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Supreme Court of Kentucky

FINAL

2007-SC-000446-MR

DATE 4/9/09 Kelly Klaber D.C.
APPELLANT

GEORGE MARION HARBIN

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCH PERRY, JUDGE
NO. 05-CR-000776

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

PB's mother, Trenika, met Appellant, George Marion Harbin, in July of 2004. A relationship developed and in September of 2004, Harbin moved in with Trenika and PB.¹ In October of 2004, Harbin lost his job. As a result, PB often found herself alone with Harbin after school.

Late in the evening of February 24, 2005, Harbin and Trenika got into an argument when she refused to allow Harbin to use her car. Trenika left the home to move the vehicle to another location in the neighborhood. While she was gone, Harbin went to PB's room where she was sleeping. According to PB, she awoke to find Harbin standing over her masturbating. Harbin offered the girl \$50.00 if she would keep quiet. PB refused and demanded that Harbin leave. When he did not leave, PB attempted to run away. Harbin grabbed her and dragged her to the floor. He then stuffed his shirt into her mouth. As she

¹ At the time of trial, PB, who was born in 1989, was seventeen (17) years old.

struggled, Harbin penetrated her vaginally with his penis. PB managed to shove him off of her and run for the front door. Before PB could unlock the door and flee, Harbin again grabbed her and forced her to the floor. This time, PB was able to lock her legs, preventing Harbin from penetrating her again. Harbin then dragged PB back upstairs to Trenika's bedroom. Once in Trenika's room, PB asked to use the bathroom. To prevent her from escaping through the window, Harbin made her leave the door open. While she was in the bathroom, Harbin put on a condom. Harbin then forced PB to sit on the edge of the bed. To prevent PB from getting blood on the white comforter, Harbin forced her to sit on her t-shirt. PB again tried to run; but Harbin caught her, removed the condom, and stated, "Wouldn't it be funny if I impregnated you?" Harbin then directed PB into a nearby room and forced her to get to her knees and perform oral sex.

Trenika arrived back home to find PB crying. PB told her mother what had happened and Harbin denied everything. Trenika then took PB and went to her car. They drove to a nearby liquor store parking lot. Harbin, who had followed them, began screaming and beating on the car, breaking a passenger side window. Trenika and PB drove away and spent the night in the parking lot of the building of Trenika's brother. The next morning, Trenika left PB at her grandmother's house. She instructed PB not to say anything about what had happened. However, the next day PB disclosed the incident to officials at school, who in turn notified police. During the subsequent investigation, officers recovered the blood-stained comforter from Trenika's room. Later tests confirmed that the comforter was stained with PB's blood and Harbin's semen.

Appellant was convicted in the Jefferson Circuit Court of first-degree sodomy,² first-degree sexual abuse,³ third-degree terroristic threatening,⁴ and first-degree indecent exposure.⁵ Although the jury hung as to the second-degree persistent felony offender charge,⁶ Harbin entered into a plea agreement on that count. As a result, Harbin's sentences were enhanced for a total of twenty (20) years in prison.

Appealing to this Court as a matter of right,⁷ Harbin's sole argument is that the trial court abused its discretion by refusing to allow the jury to consider the fact that the victim, PB, was HIV positive. He argues that this fact is relevant and admissible in his defense under the theory that he would not have knowingly had sexual intercourse with someone who was HIV positive. He points out that the evidence is not precluded under Kentucky Rule of Evidence (KRE) 412, because PB became infected from a blood transfusion she received as an infant. Further, Harbin notes that under these circumstances, the evidence is not barred under KRE 404(b). Harbin acknowledges that KRE 403 applies, but that the probative value far outweighs any chance of prejudice. Finally, Harbin cites numerous cases dealing with his due process right to present a defense. Under these circumstances, Harbin argues the trial court abused its discretion by barring the evidence from the jury.

In considering this claim, it is necessary to review what actually occurred when the court considered the Commonwealth's motion *in limine*. The

² Kentucky Revised Statute (KRS) 510.070.

³ KRS 510.110.

⁴ KRS 508.080.

⁵ KRS 510.148.

⁶ KRS 532.080.

⁷ Kentucky Constitution §110(2)(b).

Commonwealth did not seek to bar the fact that Harbin had been told PB was HIV positive. In fact, PB testified that she had, in fact, told Harbin of her condition. Rather, the Commonwealth sought to preclude the introduction of medical evidence confirming that PB actually was HIV positive, as well as the source of her infection.

The trial court agreed. It could see no relevance to the fact that PB was HIV positive. In discussions with defense counsel, it was clear that Harbin wanted to argue no one in his right mind would sexually assault someone known to be HIV positive. On questioning by the court, defense counsel acknowledged Harbin knew of the disease. Defense counsel confirmed that if Harbin took the stand he would testify that he knew PB was HIV positive because PB had told him so. The trial court agreed that it would allow evidence of what Harbin had been told; however, the court refused to allow medical evidence which would show PB actually was HIV positive. The court could see no relevance to such evidence. Further, the court agreed that even though PB had been infected through a blood transfusion, a stigma could attach – something the court felt was unduly prejudicial. Harbin’s counsel replied, “Okay, no problem. I have no problem.”

Given these circumstances, the Commonwealth argues Harbin had the opportunity to present the argument to the jury; thus, he was not denied his right to present a defense. We agree. Although Harbin elected not to testify, PB testified that she told Harbin she was HIV positive. Based on this evidence, Harbin was able to make his argument that no one would knowingly sexually assault someone known to be HIV positive. While this argument was

emphasized to the jury during closing, they rejected it to the extent they returned convictions on four counts of the fourteen-count indictment.

Further, we find some significance to the fact that, at the time of the hearing, Harbin's sole basis for his knowledge of PB's condition was what he had been told. He specifically stated his knowledge was not based on anything he observed. Under these circumstances, we must agree that medical evidence actually demonstrating PB was HIV positive – which was not known to Harbin at the time – is not relevant.

In this case, the trial court reviewed the evidence under KRE 401 and KRE 403. The court concluded the evidence that PB was HIV positive was both irrelevant and unduly prejudicial. Such decisions are left to the sound discretion of the trial court. See Rake v. Commonwealth, 450 S.W.2d 527, 528 (Ky. 1970). See also Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996), overruled in part by Chestnut v. Commonwealth, 250 S.W.3d 288 (Ky. 2008). Harbin has failed to demonstrate an abuse in this regard.

Finally, the Commonwealth argues any error in this regard was harmless. The Commonwealth pointed out that the jury was presented with the detailed testimony of PB, as well as evidence of the bloody comforter and the lab results confirming that it was stained with both PB's blood and Harbin's semen. Under these circumstances, we agree error, if any, was harmless beyond a reasonable doubt. Thus, there is no basis for reversal. See Kentucky Rule of Criminal Procedure (RCr) 9.24; Anderson v. Commonwealth, 231 S.W.3d 117, 122 (Ky. 2007) ("An error is reversible 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.”)

A review of the record in this case demonstrates that the trial court did not bar Harbin from presenting evidence that he had been told PB was HIV positive. Relying on evidence presented through PB, Harbin was allowed to make the argument to the jury that no person in his right mind would sexually assault someone he had been told was HIV positive. Harbin has not shown an abuse of discretion on the part of the trial court in excluding medical evidence confirming that PB actually was HIV positive. Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

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

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