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RENDERED: OCTOBER 21, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0624-MR

DATE 11-11-04 ELLA Gravitt, D.C.

RONALD MILAM, JR.

APPELLANT

V.

APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
2002-CR-00010

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING AND REMANDING IN PART
AND VACATING IN PART

This appeal is from a judgment based on a jury verdict that convicted Milam of twelve counts of first-degree sodomy, twelve counts of first-degree sexual abuse and four counts of incest. He was sentenced to a total of twenty years in prison.

The questions presented are whether the jury instructions lacked specificity thereby denying Milam a unanimous verdict and subjecting him to double jeopardy; whether the cross-examination of the defendant impermissibly required him to speculate on the victim's veracity; and whether the Commonwealth's closing argument improperly appealed to the community interests of the jury.

Milam was indicted for four counts of first-degree rape, twenty counts of first-degree sodomy, thirty counts of first-degree sexual abuse and seventy counts of incest. All the charges were based on allegations made by his step-daughter who was ten-

years-old at the time of trial. According to the victim, the abuse started when she was four-years-old, soon after her mother began dating Milam. She indicated that Milam would sometimes buy her toys in exchange for the sex acts or to keep her quiet about the same.

Milam testified in his own defense and completely denied the charges. He claimed he bought certain toys for the victim in order to keep her quiet about his extramarital affair. The jury was instructed on one count of first-degree rape, twelve counts of first-degree sodomy, twelve counts of first-degree sexual abuse and six counts of incest. It was unable to reach a verdict on the rape charge and acquitted Milam of two counts of incest, but convicted him on all the other charges. Milam was sentenced to twenty years on each of the sodomy charges, five years on each of the sexual abuse charges and five years on each of the incest charges, the sentences to run concurrently for a total of twenty years in prison. This appeal followed.

I. Jury Instructions

Milam argues that the jury instructions so lacked specificity that they denied him a unanimous verdict and due process of law. He further contends that the instructions created doubt as to whether double jeopardy occurred.

The victim testified about the sexual misconduct by Milam which took place over a five-year period when the family lived in five different residences. Most of the acts related to a specific room in each home and can be summarized as follows:

First residence (The apartment):

Victim's bedroom: Milam put his penis in her mouth.

The bathroom: Milam put his penis in her mouth.

Victim's bedroom: Milam put his mouth and finger on her vagina.

Mother's bedroom: Milam put his mouth on her vagina and put his penis in her mouth.

Second residence (Segal Road):

Victim's bedroom: Milam put his penis in her mouth and put his mouth on her vagina.

Third residence (Windyville; a.k.a. the house that burned):

Brother's room: Milam put his mouth on her vagina and put his penis in her mouth.

Mom's room: Milam put his penis in her mouth

Living room: Milam touched her vagina with his hand and put his penis in her mouth.

Mom's room: Milam twice had anal intercourse with her.

Fourth residence (The grandmother's house):

The victim testified that something happened here, but did not specify.

Fifth residence (Bee Springs):

Victim's room: Milam put his mouth on her vagina and put his penis in her mouth.

It should be noted that the victim also testified to an act of sodomy that occurred outside the home. Further, she apparently testified on cross-examination to two additional acts of sodomy at the apartment.

As previously mentioned, the jury was instructed on one count of rape, twelve counts of sodomy, twelve counts of sexual abuse and six counts of incest. Because the jury was unable to reach a verdict on the rape charge, it is unnecessary to address that charge in this opinion. Nor do we find it necessary to discuss in detail the incest charges, Milam having been acquitted of two of them and the instructions and evidence

being sufficient on the other four. Instead, our concern here is with the sodomy and sexual abuse charges.

The jury was instructed on three counts of sodomy and three counts of sexual abuse at four of the five residences. It was also instructed on two counts of incest at the third, fourth and fifth residences. The instructions were grouped per each residence as follows:

First residence (The apartment):

Three counts of sodomy and three counts of sexual abuse.

Second residence (Segal Road):

Three counts of sodomy and three counts of sexual abuse.

Third residence (Windyville):

Three counts of sodomy, three counts of sexual abuse and two counts of incest.

Fourth residence (Grandmother's house):

Two counts of incest.

Fifth residence:

Three counts of sodomy, three counts of sexual abuse and two counts of incest.

All the jury instructions as they related to each offense at each residence were almost identical. For instance, the only difference with the sodomy acts in the apartment was that two specified the time frame as between the years of 1996 and 1998 and the other one was between the years of 1998 and 2002. They stated as follows:

First Degree Sodomy

You will find the Defendant Guilty of First Degree Sodomy under this instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

1. That in this county on or about and between the years of 1996 and 1998, [1998 and 2002 in one of the instructions] in Edmonson County at their apartment and before the finding of the Indictment herein, he engaged in deviant sexual intercourse with [the victim];
 2. That at the time of such deviant sexual intercourse, [the victim] was less than 12 years of age;
- and
3. That the defendant knew that [the victim] was less than 12 years old.

The jury instructions as they related to the sexual abuse in the apartment were also identical. They were as follows:

First Degree Sexual Abuse

You will find the Defendant Guilty of First Degree Sexual Abuse, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

1. That in this county on or about and between the years of 1996 and 1998, in Edmonson County in their apartment and before the finding of the Indictment herein, he subjected [the victim] to sexual contact;
2. That at the time of such sexual contact, [the victim] was less than 12 years of age;
3. That the defendant knew that [the victim] was less than 12 years old.

Defense counsel objected to all the instructions at trial on three grounds: 1) the lack of specificity on each count per location; 2) the failure to differentiate sexual

contact in the sexual abuse charges from the other charges; and 3) insufficiency of the evidence on all the charges. The trial judge overruled the objection.

The jury instructions in this case should have been more closely tailored to the testimony in order to differentiate each count from the others. As stated in Miller v. Commonwealth, Ky., 77 S.W.3d 566, 576-577 (2002):

Whether the issue is viewed as one of insufficient evidence, or double jeopardy, or denial of a unanimous verdict, when multiple offenses are charged in a single indictment, the Commonwealth must introduce evidence sufficient to prove each offense and to differentiate each count from the others, and the jury must be separately instructed on each charged offense.

Here, the jury instructions should have referred to the specific rooms in each home where the victim stated the misconduct occurred. The failure to differentiate in this case is problematic because the jury instructions do not comport to the evidence. In some instances Milam has been undercharged and in other instances he has been overcharged. This may have occurred because there was some confusion regarding the testimony of the victim as it related to the second and third residences.

In any event, in those instances where the victim testified to more acts than were charged, it is impossible to determine whether the jury's verdict is unanimous. Consequently, we must reverse those convictions and remand for proceedings consistent with this opinion. In those circumstances where the jury was instructed on more charges than the victim testified, it is only necessary to vacate the additional charges. Due to the complexity caused by this situation, we offer the following outline:

RESIDENCE	TESTIMONY	# OF INSTRUCTIONS	REMEDY
#1 (The apartment)	5 acts of sodomy	Three	Reverse and Remand
#1 (The apartment)	1 act of sexual abuse	Three	Vacate two charges

#2 (Segal Road)	2 acts of sodomy	Three	Vacate one charge
#2 (Segal Road)	0 acts of sexual abuse	Three	Vacate three charges
#3 (Windyville)	6 acts of sodomy	Three	Reverse and Remand
#3 (Windyville)	1 act of sexual abuse	Three	Vacate two charges
#5 (Bee Springs)	2 acts of sodomy	Three	Vacate one charge
#5 (Bee Springs)	0 acts of sexual abuse	Three	Vacate three charges

Again, due to the uncertainty in the jury's verdict concerning the sodomy charges at the first and third residence, we must reverse all those convictions and remand for further proceedings. In addition, the evidence and the manner in which the instructions were written only supported ten of the sodomy charges and two of the sexual abuse charges. Therefore, because the evidence was insufficient on two counts of sodomy and on ten counts of sexual abuse, it is necessary to vacate these charges. There was sufficient evidence presented on the other charges for which Milam was convicted.

Milam does not raise a claim of error in his brief regarding the failure of the instructions to differentiate between sexual contact and the other charges. We have considered the argument, however, and find it to be of no merit.

II. Cross-examination

Milam claims that the trial judge erred by overruling his objection to the questions posed by the Commonwealth. He maintains that these questions called for him to speculate on the victim's veracity.

Defense counsel objected several times to the cross-examination of Milam on grounds that the questions improperly called for him to speculate as to the motivation of the victim or caused him to state that she was lying. We will set out the facts leading to the three objections separately.

The first objection arose during questioning concerning Milam's relationship with the victim. Milam stated on cross-examination that the victim was happy to have him in her life. The Commonwealth then asked Milam if that was so, what reason would the victim have to make the allegations. Defense counsel objected, asserting that the question called for the defendant to speculate on the victim's motivation and attempted to get him to say she was lying. The trial judge overruled the objection.

The second objection came during an inquiry concerning the victim's play toys. The victim had testified earlier that Milam had bought her toys in exchange for sex acts or to keep her quiet about the same. The Commonwealth showed Milam a specific toy and the following exchange took place:

Comm: Do you remember her asking you for this?

Milam: No sir. It has been a while. If I bought it, I'd admit I bought it; I would not lie about it.

Comm: It has been a while, but she remembered it, didn't she?

Milam: I guess.

Comm: You guess? You heard her testify didn't you?

Defense counsel objected, claiming that the question was an indirect way of making Milam state that the victim was lying. The trial judge overruled the objection.

The facts leading to the third objection are somewhat confusing and require additional background information. During the cross-examination of the victim, defense counsel elicited testimony that indicated that she was able to remember more details about the abuse because of dreams and nightmares she was having. Milam mentioned

the dreams and nightmares the victim was having during his direct examination. The following exchange then occurred during his cross-examination:

Comm: Is it your claim that these [allegations] came from some kind of dreams?
Milam: I don't know.
Comm: You don't know?
Milam: I wish I did know.

Defense counsel objected at this time on grounds that the questions required the defendant to speculate on the victim's motives. The trial judge overruled the objection.

The scope of cross-examination rests in the sound discretion of the trial judge. Moore v. Commonwealth, Ky., 771 S.W.2d 34, 38 (1988). A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the trial court may limit the cross-examination with respect to matters not testified on direct examination. KRE 611(b). A witness, however, should not be required to characterize the testimony of another witness as lying. See Moss v. Commonwealth, Ky., 949 S.W.2d 579 (1997).

Here, the three lines of questioning by the prosecutor did not ask the defendant to state whether the victim was lying. Nor did the prosecutor improperly seek to have the defendant speculate on why the victim brought the allegations. It was entirely proper for the prosecutor to ask the defendant why the victim would have made the allegations if, as he had testified, they had such a good relationship. The second line of questioning only sought to confirm the defendant's memory on a certain event. The third line of questioning attempted to clarify the defendant's position to which he alluded during direct examination. The trial judge did not abuse his discretion in overruling the objections.

III. Closing Argument

Milam claims that the Commonwealth made inappropriate comments during closing argument. At the very end of the Commonwealth's closing argument, the following was stated:

Comm: You must find this man guilty. You must for this community.

Milam: Objection your honor; appealing to community interests.

Comm: You must for [the victim]. Thank you very much.

Defense counsel never sought a ruling from the trial judge on his objection. If an objection is made, the party making the objection must insist that the trial judge rule on the objection, or else it is waived. Commonwealth v. Pace, Ky., 82 S.W.3d 894 (2002). The remark was an isolated comment made at the end of the closing argument. There was no palpable error. See Young v. Commonwealth, Ky., 129 S.W.3d 343 (2004).

We affirm that part of the judgment which convicts Milam of four counts of sodomy, two counts of sexual abuse and four counts of incest, as well as the respective sentences. We reverse on the six counts of sodomy as they relate to the first and third residences and we remand for additional proceedings consistent with this opinion. We vacate ten of the sexual abuse charges and two counts of sodomy.

All concur.

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