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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: DECEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0260-MR

FINAL

DATE 1-8-04 Paula Yost, CDC

ROBERT L. HALL, JR. — APPELLANT

V.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
1999-CR-0505

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Robert L. Hall, Jr., was convicted of one count of first-degree sexual abuse, four counts of first-degree sodomy, two counts of second-degree sodomy, and two counts of third-degree sodomy. For these crimes, he was sentenced to a total of twenty years' imprisonment. He appeals to this Court as a matter of right. On appeal, Hall raises three issues. The first two concern the admission of an audio-taped conversation between Hall and J.H., the victim of these offenses. The third concerns the exclusion of testimony regarding the training Hall, who was an in-school suspension teacher, received for dealing with children in crisis. We conclude that there is no error in connection with the first two issues, but hold that the trial court erred in excluding the testimony in question, and therefore we reverse the judgment of the Boone Circuit Court.

The case against Hall began when Hall's wife, Cynthia, contacted the police from her place of work. She told the officer who responded to her call that her husband, Hall, had sexually abused their nephew, J.H., in the past. After taking this information, the responding officer then contacted Detective Tracy Watson by phone. Detective Watson talked with Cynthia, who explained that she was scared of her husband and that she feared for the safety of her own children. Also, she implored Detective Watson to contact J.H.[1]

Detective Watson followed up on this call by contacting J.H. She made arrangements with J.H. to come to her office for an interview. During this interview, J.H. related how Hall had sexually abused him. In order to corroborate these claims, Detective Watson instructed J.H. to telephone Hall. Further, she instructed J.H. to use a ruse in order to get Hall to admit to the abuse. The phone call was recorded and, over a defense objection, the tape was played for the jury.

On appeal, he attacks the introduction of the tape on two grounds: (1) its introduction violated his Fourth, Fifth, and Sixth Amendment rights; and (2) the introduction of the tape violated KRE 106. We disagree with both arguments.

I. Violation of Constitutional Rights

A. Right to Counsel

Hall first argues that the introduction of the tape violated his Constitutional right to counsel. But at the time the phone call was made and recorded, Hall had not been

[1]Cynthia testified on behalf of her husband at trial. In her testimony, she explained that she no longer believed that Hall had abused their nephew and that she no longer feared for her or for her children's safety. Basically, she stated that calling the police and reporting the abuse was the result of a severe reaction to prior sexual abuse that her grandfather had inflicted upon her. This reaction was triggered when J.H. told her that Hall had been abusing him, and, further, that Hall was currently stalking her and had threatened to kill her.

indicted or arrested. Consequently, at the time, Hall had no Sixth Amendment right to counsel. See, e.g., Linehan v. Commonwealth, Ky., 878 S.W.2d 8, 10 (1994), cert. denied, 513 U.S. 994, 115 S. Ct. 499, 130 L. Ed. 2d 409 (1994), quoting McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 2208, 115 L. Ed. 2d 158, 168 (1991). ("The Sixth Amendment right to counsel is 'offense-specific . . . it does not attach until a prosecution is commenced.'") Thus, any Constitutional right to counsel must flow from the Fifth Amendment. Id. But Hall had no Fifth Amendment right to counsel at the time the phone call was made and recorded. Hall was not in custody at the time. See, e.g., Wells v. Commonwealth, Ky., 892 S.W.2d 299, 302 (1995). Nor can he claim that his admissions were the result of official coercion because there is no evidence that Hall was aware that J.H. was acting at the direction of Detective Watson. See Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 792 (2003), citing cases. ("[T]he Fifth Amendment does not protect a defendant against interrogation by an undercover law enforcement agent unless the defendant is aware of his interrogator's status.")

Therefore, we hold that introduction of the audio tape did not violate Hall's Constitutional right to counsel.

B. Fourth Amendment Rights

Hall's Fourth Amendment claim is not well articulated. In fact, it is little more than a bare assertion of a violation. As we understand it, the argument has no support. Recording a conversation between an undisclosed government agent and a suspect in a crime does not violate the Fourth Amendment. Lopez v. United States, 373 U.S. 427, 438-39, 83 S. Ct. 1381, 1387-88, 10 L. Ed. 2d 462, 470 (1963). Therefore, we hold that there was no Fourth Amendment violation.

II. Violation of KRE 106

KRE 106 states:

> 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.

Hall argues that the introduction of the audio tape violated this rule because the tape did not consist of the entire telephone conversation between Hall and J.H. The Commonwealth concedes in its brief that the recording is incomplete. The Commonwealth admits that there was an approximate five minute gap in the middle of the conversation, which occurred when the tape was flipped over for recording on the other side, and a three-to-four minute deletion of the end of the conversation, which occurred because J.H. mistakenly stopped the tape before the phone conversation ended. Thus, Hall's argument is not that the entire tape should have been played for the jury, because it was. Rather, his argument is that the tape should not have been played, because it did not consist of the entire telephone conversation between the Hall and J.H. Therefore, KRE 106 is not implicated here. Instead, the issue is whether the trial court abused its discretion in playing the audio tape for the jury.

The admission of audio tapes is left to the sound discretion of the trial court. Johnson v. Commonwealth, Ky., 90 S.W.3d 39, 45 (2002). "That discretion presumes, as a prerequisite to admission, that the tapes be authentic, accurate and trustworthy." United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983). Further, the tape recordings "must be audible and sufficiently comprehensible for the jury to consider the contents." Id. The tapes should be excluded if the "unintelligible portions are so substantial as to render the recordings as a whole untrustworthy." Id. (internal quotation marks omitted).

Here, there is no argument that any portion of the tape is inaudible or unintelligible. Rather, the attack on the trustworthiness of the tapes is based on omissions in the underlying conversations. These omissions do not make the tapes inherently untrustworthy. Rather, to show error in the admission of the recordings, Hall must show some undue prejudice that flows from the trial court's ruling. This he has not done. The reasons for these omissions were explained at trial, i.e., the first omission was due to the nature of the tape recorder itself, and the second omission was the result of inadvertence by J.H. See United States v. Johnson, 767 F.2d 1259, 1271 (8th Cir. 1985). There is nothing to indicate that the omissions were the result of deliberate, real-time editing by the Commonwealth. See State v. Anthony, 837 S.W.2d 941, 944 (Mo. App. E.D. 1992). Nor is there any evidence that the omitted portions of the tape contained any exculpatory evidence. See id. Finally, Hall was able to testify to his recollection of the conversation, including what was said in the omitted portions. Gordon v. Commonwealth, Ky., 916 S.W.2d 176, 180 (1995). Under these circumstances, we hold that the trial court did not abuse its discretion in admitting the audio tapes.

III. Expert Testimony

In the audio-taped conversation between J.H. and Hall, J.H. never directly accused Hall of any crime and Hall never admitted to committing the charges against him. Hall did, however, repeatedly express feelings of remorse and guilt—he apologized to J.H. several times and asked his forgiveness. When J.H. asked Hall to get help, Hall replied that he was afraid to seek help because it would result in his going to prison, which, in turn, would destroy his own sons' lives. In the tape, Hall several times expressed his love and concern for his sons and stated that he would never hurt

them. While Hall made no direct admission of guilt or responsibility for the charges against him in the conversation, the conversation strongly implied that something very bad happened between Hall and J.H. in the past.

To counter the impact of this evidence, Hall testified that the conversation on the tape was not what it seemed. He explained that he believed that J.H. was suicidal at the time the call was made, and that he feared that J.H. might have had a gun in his hand as he spoke. In short, according to Hall, he believed that J.H. was in crisis. To defuse the situation, Hall explained that he then employed various techniques he had been taught and trained in for dealing with troubled youth. Hall testified that part of this training consisted of allowing the child to vent his anger and, if need be, to personally take blame for causing the child's distress. According to Hall, this helped to empower the child and to defuse the crisis.

Hall further explained that he had worked with suicidal children in the past and that it is "very, very common for [such children] to be angry at one person and [to] take that [anger] out on another person." Hall stated that he believed that J.H. was angry at his father. Using his training and experience in these type of situations, Hall testified that he allowed J.H. to transfer that anger to him and did this by taking the blame for the actions committed by J.H.'s father. Thus, Hall tried to convince the jury that his statements on the tape were the result of his training and not true admissions of guilt. To bolster this defense, Hall arranged for Dr. Stephen McCafferty, who was an assistant principal at the school where Hall worked, to testify on his behalf.

The Commonwealth objected to putting Dr. McCafferty on the stand on the grounds that the subject matter of his testimony fell under KRE 702 and that Dr. McCafferty had not been qualified as an expert. Defense counsel argued that Dr.

McCafferty was a lay witness and, therefore, KRE 702 had no application to his testimony. The trial court sustained the objection based on its conclusion that Dr. McCafferty's testimony fell under the category of "expert," and, therefore, it was "inappropriate" evidence. On appeal, Hall argues that the trial court ruled incorrectly and erred in excluding Dr. McCafferty's testimony. We agree.

By avowal, Dr. McCafferty testified that he worked with Hall. Dr. McCafferty explained that, in Hall's capacity as head of the in-school suspension program, Hall worked with many students who were in crisis and distress. Further, Dr. McCafferty testified that Hall had attended a number of training sessions conducted by him, in which McCafferty taught specific methods for "de-escalating strong feelings in other people." Finally, he testified that he had listened to the phone conversation between Hall and J.H. Dr. McCafferty testified that, in his opinion, Hall was employing some of the de-escalation techniques he had trained Hall to use. At the conclusion of this avowal testimony, the trial court reiterated its determination that this testimony was expert testimony.

The admissibility of expert testimony falls under KRE 702, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Thus, testimony which falls under the rule depends on the type of testimony proffered. Dr. McCafferty's testimony does not fall within the rule.

Dr. McCafferty's testimony can be separated into two portions: fact testimony and opinion testimony. The fact portion consisted of testimony that Dr. McCafferty worked with Hall, that Hall was the in-school suspension teacher, and that McCafferty had trained Hall in methods for dealing with children in crisis and distress. These facts

do not qualify as "scientific, technical, or other specialized knowledge." Nor do the methods themselves. Dr. McCafferty testified that these included "listening, being non-judgmental, drawing out what a person is saying because allowing a person in crisis, a person under great stress, to vent is an element in helping that person heal himself or herself." The trial court erred in excluding the fact portion of Dr. McCafferty's testimony as "inappropriate" expert testimony.

The opinion portion of Dr. McCafferty's testimony consisted of his opinion that Hall, in his conversation with J.H., employed some of the methods that he had trained Hall to use in dealing with children in crisis. There is nothing scientific, technical, or specialized about this testimony. Thus, rather than falling under KRE 702, the opinion portion of Dr. McCafferty's testimony falls under KRE 701, which states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Dr. McCafferty's opinion was based on his perception of the taped conversation and his personal knowledge of Hall's de-escalation training. Thus, it satisfies requirement (a). The opinion was not necessary, however, to understand his testimony. Rather, it was an additional conclusion to his testimony. Nor was it particularly helpful to determine the fact in issue it was proffered to prove, i.e., whether Hall was employing the de-escalating methods taught to him by Dr. McCafferty. That is, the jury—once apprised of the methods that Hall had been taught for dealing with youth in distress—could make its own determination whether, in the recorded conversation, Hall was in fact dealing with a child in crisis pursuant to his training or was, rather, facing his own

personal demons. Therefore, the opinion portion of Dr. McCafferty's testimony does not satisfy requirement (b), and that portion of his testimony was properly excluded. This leaves the question of whether the error in excluding the fact portion of Dr. McCafferty's testimony requires reversal. We hold that it does.

This case was basically a swearing contest between J.H. and Hall. There was no physical evidence of sodomy or sexual abuse. Nor was there any eyewitness testimony that corroborated J.H.'s claims. There was J.H.'s testimony and evidence of opportunity, i.e., evidence of times when J.H. and Hall were alone together. And there was the taped conversation. The audio tape was powerful evidence.

Hall attempted to meet the audio tape by explaining that his statements on the tape were not what they seemed. The foundation for convincing the jury of this explanation was that he was trained in methods in dealing with children in crisis and what these methods were. Without establishing this foundation, he could never hope to convince the jury that he was in fact using his training during his conversation with J.H.

The admissible portion of Dr. McCafferty's testimony would have shored up this essential foundation. Without it, the jury may well have concluded that all of Hall's testimony was completely self-serving and that he fabricated his training in a desperate bid to explain his statements on the tape. If the jury gave no credence to his testimony regarding his training, then it surely gave no consideration to his claims that he employed that training in the conversation with J.H. The error was not harmless. See Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 903 (2000). ("Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial.")

Therefore, we hold that the exclusion of the fact based portion of Dr. McCafferty's testimony was reversible error in this case.

For the reasons set forth above, we reverse the judgment of the Boone Circuit Court and remand this case for a new trial consistent with this opinion.

Lambert, C.J.; Cooper, Graves, Johnstone, Keller, and Stumbo, JJ., concur. Wintersheimer, J., concurs as to parts I and II and dissents as to part III without opinion.

COUNSEL FOR APPELLANT:

Edward G. Drennen
30 Shelby Street
P. O. Box 276
Florence, KY 41042

Robert Carran
1005 Madison Avenue
P. O. Box 468
Covington, KY 41012-0468

COUNSEL FOR APPELLEE:

A. B. Chandler III
Attorney General of Kentucky

Carlton S. Shier
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204