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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-9-04 Ella Grow...tt, D.C.

2002-SC-0370-MR

NICIA WILSON APPELLANT

V.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
01-CR-00008-002 & 01-CR-00009-002

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Following a trial by jury in the Ohio Circuit Court, Appellant, Nicia Wilson, was convicted of one count of complicity to rape in the first degree, for which she was sentenced to thirty years in prison, and two counts of complicity to rape in the second degree, for which she was sentenced to ten years in prison for each count. The sentences were ordered to run consecutively for a total sentence of fifty years. Appellant appeals to this court as a matter of right, Ky. Const. § 110(2)(b), asserting reversible error in the following respects: (1) the trial court erroneously instructed the jury on complicity to rape; (2) the trial court consolidated two indictments against her with a third indictment containing no charges against her; (3) the trial court permitted the same attorney to represent Appellant and her two codefendants despite the existence of conflicts of interest; (4) the trial court permitted child witnesses to testify by closed circuit

television without a finding of a "compelling need" therefor; (5) the trial court permitted other witnesses to vouch for the credibility of the child victims; (6) the trial court permitted the prosecutor to cross-examine Appellant about other sexual offenses alleged to have been perpetrated by a codefendant; and (7) the trial court permitted the prosecutor to ask Appellant to characterize the Commonwealth's witnesses as "liars."

Because we agree that the complicity instructions were erroneous, we reverse and remand for a new trial. There were no contemporaneous objections to most of the other claims of error, which will be only briefly discussed.

* * *

As of late 2000, Appellant and her husband, Leonard Wilson, had six children, including L.W., age 12, and M.W., age 10, both females. Leonard Wilson was charged in Indictment No. 01-CR-00011 with engaging in sexual intercourse and oral sodomy with L.W. and sexual intercourse with M.W. He subsequently pled guilty to one count each of rape in the first degree, rape in the second degree, sodomy in the second degree, and incest, for all of which he was sentenced to a total of twenty years in prison. Another indictment, No. 01-CR-00008, charged Ernest Mac Coyle III with rape in the second degree for engaging in sexual intercourse with L.W. on November 21, 2000, and charged Appellant with complicity to that offense. A third indictment, No. 01-CR-00009, charged Coyle with rape and sodomy in the second degree for engaging in sexual intercourse and oral sodomy with L.W. on December 10, 2000, charged Appellant's brother, Lucius "Luke" Holland, with rape in the first degree for engaging in sexual intercourse with M.W. on the same date, and charged Appellant with complicity to all three offenses. A fourth indictment, No. 01-CR-00012, charged Coyle with rape in the first degree for engaging in sexual intercourse with M.W., and both rape and sodomy in

the second degree for engaging in sexual intercourse and oral sodomy with L.W., all occurring on December 18, 2000. Neither Appellant nor Holland was charged in Indictment No. 01-CR-00012. All three indictments were consolidated for purposes of trial. Appellant, Coyle, and Holland were all represented by the same counsel. All were convicted of one or more offenses and appealed. This opinion relates only to the appeal of Appellant's convictions of complicity to rape in the second degree on November 21, 2000, and complicity to rape in the first and second degrees on December 10, 2000.

I. COMPLICITY INSTRUCTIONS.

The jury instructions under which Appellant was convicted of the three offenses were identical, except for the name and age of the victim and the date and degree of the offense. Since the same error occurred in each complicity instruction, we need analyze only one of those instructions.

Count Two of Indictment No. 01-CR-00008 charged Appellant with complicity to commit rape in the second degree on November 21, 2000, when she "solicited, commanded or aided another to have sexual intercourse with a female less than 14 years of age." The testimony supporting this charge was that Appellant took L.W., age twelve, to a bedroom in Lucius Holland's mobile home and held her legs while Ernest Mac Coyle III subjected L.W. to sexual intercourse. The instruction on complicity to rape in the second degree with respect to this incident was as follows:

> COMPLICITY TO SECOND DEGREE RAPE.
>
> You will find the Defendant, NICIA WILSON, Guilty of Complicity to Second Degree Rape under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about November 21, 2000, and before the finding of the indictment herein, ERNEST MAC COYLE, III, engaged in sexual intercourse with [L.W];

B. That at the time of such intercourse, ERNEST MAC COYLE, III, was eighteen (18) years of age or older and [L.W.] was less than fourteen (14) years of age.

C. That the Defendant, NICIA WILSON, was the mother of [L.W.];

AND

D. That the Defendant, NICIA WILSON, aided or assisted ERNEST MAC COYLE, III, in having sexual intercourse with [L.W.] or, knowing that sexual intercourse may occur, failed to make a proper effort to prevent the act.

As noted in the Commonwealth's brief, we approved one paragraph of an instruction similar to paragraph D of this instruction in Tharp v. Commonwealth, Ky., 40 S.W.3d 356, 364 (2000). However, Tharp was a homicide case, and homicide (as is assault) is a "result" offense, see Robert G. Lawson & William H. Fortune, Kentucky Criminal Law § 3-3(c) (1998), in which the crime is the result of the conduct, i.e., death, not the conduct, itself, e.g., stabbing the victim with a knife. Continuing to use homicide as an example, if the accomplice intended the principal's conduct to result in the victim's death, then such intent is a required element of the offense and the conviction is of complicity to murder or complicity to manslaughter in the first degree. See KRS 502.020(1); Harper v. Commonwealth, Ky., 43 S.W.3d 261, 264-65 (2001). If the accomplice did not intend the principal's conduct to cause the victim's death, then the classification of the homicide depends upon the degree of the defendant's culpability with respect to the result, i.e., the victim's death. KRS 502.020(2); Harper, at 266-67. In Tharp, there was no evidence that the victim's mother intended for her husband to kill her child. Thus, the instructions in Tharp permitted the jury to convict the mother of

reckless homicide if her failure to make a proper effort to prevent her child's death constituted recklessness, or of manslaughter in the second degree if her failure constituted wantonness, or of wanton murder if her failure constituted aggravated wantonness. Id. at 364-66.

Rape is not a result offense. In a case, as here, of "statutory rape," it is the conduct of sexual intercourse, not the result, that constitutes the crime. Thus, conviction of complicity to rape must be obtained under KRS 502.020(1), which requires proof of intent that the crime be committed. Mere knowledge, as required by the instruction in this case, proves only criminal facilitation. KRS 506.080(1) ("a person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity"); Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 499 (1995) ("To be convicted of complicity, the jury must find that Holly intended that [the crime be committed]; to be convicted of facilitation, the jury must find only that Holly knew Michael was going to commit a crime.").

There was ample evidence in this case from which a jury could have concluded that Wilson intended for Coyle to engage in sexual intercourse with L.W. Unfortunately, the instruction only required the jury to conclude that Wilson knew "that sexual intercourse may occur." The other complicity instructions were similarly deficient. Accordingly, Wilson is entitled to a new trial. McKinney v. Heisel, Ky., 947 S.W.2d 32, 35 (1997) (erroneous instructions presumed to be prejudicial).

II. CONSOLIDATION OF INDICTMENTS.

The prosecutor moved to consolidate the three indictments because "the underlying facts supporting these indictments involve the same victims and defendants,"

citing RCr 9.12. However, RCr 9.12 only permits "two (2) or more indictments . . . to be tried together if the offenses, and the defendants, if more than one (1), could have been joined in a single indictment . . . ." RCr 6.20 permits joinder of defendants in the same indictment only if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Appellant was not charged with participating in the acts or transactions occurring on December 18, 2000. The grand jury properly did not join those charges in the same indictment with the charges related to the November 21, 2000, and December 10, 2000, offenses. Thus, the December 18, 2000, charges against Coyle were improperly joined with the November 21 and December 10, 2000, charges against Appellant. Jackson v. Commonwealth, Ky., 670 S.W.2d 828, 834 (1984).

However, Appellant waived any possible error by not objecting to the prosecutor's motion for joinder. Fraley v. Commonwealth, 309 Ky. 345, 217 S.W.2d 793, 794 (1949). If Coyle's convictions are affirmed, the issue will not recur on retrial. If not, Appellant can move for severance. RCr 9.16.

III. DUAL REPRESENTATION.

Appellant executed a written waiver of dual representation and was advised by the trial court of the danger of conflicts of interests that accompany dual representation. Thus, there was no violation of RCr 8.30 and, if a conflict of interest occurred, the conflict was duly waived. If Appellant desires to avoid dual representation at retrial, she can retain separate counsel.

IV. TESTIMONY BY CLOSED CIRCUIT TELEVISION.

The victims, as well as other child witnesses, were permitted to testify by closed circuit television pursuant to KRS 421.350. At trial, Appellant specifically agreed with this procedure, thus waiving the requirement of a hearing to determine whether there was a "compelling need" to present the children's testimony in this manner. See KRS 421.350(2); Maryland v. Craig, 497 U.S. 836, 855-56, 110 S.Ct. 3157, 3169, 111 L.Ed.2d 666 (1990); Price v. Commonwealth, Ky., 31 S.W.3d 885, 893-94 (2000); Commonwealth v. Willis, Ky., 716 S.W.2d 224, 231 (1986). If Appellant withdraws the waiver at retrial, the trial court will then hold the required hearing and make the required findings.

V. VOUCHING FOR CREDIBILITY.

Trooper Basham testified that he tried to determine the credibility of the children, and that they seemed credible to him. When asked whether she found the children credible, social worker Carrie White responded, "Yes, very much so." She also testified that she did not feel that the children had been coached in any way. Obviously, this type of testimony, i.e., one witness vouching for the credibility of another, is improper. Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 888 (1997); Hall v. Commonwealth, Ky., 862 S.W.2d 321, 323 (1993); Hellstrom v. Commonwealth, Ky., 825 S.W.2d 612, 614 (1992). However, Appellant did not object to any of this testimony. Since the case is being remanded for a new trial, we need not decide whether palpable error occurred.

VI. CROSS-EXAMINATION RE: CODEFENDANT'S OTHER SEX OFFENSES.

Appellant testified on her own behalf at trial and denied any involvement in the sexual abuse of her children. On direct examination, she further testified:

Q. If you found out someone was hurting your children, what would you do?

A. I'd probably hurt them.

On cross-examination, she testified:

Q. You don't think Luke [codefendant Holland] would harm your children?

A. No.

The prosecutor was then permitted to impeach Appellant by asking her if she was aware that Holland had previously been indicted for sexually molesting not only L.W. and M.W. but also Appellant's sons, C.W., age 11, and D.W., age 9. Appellant responded that she knew Holland had been charged but that the charges had been dropped and the indictment dismissed. When asked if she had requested the Commonwealth's attorney to dismiss the charges, she responded that she had not gone to the Commonwealth's attorney "at any time." The trial court admonished the jury to consider this evidence only for purposes of impeachment and not as proof of her guilt or Holland's.

The impeachment value of this evidence was tenuous at best. Appellant did not testify on direct examination that she would not prevent someone who had harmed her children from having any contact with them. She testified only that she would "probably hurt them." She did not state whether she had "hurt" Holland. Nor did she state on cross-examination that Holland had never harmed her children – she stated only that she did not think he would do so. Nor did Appellant testify on direct examination to Holland's good character, which might have opened the door for cross-examination about what she knew of Holland's other sexual misconduct for purposes of impeaching her credibility as a character witness. KRE 405(b). Here, the prosecutor elicited the

alleged character evidence on cross-examination, then relied on it, under the guise of impeaching Appellant's credibility, to justify further cross-examination about otherwise inadmissible hearsay evidence of other acts of misconduct by Holland. A similar tactic was deemed reversible error in Stansbury v. United States, 219 F.2d 165, 168-71 (5th Cir. 1955) (prosecutor cannot make improper inquiries about collateral matters on cross-examination and then introduce otherwise inadmissible evidence in rebuttal under the guise of impeachment).

Furthermore, even impeachment evidence is subject to the balancing test in KRE 403. Robert G. Lawson, The Kentucky Evidence Law Handbook § 4.05[3], at 275-76 (4th ed. LexisNexis 2003). Although evidence that Holland had previously been accused of molesting Appellant's children was far more damaging to Holland's defense than to Appellant's, its prejudicial effect, i.e., that Appellant had permitted her children to be alone with someone who had previously been accused of molesting them, and that she, herself, may have prevailed upon the prosecutor to drop the previous charges, would seem to far outweigh any "impeachment" value it might have. Nevertheless, since this case is being remanded for a new trial on other grounds, we need not decide whether the trial court abused its discretion in ruling otherwise. See Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999) (admission of prior sexual misconduct found not to be an abuse of discretion under the balancing test in KRE 403). We assume defense counsel will avoid at retrial the question and answer on direct examination of Appellant that the trial court felt "opened the door" to this line of inquiry on cross-examination.

VII. CHARACTERIZING OTHER WITNESSES AS "LIARS."

On cross-examination of Appellant, the prosecutor asked her three times if she was calling Detective Abrahamson a "liar." He also asked Appellant ten times whether L.W. was a liar, twice whether M.W. was a liar, and once whether D.W. lied in his testimony. Appellant correctly asserts on appeal that such questions are improper. Moss v. Commonwealth, Ky., 949 S.W.2d 579, 583 (1997); Howard v. Commonwealth, 227 Ky. 142, 12 S.W.2d 324, 329 (1928). However, like so many of Appellant's other claims of error, she did not object to any of these questions at trial. Presumably, Appellant will make proper objections to improper questions at retrial and thereby present these issues for rulings by the trial court.

Accordingly, the judgment of conviction and the sentence imposed on Appellant are reversed and this case is remanded to the Ohio Circuit Court for a new trial.

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

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