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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0144-MR

DATE 10-13-05 [illegible]

CARTER GAFFNEY APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM E. MCANULTY, JR., JUDGE
01-CR-2851

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A jury of the Jefferson Circuit Court convicted Appellant of first degree rape and first degree sexual abuse against his daughter. For these crimes, Appellant was sentenced to a total of thirty years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

Between May 1998 and September 1999, C.F., born December 1987, lived with Appellant, her natural father. C.F. testified that during this time, her father raped her on numerous occasions. On the occasion of the first sexual assault, C.F. testified that she spent the night with Appellant's sister, G.C., her aunt. The aunt dropped her off at Appellant's home the next morning at 5:30 a.m. so that she could attend school.

Appellant told her that she was not going to attend school that day because he was going to "do her like he did her mama." Thereafter, she testified that her father sexually assaulted her approximately three to five times a week until she was removed from the home in September 1999 for reasons unrelated to the sexual assaults.

C.F. testified that she was afraid to disclose the abuse because Appellant told her that she would get into a lot of trouble and that he would kill her. Nonetheless, she disclosed the abuse to her babysitter, K.H., sometime in mid-1999. The babysitter testified that she told her grandmother about C.F.'s disclosure and that her grandmother called Child Protective Services. When Child Protective Services inquired about the allegation, C.F. denied that anything happened between herself and her father. A few months after the inquiry by Child Protective Services, C.F. again disclosed the abuse to her cousin, E.B. E.B. testified that C.F. asked her not to tell anyone and that she honored C.F.'s wishes.

Nearly two years later, C.F. disclosed the abuse to her aunt, her legal guardian since being removed from Appellant's custody in September 1999. C.F.'s aunt testified that the disclosure was made after one of her sons accidentally walked in on C.F. while she was showering. She stated that C.F. became very distraught and ran down the stairs screaming and hollering. When she asked C.F. why she became so frightened, C.F. stated that she was having flashbacks, and thereafter, disclosed the abuse.

C.F.'s aunt notified police regarding C.F.'s allegations. Upon further investigation, it was discovered that C.F., who was thirteen years old at the time of the medical exam, had a well healed scar on her hymen, thinning of the hymenal tissue, and a sexually contracted disease. Dr. Betty Spivak, the physician who made these findings, testified that the scarring was consistent with repeated penile vaginal

intercourse. She testified that it cannot be medically distinguished whether such scarring resulted from consensual or forced intercourse. Dr. Spivak also testified that since the scar was well healed, it could not have happened in the last several months.

Appellant did not present any evidence on his behalf other than a calendar which showed that the date C.F. alleged she was kept home from school by Appellant and raped was a Sunday. The jury returned verdicts of guilty on both charges submitted to it. Appellant submits two assignments of error upon which he claims he is entitled to relief.

Appellant's first argument is that he was substantially prejudiced by inadmissible hearsay offered at trial by the babysitter, K.H., C.F.'s cousin, E.B., C.F.'s aunt, G.C., and the investigating detective in this case, Leigh Kemper. He contends the testimony violated his due process rights under the Kentucky and United States Constitutions by introducing prior consistent statements of the victim, C.F., in violation of KRE 802. Appellant acknowledges that none of the testimony alleged herein was objected to by trial counsel, and accordingly, he pleads the issue as palpable error affecting his substantial rights. KRE 103(e).

In Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005), we explained our review for palpable error as follows:

> A finding of palpable error must involve prejudice more egregious than that occurring in reversible error and the error must have resulted in "manifest injustice." Authorities discussing palpable error consider it to be composed of two elements: obviousness and seriousness, the latter of which is present when a failure to notice and correct such an error would seriously affect the fairness, integrity, and public reputation of the judicial proceeding. A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily dependent upon the facts of each case.

Id. (citations and quotations omitted).

In this case, the Commonwealth first elicited testimony from the victim, C.F., who testified regarding the sexual abuse. Next, the victim's aunt testified, in pertinent part, that she found out about the sexual abuse one day in 2001 after C.F. had been living with her for two years. She stated that her son walked into the bathroom while C.F. was showering. C.F. became frightened and ran down the stairs screaming and hollering. When C.F.'s aunt asked why she was so frightened, C.F. said "because my father used to come in on me like that." Next, the babysitter, K.H., testified, in pertinent part, that she lived downstairs from C.F. and Appellant and that she used to watch C.F. when Appellant was working. She stated that she thought C.F. had a normal relationship with her father, but when Appellant drank, she thought he became too possessive of C.F. She testified that she began to question C.F. about whether anything was going on between her and her father and in September 1999, C.F. finally told her what was going on. The babysitter told her grandmother who in turn called Child Protective Services. C.F.'s cousin, E.B., also testified, and stated that C.F. told her about the sexual abuse some months after C.F. was removed from Appellant's custody. She stated that C.F. seemed sad and nervous when she told E.B. what happened. Finally, Detective Leigh Kemper testified, stating that she referred C.F. for a medical exam because C.F. "had disclosed being raped by her father."

It has been generally held that hearsay in the form of prior consistent statements of a victim is not admissible if those statements are offered for the purpose of bolstering the victim's testimony. Smith v. Commonwealth, 920 S.W.2d 514, 517 (Ky. 1995) (citing Eubanks v. Commonwealth, 210 Ky. 150, 275 S.W. 630, 633 (1925)). However, where the prior consistent statement is offered "to rebut an express or implied charge against

the declarant of recent fabrication or improper influence or motive," the statement is not excluded by the hearsay rule. KRE 801A.

Notably, the witnesses in this case did not "repeat the [victim's] story as told to them." See Bussey v. Commonwealth, 797 S.W.2d 483, 485 (Ky. 1990). Rather, they simply relayed the fact that the victim had told them about being sexually abused by her father. During its cross-examination of C.F. and C.F.'s aunt, the defense attacked C.F.'s credibility and suggested that she lied about being sexually assaulted by her father in order to stay out of trouble (presumably, by her aunt for causing trouble). When the testimony is considered in this context, we find it perfectly permissible for the prosecution to rebut this motive by introducing evidence regarding the timing and circumstances surrounding the victim's disclosures. See Schambon v. Commonwealth, 821 S.W.2d 804, 810-11 (Ky. 1991) ("Our law is that once a witness's credibility has been attacked by charges of recent fabrication or improper influence, rebuttal evidence may be introduced to show that the witness made a prior consistent statement at a time when there was no improper influence or motive to fabricate.")

Moreover, the defense used the babysitter's testimony regarding C.F.'s disclosure to her and subsequent investigation by Child Protective Services to refute C.F.'s claim that she was scared to tell anyone because her father might harm her or kill her. Accordingly, Appellant cannot now claim error with the admission of this hearsay when such hearsay was a vital part of his defense. See Parson v. Commonwealth, 144 S.W.3d 775, 783 (Ky. 2004) (defendant can waive Sixth Amendment Confrontation rights "so long as it can be said that the attorney's decision [to waive those rights] was a legitimate trial tactic or part of a prudent trial strategy.") In addition, we find no error whatsoever in the detective's testimony which simply explained why she referred the

victim for a medical exam. This testimony was not explicit and was not offered to prove the truth of the matter asserted; rather, it was offered to explain how the detective's investigation proceeded. Thus, when the record is viewed in its entirety, we find nothing rising to the level of palpable error.

Appellant's second argument alleges error in the trial court's refusal to allow C.F.'s aunt to testify regarding an incident that happened while C.F. was staying with her mother. The trial court excluded the evidence on the grounds that it was irrelevant. "A trial judge's decision with respect to relevancy of evidence under KRE 401 and KRE 403 is reviewed under an abuse of discretion standard." Love v. Commonwealth, 55 S.W.3d 816, 822 (Ky. 2001).

During cross-examination, C.F.'s aunt testified that C.F.'s mother was not a good influence and generally had bad people around her. She further explained that she did not like C.F. to go to her mother's house without her supervision, but that she nonetheless allowed C.F. to have unsupervised visits with her mother on occasion. At a bench conference, Appellant's attorney stated, and offered testimony to this effect on avowal, that he had information that C.F. had been arrested at an after-hours club while she was staying with her mother. The Commonwealth objected to the admission of such testimony on the grounds of relevancy. Appellant's attorney explained that the testimony was relevant to show that C.F. was exposed to an environment where she had the opportunity to engage in sexual activity. The trial judge ruled that a single instance at an after-hours club was not relevant to imply that C.F. was sexually active. We find no abuse of discretion in this ruling and accordingly, we defer to the trial court's determination.

The judgment of the Jefferson Circuit Court is affirmed.

All concur.

ATTORNEY FOR APPELLANT

Julie Namkin
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

ATTORNEYS FOR APPELLEE

Gregory D. Stumbo
Attorney General

George G. Seelig
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601