

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 12, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0939-MR

FINAL
DATE 7-3-03 EARGROW/H.P.C.

EVERETT DEMPSEY SMITH

APPELLANT

V.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
1999-CR-0103

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury convicted Everett Dempsey Smith of first-degree rape of his grandchild, A.M.S., over a two-year period when she was five to seven-years-old. The trial court imposed a 20-year prison sentence and Smith appeals as a matter of right. Smith argues that he was entitled to a directed verdict on grounds that insufficient evidence existed to support his conviction and that the trial court erroneously prohibited Smith's treating psychiatrist, Dr. Ricon, from testifying that erectile dysfunction is a side effect of medications taken by Smith. For the reasons set forth below, we affirm Smith's conviction.

After being abandoned and neglected by their mother who suffered severe depression, A.M.S. and two of her siblings lived with their grandparents from 1997 through 1999. A.M.S. was five-years-old when she moved in with her grandparents, seven when the abuse was discovered, and ten when she testified at trial. A.M.S.

testified that her "Papaw" repeatedly "put his thing in her thing" during the two years she lived with him.

At trial, the jury heard that A.M.S. consistently reported the same allegations of sexual abuse to her aunt, investigating social workers, and a Kentucky State Trooper. Dr. Humkee, a medical expert who examined A.M.S., found a tear in her hymen consistent with rape. The jury also heard testimony that A.M.S. engaged in acts of masturbation while staying with her grandparents. Smith himself testified that A.M.S. had a "masturbation problem," that he would let A.M.S. masturbate to "see how far it would go," and that A.M.S. "rode him like a woman." Smith, who began telling his son about watching pornography during this time period, was on disability and stayed home with his grandchildren when his wife worked. After A.M.S. was removed from her grandparents' home and moved in with her aunt, she did not continue to sexually act out or masturbate.

Smith argues that he physically was unable to have an erection and that A.M.S. must have been abused by someone else while living with her neglectful mother. A social worker testified that she believed A.M.S. had been sexually abused earlier in her life before the allegations arose involving Smith. Smith and his wife testified that Smith took medications that caused erectile dysfunction, making it impossible for him to rape his granddaughter. Smith had been on medications for bi-polar disorder for over 15 years. But, Smith and his wife testified that Smith had only been suffering erectile dysfunction for the past six years, which is when he began taking blood pressure medication.

Directed Verdict

On appellate review, a defendant is entitled to a directed verdict of acquittal only "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt" Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). The trial court determined that "a reasonable juror could fairly find guilt beyond a reasonable doubt." Ibid.; see also Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). Upon review of the record, we agree.

In rape cases, the defense of erectile dysfunction is a question of fact for the jury. Jordan v. Commonwealth, Ky., 74 S.W.3d 263, 267 (2002). As in Jordan, the jury here had an opportunity to weigh the credibility of Smith's and his wife's testimony regarding his erectile dysfunction in the context of the evidence as a whole. Smith's defense of erectile dysfunction was specifically based on his medication regimen. Smith was able to introduce evidence of his medication regimen through his and his wife's testimony. The jury did not find Everett and Bessie Smith's testimony credible. Nothing in the record indicates that "it would be clearly unreasonable for a jury to find guilt."

Reciprocal Discovery Rule Does Not Apply to Dr. Ricon's Oral Testimony

Smith contends that exclusion of Dr. Ricon's medication testimony prohibited the jury from being able to properly assess whether Smith suffered erectile dysfunction and was unable to rape his granddaughter. On the opening day of trial, the Commonwealth moved to exclude all testimony of Dr. Ricon, on grounds that the defense failed to produce Smith's medical records and a list of medications in violation of the reciprocal discovery rules of RCr 7.24.

Review of the record shows that Smith subpoenaed Dr. Ricon three (3) weeks before trial and informed the Commonwealth the week before trial that Dr. Ricon would be called to testify solely as to the identity and side effects of medications taken by Smith. The trial court excluded Dr. Ricon's testimony under RCr 7.24(3)(A)(i) which provides that:

Upon written request of the Commonwealth, the defendant, subject to objection for cause, shall permit the Commonwealth to inspect, copy, or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody, or control of the defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony.

RCr 7.24(3)(A)(i).

RCr 7.24(3)(A)(i), or the reciprocal discovery rule, does not apply to oral testimony; it relates solely to production of specific written evidence. Dr. Ricon should not have been precluded from testifying under this rule. Further, RCr 7.24(3)(A)(i) only requires production of those records "made in connection with a particular case." General medical records do not fall under this category and cannot be excluded from evidence under this rule.

Further, under KRE 703, opinion testimony by experts may be based on facts or data that "need not be admissible in evidence" if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." KRE 703. Thus, this Court has held that doctors are allowed to testify even if they have read selected entries of a defendant's medical records which are inadmissible. Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6, 11 (1998). Here, even

if Dr. Ricon had relied on inadmissible medication records, she should have been allowed to give her opinion testimony under KRE 703.

Although we find that the exclusion of Dr. Ricon's testimony was improper, we also find no substantial possibility that the jury's verdict would have been any different and therefore hold that such exclusion constitutes harmless error. CR 9.24; Rogers v. Commonwealth, Ky., 60 S.W.3d 555, 559 (2001). In determining whether to grant reversal for evidentiary errors, "if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969), modified by Blake v. Commonwealth, Ky., 646 S.W.2d 718, 719 (1983). In so determining, this Court must consider the weight of the evidence in assessing whether the error is harmless or prejudicial. Abernathy, 439 S.W.2d at 953. "It would be an injudicious practice to reverse judgments of conviction where the errors complained of could have in no way influenced the result of the trial." Rogers, 60 S.W.3d at 559.

Here, both Smith and his wife testified that blood pressure medication caused him to suffer erectile dysfunction. Dr. Ricon, Smith's psychiatrist who treated him for bipolar disorder, did not prescribe Smith's blood pressure medication nor monitor such medication. Dr. Ricon could only confirm that Smith had been prescribed blood pressure medication (which the jury already knew). Dr. Ricon could not testify as to actual dosage amounts taken or side effects experienced by Smith. Dr. Ricon's expertise is in psychotropic drugs and blood pressure medication is not such a drug.

In short, Dr. Ricon could only testify to what the jury already knew: that Smith was taking blood pressure medication that can have the side effect of erectile

dysfunction. Dr. Ricon could not testify as to the likelihood of Smith suffering such a side effect. Taking the evidence as a whole, there is no substantial possibility that the jury's verdict would have been different if Dr. Ricon had been allowed to testify.

For the above-stated reasons, the judgment of the Carter Circuit Court is affirmed.

Lambert, C.J.; Graves, Johnstone, and Wintersheimer, JJ., concur. Cooper, J., dissents by separate opinion, with Keller and Stumbo, JJ., joining that dissent.

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DISSENTING OPINION BY JUSTICE COOPER

I agree with the majority opinion that the trial court erred in excluding the testimony of Appellant's treating psychiatrist, Dr. Myra Ricon. I disagree with the majority's conclusion that the error was harmless. At the outset, I note that, in arguing for the exclusion of this evidence at the trial level, the prosecutor, himself, characterized this evidence as "a huge defense for this defendant."

To recapitulate, Appellant was accused of having sexual intercourse with his granddaughter. He claimed that the combination of medications he was taking for bipolar disorder, high blood pressure, and a thyroid problem caused erectile dysfunction so that he was incapable of performing sexual intercourse. Both Appellant and his wife testified to this fact. Of course, Appellant and his wife are laypersons and the jury could (and certainly did) discount their testimonies as self-serving and unsupported by medical evidence when it found Appellant guilty of actually having engaged in sexual intercourse. The jury could also have concluded (and probably did) that Appellant did

not call his treating physician as a witness because she would not support his claim. In fact, Dr. Ricon testified by way of avowal that erectile dysfunction is a side effect of consuming a combination of Haldol and Lithium to treat bipolar disorder and that the same disorder can also be a side effect of the medication Appellant was taking for his high blood pressure.

I cannot agree that this proposed testimony from a medical professional who was also Appellant's treating physician was merely cumulative of the lay and discountable self-serving testimony of Appellant and his wife. See United States v. Roark, 753 F.2d 991, 994-95 (11th Cir. 1985) (reversing when trial court prevented psychiatrist from supporting defendant's assertion that he was psychologically coerced into making inculpatory statements); cf. Habecker v. Copperloy Corp., 893 F.2d 49, 53 (3d Cir. 1990) ("having two expert witnesses testify, instead of one, could easily have made the jury more likely to believe plaintiffs' theory"). In fact, I cannot imagine a circumstance where testimony of a medical expert would be merely cumulative of lay testimony on a matter particularly within the knowledge of the expert.

Accordingly, I dissent and would remand this case to the Carter Circuit Court for a new trial.

Keller and Stumbo, J.J., join this dissenting opinion.