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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JANUARY 20, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 2-10-05 Ella Grant, D.C.

2003-SC-0435-MR

BERNIE RAY PAYNE — APPELLANT

V.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
2002-CR-0038

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Payne of four counts of first-degree rape. He was sentenced to a total of thirty years in prison.

The questions presented are whether other bad act evidence was improperly introduced; whether it was an abuse of discretion to admit a videotaped confession; whether the Commonwealth erroneously interpreted the inaudible portion of the videotape; whether investigative hearsay was impermissibly introduced; and whether there was sufficient evidence to support the verdict.

In a tape-recorded interview on October 21, 2002, the then sixteen-year-old victim told a Kentucky state trooper and a social worker that her father had forced her to have sexual intercourse. She also provided the investigators with a handwritten statement detailing the abuse that started in 1998 - 1999. The next day, two state

troopers located Payne at a cemetery after responding to a call that he was there and could be suicidal. At the cemetery, Payne, a former police officer, confessed to raping his daughter in 1998 and 1999 and signed a statement to that effect. Two days later, and while in jail, Payne confessed again, this time to the same state trooper and social worker who had interviewed his daughter.

Payne was indicted on four counts of first-degree rape. At trial, the two state troopers from the cemetery testified concerning the confession made by Payne. Next, the Commonwealth called the victim to the witness stand and, anticipating her testimony, only asked her about the statement she gave on October 21, 2002. On cross-examination, the sixteen-year-old victim completely recanted her accusations against her father. She claimed that her prior statement was false and that she only gave it because the state trooper threatened that if she did not give it, she would be taken from her home. On re-direct, she tearfully stated that she did not want her father to go to jail.

Following the recantation by the victim, the state trooper who had interviewed her testified and denied threatening her in any manner. He also testified about the second confession given by the defendant at the jail. His testimony regarding the victim's statement and the defendant's confession was largely corroborated by the social worker who was present for both interviews.

Payne testified in his own defense and completely denied the charges. He admitted making the two confessions, but claimed that he did so because he did not want his children taken away from their home. The jury convicted Payne of four counts of first-degree rape and he was sentenced to fifteen years on each charge. Two of the

sentences were ordered to run concurrently and two were ordered to run consecutively for a total of thirty years in prison. This appeal followed.

I. Prior Bad Acts

Payne argues that the trial judge erred to his substantial prejudice in violation of his state and federal due process rights and KRE 404(b) when he permitted introduction as substantive evidence prior, uncharged, unreported occurrences of alleged abuse. He claims that this issue was preserved by a pretrial motion in limine seeking to preclude the introduction of prior bad act evidence and by the contemporaneous objections of trial counsel. Payne refers this Court to two portions of the record wherein bad act evidence was introduced, but includes several other instances in his argument. Given the confusing nature in which this issue is presented, we find it necessary to summarize the individual complaints made by Payne. They are:

1) That the victim was permitted to testify to an uncharged act when she stated that the abuse began when the defendant was examining blisters on her arms and he rubbed her private part with his elbow.

2) That the victim was permitted to testify that sexual contact with Payne occurred on ten occasions, and not the four charged in the indictment.

3) That a state trooper testified he knew Payne because he had received a "complaint from him earlier. . ."

4) That a state trooper was allowed to testify that Payne told him he touched her inappropriately, using his hands to examine her for evidence of sexual activity with her boyfriend.

5) That a second state trooper was impermissibly permitted to repeat the alleged confession by Payne regarding his examination of the victim.

We must observe that this issue is not preserved for appellate review by the pretrial motion in limine because that motion was never ruled upon. See KRE 103. As to the first complaint listed above, it is not properly preserved for review because there

was no contemporaneous objection to this testimony at trial. Regarding the second claim, Payne did object to the victim testifying that in a prior statement she said the sexual contact with Payne occurred about ten times. Any error in allowing this testimony, however, was rendered harmless by the victim's subsequent testimony wherein she completely recanted the allegations against the defendant.

The third instance arose when the prosecutor asked a state trooper how he knew the defendant. The witness responded, "I had received a complaint from him earlier, maybe several months ago, that was unrelated, and we spoke on the phone. But that was the only time." Not only is this claim unpreserved for lack of any objection, it is totally without merit. The complaint the state trooper received was from the defendant not against him. There simply was no bad act evidence presented.

The fourth allegation of bad act evidence came about during the testimony of the Commonwealth's first witness, the state trooper from the cemetery who had interviewed Payne. He testified about the confession Payne made regarding the four counts of rape, but also stated that Payne admitted to him that he examined his daughter with his hands in order to determine whether she was sexually active with her boyfriend. There was no objection to this testimony at trial, thus it is not properly preserved for appellate review. RCr 9.22.

The fifth complaint concerns the testimony of the second witness called by the Commonwealth, the state trooper who was present during the first confession. He repeated the admission made by Payne regarding his examination of the victim and this time defense counsel did object. It is not clear from the record, but it appears the trial judge overruled the objection because this evidence was previously admitted. The evidence of Payne's sexual assaults was admissible to prove intent, as well as motive

and plan, with respect to the first-degree rape charge. See Pendleton v. Commonwealth, 83 S.W.3d 522 (Ky. 2002); Price v. Commonwealth, 31 S.W.3d 885 (Ky. 2000).

II. Videotaped Confession

Payne presents two issues regarding the videotaped confession given at the cemetery. First, he contends that the trial judge erred when he permitted the introduction of the inaudible tape recording and allowed the same to be played for the jury. Any complaint about the introduction of the videotape has been waived. When the prosecution sought to introduce the videotape, defense counsel stated that he did not object to its introduction.

Waiver aside, the trial judge did not abuse his discretion in allowing the tape to be introduced or played for the jury. Cf. Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). The confession was recorded on the video camera mounted in the state trooper's cruiser. Although portions of the audio are difficult to discern, there is no doubt that Payne confessed to raping his daughter.

Second, Payne asserts that the Commonwealth violated his rights when it interpreted the inaudible portions of the tape as supportive of its theory of the case. Defense counsel objected to the state trooper providing a "play by play" narrative of the videotape, arguing that it was improper for him to narrate what was taking place. The trial judge indicated to defense counsel that if he had a particular problem to make a contemporaneous objection.

Thereafter, defense counsel's only objection on this ground occurred during the playing of the videotape when Payne apparently indicates the years the intercourse happened. The prosecutor asked the state trooper, "You just asked him whether it was

98 and 99?" The state trooper responded affirmatively. Defense counsel objected and also objected to reading off a transcript that had not been authenticated. The objections were overruled.

Having reviewed the record, it is clear that there was very little reliance on the transcript and none following the objection by defense counsel. Payne does not claim and there is no evidence in the record that the jury was given a transcript at any time. Interpretation of the audio portion of the videotape was limited to the clarification of the dates of the offense. Any error was harmless because the state trooper had already testified that Payne admitted to him that he had engaged in sexual intercourse with the victim in 1998 and 1999. Payne himself also testified that he provided this information to the state trooper. After careful review of the record, we must conclude that error, if any, was totally harmless.

III. Investigative Hearsay

Payne argues that the trial judge erred by allowing the Commonwealth to introduce investigative hearsay which only bolstered the part of the victim's testimony which supported the Commonwealth's case. Specifically, he claims that the social worker and the state trooper who interviewed the victim were improperly permitted to testify regarding the investigation. Payne maintains that this issue was preserved when he objected to the hearsay testimony of both witnesses.

The hearsay objection made by defense counsel to the state trooper's testimony occurred when the prosecutor asked him if he knew where Payne was on October 21. After the objection to the question was overruled, the witness answered, "Not for a fact. They stated he was gone." Although the answer given by the state trooper did contain

partial hearsay, we fail to see how this relates to the issue now raised by Payne. Any error in its introduction was certainly harmless. RCr 9.24.

Defense counsel did make a hearsay objection when the prosecutor asked the social worker what the victim told her about the sexual contact. That objection was overruled. This testimony was introduced following the complete recantation made by the victim. Although it was improper investigative hearsay, under all the circumstances, any error was harmless. RCr 9.24.

IV. Sufficiency of the Evidence

Payne complains that the Commonwealth failed to prove beyond a reasonable doubt that he was guilty of any of the charged offenses because it could not prove with credible evidence, either that he had sexual intercourse with the victim on the four occasions charged, or what year any such intercourse occurred. There was no motion for a directed verdict of acquittal and Payne seeks review under RCr 10.26.

The victim gave a detailed tape-recorded and handwritten statement to a state trooper and a social worker about the sexual misconduct of her father. Although she recanted her accusations at trial, there was still sufficient evidence of the defendant's guilt. Cf. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). Twice, the defendant confessed to sexual intercourse with his own daughter. Payne specifically admitted during the second confession that on two occasions the penetration was slight and on two other occasions there was full penetration. His explanation at trial that he confessed because he didn't want his kids taken away from their home was not logical or credible. Evidence was presented that the acts occurred in 1998 and 1999. There was sufficient evidence to support the verdict and there was no palpable error.

Payne received a fair trial. He was not denied any of his due process rights under the state or federal constitutions.

The judgment of conviction is affirmed.

All concur.

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