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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MAY 22, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0525-MR

RICHARD ALLEN — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN SHAKE, JUDGE
99-CR-02602

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Richard Allen, was convicted in the Jefferson Circuit Court of first-degree rape, first-degree sodomy, and first-degree sexual abuse. He was sentenced to a total of seventy-five years imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

Appellant's convictions stem from acts perpetrated on his minor biological daughter, C.A. The record reflects that sexual acts against C.A. began in 1993, when she was four years old and her family was living in Bullitt County. However, the instant offenses were committed in Jefferson County, after C.A. moved into Appellant's trailer when he and C.A.'s mother divorced in 1996. In September 1999, C.A.'s older brother, R.A., reported the crimes after witnessing two occurrences of sexual misconduct between Appellant and C.A.

At trial, C.A., R.A, and Detective Mark Fulmore, from the Crimes Against Children Unit ("CACU"), testified for the Commonwealth, while several family members and Appellant himself testified for the defense. R.A. testified that he, C.A. and Appellant slept on two couches in the living room of Appellant's trailer because other extended family members lived in the bedrooms. R.A. stated that he witnessed two occurrences of sodomy while he was on one couch and C.A. and Appellant were on the other. During both incidents, R.A. saw his father take "his private part" out of the side of his shorts and put it into C.A.'s behind.

C.A. testified that Appellant had hurt her and that she did not love him. She described Appellant's putting "his private" into her behind, into her "private," and into her mouth. She also testified that Appellant put his fingers into her private, showed her a dirty magazine, put his mouth on her private and licked it, and that Appellant "peed" white gooey stuff into her mouth and ear. Appellant warned C.A. that if she told anyone about the abuse he would kill her. On one occasion, he took C.A. out to the woods and threatened to bury her if she ever told. C.A. described another instance when he placed a pistol into her "private" and said he would shoot her if she ever told anyone. C.A. testified that she did not report the abuse out of fear that her mother would be angry with her, that her grandmother might not love her anymore, or that her brother might "spread it around school".

On September 21, 1999, Dr. Melissa Hancock, a pediatrician with "Children First," conducted an overall physical examination of C.A. as well as an external inspection of C.A.'s genital region. At trial, Dr. Hancock testified that C.A. told her Appellant had hurt and raped her. Dr. Hancock stated that the results of C.A.'s physical examination were "normal" for a child of C.A.'s age. However, Dr. Hancock noted that

"normal" results were consistent with C.A.'s allegations of rape and sodomy given the lapse of time between the alleged instances of abuse and the physical examination. On cross-examination, Dr. Hancock conceded that her reasoning might suggest that every examination could produce results consistent with abuse having occurred. On re-direct, Dr. Hancock clarified that she had conducted approximately 300 exams, and that the majority had no physical findings of abuse unless the victim was examined within twenty-four to seventy-two hours of the assault.

Detective Mark Fulmore testified that he initiated an investigation in September 1999, following R.A.'s reporting the two incidents he witnessed. Detective Fulmore recounted two visits to Appellant's trailer and several conversations with Appellant. Throughout his testimony, Detective Fulmore often referred to an investigative report he had prepared prior to trial, and essentially read parts of it in response to questions from the Commonwealth and defense counsel.

The jury found Appellant guilty of all charges and the trial court subsequently sentenced him to a total of seventy-five years imprisonment. This appeal followed.

I.

Appellant first contends that he was denied a "fundamentally fair" trial because Detective Fulmore expressed an opinion as to Appellant's guilt or innocence. No objection was raised at trial and Appellant concedes that this issue is not preserved, but urges review under RCr 10.26.

During direct examination, Detective Fulmore testified that when he confronted Appellant about the allegations, Appellant became upset and his eyes filled with tears. Detective Fulmore then recounted the conversation he had with Appellant:

> I told him I would like to hear his side of the story. He told me, "I haven't done anything." At that point, I told him [R.A.] saw something

> happen. He told me, "He's lying." I told him [R.A.] was not lying and neither was [C.A.]. I told him I knew something had happened. I told Allen [C.A.] . . . told on him and [R.A.] could testify as to what he saw. Allen, the defendant, told me, "I haven't done anything to her."

Detective Fulmore later testified, "I told Allen I believed there were nights that he got on [C.A.'s] sofa and [R.A.] saw what happened."

Appellant asserts that Detective Fulmore improperly told the jury that he believed Appellant was lying and that R.A. and C.A. were telling the truth about the allegations. Appellant argues that although this Court abolished the "ultimate issue" prohibition in Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997), cert. denied, 523 U.S. 1052 (1998), we did not "open the door to allowing witnesses to give opinions about whether another witness is lying or telling the truth, or whether a criminal defendant is guilty."

After a careful review of Detective Fulmore's testimony, we find little merit in Appellant's claims. Contrary to Appellant's belief, Detective Fulmore did not inappropriately testify about the "ultimate issue" of the case. Detective Fulmore merely explained the course of his investigation in response to questioning. He repeatedly referred to his written report and it is obvious that he attempted to convey the events and conversations exactly as they occurred. At no point did Detective Fulmore testify as to the truthfulness of the statements he made to Appellant during the interview; rather, only that he proffered certain statements to Appellant which, in turn, had elicited certain responses. In other words, Detective Fulmore did nothing more than relate to the jury the techniques and questions he used in questioning Appellant, as well as Appellant's responses thereto.

Detective Fulmore's testimony is more properly construed as a synopsis of his investigation and interviews with Appellant, than an opinion as to Appellant's guilt. As

such, we do not conclude that it improperly influenced the jury to the extent that it deprived Appellant of a fair trial. Given the testimony of C.A. and R.A., Detective Fulmore's testimony certainly does not rise to the level of palpable error warranting reversal of the convictions.

II.

Appellant argues that the trial court erred in refusing to permit him to introduce what he characterizes as prior inconsistent statements made by C.A. to Arletta Walker, a child abuse investigator for the Cabinet for Families and Children in Bullitt County. Ms. Walker testified by avowal that she interviewed C.A. in January 1993, after receiving a report from C.A.'s school of possible abuse and neglect. At that time, three-year-old C.A. was able to identify body parts, referring to both the penis and the vagina as the "too poo," and told Ms. Walker that she had seen her father place his "too poo" in her mother. However, C.A. denied that Appellant had ever inappropriately touched or hurt her in her genital areas. In fact, using an anatomically correct doll, C.A. showed Ms. Walker how her mother had pinched her vagina causing her "hole" to hurt. The defense sought to use Ms. Walker's testimony and report to impeach C.A.'s allegations of abuse by Appellant, as well as to demonstrate that C.A. had acquired knowledge of human sexuality by witnessing her father and mother having sexual relations, not by having been molested. The trial court ruled that the evidence was irrelevant and would be potentially confusing to the jury. We agree.

C.A. testified that that the abuse began when she was four years old, and, in fact, the charged offenses in this case did not occur until C.A. moved into Appellant's trailer in 1996. Since Ms. Walker's 1993 interview with C.A. occurred prior to any allegations of criminal misconduct, we fail to perceive how C.A.'s interview with Ms.

Walker could be construed as inconsistent with her testimony at trial and relevant for impeachment purposes. C.A.'s denial of previous abuse in 1993 is wholly irrelevant to the offenses in this case which took place from 1996-1999.

We likewise do not find merit in Appellant's claim that he was denied the opportunity to show that C.A. had an unusually extensive knowledge of sexual relations at such a tender age. While defense counsel was not permitted to question Ms. Walker about C.A.'s having witnessed her parent's sexual acts, he was permitted to question C.A. about such. Further, both C.A. and R.A. testified to having witnessed Appellant and his girlfriend having sex. The jury had sufficient evidence to determine whether C.A.'s sexual knowledge was the result of witnessing sexual acts between Appellant and another or by Appellant's acts committed against her.

III.

Prior to trial, the Commonwealth gave notice pursuant to KRE 404(c) that C.A. would testify that Appellant began sexually abusing her when she was four years old, although the charged offenses did not begin until she was approximately eight-years-old. Relying on Daniel v. Commonwealth, Ky., 905 S.W. 2d 76 (1995), defense counsel responded that evidence of prior bad acts did not satisfy the three-part test set forth in KRE 404(b). The trial court ruled that the evidence was admissible; however, the Commonwealth was cautioned not to confuse the jury as to which offenses they were called upon to decide.

Ultimately, when C.A. took the stand, she stated that Appellant had been sexually abusing her since she was four years old. The prosecutor thereafter questioned C.A. only about the incidents that occurred after she moved into Appellant's

trailer in 1996. Throughout C.A.'s testimony, the prosecutor periodically confirmed that C.A. was referring to events that occurred during the 1996 - 1999 time period.

At the close of the evidence, defense counsel moved to amend the indictment to cover the time period from 1993-1999, since C.A. testified that the abuse began in 1993. Defense counsel argued that the Commonwealth chose to allege a continuing course of conduct, and, by doing so, essentially waived venue on the Bullitt County offenses. KRS 452.550[1]. Thus, the defense sought to include all of the offenses since 1993, to prevent the Bullitt County authorities from prosecuting Appellant. The Commonwealth essentially responded that both Bullitt County and Jefferson County were entitled to prosecute Appellant for offenses committed in each county. In denying the motion to amend the indictment, the trial court ruled that all of the evidence presented concerned only the 1996-1999 Jefferson County offenses and that C.A.'s limited reference to when the abuse began did not constitute evidence of the Bullitt County offenses. Further, the trial court agreed that each county was entitled to prosecute Appellant.

The Commonwealth argues that the evidence was admissible under KRE 404(b)(2) because it was inextricably intertwined, and was essential to explaining C.A.'s fear and the kind of person she was at age eight when the instant offenses began. We find this proposition rather dubious since C.A. was clearly able to separate the earlier incidents from those which occurred after she moved in with Appellant in 1996.

Notwithstanding, the record reveals that aside from C.A. stating that the abuse began in 1993, there was no evidence or testimony concerning the 1993-1996 Bullitt

[1] "Where an offense is committed partly in one and partly in another county, or if acts and their effects constituting an offense occur in different counties, the prosecution may be in either county in which any of such acts occur." KRS 452.550

County offenses. The prosecutor focused solely upon the events which occurred after 1996. While we disagree with the trial court's ruling that the evidence was relevant, we do agree that such did not warrant amending the indictment. Indeed, each county is entitled to prosecute Appellant for offenses committed therein. Further, the record does not support Appellant's argument that the Commonwealth established a continuing course of conduct during 1993-1999 so as to waive venue on the earlier offenses.

IV.

Appellant argues that pursuant to Turner v. Commonwealth, Ky., 767 S.W. 2d 557 (1988), cert. denied, 493 U.S. 901 (1989), the trial court erred in refusing to grant defense counsel's request for an independent physical and gynecological examination of C.A. Appellant contends that the denial of such prevented him from challenging the findings of the Commonwealth's expert.

Appellant's reliance on Turner is misplaced. In Turner, we held that the defendant was entitled to an independent gynecological examination of the victim to refute the damaging testimony of the prosecution's examiner that tears in the four-year-old victim's hymenal ring were likely caused by penile penetration. Id. at 559. In so holding, we stated:

> [T]he critical question is whether the evidence sought by the appellant is of such importance to his defense that it outweighs the potential harm caused by the invasion of the alleged victim's privacy and the probability that the prospect of undergoing a physical examination might be used for harassment of a prosecuting witness.

Id.

Here, the Commonwealth's expert, Dr. Hancock, testified that there were no physical findings of rape, sexual abuse, or sodomy, and that the results of her examination were normal for a child of C.A.'s age. While Dr. Hancock did comment

that physical findings of abuse were often absent given the delay between the alleged abuse and the examination, the jury could draw its own conclusions from the lack of physical evidence. Since an additional examination could have produced no more favorable results for Appellant, the probative value of the evidence did not outweigh the potential harm to C.A. of having to undergo such examination.

V.

Finally, Appellant argues that the trial court erred in refusing to conduct a pretrial hearing to determine the reliability of C.A.'s expected testimony, and whether C.A. had been influenced or "corrupted" by the forensic interviewer, Valleri Mason. Appellant relies on State v. Michaels, 642 A.2d 1372 (N.J. 1994), wherein the New Jersey Supreme Court upheld a taint hearing to determine whether interviewing techniques were so flawed as to distort a child witness's recollection of events and thereby undermine the reliability of the testimony. See also Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

This Court recently addressed this issue in Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 525 (2002), wherein we declined to follow the holding in Michaels, supra, and rather held that the determination is simply whether a minor victim is competent to testify:

> Pursuant to KRE 601, a witness is competent to testify if she is able to perceive accurately that about which she is to testify, can recall the facts, can express herself intelligibly, and can understand the need to tell the truth. The competency bar is low with a child's competency depending on her level of development and upon the subject matter at hand. Jarvis v. Commonwealth, Ky., 960 S.W.2d 466 (1998).

The trial court has the sound discretion to determine whether a witness is competent to testify. Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985). Here,

C.A. was able to identify Appellant as the perpetrator and provided details of the acts committed against her. Further, as we noted in Pendleton, supra, 83 S.W.3d at 526, "Appellant had the ability to cross-examine [C.A.] and undermine her credibility with the jury, if he felt her testimony had been coerced" by the forensic interviewer. No error occurred.

For the reasons set forth herein, the judgment and sentence of the Jefferson Circuit Court are affirmed.

Lambert, C.J., Cooper, Graves, Johnstone, and Wintersheimer, J.J., concur.

Keller, and Stumbo, J.J. concur in result only.

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