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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-13-07 ELA Grant P.C.

2005-SC-000653-MR

ELBERT MAY — APPELLANT

V.

ON APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
NO. 04-CR-000086-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Elbert May, was convicted by a Clay County jury of two counts of rape in the first degree, two counts of rape in the third degree, three counts of sexual abuse in the first degree, and one count of sodomy in the first degree. For these crimes, Appellant was sentenced to forty 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.

In 1997, Brenda Smith and her four minor girls, L.M., D.S., A.B., and S.S., moved onto Appellant's property. Over the course of the next seven years, Smith's daughters alleged that Appellant repeatedly raped, sexually abused, and sodomized them with their mother's knowledge. Appellant and Smith were eventually arrested and charged with several crimes.

Appellant was tried before a jury on June 13, 2005. At the time of trial, the victims were 22, 20, 16, and 12. Appellant testified at trial, denying all accusations. Appellant was ultimately found guilty of eight sex crimes.

I. Appellant was given sufficient notice of his statement; failure to hold hearing, if error, was harmless.

In his first assignment of error, Appellant contends he was not given proper notice or a hearing prior to the trial court's admission of an incriminating statement he allegedly made upon being arrested. Sheriff Ed Jordan testified that Appellant told him at the time of his arrest, "Ed, you warned me of this and I didn't take your advice." The Commonwealth argued that this statement referred to a conversation two years earlier when Sheriff Jordan confronted Appellant regarding complaints he had received about Appellant sexually abusing the girls. Appellant testified that the statement referred to a conversation he had with Sheriff Jordan years earlier in which Jordan stated, "once you get rid of them [Brenda and the girls], you better stay away because if they ever fall out with you, they will destroy you."

Appellant first argues that he was given insufficient notice that his incriminating statement would be introduced at trial. He cites RCr 7.24(1), which states, in pertinent part, "upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness . . . ."

In this case, Appellant concedes that the Commonwealth disclosed the time, date, place, and substance of Appellant's statement prior to trial; however,

he claims the disclosure was insufficient to constitute notice because the statement was contained in a grand jury transcript provided to the defense. We are unable to discern how this fails to qualify as sufficient notice, and Appellant cites no authority which would indicate otherwise. Accordingly, Appellant's argument is without merit.

In a related argument, Appellant claims that KRE 404(c) required the Commonwealth to give pretrial notice of its intention to offer Appellant's statement at trial. KRE 404(c) requires notice only when the Commonwealth intends to offer evidence of "other crimes, wrongs, or acts" during its case in chief. KRE 404(b), (c). In this case, Appellant claims that reference to a previous investigation is encompassed by the language "other crimes, wrongs, or acts."

Once again, Appellant offers no support for his argument and we find none in our case law. The abuse in this case was alleged to have occurred between 1997 and 2004. The previous investigation allegedly referenced by Appellant was supposedly conducted in 2002 and involved the very same crimes for which Appellant was being prosecuted. Presumably, when Sheriff Jordan investigated the case two years earlier, he was unable to gather enough evidence to charge Appellant. Since the statement does not actually refer to any "other crimes, wrongs, or acts," but rather the crimes for which Appellant was being prosecuted, it does not qualify as KRE 404(b) evidence and hence, KRE 404(c) is not applicable.

Appellant also alleges the trial court violated RCr 9.78 by failing to hold an evidentiary hearing regarding whether Appellant's statement was obtained in

violation of his Miranda rights. RCr 9.78 states, in pertinent part, "If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities . . . the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling."

In this case, Appellant never alleged a violation of his Miranda rights either prior to or during trial. Thus, that objection is unpreserved and not reviewable. Kennedy v. Commonwealth, 554 S.W.2d 219, 222 (Ky.1976) ("[A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.")

Rather, Appellant's objection at trial was based on the premise that he was not given notice pursuant to KRE 404(c) and RCr 7.24. The trial court heard arguments by counsel at sidebar before making his ruling. Appellant claims that this is not sufficient to constitute an "evidentiary hearing" as it is envisioned by RCr 9.78. We find that error, if any, was surely harmless since none of the essential issues of fact necessary for determining Appellant's objection were disputed by the parties. See Mills v. Commonwealth, 996 S.W.2d 473, 481 (Ky. 1999) (failure to hold evidentiary hearing was error, but harmless since no material facts were in dispute). Appellant did not dispute the fact that he received the grand jury transcript with Appellant's statement, nor was there any

dispute as to what Appellant said. Thus, an evidentiary hearing would have been pointless. Appellant is not entitled to relief on this issue.

II. Reference to gun evidence was admissible for impeachment.

Appellant next alleges the trial court erred when it admitted evidence that a gun was found in Appellant's vehicle despite the fact that the gun was ruled inadmissible and suppressed prior to trial.[1] The trial court determined that although the evidence was not admissible during the Commonwealth's case in chief, it was admissible for the purpose of impeachment.

In United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980), the U.S. Supreme Court held as follows:

> We . . . hold that a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.

Id. at 627-28, 100 S.Ct. at 1917. "If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal obligation to speak truthfully and accurately, and we have consistently rejected arguments that would allow a defendant to turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." Michigan v. Harvey, 494 U.S. 344, 351,

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[1] Appellant claims that he was also entitled to an evidentiary hearing pursuant to RCr 9.78 when his trial counsel objected to the admission of the previously suppressed gun evidence for impeachment purposes. Appellant's argument is without merit for several reasons, not the least of which is the fact that a hearing was conducted on Appellant's motion to suppress, and the motion was ultimately granted.

110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990) (internal citations and quotations omitted).

In this case, Appellant's direct testimony indicated that he never had much of a relationship with the victims other than the fact that he dated their mother and they lived on his property. He further testified that the girls damaged his property, were aggressive with him, tried to take and borrow money, and tried to live on his property without his consent. When asked whether he sexually abused the girls, Appellant firmly asserted that no such events ever occurred and stated on cross-examination that the victims lied out of hatred. This testimony was in direct contradiction to the testimony offered by the victims. The victims indicated that Appellant terrorized and abused them on a near daily basis by threatening to shoot them with a gun he always carried and intimidating them with that gun whenever they balked at having sex with him.

Under these circumstances, we believe that the prosecutor's question regarding the gun Appellant kept around was "proper cross-examination reasonably suggested by the defendant's direct examination." Havens, 446 U.S. at 627. Appellant suggested on direct examination that he did not terrorize the girls and was in fact a victim of their bad behavior and vicious lies. In light of such testimony, it was clearly appropriate for the prosecutor to rebut these charges on cross-examination by inquiring about the fact that Appellant owned a gun, a critical aspect of the victims' version of events. When Appellant indicated that he did not own a gun, he was subject to impeachment by reference to the gun found in his vehicle. Accordingly, we find that the trial court did not err when

it permitted reference to evidence that had been illegally obtained for the limited purpose of impeaching statements made by Appellant during cross-examination.

III. Evidence was sufficient to prove "sexual intercourse" as it pertained to charges involving S.S. and L.M.

Appellant first argues that he was entitled to a directed verdict on the charge of rape in the first degree because the evidence was insufficient to prove "sexual intercourse" beyond a reasonable doubt as it pertained to S.S. "If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). "[T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." Id.

As it pertains to this case, "sexual intercourse" is defined as follows:

> 'Sexual intercourse' means sexual intercourse in its ordinary sense and includes penetration of the sex organs of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight; emission is not required.

KRS 510.010(8). In this case, S.S. testified that she was 9 or 10 when Appellant "hurt me in my private parts." She further stated that "it hurt bad." S.S. later clarified that Appellant used his private parts to hurt her private parts. Finally S.S. testified that Appellant would allow her privileges if she gave him what he wanted. When asked what it was that Appellant wanted, S.S. answered "sex." Appellant claims for a variety of creative reasons that this testimony is not sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Appellant placed his penis in S.S's vagina. We disagree. When all fair and

reasonable inferences are viewed in favor of the Commonwealth, this testimony was sufficient to support such an inference. See Jones v. Commonwealth, 833 S.W.2d 839, 841 (Ky. 1992) (penile penetration of the vagina may be inferred by the circumstances).

Appellant also alleges that he was entitled to a directed verdict on the charge of rape in the third degree because the evidence was insufficient to prove "sexual intercourse" beyond a reasonable doubt as it pertained to L.M. L.M. testified that she first started having sex with Appellant in middle school. She said the sex continued until she went to live with her grandmother. When asked what she meant by "sex," L.M. replied, "Just that. He had sex with us." The prosecutor then asked if Appellant penetrated her private part with his private parts and L.M. answered "yes." Finally the prosecutor asked if that is what she meant when she testified that she had sex with Appellant and L.M. replied, "yeah, we had sex." For the reasons set forth above, we agree with the trial court that when all fair and reasonable inferences are drawn in favor of the Commonwealth, this testimony was sufficient to withstand a directed verdict motion on the element of "sexual intercourse" as it is defined in KRS 510.010(8).

IV. Evidence was sufficient to support charge of sexual abuse in the first degree involving L.M.

In his final assignment of error, Appellant claims he was entitled to a directed verdict on the charge of sexual abuse in the first degree involving L.M. because the Commonwealth failed to prove "forcible compulsion," which was a mandatory element of that charge. "Forcible compulsion" is defined in KRS 510.010(2) as follows:

> 'Forcible compulsion' means physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition.

L.M. testified that Appellant threatened her and her mother on multiple occasions and that Appellant forced her and her sisters to have sex with him. She specifically stated that Appellant would threaten her and her sisters by following them around with a gun and also threatened to kill her mother in their presence. She stated that she lived in fear of Appellant. Finally, L.M. testified that Appellant intimidated her and her mother into making a video of Appellant and L.M. having sex because Appellant had a gun lying within reach.

Appellant claims that such testimony is insufficient to prove "forcible compulsion" as it is defined above because it is "vague, amorphous, and conclusory" and is not directly connected to sexual conduct. We disagree. L.M.'s testimony was sufficiently specific to induce reasonable jurors to believe beyond a reasonable doubt that she engaged in sexual intercourse with Appellant by means of forcible compulsion. See Yarnell v. Commonwealth, 833 S.W.2d 834, 836-37 (Ky. 1992) (forcible compulsion was established where child victims were subject to constant emotional, verbal and physical duress and lived in fear of what the defendant might do to them or their mother).

V. Conclusion

For the reasons set forth herein, the judgment and sentence of the Clay Circuit Court is affirmed.

All sitting. Lambert, C.J.; Cunningham, Minton, Noble, Schroder and Scott, JJ., concur.

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