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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 21, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL DATE 11-11-04 ELIA GRAVITT, D.C.

2003-SC-0138-MR

WILLIE B. WARREN — APPELLANT

V.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
02-CR-62

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Willie B. Warren, was convicted by a Fulton Circuit Court jury of one count of burglary in the first degree, KRS 511.020, and one count of rape in the first degree, KRS 510.040. He was sentenced to ten years in prison for the burglary and twenty years in prison for the rape, with the sentences to run concurrently. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting six claims of reversible error, viz: (1) defense counsel was prohibited from inquiring during voir dire whether the prospective jurors could consider the full range of penalties for rape in the first degree; (2) the trial court overruled defense motions to strike for cause three prospective jurors who stated they would not consider a sentence of less than twenty years as punishment for rape and two prospective jurors who were employed at the Fulton County Jail; (3) the Commonwealth struck three African-American jurors in

violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); (4) hearsay statements of the victim were read into evidence; (5) irrelevant testimony regarding the victim's mental capacity and learning disabilities was admitted into evidence; and (6) the prosecutor improperly cross-examined Appellant by forcing him to characterize two police officers as liars. We reverse and remand for a new trial because of errors made during jury selection and because of the admission into evidence of the victim's hearsay statements.

* * *

The victim, C.M., a twenty-one year old female, testified that she was watching television inside her apartment at approximately 11:00 p.m. on May 1, 2002, when she heard a knock on the door. When she asked who was at the door, Appellant responded, "Chris," the name of his son with whom C.M. was acquainted. C.M. opened the door; but when she realized that the caller was Appellant, not Chris, she immediately attempted to re-shut the door. Appellant, however, was able to force his way into the apartment. C.M. testified that Appellant went into her bathroom for about ten minutes, then went into her bedroom and called for her to join him. When C.M. went into the bedroom, Appellant had removed his shoes, socks, and hat, and was beginning to remove his pants. He asked C.M. to remove her clothing, but she refused and returned to the living room. Appellant again called to her to come into the bedroom and told her to remove her clothing. When she again refused, Appellant grabbed her from behind, threw her on the bed, and forcibly removed her clothing and subjected her to vaginal and anal intercourse. C.M. further testified that Appellant told her that he was

going to teach her a lesson for "telling his wife on him,"[1] and that he would kill her if she told anyone that he had raped her. Appellant then departed from C.M.'s home and C.M. called the police.

A police officer arrived at C.M.'s residence and transported her to Hillview Clinic where Denise Lindsey, a nurse practitioner, performed a "rape kit" examination. Lindsey testified that her examination revealed two one-quarter-inch lacerations between C.M.'s rectum and vagina, along with unusual redness inside the vagina and in the anal area. A swab of C.M.'s vagina revealed the presence of dead sperm. Lindsey admitted that sperm can have a life span of up to seventy-two hours.

Appellant testified that he was in C.M.'s apartment and had sexual intercourse with her on the night in question. He claimed the intercourse was consensual. He denied misidentifying himself as his son in order to gain access to the apartment by ruse. His version was that he asked C.M. if Chris was there, because he did not want his son to know that he was "messing around with her." However, when questioned by the police on the morning of May 2, 2002, Appellant handwrote a statement that read: "I say my name was Chris and she open the door and we she no but we had sex." (Sic.) The police attempted to tape record Appellant's interrogation, but they inadvertently activated the "pause" button on the recorder so that only a portion of the interrogation was actually recorded. A transcript of the recorded portion of the interrogation reveals that Appellant admitted misidentifying himself as Chris, forcing his way into the apartment, and having vaginal intercourse with C.M. against her will. He denied engaging in anal intercourse with or threatening to kill C.M.

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[1] No witness ever revealed what C.M. had supposedly told Appellant's wife, though Appellant's wife agreed that C.M. had, indeed, told her "something."

Several of Appellant's relatives testified that C.M. later told them that Appellant did not rape her, and that she signed a "statement," though no one produced the statement or revealed its contents at trial.

I. JURY SELECTION.

1. Voir dire.

On the morning of trial, defense counsel moved the trial court to permit him to inquire of prospective jurors whether they could consider the minimum penalty of ten years for each indicted offense. The prosecutor objected, conceding that "the case law is there," but asserting that "their reasoning is flawed." In overruling the motion, the trial court stated:

> You can say in this case that you can penalize up to a maximum of twenty years. You can do that and that's all. You cannot argue the minimum. That's the penalty that he's up here for. They can consider the fact that there is a charge that could be less than that. That's the idea is to say they have to know it's a serious crime. I guess that's what the theory of all that is.

Pursuant to the trial court's ruling, defense counsel only informed the jurors that the penalty was "up to a maximum of twenty years." He then asked whether any prospective juror believed that twenty years was not enough. Four jurors responded affirmatively to that inquiry. Counsel then asked, "Does that mean that you could not consider the minimum?" to which three of the four responded that they could not (even though they did not know what the "minimum" was).

The prosecutor was partially correct; the case law is there (at least in Kentucky, see Caudill v. Commonwealth, Ky., 120 S.W.3d 635, 654-55 (2003)). See (in chronological order) Grooms v. Commonwealth, Ky., 756 S.W.2d 131, 137 (1988), ("[A] juror should be excused for cause if he would be unable in any case, no matter how

extenuating the circumstances may be, to consider the imposition of the minimum penalty prescribed by law."); Morris v. Commonwealth, Ky., 766 S.W.2d 58, 60 (1989), (holding in a death penalty case that potential jurors should be informed of the possible penalties and asked whether they could consider the entire range of penalties); Shields v. Commonwealth, Ky., 812 S.W.2d 152, 153 (1991) ("In order to be qualified to sit as a juror in a criminal case, a member of the venire must be able to consider any permissible punishment. If he cannot then he properly may be challenged for cause."); Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 544 (2001) ("[W]e hold that in all non-capital criminal cases where a party or the trial court wishes to voir dire the jury panel regarding its ability to consider the full range of penalties for each indicted offense, the questioner should define the penalty range in terms of the possible minimum and maximum sentences for each class of offense."). Circuit courts are required to follow precedents established by the Supreme Court, even those they deem to be "flawed." SCR 1.040(5).

Defense counsel was not permitted to ascertain whether the prospective jurors could consider the minimum penalty prescribed by law. Since counsel proposed to make the proper inquiry, compare Lawson, 53 S.W.3d at 544, and since the jury did not impose the minimum penalty for rape in the first degree, compare McCarthy v. Commonwealth, Ky., 867 S.W.2d 469, 472 (1993), the error cannot be deemed harmless and requires reversal of the rape conviction for a new trial.

2. Challenges for cause.

As noted, four jurors stated that they did not believe imprisonment for twenty years was "enough" for a conviction of rape in the first degree. Defense counsel asked those jurors if that meant that they could not consider the minimum penalty. Jurors 17,

32 and 37 responded that they could not. Juror 39 responded, "Maybe," and that she could "under some circumstances." Defense counsel moved to strike Jurors 17, 32 and 39 (apparently confusing Jurors 37 and 39) "because they could not consider the full range of penalties." The trial court then advised the jurors that he would instruct them at the conclusion of the trial as to the range of penalties and inquired: "Can you follow the law as I give it to you?" There were no audible responses to that inquiry and the motion to excuse the jurors for cause was overruled.

Even assuming the jurors had responded affirmatively to the trial court's inquiry, under the case law cited in Part I(1), supra, it was clearly error not to strike Jurors 17 and 32 for cause. First, the instructions given to the jury during the penalty phase did not instruct them that they must consider the full range of penalties, but only that:

> Rape in the First Degree, a Class B felony, you will fix the Defendant's punishment at confinement in the penitentiary for a term of not less than ten (10) years nor more than twenty (20) years, in your discretion.

Second, a juror who has already stated that he or she cannot consider a penalty within the statutory range cannot be rehabilitated by a "magic question" as to whether the juror can "follow the law." Cf. Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 718 (1991) (juror disqualified by bias or prejudice cannot be rehabilitated by asking whether he or she can put aside those views, sentiments, or opinions and decide the case solely on the evidence and the court's instructions).

Appellant exhausted all eight of his peremptory strikes, including two that were used to strike Jurors 17 and 32. He is entitled to a new trial on the charge of rape in the first degree. Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 374 (2002); Thomas v. Commonwealth, Ky., 864 S.W.2d 252, 260 (1993).

Two jurors, Nos. 28 and 38, were deputy jailers at the Fulton County Jail, where Appellant was incarcerated for six months prior to trial. No motion was made to strike these jurors on grounds of implied bias and neither was asked whether he or she even knew Appellant. Appellant cites to three occasions in the record where he supposedly moved to excuse these jurors; however, a review of the videotape reveals no such motion. We decline to hold that the trial judge was required to excuse them sua sponte.

3. Peremptory challenges.

A Batson violation did not occur in this case. The prosecutor used peremptory strikes to excuse Juror Nos. 4, 9, and 13, all of whom are African-Americans. When asked for race-neutral reasons for the strikes, the prosecutor explained that Juror 4's brother was serving time for rape, the same charge presented by this case; that he (the prosecutor) had prosecuted a relative of Juror 9 (the same reason he struck Juror 14, a Caucasian); and that Juror 13 held a grudge against City of Hickman Chief of Police Greg Youree, who had conducted the interrogation of Appellant and would be the chief police witness in the case. The trial court accepted these explanations as race neutral and that ruling stands unless clearly erroneous. Washington v. Commonwealth, Ky., 34 S.W.3d 376, 379-80 (2000); Stanford v. Commonwealth, Ky., 793 S.W.2d 112, 114 (1990). A Batson challenge turns solely on the prosecutor's credibility and the judge's opportunity to personally observe the demeanor of both the prosecutor and the jurors. Batson, 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n.21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."). There is nothing in this record upon which to base a finding of clear error.

II. HEARSAY.

Denise Lindsey, a nurse practitioner at Hillview Clinic, testified about her sexual assault examination of C.M. and the injuries that she observed. Over Appellant's objection, she also testified to what C.M. had told her about the burglary and rape and that C.M. had identified Appellant as the perpetrator. All of Lindsey's testimony with respect to what C.M. told her was read verbatim from handwritten notes Lindsey had prepared while interviewing C.M. Her testimony essentially repeated C.M.'s own testimony about the events of the evening. In other words, Lindsey was permitted to testify to C.M.'s prior out-of-court statements that were consistent with C.M.'s in-court statements. KRE 801A(a)(2) permits introduction of such evidence only if offered "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Also, a prior consistent statement is generally admissible only if it was made before the motive to fabricate or the improper influence or motive occurred. Noel v. Commonwealth, Ky., 76 S.W.3d 923, 928 (2002). See also Tome v. United States, 513 U.S. 150, 167, 115 S.Ct. 696, 705, 130 L.Ed.2d 574 (1995) (interpreting Federal Rule (FRE) 801(d)(1)(B); Slaven v. Commonwealth, Ky., 962 S.W.2d 845, 858 (1997) (applying premotive limitation to allegation of recent fabrication); Smith v. Commonwealth, Ky., 920 S.W.2d 514, 517 (1995) (same).

Appellant's theory was that C.M. lied about the rape because she did not want Appellant's wife to find out about her sexual affair with Appellant. In support of that theory, Appellant proved that C.M. had made previous statements that she had not been raped. If this evidence had been offered in the proper sequence, C.M. would have testified that she was raped, Appellant's witnesses would then have testified that she denied being raped, implying that her trial testimony was a recent fabrication, and the

Commonwealth would have offered the prior consistent statement to rebut that implication. Though no evidence was introduced as to what C.M.'s motive for fabrication might have been, it is reasonable to assume that fabrications are based on motives. The evidence of C.M.'s premotive consistent statement to Lindsey was admissible to rebut the implication of recent fabrication. Appellant did not object to the order of proof; and we view the sequence of the evidence as harmless since the evidence ultimately would have been admissible.

However, it was error to permit Lindsey to read her recorded notes of her interview of C.M. The notes, themselves, were hearsay and Appellant objected to their admission as such. To the extent they contained statements made by C.M., they were not admissible under the business records exception to the hearsay rule, KRE 803(6), because C.M. was not under a business duty to report the information to Lindsey. Manning v. Commonwealth, Ky., 23 S.W.3d 610, 613-14 (2000) (information in police report provided by bystander inadmissible); Prater v. Cabinet for Human Resources, Ky., 954 S.W.2d 954, 959 (1997) (information contained in social worker's case file obtained from interview with child inadmissible because child not under business duty to report); Robert G. Lawson, The Kentucky Evidence Law Handbook § 8.65[6], at 684-86 (4th ed. LexisNexis 2003). Further, Lindsey never testified that it was the regular practice of the clinic to make such notes or that the notes were kept in the course of the regular business of the clinic.

The notes were not admissible under the "recorded recollection" exception, KRE 803(5), because Lindsey did not claim to have insufficient recollection to be able to testify fully and accurately from her own memory. Berrier v. Bizer, Ky., 57 S.W.3d 271, 277 (2001); Lawson, supra, § 8.85[1], at 725. Finally, KRE 612, which pertains to

present memory refreshed, does not permit the document to be "read [aloud] under the pretext of refreshing the recollection of the witness." Berrier, 57 S.W.3d at 277; Lawson, supra, § 3.20[7], at 248 (quoting Payne v. Zapp, Ky., 431 S.W.2d 890, 892 (1968)). Because this inadmissible hearsay pertained to both the burglary and the rape, its admission requires reversal of both convictions.

III. RELEVANCY.

Appellant argues that it was improper for the trial court to allow the Commonwealth to introduce evidence regarding C.M.'s intelligence level and learning disabilities. Kenneth Anderson, Public Administrator for the Western District of Kentucky, testified that he was appointed to be C.M.'s Supplemental Security Income disability benefits payee, because C.M. was mentally incapable of managing her own funds. Melanie Atwood, Director of Special Education for Fulton County Schools, testified that C.M. suffered from speech and academic problems when she was enrolled in the Fulton County school system. Each defense witness was asked on cross-examination whether he or she was aware that C.M. was "slow." Appellant asserts that such evidence is relevant only to a charge of rape in the third degree under KRS 510.060(1)(a), which requires a showing that the victim's mental capacity rendered her unable to consent to sexual intercourse,[2] and is irrelevant to a charge of rape in the first degree under KRS 510.040(1)(a), which only requires proof of forcible compulsion.

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[2] Appellant most likely could not have been charged with rape in the third degree, as there is no evidence that C.M.'s learning disabilities precluded her from understanding the nature of the sexual acts performed upon her. See Salsman v. Commonwealth, Ky. App., 565 S.W.2d 638, 640 (1978).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

> An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not. . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear with that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable.

Lawson, supra, § 2.05[3], at 80 (quoting Edward W. Cleary, McCormick on Evidence 542-43 (3d ed. 1984)).

Appellant's defense to the rape charge was that the intercourse was consensual and that C.M. fabricated the rape story so that Appellant's wife would not discover their relationship. Several of Appellant's witnesses testified that C.M. signed a paper, insinuating that the paper contained a statement that she had not been raped. C.M. admitted signing a piece of paper, but testified that she did not know what was written on the paper. Thus, her diminished mental capacity and her learning disabilities were relevant to the issue of whether she understood what she was signing and whether she was capable of concocting an elaborate fabrication about a rape that never occurred. It also served to explain her own unusual behavior, i.e., eschewing obvious opportunities to escape the residence even after Appellant had forced his way in, undressed, and told her to remove her clothing.

Appellant argues that even if the evidence were relevant, it should have been excluded because its prejudicial effect substantially outweighed its probative value. KRE 403. The outcome of this balancing test is within the sound discretion of the trial judge and will not be overturned absent an abuse of discretion. Commonwealth v.

English, Ky., 993 S.W.2d 941, 945 (1999). No abuse of discretion occurred here. The testimony about C.M.'s intelligence level lasted less than fifteen minutes in total duration. The prosecutor did not argue that C.M.'s mental condition proved lack of consent. Yet, the evidence was highly relevant to rebut or explain facts supporting Appellant's defense.

IV. IMPROPER CROSS-EXAMINATION.

Appellant asserts that the prosecutor improperly cross-examined him by forcing him to characterize the testimony of two police officers as lies. Chief Youree and Deputy Weatherly testified that Appellant initially denied that he had entered C.M.'s apartment or had sexual intercourse with her. Youree further testified that when he told Appellant they could obtain DNA evidence from a cigarette butt he had smoked and that he (Appellant) would be in a lot of trouble if his DNA matched DNA from the bodily fluid swabbed from C.M.'s vagina, Appellant admitted having sexual intercourse with C.M., but claimed that it was consensual. At trial, Appellant testified that he had never denied having sexual intercourse with C.M. On cross-examination, the prosecutor reminded him that two police officers had testified otherwise and asked, "So, they are lying then?"

Appellant is correct that this form of cross-examination is improper. Moss v. Commonwealth, Ky., 949 S.W.2d 579, 583 (1997) ("A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony."). See also Caudill, 120 S.W.3d at 662; Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 28 (1998). However, Appellant objected to this question only on grounds that it called for speculation. Error is not preserved for appellate review if the wrong reason is stated for the objection. Young v.

Commonwealth, Ky., 50 S.W.3d 148, 168 (2001); Tamme, 973 S.W.2d at 33. Further, error is deemed unpreserved if the grounds asserted on appeal are different from those asserted in the trial court. Richardson v. Commonwealth, Ky., 483 S.W.2d 105, 106 (1972).

Accordingly, the convictions and sentences imposed therefor are reversed and this case is remanded to the Fulton Circuit Court for a new trial consistent with the content of this opinion.

Lambert, C.J.; Cooper, Graves, Johnstone, and Stumbo, JJ., concur. Keller, J., concurs in result only without separate opinion. Wintersheimer, J., dissents without separate opinion.

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