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RENDERED: NOVEMBER 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000101-MR

GENE R. FRONING — APPELLANT

V.

ON APPEAL FROM ROBERTSON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
NO. 05-CR-000003

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Gene R. Froning, was convicted of three counts of first-degree rape, two counts of first-degree sodomy, one count of second-degree sodomy, and one count of criminal attempt to commit rape. The Robertson Circuit Court sentenced him to a total of twenty years' imprisonment. He now appeals to this Court as a matter of right. Ky. Const. §110(2)(b).

The victims in this matter were Appellant's two minor daughters, C.F. and N.F. Appellant, who was divorced from the girls' mother, lived with C.F. and N.F., as well as the couple's two other children, S.F. and K.F. At trial, N.F. testified that Appellant began to touch her sexually when she was thirteen years old, and that he attempted to have sexual intercourse with her at that time. A few weeks later, he forced her to perform oral sex on him. C.F. testified that Appellant had sexual intercourse with her for the first time when she was eleven years old, and that he continued to have sexual intercourse with her for three more years until the children were removed from the home. At times,

Appellant would also force C.F. to perform oral sex on him. Appellant's son, K.F., testified that he witnessed Appellant having sexual intercourse with C.F. on two separate occasions. Appellant took the stand in his own defense and denied all charges.

As to his abuse of C.F., the jury found Appellant guilty of three counts of first-degree rape and two counts of first-degree sodomy. With respect to his abuse of N.F., Appellant was found guilty of one count of second-degree sodomy and one count of criminal attempt to commit second-degree rape. He was acquitted of one additional count of first-degree sodomy. The jury recommended a total sentence of twenty years' imprisonment, which the trial court imposed. This appeal followed.

Appellant raises a single issue for our review. He argues that the trial court improperly admitted evidence that he had physically abused his children in violation of KRE 404(b), which resulted in undue prejudice. Upon review of the record, we find no error. Further, to the extent some of the testimony was cumulative, any error was harmless.

N.F. testified that Appellant once beat her and C.F. with a plastic pipe after they had broken a window. C.F. later testified to the same event, explaining that Appellant had beaten them on their "backs, legs, and hind-ends" with the pipe. Finally, Charlotte Huddleston, a social worker for the Cabinet for Health and Family Services, testified that she originally became involved with the family as a result of a physical abuse report that the Cabinet had received.

Turning to N.F.'s testimony, we first address the issue of preservation. When N.F. testified that Appellant had beaten her with the pipe, defense counsel objected. The trial court overruled the objection without comment, and denied defense counsel's

request to approach the bench. Though counsel did not state the basis of the objection, we nonetheless consider the argument preserved, as defense counsel clearly made an attempt to explain the objection but was denied the opportunity. RCr 9.22; Brewer v. Commonwealth, 206 S.W.3d 313, 320 (Ky. 2006). Furthermore, a prior defense objection to a similar line of questioning makes it apparent that defense counsel objected on KRE 404(b) grounds. KRE 103(a)(1).

However, no error occurred in the admission of this testimony because it was not admitted to establish Appellant's criminal propensity, as prohibited by KRE 404(b), but rather to prove an element of the offense. Appellant was charged with first-degree rape and first-degree sodomy against C.F. 'Forcible compulsion' is an element of both offenses. KRS 510.040(1)(a); KRS 510.070(1)(a). KRS 510.010(2) defines 'forcible compulsion' as "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..."

We have previously analyzed the type of evidence necessary to establish 'forcible compulsion.' In Yarnell v. Commonwealth, 833 S.W.2d 834, 836 (Ky. 1992), we explained: "Actual physical force is not needed to prove forcible compulsion. In determining whether the victim submitted because of an implied threat which placed her in fear, a subjective rather than an objective standard must be applied." Yarnell, id. at 836.[1] Thus, evidence of prior physical, emotional or verbal abuse is relevant to the existence of an implied threat. Id. Furthermore, the fact that the abuse did not occur contemporaneously with the charged offense in no way undermines its relevancy.

[1] In Yarnell, the element of forcible compulsion was established by the victims' testimony concerning the defendant's prior physical and verbal abuse of themselves and their mother. The dissent points out that the issue in Yarnell was the sufficiency of the evidence of forcible compulsion, rather than the admissibility of the testimony, as in the present case. Of course, it is axiomatic that, if the children's testimony in Yarnell was sufficient to establish the element of forcible compulsion, the testimony was properly admitted.

Rather, if the prior abuse contributed to the victim's fear of the perpetrator, it is relevant to the question of whether, from a subjective standpoint, an implied threat existed.

Here, both C.F. and N.F. testified that they were afraid of the Appellant. Testimony concerning the beating with the pipe was relevant to and probative of the basis of that fear. Furthermore, this testimony assisted the jury in understanding why C.F. and N.F. failed to report the abuse prior to their removal from the home. In short, the brief testimony concerning the pipe incident helped the jury to understand the climate of the household and to determine whether the children had a reasonable fear of their father.

Having considered the relevancy of and probative value of N.F.'s testimony, we now examine the prejudicial nature of the testimony. KRE 403. The evidence against Appellant was overwhelming, and the testimony of both N.F. and C.F. was lengthy and graphic. Both girls testified that they were afraid of their father, and C.F. specifically stated that Appellant had threatened to kill her if she revealed the sexual abuse. Particularly in the context of the overall trial, we find little indication that the marginally prejudicial nature of these statements outweighed their probative value. KRE 403. The trial court did not abuse its discretion in admitting this testimony. Johnson v. Commonwealth, 105 S.W.3d 430, 438 (Ky. 2003).

Defense counsel did not, however, object to the testimony of either C.F. or Ms. Huddleston. Thus, any allegation of error with respect to this testimony is unpreserved for appellate review. Bratcher v. Commonwealth, 151 S.W.3d 332, 350 (Ky. 2004). We note briefly, however, that in light of our determination that N.F.'s testimony was properly admitted, the testimony of C.F. and Ms. Huddleston was cumulative. Therefore, any supposed error in the admission of their statements was undoubtedly

harmless. Chumbler v. Commonwealth, 905 S.W.2d 488, 494 (Ky. 1995) (evidence that defendant was in jail was harmless because identical information was properly elicited from prior witnesses).

For the foregoing reasons, the judgment of the Robertson Circuit Court is hereby affirmed.

All sitting. Lambert, C.J.; Abramson, Cunningham, Schroder, and Scott, JJ., concur. Noble, J., dissents by separate opinion in which Minton, J., joins.

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DISSENTING OPINION BY JUSTICE NOBLE

In finding that testimony about the unrelated beating of the victims with a plastic pipe did not violate KRE 404(b)'s prohibition on evidence of other crimes or bad acts because it helped establish the forcible compulsion element of the first-degree sodomy and rape charges, the majority overextends the holding in Yarnell v. Commonwealth, 833 S.W.2d 834 (Ky. 1992).

The majority finds that testimony about a beating the two girls were given with a plastic pipe is not prohibited KRE 404(b) evidence, but instead proof of an element of the offenses. At trial, some witnesses were allowed to testify to prior reports of physical abuse. The victims testified on redirect to one instance of their father disciplining them by whipping them with a plastic pipe, to which defense counsel objected, but was not allowed to state his grounds.

The events of physical abuse were not connected in time with the sex acts, and the victims did not claim the alleged abuse as their reason for complying. The youngest girl testified that her father never threatened her. In fact, she testified that she had not

had intercourse with her father, because it hurt when he tried, so she told him to stop, which he did. Further, he never tried to have intercourse with her after that, but did insist on one instance of oral sex when she was thirteen. Counts 1 and 2 reflect the limits of her testimony.

The older daughter testified that she and her father did have intercourse and oral sex on several occasions, that he threatened to kill her if she told anyone about it, that he held her arms, and that because he was stronger she didn't have any choice, all proper evidence of forcible compulsion as to her. She also testified that on occasions she did resist and was sometimes successful in preventing the acts, and that she often complied as a form of quid pro quo in order to get to go places.

Neither girl connected the whipping with the pipe to the sex events. Both girls testified that the whipping with the pipe occurred because the older girl pushed the younger through a window. Given that the younger girl could have been seriously injured, and that a window was broken, both girls seemed to regard the whipping with the pipe as punishment for that act. It is clearly prohibited KRE 404(b) evidence because it is evidence of an uncharged bad act committed by Appellant. Unless it falls under one of the exceptions found in KRE 404(b)(1) and (2), such evidence is prohibited.

The majority relies on Yarnell v. Commonwealth, 833 S.W.2d 834 (Ky. 1992), as establishing that prior physical abuse can be used to prove forcible compulsion. That case did describe the evidence as including testimony from the victims that they succumbed to sexual abuse by their stepfather out of fear, thereby establishing forcible compulsion. However, the passage on which the majority relies falls in the course of a discussion of whether the defendant was entitled to a directed verdict. In fact, no

discussion of KRE 404(b) even appears in Yarnell. Using that case to support admission of prohibited KRE 404(b) evidence is using the price of apples to set the price of oranges.

Even assuming the legal discussion in Yarnell has some bearing on this case, the factual similarity between the two is vague at best. In Yarnell, "The evidence indicates that the two children were subject to constant emotional, verbal and physical duress." Id. at 837 (emphasis added). Further, those victims specifically testified that they went along with the sexual behavior only because of their fear. Here, both girls talked about one instance that both attributed to discipline for misbehavior, even though the whipping was clearly excessive. This instance does not appear to be the reason they complied with their father's sexual demands, and neither indicated that it was.

Yarnell goes further than the facts in this case because there is no connection between the one instance of physical abuse and the sex acts perpetrated on the victims. Given that KRE 404(b) is an exclusionary rule, with a limited exception, a court must not make an inferential leap that something is so without adequate evidence. Over-application or too broad an application of an exception to an exclusionary rule obviates the rule.

In finding that the unrelated beating testified to by the victims goes to establishing the forcible compulsion element of the first-degree rapes and sodomies in this case, the majority has read more into the facts than is there, and has effectively established a rule that any parent charged with a sex offense is also subject to having any previous acts of discipline or disagreement admitted to prove forcible compulsion. This is not to say that a beating of a child as discipline is ever acceptable behavior, but the real question here must be whether the act, although abhorrent, is actually relevant and probative of

something other than a defendant's criminal propensity. A nexus between the other bad act and the purported "other purpose" must be established by testimony or other evidence.

Forcible compulsion is established by showing the victim's perception that he or she had no choice but to comply whether the force is actual or not. While one may assume that constant beatings, or possibly even one, could create fear in a victim which would lead to compliance, without nexus testimony such as that in Yarnell this evidence does not fall under the KRE 404(b) exception. It is also not specifically sexual in nature, and constitutes the stand-alone crime of physical abuse or assault. There was no direct evidence that it was the basis of a perception in the minds of the victims that they were subject to sexual force because of the beating with the plastic pipe. Any belief that it was must have come from an inferential leap that is not supported by the evidence.

When properly weighed under KRE 403, this evidence no doubt confuses the issues and results in the defendant being tried for crimes not charged in the indictment. Holland v. Commonwealth, 703 S.W. 2d 876 (Ky. 1985). It is also not at all necessary to prove the charged offenses in this case, and is indeed a "piling on" not contemplated by KRE 404(b). A court cannot abandon the very real requirement that it carefully analyze the effect of all evidence offered and objected to. Here, the trial court did not even allow defense counsel to argue the reasons for excluding this evidence.

Finally, even assuming the majority's KRE 404(b) exception analysis is sound, it only goes to three of the seven charges. Most of the charges relied on the age of the victims (under age twelve for the first-degree rape and sodomy counts) rather than the element of forcible compulsion. For example, two counts of the three counts of rape against the older daughter occurred when she was eleven years of age, and therefore

forcible compulsion is not an element of the offense. Nor was it an element of the offenses charged against the younger girl. This significantly reduces the probativeness of the evidence, making it more likely to be substantially outweighed by prejudice in the balancing required by KRE 403.

There is certainly a reasonable probability that this evidence affected the verdict in this case, and thus it cannot be harmless error. For these reasons, I dissent.

Minton, J., joins this dissenting opinion.