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NOT TO BE PUBLISHED OPINION

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RENDERED: SEPTEMBER 23, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10-14-10 D Skaggs

2009-SC-000283-MR

CHARLES MCCLENDON APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
NO. 07-CR-00808

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On the evening of September 28, 2007, Deborah Deaton and her friend, Patricia Aistok, sat and drank several beers at Deaton's home. Sometime around 11:50 p.m., they walked to a Sunoco gas station, approximately six or seven blocks away, to get some food. Afterwards, while the two women were walking back to Deaton's home, they were approached on foot by Appellant, Charles McClendon. McClendon was carrying an open beer and the remains of a twelve pack and appeared to be highly intoxicated. McClendon asked the two women where he could buy some more liquor, and Deaton suggested Big Daddy's liquor store. McClendon then asked Deaton to drive him there in his truck, which he said was parked in a nearby alley. According to Deaton, she agreed to drive McClendon to the store because he was visibly intoxicated and she did not want him to harm himself or others in an accident.

Aistok went her separate way. Deaton followed McClendon to a nearby alley and became frightened when she did not see a vehicle. McClendon responded by telling Deaton that she had better be scared. McClendon then grabbed Deaton by her hair and pulled her through a side yard and up against a wall by an air conditioner. Deaton tried to call for help on her cell phone, but McClendon grabbed the phone and placed it on a nearby windowsill. McClendon told Deaton that, once she did her "business," she could leave. At that point, McClendon forced Deaton to get on her knees and perform oral sex. After a short period of time, Deaton told McClendon that she did not want to continue. McClendon then ordered her to turn around and pull her pants down. Deaton did as she was told while protesting that she did not want to have intercourse with McClendon. McClendon then forced Deaton to resume performing oral sex. Deaton's cell phone rang repeatedly during this encounter.

Chenae Vickers testified that she heard someone crying through her open window. Vickers indicated that she heard the woman say: "Why are you doing this? I have no money." When Vickers looked outside, she saw a man pushing a woman up against an air conditioner. After calling the police, Vickers watched as the man pushed the woman down towards his groin. Apparently seeing Vickers through the window, Deaton began waving her hands frantically. Moments later, police arrived. Officer Brian Steffen observed McClendon fleeing on foot and jumping over a nearby fence. With the

assistance of another officer, Officer Steffen subsequently apprehended McClendon. McClendon did not comply with either officer's commands and had to be tasered. While being placed in the back of the police cruiser, McClendon indicated that Deaton had performed oral sex on him in exchange for crack cocaine.

At all times during trial, McClendon maintained his innocence. McClendon consistently stated that he and Deaton knew each other, and that Deaton had on at least two occasions performed oral sex in exchange for crack cocaine. McClendon also stressed that the encounters, including the one which gave rise to these charges, were entirely consensual. The jury, however, did not believe McClendon's version of events, and he was ultimately convicted of first-degree sodomy and of being a first-degree persistent felony offender. He was sentenced to thirteen years imprisonment, enhanced to twenty years due to his persistent felony offender status. He now appeals the final judgment entered as a matter of right. Ky. Const. § 110(2)(b).

McClendon raises two issues on appeal: (1) his federal and state due process rights were violated when the examining nurse was permitted to read the victim's prior consistent statement, thereby bolstering her testimony; and (2) the trial court committed reversible error in admitting improper character testimony.

Testimony of examining nurse

The Commonwealth offered the testimony of Leslie Mertens, a nurse who

examined Deaton after the attack. Mertens is a trained Sexual Assault Nurse Examiner ("SANE") who, during the trial, effectively read Deaton's history statement verbatim. McClendon now objects, believing that Mertens' testimony did little more than bolster that of Deaton, thereby violating his state and federal due process rights. In addition, McClendon claims that he was prejudiced by allowing the SANE report to go to the jury room as an exhibit during deliberation.

As both parties make clear in their briefs, there is some question as to whether these allegations of error are preserved for appellate review. After extensively reviewing the record, we believe that this issue is a very close call. However, out of an abundance of caution, given the crimes charged and the lengthy sentence McClendon received, we will treat the issue as being preserved.

Kentucky law has long been clear that "a witness cannot be corroborated by proof that on previous occasions [she] has made the same statements as those made in [her] testimony." *Smith v. Commonwealth*, 920 S.W.2d 514, 517 (Ky. 1995). As this Court stated in *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky. 2005):

> It is improper to permit a witness to testify that another witness has made prior consistent statements, absent an express or implied charge against the declarant of recent fabrication or improper influence. KRE 801A(a)(2). Otherwise, the witness is simply vouching for the truthfulness of the declarant's statement, which we have held to be reversible error. *Bussey v. Commonwealth*, 797 S.W.2d 483, 484-85 (Ky.1990). *See also LaMastus v. Commonwealth*, 878

> S.W.2d 32, 34 (Ky.App.1994). We perceive no conceptual distinction between testimony that repeats the witness's prior consistent statement verbatim and testimony that the witness previously made statements that were consistent with her trial testimony. Either way, the evidence is offered to prove that the declarant's trial testimony is truthful because it is consistent with her prior statements.

Id. at 472.

Though defense counsel did, at various times during cross-examination of Deaton, attempt to find some contradictions between her testimony and the history contained in the SANE report, there was no allegation of recent fabrication or improper influence. To the extent that Mertens' testimony merely showed prior consistent statements from Deaton, its introduction clearly was in error. However, we believe that the error in this instance was harmless. Initially, we note that Mertens never directly asserted that she believed Deaton's history statement in the SANE report to be credible. *See Roach v. Commonwealth*, 313 S.W.3d 101, 113 (Ky. 2010). Moreover, the SANE report that Mertens read did not identify McClendon as the perpetrator. *See Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010). Furthermore, Mertens' testimony was clearly within the bounds of the medical treatment or diagnosis exception to the hearsay rule embodied in KRE 803(4). The statements contained in the SANE report were provided for the purpose of allowing Mertens to assess any and all injuries, those outwardly visible and not, that may have been sustained by Deaton and which were reasonably related to the "inception or general character of the cause or external source" of the injury.

Id.

Even without Mertens' testimony, the jury could still have reasonably believed the testimony of Deaton, which was corroborated in part by that of both Aistok and Vickers. "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) (citing *Murphy v. Sowders*, 801 F.2d 205 (6th Cir. 1986)). In addition, McClendon's own actions in fleeing the scene weaken his suggestion that the act was consensual. Accordingly, while allowing Mertens to read directly from Deaton's SANE report was error, we are confident that "the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009).

McClendon also argues that he was prejudiced when the jury was allowed to take a copy of the SANE report into the jury deliberation room. Our extensive review of the proceedings reveals that this allegation of error is unpreserved for our review. In any event, we cannot determine what prejudice, if any, McClendon suffered as a result. We find nothing so manifestly unfair or prejudicial that warrants this Court disturbing the jury's verdict. RCr 10.26.

Character testimony

When asked by the prosecutor if she was surprised that Deaton would offer to drive a man whom she allegedly did not know to a nearby liquor store,

Aistock replied that she wasn't surprised because, "[Deaton's] like that, she'd do anything for anybody." Defense counsel immediately objected on the grounds of improperly putting the victim's character in evidence. This objection was overruled by the trial court. McClendon now claims that this testimony was so prejudicial and seriously undermined his defense in violation of his state and federal due process rights.

We believe that the prosecutor's question was a logical one and addresses a doubt the jury might have had about the plausibility of Deaton's testimony. The answer was also a reasonable answer to the question. In other words, there was nothing unusual about Deaton's actions. Neither the question nor the answer was error. But even if error, it was harmless. As noted above, the jury could have disbelieved McClendon's version of events and found Deaton's testimony more credible. Accordingly, we do not believe that the statement "so fatally infected the proceedings as to render them fundamentally unfair." *Lanham v. Commonwealth*, 171 S.W.3d 14, 35 (Ky. 2005).

Based upon the foregoing, we hereby affirm the decision of the Kenton Circuit Court.

All sitting. All concur.

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