IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-0857-MR

DATE 9-16-04 Ella Grauich, D.C.

FRANK JOHNSON APPELLANT

V.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
98-CR-00301

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Appellant, Frank Johnson, appeals as a matter of right[1] from the final judgment of the Daviess Circuit Court sentencing him to twenty-five (25) years of imprisonment for five (5) counts of third-degree sodomy. The issues presented are whether the trial court erred in excluding evidence of the victim's juvenile record, whether Appellant's right to a speedy trial was violated, whether the trial court erred in denying Appellant's motion for directed verdict, whether the trial court improperly admitted evidence of uncharged prior bad acts, whether the trial court erred in not striking a witness's testimony as to Appellant's admission that he engaged in sexual acts with the victim, and whether the sentence imposed upon Appellant violates the statutory maximum provided by law.

[1] Ky. Const. § 110(2)(b).

Appellant is best described as the victim's, N.J.'s, former step-grandfather. After the divorce of N.J.'s mother and step-father, Appellant continued to have a relationship with the victim until charges were brought in the summer of 1998. Following a heart attack in 1993, Appellant had stopped working, and spent much of his time with N.J. and his best friend, W.M. Both N.J. and W.M. were thirteen at the time.

At trial, N.J. testified that Appellant's relationship with him changed when he was about thirteen or fourteen years old. N.J. said that Appellant began buying clothes, cigarettes, alcohol, and marijuana for him, and giving him money. The victim stated that Appellant let him drive his vehicle on outlying roads.

N.J. testified that Appellant began to talk with him about sex. He stated that Appellant made pornography available to him in the form of magazines and videotapes. Then, during a trip to southern Indiana, Appellant gave him a marijuana cigarette to smoke and told him to look at a Playboy magazine. While the victim was looking at the magazine, Appellant performed oral sex on him. N.J. testified that he and Appellant had sexual contact on a regular basis from the time N.J. was thirteen until he was fifteen. Appellant would bargain for "snuggle time," or oral sex in exchange for alcohol, cigarettes, and marijuana. N.J. ended the sexual contact with Appellant on May 2, 1998, after telling his mother that Appellant had sexually abused him.

W.M., N.J.'s best friend, testified that Appellant allowed him to have alcohol, marijuana, and pornography when he came over to Appellant's home. W.M. said that Appellant encouraged both children to masturbate in front of him while watching pornographic videos. W.M. stated that N.J. had told him of the "snuggle time" with Appellant. N.J. also told W.M. that Appellant had offered to perform oral sex, although N.J. claimed that he had declined the offer.

W.M. said that his relationship with Appellant began to change in May of 1998, after the end of N.J.'s relationship with Appellant. Appellant began to buy him cigarettes and marijuana, and to give him money. He allowed W.M. to drive his car. W.M. stated that every time he smoked marijuana, Appellant would ask him to sit on his lap. He claimed that eventually Appellant began to put his hands under W.M.'s shirt. W.M. testified that when he asked Appellant if N.J.'s accusations were true, Appellant replied: "Yes and No. Yes it happened, but not the way N.J. said it did." W.M. broke off his contact with Appellant after an offer to buy him a class ring during his senior year of high school. W.M. felt that Appellant's demands would increase if allowed to purchase the ring.

At trial, Appellant claimed that N.J.'s accusations were the product of Appellant's role as a disciplinarian in N.J.'s life and a belief that Appellant was "out to get him." Appellant testified to specific incidents that could have created this perception in N.J.: he had turned in N.J.'s drug suppliers to the police, and had informed the police that N.J. had lied to an officer as to the cause of a head injury during an accident investigation. Appellant also stated that N.J. wanted to attend a friend's party, but had been told that he was staying overnight with Appellant the evening of May 2, 1998, when the accusations were made, because his mother would be away attending a Garth Brooks concert. Appellant claims that the accusations were N.J.'s attempt to get even with him.

Appellant was charged with five counts of third-degree sodomy, and indicted on September 9, 1998. Appellant was arraigned on September 15, 1998, and was released on bond. The trial began on June 24, 2002. The delay between indictment and trial was forty-five (45) months. The record is silent as to the reasons for the great

majority of the delay, but Appellant was granted two continuances. The jury returned a verdict of guilty for five (5) counts of third-degree sodomy. Appellant was convicted and sentenced to twenty-five (25) years imprisonment, five (5) years for each count.

Appellant argues that the trial court's exclusion of N.J.'s juvenile record violated the Confrontation Clause of the Sixth Amendment. Appellant claims this violation prohibited his defense from revealing N.J.'s bias against him. During cross-examination, N.J. was asked if he had appeared in court prior to that date for any reason. N.J. replied that he had never been in court before. He stated that he had no recollection of any court appearances, and that no criminal charges were ever filed against him.

At trial, Appellant called Officer Mark Smith of the Owensboro Police Department to testify about events concerning a head injury that N.J. had sustained as a child. Officer Smith confirmed that N.J. had told him that he had fractured his skull as a result of slipping on slick pavement while running around. Officer Smith then stated that upon further investigation it was discovered that N.J. had actually sustained the injury when he jumped from the running board of a moving van that he had been riding. Appellant attempted to ask if N.J. had been charged with a crime as a result of the original report, but the trial court curtailed this as an improper form of impeachment. The trial court did allow Appellant to ask Officer Smith if N.J. had ever been required to appear in court, but Appellant chose not to ask this question. Rather, Appellant chose to ask Officer Smith if he and N.J. ever had any further dealings, to which the officer gave a negative reply.

The procedure used to preserve trial court rulings on the admissibility of evidence is detailed in KRE 103 and RCr 9.52. KRE 103 provides:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and . . . .
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> > (2) Offer of proof. In case the ruling is one excluding evidence, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.
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> (b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

RCr 9.52 closely tracks the language of KRE 103.[2]

Without an avowal a reviewing court lacks the information necessary to determine whether the trial court committed prejudicial error in excluding the testimony.[3] In the case *sub judice*, Appellant argues that the excluded testimony was necessary to establish N.J.'s bias against him. In Caudill v. Commonwealth,[4] the defendant in a sodomy case attempted to establish that the mother of the victim was biased against him, but did not offer an avowal of the excluded testimony. That defendant argued that his defense was prejudiced by the absence of the testimony. We held in Caudill that want of an avowal left the propriety of the trial court's exclusion unpreserved for review.[5]

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[2]RCr 9.52 provides:

> In an action tried by jury, if an objection to a question propounded to a witness is sustained by the court, upon the request of the examining attorney the witness may make a specific offer of his or her answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

[3] Commonwealth v. Ferrell, Ky., 17 S.W.3d 520, 523 (2000); Partin v. Commonwealth, Ky., 918 S.W.2d 219, 223 (1996).

[4] Ky., 777 S.W.2d 924 (1989).

[5] Id. at 926.

Regardless of preservation, it is unlikely that using this testimony to show N.J.'s bias would have had a material effect on the case. Appellant was allowed to testify to incidents showing motivation for N.J. to falsely accuse him. Appellant testified to generally acting as a disciplinarian, reporting N.J.'s drug sources to police, alerting the police to the real cause of N.J.'s head injury in an accident investigation, and interfering with N.J.'s recreational plans immediately prior to the accusations of sodomy.

Any error the trial court might have made would not have been reversible. Violations of the Confrontation Clause are subject to harmless error analysis.[6] The inquiry in such a case is as follows:

> Whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends on a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.[7]

Viewed with Appellant's own testimony, the testimony of Officer Smith appears cumulative. Despite the exclusion of Officer Smith's testimony, Appellant was allowed to paint a "reasonably complete picture of the witness' veracity, bias, and motivation."[8] Additionally, the trial court allowed pertinent cross-examination of Officer Smith. Appellant was permitted to ask Officer Smith if N.J. had ever appeared in court. This went toward contradicting N.J. on his claim that his presence at trial was the first time

[6] Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).
[7] Id. at 684 (emphasis added).
[8] Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 721(1997).

he had ever been in a court proceeding. Appellant did not utilize this opportunity. In light of these factors, any error the trial court may have made was harmless beyond a reasonable doubt.

Appellant's second argument is that he was denied a speedy trial, a right that is protected by the Sixth Amendment of the U.S. Constitution and Section Eleven of the Kentucky Constitution. Barker v. Wingo[9] set forth the test for determining if the right to a speedy trial has been violated. Barker provides that when analyzing an alleged speedy trial violation, a court must look to the length of the delay, the reason for the delay, the assertion of the right, and the prejudice to the defendant.[10] No single factor is "necessary or sufficient" to establish a deprivation of a speedy trial; instead, we must balance all of the factors in conjunction with the particular facts of the case.[11]

The analysis begins with a determination of whether the length of the delay was presumptively prejudicial. The length of the delay acts as a triggering factor. If it is not presumptively prejudicial, then there is no violation of Appellant's rights and further analysis is not required; however, if it is deemed prejudicial, the analysis continues with the remaining factors.[12] To determine whether a delay is presumptively prejudicial, the nature of the charges must be viewed in regard to the length of the delay.[13] Cain v. Smith[14] held that a complex case, such as conspiracy, may justify a longer delay than a "mundane garden variety" burglary or assault.

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[9] 407 U.S. 514, 92 S. Ct. 2128, 33 L. Ed. 2d 101 (1972).
[10] Id. at 530.
[11] Id. at 533.
[12] Dunaway v. Commonwealth, Ky., 60 S.W.3d 563, 569 (2001).
[13] Id.
[14] 686 F.2d 374 (6th Cir. 1982).

In the instant case, Appellant was charged with five counts of third-degree sodomy. This is not generally a crime requiring forty-five months of preparation. Here the great majority of the evidence is testimonial and required little discovery time. Cain, a robbery case, held that a delay of eleven and one-half months triggered additional inquiry into the remaining Barker factors.[15] In McDonald v. Commonwealth,[16] an appeal from multiple convictions including rape, the pretrial delay of three years was considered presumptively prejudicial. In the instant case, the delay of forty-five months from indictment to trial in such circumstances clearly prompts further analysis.

Having concluded that the delay in this case was presumptively prejudicial, we now turn to the reasons for the delay. Delays may fit within three categories: (1) deliberate attempts to delay the trial so that the effectiveness of the defense is impaired; (2) neutral reasons, such as negligence or overcrowded dockets; and (3) valid reasons, such as a missing witness.[17] Different reasons are accorded different weight in the balancing process, so that a delay for negligence would weigh more heavily against the negligent party than delay due to an overcrowded docket.[18] The primary burden remains "on the courts and the prosecutors to assure that cases are brought to trial."[19]

The record is silent as to why there was a delay of thirty-eight months from the date Appellant was indicted, September 9, 1998, to the pretrial conference on December 4, 2001. As it is the burden of the Commonwealth to explain the cause for

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[15] Id. at 382.
[16] Ky., 569 S.W.2d 134, 136 (1978)
[17] Barker, 407 U.S. at 531.
[18] Dunaway, 60 S.W.3d at 570.
[19] Barker, 407 U.S. at 529.

pretrial delay, any unexplained delay is weighed against it.[20] However, from that moment, the record shows that Appellant was the cause for all remaining delays until the trial took place on June 24, 2002. On March 5, 2002, Appellant told the trial court he was not ready to proceed with trial and that additional investigation was required. The trial court allowed six weeks for further preparation. Six and one-half weeks later, on April 22, 2002, Appellant was granted an additional continuance and a new trial date was set for June 24, 2002. Delay caused by Appellant is not to be considered while determining if the right to a speedy trial has been violated.[21]

The third factor in the Barker test regards Appellant's assertion of his right to a speedy trial. In this case, Appellant never made a formal assertion of his right. A failure to assert the right does not excuse a constitutional violation; however, it will make it difficult for Appellant to prove that there was a denial of his right.[22] Appellant did file a motion to dismiss for failure to prosecute, but such a motion is not equivalent to a formal demand for a speedy trial.[23]

The final Barker inquiry concerns the prejudice that Appellant suffered due to the delay. Prejudice can take one of three forms as identified by the Barker court: (1) oppressive pretrial incarceration, (2) anxiety and concern of the accused, and (3) impairment to the defense by dimming memories and loss of exculpatory evidence.[24] As Appellant was released on bond almost immediately, the first form of prejudice does not exist in this case.

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[20] Cain, 686 F.2d at 382.
[21] Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 70 (2000).
[22] Cain, 686 F.2d at 383-84.
[23] Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 22 (1998).
[24] Barker, 407 U.S. at 533.

Appellant does contend that he was prejudiced in the two remaining ways. He claims that his health deteriorated during the forty-five months prior to trial due to anxiety and concern, and that he was prejudiced from the inability of some witnesses to clearly recall facts. No evidence is presented linking Appellant's worsened health to the delay of the trial. The burden of showing actual prejudice is on Appellant.[25] It is not improbable that the health of an elderly man might decline during a period of almost four years, independent of any strain caused by an impending trial.

Although Appellant claims that he suffered prejudice due to witnesses' difficulty in recalling events, Appellant never discloses what information has been denied him by the passage of time. Appellant specifically complains of only one witness, other than himself, that being the victim, N.J. The Commonwealth's chief witness is the least likely of all to aid in Appellant's defense. As to Appellant's claim that he had difficulty with memory recall, the person best positioned to gauge his ability to testify effectively was Appellant himself. If he had wanted to present well preserved testimony to the jury, Appellant would have asserted his right to a speedy trial rather than actively seeking continuances.

There is no claim that a key witness was unavailable at trial, that an alibi was unable to be presented, or that the defense had been irreparably harmed by the loss of some tangible evidence. There is no showing that Appellant endured oppressive pretrial incarceration. All that is claimed here is that an elderly individual suffered ill-health, which is not directly connected to pretrial anxiety.

In summary, although the forty-five month pretrial period is presumptively prejudicial, that alone does not constitute a violation of Appellant's right to a speedy

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[25] Preston, 898 S.W.2d at 504.

trial. Appellant's motions for continuances, failure to assert his right to a speedy trial, and lack of actual prejudice diminish the weight of Appellant's claim sufficiently that reversal is not required.

Appellant also contends that the trial court erred by denying his motion for directed verdict. Appellant argues that the evidence produced at trial was insufficient as a matter of law to support a conviction for third-degree sodomy. The standard for a motion of directed verdict is set forth in Commonwealth v. Benham:[26]

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserve to the jury questions as to the credibility and weight to be given to such testimony.
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> 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.

Upon motion for directed verdict, the trial judge is in the best position to analyze the evidence presented, and to determine if it is "sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty."[27] The Benham standard explicitly states that questions pertaining to credibility are reserved for the jury. In the instant case, the Commonwealth's evidence took the form of testimony from individuals that Appellant claims have bias against him. Although it is true that testimony may sometimes be so "incredible on its face as to require its rejection as a matter of law,"[28] that is not true in this case. The testimony presented at trial was not

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[26] Ky., 816 S.W.2d 186, 187 (1991).
[27] Id.
[28] Taylor v. Commonwealth, 301 Ky. 109, 113, 190 S.W.2d 1003, 1005 (1945).

so "incredible or improbable or so at variance with natural laws or common human experience as to be patently untrue,"[29] thus requiring a reasonable jury to find for the defendant. The jurors' function was to hear the testimony and determine its veracity. The trial court correctly denied the motion for directed verdict.

Appellant's fourth claim is that the trial court improperly admitted evidence of uncharged prior bad acts. Appellant filed a motion *in limine* to exclude any reference at trial to Appellant's supplying N.J. and W.M. with cigarettes, alcohol, marijuana, or pornography. This motion was denied by the trial court. At trial Appellant did not make specific objections to any of the Commonwealth's evidence of wrongfully supplying the above substances to minors. Although we question whether this claim is properly preserved,[30] we will address the merits of the argument.

At trial, N.J. testified that immediately prior to his first sexual encounter with Appellant he was given a pornographic magazine to look at and a marijuana cigarette to smoke. The victim also claims that Appellant negotiated "snuggle time" based on debt owed for alcohol, cigarettes, and marijuana. W.M. testified that Appellant encouraged both him and N.J. to masturbate in front of him while watching pornographic movies. Appellant also required that W.M. sit on his lap and allow himself to be touched underneath his shirt when given marijuana.

From the evidence, Appellant offered these substances to N.J. and W.M. in close temporal proximity to sexual acts and intimate contact. As such, a "special relationship" exists between the evidence of these acts and the charged offense of

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[29] Bussey v. Commonwealth, Ky., 797 S.W.2d 483, 484 (1990).
[30] *See* Tucker v. Commonwealth, Ky., 916 S.W.2d 181, 183 (1996) (holding that absence of a contemporaneous objection inadequate to preserve issue even though defendant had filed motion *in limine*).

sodomy because they are "so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party."[31] The giving of favors and substances was *quid pro quo* for sexual contact. Because of this "special relationship," the testimony that Appellant supplied the children with the foregoing was relevant and properly admitted at trial.

Appellant's fifth argument is that the trial court erred by not striking W.M.'s testimony. The Commonwealth called W.M. as a witness to testify that Appellant admitted to having sexual encounters with N.J. The Commonwealth had notified Appellant's counsel of its intent to use W.M.'s testimony, pursuant to RCr 7.24, but had indicated that the admission had taken place soon after the charges had been filed. In his testimony, however, W.M. stated that the conversation occurred two years after the charges had been filed. Appellant argues that the trial court erred by not excluding the testimony because it was admitted in violation of RCr 7.24(1). RCr 7.24(1) provides that an "attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness . . . ."

While a formal exception is no longer necessary to preserve an issue,[32] a timely objection is still required for review.[33] A timely objection has generally been defined as "one that is made as soon as the basis for objection becomes apparent."[34] A party that does not raise a timely objection waives review of the issue.[35] The discrepancy of the

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[31] KRE 404(b)(2). *See also* Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 528 (2002).
[32] RCr 9.22.
[33] Patrick v. Commonwealth, Ky. App., 436 S.W.2d 69, 74 (1968).
[34] Lawson, Kentucky Evidence Law Handbook, § 1.10[4][a] (4th ed. 2003).
[35] Stephenson v. Commonwealth, Ky., 982 S.W.2d 200, 201 (1998).

conversation's date was immediately apparent, but Appellant did not object until three hours after W.M.'s testimony.

Furthermore, the trial court offered Appellant a continuance, a form of relief suggested in RCr 7.24(9), to afford Appellant time to accumulate appropriate rebuttal information. This offer was declined. This Court has held that one "cannot intentionally decline to avail himself of a remedy granted by the court and then claim on appeal that he was prejudiced."[36]

Finally, Appellant contends that the twenty-five year sentence imposed on him by the trial court exceeded the statutory maximum provided by the General Assembly. KRS 532.110(1) provides:

> When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:
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> (c) The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

The crime of third-degree sodomy is a class D felony. According to KRS 532.080(6)(b), the longest term which a class D felon sentenced as a first-degree persistent felony offender may be required to serve is twenty years. As such, the sentence of twenty-five years violates the statutory maximum set forth by law, and this cause must be remanded to the trial court for resentencing. In all other respects, the final judgment is affirmed.

All concur.

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[36] Berry v. Commonwealth, Ky., 782 S.W.2d 625, 628 (1990).

COUNSEL FOR APPELLANT:

Dennis Stutsman
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane'
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

John R. Tarter
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204