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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MAY 18, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 6-8-06 ELIA Grant D.C.

2004-SC-0815-MR

JOHN RUSSELL WALKER — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
03-CR-00637

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, John Russell Walker, was convicted in the Fayette Circuit Court of kidnapping, first degree sodomy, and three counts of first degree rape. Appellant's convictions stem from his crimes perpetrated against T.S., his former girlfriend. He was sentenced to a total of twenty-five years imprisonment and appeals to this Court as a matter of right. Additional facts will be set forth as necessary.

I.

Appellant's first argument on appeal is that the trial court erred when it permitted Anita Capillo, the nurse examiner who examined T.S., to testify to T.S.'s hearsay statements. Capillo is a Sexual Assault Nurse Examiner, also known as a SANE nurse. She is employed by the Lexington Police Department and performs examinations of sexual assault victims at the University of Kentucky Medical Center Emergency

Room. These examinations serve two purposes: (1) to treat the victim's injuries; and (2) to collect evidence.

At trial, the Commonwealth asked Capillo to recount the history given by T.S. during the physical examination. Appellant objected on hearsay grounds. The Commonwealth argued that the testimony was admissible pursuant to KRE 803(4) because the overall purpose of T.S.'s statements was for medical diagnosis and treatment. After acknowledging that Kentucky courts have not ruled specifically on the testimony of SANE nurses, the trial judge allowed the testimony under KRE 803(4).

Appellee argues that this issue is not properly preserved for review. Prior to Capillo's testimony, Appellant objected on hearsay grounds. The trial judge allowed Capillo to testify under the medical diagnosis exception. Capillo recounted in detail the history given by T.S. Appellant, however, failed to object during Capillo's testimony. Appellant now alleges that the bulk of her testimony was not reasonably pertinent to medical diagnosis or treatment. We agree that there were portions of Capillo's statement that were not related to medical diagnosis or treatment. However, Appellant failed to object. The trial judge allowed Capillo to testify under the KRE 803(4) exception to the hearsay rule. Nevertheless, the trial judge could not foretell the specific details of Capillo's testimony, and when the testimony deviated from the scope of KRE 803(4), it was incumbent upon Appellant to object. Insofar that Appellant complains to any particular statement as being inadmissible under KRE 803(4), the objection is not properly preserved for review. See Meadows v. Commonwealth, 178 S.W.3d. 527, 537-38 (Ky. App. 2005) (Appellant did not properly preserve the issue for review where he failed to object to the doctor's testimony that exceeded the scope of KRE 803(4)).

Nevertheless, we must still consider Appellant's initial objection concerning the admissibility of Capillo's statement as a whole. As discussed above, a SANE nurse serves the dual function of gathering evidence and providing medical treatment. The rationale behind the KRE 803(4) exception to the hearsay rule is that there is a presumption that the declarant, in the interest of aiding her medical treatment, is being truthful. See Johnson v. Commonwealth, 864 S.W.2d 266, 274 (Ky. 1993). T.S. still had this motivation to be truthful because Capillo was providing medical treatment, notwithstanding her role as evidence gatherer. Therefore, we believe that Capillo's testimony was admissible pursuant to KRE 803(4).

II.

Next, Appellant argues that the trial court erred when it allowed Capillo to testify, in violation of the hearsay rule, regarding a statistical report listing the type and frequency of injuries sustained during non-consensual sexual intercourse. Upon review of the record, we find that this error was not preserved. When Capillo initially mentioned the statistical report, defense counsel objected on the ground that he had not previously been furnished with the study and could not adequately prepare for it. The trial court ruled that Capillo could discuss the study as it relates to her education, knowledge, and experience, without mentioning its specific details. When Capillo mentioned the study during her testimony, defense counsel once again objected, stating, "I think you said she could testify from her experience, not the researchers'." This second objection was not a hearsay objection, but rather, related to the earlier trial court ruling that Capillo could testify without specifically mentioning the details of the study. Because defense counsel did not object on the basis of hearsay, this alleged error was not preserved. Moreover, it does not rise to the level of palpable error. RCr 10.26.

III.

Appellant claims that the trial court erred in permitting the Commonwealth to introduce evidence of his prior felony conviction for impeachment purposes. Appellant's prior felony was a bank robbery. The Commonwealth was permitted to impeach Appellant with the prior felony conviction on two issues. On direct, after being asked whether he committed the charged offenses, Appellant testified that he "would never do nothing like that to a woman." During cross-examination, the Commonwealth asked Appellant whether he testified that he would never victimize a woman. Appellant answered in the affirmative. The Commonwealth then named two females who were present during the bank robbery, at which point defense counsel objected. Defense counsel argued that the Commonwealth's question regarding whether he would "victimize" a woman was confusing because Appellant's testimony concerned whether he would ever commit sexual assault against a woman. The trial court overruled the objection, and the Commonwealth proceeded to ask Appellant about his prior felony conviction.

The Commonwealth also introduced the testimony of Linda Black, the Fayette County Chief Deputy Clerk, who testified that Appellant had been indicted and convicted of a felony involving the possession of a handgun.[1] Appellant pled guilty to that offense. Black's testimony was offered after Appellant was asked, "And you had a gun in that crime didn't you?" Appellant replied in the negative. The attorneys approached the bench and clarified that Appellant's previous felony involved the possession of a gun by one of the parties involved, but it was unclear whether Appellant had the gun. The

[1] In his brief, Appellant discusses a line of questioning involving whether Appellant had ever victimized females. Appellant testified that he would never victimize a woman, but later admitted that two females were the victims of his previous felony. This line of questioning, however, was not impeached, and unnecessary for us to discuss in detail.

Commonwealth rephrased the question to ask whether the previous felony conviction involved the possession of a gun, and Appellant answered, "No." The Commonwealth moved to admit the impeachment evidence. Defense counsel objected on the grounds that the question was confusing because Appellant was likely still under the impression that he was being asked whether he personally had a gun during the crime. Defense counsel requested that the Commonwealth rephrase the question to ask whether the felony involved possession of a gun by any of the parties. The trial court overruled the objection and allowed the impeachment evidence. Black testified that Appellant was convicted of a felony that involved the possession of a gun, but it was unclear from the indictment whether Appellant or another party was actually in possession of the gun.

Upon review of the record, it is evident that reasonable minds could differ as to whether Appellant was confused by the questions that triggered the admissibility of the impeachment evidence. While the trial judge might have cleared up this confusion by directing the Commonwealth to rephrase its questions, we cannot say that the trial court abused its discretion when it ultimately admitted the impeachment evidence. Matthews v. Commonwealth, 163 S.W.3d 11, 19 (Ky. 2005) (This Court will not disturb a trial court's decision to admit evidence absent an abuse of discretion).

IV.

Next, Appellant alleges that the trial court erred in admitting impermissible bad acts evidence, under KRE 404(b). As motive evidence, Commonwealth sought to introduce evidence that T.S. obtained an Emergency Protective Order (EPO) after Appellant had slapped her, and that when he learned of the EPO, he became angry at her because he had an outstanding warrant, and because he kept drugs in his car which could be discovered by authorities.

Initially, the trial court only allowed evidence regarding the domestic violence and the EPO, but later amended its ruling, and allowed evidence of Appellant's outstanding warrants as evidence of motive. T.S. testified that Appellant was angry when she obtained an EPO because he feared being arrested on outstanding warrants. On direct examination, Appellant testified that, after the EPO had been filed, he had inquired about the outstanding warrants and was told that there was only a summons for traffic tickets carrying a penalty of a fine.

At this point, the Commonwealth requested that the trial court reconsider its ruling regarding drugs in Appellant's car. The trial court agreed, and allowed the Commonwealth to ask Appellant whether he had drugs in his car. The trial court found that this was admissible evidence of Appellant's motive. The Commonwealth asked Appellant whether he had drugs in his car, and he replied in the negative.

We recognize that the tendency of the bad acts evidence to show motive was attenuated. Ultimately, however, we find that there is not a substantial possibility that any of this evidence had an effect on the outcome of the case. Any error was clearly harmless. RCr 9.24.

V.

Appellant argues that the trial court erred when it overruled his motion to suppress his statements to police. Appellant claims that this statement was taken in violation of his Fifth Amendment privilege against self-incrimination. Detectives Pugh and Johnson took Appellant's statement while he was in custody. Detective Pugh read him his Miranda rights, and stated, "You have the right to stop (the interview). All you have to do is say, you know, I don't want to do this anymore." The trial court held a

suppression hearing on Appellant's motion to suppress, and overruled the motion on the ground that Appellant did not sufficiently invoke his right to remain silent.

Appellant claims that he asserted his right to remain silent on three occasions, during the following exchange:

Detective Pugh: Why would she get this EPO? Do you have any idea, if it wasn't the slapping, was she just mad at you or what?

John Walker: You know what, I'm going to keep it all real with you, okay?

DP: Okay.

JW: Her little feelings is real, real hurt and all she needs is a hug, *that's my statement, that's really all I got to say.*

DP: Okay.

JW: *And I'll tell you everything that really, really went on, in trial. For real.*

DP: Okay. You're saying its just hurt feelings, all the way through the whole thing?

JW: I mean, I could sit here and tell you that, I can't tell you that I have not hurt this girl's feelings, I mean, I couldn't tell you that. [interview continues]

DP: You know, is she using, is she selling (drugs)? What kinds of things you want me to check out?

JW: *I can't help you. I'm saying I can't help you. My lawyer has told me I cannot help you. I can't help you.*

Concerning a suspect's right to remain silent, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "[N]o ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination. All that is necessary is an objection stated in language that a committee may reasonably be expected to understand as an

attempt to invoke the privilege." Emspak v. United States, 349 U.S. 190, 194, 75 S.Ct. 687, 99 L.Ed. 997 (1955). Furthermore, suspects must make a "clear and unequivocal" assertion of their Fifth Amendment rights.[2] Davis v. United States, 512 U.S. 452, 461-62, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). See also Talbott v. Commonwealth, 968 S.W.2d 76 (Ky. 1998).

Upon careful analysis of the record, we do not find that Appellant made a clear and unambiguous assertion of his right to remain silent. In Furnish v. Commonwealth, 95 S.W.3d 34, 47 (Ky. 2002), the suspect told questioning officers, "I don't know what you are talking about" and "I've got nothing else to say." We found that the suspect did not remain silent, but rather, denied any knowledge of the crimes. We held, "at no point did Appellant state that he did not wish to talk to the officers." Similarly, in this case, we do not find that Appellant's statements,"that's all I really have to say," and "I can't help you" are tantamount to requests for the interview to stop. Similarly, we do not find Appellant's statement that "I will tell you everything... in trial" was an unequivocal assertion of his right to silence.

By contrast, Appellant was instructed by Detective Pugh that he could express his desire to stop the interview by saying "I don't want to do this anymore." While it may seem as though we are splitting hairs, a statement like "I don't want to do this anymore" can be distinguished from Appellant's statements because the former expresses the

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[2] Although the holding in Davis concerns a suspect's request for counsel, and not a statement asserting his right to remain silent, many federal courts have applied the Davis holding to a suspect's request to remain silent. See e.g., Coleman v. Singletary, 30 F.3d 1420, 1424-25 (11th Cir. 1994) (finding it unnecessary to apply a different rule for invocations of right to remain silent); McGraw v. Holland, 257 F.3d 513, 519 (6th Cir. 2001) (applying Davis); U.S. v. Johnson, 56 F.3d 947, 955 (8th Cir. 1995) (citing to Davis regarding right to remain silent); U.S. v. Ramirez, 79 F.3d 298 (2nd Cir. 1996) (recognizing that other circuits have applied Davis to invocations of right to remain silent, and following suit).

suspect's desire to terminate the interview. Our holding is consistent with the Sixth Circuit case cited by Appellant, McGraw v. Holland, 257 F.3d 513 (6th Cir. 2001), which found the statement, "I don't want to talk about it" to be an unequivocal assertion of the right to remain silent. Id. at 519.

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

Graves, Roach, Scott, and Wintersheimer, J.J. concur.

Lambert, C.J., Cooper and Johnstone, J.J., dissent and would reverse and remand this case for a new trial because of the admission of improper hearsay evidence by the witness, Capilla, and factual details of Appellant's prior conviction under the guise of impeachment. Purcell v. Commonwealth, 149 S.W.3d 382, 395-401 (Ky. 2004).

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