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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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-1014-MR

SAMUEL E. PLOTNICK — APPELLANT

V.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
2001-CR-0033

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Samuel Plotnick, was convicted of First-Degree Sodomy in the Whitley Circuit Court and sentenced to the minimum of twenty years imprisonment. The charge stemmed from an allegation by the four-year old child of Appellant's estranged girlfriend, that Appellant had "stuck a tent pole up [his] butt." Appellant appeals his conviction to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant alleges several errors on appeal, namely: (1) that defense counsel was improperly denied a recross-examination of the victim after the Commonwealth had insinuated on redirect that the victim's mother had manipulated the victim's testimony; (2) that the trial court committed reversible error when it failed to instruct the jury on the lesser-included offense of Sexual Abuse I; (3) that there was not sufficient evidence to convict Appellant of Sodomy I, and therefore, Appellant's motion for directed verdict should have been granted; and (4) that the prosecutor engaged in misconduct when he

gave unsworn testimony regarding his displeasure with the victim's mother in taking the victim to see Appellant while in jail. For the reasons set forth below, we affirm.

RECROSS-EXAMINATION OF VICTIM

Appellant contends that the trial court erred when it refused to allow defense counsel to recross-examine the victim. On direct examination of the victim, the prosecution elicited testimony that Appellant had been the one who had sodomized the victim. However, on cross-examination, the victim, for the first time, accused Rondel Goins (a previous boyfriend of the victim's mother) of sodomizing him. On redirect, the prosecution sought to establish that the victim had been to the jail to see Appellant the night before he gave his testimony in court, presumably to allow the jury to infer that Appellant or the victim's mother had manipulated the child's testimony. When defense counsel asked to recross, the trial court denied the request by stating "that's enough" and dismissed the witness.

Appellant states that this issue is preserved by defense counsel's request, and the trial court's subsequent refusal of, the recross-examination of the victim. However, we have repeatedly held that in circumstances such as this, the issue is not properly preserved unless the disputed testimony is put into the record by avowal. Mills v. Commonwealth, Ky., 95 S.W.3d 838, 843 (2003). Since no avowal was taken in this case, this issue is not preserved for our review, as we cannot speculate as to what the actual testimony of the victim would have been.

Nevertheless, Kentucky Rule of Evidence (KRE) 611 vests the trial court with the discretion and control over the scope of cross-examination of witnesses. Although limitations on cross-examination should be cautiously applied because of due process

implications, trial courts retain broad discretion in the regulation of cross-examination. Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 721 (1997).

Here, the witness was a five-year old child who was becoming increasingly confused throughout his testimony. Along with the revelation that Rondel Goins had been the person who had hurt him, the victim also stated that the pole had gone through his stomach and that pieces of his brain were coming out of his arms. Clearly the child was veering off course. Any further attempt to elicit relevant testimony would likely have been futile. Moreover, the victim's mother had already testified that she had taken the victim to see Appellant while in jail because he wanted to make sure that Appellant was still there so that he couldn't be hurt anymore. There was no new material information adduced on redirect that would necessitate another cross by defense counsel. Therefore, regardless of the lack of preservation, we cannot say that the trial court abused its discretion in refusing to allow recross-examination of the child on this issue. The jury already possessed the relevant facts from which they could draw their own inferences.

LESSER-INCLUDED OFFENSE OF SEXUAL ABUSE I

Appellant contends that the jury should have been instructed on the lesser-included offense of Sexual Abuse I because the prosecution could not establish that actual penetration occurred as required by KRS 510.070 and KRS 510.010. The Commonwealth argues that this issue is not preserved for appellate review. Indeed, the record does not contain any tendered instructions by either party, nor does it contain a transcript of the conference on jury instructions. Appellant refers us to a colloquy during the argument for a directed verdict wherein defense counsel stated:

> [t]he child stated, even in the interview, that it occurred on top of his clothes. So, that is not intercourse in anyway. That might be criminal abuse or you could call it sexual abuse, but there is no showing that there was . . . object to skin contact. Said it, specifically, on top of his clothes, Your honor. That does not support a charge of Sodomy in the First Degree.

This, however, is not sufficient compliance with Rule of Criminal Procedure (RCr) 9.54(2) which mandates that:

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

See also Hopper v. Commonwealth, Ky., 516 S.W.2d 855 (1974). Accordingly, we find that Appellant has not properly preserved the issue of the trial court's failure to instruct on the lesser-included offense of Sexual Abuse I.

DIRECTED VERDICT

Appellant next alleges that the trial court erroneously denied his motion for a directed verdict based on: (1) the lack of evidence of penetration; (2) the lack of evidence of sexual gratification; and (3) the general sufficiency of the evidence.

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Further, the trial court is to evaluate the evidence in a light most favorable to the Commonwealth when ruling upon the defendant's motion for directed verdict. Id. The evidence in this case clearly indicates that the trial court did not err

when it found that it would not be clearly unreasonable for the jury to find Appellant guilty of Sodomy I. Although the element of penetration was clearly in dispute, there was medical testimony to the effect that penetration would have been possible given the victim's injuries. This was clearly a question for the jury, as the prosecution produced "more than a scintilla of evidence" on this issue. Id. at 188.

Appellant also argues that there was no evidence adduced that would show he acted for the purpose of "sexual gratification" as required by the definition of "deviate sexual intercourse" in KRS 510.010. However, as we read the statute, sexual gratification is only a requirement for the first part of the definition stating that deviate sexual intercourse "means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another." The next phrase is separated by a semicolon and begins "*or* penetration of the anus of one person by a foreign object manipulated by another person." KRS 510.010(1) (emphasis ours).

KRS 446.080(4) states that "[a]ll words and phrases shall be construed according to the common and approved usage of language. . . ." Therefore, in so construing KRS 510.010(1), we conclude that sexual gratification is not a necessary element of "deviate sexual intercourse" if the evidence establishes that the anus was penetrated by a foreign object, thus satisfying the second part of the definition. Accordingly, the Commonwealth was not required to prove that Appellant derived any sexual gratification from the act.

Appellant also argues general insufficiency of the evidence in support of his argument that the trial court erred in refusing to grant his directed verdict. As stated previously, we believe that the trial court correctly denied Appellant's motions for

directed verdict as the prosecution produced more than a scintilla of evidence from which a reasonable jury could determine that the appellant was guilty of the offense charged. See Benham, supra.

PROSECUTORIAL MISCONDUCT

Lastly, Appellant asserts that the prosecutor made improper comments during his direct examination of the victim's mother when he sought to establish that he (the prosecutor) and the victim's mother had argued over the fact that the mother had taken the victim to see Appellant on several different occasions. Appellant insists that these comments insinuated to the jury that the prosecutor personally believed Appellant to be guilty and was going forward with the prosecution despite the mother's belief that Appellant was innocent. Appellant concedes that this issue is not preserved but seeks review for manifest injustice pursuant to RCr 10.26.

It was not error for the prosecutor to establish that the victim's mother may have been biased due to her belief of Appellant's innocence. The defense itself introduced numerous letters from the victim's mother to Appellant proclaiming her belief in his innocence. The prosecutor's comments regarding his displeasure with the victim's mother for exposing the victim to Appellant prior to trial do not even remotely reach the level of palpable error as required for reversal. At the most, it was harmless error.

For the foregoing reasons, the judgment of the Whitley Circuit Court is affirmed.

Lambert, C.J.; Graves, Johnstone, Keller and Wintersheimer, JJ., concur. Cooper, J., concurs in result only by separate opinion. Stumbo, J., dissents by separate opinion.

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CONCURRING OPINION BY JUSTICE COOPER

Effective July 14, 2000, KRS 510.010(1) was amended, 2000 Ky. Acts, ch. 401, § 4, so that it now reads (new language in bold):

> "Deviate sexual intercourse" means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; **or penetration of the anus of one person by a foreign object manipulated by another person. "Deviate sexual intercourse" does not include penetration of the anus by a foreign object in the course of the performance of generally recognized health-care practices;**

The premise of the majority opinion is that the 2000 General Assembly's failure to delete the first semicolon indicates a legislative intent to eliminate the "sexual gratification" requirement from the offense when it is committed by penetration with a foreign object. Perhaps, but the failure to delete the preexisting semicolon could also have been mere oversight.

> Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will

> repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed.

United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 82-83, 53 S.Ct. 42, 44, 77 L.Ed. 175 (1932) (citations omitted). My view is that if the offending act was not committed for sexual gratification, it is not a sexual offense but an assault that should more properly be prosecuted under KRS Chapter 508. Nevertheless, until 2000, the same act of penetration of the anus of another with a foreign object was formerly included in the definition of "sexual intercourse." KRS 510.010(8). When the 2000 General Assembly amended subsection (1) of KRS 510.010, it also amended subsection (8) as follows:

> "Sexual intercourse" means sexual intercourse in its ordinary sense and includes penetration of the sex organs ~~[or anus]~~ of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight; emission is not required. "Sexual intercourse" does not include penetration of the sex organ ~~[or anus]~~ by a foreign object in the course of the performance of generally recognized health-care practices;

Thus, the only apparent purpose of the 2000 amendment was to move the act of penetration of the anus of another with a foreign object from the definition of "sexual intercourse" to the definition of "deviate sexual intercourse." If the legislature did not intend to require that penetration of the anus of another with a foreign object to have been for "sexual gratification" when it was in subsection (8), it is not illogical to assume that it had the same non-intent when it moved it to subsection (1). Nor would there be any logic in requiring that penetration of the anus of another with a foreign object to be for sexual gratification under subsection (1) when subsection (8) does not contain the same requirement for penetration of the vagina of another with a foreign object. Although I continue to believe that such an attack for a purpose other than sexual

gratification should more properly be categorized as an assault, I must conclude that it is within the General Assembly's prerogative to categorize it as a sexual offense. Accordingly, I concur in the result reached by the majority.

I would note in passing that this issue arose in the context of a motion for a directed verdict of acquittal for failure to prove the act was done for sexual gratification, not in the context of an objection to the instructions which, in fact, did (unnecessarily, as it turns out) include the requirement of sexual gratification. Further, if sexual gratification were an element of the offense, it could be inferred from the nature of the act, cf. Anastasi v. Commonwealth, Ky., 754 S.W.2d 860, 862 (1988); thus, Appellant would not have been entitled to a directed verdict of acquittal in any event.

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DISSENTING OPINION BY JUSTICE STUMBO

Respectfully, I must dissent from the majority opinion because I feel that the failure of the trial court to instruct the jury on the lesser-included offense of Sexual Abuse I was so prejudicial to the substantial rights of Appellant that manifest injustice occurred. RCr 10.26.

Under the palpable error rule, we must determine if, after considering the case as a whole, there exists a substantial possibility that the result would have been different had the error not occurred. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). Appellant argues that the evidence could not conclusively establish that penetration occurred, thereby warranting a charge of First-Degree Sodomy.

KRS 510.070(1)(b) states that a person is guilty of First-Degree Sodomy if he "engages in deviate sexual intercourse with another person who is incapable of consent because he . . . [i]s less than twelve (12) years old." KRS 510.010 defines "deviate

sexual intercourse" as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign object manipulated by another person." Here, there was medical testimony that established the victim had bruising around the rectal area that was consistent with a pole being stuck in his anus. However, the physician's assistant who first examined the victim testified that some of the bruises were yellowing, indicating healing, and that there were no tears or fissures of the rectum. She also testified that while it was hard to tell from the victim's injuries, it would be possible to have penetration without having a tear or fissure, depending on the width of the pole. Most importantly though, at all times, the victim has maintained that he was clothed during the incident. While it is true that we have held that the element of penetration can be established by circumstantial evidence, Gregory v. Commonwealth, Ky., 610 S.W.2d 598 (1980), I think the jury could have reasonably concluded that no penetration occurred and opted for a conviction on the lesser-included offense of Sexual Abuse I.

"An instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 298 (1993). "In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 360 (1999).

"Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." Keeble v. United States, 412 U.S. 205, 212-213, 93 S. Ct. 1993, 1998, 36 L. Ed. 2d 844, 850 (1973).

Since the jury was only presented with the options of a conviction for Sodomy I or a complete acquittal, I do not believe that this Court can say that the result of the case would not have been different if the jury was presented with the opportunity to convict Appellant on the lesser charge of Sexual Abuse I. Id. Accordingly, I would find that given the evidence presented, a reasonable juror could have entertained reasonable doubt that penetration occurred, as required for a conviction of Sodomy I, while believing beyond a reasonable doubt that Appellant was guilty of the lesser-included offense of Sexual Abuse I, which does not contain an element of penetration. Therefore, I find this to be palpable error and grounds for reversal.