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RENDERED: SEPTEMBER 18, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000369-MR

CARROLL WAYNE ALEXANDER — APPELLANT

V.

ON APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 06-CR-00076

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Carroll Alexander appeals as a matter of right from a May 1, 2007 Judgment of the McCracken Circuit Court sentencing him to life in prison for sexual offenses, including first-degree sodomy and first-degree rape, perpetrated against C.A., Alexander's daughter, and A.T., C.A.'s friend. Both victims were under twelve years of age during the latter half of 2005, when the offenses occurred. Alexander was sentenced as a first-degree persistent felon. He contends on appeal that his trial was rendered unfair (1) when the social worker who counseled the victims was permitted to give hearsay testimony concerning the victims' emotional injuries and (2) when the trial court responded inappropriately to questions the jury posed during its deliberation. Although we agree with Alexander that the social worker was permitted to testify in violation of the hearsay rule, we are convinced that the violation was harmless. We are

also convinced that the trial court did not err by responding as it did to the jurors' questions. Accordingly, we affirm the trial court's judgment.

RELEVANT FACTS

Both victims testified at trial and recounted several incidents during which Alexander penetrated them anally, vaginally, and orally in a sexual manner. A.T. testified to incidents of vaginal intercourse and oral sodomy, C.A. testified to anal intercourse and oral sodomy, C.A. recounted Alexander's penetrating A.T. vaginally with a "sex toy," and A.T. recounted Alexander's penetrating both of them with the "toy," vaginally in her case and anally in C.A.'s. Both girls described being shown pornographic videos, and both stated that Alexander sometimes took a small, bluish-green pill. Another of C.A.'s friends testified that during 2004 she had accompanied C.A. to Alexander's Paducah residence, where they had watched Alexander masturbate and were then invited to touch his penis. The friend did not touch Alexander, but C.A. did. The friend eventually told her mother what she had seen, and her mother's report to authorities led to a police investigation. In July 2006, the police executed a search warrant at Alexander's residence and found, in addition to the sex toy, condoms, lotion, Viagra (a small, bluish-green pill), Levitra, a pornographic deck of playing cards, and a pornographic magazine. Alexander denied the girls' allegations and claimed during his testimony that they had been instigated by C.A.'s mother, who, he testified, bore him ill will.

The Commonwealth's proof also included testimony by a physician who had examined the girls and by a licensed clinical social worker who had counseled them. The physician did not find physical evidence of abuse, but she repeated the histories the girls had given her, which corresponded with their testimonies. The social worker

testified regarding "symptoms" the girls had reported, including age-inappropriate sexual knowledge, reluctance to discuss the abuse, inability to concentrate, anxiety, and depression. Prior to trial and again when the social worker took the stand, Alexander objected to her testimony on the ground that in Kentucky social workers are not authorized to give hearsay testimony and that otherwise the social worker's remarks tended improperly to bolster the testimony by the girls.

On appeal, Alexander maintains that the trial court erred by admitting the social worker's "symptom" testimony, which, he contends, ran afoul of several cases forbidding reference to the "Child Sexual Abuse Accommodation Syndrome" (CSAAS), a constellation of behaviors therapists often find associated with sexual abuse. Although we agree with Alexander that the social worker's testimony was largely inadmissible, we are convinced that it did not prejudice Alexander's trial and thus does not entitle him to relief. We also reject Alexander's contention that the trial court inappropriately invaded the province of the jury when it responded to two written questions by directing the jurors to a specific portion of the jury instructions.

ANALYSIS

I. Admission of the Social Worker's CSAAS and Hearsay Testimony Was Harmless Error.

Alexander maintains that the social worker who treated C.A. and A.T. was improperly allowed to testify about the girls' behavior "consistent with the Child Sexual Abuse Accommodation Syndrome." The behaviors contributing to the CSAA syndrome include secrecy about the abuse, helplessness in its face, accommodation of the abuser, delay in disclosing the abuse, and retraction of the disclosure. Lantrip v. Commonwealth, 713 S.W.2d 816 (Ky. 1986). We have disallowed "syndrome" testimony because the syndrome is not diagnostically reliable enough for evidentiary

purposes and because, by purportedly providing a "scientific" reason for the victim's delay in bringing charges or his or her recanting of them, it encroaches impermissibly on the jury's duty to assess independently the witnesses' credibility. Newkirk v. Commonwealth, 937 S.W.2d 690 (Ky. 1996) (summarizing the case law).

On the other hand, as the Commonwealth notes, in Dickerson v. Commonwealth, 174 S.W.3d 451 (Ky. 2005), we recently held that evidence tending to show that the alleged victim of sexual abuse has suffered emotional injury—evidence such as observed changes in the victim's behavior or mood, or evidence, such as that in Dickerson, that the victim had been taken to a rape crisis center—is admissible as proof that a sexual assault has occurred. We expressly rejected an argument that this emotional-injury proof should be disallowed as indirect CSAAS evidence. Id. at 472. In this case, the social worker was careful not to offer an express opinion that the symptoms the girls described to her indicated, or were consistent with, sexual abuse. She limited her testimony, rather, to merely listing the symptoms. The Commonwealth maintains that the social worker's testimony thus provided "emotional-injury" proof under Dickerson, avoided improper CSAAS proof, and thus was properly admitted. We disagree.

Dickerson did not modify our long established rule that the alleged "symptoms" of sexual abuse, whether labeled as such or not, are not admissible to suggest an expert diagnosis of abuse. Newkirk v. Commonwealth, supra; Hellstrom v. Commonwealth, 825 S.W.2d 612 (Ky. 1992). Dickerson permits, rather, a person familiar with the victim to testify to observed changes in the victim's behavior in the wake of the alleged abuse. Such changes, we held, may be indicative that something of a traumatic nature has occurred and thus can be relevant "to prove that [the victim] was sexually assaulted."

Dickerson v. Commonwealth, 174 S.W.3d at 472. Whether such testimony is truly relevant in a particular case is a question that must be addressed on a case-by-case basis.

In this case, the social worker's "emotional change" testimony was based not on the social worker's own before-and-after observations, but rather on statements the girls had made to her. Notwithstanding the fact that she refrained from making an explicit diagnosis of abuse, her listing of "symptoms" had the effect of suggesting an expert diagnosis. Her testimony was not the sort that Dickerson permits, but was instead the sort of implicit abuse diagnosis our case law has long disallowed.

The social worker's testimony was hearsay, moreover, based on the girls' statements, and the settled rule in Kentucky has long been that "there is no recognized 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) (internal quotation marks omitted, citing and quoting from Souder v. Commonwealth, 719 S.W.2d 730 (Ky. 1986)). It is true, as the Commonwealth points out, that we recently retreated a bit from this settled rule in Cabinet for Health and Family Services v. A.G.G., 190 S.W.3d 338 (Ky. 2006), a termination of parental rights case. In A.G.G., we applied one of the KRE 803(4) hearsay exceptions—the exception for statements made "for purposes of medical treatment or diagnosis"—to statements an abused child had made to "a licensed marriage and family therapist," permitting the therapist to repeat during her testimony the child's abuse allegations. Marriage and family therapists, however, are different from clinical social workers, such as the witness in this case. The two professions have different licensure requirements (*see* KRS 335.100 and KRS 335.330) and are overseen by different boards (*see* KRS 335.050 and KRS 335.310). Marriage

and family therapists, in particular, are required to have diagnostic training and experience in family therapy, making them for evidentiary purposes more like the physicians and psychologists who have been permitted to give hearsay testimony pursuant to KRE 803(4). Contrary to the Commonwealth's suggestion, in other words, A.G.G. did not overrule Sharp, and, indeed, in B.B. v. Commonwealth, 226 S.W.3d 47 (Ky. 2007), we more recently once again reiterated the rule against social-worker hearsay. We agree with Alexander, therefore, that the trial court erred by admitting the social worker's "emotional injury" testimony, both because that testimony amounted to an improper expert diagnosis of abuse, and also because it was based on hearsay the social worker was not authorized to repeat.

Although we agree with Alexander that an error occurred, RCr 9.24 requires us to disregard the error if it was harmless. An evidentiary error is reversible, we have held,

> if the erroneously admitted evidence has a reasonable possibility of contributing to the conviction; it is harmless if there is no reasonable possibility that it contributed to the conviction.

Anderson v. Commonwealth, 231 S.W.3d 117, 122 (Ky. 2007).

We are convinced that the social worker's testimony here was harmless according to this standard. This was not a case where a single child's allegations were pitted against the denials of a possibly estranged adult. Two victims and a third child all confirmed, with sadly convincing detail, that Alexander perpetrated the abuse. The physical evidence seized from Alexander's residence, moreover, although not criminal in itself, was certainly consistent with an environment of abuse, and provided strong corroboration of the girls' allegations. DNA analysis of a sample extracted from the "sex toy," moreover, found DNA on the "toy" consistent with that of the two victims. The

physician's testimony regarding the histories she was given, finally, corroborated the testimonies of the girls and rendered the social worker's testimony largely cumulative. In light of the totality of the evidence, it is not reasonably possible that the social worker's hearsay testimony about the emotional repercussions the girls' had suffered or her testimony that they were reluctant to talk about the abuse (CSAAS-like behavior) contributed to the conviction. Therefore, even though the social worker's testimony was improperly admitted, Alexander is not entitled to relief.

II. The Trial Court Responded Appropriately to Questions From the Jury.

Alexander next contends that the trial court responded inappropriately to two questions the jury posed during its deliberations. The jury's instructions included the following definition of "sexual contact":

> "Sexual Contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.

The jury was instructed that it was to find Alexander guilty of first-degree sexual abuse if and only if it believed from the evidence that he subjected either underage victim to sexual contact. During its deliberations, the jury sent written questions to the court asking,

> [1] Does the act of the child masturbating the adult fit into the definition of sexual contact? If not, where does it fit?
> [2] Does the act of a child simply touching an adult's penis fit into sexual contact?

The trial court responded that

> the answer to both questions is in the instructions, specifically see the definition of "sexual contact" in the definitions, page three.

Alexander contends that by referring the jury to the specific page and the definition of "sexual contact", as opposed to referring the jury to the instructions as a whole, the trial

court implied an answer of, "Yes, you can convict under this definition, see page three." We disagree.

As the parties observe, RCr 9.54 and RCr 9.74 require that jury instructions be given in writing without oral elaboration. Ingram v. Commonwealth, 427 S.W.2d 815 (Ky. 1968). Perplexed juries are not simply to be left in the dark, however, and the court does not err if in response to a jury's question it correctly clarifies a point of law (conforming procedurally to RCr 9.74), Muncy v. Commonwealth, 132 S.W.3d 845 (Ky. 2004), or, as here, correctly refers the jury to the pertinent instructions. Ingram v. Commonwealth, supra.

In this case, the trial court merely referred the jury to the definition the jury was wrestling with and advised it, in effect, to continue wrestling. Informing the jury that the "sexual contact" definition was the appropriate place to look for resolution of its questions was legally correct and did not encroach upon the jury's role by suggesting either an affirmative or a negative finding. There was no error.

CONCLUSION

In sum, neither the social worker's testimony nor the court's response to the jury's questions entitles Alexander to relief. Although the social worker should not have been permitted to refer to the victims' CSAA syndrome-like behavior or their hearsay reports of emotional injury, the references in this case were harmless. The court, furthermore, did not err when it responded to the jurors' questions regarding "sexual contact" by referring the jurors to the appropriate definition in the instructions. Accordingly, we affirm the May 1, 2007 Judgment of the McCracken Circuit Court.

All sitting, except Venters, J., not sitting. Minton, C.J., Abramson, Cunningham, Noble, and Scott, JJ., concur. Schroder, J., concur in result only.

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