IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MARCH 20, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0858-MR

JAMES JOHNSTON — APPELLANT

V.

APPEAL FROM MERCER CIRCUIT COURT
HON. DARREN W. PECKLER, JUDGE
ACTION NO. 1999-CR-0042

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

In November of 1992, Appellant allegedly engaged in deviate sexual intercourse with his stepdaughter, A.F., who was under the age of twelve at the time. The following month, Appellant allegedly attempted to rape his stepdaughter. These alleged criminal acts were not brought to the attention of the police until 1999. On August 27, 1999, the Mercer County Grand Jury charged Appellant with one count each of first-degree attempted rape and first-degree sodomy.

The Commonwealth first attempted to prosecute Appellant in February of 2001, but those proceedings ended in mistrial. Following a jury trial held in July of 2001, Appellant was convicted of first-degree attempted rape and first-degree sodomy. He was sentenced to twenty years in prison, and therefore appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant alleges seven points of error in this appeal. We address each in turn.

I.

The first trial ended in mistrial after the Commonwealth's witness, Detective Robert Stephens, of the Kentucky State Police, testified that he went to the county jail to interview Appellant, and after Appellant was advised of his rights, Appellant refused to make any statements to him. This was a clear violation of Appellant's right to remain silent. During the second trial, Appellant testified that he had attempted to contact Stephens via telephone before he was arrested, but Stephens never returned his call. In light of Appellant's testimony, the Commonwealth sought to allow Stephens to testify that he actually did meet with Appellant. The trial court allowed this so long as Stephens did not mention that he met with Appellant in jail or that Appellant exercised his right to remain silent. During his testimony, Stephens stated that he made a "personal" contact with Appellant.

Appellant now argues that it was error to allow the Commonwealth to question Stephens in the manner described above. Appellant contends that the only reasonable inference of the testimony was that Appellant refused to make a statement to Stephens. We disagree. Unlike Stephens' testimony during the first trial, Appellant's act of invoking his right to remain silent was never mentioned, and the trial court so limited Stephens' testimony. In addition, Appellant opened the door to Stephens' testimony when Appellant testified that Stephens had not contacted him. Thus, we find no error concerning this issue.

II.

Appellant asserts that it was error for the trial court to allow the introduction of hearsay into evidence during the testimony of Mary Fraley, A.F.'s mother. Fraley

testified that, while living in Mercer County, A.F. told her that Appellant had touched her [A.F.'s] behind. The trial court overruled Appellant's objection to this testimony because it went to A.F.'s state of mind as to why A.F., at that time, did not report the offenses charged to the police. The trial court allowed the testimony because its probative value outweighed its prejudicial effect. This was error.

We fail to see the relevancy of this evidence. Even if this evidence were relevant, it would be improper to admit such evidence because of the danger of undue prejudice. Here Appellant has been accused of two heinous acts against a victim, who was then under the age of twelve. In our view, an account of an unrelated incident, which was in no way similar to the crimes charged, was highly prejudicial to Appellant. Further, when Mrs. Fraley testified, there had been no evidence that A.F. had failed to report the charged offenses, thus there was no evidence to rebut. Consequently, it was error for the trial court to allow this sequence of Fraley's testimony into evidence.

Fraley also testified about an incident where she asked her daughter if anyone had ever abused her, to which A.F. affirmatively replied. A.F. indicated that Appellant was the perpetrator. Appellant objected to Fraley's testimony because it would unnecessarily bolster A.F.'s testimony. The Commonwealth argued that the testimony was proper because it constituted a "spontaneous utterance." The trial court overruled defense counsel's objection, and allowed the testimony as part of the "res gestae" of the events that took place.

Historically, before the adoption of the Kentucky Rules of Evidence, res gestae was an exception to the hearsay rule which governed the admissibility of spontaneous statements. See Robert G. Lawson, The Kentucky Evidence Law Handbook, § 8.60, at 451 (3d ed. Michie 1993). Presently, the two spontaneous statements that are not

excluded by the hearsay rule are the present sense impression, KRE 803(1), and the excited utterance, KRE 803(2). We now consider whether Fraley's testimony falls within either of these exceptions.

KRE 803(1) provides that the present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." The criminal acts perpetrated against A.F. occurred in late 1992. A.F. did not inform Fraley of these acts until 1999. Clearly, Fraley's testimony does not fall within the present sense impression exception.

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." KRE 803(2). In determining whether a statement qualifies as an excited utterance, we consider the following criteria most significant: lapse of time between the main act and the declaration; the opportunity or likelihood of fabrication; the inducement to fabrication; the actual excitement of the declarant; the place of the declaration; the presence there of visible results of the act or occurrence to which the utterance relates; whether the utterance was made in response to a question; and whether the declaration was against interest or self-serving. Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 470 (1998); Souder v. Commonwealth, Ky., 719 S.W.2d 730, 733 (1986). "[T]he above criteria do not pose a true-false test for admissibility, but rather only act as a guideline for consideration of admissibility." Jarvis, supra; Smith v. Commonwealth, Ky., 788 S.W.2d 266, 268 (1990), cert. denied 498 U.S. 852, 111 S. Ct. 146, 112 L. Ed. 2d 112 (1990).

After considering and applying the above criteria, we find it quite manifest that Fraley's testimony does not qualify as an excited utterance. A.F.'s statement to her

mother was not uttered under the stress of excitement. Also, A.F. made the statement in response to a question posed by Fraley. This statement is simply not an example of an excited utterance, and should not have been allowed into evidence.

Appellant also claims error concerning the portion of Fraley's testimony regarding prior occasions when she told A.F. that she was glad A.F. never had to live through any sort of abusive experience. Fraley continued and testified that A.F. stated in response, "[y]ou just don't know." Appellant claims that this was hearsay that should have not been admitted into evidence, but Appellant did not properly preserve his objection to this part of Fraley's testimony. While this Court need not review this alleged error, we consider said error because it will likely arise on retrial. Similar to the previous instances of hearsay made during Fraley's testimony, we hold that this evidence constituted inadmissible hearsay that the trial court should not have permitted. It is clear that this evidence does not qualify as an excited utterance, a present sense impression, or any other exception to the hearsay rule.

Accordingly, we reverse and remand this case to the circuit court for a new trial.

III.

At trial, in response to defense counsel's motion for a directed verdict, the trial judge stated the following: "The court would overrule that motion at this time, and decide there is sufficient evidence to take this case forward to the jury." The trial judge made the statement while his microphone was turned on, thereby enabling all present in the courtroom to hear it. This issue was not preserved for our review. However, Appellant now claims the failure to preserve by defense counsel was inexcusable and moreover, that this is an instance of palpable error meriting review under RCr 10.26. This issue is rendered moot by our reversal on other grounds; thus we need not

address it.

IV.

Appellant argues that the trial court allowed evidence of other crimes and bad acts to be introduced at trial, causing him to suffer substantial prejudice. Appellant further argues that he received no pre-trial notice of this evidence per KRE 404(c). In light of our decision to grant Appellant a new trial, as discussed in Part II of the opinion herein, this issue is moot and requires no further consideration. The trial court, Appellant, and the Commonwealth now have due notice of this issue if it surfaces during retrial or any other future proceedings regarding this matter.

V.

The trial court allowed the Commonwealth to introduce into evidence a photograph of the victim, which depicted A.F. as she looked at the time the criminal offenses at issue were allegedly committed by Appellant. Appellant argues the photograph was not relevant to any material issue in this case and the introduction of said photograph caused him substantial prejudice. We cannot agree.

This Court has frequently held that life photographs of a homicide victim are admissible to remind the jury that the victim was more than a mere statistic. Love v. Commonwealth, Ky., 55 S.W.3d 816, 827 (2001). While the victim here is a victim of sexual offenses, under the circumstances, we think the photograph should be admissible to show the jury how A.F. appeared at the time the alleged offenses were committed. Therefore, we hold that the trial judge did not abuse his discretion by allowing the photograph of the victim to be admitted as evidence. Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

VI.

Appellant's next contention is that the trial court improperly imposed the 85% parole eligibility set forth in KRS 439.3401. This he argues, is in violation of KRS 439.3401(7) which provides the following: "For offenses committed prior to July 15, 1998, the version of this statute in effect immediately prior to that date shall continue to apply." The crimes committed by Appellant occurred before July 15, 1998. There is no reference in the judgment entered herein to parole eligibility at all, as is appropriate since parole is not an issue to be determined by the trial courts. We find no error.

VII.

Finally, Appellant asserts that his right to a speedy trial was violated. U.S. Const. Amend. VI; Ky. Const. § 11. After applying the four factors set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), we hold that a dismissal of this case is not warranted. Here the length of the delay between Appellant's indictment and trial lasted less than two years. The trial court determined a reason for this delay could possibly be attributed to Detective Stephens' failure to provide discovery information to trial counsel. In fact, we find it very likely that this failure was a factor in prolonging the delay. However, under the totality of the circumstances, we cannot conclude that the prejudice to Appellant was so severe that a dismissal would be justified.

Wherefore, for the foregoing reasons, we reverse Appellant's conviction and hereby remand this case to the Mercer Circuit Court for a new trial in conformity with this opinion.

Lambert, C.J.; Cooper, Graves, Johnstone and Stumbo, JJ., concur. Keller, J., concurs in result only; Wintersheimer, J., dissents without opinion.

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