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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

AS MODIFIED AUGUST 21, 2008
RENDERED: APRIL 24, 2008
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

DATE 8-21-08 ElnA Grav:tt P.C.

2006-SC-000311-MR

JOSHUA POPP — APPELLANT

V.

ON APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
NO. 05-CR-00088

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Following a jury trial in the Franklin Circuit Court, Appellant, Joshua Popp, was convicted of one count of first-degree rape, one count of first-degree sodomy, two counts of first-degree sexual abuse, and of being a second-degree persistent felony offender. He was sentenced to thirty years' imprisonment. He appeals to this Court as a matter of right. We reverse and remand for a new trial based on the erroneous admission of hearsay evidence by a social worker. Because the case is being remanded, we will also address those unpreserved errors likely to occur on retrial.

B.Y. is the biological daughter of Sarah Popp and Shaun Yunt. Sarah and Shaun divorced in 1999, when B.Y. was about one year old. In 2001, Sarah married the Appellant, Joshua Popp. B.Y. resided with Sarah and Joshua. B.Y.'s biological father, Shaun Yunt, had visitation. On February 19, 2005, during a visitation, B.Y. (then six

years old) and Shaun, along with Shaun's wife, and Shaun's stepdaughters, ages 10 and 12, went to a Bob Evans restaurant. There, the three girls colored on children's placemats. Afterwards, Shaun drove B.Y. back to Sarah's house. B.Y. continued coloring in the car. Shaun asked B.Y. to see what she had colored, and she said he could not see it because she was still coloring. He took it from her anyway and saw what looked like a penis drawn on the placemat's boy figure.[1] Shaun got upset and asked B.Y. where she learned how to draw something like that or where she got the idea. She said on a movie or something she had seen on TV. Shaun dated the placemat February 19, 2005. Upon arriving at Sarah's apartment, he confronted Sarah and Joshua Popp's parents, who had just arrived, about the placemat. An argument ensued as to where B.Y. had seen pornography. Subsequently, Sarah talked to B.Y.'s school counselor about the placemat. The counselor told Sarah the school could call social services for her "just in case", but that she (the counselor) felt there was no need to be concerned. The counselor then placed a call to social services for Sarah, and Sarah talked to a social worker. The social worker also told Sarah there was no need for concern, but to let Shaun know that if he had any further concern he could direct it to them.

About a month later, B.Y. came home from a visitation with Shaun, and told Sarah that daddy (Shaun) did not think it was a good idea for her to sleep in Sarah and Joshua's bed, and that daddy said he thought Joshua was touching her in a bad way. Sarah asked B.Y. if she thought Joshua was touching her in a bad way, and B.Y. said no. About a week later, at the dinner table, B.Y. told Sarah she should kick Joshua out. Sarah asked why, and B.Y. said because of the bad thing he did to her. Sarah asked

[1] The placemat depicts a boy and girl playing basketball.

what that was, but B.Y. would not talk anymore that night. The next morning, March 14, 2005, Sarah asked again, and B.Y. said that Joshua's "private spot" touched her "private spot." Sarah had a marital counseling appointment that day and told her counselor what B.Y. had said. The counselor directed Sarah to social services immediately thereafter. The case was assigned to investigating social worker Patricia Adams. The case was also referred to the Frankfort City Police and assigned to Detective Jeff Hulker.

On March 21, 2005, B.Y. was sent to the Children's Advocacy Center in Lexington for a forensic interview. The interview was conducted by forensic interviewer Reagan Gyorffy, and observed on closed circuit television by Adams and Detective Hulker. Following a discussion about "private parts" and touching, B.Y. indicated that Joshua had put his "private spot" in her "private spot", put his "private spot" in her "butt", put his finger in her "private spot", and put his finger in her "butt". B.Y. said she was in the bed with Joshua when it happened, and that her mom was at work. B.Y. said that afterwards, she went downstairs and played. On April 7, 2005, B.Y. was examined and interviewed by Dr. Deborah Stanley, a pediatrician with the Children's Advocacy Center. The examination showed no physical signs of sexual abuse, nor, when questioned by Dr. Stanley, did B.Y. indicate that she had been sexually abused. B.Y. was also put into counseling with a mental health therapist, Ms. Denise Insley. B.Y. did not make any statements to Ms. Insley that she had been sexually abused.

Joshua Popp was charged with one count of first-degree sodomy, one count of first-degree rape, two counts of first-degree sexual abuse, and being a second-degree persistent felony offender (non-sexual offense). A jury trial commenced in December, 2005. B.Y., then age 7, testified effectively and at length. When asked what Joshua did

that he was not supposed to do, B.Y. testified that he put his "private" in her "private", put his finger in her "private", put his finger in her butt, and put his "private" in her butt. B.Y. said that she was in the bed with Joshua when it happened, and that her mother was at work. When asked what happened afterwards, B.Y. said she went downstairs to play.

Over objection, the investigating social worker, Patricia Adams, testified as to the contents of the forensic interview of B.Y., basically reiterating that which B.Y. had already testified to. Detective Hulker testified to the content of the same interview. Other witnesses included Dr. Stanley, who testified that B.Y.'s physical examination was normal, but that a normal exam does not rule out the possibility of sexual abuse. Ms. Insley was questioned as to the behaviors and reporting patterns of abused children, and basically testified that children vary and that any behavior or reporting pattern is possible. The placemat was introduced through the testimony of Shaun Popp. Joshua Popp testified in his own defense and denied ever sexually abusing B.Y. The jury found Popp guilty on all charges. Popp was sentenced to a total of thirty years' imprisonment. He appeals to this Court as a matter of right. On appeal, Popp raises numerous errors, preserved and unpreserved.

We first turn to the preserved reversible error in this case, which involves inadmissible hearsay by social worker Patricia Adams. Adams was assigned to the case as the investigating social worker. Adams did not interview B.Y. herself, but observed, via closed circuit television, the forensic interview of B.Y. conducted at the Children's Advocacy Center on March 21, 2005. At trial, the Commonwealth called Adams to testify as to B.Y.'s statements in the forensic interview. Defense counsel objected on grounds of bolstering. The Commonwealth argued that B.Y.'s credibility

had been impeached (on cross-examination), and that it was entitled to introduce the interview as "prior consistent statements" for rehabilitation. The defense objection was overruled. Adams thereafter testified from her notes and memory as to her recollection of the interview questions and B.Y.'s answers. Her testimony basically reiterated what B.Y. had already testified to in court.

The trial court's admission of this hearsay was clear error. There is no exception to the hearsay rule for social workers or the results of their investigations. Sharp v. Commonwealth, 849 S.W.2d 542, 546 (Ky. 1993). Moreover, the statements were not admissible as prior consistent statements. The statements do not comport with KRE 801A(a)(2), which requires the prior consistent statement be "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." There was no so such charge in this case, nor did the Commonwealth argue this to the trial court. Rather, the Commonwealth offered up a vague assertion that B.Y.'s credibility had been impeached (by cross-examination) and that it was therefore entitled to introduce the interview as prior consistent statements for rehabilitation. This reasoning was soundly rejected by this Court in Bussey v. Commonwealth, 797 S.W.2d 483, 484-85 (Ky. 1990). Justice Lambert, in writing the opinion of the Court, enunciated:

> Appellant next contends that the trial court erred to his substantial prejudice by admitting the hearsay testimony of four police officers. During the Commonwealth's case in chief, Officers Shirley, Scott, Schiller and Mullhull were permitted to repeat the victim's version of what transpired. The Commonwealth argues that this testimony was properly admitted because the victim's credibility had been attacked during cross-examination. According to this theory, anytime the credibility of a witness is attacked, hearsay evidence which tends to corroborate the witness's story becomes admissible. This view of the law is much too expansive.

The rule which permits rehabilitation of a witness is limited to those circumstances in which the credibility of the witness is attacked on the basis of a prior inconsistent statement, recent fabrication, improper influence, or some circumstance which impairs his present ability to recall and narrate the event. Eubank v. Commonwealth, 210 Ky. 150, 275 S.W. 630 (1925), and Reed v. Commonwealth, Ky., 738 S.W.2d 818 (1987). The Commonwealth's reliance on Lowery v. Commonwealth, Ky., 566 S.W.2d 750 (1978), is misplaced. In that case, the witness was impeached by evidence that he had been drinking alcohol shortly before his testimony. In view of this circumstance, the court permitted rehabilitation of the witness by proof that he had earlier told a story consistent with his testimony at trial. The prior consistent statement was permitted because it disclosed that the story was the same as before the "onset of the malady."

Nothing contained in the facts presented here permits such a result. There was no contention of recent fabrication nor was there any evidence that the victim's mental condition had become diminished in the period between the occurrence of the crime and trial. . . . Merely challenging the truthfulness of a witness's testimony does not open the door to a parade of witnesses who repeat the witness's story as told to them. The law of Kentucky is well stated in Eubank v. Commonwealth, supra, as follows:

"As a general rule, a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony. Where, however, a witness has been assailed on the ground that his story is a recent fabrication, or that he has some motive for testifying falsely, proof that he gave a similar account of the matter when the motive did not exist, before the effect of such an account could be foreseen, or when the motive or interest would have induced a different statement, is admissible." Id. at 275 S.W. 633.

This case well illustrates the reason for the foregoing rule. The only witnesses to the occurrence of this crime were appellant and the Bussey brothers. To arrive at a conviction, it was necessary for the jury to believe the victim and disbelieve appellant. As such, the jury was required to determine the credibility of all fact witnesses. This process was flawed when four law enforcement witnesses were permitted to bolster the victim's testimony by repeating what he had told them. Accordingly, we must reverse the conviction.

Similarly, in the present case, nothing in the trial permits the introduction of the interview as "prior consistent statements." The trial court's ruling was erroneous.

This Court has continuously held that the hearsay testimony of social workers is inadmissible, and constitutes reversible error as it unfairly bolsters the testimony of the alleged victim. Smith v. Commonwealth, 920 S.W.2d 514, 516 (Ky. 1995) (citing Sharp, 849 S.W.2d at 546; Brown v. Commonwealth, 812 S.W.2d 502, 503-04 (Ky. 1991), overruled on other grounds, Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997); Mitchell v. Commonwealth, 777 S.W.2d 930 (Ky. 1989); Reed v. Commonwealth, 738 S.W.2d 818, 821-22 (Ky. 1987); Hester v. Commonwealth, 734 S.W.2d 457 (Ky. 1987); Bussey v. Commonwealth, 697 S.W.2d 139, 141 (1985)). See also Belt v. Commonwealth, 2 S.W.3d 790 (Ky.App. 1999). This case falls squarely under this rule. There was no evidence of abuse other than B.Y.'s allegations. In order to convict, the jury was required to believe B.Y. and disbelieve the Appellant. The testimony of Patricia Adams was highly prejudicial and unfairly bolstered the credibility of B.Y. Accordingly, the admission of this testimony constitutes reversible error. Smith, 920 S.W.2d at 517; Bussey, 797 S.W.2d at 485.

We note that, on appeal, the Commonwealth now attempts to argue that the interview was admissible as "prior inconsistent statements" under KRE 801A(a)(1), rather than as "prior consistent statements" as argued at trial. This argument is without merit. First, the interview was consistent with B.Y.'s testimony. Second, had the Commonwealth wished to introduce any of the statements in this interview as prior inconsistent statements, it would have been required to have laid the proper foundation required by KRE 613(a). Noel v. Commonwealth, 76 S.W.3d 923 (Ky. 2002). This was

not done. Accordingly, this argument is without merit and will not be a basis for justifying the admission of Adams's testimony.

As we are reversing this case based on the erroneous admission of the testimony of social worker Patricia Adams, we will address only those errors likely to occur upon retrial. The first involves the testimony of Detective Jeff Hulker. This error is unpreserved, but so egregious as would have required reversal under RCr 10.26. Detective Hulker observed the same forensic interview as Adams, and at trial was allowed to reiterate the contents of the same interview. There is no hearsay exception which would permit the introduction of this testimony. Further, as we stated in Smith, the rationale behind prohibiting hearsay testimony in situations involving social workers is applicable to the case of a police detective relating prior statements by the victim. 920 S.W.2d at 516-17. Detective Hulker's testimony was highly prejudicial as it unfairly bolstered B.Y.'s credibility. Id. See also Belt, 2 S.W.3d at 792; Bussey, 797 S.W.2d at 485.

Hulker also opined that the younger the child, the less likely a story is false, because a young child would not be able to mentally form a story of sexual abuse. Hulker went on to testify that in the interview, B.Y. had touched her arm when showing how she was lying on the bed when the abuse happened, and that when someone makes a physical gesture in an interview, that means they are having a "physical memory", and that this would not happen if a story is fabricated. There was no scientific basis offered for this testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The testimony was clearly improper vouching. It is well settled that a witness may not vouch for the credibility of another witness. Stringer, 956 S.W.2d at 888; Hellstrom v. Commonwealth, 825 S.W.2d 612,

614 (Ky. 1992); Hall v. Commonwealth, 862 S.W.2d 321, 323 (Ky. 1993). Further, "a party cannot introduce evidence of the habit of a class of individuals . . . to prove that the person was a member of that class *because* he/she acted the same way under similar circumstances." Miller v. Commonwealth, 77 S.W.3d 566, 572 (Ky. 2002) (holding that detective's testimony as to her observation of the reporting pattern of sexually abused children as a class was impermissible habit evidence).

Another error likely to occur upon retrial involves admission of the child's placemat. This issue was unpreserved. Shaun Yunt testified that B.Y. and her two stepsisters, ages 10 and 12, were coloring on children's placemats at the Bob Evans restaurant, and that B.Y. continued coloring in the car. Shaun asked B.Y. to see what she had colored, and she said he could not see it because she was still coloring. Shaun took it from her anyway and saw what looked like a penis drawn on the boy figure. Shaun got upset and asked B.Y. where she learned how to draw something like that or where she got the idea. She said on a movie or something she had seen on TV. At trial, the placemat was introduced through the testimony of Shaun Yunt. B.Y. was never questioned about it at trial. KRE 402 requires that evidence be relevant. In light of B.Y.'s explanation that this was something she had seen on TV, the evidence does not tend to prove or disprove that the alleged crimes occurred, which renders said drawing irrelevant. KRE 401. Accordingly, the placemat should not have been introduced into evidence. However, on remand, if there is additional evidence which ties the drawing to the alleged crimes, the trial court would be in a position to reconsider its admissibility.

Another unpreserved error involves the testimony of the mental health therapist, Denise Insley. B.Y. was first referred to Ms. Insley by social services at the start of the investigation. Thereafter, Insley had a number of counseling sessions with B.Y.,

primarily for the purpose of providing treatment for B.Y.'s behavioral and emotional issues. Ms. Insley did not directly ask about, and B.Y. did not disclose, any abuse. Insley was questioned at length by the prosecutor as to reporting patterns and behaviors of sexually abused children, and whether B.Y.'s behavior and reporting pattern were indicative of abuse. We have consistently held as inadmissible, evidence of a child's reporting pattern or behavioral symptoms as indicative of sexual abuse. In the context of expert testimony, this type of evidence is sometimes referred to as "Child Sexual Abuse Accommodation Syndrome", and has been consistently held inadmissible on grounds that this is not a generally accepted medical concept. Brown, 812 S.W.2d at 504 (social worker's testimony that child's behavior was "consistent with abuse" was reversible error). See also Hellstrom, 825 S.W.2d at 613-14; Hester, 734 S.W.2d at 458; Lantrip v. Commonwealth, 713 S.W.2d 816 (Ky. 1986); Bussey, 697 S.W.2d at 141. We have also consistently held that this type of evidence is inadmissible habit evidence. Miller, 77 S.W.3d at 572. Because Insley basically testified that any reporting pattern or behavior is possible, and did not try to match B.Y.'s behavior to any of the perceived behaviors or reporting patterns of abused children, the error in admitting her testimony was harmless. However, on retrial, this testimony should be excluded as inadmissible.

For the aforementioned reasons, the judgment of the Frankfort Circuit Court is reversed and the case is remanded for a new trial.

All sitting. All concur.

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Supreme Court of Kentucky

2006-SC-000311-MR

JOSHUA POPP — APPELLANT

V.

ON APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
NO. 05-CR-00088

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION

The petition for rehearing filed by Appellee, Commonwealth of Kentucky, is **DENIED**. The Opinion of the Court, rendered on April 24, 2008, is **MODIFIED** on its face by substitution of the attached opinion in lieu of the original opinion. Said modifications do not affect the holding.

Minton, C.J.; Abramson, Cunningham, Noble, Schroder, and Scott, JJ., concur. Venters, J., not sitting.

Entered: August 21, 2008.

CHIEF JUSTICE