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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: NOVEMBER 25, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000345-MR

DAVID TOLLE — APPELLANT

V.

ON APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
NO. 07-CR-00027

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On July 10, 2007, A.R., age 10, asked her mother, Ann Tolle, to tell Appellant not to "wake her up." When Ms. Tolle asked A.R. what she meant, A.R. indicated that Appellant would wake her up and make her lie on top of him while he was naked. Ms. Tolle then called the Bracken County Cabinet for Health and Human Services to report the allegations. On July 12, 2007, Patricia Conley, a social worker, conducted an interview with A.R. and Ms. Tolle at their home. She also spoke with Ms. Tolle's other children, A.J.R. and M.T., several days later. Ms. Conley recommended a forensic interview and physical examination at the Buffalo Trace Children's Advocacy Center in Maysville, Kentucky. Both events were completed the following day.

At trial, Appellant's step-daughter, A.R., testified that on multiple occasions while Ann was at work, Appellant woke her up in the middle of the

night and touched her "where she did not need to be touched." A.R. said he would enter her room without wearing clothing, get her out of bed, and take her back to his bedroom. During these encounters, A.R. testified that Appellant would "touch her pee-pee"; tickle her thighs; squeeze her "titties"; and touch her "bathroom spot" with his hands. A.R. testified that on one occasion, Appellant tried to stick his "bad spot" in her, and that he touched her "bathroom spot" with his mouth. These actions occurred multiple times per week for a period of approximately six to seven months. Dr. Leroy Gallenstein testified that his examination of A.R. revealed that her hymen was intact and that the examination was otherwise normal. He further testified that his findings were not inconsistent with A.R.'s allegations.

Appellant was convicted of criminal attempt to commit first-degree rape, first-degree sodomy, and first-degree sexual abuse. The jury recommended Appellant be sentenced to twenty years in prison for sodomy, ten years for criminal attempt to commit first-degree rape, and one year for first-degree sexual abuse, with the sentences to run concurrently for a total of twenty years. He now appeals the final judgment entered as a matter of right, Ky. Const. § 110(2)(b).

Appellant raises multiple issues on appeal: (1) that it was error for the trial court to deny his motion for a Daubert hearing regarding the scientific testimony of Dr. Gallenstein; (2) that multiple hearsay statements vouching for A.R.'s truthfulness improperly bolstered her testimony; (3) that there were

multiple violations of Appellant's constitutional right to remain silent when witnesses referenced his refusal to talk to investigators; (4) that the trial court erred in admitting evidence of the sexual relationship between Appellant and his wife; and (5) that the trial court erred in admitting evidence of an emergency protective order and domestic violence order. Each shall be addressed in turn.

Daubert hearing on the scientific testimony of Dr. Gallenstein

Appellant challenges the admissibility of Dr. Gallenstein's testimony on the grounds that it did not satisfy the test set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Notably, Appellant contends that a hearing was required regarding its admissibility into evidence.

Daubert provides that when expert scientific testimony is offered, the trial court must determine at a preliminary hearing "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Id. at 592. Thus, when a party seeks to introduce expert testimony, an initial determination is made to ensure that the expert is proposing to testify to scientific knowledge which "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid . . . ." Id. at 592-93.

In the instant case, Dr. Gallenstein testified that there are many variants of a "normal" hymen, and that its presence is not necessarily evidence of virginity. He also indicated that several recent studies have shown that a

female could have an intact hymen even though pregnant. We considered a similar issue in Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997). In Collins, Dr. Artie Bates testified that "it was not uncommon for women who have had numerous sexual encounters to still have a hymen." Id. at 574. The defendant claimed that Dr. Bates's testimony did not comport with the Daubert requirements and that the trial court erred in its admission. Disagreeing with the defendant, this Court held:

> Having articulated that Kentucky follows the Daubert analysis for the admissibility of scientific evidence, we conclude that such analysis is not, in fact, triggered in this case. Daubert and Mitchell use the catch phrases "expert scientific testimony," "theory," "technology," and "methodology." Dr. Bates's testimony, on the other hand, concerned basic female anatomical findings. Her examinations did not involve any novel scientific techniques or theories. Likewise, the research that Dr. Bates referred to involved the study of a female physical characteristic. Dr. Bates testified that the studies she relied upon were compilations of statistics derived from pelvic examinations of young females in various age groups. We discern nothing of a scientific nature to trigger the necessity of applying the Daubert analysis.

Id. at 575.

Like Collins, Dr. Gallenstein's testimony concerned "basic female anatomical findings" and did not trigger analysis under Daubert. His testimony was based on multiple studies that showed the presence of intact hymens in sexually active females and clearly assisted the trier of fact to understand a fact in issue – the presence of a hymen in a female who has been

sexually abused. The trial court committed no error in allowing Dr. Gallenstein's expert testimony without a Daubert hearing.

Improper bolstering of A.R.'s testimony

This argument was not preserved for review, and is thus analyzed under the palpable error standard. RCr 10.26. Palpable error is one "which affects the substantial rights of a party [and] may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." RCr 10.26. The basic palpable error review, where an unpreserved error requires reversal, is "if a manifest injustice has resulted from the error," which means there "is [a] probability of a different result or [the] error [is] so fundamental as to threaten a defendant's entitlement to due process of law." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006). Thus, the alleged error must be "so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." Id.

Appellant first contends that the testimony of A.R. was improperly bolstered on numerous occasions by Trooper Jones, Patricia Conley, Teresa Conway, and Ms. Tolle. According to Appellant, each of these witnesses simply repeated A.R.'s testimony and at times offered opinions as to its veracity, which cumulatively resulted in manifest injustice. The crux of Appellant's complaint

seems to stem, however, from the testimony of Ms. Conway.

Ms. Conway conducted the forensic interview with A.R. She was asked on direct examination about certain statements made by A.R. during the interview. During her testimony, Ms. Conway confirmed that A.R. indicated that Appellant had "touched her"; that he had "taken his mouth and put it on her pee-pee"; that he had tried "to get her to touch it"; and that he had "tried to put it in her." Ms. Conway also testified that A.R. confirmed that these encounters occurred "3, 4, or 5 times per week" and "every Saturday." Additionally, A.R.'s testimony was, in her opinion, consistent with her statements made during the forensic interview.

This Court has made clear its discomfort with convictions for child abuse based upon the hearsay testimony and ultimate fact opinion given by social workers. Sharp v. Commonwealth, 849 S.W.2d 542, 546 (Ky. 1993). It is also true that "[t]here is no recognized exception to the hearsay rule for social workers or the results of their investigations." Souder v. Commonwealth, 719 S.W.2d 730, 734 (Ky. 1986). However, when viewed in the context of the trial as a whole, the testimony by Ms. Conway does not amount to palpable error. A major piece of Appellant's defense strategy was to point out perceived inconsistencies in A.R.'s testimony and her statements given during the forensic interview. Virtually, the entirety of the cross-examination of Patricia Conley and Ms. Conway centered on this point. To advance his theory that A.R.'s statements were full of inconsistencies, Appellant requested that the trial

court play the videotaped forensic interview. This was done over the objection of the Commonwealth. Any prejudicial effect of the statements made by Ms. Conway during her testimony, which were clearly hearsay, was severely weakened when Appellant requested that the interview, from which these statements were taken, be played for the jury. Taken in this light, we are not convinced that Ms. Conway's testimony fundamentally threatened Appellant's entitlement to due process of law. Nor does the record suggest that a different result would have occurred with the exclusion of this testimony. A.R.'s testimony alone constituted adequate evidence upon which a jury could determine Appellant's guilt beyond a reasonable doubt. "The testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence." Commonwealth v. Suttles, 80 S.W.3d 424, 426 (Ky. 2002). Any error in the admission of the testimony was not palpable.

References to Appellant's refusal to speak to investigators

This argument was not preserved for review and is, thus, analyzed under the palpable error standard. RCr 10.26.

Appellant argues that there were multiple violations of his constitutional right to remain silent when witnesses referenced his refusal to talk to investigators. Appellant's silence was brought up on two separate occasions, once by Patricia Conley ("My supervisor actually attempted to do that for me

here at the courthouse and he refused the interview."); and by Trooper Jones (Appellant indicated he was "not talking further until he got a lawyer."). This argument, however, is simply without merit.

At the time Appellant made these remarks, he was not under arrest, nor was he in custody. In both instances, the remarks were not used extensively by the Commonwealth nor offered in any way as affirmative proof during its case-in-chief. See Hall v. Commonwealth, 862 S.W.2d 321, 323 (Ky. 1993) ("It is clear that the prosecution is prohibited from using the defendant's silence in its case-in-chief."). In the context of the remarks made by Ms. Conley, it is clear from the record that her testimony related the investigative steps used by Child Protective Services. Trooper Jones merely testified to what Appellant told him during an interview at the home – statements clearly admissible under KRE 801A(b)(1). The references to Appellant's silence were not improper comments on Appellant's right to silence and do not rise to the level of palpable error.

Admission of evidence concerning Appellant's sexual relationship with Ms. Tolle

This argument was not preserved for review. Appellant's objection was based upon a question that would elicit a hearsay response, and Appellant did not object to any other portion of Ms. Tolle's testimony. Therefore, the claim is analyzed under the palpable error standard. RCr 10.26.

Appellant argues that the Commonwealth's introduction of evidence

concerning the lack of sexual relations between him and Ms. Tolle was unduly prejudicial and should have been excluded under KRE 403. This evidence is ambiguous at best. It could be interpreted as showing a lack of sexual desire on Appellant's part, which would arguably be mitigating; or it could be interpreted that such deprivation of sexual relations with his wife caused him to prey upon A.R. Even if the admission of this evidence was in error, it certainly is not so "shocking or jurisprudentially intolerable" as to undermine the overall fairness of the proceedings. Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006). There was no palpable error.

Admission of evidence of an EPO and DVO

An appellate court's 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 Commonwealth offered no evidence that an EPO or DVO was actually obtained against Appellant. Trooper Jones was called to Ms. Tolle's residence after Appellant had vacated it, but had returned to find a trailer he owned missing. Appellant became very upset, but left without incident after Trooper Jones advised him that the trailer had been loaned to someone by Ms. Tolle. Trooper Jones then advised Ms. Tolle in passing that she could obtain a protective order if she believed there would be continuing problems. The trial court did not abuse its discretion by allowing

admission of Trooper Jones' comment to Ms. Tolle.

For the reasons set forth herein, the judgment of the Bracken Circuit Court is hereby affirmed.

Minton, C.J.; Abramson, Cunningham, Scott and Venters, JJ., concur. Noble, J., concurs in result only by separate opinion in which Schroder, J., joins. Schroder, J., also concurs in result only by separate opinion in which Noble, J., joins.

NOBLE, J., CONCURRING IN RESULT: Since Appellant was charged with Rape in the First Degree, the physical state of the victim was clearly relevant. Consequently, the testimony of Dr. Gallenstein, who examined her, was appropriate as to what he found. In this instance, he found that the victim's hymen was intact, and that the exam was otherwise normal. At first blush, this would appear to be supportive of the Appellant's position that he did not rape the victim. However, the doctor was allowed to go further in his testimony, to state that these findings were not inconsistent with rape. In support of this statement, he referenced a recent study, which he did not identify, that showed that the "vast majority" of young sexually abused girls show no tears in their hymens. The Appellant properly and timely objected to this testimony, claiming that he was entitled to a hearing on its scientific reliability and admissibility pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which has been adopted as the standard under the Kentucky Rules of Evidence, Miller v. Eldridge, 146 S.W.3d

909, 913 (Ky. 2004).

In Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997), this Court held that such an analysis was not necessary since the doctor's testimony in that case "concerned basic female anatomical findings" rather than "expert scientific testimony," even though the doctor relied on "studies" that she claimed were compilations of statistical data on young females of various ages. The Court found "nothing of a scientific nature" in the testimony. Since all the testimony was medical in nature and much of it went beyond mere description of the state of the victim's anatomy, I believe the Court clearly was overbroad in its holding in that case.

The United States Supreme Court established in Daubert that Federal Rule of Evidence 702, governing expert testimony, required first a determination whether the proposed evidence was "scientific," and if so, whether it would assist the trier of fact. To answer the first question, the Supreme Court stated, "The adjective 'scientific' implies a grounding in the methods and procedures of science." Daubert, 509 U.S. at 590. Science is based on more than a subjective belief or unsupported speculation. Medicine is a science. And, surely, proper medical evidence would assist the trier of fact in determining what the facts are related to a victim's physical or mental condition.

It is also not unusual for experts to offer opinions that are not based on first-hand knowledge or observation—that is primarily how an expert witness

differs from a lay witness. But as the Supreme Court pointed out in Daubert, that testimony "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." Id. at 592. It is the reliability of Dr. Gallenstein's testimony that is at issue here.

He did not identify the study he quoted by name. It had not been provided to the Appellant to prepare for cross-examination. There was no testimony about the method of collecting the data, and most importantly, there was no real distinction that the claimed study dealt with cases that were factually similar to the one on trial. Allowing the doctor to pluck a "study" out of thin air without some kind of validation invites speculation that he might be making it up on the spot. This is not the kind of evidence in which a court can have reasonable confidence that it is correct or even a part of the known knowledge of his discipline. This is clearly more than a bare description of the physical anatomy that the doctor found during his examination; indeed, he drew inferences that appeared counterintuitive in light of those findings, and premised those inferences on an unnamed source.

A Daubert hearing would have fleshed out the source and content of the alleged study, and whether it met scientific standards. The hearing indicated in Daubert is not a rigid, formulaic hearing because "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." Id. at 593. As the Supreme Court further pointed out, the focus must be on how the evidentiary submission was obtained, not on the conclusions that may

be drawn from it. A proper expert is free to give any opinion that is a permissible inference from the evidence, so long as the evidence is relevant and reliable. Unreliable evidence certainly has the potential to prejudice the party against whom it is offered, and that is why it should not be.

Having said this, however, I do concur in the result of the majority, because the evidence, while improper, clearly did not prejudice the jury against Appellant. He was charged with First-Degree Rape but was convicted of Attempted First-Degree Rape. The point the doctor was trying to make, that the victim could have been raped but kept an intact hymen, apparently did not persuade the jury that Appellant was guilty of rape. Thus, while the failure to conduct a Daubert hearing was error, it is harmless in this case because it did not affect the verdict. I would, however, overrule Collins, because it allows scientific testimony that has not been vetted under the standards laid out in Daubert.

Additionally, the hearsay testimony of several witnesses and any bolstering through statements of belief in the victim's testimony was error. As the majority notes, several of the witnesses commented on the veracity of the minor victim. This was improper. See Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky.1997) ("'A witness's opinion about the truth of the testimony of another witness is not permitted.... That determination is within the exclusive province of the jury.'" (quoting State v. James, 557 A.2d 471, 473 (R.I.1989)); Stringer v. Commonwealth, 956 S.W.2d 883, 888 (Ky.1997) ("Generally, a

witness may not vouch for the truthfulness of another witness."). However, because the hearsay and bolstering were not objected to at trial and did not result in a manifest injustice, they do not require reversal.

Schroder, J., joins.

SCHRODER, J., CONCURRING IN RESULT: In a case where the only evidence of a crime is the unsupported allegations of an alleged victim, the introduction of the type and amount of inadmissible hearsay as was introduced in this case, in particular, the contents of a forensic interview, would generally rise to the level of palpable error. The reasons given by the majority would not suffice to make it otherwise. However, the majority fails to point out the crucial sequence of events which makes the error non-palpable in this case – that it was the defense who initiated the introduction of the inadmissible hearsay. Near the beginning of the Commonwealth's case, prior to any testimony by Teresa Conway or Trooper Jones regarding the interview, defense counsel requested and received, over the objection of the Commonwealth on hearsay grounds, a ruling by the trial court that he could play the entire tape of the forensic interview as part of the defense. What would otherwise have been palpable error was, in this case, trial strategy.

Noble, J., joins.

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