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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

AS MODIFIED: APRIL 23, 2009
RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 4/23/09 Kelly Klaber D.C.

2006-SC-000852-MR

LEON HIBBARD — APPELLANT

V.

ON APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY ALLEN LAY, JUDGE
NO. 06-CR-000025

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

A Knox County jury convicted Leon Hibbard of four counts of first-degree sodomy,[1] one count of first-degree rape,[2] and one count of first-degree sexual abuse.[3] In accordance with the jury's recommendation, Appellant Hibbard was sentenced to a total of twenty-five (25) years in prison. Appealing to this Court as a matter of right,[4] Hibbard argues the circuit court erred by: (1) failing to suppress testimony that Hibbard showed the victim, CB, a portion of a pornographic videotape; and (2) allowing the Commonwealth to amend the indictment on the first day of trial. We reject the two arguments raised by Hibbard on appeal and, thus, affirm the circuit court.

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[1] Kentucky Revised Statute (KRS) 510.070.
[2] KRS 510.040.
[3] KRS 510.110.
[4] Kentucky Constitution §110(2)(b).

II. Factual Background

In April or May of 2001, Leon Hibbard moved into the home of his cousin and her family. Hibbard's cousin had three small children, two girls and a boy. During the period Hibbard stayed with his cousin's family, they lived in a trailer in Artemus, Kentucky. Because Hibbard's cousin and her husband worked, Hibbard was occasionally left to watch the children during the five to six month period he resided with the family. The oldest child, CB, was a little girl born September 9, 1993. Her allegations as to what occurred during this period ultimately led to Hibbard's indictment on five counts of first-degree rape, nine counts of first-degree sodomy, and of being a second-degree persistent felony offender.

It was not until the fall of 2005 that CB disclosed the sexual abuse to a school counselor. As a result of CB's disclosure, Sherry Crawford with social services, and Detective Doyle Halcomb of the Kentucky State Police, investigated the claims. Throughout the case, CB has been consistent in relating that the three incidents occurred while her family lived in the trailer in Artemus.

According to CB, the first incident occurred one day when she had been outside playing. Hibbard sent her to her room and told her he would "whoop" her if she left her room. While CB was in her room, Hibbard came in and told her to pull down her shorts and bend over the bed. CB could feel Hibbard touching her before he finally "stuck his penis in [her] butt." When Hibbard had finished, CB sat on the bed. Later, Hibbard threatened to "put her in a black garbage bag and throw [her] over the old river bridge if [she] told anybody."

The second incident occurred on a day when all three children were alone with Hibbard in the trailer. Hibbard called CB back to the bedroom he was using and had

her watch a portion of a pornographic videotape.[5] According to CB, the video depicted a man and a woman in various sex acts. After showing her the videotape, Hibbard told CB "that's what I want today[.]" When CB refused Hibbard's direction to remove her clothes, he hit her two or three times with a belt. Once she removed her clothing, Hibbard made her lie on top of him with her face over his groin. After forcing CB to take his penis in her mouth, Hibbard "whooped" her on the back and told her not to use her teeth.

While CB was lying with her legs on either side of Hibbard's head, she could feel him touch her vaginal area, though she could not say if he used his mouth or his hand. Hibbard then made her lie on her stomach. When Hibbard inserted his penis into her "butt," CB asked him to stop. In response, Hibbard "flipped [her] over on [her] back and he stuck it in [her] vagina[.]" After Hibbard ejaculated, CB stated that he again "stuck his penis in . . . her butt[.]" According to CB, Hibbard stopped and left the room. When Hibbard returned a few minutes later, he told CB to wash herself.

The final incident occurred one day when the three children were in the house watching a "Barney" program. On this occasion, Hibbard called CB down to her parents' bedroom. When CB refused Hibbard's instructions to lift her dress, he forced her to remove her clothes. Hibbard then forced CB onto her hands and knees, grabbed her hips, and inserted his penis into her "butt." CB testified that while this was occurring, she looked at the clock, saw that it was 2:49 p.m., and realized her father did not get home from work until 5:00 p.m.

In October of 2005, CB was examined by Dr. Jacky Crawford. Dr. Crawford, an emergency room physician with experience in family practice, examined CB for sexual

[5] The videotape was not recovered by the Commonwealth. As a result, it was not provided to the defense during discovery, nor was it played for the jury.

assault. While the examination revealed scarring of the hymen, consistent with some form of penetration trauma, no abnormalities were discovered during an anal exam. Dr. Crawford testified that this was not unusual given the fact that the tissue is more pliant, that it heals more quickly, and that the abuse was alleged to have occurred more than three years prior to the examination.

Following his interview with CB, Detective Halcomb interviewed Hibbard. While Hibbard admitted he had lived with CB's family, he denied having molested the child.

On the first day of trial, the Commonwealth moved to amend the indictment. First, the Commonwealth asked that four counts of sodomy and four counts of rape be dismissed. Second, the Commonwealth moved to amend the time frame on the remaining counts of sodomy and rape to reflect that they occurred during 2001, and not 2002. When Hibbard objected to the amendment of the time frame, the Commonwealth argued that it was based on the fact that records of the family's water bills showed they lived in the trailer in Artemus in 2001, and not in 2002. Further, the Commonwealth noted that CB's statements had always been consistent that the incidents happened while the family lived in the trailer in Artemus. Over Hibbard's objection, the circuit court allowed the amendment.

At trial, Hibbard testified in his own behalf. He denied having raped or sodomized CB. Further, Hibbard testified that he believed the allegations had been brought because he had caused CB's father to lose his job. According to Hibbard, CB's father had taken a tool from his place of employment and had lent it to Hibbard to repair an axle on Hibbard's car. Shortly after the repairs had been completed, Hibbard was stopped and cited for having no operator's license and no insurance. As a result of the traffic stop, Hibbard's car was impounded with the tool inside.

In rebuttal, CB's father testified that he did not lose his job over the incident. While he agreed he had taken a tool from his workplace and had loaned it to Hibbard, he claimed his boss had simply allowed him to buy a replacement. This testimony was corroborated by John Smith, his employer at the time.

Rejecting Hibbard's contention that the charges had been fabricated for revenge, the jury returned a guilty verdict.

III. Analysis

A. Evidence Hibbard showed CB portions of a pornographic videotape

During CB's testimony, she gave a detailed description of the second incident of abuse. CB disclosed the fact that Hibbard began this incident by showing her a portion of a pornographic videotape and telling her that this was what he expected her to do. Hibbard's attorney objected and moved for a mistrial. Counsel argued that the Commonwealth failed to disclose any evidence concerning the existence of the videotape or the fact that Hibbard had shown portions of it to CB. The circuit court, accepting the Commonwealth's argument that the behavior was contemporaneous with the charged offense, agreed Kentucky Rule of Evidence (KRE) 404 was not applicable. Having found the evidence to be admissible, the court overruled Hibbard's motion for a mistrial.

Hibbard argues the circuit court erred by failing to suppress this evidence. Hibbard points out that neither CB's statements, nor the Commonwealth through discovery, made any mention of Hibbard using portions of a pornographic videotape. As the videotape was alleged to have been used prior to the physical contact that occurred during the second incident, Hibbard argues it amounts to prior bad acts governed by KRE 404. Thus, Hibbard argues he was entitled to receive notice under

KRE 404(c). Further, citing to Funk v. Commonwealth, 842 S.W.2d 476 (Ky. 1992), Hibbard asserts that the evidence of the use of portions of the videotape is not inextricably intertwined with evidence of the subsequent physical acts. Hibbard contends that the jury could have considered the charges without reference to the videotape. Finally, recognizing that KRE 404 gives the court discretion to allow the evidence without prior notice for good cause shown, Hibbard argues that in such a circumstance the court must grant a continuance. Since the court denied his motion for a continuance, Hibbard argues his conviction should be reversed.

Kentucky has long recognized that rulings on the admissibility of evidence are within the sound discretion of the trial judge. See Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994). Further, "such rulings should not be reversed on appeal in the absence of a clear abuse of discretion." Id. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

While we agree with Hibbard's basic premise that KRE 404 is applicable to evidence of other crimes, wrongs, or acts, we disagree with his conclusion that KRE 404 is applicable to the facts in this case. Analyzing the videotape in isolation, Hibbard argues it amounts to the distribution of obscene material to a minor in violation of KRS 531.030. Thus, Hibbard argues it amounts to evidence of "other crimes" and is governed by KRE 404. We believe this argument ignores the context within which the videotape was shown.

CB testified that Hibbard used the videotape to demonstrate what sexual acts he wanted her to perform. Having shown the child what he expected, Hibbard forced CB to

perform the acts she had just been shown. Looking at the totality of the circumstances surrounding the second incident, we conclude the videotape was used in place of, or to augment, verbal directions concerning what Hibbard expected of CB. As we noted in Wiley v. Commonwealth, "The totality of the circumstances surrounding the acts complained of and the ensuing arrest are and should be proper evidence to be considered." 575 S.W.2d 166, 169 (Ky. 1978) (citation omitted). As this does not qualify as a prior bad act, we reject Hibbard's argument that KRE 404 applies.

B. Amendment of the indictment

On the first day of trial, the Commonwealth moved to amend the indictment. First, the Commonwealth sought to dismiss four counts of first-degree sodomy and four counts of first-degree rape. Second, the Commonwealth sought to amend the remaining counts of sodomy and rape to reflect that they occurred during the summer of 2001, instead of on or about September or November of 2002. The date change was made to correspond with CB's testimony that the incidents all occurred when Hibbard lived with CB's family in their trailer in Artemus. Hibbard's attorney objected to amending the dates, arguing that Hibbard was prepared to answer allegations that he committed the offenses in 2002, not 2001.

The circuit court agreed "on the face of it, that the change is not insignificant." However, the court also recognized that the discovery provided concerning CB's statements had consistently indicated "that what this child is saying is that the abuse occurred during the time frame while the defendant was babysitting her while he lived with them in a trailer in Artemus." The court then found that the discovery provided adequate opportunity and notice to Hibbard that the allegations occurred while he was

living with the victim's family in a trailer in Artemus.[6] The court granted the Commonwealth's motion to amend. Further, having concluded the amendment did not cause undue prejudice, the court overruled Hibbard's motion for a continuance based on the amendment.

Under Kentucky Rule of Criminal Procedure (RCr) 6.16, a "court may permit an indictment . . . to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The decision to allow an amendment under RCr 6.16 is reviewed for an abuse of discretion. See Riley v. Commonwealth, 120 S.W.3d 622, 631-32 (Ky. 2003).

Under the circumstances present in the case before us, we find Hibbard failed to establish an abuse of discretion. While Hibbard argues he was prepared to defend against allegations occurring in 2002, he does not dispute the fact that the child's statements made it clear that the incidents occurred while he lived with the victim's family in a trailer in Artemus. Further, Hibbard never denied the fact that he stayed with the victim's family during this time frame. Thus, we agree that the discovery provided notice and opportunity to defend the substance of CB's allegations. Finally, we note that since Hibbard denies the events ever occurred, the change in time from on or about September or November of 2002, to the summer of 2001, neither creates prejudice, nor does it create additional or different charges. See Anderson v. Commonwealth, 63 S.W.3d 135, 141 (Ky. 2001) ("The amendments to the indictments here did not charge Appellant with any additional or different offenses, it simply changed the dates. The Defendant maintains that these events never occurred, whether in 1992 or 1994, or whether on April 26 or April 17. As such, any sort of alibi defense was not prejudiced by

[6] The evidence showed Hibbard lived with the victim's family for five to six months beginning in April or May of 2001.

an amendment to an indictment."). Thus, we are unable to say the circuit court abused its discretion when it allowed the Commonwealth to amend the time frame in the indictment to correspond with the allegations as presented by CB.

Further, we cannot say the circuit court abused its discretion when it denied Hibbard's motion for a continuance following the amendment of the indictment. Hibbard correctly notes that "[i]f justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted." RCr 6.16. However, this language alone does not mandate a continuance. In this case, the circuit court found that Hibbard had notice and opportunity to defend based on the substance of CB's allegations. Further, the court concluded Hibbard suffered no undue prejudice.

Under RCr 9.04, "[t]he court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial." This Court has long recognized that "[t]he granting of a continuance is in the sound discretion of a trial judge, and unless from a review of the whole record it appears that the trial judge abused that discretion, this court will not disturb the findings of the court." Williams v. Commonwealth, 644 S.W.2d 335, 336-37 (Ky. 1982). While Hibbard has argued the factors in Snodgrass v. Commonwealth support the granting of a continuance, he has failed to demonstrate sufficient cause for a continuance as required under RCr 9.04. 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds by Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). See also Eldred v. Commonwealth wherein this Court recognized a continuance "will be granted upon a showing of sufficient cause." 906 S.W.2d 694, 699 (Ky. 1994), overruled on other grounds by Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003). Given that (1) the circuit court found Hibbard had notice of the substance of the allegations; (2) the circuit court found

no undue prejudice; and (3) Hibbard has failed to demonstrate sufficient cause to warrant a continuance, we cannot say the court erred in denying Hibbard's motion for a continuance based on the amendment of the dates within the indictment so as to bring the indictment in line with CB's allegations.

IV. Conclusion

Having found that Hibbard failed to demonstrate error in regard to the arguments he raised on appeal, we affirm the Knox Circuit Court.

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

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COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER GRANTING PETITION FOR MODIFICATION

The petition of the appellee, Commonwealth of Kentucky, for modification of the Opinion rendered August 21, 2008 is GRANTED.

Therefore, the Memorandum Opinion of the Court rendered August 21, 2008 shall be modified on page 1, modifying the title, page 1 omitting footnote 4, and pages 2 and 10 omitting language referencing "vacating and remanding." Due to pagination, the modified Memorandum Opinion shall be substituted, as attached hereto, in lieu of the Memorandum Opinion as originally rendered. Said modification does not affect the holding.

All sitting. All concur.

Entered: April 23, 2009.

CHIEF JUSTICE