

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2003-SC-0093-MR

DATE 9-16-04 EIA Growth, D.C.

GEORGE ARNOLD GABBARD

APPELLANT

V. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
CASE NO. 02-CR-00058

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Bell Circuit Court jury found Appellant guilty of rape in the first degree, rape in the second degree, rape in the third degree and incest. All of the charges involve GLG, his daughter, and occurred from 1996 to 2000, when GLG was nine (9) through fourteen (14) years old. The trial court sentenced Appellant to twenty-five (25) years incarceration. He now appeals his conviction to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant contends the trouble arose in 1996, before GLG's tenth birthday, when GLG's parents discovered she was dating an eighteen (18) year-old boy she had met at church. GLG testified that Appellant sexually molested her beginning in 1996, in the month of her tenth birthday and that the molestation continued until April 2000, when she was fourteen (14).

One evening in 2000, GLG left church early and was stopped by an officer on the road. GLG told the officer she did not want to return home because she was afraid she would be abused by her parents because they had found out about the love letters exchanged between her and her boyfriend. GLG was placed in foster care after being interviewed by the police and social workers. She later recanted her accusations purportedly because she was unhappy about being kept away from her siblings. Later, though, she agreed to proceed with the charges against Appellant.

Dr. Ashburn, from the Cabinet for Families and Children ('the Cabinet'), examined GLG after receiving her medical history from 1996 forward. His examination revealed an abnormal scarring which would have been consistent with penetration of the vagina by a penis or another object.

GLG's mother denied ever knowing that Appellant had abused GLG. Although, she did confirm that she had taken GLG to the emergency room in 1996 with bleeding problems, and that she regularly had problems with vaginal infections. Also, GLG's mother testified that GLG confronted her and Appellant about the abuse in January 2001 in front of social workers, but she said that GLG later stated she was lying because they would not let her be with her boyfriend.

Appellant testified that he never engaged in any sexual contact with GLG. He stated that he did not remember whether he was present when GLG confronted him and his wife in front of social workers about an earlier incident of abuse in the home. He first denied the event ever happened.

In rebuttal, the Commonwealth called social worker Jimmy Middleton. He repeated the allegations made by GLG when she confronted her parents while accompanied by him and two other social workers. The trial court allowed Mr.

Middleton's testimony as to statements made by GLG because GLG had already testified to the same statements.

Appellant was found guilty on all four charges, and appeals to this Court based on the following issues: (1) the trial court erred in failing to grant a Directed Verdict on Count I of first-degree rape when the verdict was against the weight of the evidence; and (2) the trial court erred by permitting the Commonwealth to introduce hearsay that only served to bolster the credibility of the victim's testimony and prejudice Appellant.

DIRECTED VERDICT

Appellant argues the Commonwealth did not prove its case beyond a reasonable doubt; and, as a result, he was denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Section 11 of the Kentucky Constitution. Appellant moved for a Directed Verdict, arguing that the Commonwealth lacked sufficient evidence to support the charge of first-degree rape.

According to KRS 510.040(1)(b)(2), a person is guilty of rape in the first degree when he engages in sexual intercourse with another person who is incapable of consent because she is less than twelve (12) years old. Appellant argues that GLG gave conflicting testimony about when and where the rape occurred, how old she was at the time of the initial rape, and who was present in the house at the time. He points out that she also reported sexual abuse to the social worker, and then recanted the story. Further, he notes that she could not identify what Appellant was wearing during the first rape, and that there was no DNA or physical evidence recovered to support GLG's initial allegations.

Appellant's claims primarily concern credibility and weight of testimony, which are issues for the jury to decide. Because credibility and weight are exclusively jury issues, his argument must fail. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). Furthermore, GLG's testimony was neither incredible nor uncorroborated because Dr. Ashburn testified to GLG's history, and his examination revealed injury consistent with that history. Further, GLG's mother corroborated her testimony as to the onset of her emotional upset, vaginal bleeding, and other physical problems in January 1996.

Furthermore, mere inconsistencies as to the victim's age do not make the evidence insufficient. Owsley v. Commonwealth, Ky. App., 743 S.W.2d 408 (1987). Therefore, we believe that the trial court did not err in denying Appellant's Motion for a Directed Verdict.

HEARSAY

Secondly, Appellant argues that the trial court erred in allowing hearsay by social worker Middleton, who repeated what GLG had said in 2001 in a meeting with him, other social workers, and GLG's parents. GLG's statement was that Appellant had raped her multiple times, and she was emotionally disturbed. Appellant argued that GLG had already testified to this information, and that it was hearsay.

Under KRE 801(c), hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is prohibited by KRE 802, which states that hearsay is not admissible except as provided by the rules of evidence. Appellant argues that the Commonwealth offered no valid exception to the hearsay rule to permit the testimony of Mr. Middleton.

However, this Court believes that the testimony was not impermissible hearsay, and was proper rebuttal. It was not offered to prove the truth of the matter asserted, i.e., that Appellant had raped GLG. It was only offered in rebuttal to prove that GLG had actually confronted Appellant with her charges, since Appellant either denied or could not remember the statements. Therefore, the statements had relevancy beyond the truth of the matter asserted. Further, when a statement is offered merely to prove that it was uttered, as in this case, the statement is admissible. Osborne v. Commonwealth, Ky., 43 S.W.3d 234 (2001). Consequently, there is no abuse of discretion when Appellant opened the door by denying that the statement was even made. Copley v. Commonwealth, Ky., 854 S.W.2d 748 (1993).

Accordingly, for the above reasons, Appellant's conviction must be and is hereby affirmed.

All concur.

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