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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: FEBRUARY 19, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-0921-MR

DATE 3-11-04 Ella Gray, D.C.

ALLAN DAVID GRUNDY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
01-CR-1743 AND 02-CR-1479

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

FACTS

Appellant, Allan David Grundy, was convicted by a Jefferson County jury of two counts of second-degree rape and being a second-degree persistent felony offender. Appellant was sentenced to nine years on each of the two counts of second-degree rape, enhanced to twenty years on each due to being found a persistent felony offender in the second degree. The trial court ordered that these sentences run concurrently. Appellant appeals as a matter of right.

When the victim, P.U., was thirteen years old, Appellant raped her twice, once in early February 2001 and again in April 2001. As a result of intercourse with Appellant, P.U. became pregnant and had an abortion. The tissue from the aborted fetus underwent DNA testing to determine paternity. The results of the DNA testing

evidenced a combined paternity index of 406 to 1 which translated to a probability of paternity of 99.75% by Appellant.

On July 19, 2001, Appellant was indicted on two counts of rape in the second degree. On July 23, 2002, Appellant was tried by a jury and found guilty of two counts of rape in the second degree and being a persistent felony offender in the second degree.

Appellant raises the following four issues on appeal: (1) prejudice by denial of a continuance; (2) admissibility of opinions concerning combined paternity index and probability of paternity based on DNA testing of a mixed sample containing both fetal and maternal tissue; (3) introduction of evidence from pre arrest questioning; and (4) denial of a mistrial because the victim gave an avowal inconsistent with her trial testimony.

I. DENIAL OF CONTINUANCE

On the day of trial, after both sides announced they were ready for trial and the trial court had ruled on pre-trial motions, Appellant moved for a continuance because he wanted to dismiss his counsel and hire a new attorney. At the hearing on this motion, the trial court asked for an explanation of the problem with his current counsel. Appellant advised the trial court that his complaint was his counsel's handling of the DNA issue because the defense did not have an expert in opposition to the Commonwealth. Counsel for Appellant informed the trial court that the physician he had consulted at DNA Diagnostics could not give testimony that would help Appellant because in his professional opinion the Commonwealth's DNA testing was probably more accurate. During a hearing on the admissibility of the results of the DNA testing,

Appellant indicated to his counsel that he preferred to defend by challenging the chain of custody rather than having the DNA material reevaluated.

RCr 9.04 states that:

> The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

Appellant failed to meet the requirements of RCr 9.04 because he did not file an affidavit stating the facts and materiality of the evidence he expected to obtain of the witnesses who were not present.

The trial court has broad discretion in granting or denying a motion for a continuance. Woodall v. Commonwealth, Ky., 63 S.W.3d 104, 128 (2001), cert. denied, 537 U.S. 835 (2002), (citing Dishman v. Commonwealth, Ky., 906 S.W.2d 335, 339 (1995)). The factors to be considered are the following:

> [L]ength of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Woodall, supra, at 129. The trial court was correct in finding there was no justifiable basis for Appellant's request for a continuance.

II. ADMISSIBILITY OF RESULTS OF DNA TESTING

Appellant argues error in the admission of opinion evidence of the combined paternity index and probability of paternity based on DNA testing on the mixed sample of fetal and maternal tissue. Appellant does not challenge the DNA testing procedure

but only the calculations of the odds and percentages used to obtain paternity index and probability of paternity based on DNA testing of a mixed sample.

Trial courts in Kentucky can take judicial notice of scientific evidence that is reliable and no longer require a Daubert hearing. Johnson v. Commonwealth, Ky., 12 S.W.3d 258, 261-62 (1999). The issue of scientific reliability goes to the weight of the evidence rather than admissibility. Id.

The trial court determines relevancy and admissibility of evidence. With respect to evidentiary issues, "[a] decision of a trial court will not be disturbed in the absence of an abuse of discretion." Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996). The standard for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair or unsupported by sound legal principles." Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). While DNA evidence does not require a Daubert hearing and is admissible, DNA evidence is still subject to challenge at trial regarding the handling of the samples, the chain of custody, the accuracy of the procedures, and the quality of the training of persons performing actual tests and any other challenges as to the credibility of the evidence. Fugate v. Commonwealth, Ky., 993 S.W. 2d 931, 938 (1999). However, such challenges go to the weight of the evidence, not its admissibility. Id.

Appellant challenges the reliability of the calculations of the paternity index and probability of paternity. In Butcher v. Commonwealth, Ky., 96 S.W.3d 3 (2002), cert. denied, __U.S.__, 124 S.Ct. 174 (2003), we held paternity test results are admissible in a criminal trial. Because the Commonwealth's expert admitted there was no standard protocol for establishing paternity of fetal tissue, Appellant challenged the calculations of the probability of paternity and combined paternity index. However, Appellant failed to

put forth any evidence that the calculations were unreliable. We held in Butcher, supra, that there is ample opportunity to question the use of the prior probability and that the jury was free to believe or disbelieve the expert's opinion. Id. at 8. No error occurred in admitting the paternity test results.

The fact there is not a national standard for indexing in mixed tissue situations does not mean that there are no scientifically acceptable procedures. The trial court was correct in ruling that a Daubert hearing on the calculations of probability of paternity was not necessary because it was an issue of weight, and Appellant was entitled to obtain the tissue to do his own testing.

Based on the record in the current case, there is more than sufficient evidence to convict Appellant even if the chain of custody was found to be deficient and the DNA results were not introduced. P.U. testified that Appellant was physically abusive and engaged in other sexual touching. P.U. testified that Appellant forced her to have sexual intercourse with him on two occasions as well as the sexual contact that Appellant subjected her to as a girl, which resulted in a pregnancy with an abortion. The victim's testimony, standing alone, was sufficient to sustain Appellant's conviction.

Kentucky law states that uncorroborated rape victim testimony "if not contradictory or incredible, or inherently improbable" is sufficient to sustain a conviction. Dyer v. Commonwealth, Ky., 816 S.W.2d 647, 651 (1991), overruled on other grounds, Baker v. Commonwealth, Ky., 973 S.W.2d 54 (1998). See also Garrett v. Commonwealth, Ky., 48 S.W.3d 6, 10 (2001); Commonwealth v. Cox, Ky., 837 S.W.2d 898, 900 (1992). The jury shall decide the weight and the credibility of the evidence, and the decision of the jury shall not be disturbed by the trial court. Partin, supra, at 220. See also Estep v. Commonwealth, Ky., 957 S.W. 2d 191, 193 (1997).

III. PRE-ARREST QUESTIONING

Appellant argues that the trial court erred in allowing the introduction of Detective Newton's testimony regarding Appellant's pre-arrest statements made while interviewing Appellant in his home. Appellant was not in custody during the interview in his home. Appellant filed a pretrial motion requesting the trial court to exclude any mention of Appellant's invocation of his right to remain silent and/or statements that he would wait until he had an opportunity to review the DNA results.

Since Appellant was not in custody during the interview, Miranda warnings were not required, and any statements made by Appellant to Detective Newton were voluntary statements and could be used at trial. Any invocation of the constitutional right to remain silent must be made clearly and unequivocally or evidence will not be excluded. Appellant's statement that he would wait to see what the DNA results showed was not a clear indication that he did not want to answer any more questions from Detective Newton.

The United States Supreme Court has held that Miranda warnings are only required when the suspect being interrogated is "in custody." Thompson v. Keohane, 516 U.S. 99, 102, 116 S.Ct. 457, 460, 133 L.Ed.2d 383, 388 (1995). "Custodial interrogation" is defined in Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966), as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." See also Thompson, supra at 107, 116 S.Ct. at 462. Miranda warnings are only required where there has been "such a restriction on a person's freedom as to render him 'in custody.'" Id. (quoting Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528, 128 L.Ed.2d 293 (1994) (per curiam)). The ultimate

inquiry for making an "in custody" determination is whether the person was under formal arrest or whether there was a restraint on his freedom of movement to the degree associated with a formal arrest. Thompson, supra, at 112, 116 S.Ct. at 456; United States v. Mahan, 190 F.3d 416, 421 (6th Cir. 1999).

Custody or seizure has not occurred until the police, by some form of physical force or show of authority, have restrained the person's liberty. Baker v. Commonwealth, Ky., 5 S.W.3d 142, 145 (1999) (citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The test is whether, looking at the surrounding circumstances, a reasonable person would have believed he or she was free to leave. Id. (citing United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed. 2d 497 (1980)).

The United States Court of Appeals for the Sixth Circuit held that one factor to consider in determining whether someone is in custody is whether a reasonable person believed that he was free to end the interrogation and leave. United States v. Crossley, 224 F.3d 847, 861 (6th Cir. 2000). See Mason v. Mitchell, 320 F.3d 604, 631 (6th Cir. 2003). Other factors to be considered are the following:

> (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police or voluntarily admitted the officers to the residence and acquiesced to their requests to answer some questions.

Id. (quoting United States v. Salvo, 133 F.3d 943, 950 (6th Cir. 1998), cert. denied, 523 U.S. 1122 (1998)).

Based on the totality of the circumstances, including Appellant's own testimony, Appellant was not in custody when his statements were made during the interview with Detective Newton. Custody requires a restraint on Appellant's freedom or a coercive environment. Farler v. Commonwealth, Ky., 880 S.W.2d 882, 885 (1994). "Coercive environments not rising to the level of formal arrest or restraint on freedom of movement do not constitute custody within the meaning of Miranda." United States v. Phillip, 948 F.2d 241, 247 (6th Cir. 1991), cert. denied, 504 U.S. 930 (1992).

In Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the United States Supreme Court held that "ambiguous or equivocal" statements do not sufficiently invoke Fifth Amendment rights. In the current case, Appellant never mentioned his right to remain silent and continued to voluntarily talk with Detective Newton. Objectively, none of Appellant's statements could be construed as an unequivocal and unambiguous invocation of his Fifth Amendment right to remain silent. Therefore, Detective Newton's comment did not go to Appellant's silence, but could equally be construed as a comment on Appellant's statement that the results of the DNA test would exonerate him. Whether Detective Newton actually believed he was guilty did not prejudice Appellant as the jury would conclude Detective Newton sought an indictment because she thought Appellant was guilty.

The trial court determines relevancy and admissibility of evidence. With respect to evidentiary issues, "[a] decision of a trial court will not be disturbed in the absence of an abuse of discretion." Partin, supra, at 222. See English, supra, at 945. The standard for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair or unsupported by sound legal principles." Id.

All of Appellant's statements made to Detective Newton were clearly voluntary and were not made during custodial interrogation. Additionally, Appellant did not invoke his constitutional right to remain silent. The trial court was correct in finding that the interview in Appellant's home did not amount to an interrogation requiring that Appellant be Mirandized.

IV. MOTION FOR A MISTRIAL

On direct examination, P.U. testified that she had sex with Appellant on two occasions. Then on cross examination, P.U. admitted that she told her counselor it was twenty times. The Commonwealth objected, and the trial court sustained the objection because Appellant's counsel was using a confidential document, which was inadmissible evidence, to impeach P.U. Then Appellant was allowed to introduce by way of avowal testimony about P.U. having said she had sex with Appellant twenty times. The trial court ruled that the document from P.U.'s counselor was confidential and not admissible and therefore the avowal testimony was not grounds for a mistrial.

"A trial court has broad discretion in determining when a mistrial is necessary." Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 906 (2000). The trial court's decision in determining whether to grant a mistrial should not be overturned absent an abuse of discretion. Clay v. Commonwealth, Ky.App., 867 S.W.2d 200, 204 (1993). A trial judge is best situated to intelligently decide if a mistrial is necessary, but the reasons must be compelling. Gosser, supra. A motion for mistrial should only be granted if the court decides a "manifest necessity for such an action or an urgent or real necessity." Id.

Since the jury heard P.U.'s prior inconsistent statement about the number of times of sexual intercourse, the trial court's denial of further questioning of P.U. was correct and there was no prejudice to Appellant. The jurors knew that P.U. made the

inconsistent statement that she had sexual intercourse with Appellant twenty times as opposed to her direct testimony that she had sexual intercourse on two occasions. The trial court properly denied Appellant's motion for mistrial.

The judgment of the Jefferson Circuit Court is affirmed.

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

Cooper, J., dissents in a separate opinion in which Stumbo, J., joins.

Keller, J., dissents in a separate opinion in which Cooper and Stumbo, J.J., join.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE COOPER

I fully concur with Justice Keller's separate dissenting opinion that the trial judge's failure to hold a Daubert hearing before admitting the results of DNA testing that used "modified" formulae without any established protocol requires reversal for a new trial. However, I believe the trial judge committed two additional reversible errors by (1) permitting the investigating officer to testify to her opinion that Appellant was guilty, and (2) not permitting Appellant to cross-examine the victim with respect to the two prior inconsistent statements she made, one to a counselor and the other during a confidential family court custody hearing.

I. OPINION AS TO GUILT.

Officer Jeri Newton testified that she interviewed Appellant at his home on June 4, 2001, and asked him whether he had subjected the victim to sexual intercourse. She further testified that she informed him that she believed his equivocal response was

an indication of guilt. We have long held that a witness may not express an opinion to the jury as to the defendant's guilt. Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 889-90 (1997) (expert witness may not express opinion as to defendant's guilt or innocence); Meredith v. Commonwealth, Ky., 959 S.W.2d 87, 91-92 (1997) (placing contents of letter before jury improper because it contained author's opinion that defendant was guilty); Nugent v. Commonwealth, Ky., 639 S.W.2d 761, 764-65 (1982). See also Cooper v. Sowders, 837 F.2d 284, 287 (6th Cir. 1988). We have further held that a witness should not be permitted to interpret what another person meant by his statements. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 33-34 (1998); Adcock v. Commonwealth, Ky., 702 S.W.2d 440, 442 (1986). It is immaterial that Newton's opinion was stated indirectly, i.e., that she told Appellant she believed he was guilty, as opposed to directly. The result was the same.

II. RIGHT TO CONFRONTATION.

The victim testified that Appellant had sexual intercourse with her on only two occasions, once in February 2001 and again in April 2001. Defense counsel sought to impeach the victim's credibility by eliciting on cross-examination statements made to her school counselor and father that Appellant had subjected her to sexual intercourse on twenty occasions. Defense counsel had obtained this information from allegedly confidential records of a family court custody hearing. The trial court refused to allow the cross-examination, citing the counselor-client privilege, KRE 506(b), and the confidentiality of the family court records. On avowal, the victim admitted that she made the statements.

As noted in Commonwealth v. Barroso, Ky., 122 S.W.3d 554, 558 (2003), KRE 506(b) is a qualified privilege that does not apply "if the judge finds: (A) [T]hat the

substance of the communication is relevant to an essential issue in the case; (B) [T]hat there are no available alternate means to obtain the substantial equivalent of the communication; and (C) [T]hat the need for the information outweighs the interest protected by the privilege." Id. (citing KRE 506(d)(2)). The trial court made no findings on these issues. Even so, any findings that would have excluded the prior inconsistent statement made to the counselor would have been clearly erroneous. First, it was not shown that the counselor to whom the statement was made was a "counselor" within the meaning of the privilege. KRE 506(a)(1)(A). Second, any evidence that impugns the credibility of the prosecuting witness is relevant to an essential issue in the case. Third, there was no alternate means available to obtain this information. Finally, there is no confidentially interest in this information. Appellant was accused of sexually assaulting the victim on two separate occasions. There is no need to protect the victim's earlier statements that she had been assaulted by him twenty times.

The holding that the confidentiality of family court records somehow warrants suppression of these statements is specifically belied by the United States Supreme Court's holding in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Davis held that a state's interest in the confidentiality of certain court proceedings must yield to a criminal defendant's Sixth Amendment right to confront the witnesses against him. Id. at 320, 94 S.Ct. at 1112. In Davis, the defendant was precluded from proving the bias of an adverse witness by showing that the witness was on probation for a juvenile adjudication. This decision was based on the confidentiality afforded to state juvenile court records. Id. at 312-14, 94 S.Ct. at 1108-09. Holding otherwise, the Supreme Court noted:

> [T]he jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to

> place on Green's testimony which provided a crucial link in the proof . . . of petitioner's act. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner.

Id. at 317, 94 S.Ct. at 1111 (citations and quotations omitted).

Likewise, I believe that the jurors in Appellant's case were entitled to know that his accuser had made two prior inconsistent and apparently exaggerated accusations of sexual assault against him so that they could properly evaluate the credibility of her present accusations.

Accordingly, I dissent and would reverse for a new trial.

Stumbo, J., joins this dissenting opinion.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE KELLER

I respectfully dissent and vote to vacate Appellant's Second-Degree Rape conviction and to remand the case with instructions for the trial court to perform its KRE 702 "gatekeeper" function by conducting the admissibility inquiry identified in Daubert v. Merrill Dow Pharmaceuticals, Inc.,[1] and adopted in Kentucky in Mitchell v. Commonwealth[2] with respect to the expert opinion testimony concerning the probability that Appellant had impregnated the complaining witness. Although this Court held in Fugate that "the DNA comparison analysis using the RFLP and PCR methods is admissible without being the subject of a pretrial Daubert hearing,"[3] Appellant's motion *in limine* did not challenge the scientific reliability of DNA comparisons in general, but raised a specific objection to the proffered opinions in this case, i.e., a 99.75%

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[1] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[2] Ky., 908 S.W.2d 100 (1995), overruled in part by Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999).

[3] Fugate, 993 S.W.2d at 937-8.

probability of paternity admittedly calculated using "modified" formulae and without any established protocol from a mixed sample of fetal and maternal tissue that made the standard DNA comparison calculations inapplicable. I agree with Appellant's contention that the proffered evidence did not represent a "method[ ] or technique[ ] that ha[s] been scrutinized well enough in prior decisions to warrant taking judicial notice of their status,"[4] and thus the trial court was required to evaluate the scientific reliability of this expert testimony before permitting its introduction. Accordingly, I would vacate Appellant's conviction and remand this case for the trial court to conduct an evidentiary hearing to determine whether this evidence was scientifically reliable. If the trial court found that the evidence should not have been admitted, Appellant would be entitled to a new trial at which this evidence would be excluded. If, however, the trial court found the evidence to be scientifically reliable, it would reinstate the prior judgment of conviction, and Appellant could seek appellate review from the trial court's reliability determination.

Cooper and Stumbo, JJ., join this dissenting opinion.

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[4] Johnson v. Commonwealth, Ky., 12 S.W.3d 258, 261 (2000).