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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MARCH 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-0302-MR

ROSCOE KEVIN TRUITT — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
2004-CR-1002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Roscoe Kevin Truitt, was convicted in the Jefferson Circuit Court of first-degree assault, first-degree sodomy, attempted first-degree rape, first-degree unlawful imprisonment, and of being a first-degree persistent felony offender. He was sentenced to life imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

The evidence at trial established that Appellant, who was a handyman, had been staying in a house that he had been hired to remodel. The home was in disrepair, having no furniture and being filled with construction equipment. The victim, S.L., was a transient who had also been staying at the house with Appellant for a few days prior to the offenses. On the morning of March 20, 2004, S.L. returned to the house to find Appellant upset from an argument he had with another female. S.L. testified that Appellant was high from having smoked crack cocaine that morning and began ranting

about women in general. When S.L. tried to leave, Appellant grabbed her and a physical fight ensued. Appellant dragged S.L. to the second floor where he tore off her clothing and proceeded to sodomize her. S.L. stated that Appellant attempted to rape her, but was unable to maintain an erection.

At some point, Appellant left the room and S.L. tried to escape. She made it as far as the front door when Appellant grabbed her by the hair. During the continuing struggle, Appellant cut S.L. several times on her back with a drywall knife, struck her on the top of the head with a claw hammer, and then struck her across the face with a piece of metal pipe. Thereafter, Appellant bound S.L.'s wrists and ankles with duct tape and attempted to push her through a hole in the floor into the basement. When S.L. struggled free, Appellant re-taped her, as well as stuffed a sock in her mouth and wrapped her face in duct tape. He then dropped her into the basement.

S.L. stated that after Appellant tossed her belongings into the basement, he came down holding a hammer and several garbage bags. S.L. told police that she pretended to be unconscious with the hopes that Appellant would leave her alone. However, while trying to place her feet and legs into one of the bags, Appellant realized that S.L. was still awake. He then removed the tape from her mouth and forced her to perform oral sex on him. He again unsuccessfully attempted to rape her. Eventually, Appellant resorted to masturbation, after which S.L. stated that his entire demeanor changed. S.L. claimed that Appellant became calm, removed the duct tape from her wrists and ankles, and helped her out of the basement. S.L. convinced Appellant to go buy them some more "dope." Once Appellant was gone, S.L. dressed and ran to a nearby florist shop for help.

S.L. was treated at University of Louisville Hospital. Her injuries included a swollen right ear, a scratch on her right abdomen, a right eyelid that was swollen shut and required multiple stitches, a laceration to the top of the head that required multiple staples, two vaginal lacerations, and extensive cuts and bruising on her arms, legs and back.

Based upon S.L.'s report, police were dispatched to the house. While surveying the property, which authorities believed to be empty, an upstairs light came on in the house. As police approached the rear of the house, Appellant was observed crawling on his stomach through the grass. He was thereafter arrested. A search of the house revealed a claw hammer and metal pipe covered in blood, a bloody sock, and duct tape matted with S.L.'s hair. Her belongings were also retrieved from the basement, in addition to garbage bags and a roll of duct tape. Finally, blood found on Appellant's pants was linked by DNA to S.L.

Appellant was subsequently indicted by a Jefferson County grand jury for two counts of first-degree rape, first-degree sodomy, first-degree assault, first-degree unlawful imprisonment, and for being a first-degree persistent felony offender.

Prior to trial, the Commonwealth filed a request to issue an arrest warrant for an indispensable party pursuant to RCr 7.06. The accompanying affidavit stated that the Commonwealth was having difficulty securing S.L.'s attendance at trial. S.L. had failed to show for multiple appointments with the prosecuting attorney and had never attended a pretrial conference. Apparently, S.L. was no longer living at the address she had given the Commonwealth. A warrant for S.L.'s arrest was thereafter issued on January 18, 2005.

On January 26, 2005, a hearing was held during which S.L. was appointed an attorney. Based on the information presented, the trial court ruled that it was necessary to keep S.L. in custody until trial. At some point, she was placed in a home incarceration program, which was subsequently terminated when she moved her location and violated the terms of the agreement. On January 31, 2005, a second arrest warrant was issued.

On the morning of the February 8, 2005 trial date, the prosecutor informed the trial court that S.L. had notified him the previous evening that she did not intend to testify. The prosecutor stated that he was nonetheless going to call her and, if she failed to appear and/or testify, he would move to hold her in contempt of court. Ultimately, S.L. did testify against Appellant and corroborated her prior statement to police.

Appellant took the stand in his own defense and admitted that he was addicted to crack cocaine. Although he conceded that he and S.L. had engaged in a physical altercation on the morning in question, he denied ever hitting her with a weapon or sexually abusing her. Appellant noted that he taped S.L.'s wrists and ankles for both of their safety because she was extremely aggressive. On cross-examination, however, Appellant was unable to explain either the duct tape matted with S.L.'s hair or the bloody sock.

In addition to the Commonwealth's physical evidence and S.L.'s testimony, Kenneth McNalley testified that on the morning in question, S.L. ran up to the side of his pick-up truck and began banging on the door for help. McNalley stated that S.L. had blood all over her face, but ran off before he could help her. Further, Lisa Worthington, the employee at Mathis Florist who assisted S.L., testified that when S.L.

came into the store, she was barefoot, her head and face were bleeding, and she had a wad of bloody duct tape still in her hair.

At the close of trial, the jury found Appellant guilty of the instant charges and recommended life imprisonment. Judgment was entered accordingly and this appeal ensued. Additional facts are set forth as necessary.

The sole issue presented on appeal concerns the trial court's refusal to allow defense counsel to ask S.L. about the fact that she was on conditional discharge from a misdemeanor offense at the time of her testimony in this case. Appellant claims that his inability to impeach S.L.'s credibility to demonstrate that she had a motive to testify against him violated his constitutional rights.

During cross-examination, defense counsel asked S.L., "You're on probation right now, aren't you, out of district court?" S.L. responded, "No." The Commonwealth objected, and during the bench conference that followed it was noted that S.L. was actually on conditional discharge from an unrelated misdemeanor offense in district court.[1] Defense counsel argued that the information was relevant to show S.L.'s motivation to cooperate with the prosecution. The trial judge noted that it was obvious S.L.'s cooperation was non-existent, and ruled that the conditional discharge was not relevant.

A criminal defendant has a constitutionally-protected right to cross-examine witnesses for any potential bias or motivation in testifying. Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 354 (1974).

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[1] By an avowal the following day, the defense introduced a certified copy of a judgment wherein S.L. entered a guilty plea to one count of misdemeanor theft and was sentenced to 365 days incarceration, conditionally discharged for a period of two years.

However, it is well-established that such right is not unlimited, and that trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674, 683 (1986). See also Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997) ("[t]rial courts retain broad discretion to regulate cross-examination"). "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Van Arsdall, 475 U.S. at 679, 106 S. Ct. at 1435, 89 L. Ed. 2d at 683 (emphasis in original). This Court has noted, "[s]o long as a reasonably complete picture of the witness' veracity, bias, and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." Turner v. Commonwealth, 153 S.W.3d 823, 831 (Ky. 2005) (quoting United States v. Boylan, 898 F.2d 230, 254 (1st Cir. 1990).

"In defining reasonable limitations on cross-examination, this Court has cautioned: 'a connection must be established between the cross-examination proposed to be undertaken and the facts in evidence.'" Davenport v. Commonwealth, 177 S.W.3d 763, 768 (Ky. 2005) (quoting Maddox, 955 S.W.2d at 721). The trial court does not err in limiting evidence of potential bias when there is a lack of credible evidence supporting the inference. Bowling v. Commonwealth, 80 S.W.3d 405, 411 (Ky. 2002). Cf. Williams v. Commonwealth, 569 S.W.2d 139 (Ky. 1978) (evidence supporting the inference of bias was strong: the key witness refused to testify at the defendant's first trial unless he was released from jail; he was in fact thereafter released, the conviction

was later vacated, and he admittedly refused to incriminate the defendant until after he had spoken with a government agent).

This Court has recently addressed this issue in Davenport v. Commonwealth, 177 S.W.3d 763 (Ky. 2005), wherein the appellant challenged the trial court's refusal to permit defense counsel to cross-examine a witness about his probationary status in an adjacent county as well as his pending misdemeanor charges in the venue county. The appellant maintained that the proposed cross-examination was necessary to impeach the witness's credibility, by establishing the possibility that he may have cooperated with the police in anticipation of leniency regarding his probation and, more importantly, to establish that an even greater potential for bias existed given the two misdemeanor charges that were pending at the time of the trial. As does Appellant herein, the appellant in Davenport claimed that the exclusion of that testimony violated his Sixth Amendment right to cross-examine the prosecution's witnesses.

Upholding the trial court's decision, this Court noted:

> [A] limitation placed on the cross-examination of an adverse witness does not automatically require reversal: the "denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." Van Arsdall, 475 U.S. at 682, 106 S. Ct. at 1437. Rather, a reviewing court must first determine if the Confrontation Clause has been violated. The [United States Supreme] Court explained:
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> > While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. . . . We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise

> appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Respondent has met that burden here: A reasonable jury might have received a significantly different impression of [the witness'] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.

Davenport, 177 S.W.3d at 768 (quoting Van Arsdall, 475 U.S. at 680, 106 S. Ct. at 1435-36 (internal citations omitted)).

We are of the opinion that Appellant herein presented a "reasonably complete" picture of S.L.'s veracity, bias, and motivation. And, as in Davenport, the jury would not have received a "significantly different impression" of S.L.'s credibility had defense counsel been permitted to cross-examine her about the conditional discharge. The jury was clearly aware that S.L. did not want to cooperate with the authorities. In fact, defense counsel was permitted to bring out the relevant information concerning S.L.'s arrest to secure her appearance at trial, and that she had been in jail approximately two weeks prior to trial and had been rearrested after having violated the terms of her home incarceration. Defense counsel again emphasized the issue during closing argument:

> And lastly, and perhaps most importantly, ladies and gentlemen, Sondra had to be arrested to get her here to testify. She would not cooperate with the prosecutor or the police. They couldn't locate her at all. But they had to arrest her to insure her appearance here before you yesterday. And she spent almost two weeks in jail. That's not how a rape victim acts ladies and gentlemen. But the Commonwealth is gonna try and tell you that she was scared, and she was scared to meet with the prosecutor. That doesn't make sense. If she was scared of Roscoe, she'd want to be here to testify, to make sure that he went to jail, to prison for a long time. They wouldn't have had to lock her up to make her testify. She had every reason to come in here and lie to you, because she was in jail. By arresting her, they showed her . . . they showed her the consequences of her not doing what they wanted her to do.

The only information the jury did not hear was that S.L. was on conditional discharge from an unrelated misdemeanor conviction. However, the Van Arsdall Court noted that any Confrontation Clause inquiry must be fact specific: "that on the facts of that case, the error might well have contributed to the guilty verdict." 475 U.S. at 683, 106 S. Ct. at 1437. As we held in Davenport:

> While a witness's pending charges or probationary status alone may, in some cases, be a satisfactory basis upon which to infer bias, the facts in evidence here were simply insufficient to support the inference of Davenport's bias. Other than the plain fact of Davenport's probationary status, defense counsel offered no evidence whatsoever to support the claim that he was motivated to testify in order to curry favor with authorities. Nor was there any evidence that prosecutors had offered Davenport a "deal" for his testimony.

177 S.W.3d at 771. See also Bowling, 80 S.W.3d at 411. Similarly, other than the factual information of the conditional discharge, defense counsel offered absolutely no evidence during the avowal to support a claim that S.L.'s testimony was motivated by or related in any manner to her discharge status. Quite simply, the claim was purely speculative.

"The burden espoused in Van Arsdall is whether a 'reasonable jury might have received a significantly different impression of [S.L.'s] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination.'" Davenport, 177 S.W.3d at 770 (emphasis in original) (quoting Van Arsdall, 475 U.S. at 680, 106 S. Ct. at 1436). We are of the opinion that Appellant has failed to meet that burden. Accordingly, the trial court did not abuse its discretion in limiting the cross-examination of S.L. Nunn v. Commonwealth, 896 S.W.2d 911, 914 (Ky. 1995). Moore v. Commonwealth, 771 S.W.2d 34, 38 (Ky. 1988).

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

Lambert, C.J.; Graves, Johnstone, Scott, and Wintersheimer, JJ., concur.

Cooper and Roach, JJ., concur in result only.

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