercourse with D.F. during the spring, summer, fall and winter of 1978, and the spring, summer, fall, and winter, of 1979, during which time D.F. was less than twelve years of age. KRS 510.040(1)(b)2. To convict of first-degree rape in the absence of forcible compulsion, the sexual intercourse with D.F. must have occurred prior to her twelfth birthday, December 15, 1980.

D.F. testified that she lived in Decatur, Macon County, Illinois, with her parents and two younger brothers, Steven and Terry, until her parents separated. While they were living in Decatur, D.F., her mother, and her brothers occasionally visited her maternal grandmother in Hardinsburg, Breckinridge County, Kentucky. After the last such visit, Appellant, who is D.F.'s first cousin and her mother's nephew, returned with the family to Illinois. Shortly thereafter, D.F.'s mother and father separated. D.F., her mother, her brothers, and Appellant then moved from Illinois to a small house in Cloverport, Breckinridge County, Kentucky. D.F. testified that she moved to Cloverport when she was "nine or ten years old."

D.F. testified that she, her mother, her brothers, and Appellant continued to live in Cloverport for two and one-half years. They then moved to Hardinsburg and lived "for a while" with her (and Appellant's) grandmother before moving to a farm in the small Breckinridge County community of Balltown. D.F. testified that, although Appellant subjected her to sexual contact ("fondling" her vagina) while they lived in Cloverport, he did not subject her to sexual intercourse until after they moved to Balltown. She testified that Appellant continued to subject her to sexual intercourse thereafter for "four or five years" until she was age thirteen at which time her father came to Breckinridge County and took all three children with him to Illinois for a summer

visitation. During this visitation period, D.F. told her father that she was being sexually abused by Appellant, whereupon her father filed a petition for and subsequently obtained a change of custody of all three children.

D.F.'s brother, Steven, whose date of birth is April 26, 1970, testified that when he was "seven or eight years old," he, his mother, his brother, D.F. and Appellant all moved from Illinois to Cloverport where they lived for "one to two years" before moving to Balltown. He testified that the three children returned to Illinois to spend summer vacations with their father every year for "two or three years" and that the change of custody was obtained after D.F. told her father during the last such visitation that she was being sexually abused by Appellant.

To support his alibi defense, Appellant produced copies of his military records, which reflect that Appellant was stationed at the Marine Corps Recruit Depot, San Diego, California, from July 1977 to October 1977; at Camp Lejeune, North Carolina, from October 1977 to February 1978; at El Toro Marine Base, California, from February 1978 to January 1979; at 1st MAW, FPO San Francisco, California, i.e., Japan, from January 1979 until January 1980; and at Camp Pendleton, California, from January 1980 until he deserted on March 3, 1980. Although the prosecutor suggested that Appellant could have had sexual intercourse with D.F. in 1978 and 1979 while on military leave, the records reflect that Appellant's only annual leave during that period was from November 29 to December 28, 1978. Appellant was stationed in California at the time and claimed that he did not return to Breckinridge County, Kentucky, during that leave period. Of course, as noted by the trial judge, D.F. did not testify that Appellant had sexual intercourse with her during a brief period of military leave, but that

he did so only after they had lived together at three different locations over a period of two and one-half years and that he continued to do so for four or five years.

Appellant further testified that after "going AWOL" in March 1980, he stayed in hiding for three months in California and Mexico before returning to Breckinridge County, where he lived with his parents until moving with his aunt (D.F.'s mother) to Illinois in June 1980. He then returned to Breckinridge County and lived with his parents for a short while before taking up residence with D.F.'s family in Cloverport.

Appellant's trial testimony is consistent not only with his military records but also with information contained in the official court records of the Sixth Circuit Court, Macon County, Illinois, pertaining to the dissolution of the marriage of D.F.'s parents. Those records, which were filed in this record by the Commonwealth pursuant to a discovery order, reflect that D.F's father filed his petition for dissolution of marriage on June 10, 1980, and that the final judgment of divorce was entered on June 24, 1981. A verified petition for temporary relief, also filed on June 10, 1980, contains the sworn statement of D.F.'s father that "the Respondent" (D.F.'s mother) had left Illinois and moved to Kentucky with their children on June 7, 1980.

Thus, although D.F. believed that she was nine or ten years old when she moved from Illinois to Cloverport, these contemporaneous official court records verify Appellant's testimony that this move did not occur until June 1980, six months prior to D.F.'s twelfth birthday. Further, Steven, who claimed to have been seven or eight years old at the time, was actually ten years old. Thus, whether D.F. and Appellant lived in Cloverport for one to two years (Steven's testimony) or two and one-half years (D.F.'s testimony), D.F. must have been more than twelve years old when Appellant began having sexual intercourse with her in Balltown.

The same Illinois court records reflect that D.F.'s father filed his petition for modification of custody on June 28, 1983, when D.F. was fourteen years old, and that the judgment of modification was entered on July 21, 1983. These dates are consistent with Steven's testimony that he, his brother, and D.F. visited their father during two summers before D.F. reported the sexual abuse, which would correspond with the family's residence for two years in Cloverport, i.e., 1980 to 1982, during which no sexual intercourse took place, and subsequent move to Balltown, where the sexual intercourse occurred prior to their visitation with their father in the summer of 1983, during which the petition for modification of custody was filed.

Thus, the evidence presented by the Commonwealth entitled Appellant to a directed verdict of acquittal on the charges of first-degree rape, because the sexual intercourse could not have occurred prior to D.F.'s twelfth birthday. However, after his motion was overruled, Appellant, himself, testified that he and D.F.'s family lived in Cloverport for "about four months" before moving to Balltown. That testimony placed Appellant and D.F in Balltown as early as mid-October 1980, creating a two-month window of opportunity for sexual intercourse to have occurred there prior to D.F.'s twelfth birthday. A defendant who was entitled to a directed verdict of acquittal because of the insufficiency of the Commonwealth's evidence forfeits that entitlement by presenting evidence in his own behalf that cures the defect in the Commonwealth's case. Shepherd v. Commonwealth, 240 Ky. 261, 42 S.W.2d 311, 313 (1931); Cutrer v. Commonwealth, Ky. App., 697 S.W.2d 156, 159 (1985).

The mere fact that D.F. was confused about how old she was when she lived in Balltown would not have been fatal to the first-degree rape charges so long as D.F. and Appellant lived in Balltown where the sexual intercourse occurred during any period of

time when she was less than twelve years of age. Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 886 (1997). As the majority opinion points out, Stringer also holds that the date of the offense is not a material element unless time is a material ingredient of the offense. Id. at 885-86. However, in Stringer, the victim was only ten years old at the time of her testimony, id. at 885, so she must have been under the age of twelve at the time of the offense. Here, however, time is a material ingredient of the offense because D.F. was not under the age of twelve when she testified and Appellant could not be convicted of first-degree rape for having sexual intercourse with her unless that sexual intercourse occurred prior to her twelfth birthday, December 15, 1980.

The indictment could have been amended to conform the date of the offense to the evidence, e.g., "on or about October 1980 through December 15, 1980," because that amendment would not have charged an additional or different offense. RCr 6.16; Gilbert v. Commonwealth, Ky., 838 S.W.2d 376, 377-78 (1991); Stephens v. Commonwealth, Ky., 397 S.W.2d 157, 158 (1965). However, a motion was not made to amend the indictment and the indictment was, in fact, not amended.

Instead, the trial judge dismissed Counts 3 through 9 of the indictment as being outside the time frame proven by the evidence, and instructed the jury under Count 10 that Appellant could be convicted of first-degree rape if the jury believed beyond a reasonable doubt that he had sexual intercourse with D.F. "in or about the Winter, 1979," when D.F. "had not attained twelve (12) years of age, which she attained on December 15, 1980." In my view, "in or about the Winter, 1979" was no more within the time frame proven by the evidence than was, e.g., "in or about the Fall, 1979" (count 9). In fact, Appellant was in Japan during the winter of 1979 (or in California if one believes that the winter of 1979 extended to March 1980). Under any set of facts supported by

the evidence, Appellant did not have sexual intercourse with D.F. prior to October 1980, well after "the Winter, 1979." Thus, he was as equally entitled to a dismissal of Count 10 as he was to a dismissal of Counts 3 through 9. Although such would preclude his retrial on any charge of first-degree rape, it would not preclude a new indictment for and conviction of second-degree rape for engaging in sexual intercourse with D.F. between December 15, 1980, and December 14, 1982, KRS 510.050(1)(a), or third-degree rape for engaging in sexual intercourse with D.F. between December 15, 1982 and June 1983, KRS 510.060((1)(b).

IV. COMMENT ON SILENCE.

During his opening statement, defense counsel told the jury that, "[t]oday will be the first time Joe Morris has got his chance to tell his side of the story." To rebut this remark, the Commonwealth, in its case in chief, called the investigating officer to the witness stand for the sole purpose of testifying, over objection, that he had, in fact, afforded Appellant an opportunity to speak with him, clearly implying that Appellant had, instead, exercised his Constitutional right to remain silent. Later, during cross-examination of Appellant, the prosecutor elicited the fact that Appellant was in the courthouse on the day the grand jury considered the evidence against him and that he did not request the opportunity to testify before the grand jury. Finally, in closing argument, the prosecutor stated: "He's had a chance to tell his story before today, but he chose not to."

In view of the absence of any information in the record as to whether Appellant had been advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), I am unable to conclude that the evidence elicited by the

prosecutor or the remarks made during closing argument were in violation of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), or Niemeyer v. Commonwealth, Ky., 533 S.W.2d 218 (1976). However, if Appellant had received Miranda warnings, then Doyle prohibits the use of his silence even for the purpose of impeachment, 348 U.S. at 619, 96 S.Ct. at 2245 (assuming, of course, that innocuous remarks made during opening statement are even subject to impeachment). Presumably, upon retrial, defense counsel will alter his opening remarks and the issue will not recur.

Keller and Stumbo, JJ., join this opinion, concurring in part and dissenting in part.