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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000376-MR

ROSCOE TRUITT — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN LYNN SCHULTZ, JUDGE
NO. 05-CR-000418

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Roscoe Truitt, was convicted by a Jefferson Circuit Court jury in April 2007 of one court of first-degree rape. Appellant waived jury sentencing and was consequently sentenced to twenty years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant makes two arguments in his appeal. First, he argues that the trial court committed reversible error by precluding him from introducing evidence taken from the

rape victim's Myspace.com[1] profile. Second, he argues that the jury was improperly instructed on his right to remain silent and not testify. For the reasons set forth herein, we affirm Appellant's convictions.

On or about September 24, 2001, sixteen-year-old V.W. was attacked and raped in her downtown Louisville neighborhood. V.W. could not positively identify her assailant at that time but provided a description similar to the appearance of Appellant. In April 2004, samples from the rape kit used to investigate V.W.'s allegation tested positive for semen. DNA from that semen sample matched Appellant's DNA. On February 8, 2005, a grand jury returned an indictment charging Appellant with rape in the first degree, sodomy in the first degree, kidnapping, and wanton endangerment in the first degree.

I. The trial court did not abuse its discretion in prohibiting Appellant from introducing excerpts from the rape victim's Myspace profile into evidence

Prior to trial in 2007, Appellant filed a motion to introduce evidence pursuant to KRE 412(b)(1)(B) and (C). Specifically, this evidence consisted of forty-five pages of information V.W., posted on her Myspace profile. The Myspace entries were gathered

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[1] Myspace.com is "a website that allows its users to create an online community where they can meet people. Myspace can be used to share photographs, journals, and 'interests' with mutual friends. People with Myspace accounts can create a 'profile,' to which they can link their friends, and the owner of the profile can either invite people to become friends, or other Myspace users can ask the owner of the profile to become friends with the owner of the profile. If the owner of a profile accepts another Myspace user as a friend, the friend's profile picture is posted on the profile owner's Myspace page, along with a link to the friend's Myspace profile. The owner of a profile can kick friends off his profile, deleting that friend's profile picture from the owner's profile page. In addition, a profile owner can completely block other Myspace users from viewing his profile page. The owner of a profile can post blogs on his own profile page, allow other Myspace users to post comments on his profile page, or post comments on other users' profile pages." Spanierman v. Hughes, ___ F.Supp.2d ___ (D. Conn. 2008).

by Appellant in 2007, nearly six years after the rape. V.W. was twenty-one when the entries were collected. In one of the postings V.W. wrote:

> When I was fifteen, a man I didn't know got me drunk and slept with me. We continued sleeping together for months afterward. He was supposed to fill the void of my father. He missed his mark, and filled something else instead. When I was seventeen, a man I didn't know welcomed me into his home and his heart. He would later fill the void of my father. When my son was born he loved him too, because he wanted to. He didn't have to. When I was nineteen, a man twice my age offered me a friendship I could not refuse. He later became my lover. That man fills my life with stress, anger, joy, sweat, tears, excitement & love.

Another posting stated: "How can you say that no child is left behind? When I was fifteen . . . I was victim to several pedophiles. One of which was my mother's boyfriend." An additional posting listed several of V.W.'s interests, which included sexual devices, "polyamory", and "bi-pride."

Appellant argued that these and other statements were admissible under KRE 412(b)(1)(B) to establish V.W.'s consent to having sex with Appellant and under KRE 412(b)(1)(C) as evidence directly pertaining to the offense charged. Additionally, Appellant argued that these statements are relevant to V.W.'s credibility, because they make it more likely that V.W. consented to having sex. The Commonwealth argued in response that Appellant failed to establish that the events described in the Myspace postings referred to him and that the materials did not fit within the exception set forth in KRE 412(b)(1). In particular, the Commonwealth argued that the drunken sexual encounter V.W. referred to at age fifteen involved her mother's boyfriend and happened in Nebraska, not Kentucky. The trial court denied the motion, finding that Appellant failed to establish that the evidence was admissible under KRE 412(b)(1)(B) or (C) and that the evidence was more prejudicial than probative.

During her avowal testimony, V.W. testified about her Myspace profile. V.W. denied that Appellant had anything to do with the Myspace entries and that the entries referred to events that happened in Nebraska and not Kentucky. V.W. admitted that she does have exploratory sexual interests, but that when she was raped she did not have such interests. The trial court admitted the Myspace entries as an avowal exhibit.

The standard of review for admission of evidence is whether the trial court abused its discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id.

"The primary objective of KRE 412 is 'to protect alleged victims of sex crimes against unfair and unwarranted assaults on character.'" Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.30[3], at 161 (4th ed. LexisNexis 2003) (citation omitted). Thus, it "insure[s] that [the victim] does not become the party on trial through the admission of evidence that is neither material nor relevant to the charge made." Barnett v. Commonwealth, 828 S.W.2d 361, 363 (Ky. 1992). KRE 412 "provides such protection by closing the courtroom door to the kinds of evidence that have been used historically to wage character warfare on such victims: (1) specific acts of 'sexual behavior' and (2) evidence of 'sexual disposition.'" Lawson, supra, sec 2.30[3]. However, the bar to admitting the victim's character evidence is not absolute. KRE 412 contains exceptions when it conflicts with the defendant's right to self-defense. Lawson, supra, sec 2.30[4]. KRE 412(b)(1) states:

> In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
(C) any other evidence directly pertaining to the offense charged.

However, even if evidence qualifies under one of the exceptions outlined in KRE 412(b)(1), the trial judge must balance the evidence's probative value against its potential for prejudice under KRE 403. Lawson, supra, sec. 2.30[4][e].

Appellant first argues that V.W.'s entries referring to her sexual behavior around the age of fifteen are admissible under KRE 412(b)(1)(B) because he believes the information is relevant to show that V.W. may have consented to having sex with him. However, Appellant presents no evidence to support the theory that the Myspace entries refer to him. Appellant instead states that the Myspace entries are "arguably a description of what occurred between V.W. and [him]."[2] The only evidence regarding who is referred to in the Myspace entries comes from V.W.'s avowal testimony. V.W. clearly testified that Appellant was not the man from the entries. Appellant's conjecture regarding V.W.'s Myspace entries cannot satisfy the "specific instances" requirement of KRE 412(b)(1)(B). See In re KW, 666 S.E.2d 490 (N.C. Ct. App. 2008) (holding that without direct evidence of specific instances, a victim's Myspace page is not admissible under North Carolina's rape shield rule). His argument is little more than an attempt to put V.W.'s sexual behavior in front of the jury and is thus inadmissible under KRE 412(b)(1)(B).

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[2] As the Commonwealth notes, Appellant has never once stated that he is the man referenced in the Myspace entries. Such an assertion would in fact amount to an admission that he committed rape in the third degree, KRS 510.060, since V.W. was fifteen at the time of the rape.

Appellant next argues that V.W.'s Myspace entries are admissible under KRE 412(b)(1)(C). However, again Appellant offers no evidence indicating that her postings are "evidence directly pertaining to the offense charged" or that Appellant is implicated in them. While her postings do allude to the fact that she was sexually active around the age of fifteen, that conduct was irrelevant to the trial. The only true question is whether Appellant raped V.W. The Myspace postings provide no relevant evidence to answer that question. Thus, the trial court did not abuse its discretion or commit error in denying Appellant's motion to admit V.W's Myspace entries under KRE 412(b)(1).

II. The trial court's jury instructions on Appellant's right to remain silent were appropriate

Appellant finally argues that the trial court improperly instructed the jury regarding his right to remain silent. Appellant never testified in his defense at trial. Upon Appellant's request, the jury was instructed, "The defendant is not compelled to testify, and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." The given jury instruction differed from the instruction Appellant tendered. Appellant believes that the language used by the trial court violates RCr 9.54(3) which states:

> The instructions shall not make any reference to a defendant's failure to testify unless so requested by the defendant, in which event the court shall give an instruction to the effect that a defendant is not compelled to testify and that the jury shall not draw any inference of guilt from the defendant's election not to testify and shall not allow it to prejudice the defendant in any way.

Hence, Appellant argues that the jury instruction language "should not prejudice him" is inappropriate and instead should have been "shall not prejudice him." Appellant also

argues that the language "defendant is not compelled to testify" improperly suggested that the Commonwealth wanted him to testify but could not force him to do so.

The given jury instruction in this case mirrors the model instruction provided in 1 Cooper, Kentucky Instructions to Juries (Criminal) sec 2.04A (1999). That model instruction is the same one found to be constitutionally required when requested by a defendant in Carter v. Kentucky, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d. 241 (1981). While the language of RCr 9.54(3) is different than the jury instruction used here, RCr 9.54(3) contains no magic language requirements. Additionally, this court has approved similar jury instruction language in several recently published opinions. See, e.g., Ragland v. Commonwealth, 191 S.W.3d 569, 591 (Ky. 2006), Commonwealth v. Hager, 41 S.W.3d 828 (Ky. 2001). The jury instruction provided by the trial court was appropriate. There is no error here.

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

All sitting. All concur.

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