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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

FINAL

DATE 2-11-04 ELIA Grow.H, DC.

2002-SC-0880-MR

JAMES MELVIN RIGGS — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
NO. 98-CR-0993

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Melvin Riggs, was convicted of first-degree sexual abuse and first-degree sodomy in connection with the sexual molestation of his then stepdaughter. Appellant received five years on the sexual abuse charge and twenty years on the sodomy charge to run concurrently for a total of twenty years imprisonment. He was acquitted of the same charges brought in connection with his biological daughter. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant alleges four issues on appeal, namely that: (1) the trial judge committed reversible error when he failed to excuse three jurors for cause; (2) it was error to overrule Appellant's motion to compel the two victims to submit to a monitored interview with defense counsel; (3) it was error not to sever for trial the counts pertaining

to the stepdaughter victim from the counts involving Appellant's biological child; and (4) the prosecutor made improper comments during the closing arguments. For the reasons set forth below, we affirm Appellant's conviction.

Appellant was indicted in 1998 after his stepdaughter, then aged thirteen, alleged that Appellant had molested her numerous times from approximately 1989 through 1991, when she was four to six years of age. Appellant's biological daughter also claimed that Appellant had molested her several times during a two-week period she had visited Appellant at his home in 1997. Appellant's biological daughter was eight years old when the alleged abuse occurred.

Appellant's stepdaughter testified that Appellant would come into her bedroom after he got off of work (late at night) and wake her by fondling her under her pajamas. She also testified that Appellant forced her to engage in oral sex on numerous occasions. Appellant allegedly told his stepdaughter that her mother would be taken away from her if she told anyone about the abuse. The abuse ended apparently when Appellant and his stepdaughter's mother divorced and he moved from the home they shared.

Appellant's biological daughter testified that she had only been molested during the two-week period she stayed with Appellant during vacation. She testified that Appellant woke her in the night and had her come to the living room to watch a pornographic video titled "Dads and Daughters," where Appellant touched her and had her touch him. She also testified that Appellant then took her back to the bedroom where he forced her to engage in oral sex. Appellant also allegedly told her that she would be taken away from her family if she told anyone what had happened. Appellant's biological daughter did not come forward with her story until after her

stepsister had revealed her abuse. Ultimately, the jury acquitted Appellant on all counts relating to his biological daughter.

CHALLENGES FOR CAUSE

Appellant first alleges that the trial court erred in not striking three jurors for cause, thereby requiring that Appellant exercise peremptory strikes to remove the jurors from the venire panel.

Juror #36089 stated during voir dire that she had two family members that had been sexually abused and that she would therefore tend to lean toward the maximum penalty if Appellant was found guilty. This juror also stated that it would be hard to say if she could put her family history behind her and be impartial because "it's a sensitive issue." The juror ultimately stated that she could consider the entire penalty range.

Juror #26911 stated that he did not think even the maximum penalty available was harsh enough. This juror maintained that anything short of tying a rock around a child molester's neck and throwing him in the river would not be severe enough. After further questioning, the juror stated that he could live with a twenty-year sentence, since the rock was not an option, and further stated that he did not know the facts of this case yet.

Juror #27817 also favored the maximum punishment for a child molester. She stated that in her opinion, this offense was just short of murder. She also stated that she thought she could put those feelings aside and listen to the facts of the case.

In reviewing the failure to excuse prospective jurors for cause, we are bound to defer to the decision of the trial court unless that decision is found to be an abuse of discretion. Mabe v. Commonwealth, Ky., 884 S.W.2d 668, 670 (1994). If the trial court abused its discretion in not excusing a juror for cause, such is reversible error even if

Appellant ultimately used a peremptory challenge to remove the juror from the panel. Id.

Along with giving due deference to the decision of the trial court, we must look at the totality of the evidence when determining whether the challenged jurors possessed a mental attitude of "appropriate indifference." Id. at 671. "The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." Id.

Although a juror who would otherwise be disqualified as biased cannot be rehabilitated upon further questioning by the Commonwealth, Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 717-718 (1992), the record here does not show that any of the challenged jurors exhibited such a bias that they could not follow the requirements of the law and render a fair verdict. "A per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination." Mabe, supra, at 671. The fact that Jurors #26911 and #27817 did not initially feel that the maximum sentence for a child molester was harsh enough, does not automatically excuse them for cause. A review of the entirety of their comments suggests an ability to listen to the facts and consider the range of penalties for each charge. Likewise, just because a juror has been the victim of a violent crime, or has had family members who were victims of a violent crime, does not automatically require his or her excusal for cause in a trial for similar charges. Woodall v. Commonwealth, Ky., 63 S.W.3d 104, 118 (2001). Therefore, we cannot say that the trial judge abused his discretion when he failed to excuse Juror #36089, whose family members had suffered prior sexual abuse, for cause.

REQUEST TO INTERVIEW CHILD WITNESSES

Appellant next claims that the trial court erred when it denied his "Motion to Allow Defense Counsel to Interview [the minor children]." Defense counsel asked the trial court to compel the Commonwealth and the children's guardian to grant an interview with both children. Appellant states that without being allowed to interview the children, he was "essentially operating blind at trial."

Appellant concedes that no criminal rule of evidence explicitly gives him the right to interview a witness prior to trial. Appellant states that he is not advocating the right to take depositions of the child victims in all sexual abuse cases, but rather only when the circumstances of the particular case require it. He contends that the trial court has the inherent authority to order a witness to submit to a pre-trial interview. Appellant's argument has no merit.

"There is no right to take depositions for discovery in criminal proceedings in Kentucky." Rigsby v. Commonwealth, Ky., 495 S.W.2d 795, 798 (1973), overruled on other grounds by Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985); Wickware v. Commonwealth, Ky., 444 S.W.2d 272, 274 (1969). RCr 7.10 states in relevant part the grounds for taking depositions in criminal trials and allows the court to order a deposition only when "it appears that a prospective witness may be unable to attend or is or may be prevented from attending a trial or hearing. . . ." Since there was no concern that either witness would not be able to testify in person at trial, RCr 7.10 does not afford Appellant a right to depose/interview the witnesses.

Appellant also tries to equate the current situation with a trial court's authority to order that a witness submit to a physical or psychological examination by a defense or independent expert. See Turner v. Commonwealth, Ky., 767 S.W.2d 557 (1988) and

Mack v. Commonwealth, Ky., 860 S.W.2d 275 (1993). Turner and Mack both dealt with the application of CR 35.01, which gives a trial court the authority to order a party to submit to a physical or mental examination if such a condition is in controversy. In each case, this Court, guided by due process concerns, extended the scope of that rule to cover nonparty victims of child sexual abuse. We do not find Appellant's analogy to the present situation persuasive. This Court explicitly confined the holdings in those cases to the facts of each case, and we decline to extend the reasoning to the present circumstances. Appellant was not denied due process simply by the fact that he was unable to interview his accusers prior to trial. Appellant had both victims' statements to police prior to trial, and both victims testified at trial and were subject to defense cross-examination. There was no error.

SEVERENCE OF COUNTS

Appellant also finds error in the trial court's refusal to sever the counts pertaining to his stepdaughter from the counts in the indictment pertaining to his biological daughter.

The decision of whether to join offenses for trial is within the sound discretion of the trial judge and will be reversed only upon an abuse of that discretion. Violett v. Commonwealth, Ky., 907 S.W.2d 773, 775 (1995). The question is whether the joinder of the offenses resulted in undue prejudice to Appellant. Roark v. Commonwealth, Ky., 90 S.W.3d 24, 28 (2002); RCr 9.16. "The primary test for determining whether joinder constitutes undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other." Id. We have previously said that evidence of other sexual crimes committed by the accused may be admissible at trial if offered to show intent, motive, identity, knowledge, absence of mistake, or common

scheme or plan. Commonwealth v. English, Ky., 993 S.W.2d 941, 943 (1999); Anastasi v. Commonwealth, Ky., 754 S.W.2d 860, 861 (1988). Evidence of other instances of sexual misconduct is also admissible to show a common modus operandi. Pendleton v. Commonwealth, Ky., 685 S.W.2d 549, 552 (1985). In order for evidence of prior sexual misconduct to be relevant and not unduly prejudicial, the acts must be sufficiently similar and not too remote in time to one another. English, supra, at 944-945.

The trial court found in this case that the acts against Appellant's stepdaughter and biological daughter were similar enough to one another to warrant joinder of the offenses for trial. Specifically, the trial court found:

> In the present case, the Defendant is being charged with both sodomy and sexual abuse against two female children, one was his step-daughter at the time of the alleged act, the other is his natural daughter. Both children were around the same age at the time the alleged acts were committed; and, as a father figure, the Defendant stood in a position of authority over both children. He approached each child at night in her room while she was sleeping and was careful not to draw anyone else's attention to the transaction. The offenses were comprised of similar acts on each child, and the Defendant instilled fear in each child in an attempt to prevent them from telling anyone.

We agree that the similarity of acts committed on each child was sufficient to establish a pattern of conduct, or modus operandi, on the part of Appellant. The trial court relied on Anastasi, supra, that held an eight-year time span between incidences of sexual misconduct was not too remote, in finding that the five and a half year time gap in the current case was not unduly prejudicial. We cannot say that the trial court abused its discretion in finding that the probative value established by the similarities of the offenses outweighed any prejudice Appellant may have suffered as a result of the passage of time between offenses.

Appellant attempts to persuade us that our previous cases dealing with the admissibility of other acts of sexual misconduct are based on the conceptual flaw that the mental state of the accused is relevant in sex offense cases. Appellant contends that the only legitimate purpose for introducing evidence of abuse of his stepdaughter at the trial of his biological daughter (and vice versa) would be to prove the identity of the alleged perpetrator, which is not at issue. Modus operandi, Appellant contends, is usually used to prove the identity of an unknown assailant. Therefore, according to Appellant, evidence of other crimes is not relevant in his case. In Billings v. Commonwealth, Ky., 843 S.W.2d 890, 893 (1992), we said:

> While the issue of the corpus delicti is primary in these cases, identity of the perpetrator (if any) is not wholly irrelevant. It seems more accurate to say that the latter issue is assimilated into the former. If the act occurred, then the defendant almost certainly was the perpetrator. The two issues are essentially integrated. It is entirely appropriate, we believe, for purposes of assessing the admissibility of evidence of collateral crimes in the present context, to treat the evidence as if offered to prove identity by similarity, and to require that the details . . . be sufficiently similar as to demonstrate a modus operandi.

The similarity of the methods of commission of the acts upon Appellant's stepdaughter and biological daughter indicate a reasonable probability that the acts were committed by the same person. Adcock v. Commonwealth, Ky., 702 S.W.2d 440, 443 (1986). Evidence of Appellant's modus operandi would also be relevant to substantiate the victims' accusations by showing them not to be fabrications. The evidence of misconduct with Appellant's stepdaughter would have been admissible at the separate trial of his biological daughter; and likewise, the evidence pertaining to the biological daughter would have been admissible at the trial relating to the stepdaughter.

PROSECUTOR'S COMMENTS

Appellant concedes that this issue is not preserved for review and asks us to examine the prosecutor's comments for palpable error pursuant to RCr 10.26. Appellant takes offense to the prosecutor's final statement asking the jury to hold Appellant responsible on behalf of the two children. Appellant's argument has no merit and there was no palpable error.

For the reasons set forth above, we hereby affirm the judgment of the Jefferson Circuit Court.

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

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