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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0487-MR

DATE 2-9-06 Ella Graves D.C.

JOHNNY LEE CISSELL — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN SHAKE, JUDGE
02-CR-2248

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Jefferson Circuit Court convicted Appellant, Johnny Lee Cissell, of Rape in the First Degree, KRS 510.040(1)(b), and Assault in the First Degree, KRS 508.010(1)(a), for which he was sentenced to twenty-four years in prison. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting the following claims of error: (1) admission of an unduly prejudicial out-of-court statement that he made to a police detective and a social worker; (2) admission of unduly prejudicial photographs; (3) admission of rebuttal testimony by the Commonwealth's expert witness after the close of Appellant's case-in-chief; and (4) improper jury instructions. Finding no error, we affirm.

Appellant and his girlfriend, Felisha Roberts, lived together in a Louisville residence with their three biological children, the oldest of whom was three-year-old

K.C., the victim in this case.[1] At approximately 7:30 a.m. on June 14, 2002, Roberts left for work, leaving Appellant and the three children asleep in the house. Sometime around 10:30 a.m. that morning, Appellant's mother, Diana Cissell, arrived at the residence to pick up the three children so that Appellant could search for a job. Upon her arrival, Cissell discovered that K.C. was bleeding heavily from her vaginal area. Cissell drove Appellant and K.C. to Roberts's workplace. After leaving the other two children with Roberts's grandmother, Cissell, Roberts, and Appellant then took K.C. to Kosair Children's Hospital.

Treating emergency room physicians determined that K.C. had a large vaginal laceration that penetrated into her rectum. They also noticed a small petechial bruise around one eye and slight bruising on her inner thighs. Dr. Betty Spivack, a forensic pediatrician, concluded that K.C. had sustained an acute trauma caused by the forcible penetration of her vagina by an object too large for her vaginal canal – possibly an adult penis or other object. She also concluded that such an injury was consistent with child sexual abuse and was not caused by an accidental "straddle" injury. K.C. underwent surgery that evening and remained hospitalized for three days thereafter.

Detective Whelan, of the Louisville Metro Police Department's Crimes Against Children Unit (CACU), was called to the hospital where she interviewed Roberts, Cissell, and Appellant. Though he was alone with the three children that morning, Appellant denied any knowledge of the cause of K.C.'s injury. He advised that K.C. often stood on the commode to brush her teeth and speculated that she might have fallen and thereby sustained the injury, though he never heard her fall or cry out. Roberts consented to a search of the residence, where police recovered several items,

[1] None of the three children were deemed competent to testify due to their age.

including K.C.'s bloody clothing and a toilet plunger with traces of K.C.'s blood on the end of the handle. A videotape and various photographs were taken of the residence during the search. Appellant was indicted on October 15, 2002.

I. RELEVANCY AND PREJUDICE.

Appellant made several motions in limine to exclude certain evidence on grounds of irrelevancy under KRE 401, or, alternatively, that though relevant, the probative value of the evidence was outweighed by a danger of undue prejudice under KRE 403.

Under KRE 401, evidence is relevant if it has any tendency to render the existence of any consequential fact more or less probable, however slight that tendency may be. Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1999); Turner v. Commonwealth, 914 S.W.2d 343, 346 (Ky. 1996). The trial court's KRE 401 relevancy determination is reviewed for abuse of discretion. Love v. Commonwealth, 55 S.W.3d 816, 822 (Ky. 2001); Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996).

Relevant evidence is admissible unless excluded by some other rule. KRE 402. Under KRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice . . . ." A trial court's KRE 403 determination in this respect is also reviewed for abuse of discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999); Partin, 918 S.W.2d at 222; Bell v. Commonwealth, 875 S.W.2d 882, 890 (Ky. 1994). Applying these legal standards, we now address the evidence that Appellant asserts was erroneously admitted.

A. Appellant's Statement Regarding Father's Conviction.

Detective Whelan interviewed Appellant at Kosair Hospital while K.C. was being treated for her injuries. To assuage his visible nervousness, Whelan told Appellant at the outset that the interview was a routine practice whenever a child was injured under

suspicious circumstances. In response, Appellant stated that he understood and that his father was in prison for "similar stuff." When asked what he meant by "similar stuff," Appellant responded, "child molestation."

Obviously, Appellant's statement satisfied the hearsay exception for admissions of a party. KRE 801A(b)(1). Appellant moved the court to exclude his statement and to foreclose any reference to his father's conviction of child molestation on grounds that it was not relevant under KRE 401 or, alternatively, was unduly prejudicial under KRE 403. Specifically, he posited that once the jurors learned that his father was a convicted child molester, they would be more inclined to believe he was guilty in this case, i.e., "like father, like son." The Commonwealth argued that the statement was relevant to show Appellant's state of mind: because Whelan had said nothing to suggest molestation was suspected, Appellant's statement reflected his knowledge that K.C. had been sexually abused rather than injured by an accidental fall.

The trial court heard both sides of the argument, questioned Detective Whelan under oath about her account of the exchange including who was present and what was said prior to the interview, specifically asking whether there had been any previous mention of child molestation. Appellant's counsel was allowed to cross-examine Whelan. The trial court then ruled that the evidence was admissible because (1) it was relevant to prove Appellant's knowledge that the cause of K.C.'s injury was sexual abuse rather than an accident, and (2) that, although prejudicial, its probative value was not substantially outweighed by its prejudicial effect. The decision to admit the statement was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles," English, 993 S.W.2d at 945, and, therefore, the trial court did not abuse its discretion in admitting the statement.

B. Photographs Admitted at Trial.

Appellant also made a motion in limine to exclude several photographs on grounds that they were unduly prejudicial.

1. Injury photographs.

Exhibits 1 through 3 are photographs of K.C.'s vaginal area that were taken on the operating room table prior to the surgical repair. In order to fully display the nature and extent of the injury, Exhibit 1 shows a nurse inserting her fingertip into the rectal cavity and through the tear in the vaginal cavity. Exhibits 2 and 3 show K.C.'s vaginal area without any manipulation.

Appellant argued that, due to their graphic nature, all three photographs were inflammatory and therefore inadmissible under KRE 403. The Commonwealth responded that these photographs were relevant to show the depth and extent of the injury, both to establish its seriousness and to refute Appellant's claim that the injury resulted from an accident. The trial court reviewed the photographs, invited argument by both parties, then overruled Appellant's exclusionary motion.

"The general rule is that a photograph, otherwise admissible, does not become inadmissible simply because it is gruesome and the crime is heinous." Funk v. Commonwealth, 842 S.W.2d 476, 479 (Ky. 1992); see also Holland v. Commonwealth, 703 S.W.2d 876, 879 (Ky. 1985); Brown v. Commonwealth, 558 S.W.2d 599, 605 (Ky. 1977). An especially gruesome photograph may become inadmissible if its depictions go "far beyond demonstrating proof of a contested, relevant fact." Holland, 703 S.W.2d at 879.

Appellant argues that Exhibit 1 was unduly prejudicial because the nurse's manipulation of the victim's wound rendered the photograph more gruesome than was

otherwise necessary, and that the same facts could have been established at trial by Exhibits 2 and 3 in conjunction with testimony from the medical personnel who treated K.C. In conducting an inquiry under KRE 403, a trial court should consider whether evidentiary alternatives would sufficiently prove the fact at issue without a comparable risk of prejudice. Old Chief v. United States, 519 U.S. 172, 184-85, 117 S.Ct. 644, 652, 136 L.Ed.2d 574 (1997); Norris v. Commonwealth, 89 S.W.3d 411, 416 (Ky. 2002). However, evidence that proves the corpus delicti, e.g., crime scene photographs and photographs depicting the nature of wounds inflicted, are generally admissible even if otherwise inflammatory and prejudicial. Adkins v. Commonwealth, 96 S.W.3d 779, 794 (Ky. 2003); Salisbury v. Commonwealth, 417 S.W.2d 244, 246 (Ky. 1967). "Were the rule otherwise, the state would be precluded from proving the commission of a crime that is by nature heinous and repulsive." Salisbury, 417 S.W.2d at 246.

Here, the nature of the physical injury was critical in refuting Appellant's claim that the injuries resulted from an accidental fall. Exhibit 1 was the only photograph that visually captured both the depth and severity of the tear. Although extensive testimony was available to describe K.C.'s injury, the photographic, demonstrative evidence was a more direct and credible means of establishing it, less susceptible to refutation or impeachment in a juror's mind. Brown, 558 S.W.2d at 604; City of Louisville v. Yeager, 489 S.W.2d 819, 821 (Ky. 1973).

The representation in the photograph is an accurate depiction of the injury. Neither the manner in which it was shown to the jury nor the duration of its presentation was longer than necessary. Exhibit 1 does not come close to those pictures which this Court, or its predecessor court, have found unduly prejudicial. See, e.g., Funk, 842 S.W.2d at 478-79 (photographs of corpse with animal mutilation, substantial

decomposition, and maggot infestation); Clark, 833 S.W.2d at 794-95 (up-close color photographs of substantially decomposed corpse excessively projected in courtroom); Holland, 703 S.W.2d at 879-80 (photographs of corpse with extensive animal mutilation); Haddad v. Kuriger, 437 S.W.2d 524, 525-26 (Ky. 1968) (photographs that exaggerate injuries through magnification). Compare Adkins, 96 S.W.3d at 794-95 ("gruesome" picture of large holes in murder victim's skull held admissible); Foley v. Commonwealth, 953 S.W.2d 928, 935 (Ky. 1997) (pictures of burial site and corpses wrapped in quilts, roughly two years after the murder, held admissible); Yeager, 489 S.W.2d at 820-21 (color photographs of victim's gunshot wounds); Faught v. Commonwealth, 467 S.W.2d 322, 325 (Ky. 1970) (photographs of victim's knife wounds).

Nor did the manipulation of the wound by the nurse's finger elevate the depiction to the level of undue prejudice. Although this Court recognizes an exception for the admissibility of an otherwise-relevant, gruesome picture when its subject matter has been altered by "extraneous causes," Clark, 833 S.W.3d at 794, this exception does not contemplate human manipulation necessary to present the relevant evidence, i.e., the nurse's fingertip revealing the tear in K.C.'s vaginal wall that would otherwise be concealed from the camera's view. Furthermore, the photographs, though graphically portraying the nature of the injury to K.C.'s genitalia and rectum, are not gruesome. "In this advanced technological age of television, movies, and the news media, children, as well as adults, are exposed to more gruesome, repulsive, and nauseous depictions of human misery and tragedy . . . . They are not strangers to the viewing public and prospective jurors." Brown, 558 S.W.2d at 604-05. Therefore, the trial court did not abuse its discretion in admitting the photographs of K.C.'s injuries.

2. Photographs of Bloody Sheets and Clothes.

Appellant also asserts error in the admission of photographs of hospital sheets, underwear, shorts, a sanitary napkin, and a toilet plunger, all with blood on them. Specifically, he argues that these photographs were both irrelevant and cumulative.

The photographs are clearly relevant. Testimony regarding the quantity of blood lost by K.C. was relevant in determining when the injury occurred. The prosecution and the defense called medical experts to the stand, and the conclusions they drew from the evidence varied. As explained, supra, photographs can be far more effective than third-party testimony at establishing essential facts, and the photographs here have a tendency to render the existence of a consequential fact, i.e., the volume of blood K.C. lost within the hours preceding her medical treatment, more probable. Springer, 998 S.W.2d at 449. Thus they are relevant under KRE 401.

The same is true of the photograph of the toilet plunger with visible traces of blood around its handle. Two counts in Appellant's indictment were for various degrees of assault for his suspected insertion of the toilet plunger handle into K.C.'s vagina. Expert testimony stated that K.C.'s wound was caused by penetration, either by a penis or some other object. A photograph showing blood on the handle of the toilet plunger tended to render the fact that Appellant had committed the suspected assault more probable and was, therefore, relevant. Appellant's claim that these photographs were cumulative and that in the aggregate they became unduly prejudicial is likewise unconvincing. No two photographs entered as exhibits depict the same item unless one shows something the other does not, e.g., one picture showing the front of a pair of K.C.'s shorts and a second showing the back. Moreover, though Appellant cites Clark, 833 S.W.2d at 794-95, and Holland, 703 S.W.2d at 879-80, in support of his claim,

those cases are distinguishable because they address the admission of exceedingly gruesome photographs. The exhibits at issue here, though certainly prejudicial against Appellant, are not unduly inflammatory.

II. REBUTTAL EVIDENCE.

Appellant asserts the trial court committed reversible error by allowing the Commonwealth to recall its expert as a rebuttal witness after the defense rested. At trial, each side offered the testimony of a forensic pediatrician to express an expert opinion regarding the probable time frame within which K.C. suffered her injuries. The time frame was extremely relevant because Appellant was home alone with K.C. and his other two children for the three hours between Roberts's departure from and Cissell's arrival at the residence. The prosecution's expert, Dr. Betty Spivack, opined that based on the hematocrit levels[2] in K.C.'s blood and the volume of blood lost, the injury occurred within four hours of her arrival at the hospital. The defense expert, Dr. Janice Ophoven, opined that the injury likely occurred from twelve to twenty-four hours prior to K.C.'s arrival at the hospital. Dr. Ophoven based her opinion on, among other factors, K.C.'s markedly elevated white blood cell count and the blood clotting around the vaginal wound. Ophoven also disputed Spivack's opinion that one could competently ascertain the age of the injury on the basis of hematocrit levels.

At the close of Appellant's case-in-chief, the Commonwealth recalled Dr. Spivack in rebuttal to address Dr. Ophoven's opinions regarding the significance of K.C.'s white cell count and the clotting around the injury. In response to Appellant's objection that Dr. Spivack was an improper rebuttal witness, the Commonwealth proffered that Dr.

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[2] The hematocrit level represents the ratio of physical matter (i.e., blood cells) to liquid matter (i.e., plasma) in a person's blood.

Ophoven had failed during a pretrial interview to disclose fully the bases for her expert opinions, specifically that her opinion regarding the age of K.C.'s injury was premised upon her white blood cell count and blood clotting; thus, Dr. Spivack could not have addressed these issues in her testimony in chief. The trial court overruled Appellant's objection.

Criminal Rule 9.42(e) provides: "The parties respectively may offer rebutting evidence, unless the court, for good reason in furtherance of justice, permits them to offer evidence in chief." Rebuttal evidence is unquestionably proper to refute a previously unanticipated argument made by another party. Archer v. Commonwealth, 473 S.W.2d 141, 143 (Ky. 1971). Whether to allow evidence to be admitted in rebuttal is ordinarily within the sound discretion of the trial court. Gilbert v. Commonwealth, 633 S.W.2d 69, 70 (Ky. 1982).

Dr. Spivack's rebuttal testimony tended to refute Dr. Ophoven's claim that K.C.'s white blood cell count and blood clotting around the wound strongly supported her conclusion that the injury was sustained at least twelve hours prior to arriving at the hospital. In light of the Commonwealth's unrefuted proffer that Dr. Ophoven failed to fully disclose the bases for her opinion testimony during the pre-trial interview, the trial court's decision to permit Dr. Spivack to rebut that testimony was not an abuse of discretion.

Appellant also asserts that the trial court erred in allowing Dr. Spivack to exceed the permissible scope of rebuttal. Our case law admonishes courts not to permit rebuttal witnesses to reiterate evidence presented in chief. Shell v. Commonwealth, 245 Ky. 535, 53 S.W.2d 954, 956 (1932). However, Appellant failed to obtain a ruling

from the trial court on this issue.[3] To preserve for review the overruling of an objection or the denial of a motion, the party seeking relief must insist on a ruling from the trial court. Bratcher v. Commonwealth, 151 S.W.3d 332, 350 (Ky. 2004); Sanborn v. Commonwealth, 892 S.W.2d 542, 556 (Ky. 1994); Bell v. Commonwealth, 473 S.W.2d 820, 821 (Ky. 1971). Because the trial court did not specifically rule on Appellant's objection to the scope of Dr. Spivack's rebuttal testimony, any alleged error was unpreserved. Nevertheless, even if error occurred, it would not require reversal.

Concededly, it is improper to admit evidence if it could and should have been introduced in chief and if its introduction after the defense rests would unduly prejudice the defendant's case. Archer, 473 S.W.2d at 143. Whether or not the evidence regarding the quantity of blood K.C. lost was improperly offered during rebuttal, the testimony here was not so prejudicial as to mandate reversal. See, e.g., Wager v. Commonwealth, 751 S.W.2d 28, 29 (Ky. 1988) (jailhouse informant's testimony that Appellant admitted committing the crime improperly introduced in rebuttal under guise of impeachment); Gilbert, 633 S.W.2d at 70-71 (rape defendant's tape-recorded admission to having had sexual intercourse with granddaughter improperly introduced in rebuttal under guise of prior inconsistent statement); Robinson v. Commonwealth, 459 S.W.2d 147, 149 (Ky. 1970) (witness's testimony that defendant admitted committing the crime improperly introduced in rebuttal under guise of impeachment); Lucas v. Commonwealth, 302 Ky. 512, 195 S.W.2d 90, 92-93 (1946) (defendant's alleged confession should have been introduced during case-in-chief); but see Humphrey v.

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[3] When Dr. Spivack began testifying to the percentage of blood lost by K.C., Appellant objected to the scope of her testimony. After the prosecution explained that the testimony was relevant to the clotting issue (which the trial judge had already determined was proper rebuttal), Appellant relented and no further ruling was requested by Appellant or made by the court.

Commonwealth, 836 S.W.2d 865, 870-71 (Ky. 1992) (defendant not prejudiced by witness's testimony because Commonwealth furnished defendant with witness's statement during discovery, and no abuse of discretion because Commonwealth proffered that it did not decide to use the witness (a jailhouse informant) until after defendant testified); Davis v. Commonwealth, 795 S.W.2d 942, 947 (Ky. 1990) (defendant's admission, though extremely inculpating, was proper rebuttal when first discovered after close of prosecution's case-in-chief). The trial court certainly did not abuse its broad discretion in permitting Dr. Spivack's rebuttal testimony; furthermore, no resulting prejudice is apparent.

III. JURY INSTRUCTIONS.

Appellant argues that the jury instructions deprived him of his rights to due process and a fair trial by giving improper directives on the burden of proof and the presumption of innocence. The form of the instructions on the individual charges is exemplified by the instruction on rape in the first degree:

INSTRUCTION NO. 1 – RAPE IN THE FIRST DEGREE

> You will find the defendant, Johnny Lee Cissell, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:
>
> (A) That . . . the defendant, Johnny Lee Cissell, engaged in sexual intercourse with [K.C.];
>
> AND
>
> (B) That at the time of such intercourse, [K.C.] was less than 12 years of age.

Instructions with the same introductory language regarding the Commonwealth's burden of proof followed the charges of Assault in the First Degree and Assault in the Second Degree, along with an instruction on relevant definitions. Additionally, as required by

RCr 9.56(1), the jury was instructed as follows with respect to the presumption of innocence and the burden of proof:

INSTRUCTION NO. 5 – PRESUMPTION OF INNOCENCE

> The law presumes a defendant to be innocent of a crime and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

(Emphasis added.)

Appellant argues that for each criminal offense for which he stood trial, the jury instructions should have stated: "You shall find the defendant not guilty under these instructions, unless you find beyond a reasonable doubt that he . . . [followed by the elements of each offense]." (Emphasis added.) He argues further that a separate instruction on the presumption of innocence should have been included in the instructions on each charge. Appellant asserts that such changes are constitutionally required by the guarantees of due process and a fair trial. We disagree.

In the first place, the failure to specifically instruct on the presumption of innocence is not per se reversible error under the United States Constitution. Though due process may require that the jury in a criminal trial be instructed on the presumption of innocence, Taylor v. Kentucky, 436 U.S. 478, 490, 98 S.Ct. 1930, 1937, 56 L.Ed.2d 468 (1978), "the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution." Kentucky v. Whorton, 441 U.S. 786, 789, 99 S.Ct. 2088, 2090, 60 L.Ed.2d 640 (1979). In Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990), we held that the instruction required by RCr 9.56(1) and given by the trial court as Instruction No. 5 in this case adequately instructed the jury on the

presumption of innocence and the burden of proof. Id. at 679. See also Patterson v. Commonwealth, 630 S.W.2d 73, 75 (Ky. App. 1981).

Furthermore, a trial court is not required to accept a defendant's proffered instruction on the presumption of innocence or the burden of proof in lieu of its own adequate instructions. See, e.g., Wiseman v. Commonwealth, 587 S.W.2d 235, 239 (Ky. 1979); Edwards v. Commonwealth, 573 S.W.2d 640, 641 (Ky. 1978). Other states follow a similar rule. See, e.g., Flowers v. State, 481 N.E.2d 100, 103-04, (Ind. 1985), abrogated on other grounds by Richardson v. State, 717 N.E.2d 32, 48-49 (Ind. 1999); Diaz v. State, 740 A.2d 81, 86-89 (Md. Ct. Spec. App. 1999); Blake v. State, 121 P.3d 567, 580 (Nev. 2005); Skatell v. State, 688 S.W.2d 248, 251 (Tex. Ct. App. 1985); Stockton v. Commonwealth, 314 S.E.2d 371, 384 (Va. 1984).

As for the form of the instructions on the individual charges, "[t]he function of instructions in this jurisdiction is only to state what the jury must believe from the evidence (and in a criminal case, beyond a reasonable doubt) in order to return a verdict in favor of the party who bears the burden of proof." Webster v. Commonwealth, 508 S.W.2d 33, 36 (Ky. 1974). The instructions given by the trial court satisfied this requirement.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

All concur.

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