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RENDERED: NOVEMBER 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-26-07 ELIA GROVE, D.C.

2005-SC-000976-MR

JAMES D. SOUTH — APPELLANT

V. — ON APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE R. WARD, JUDGE
NO. 04-CR-000444

COMMONWEALTH OF KENTUCKY — APPELLEE

AND 2005-SC-000977-MR

JAMES D. SOUTH — APPELLANT

V. — ON APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE R. WARD, JUDGE
NO. 04-CR-000636

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is on appeal from the Campbell Circuit Court where Appellant, James D. South, was convicted of the first-degree rape of T.C. and first-degree rape, second-degree rape, first-degree sodomy, second-degree sodomy, and three counts of first-degree sexual abuse of B.B. Appellant received a sentence of life imprisonment for the rape of T.C. and a sentence of life imprisonment for all convictions pertaining to B.B.

Appellant raises six claims of error: (1) the admission of improper hearsay; (2) the introduction of improper expert testimony; (3) the denial of a motion for a new trial after it was discovered that the daughter of one of the jurors had been raped; (4) the excessive introduction of evidence of alleged computer searches; (5) the trial court's failure to carry out its duties under Faretta v. California, 422 U.S. 806, 95 S.Ct., 2525, 45 L.Ed.2d 562 (1975), when faced with Appellant's request for hybrid representation; and (6) the exclusion of relevant evidence pertaining to T.C. The second claim of error is unpreserved, no manifest justice occurred, and thus no palpable error can be found. This Court affirms Appellant's convictions on all claims of error.

I. Background

Appellant and Mrs. South married in 1997. Mrs. South had a daughter, B.B., from a previous relationship. In April or May of 2004, Appellant South met T.C., the foster child of their next door neighbors. T.C. was friends with B.B., so the Souths saw her almost every day.

At trial, B.B. and T.C. testified to the following version of events: B.B. was six when her mother married Appellant, and she and Appellant got along well. According to B.B., she was six or seven when Appellant first touched her, licked her vagina and put his penis in her mouth. He also showed her a pornographic video of girls on a table having sex with men, and computer porn showing cartoon characters. On another occasion Appellant tried to have anal sex with B.B., but stopped when she told him it hurt. When B.B. was eleven or twelve, she and Appellant starting having intercourse. They had sex more than once. On occasion, B.B. and Appellant used a dildo she had found in a vacated rental home. Appellant also attached a screwdriver to a drill, put the handle in B.B.'s vagina and turned the drill on. On another occasion, Appellant wanted

her to suck on his penis, but she would not, so he masturbated and ejaculated on the floor next to her bed.

B.B. testified that Appellant had massaged her and T.C. on more than one occasion in B.B.'s room. He had massaged them together and had massaged T.C. while B.B. watched. According to B.B., one day after swimming, she and T.C. went down to B.B.'s room for a massage. They took off everything but their underwear and Appellant massaged their backs. B.B. went to the bathroom and when she returned, Appellant and T.C. were having sex. T.C. said she had to go to the bathroom and B.B. went with her, where T.C. was crying, though they then continued swimming. B.B. later told Appellant never to do that again, and Appellant told her to tell T.C. not to tell anyone, which she did keep a secret.

Crime lab testing revealed the presence of semen on B.B.'s comforter, pillow, pillow case, pillow sham, carpet, and a towel. Some of the DNA on the comforter matched Appellant; all of the DNA on the carpet matched Appellant. DNA extracted from the screwdriver matched B.B.

On September 8, 2005, Appellant filed a motion to preclude the Commonwealth from introducing evidence "of the Defendant's alleged use of his computer to logon to child pornography and other pornography websites or his use of pornography generally." The trial court denied the motion. That same day, Appellant advised he wished to represent himself with the assistance of "shadow counsel." After lengthy discussion that took place over a couple of days, Appellant proceeded with co-counsel and stated on the record how the duties would be divided.

On September 19, 2005, the first day of trial, the Commonwealth filed a motion invoking KRE 412 and seeking to preclude Appellant from introducing "any evidence

that any alleged victim engaged in other sexual behavior...[or] any evidence to prove any alleged victim's sexual predisposition." The trial court sustained the motion.

It was revealed at trial that on July, 16, 2004, eleven days after Appellant was arrested, Dr. Kathy Macaroff examined B.B., but did not take any history from her. Dr. Macaroff testified at trial that her findings were non-specific. On July 5, 2005, Sherry Fey, a Sexual Assault Nurse Examiner (SANE) nurse, examined T.C. Fey testified she found a tender, red abrasion on T.C.'s genitalia which signified injury and was indicative of force. The Commonwealth offered to stipulate through this witness that T.C.'s DNA was found on a dildo, but Appellant refused the stipulation and put that testimony in by avowal. Later, Appellant also put in avowal testimony of T.C. that she alone used the dildo on herself.

Detective Hyde testified that he learned that the Souths' family room computer and certain disks had pornography on them. Jack Prindle, the Sheriff's office computer expert, extracted information of potential evidentiary value from the hard drive of the Souths' computer, information he knew was significant because the charges involved sexual exploitation of children.

Appellant denied the rape of T.C. and the sexual abuse of B.B., stating that his DNA was in B.B.'s bedroom because he and his wife had sex there. The jury imposed a life sentence for the first-degree rape of T.C., life sentences for the first-degree rape and first-degree sodomy of B.B., ten years each on the second-degree rape and second-degree sodomy of B.B., and five years each on three first-degree sexual abuses of B.B. The jury recommended that all sentences run consecutively. Immediately after trial, one of Appellant's attorneys allegedly encountered a juror in the case who told the

attorney that his daughter had been raped. The trial court denied Appellant's request for a new trial.

II. Analysis

A. Hearsay

Dr. Kathy Macaroff physically examined B.B. eleven days after Appellant was arrested and after B.B. had been interviewed at the Northern Kentucky Child Advocacy Center (NKCAC). She used the history taken by staff at the NKCAC to testify that B.B. told them Appellant had been sexually abusing her since second or third grade and that she gave a history of oral, vaginal and anal penetration. Additionally, SANE nurse Sherry Fey testified similarly in regard to T.C.

Appellant argues that the testimony of Dr. Macaroff and SANE nurse Fey was prejudicial double and triple hearsay. KRE 803(4) requires that a statement be made for purposes of medical treatment or diagnosis to be admissible. The doctor could have relied on this history to make her diagnosis, though it is well settled law that, even in child sex abuse cases, "statements of identity are 'seldom if ever' pertinent to diagnosis or treatment." Garrett v. Commonwealth, 48 S.W.3d 6, 11-12 (Ky. 2001) (quoting United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980)).

It is clear, however, that there is no reasonable probability that Appellant was prejudiced by this testimony. The direct evidence presented by the Commonwealth, particularly from B.B., identified Appellant and the testimony of Dr. Macaroff and SANE nurse Sherry Fey was merely cumulative. This court has long held that hearsay evidence that is merely cumulative is harmless. White v. Commonwealth, 5 S.W.3d 140, 142 (Ky. 1999); Collins v. Commonwealth, 951 S.W.2d 569, 576 (Ky. 1997); Allgeier v. Commonwealth, 915 S.W.2d 745, 747 (Ky. 1996).

B. Denial of Motion for New Trial

During voir dire, the prosecutor informed the jury she would be asking them some personal questions because of the nature of the charges, which involved sexual assault. She informed the jury that this case "might not be the appropriate case for you" because of, among other things, some kind of life experience. The prosecutor then went on to ask: "Now, because of the nature of the case there may be some of you that were either a victim of some type of sex abuse or know someone, a family member or close friend that was a victim of sex abuse. Anybody here have that experience?" There were two responses, but they were not in the panel being questioned.

At the close of voir dire, the prosecutor asked, "Now, is there anything else that anyone thought of while we were talking here and thought maybe I should have said something earlier or anything else that you'd like to approach the bench or any other concerns before I sit down?" No one responded. Defense counsel covered similar testimony, stating, "I believe she [the prosecutor] asked if anyone had life experiences about sex abuse and I believe we got no response...." Based on these answers, both sides accepted the panel and, after strikes were exercised, a jury was sworn.

Appellant alleges that his counsel encountered a group of jurors in the courthouse parking lot after the trial and that one of the male jurors who sat on the case stated that his daughter had been raped. Appellant filed a motion for a new trial based on this information, but the motion was denied. The trial court found, "It appears from the record that none of the jurors were asked any questions about their personal experiences with issues of rape. Therefore, the alleged juror did not give an improper response to a material question."

Appellant argues that a juror whose daughter was raped would likely be influenced by that life experience in a case where the defendant was accused of rape, sodomy or sexual abuse. The fact that this juror sat on Appellant's jury, if Appellant's allegations are true, is disturbing because it raises serious questions of whether that juror could have been impartial. However, in circumstances where no challenge is made to juror qualification prior to or during trial and the challenge first occurs after rendition of a verdict, a party seeking relief from the effect of the verdict bears a heavy burden. "It is incumbent upon such a party to allege facts, which if proven to be true, are sufficient to undermine the integrity of the verdict." Brown v. Commonwealth, 174 S.W.3d 421, 430 (Ky. 2005). In order to grant a new trial, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire..." Adkins v. Commonwealth, 96 S.W.3d 779, 796 (Ky. 2003) (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984)).

Other than defense counsel's affidavit that the juror made the statement to her, no other proof of the truth of the statement, such as an affidavit from the juror or subpoenaing the juror for the motion hearing, was offered. The Appellant failed to meet his heavy burden, and there was no trial court error.

C. Computer Searches and Downloads

Prior to trial, the trial court denied Appellant's motion to exclude evidence of pornographic information obtained from his computer. The trial court noted that the Commonwealth intended to use the material as evidence of an overall scheme or plan.

At trial, the Commonwealth presented testimony from Jack Prindle, an officer with the Boone County Sheriff's Department charged with running its electronic crimes

division, regarding certain information found on Appellant's computer and certain disks found at his residence. Officer Prindle testified that on one of the disks, he found numerous images of cartoon characters engaged in pornographic acts. He further testified that, based on his training and experience, pornographic cartoon images were frequently used by individuals to entice children into sexual activity and as a tool to teach them different ways of engaging in sexual acts.

Officer Prindle testified that, on the hard drive of Appellant's computer, he found references to pornographic websites and "references to specifically things that point or indicate child pornography." One of these items was a "file slack" containing a reference to having sex with one's eldest daughter, as well as evidence of a Google search using the words "preteen incest porn."

Under KRE 404(b), evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," subject to certain exceptions. KRE 404(b) evidence may be admitted if "offered for some other purpose, such as proof of motive opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," KRE 404(b)(1), or if it is "inextricably intertwined with other evidence essential to the case." KRE 404(b)(2). This Court has adopted a three-part test "for determining the admissibility of other crimes evidence" under KRE 404(b): (1) relevance, (2) probativeness and (3) prejudicial effect. Bell v. Commonwealth, 875 S.W.2d 882, 889. (Ky. 1994).

B.B. described how Appellant showed her computer pornography, including "kids my age with guys, like, older than them." Appellant also showed her pornographic cartoons. B.B. stated that Appellant showed her pornography on more than one occasion and was able to identify images she had seen on his computer.

There is no question this evidence was relevant and probative. Officer Prindle's testimony was offered to show that Appellant used his computer as part of a plan to entice B.B. to engage in sexual acts with him by having B.B. watch pornography so that she would become comfortable with sex acts. Officer Prindle's testimony also showed that Appellant's acts were intentional, and that he prepared for and executed his plan regarding B.B. by using his computer to conduct searches for child pornography; most alarmingly, images relating to sex with one's eldest daughter and "preteen incest."

As always, under KRE 403 and under Bell, the probative nature of the evidence must be weighed against its prejudicial effect. Appellant argues that only the pornographic video and cartoon viewed by B.B were relevant evidence. This Court disagrees. The information on the hard drive regarding Appellant's computer searches was highly relevant and probative to demonstrate a scheme or plan to molest his step-daughter, and outweighed any prejudice incurred by Appellant.

Appellant also alleges that the prosecutor failed to comply with KRE 404(c), which requires the prosecutor to give "reasonable pre-trial notice" of his intent to introduce evidence of "admissible" other crimes/bad acts evidence. However, it is clear from the record that the Commonwealth fulfilled this requirement.

D. Appellant's Representation

Since the Appellant is alleging that the trial court failed to carry out its Faretta duties, it is necessary to go into a rather lengthy recitation of the facts. On September 12, 2005, a week before trial, Appellant's trial counsel, two appointed public advocates, advised the court that Appellant wanted to proceed pro se with "shadow counsel." When Appellant was questioned why he wanted to proceed pro se, he said, "I just do." The trial court then described the possible penalties at issue and advised, "I just think it

would be absolutely foolhardy and foolish of you to represent yourself." After the trial court explained the duties he would be faced with, Appellant confirmed he wanted to proceed pro se.

After a brief discussion as to who would examine the child victims at trial, the court discussed the limited role of "shadow counsel" and that only one of Appellant's public advocates would be present. Appellant confirmed he understood. After further discussion of the possible harm to the victims if Appellant were allowed to examine them, the trial court returned to discussing that proceeding pro se was not in Appellant's best interests. Appellant told the trial court he understood the ramifications of his choice. The trial court did not make a ruling that day concerning Appellant's request. The following day, the Commonwealth filed a motion asking the court to make a finding on the record that Appellant's waiver of counsel was entered knowingly, intelligently, and voluntarily. That same day, the trial court signed an order directing that an evidentiary hearing be held the following day regarding Appellant's request.

On September 14, 2005, the trial court noted the Commonwealth's motion. After approximately ten minutes of discussion regarding the victims' testimony, the trial court advised that it wanted to ensure that Appellant's waiver of counsel was knowing, intelligent, and voluntary. While under oath, Appellant confirmed that he wanted to represent himself, that he wanted "total control" over his case, and that he did not want co-counsel. When questioned whether Appellant wanted his trial counsel to assist him during trial, Appellant responded they could if they wanted. The trial court explained that things did not work that way and that Appellant had the option of co-counsel or no counsel, and that if Appellant chose co-counsel, or whether he wanted to be the sole

attorney in his case, the trial court would spell out the duties. After a lengthy discussion, Appellant confirmed he wanted total control and did not want co-counsel.

Once again, the trial court emphasized to Appellant that proceeding pro se was a "very bad idea," and asked Appellant to re-consider. Appellant advised that his trial counsel had discussed the possible pitfalls with him but that he still wanted to proceed pro se. At this point, Appellant confirmed that this was his decision, and that his decision was being made voluntarily, knowingly, and intelligently.

The trial court then asked whether Appellant knew how to defend himself and told Appellant a story of a defendant who testified pro se and how he was sentenced to 40 years. Appellant remained firm in his decision. When asked again whether he wanted to proceed pro se, Appellant conferred with his counsel and the trial court advised that if Appellant represented himself, he would not have the benefit of conferring so often with his trial counsel. Appellant's trial counsel then told the trial court that Appellant was confused as to whether he would be allowed "shadow counsel," and that Appellant did not want to proceed without "shadow counsel." The trial court advised that Appellant would have "shadow counsel," and then explained that co-counsel means someone who assists in preparing a defense, makes objections, and collaborates when making trial decisions, while shadow counsel would not be making objections and it would be up to Appellant to know the rules of trial.

Again, the trial court urged Appellant to reconsider and to assist his trial counsel behind the scenes. Appellant then conferred with counsel and the trial court stated that Appellant would be given some time off the record to continue speaking with counsel. A few minutes later, the discussion resumed on the record and Appellant asked whether having co-counsel was still an option. The trial court then told Appellant that co-counsel

would be doing very specific things to be spelled out so that Appellant and his co-counsel would not be asking questions of the same witness. Appellant stated at this time he wanted co-counsel. At this point, Appellant's trial counsel stated he is "never" comfortable being co-counsel with someone who is not an attorney and would rather be "shadow counsel," a comment that garnered laughs in the courtroom. Regardless, a co-counsel arrangement is what took place.

There was discussion as to how to divide trial duties. The trial court asked for an overall guideline at that time. A short time later, Appellant's trial counsel advised that he had assigned them duties and described these duties in great detail. Additionally, Appellant confirmed he would undertake all duties not assigned to trial counsel and his counsel advised they would be listening for objectionable questions and testimony.

A defendant may make a limited waiver of counsel, "specifying the extent of services he desires, and he is then entitled to counsel whose duty will be confined to rendering the specified kind of services (within, of course, the normal scope of counsel services.)" Wake v. Barker, 514 S.W.2d 692, 696 (Ky. 1974). This right is "accompanied by the right to be informed by the trial court of the dangers inherent in that decision." Hill v. Commonwealth, 125 S.W.3d 221, 226 (Ky. 2004). The trial court has an affirmative duty to make the defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that the defendant understands his choice and knows what he is doing." Id. When a criminal defendant requests to proceed pro se or for hybrid representation, the principles of Faretta become applicable. In Kentucky, these duties include: 1) the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing and intelligent, 2) during the hearing, the trial court must warn the defendant of the hazards

arising from and the benefits relinquished by waiving counsel, and 3) the trial court must make a finding on the record that the waiver is knowing, intelligent and voluntary.

Though a hearing was held, the trial court failed to make an express finding of a knowing, intelligent, voluntary waiver. It is always preferable to have express findings on record as it makes the issues on appeal much clearer. However, it is clear from the record that the trial court complied with any duties it had with respect to Appellant's representation. There is a lengthy discussion on the record between the trial court, Appellant, and trial counsel regarding this issue, including Appellant being placed under oath. It is also clear from the record that Appellant was repeatedly advised against representing himself and that he waived this right knowingly, intelligently and voluntarily. Appellant claims that the fact his trial counsel said he was never comfortable being "shadow counsel" was a violation of Hill. However, in the end, Appellant asked for co-counsel and that is what he received. Based on the record, it is clear that it was Appellant who determined the duties that would be carried out by his trial counsel and this division of duties was agreed to by both Appellant and his trial counsel.

Furthermore, Appellant's claim that the trial court confused him with regard to hybrid representation rings false. The record reveals nearly 80 minutes was spent over a two day period discussing this matter with Appellant. During this time, Appellant asked questions of the trial court and of counsel. It is clear that any confusion Appellant may have had was resolved, and there was no Faretta violation.

E. Exclusion of Relevant Evidence

T.C. testified that Appellant raped her and B.B. claimed that she witnessed sexual intercourse between Appellant and T.C. The only piece of physical evidence

was a tender, red abrasion on T.C.'s external genitalia. SANE nurse Sherry Fey testified that the abrasion signified injury and was indicative of force.

DNA was found on a dildo in B.B.'s room that matched T.C. The Commonwealth offered to stipulate to this, but Appellant declined in the belief that the testimony had to be presented by avowal to preserve error. He also entered avowal testimony from T.C. that she alone had used the dildo on herself. No testimony as to when this occurred is in the record.

KRE 412(b)(1)(A) states that evidence of specific instances of sexual behavior by the alleged victim are admissible if offered to prove that a person other than the accused was the source of injury. However, before this evidence may be admitted, "the party intending to introduce the evidence must file a written notice at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial." KRE 412(c)(1)(A).

The Commonwealth claims that Appellant failed to file the requisite notice and cites federal cases where the courts precluded the defendant from introducing evidence when he failed to file a written notice of intent. United States v. Ramone, 218 F.3d 1229 (10th Cir. 2000); United States v. Eagle Thunder, 893 F.2d 950 (8th Cir. 1990). It is clear, however, that these cases are materially different from Appellant's. In both Ramone and Eagle Thunder, the defendants failed to comply with the notice requirement and failed to provide good cause for filing during trial. Appellant claims that his attorney did not receive notice that T.C. was sexually active until the night before the first day of trial thereby making it impossible to give notice of intent to use this information in his defense. The prosecutor claimed that Appellant had been advised that

T.C. was sexually active by her foster parents, but Appellant disputed that. Despite this, the Commonwealth offered to stipulate that T.C.'s DNA was on the dildo, but Appellant declined.

Clearly, it was within the discretion of the trial court to allow Appellant to introduce the desired evidence if the court felt that the Appellant's explanation for lack of notice constituted "good cause." Therefore, the question to be asked is whether the trial court abused its discretion in not permitting this evidence to be introduced under the "good cause" exception.

This case is strikingly similar to Barnett v. Commonwealth, 828 S.W.2d 361 (Ky. 1992). Barnett concerned the old Rape Shield statute, however KRE 412 is substantively similar. In Barnett, Appellant's counsel claimed that evidence of other sexual activity of the victim "came into his possession less than two days before trial, making it impossible for him to timely move for a hearing on its admissibility." Barnett at 363. In that case, Appellant did not raise the good cause exception to the statute and generally conceded to the court that the evidence was precluded by statute, and therefore, no hearing was held on the matter. This Court found this series of events so disturbing that it applied RCr 10.26 on grounds of manifest injustice.

Omission of the evidence concerning T.C. was prejudicial to Appellant in light of the testimony by Sherry Fey who expressed that findings of an abrasion of T.C.'s genitalia was indicative of force. It was certainly possible that T.C. used the dildo on herself and that this was what caused the abrasion. However, Appellant's avowal evidence from T.C. does not establish when she used the dildo, a fact necessary to establish that use as an alternative cause. The most the Appellant could have argued was an inference that the dildo T.C. used on herself was the possible cause of the

abrasion, at least as much so as her claim of forcible rape. This he could have argued from the Commonwealth's stipulation that T.C.'s DNA was on the dildo, which he rejected.

It is true that testimony by T.C. regarding using the dildo on herself would strengthen Appellant's inference that the abrasion was caused by her rather than him, and the jury did not hear this. However, it is in the sound discretion of the trial court to determine, in light of the whole trial, whether this testimony should go to the jury. Here, the trial court could have determined, in view of the rejection of the stipulated DNA evidence, that this testimony offered no greater inference than the stipulation even though it may have carried more weight.

Based on that alone, this Court cannot say that there is a reasonable probability that omitting the avowal testimony in the record affected the verdict and is therefore harmless. Any error is the direct result of Appellant's choice of strategy at trial

III. Conclusion

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

Lambert, C.J.; Abramson, Cunningham, Minton, Noble and Scott, JJ., concur. Schroder, J., concurs in result only.

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