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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 16, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL DATE 7-7-05 ELIA GROUP, P.C.

2003-SC-000374-MR

JEFFREY ALLEN DEAN — APPELLANT

V.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES WEDDLE, JUDGE
00-CR-00047

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jeffrey Allen Dean, was convicted of first-degree sodomy, second-degree rape, first-degree sexual assault, and second-degree sexual assault in the Casey Circuit Court. The convictions arose from allegations made by his stepdaughter, J.P., and his daughter, S.D. The first trial ended in a mistrial in August 2002. The second trial was held in February 2003. Appellant was sentenced to a total of twenty years imprisonment and appeals to this Court as a matter of right.

Cynthia Dean (Mrs. Dean) and her daughter, J.P., began living with Appellant in 1986 when J.P. was several months old. J.P. testified that the first instance of sexual abuse occurred in the spring of 1999 when she was a twelve-year-old seventh grader. Appellant continued to sexually abuse J.P. over the course of the summer. J.P. testified that she did not want to tell anyone about the abuse because she was afraid of Appellant, but she eventually told her friend, B.P. B.P. reported what J.P. had told her, and Linda Lee of Family Services and Kentucky State Police Detective Jackie Hunt

went to Appellant's home that evening. J.P. was taken to the home of Glenn Haney to stay.

J.P. remained at Haney's home until some time near December 1999. At this time, Mrs. Dean removed J.P. from Haney's home and returned her to Appellant's home. After a few weeks, Appellant resumed sexually abusing J.P. These acts of abuse occurred until May of 2000, when J.P. again told B.P. what Appellant was doing. B.P. reported the abuse, and J.P. was removed from Appellant's home and placed in a foster home.

S.D., a natural child of Appellant and Mrs. Dean, was born in August 1990. Appellant began sexually abusing her when she was ten years old. At trial, S.D. testified to several incidents of sexual abuse, including one instance of sodomy. In August 2000, S.D. told her grandmother what Appellant had been doing to her. The following day, on August 15, 2000, authorities placed S.D. in the foster home where J.P. had been staying.

I.

Appellant argues that the trial court erred to his substantial prejudice in allowing the admission of double hearsay. At trial, J.P. testified that she was removed from Haney's home and returned to Appellant's home. Mrs. Dean picked J.P. up from Haney's home to take her to a Christmas party. They drove to the Wal-Mart store where Appellant worked. Appellant came out of the store. J.P. testified that she heard Mrs. Dean say the following to Appellant: that she (Mrs. Dean) told J.P. that she was bringing her back to Appellant's house because Appellant had so requested. J.P. could not remember whether Appellant responded to what Mrs. Dean said to him. Defense

counsel objected to the testimony as hearsay. The trial judge overruled the objection because Appellant was present when the statement was made.

In alleging double hearsay, Appellant mischaracterizes the statement in question. J.P. testified that Mrs. Dean's statement was made directly to Appellant. Therefore, Mrs. Dean's statement is the only layer of potential hearsay to address. The issue for us is whether Appellant made an adoptive admission as to the truth of Mrs. Dean's statement. KRE 801A(b)(2) concerns the hearsay exclusion of adopted admissions by a party.

> When accusatory or incriminating statements are made in the presence and hearing and with the understanding of the accused person and concerning a matter within his knowledge, under such circumstances as would seem to call for his denial and none is made, those statements, and the fact that they were not contradicted, denied, or objected to, become competent evidence against the defendant.... Related to this specific rule is that which admits evidence of the circumstances when the accused makes a reply which of itself is to be regarded as an admission.

Hodge v. Commonwealth, 17 S.W.3d 824, 847 (Ky. 2000); see also Marshall v. Commonwealth, 60 S.W.3d 513 (Ky. 2001). A party's mere presence when a statement is made is insufficient to establish an adoptive admission; there must be some manifestation of adoption or belief in the truth of the statement. Perdue v. Commonwealth, 916 S.W.2d 148, 158 (Ky. 1995).

In discussing adoptive admissions, Professor Robert Lawson classifies two types of admissions, "admissions by conduct" and "admissions through silence." Robert G. Lawson, The Kentucky Evidence Law Handbook § 8.20[2], at 592 (4th ed. LexisNexis 2003). Considering an admission by silence, a statement that J.P., the child who accused Appellant of sexually assaulting her, was being brought home at Appellant's request would seem to call for a denial by Appellant were it untrue. However, J.P. testified that she did not remember whether Appellant made a response to Mrs. Dean's

statement. Therefore, we cannot establish whether or not Appellant acquiesced in Mrs. Dean's statement by remaining silent, and thus, the statement does not qualify as an adoptive admission through silence. Lawson, supra, § 8.20[4], at 595 ("A statement may not be admitted as an adoptive admission [through silence] unless it is established that the party heard and understood the statement and remained silent.")(citing Ray. v. Ray, 196 Ky. 579, 245 S.W. 287, 289 (1922)); see also Blair v. Commonwealth, 144 S.W.3d 801, 806 (Ky. 2004).

The Commonwealth also claims that Appellant's conduct, specifically the fact that J.P. remained in Appellant's home for five months without Appellant notifying family services or the police, constitutes an admission by conduct. This "conduct" was not a reaction to Mrs. Dean's statement and does not fall within the converge of KRE 801(A)(b)(2). Lawson, supra, § 8.20[2], at 592 ("The premise underlying the concept [of adoptive admissions] is that parties can react to statements made by nonparties in ways that manifest an assent to the truthfulness of the assertions contained there.") In sum, Mrs. Dean's statement to Appellant was not admissible as an adoptive admission under KRE 801(A)(b)(2).

Nevertheless, this error was harmless. RCr 9.24. The test for harmless error is whether there is any substantial possibility that the outcome of the case would have been different without the presence of that error. Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983). In light of the evidence presented at trial, we do not believe that the issue of whether or not Appellant wanted J.P. returned home had a substantial effect on the outcome of the case. Specifically, the jury heard J.P. give detailed accounts of sexual abuse. The jury also heard the testimony of Sharon Jameson, a family nurse practitioner, who administered a pelvic examination on J.P. Jameson

explained that J.P.'s vagina had been infected, and that this infection indicated that J.P. was sexually active. Jameson also testified that J.P.'s hymen was not intact. J.P. testified that up to the time of the trial she had not had relations with boys, and no evidence was offered to establish otherwise.

Furthermore, Mrs. Dean's statement that Appellant wanted J.P. home would only be damning if the jury believed the accusations against Appellant, as his desire to have her back home alone is consistent with innocence. In addition, if the jurors did not find J.P. to be credible, that is, if they believed that she was fabricating her accounts of sexual abuse, then they would have likewise simply not believed her testimony that Appellant wanted her returned home.

II.

Appellant alleges that the Commonwealth was improperly allowed to ask leading questions throughout its examination of S.D. The record, however, does not so reflect, and Appellant does not provide examples of leading questions. At trial, defense counsel made one objection to a leading question, asked while S.D. was testifying to an instance of sexual abuse. The trial court overruled the objection on the grounds that the witness was twelve years old.

A trial court has broad discretion in allowing leading questions to be asked to a child of tender years. Hardy v. Commonwealth, 719 S.W.2d 727, 729 (Ky. 1986). Here, a child, who moments earlier cried during her testimony, was giving a detailed account of a traumatic event. We find no abuse of discretion.

The judgment and sentence of the Casey Circuit Court are affirmed.

All concur.

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