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RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0411-MR

DATE 10-13-05 EIA Grou + DC

JAMES ROY TUCKER

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
03-CR-1079

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Tucker of three counts of first-degree sodomy, one count of second-degree sodomy, one count of third-degree sodomy and two counts of first-degree sexual abuse. He was sentenced to a total of sixty-one years in prison.

The questions presented are whether the testimony of the examining physician exceeded the scope of KRE 803(4); whether the defendant was denied the opportunity to cross-examine the physician; whether Tucker was denied the right to refute hearsay testimony; whether investigative hearsay was improperly introduced into evidence; whether unqualified expert testimony was erroneously admitted; whether evidence of a prior consistent statement should have been excluded; whether improper rebuttal evidence was allowed; whether the trial judge exhibited bias toward the

Commonwealth; whether the defendant was denied his right to present a defense; and, whether there was cumulative error.

Tucker was indicted for five counts of first-degree sodomy and two counts of first-degree sexual abuse against three victims. Two of the victims were brothers and the third victim was their friend. For purposes of this opinion we will refer to the older brother as the first victim, the younger brother as the second victim and the friend as the third victim.

Tucker was married to the step-sister of the mother of the first and second victims. Both of these victims visited the Tucker home frequently and often stayed overnight. On one of those overnight visits, the third victim accompanied them.

The victims recounted several acts of sexual misconduct perpetrated by Tucker, including anal and oral sodomy as well as sexual abuse. In each instance, the victims were isolated and had something placed over their heads or had their vision otherwise restricted. These improper acts occurred on different dates over several years when they were between the ages of thirteen and sixteen. The victims were seventeen, thirteen and sixteen, respectively, at trial.

Tucker testified in his own defense and completely denied the charges. The jury convicted him of three counts of first-degree sodomy (fifteen years each), second-degree sodomy (ten years), third-degree sodomy (two years), and two counts of first-degree sexual abuse (two years each). The sentences were run consecutively for a total of sixty-one years in prison. This appeal followed.

I. KRE 803(4) Testimony

Tucker argues that the trial judge erred when she allowed an examining physician to give hearsay testimony far broader than permitted as statements for the

purpose of treatment or diagnosis. A pediatrician who specializes in sexual abuse evaluations testified about the examination she conducted on the first and second victims. When she was asked to recall the history she took from the first victim, defense counsel objected on grounds that 1) this was not medical treatment, but therapy; and 2) the information was privileged. The objection was overruled. The doctor then read the history she took from the first victim which included the allegations of sexual misconduct by Tucker.

Defense counsel made a second objection when the doctor testified that the first victim had informed her that he had told a friend about the abuse. The objection was that the testimony was duplicative and bolstering. It too was overruled. The doctor then continued with her testimony about the history she took, which included the first victim telling his friend; the pornography he was shown and that was possessed by Tucker; and how the allegations finally came to light. After the narrative, she proceeded to inform the jury about her physical findings for the first victim. Those findings were consistent with the history taken, but showed no abnormalities.

Next, the doctor was asked to give a history of the second victim. Defense counsel responded "same objection your honor." That objection was overruled by the trial judge. The doctor then read the history she took from the second victim which included the allegations of sexual misconduct by Tucker. After reading this history, she repeated her physical findings of the second victim. The doctor concluded that those findings were consistent with the history taken, but showed no abnormalities.

Portions of the doctor's testimony were not admissible under KRE 803(4) because they were not made for the purpose of medical treatment. Particularly, the identification by the victims of the perpetrator and the unnecessary details surrounding

the sexual misconduct were not admissible. Cf. Garrett v. Commonwealth, 48 S.W.3d 6 (Ky. 2001). However, defense counsel did not offer a proper objection to this testimony. Thus, this error is not preserved for judicial review. RCr 9.22.

Defense counsel did object to a later portion of the testimony as duplicative and bolstering and the trial judge should have sustained that objection. Nevertheless, the admission of this cumulative hearsay evidence was harmless error. Cf. White v. Commonwealth, 5 S.W.3d 140 (Ky. 1999).

II. Cross-examination of Doctor

Tucker contends that the trial judge erred when she refused to allow him to question the doctor about whether the physical examination alone justified a finding of abuse. We disagree.

On cross-examination, defense counsel asked the doctor if there were any findings that showed sexual abuse, and she replied she found no permanent injuries during her examination. She agreed with the defense that someone who had never been sexually abused could have identical results. Defense counsel then asked if the results of the physical exam assist in determining one way or another if a child had been abused, and the doctor answered that children who are abused may present a very normal physical examination. She agreed that children who are not abused can have normal physical exams.

Defense counsel later asked the doctor this question: "You certainly cannot tell this jury as a fact to use in their deliberations, you cannot tell them that either as your opinion or as a result of your exam that it's your belief that these people, or that it is a fact that these two individuals suffered any kind of sexual abuse at anybody's hand?" Unclear about the question and whether she could properly answer it, the doctor

explained the procedure she followed as a physician. Attempting to rephrase his question, defense counsel then asked: "You can't or you wouldn't, you would not feel comfortable, however you want to say it, telling this jury that these two boys, either one of them, has suffered any form of sexual abuse based on your examination." Again unclear and concerned about what she was being asked to testify to, the doctor turned to the trial judge for assistance. The Commonwealth interjected that the question had been asked and it should be answered, then sought to approach the bench.

At the ensuing bench conference, defense counsel stated that his question was whether these children suffered from sex abuse based on her physical examination. When the trial judge explained that he could not ask that question because the doctor could not give her opinion based on physical findings without considering the history, defense counsel stated that he would withdraw the question.

Not only was this issue waived when defense counsel withdrew the question, it was not preserved by way of avowal. Commonwealth v. Ferrell, 17 S.W.3d 520 (Ky. 2000). It is unknown how the doctor would have answered the original question posed by defense counsel, but it appears evident from the record that it would not have been favorable to the defense.

III. Denial of Right to Refute Hearsay Testimony

Tucker asserts that the trial judge erred when she refused to permit a defense witness to refute evidence that he had been abused by him. Defense counsel sought to ask the cousin of the first and second victims if Tucker ever did anything improper to him. The Commonwealth objected to the question and a bench conference followed. Defense counsel claimed that the question was proper to rebut the testimony of the detective that the first victim told her that Tucker had sexually abused the cousin. The

Commonwealth countered that the detective never mentioned this. The trial judge said that they could go back and review the tape and determine whether the question was proper. Defense counsel indicated he would call the detective to testify. The issue, however, was apparently abandoned following the bench conference because it was never revisited at trial.

On appeal, Tucker argues that the question was permissible to counter the testimony of the doctor, not the detective. Not only was this issue waived by abandoning it at trial, it is a different argument than the one presented to the trial judge. Accordingly, it is not preserved for appellate review. Tucker will not be permitted to feed one can of worms to the trial judge and another to the appellate court. See Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1976).

IV. Investigative Hearsay

Tucker claims that the trial judge erred when she allowed the police detective to present harmful investigative hearsay to the jury. We disagree.

The prosecutor asked the police detective if the first victim talked about a cousin having pornography. Before she could respond, defense counsel objected on grounds that the question called for hearsay. The trial judge overruled the objection, noting the defendant had opened the door to this question. The police detective then testified that the first victim had stated that he had knowledge of a computer disc that had pornography; that the defendant had made the disc and that his cousin possessed it.

Previously, defense counsel had cross-examined the first victim about the computer disc. The first victim stated that his cousin told him that Tucker made a computer disc with pornography. Defense counsel then implied that assertion was false by asking the witness whether he knew what perjury was and the consequences of it.

Accordingly, the testimony of the police detective was admissible as a prior consistent statement of the first victim to rebut an implied charge of recent fabrication. KRE 801A(a)(2). The trial judge did not err in overruling the objection.

V. Unqualified Expert Testimony

Tucker complains that the trial judge erred when she allowed an unqualified police detective to testify as an expert about behavior to expect from victims of sex crimes. This witness had been a police officer for four years. When the investigation into the allegations was conducted she was assigned as a detective with the Crimes against Children Unit. At the time of trial, however, she was a patrol officer. This was neither a promotion nor a demotion.

The police officer testified that it was hard for the first victim to remember details. She explained that this was not uncommon for children who experience traumatic injuries of this nature. The police officer continued, "We try to focus on the first time it happened to him and the very last time it happened to him because it has been my experience - -" Defense counsel interrupted her testimony at that point with an objection, claiming that the witness was not qualified as an expert. The trial judge overruled the objection.

Following that ruling, the police officer, over a second objection, explained why they focus on the first and last incident. She indicated that the first incident is memorable because of the trauma associated with it and the last incident is remembered because it is fresh in their mind. The police officer then explained why the first victim was not able to give a specific date because that is not something that stands out in a child's mind. She suggested that the only time you can pinpoint a specific date with a child is when the incident is associated with a holiday.

The experience this police officer had certainly could have been more fully developed at trial. For example, it is not clear from the record how long the detective had been with the Crimes against Children Unit or how many cases she had handled with that unit. Nevertheless, her four years experience as a police officer and the fact that she was assigned to the Crimes against Children Unit for part of that time, qualified her as an expert under KRE 702. Cf. Sargent v. Commonwealth, 813 S.W.2d 801 (Ky. 1991). Even if we were to conclude otherwise, given the limited expert testimony she provided and the record before us, any error here would certainly be harmless. RCr 9.24.

VI. Prior Consistent Statement

Tucker maintains that the trial judge erred by permitting evidence of a prior consistent statement when there had been no allegation of recent fabrication or improper influence. We disagree.

The first victim testified about the sexual misconduct of Tucker. On cross-examination, defense counsel implied that those allegations were false by asking whether he knew what perjury was and the consequences of it. Following the testimony of this victim, a friend of his testified and recounted an incident several years earlier wherein the first victim revealed to him that his uncle had done something to him. This testimony was admissible to rebut an implied charge against the first victim of recent fabrication. KRE 801A(a)(2). No error occurred.

VII. Rebuttal Testimony

Tucker contends that the trial judge erred when she allowed new testimony during the prosecutor's rebuttal case on a point that was not at issue. The defendant testified that "he couldn't place" the diagram of an apartment drawn by the first victim,

but that it was similar to his first apartment in Lexington. Thereafter, the Commonwealth presented a witness in rebuttal who could describe the apartment the defendant lived in at the time of the abuse allegations by the first victim.

The trial judge is afforded a great degree of discretion in determining when rebuttal evidence will be received. RCr 9.42. Where there is no clear showing of arbitrariness or an abuse of discretion, the ruling of the trial judge will not be disturbed. Pilon v. Commonwealth, 544 S.W.2d 228 (Ky. 1976). No such showing has been made here.

VIII. Trial Judge Bias

Tucker argues that the trial judge erred by giving an appearance of bias toward the Commonwealth when she excused the first victim, saying "Thank you, Sweetie." This issue is not properly preserved for appellate review. The assertion by Tucker that defense counsel may not have heard the remark is speculative and not very plausible. Having reviewed the entire record, it is clear that the trial judge exhibited a very professional and neutral demeanor throughout the trial. There was no bias by the trial judge and certainly no palpable error.

IX. Denial of a Defense

Tucker complains that the trial judge erred when she refused to allow testimony that a convicted sex offender lived at and had pornography at the household of the first and second victims. His theory of the case was that the boys took events that happened to them with this other individual and transferred them onto him.

The Commonwealth filed a motion in limine before trial seeking to exclude any evidence that another individual may have sexually abused the victims due to the fact that he had been convicted of a sexual offense. It alleges that such evidence was

irrelevant to the issue of whether the defendant committed the acts charged. The trial judge sustained the motion, but gave some latitude to the defense to introduce evidence that pornographic material existed in the home of the two victims. She offered to allow any excluded evidence to be presented by way of avowal.

The individual in question was friends with the older brother of the first and second victims. He apparently stayed with the family for a short period of time and slept in the bedroom of the oldest victim. He was previously convicted of a misdemeanor sex offense. The first and second victim indicated that they had little contact with this individual and the third victim stated he had never met him.

This issue is without merit. Tucker failed to offer any scientific, medical or legal authority to support his theory. Moreover, the first and second victims had very little contact with this individual and the third victim denied ever meeting him. There was little or no nexus between any of the three victims and the other individual.

X. Cumulative Error

There is no specific error and thus no basis to claim cumulative error in this case. Tucker received a fundamentally fair trial and was not denied either his state or federal constitutional rights.

The judgment of conviction is affirmed.

All concur.

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