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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED

FINAL DATE 2-9-06 ELIA GRANT P.C.

Supreme Court of Kentucky

2004-SC-000489-TG

THOMAS SCOTT SOUTHERN — APPELLANT

V.

APPEAL FROM BELL CIRCUIT COURT
HON. JAMES L. BOWLING, JUDGE
INDICTMENT NO. 03-CR-00068

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from the Bell Circuit Court's judgment of sentence entered March 1, 2004. The jury returned verdicts of guilty on two counts of Rape in the First Degree and one count of Sodomy in the First Degree. Pursuant to the jury recommendations, the court sentenced the Appellant to an aggregate of thirty years in the penitentiary. The Appellant appeals to this Court as a matter of right pursuant to Ky. Const. §110(2)(b).

The Appellant argues he should be granted a new trial for the following reasons: 1) the trial court erred to the Appellant's substantial prejudice and denied him due process of law in denying his motion to strike Juror #50 for cause; 2) the trial court erred to the Appellant's substantial prejudice and denied him due process of law and fundamental fairness by denying his motion to test

cultures taken from the victim by Dr. Ashburn, the medical expert for the Commonwealth, and to have a second independent examination of the victim by a doctor of his choice; 3) he was prejudiced when the Commonwealth introduced evidence of an uncharged crime in violation of KRE 404(c); 4) he was prejudiced when the trial court allowed the Commonwealth to cross-examine his wife on irrelevant and inflammatory evidence; and 5) the Appellant was prejudiced and denied his right to present his defense when the trial court prohibited him from introducing relevant evidence.

Final sentencing occurred on March 1, 2004 and a timely notice of appeal was filed on the same date. After review of the record, we AFFIRM the trial court's rulings.

FACTS

J.S. has lived with her biological father and parental custodian, the Appellant, Thomas Scott Southern, since she was two. At the time of trial, she was 16 years old. On September 2, 2002, J.S. was checked out of school, taken to her grandmother's home, and given a pregnancy test. J.S. claimed the pregnancy test was given to her because she told the Appellant she had missed her menstrual cycle and he was fearful she might be pregnant with his baby and would need an abortion. J.S. claims the Appellant was the only person she ever had sex with. The Appellant, on the other hand, claims J.S. told him she might be pregnant because things had happened between her and another boy.

Several days later, J.S. disclosed to her friends, social workers, police, and her principal, that her father had been having sex with her for three years.

As a result of the allegations against the Appellant, J.S. was removed from the home and placed in the care of her aunt Eva and cousin Jessica.

Two and a half months after the occurrence of the last alleged act of sexual activity between the Appellant and J.S., social workers arranged for J.S. to be examined by Dr. William Ashburn, a family practitioner at the Barbourville Family Health Center. Although Dr. Ashburn is not an OB/GYN, he is relied upon locally, and referred to, by other OB/GYNs for his expertise in sexual abuse diagnosis. His examination showed a scarring on J.S.'s hymen and thinning of the hymeneal tissue. Also, lab reports showed J.S. tested positive for HPV (human papilloma virus). Dr. Ashburn described HPV as a virus that is contracted through sexual intercourse with someone who has had multiple sex partners.

On April 2, 2003, a Bell County Grand Jury indicted the Appellant on two counts of first degree rape and one count of first degree sodomy of his daughter J.S..

On May 12, 2003, the Commonwealth moved to depose Dr. Ashburn because he was leaving the country for two years and was a material witness in the case.

On June 2, 2003, the Appellant moved for a second, independent medical exam of J.S. During the hearing on that motion, the Appellant asked to have his own tests run on the cultures Dr. Ashburn had taken from J.S. during his exam. The court ordered the Appellant to get a medical expert of his choice to review Dr. Ashburn's records and findings first, and then, if his medical expert suggested a second medical examination would be beneficial, the trial court would allow a

second examination. For reasons not clear in the record, the cultures were never given to the Appellant, but he never renewed the issue or offered any objections during trial. The trial lasted three days, beginning January 6, 2004.

During voir dire, Juror #50 answered positively when asked if anyone knew Dr. Ashburn. She said she was a nurse and had worked with Dr. Ashburn and his patients during the four years prior to the Appellant's trial. She stated that although she knew Dr. Ashburn to be a "truthful man," her knowledge of him would not influence her ability to evaluate his testimony or the entirety of the evidence.

Additionally, she noted that through her occupation as a nurse, she has to report sexual abuse. She also told the court during voir dire that some allegations of sexual abuse can be fabricated and therefore, the evidence as a whole must be considered before a report is made. She stated that all allegations must be looked at on a "case by case" basis and she would be able to look at the evidence in the case as a whole and make a fair decision as to the guilt or innocence of the Appellant. The Appellant moved to strike her for cause, which was denied.

Jen. S., the Appellant's niece, also testified at trial. Prior to testifying, Jen. S. was interviewed by Officer England. Jen. S. testified about an incident during the summer of 2002 when she visited J.S. at the Appellant's home. That night, while sleeping in J.S.'s bed, Jen. S. was startled out of her sleep by the Appellant when he placed himself on top of her and began to touch her breasts. However, when he realized it was not J.S., he stopped suddenly and left the room.

This incident was also addressed when J.S. took the stand and in closing arguments to which the Appellant made no objections. It was not until his motion for new trial that any objections were raised to this evidence.

The Commonwealth also introduced a videotape of an interview with the Appellant. During the interview, he described an event involving J.S. and a boy named Timmy Houston that occurred in his home prior to the investigation and trial against him. The Appellant claimed that J.S., dressed only in a T-shirt, and Timmy were in her room alone. Although he did not state that the two were involved in any sexual activity, the Appellant said Timmy was pulling up his pants.

On the basis of the Commonwealth's introduction of this interview, the Appellant moved to introduce corroborating testimony from his sons, Dustin and Billy Southern. The trial court, however, excluded this additional evidence, reaffirming its ruling on the Commonwealth's motion *in limine* prohibiting information of J.S.'s past sexual history as impeachment on a collateral matter. The Appellant preserved the issue in his motion for new trial.

The Appellant called his wife to testify. On cross-examination she was questioned about his prior marriages and the ages of his wives at the time of each of the marriages. The Appellant objected on relevancy grounds to which the Commonwealth responded that the information potentially involved testimony in relation to the medical testimony in the case, namely, the Appellant's multiple sexual partners. Appellant objected to the relevance of this evidence, but the trial court overruled the objections. However, the Appellant's wife did not know most of the answers.

Next, the Commonwealth called J.S. to testify. She testified the Appellant had been having sex with her two or three times a month from the time she was eleven years old.

At the close of the evidence, the Appellant moved for a directed verdict of acquittal which the trial court overruled.

Final sentencing occurred on March 1, 2004. The Appellant then moved for a judgment notwithstanding the verdict and for a new trial, which the court also denied.

Issues

I. Motion to strike juror #50

Appellant argues that the trial court denied him due process of law and caused substantial prejudice to the Appellant when it denied his motion to strike Juror #50 for cause because the juror knew the Commonwealth's key witness and believed him to be truthful.

It is well known that justice depends upon the impartiality of the jurors. And, a trial court's management of *voir dire* is "subject to essential demands of fairness." Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001) (citing Wolfe v. Brigano, 232 F.3d 499, 504 (6th Cir. 2000)). "Because a petitioner's Sixth Amendment right to an impartial jury is at stake, a defendant may obtain a new trial if an impaneled juror's honest responses to questions on *voir dire* would have given rise to a valid challenge for cause." Miller v. Webb, 385 F.3d 666, 673 (6th Cir. 2004) (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)).

However, "disqualification of a juror is merited only when the juror's knowledge precludes impartiality." Bowling v. Commonwealth, 942 S.W. 2d 293, 300 (Ky. 1997). "The real test is whether, after having heard all the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." Id. at 299 (citing, Mabe v. Commonwealth, 884 S.W. 2d 668 (Ky. 1994)).

In order to merit disqualification of a juror, it must be shown that the juror has a "predisposition or bias that cannot be put aside, requiring the juror to decide a case one way or the other." Hodge v. Commonwealth, 17 S.W.3d 824, 838 (Ky. 2000). "There is no constitutional prohibition against jurors simply knowing the parties involved or having knowledge of the case." Id.

Here, the Appellant argues that the trial court abused its discretion when it did not excuse Juror #50 for cause based upon the information she gave during voir dire. During voir dire, Juror #50 was open about her work relationship with Dr. Ashburn and admitted having worked with him some prior to being selected for the jury in this trial. Additionally, she stated that although she knew Dr. Ashburn to be an "honest man," her ability to evaluate the evidence impartially would not be affected.

Moreover, individual voir dire of Juror #50 was conducted in chambers by the trial judge and counsel for both sides. Once again, she was specifically asked questions about her relationship with Dr. Ashburn. She also disclosed to the court that it was her duty as a nurse to report sexual crimes when there was evidence to do so. She stated that although she has made reports of child abuse, she does believe that false accusations are possible; whether an

allegation is true would be decided on the facts of each case and weighing the evidence impartially in this case would be no different.

In Rodriguez v. Commonwealth, 107 S.W.3d 215, 220 (Ky. 2003), a motion to strike for cause was denied even though the juror admitted to hearing another juror claim positively that the defendant had stolen a car. In Rodriguez, this Court held that the trial court did not abuse its discretion because the juror's answers on record showed the juror was not partial to the defendant's guilt. Id. at 220.

Like Rodriguez, the record does not indicate that Juror #50 could not weigh the evidence impartially and render a fair verdict based on the evidence. Moreover, the record does not show Juror #50 was pre-disposed to the guilt or innocence of the Appellant. Since Juror #50 was appropriately qualified through multiple voir dires, we do not believe the trial court abused its discretion by allowing her to sit on the panel.

II. Testing of cultures and independent medical examination

Secondly, the Appellant argues that he was denied due process when the court denied his motion for a second, independent medical examination of J.S. and did not allow a medical doctor of his choosing to examine the cultures taken from J.S. by the Commonwealth's medical witness, Dr. Ashburn.

In Kentucky, there does not appear to be any specific rule of criminal procedure concerning the physical examination of a prosecuting witness. Turner v. Commonwealth, 767 S.W. 2d 557, 559 (Ky. 1988). Although the Kentucky Rules of Criminal Procedure, specifically RCr. 7.24, provides, in part, that a defendant should be given any results or reports of physical examinations or of

scientific tests or experiments made in connection with the particular case for his own evaluation, "the critical question is whether the evidence sought by the appellant is of such importance to his defense that it outweighs the potential for harm caused by the invasion of the alleged victim's privacy and the probability that the prospect of undergoing a physical examination might be used for harassment of a prosecuting witness." Id.

The proper approach to this issue, the problem of a second physical examination of a child, allegedly the victim of rape or sodomy, is to have a "second physician evaluate the medical findings of the initial examining physician and express an opinion as to whether a second physical examination would be beneficial." Crawford v. Commonwealth, 824 S.W.2d 847, 850 (Ky. 1992).

In this case, J.S. was examined by Dr. Ashburn, a physician recommended by social services. Although Dr. Ashburn is not an OB/GYN, he is relied upon locally in sexual abuse cases because of his expertise on that subject. The record indicates the trial court ruled, in accordance with our holding in Crawford, that the Appellant should first have the medical findings of Dr. Ashburn examined by the Appellant's own doctor. Then, if the Appellant's doctor found that a second examination would be beneficial, a second examination would be granted.

However, after the Appellant received the medical findings of Dr. Ashburn, he did not make any further inquiries about the cultures or the second exam until his motion for new trial. Therefore, since the record shows the Appellant did not properly follow the trial court's ruling by reviewing the medical findings and

renewing his motion to the court supported by evidence that a second medical examination would be beneficial, the trial court committed no error.

III. Uncharged crime introduced without pretrial notice

The Appellant next argues he was denied due process when the Commonwealth introduced evidence of an uncharged crime without pretrial notice to him.

Like many other jurisdictions, Kentucky "has consistently followed the general rule that evidence of other criminal acts of the accused is admissible only if it comes within certain specific exceptions which must be strictly construed." Pendleton v. Commonwealth, 685 S.W.2d 549, 552 (Ky. 1985) (citing Jones v. Commonwealth, 198 S.W.2d 969 (Ky. 1947)). In order to admit evidence of other crimes it must have a special relationship to the offense charged. Id.

Although evidence is not admissible to show a lustful inclination, "evidence of independent sexual acts between the accused and persons other than the victim are admissible if such acts are similar to that charged and not too remote in time, provided the acts are relevant to prove intent, motive or a common plan or pattern of activity." Id. "Such evidence is deemed corroborative of the evidence of the offense being tried as it tends to indicate an affinity or lustful desire or incestuous disposition toward the particular victim." Thacker v. Commonwealth, 816 S.W.2d 660, 661 (Ky. App. 1991).

Jen. S.'s testimony stated she was in J.S.'s bed when the Appellant came into the room, rested himself on top of her, and began touching her breasts. She stated that when the Appellant realized she was not J.S., he hurriedly left the room. In this instance, the evidence supports the inference that the Appellant

believed she was J.S. The evidence also was admissible to prove intent, pattern, and common plan, because the acts performed on Jen. S. were of a similar nature as those performed on the victim, J.S.

Although the evidence is admissible, the Commonwealth had the duty to give pretrial notice to the Appellant about this type of testimony. When evidence of this kind is sought to be admitted, the counsel wishing to introduce it must give reasonable pretrial notice required under KRE 404(c) of the intention to offer such evidence; a police report alone does not satisfy this requirement. Daniel v Commonwealth, 905 S.W.2d 76, 77 (Ky. 1995). Thus, the Appellant argues that the notice was no more than a police report and therefore, was not sufficient to give him notice of such testimony at trial. We disagree.

The report provided to the Appellant was more than a mere police report. The notice was a signed statement from Jen. S., in her own words, taken by Officer England. This is not the same type of notice that was given in Daniel, *supra*. There, the notice was a police report; it was not a signed statement from the witness, like we have in this case.

Based on the record, the Appellant made no objection to the testimony. If he had, the trial court may have been obligated to grant a continuance or such other remedy to avoid unfair prejudice, which is required by KRE 404(b) when necessary. Since the Appellant did not make such an objection, this issue will not be considered.

Therefore, the testimony was admissible to show a pattern of activity of the Appellant, and pretrial notice was satisfied when the Commonwealth

provided him with the signed statement of Jen. S.. The ruling of the trial court as to this evidence is affirmed.

IV. Cross exam of wife on irrelevant inflammatory evidence

The Appellant argues he was denied due process of law when the Commonwealth was allowed to cross-examine his wife about his prior marriages.

KRE 401 states that relevancy is established when there is any tendency to make the existence of any fact that is of consequence to the determination of the action more probable, or less probable, than it would be without the evidence. "A trial judge's decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an abuse of discretion standard." Love v. Commonwealth, 55 S.W.3d 816, 822 (Ky. 2001).

Since "only a slight increase in probability must be shown to allow evidence," Blair v. Commonwealth, 144 S.W.3d 801, 808 (Ky. 2004) (citing Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1999)), the test for abuse of discretion is whether "the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Woodard v. Commonwealth, 147 S.W.3d 63, 67 (Ky.2004).

While the Appellant's wife was on the stand, the Commonwealth crossed her on his prior marriages. During cross, the Appellant's wife was asked specifically about the ages of the Appellant's former wives at the time of the marriages. The trial court allowed the Appellant's wife to answer the questions over his relevancy objection. The Appellant now argues the admission of such evidence denied him a fair trial.

However, this evidence was not of such a prejudicial nature that the trial court's ruling was "arbitrary" or "unreasonable." In fact, the Appellant's wife only answered the questions in reference to his first marriage, stating that he was 15 and his wife 13 when they got married.

Therefore, since the trial court is in the best position to rule on evidentiary issues and the evidence elicited by the Commonwealth was not highly prejudicial to the Appellant, the trial court was not unreasonable or unfair and its ruling is affirmed.

V. Excluding evidence of another boy in J.S.'s room

The Appellant argues he was denied due process when he was not allowed to introduce evidence to corroborate his audiotape testimony of an incident in which he found the victim in her room with another boy.

"The purpose of the Rape Shield Statute in generally prohibiting evidence of prior sexual conduct of a complaining witness is to insure that that witness does not become the party on trial through the admission of evidence that is neither material, nor relevant to the charge made." Barnett v. Commonwealth, 828 S.W.2d 361, 363 (Ky. 1992). "The statute does not prohibit the introduction of relevant, probative evidence at trial, if the evidence of prior sexual conduct directly pertains to the crime with which the defendant is charged." Id. (citing, KRS 510.145; and Bixler v. Commonwealth, 712 S.W.2d 366 (Ky. App. 1986)). "The rationale behind these statutes is that evidence of a rape victim's prior sexual activity is of dubious probative value and relevance and is highly embarrassing and prejudicial" because "often such evidence has been used to

harass the prosecuting victim." Bell v. Harrison, 670 F.2d 656, 658 (6th Cir. 1982).

The Appellant argues that he was denied his right to confrontation, due process of law, and a fair trial when the trial court sustained the Commonwealth's motion *in limine* and did not allow him to introduce witnesses to corroborate his testimony about the incident that allegedly occurred in J.S.'s bedroom.

The Appellant testified via audiotape that he found Timmy Houston and his daughter in her bedroom. Appellant wanted to corroborate his testimony with that of his sons, Dustin and Billy Southern. Appellant stated the sons' testimony would be that Dustin saw Timmy in J.S.'s bedroom and Billy knew J.S. was disciplined for the incident. The trial court ruled that this evidence was impeachment on a collateral matter and would not allow the witnesses to testify.

In Violett v Commonwealth, 907 S.W.2d 773 (Ky. 1995), the defendant tried to introduce letters between the victim, defendant's daughter, and her boyfriend which detailed their sexual activity. This Court ruled that since the proposed evidence did not directly relate to the offense charged, the trial court did not abuse its discretion when it denied admission of the evidence. Id. at 776.

Like Violett, the evidence here is not directly related to the crime charged. Also, the evidence the Appellant wanted to elicit from the two witnesses was not of such a great magnitude that denying its admittance amounted to reversible error. The error, if any, was harmless. Moreover, the Appellant did not give any pretrial notice as required by 412(c).

CONCLUSION

In conclusion, the judgment of conviction is AFFIRMED.

All concur.

COUNSEL FOR APPELLANT

Julie Namkin
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
(502) 564-8006

COUNSEL FOR APPELLEE

Gregory D. Stumbo
Attorney General of Kentucky

Michael Harned
Kenneth Wayne Riggs
Criminal Appellate Branch
1024 capital Center Drive
Frankfort, KY 40601