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RENDERED: NOVEMBER 18, 2010

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000716-MR

FINAL

DATE Anne Hicks 12-9-10

WILLIAM HELM

APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT

HONORABLE JANET P. COLEMAN, JUDGE

NO. 06-CR-00602

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

The charges in this case arose from Appellant William Helm's relationship with two sisters, T.C. and M.C., beginning when each girl was approximately twelve years old. The evidence established that Helm was friends with the girls' mother and eventually became close with the entire family, helping them find places to live on several occasions. Helm testified that he first had a sexual relationship with T.C., the older of the two sisters, and then later had a similar sexual relationship with M.C. after his relationship with T.C. ended. T.C. and M.C. described numerous instances of sexual intercourse, sodomy, and other sexual contact with Helm.

In an interview with Detective Jody Ennis¹ of the Radcliff Police Department, Helm admitted to having a sexual relationship with both girls. Helm testified at trial against the advice of counsel and candidly described details of these relationships. However, Helm denied using force, and stated that he waited to have sexual relations with each girl until she was twelve years of age. Helm did admit to engaging in other sexual contact with the T.C. prior to the age of twelve, including kissing and fondling.

Helm was charged with eight counts of first-degree rape and three counts of first-degree sodomy. Apparently believing Helm that he waited until each girl was twelve years old before engaging in sexual contact,² the jury acquitted him of all 11 primary charges, but convicted him of a number of lesser-included offenses: five counts of second-degree rape, two counts of second-degree sodomy, and two counts of first-degree sexual abuse.³ The jury fully acquitted Helm of two counts related to M.C. Helm agreed to concurrent sentences totaling 10 years for all crimes related to each victim, with each 10-year sentence to run consecutively for a total of 20 years' imprisonment. He

¹ There is a discrepancy as to the proper spelling of Detective Ennis's name. The original Uniform Citations issued in this case, and signed by Detective Ennis, appear to be signed "Ennis." We have therefore adopted that spelling throughout.

² Engaging in sexual intercourse with a person under twelve years of age constitutes first-degree rape, KRS 510.040(1)(b)2, while engaging in sexual intercourse (in the absence of physical compulsion) with a person twelve or thirteen years of age constitutes second-degree rape if the defendant is eighteen years of age or older. KRS 510.050(1)(a). The same elements of age and compulsion apply to first- and second-degree sodomy. See KRS 515.070 & 515.080.

³ A clerical error in the court's order led to Helm being convicted of second-degree rape on one count, when the jury in fact found him guilty of first-degree sexual abuse. We have listed Helm's convictions as found by the jury, and, as will be discussed further, we remand for correction of the error.

therefore appeals to this Court as a matter of right.⁴ We now affirm Helm's convictions, but remand for a new penalty phase to correct two errors in Helm's sentence.

I. The Trial Court Did Not Err In Finding Helm Competent To Stand Trial

Helm first argues that the trial court erred in finding him competent to stand trial. Helm's attorneys raised the issue of competency a number of times. On May 19, 2007, Helm, through counsel, moved for a competency evaluation. One of Helm's attorneys stated that they (his attorneys) had had difficulty communicating trial procedure and communicating with Helm on a level that would allow them to defend him. The trial court ordered a competency evaluation, which Kentucky Correctional and Psychiatric Center (KCPC) referred to J. Robert Noonan, Ph. D. Dr. Noonan interviewed Helm for several hours in the Hardin County Jail. The court conducted a competency hearing on December 4, 2007, at which Dr. Noonan was the only witness. Dr. Noonan's uncontroverted testimony was that Helm was competent to stand trial, and Helm did not seriously question this conclusion. The trial court therefore found Helm competent to stand trial.

At a pretrial hearing on May 21, 2008, Helm's attorneys again raised the issue of competency. They stated that it appeared to them that Helm's competency had deteriorated since Dr. Noonan's evaluation. Their primary concern was that Helm did not seem to comprehend that he had done anything wrong, nor the serious nature of the charges against him. The trial court

⁴ KY. CONST. § 110(2)(b).

ordered a second competency evaluation, this time with Helm's attorneys present so that they could express their concerns to Dr. Noonan.

After the reevaluation, at a second competency hearing on June 17, 2008, Dr. Noonan agreed with the Commonwealth's characterization of Helm as a "conscientious objector." He noted that Helm had "his own point of view on the situation" that most people would not agree with. While Helm was "a bit unrealistic in some respects" and had a value system "at odds with the law," this was simply his point of view, and not the result of mental illness. He understood that his behavior was illegal, and simply took a different view of the severity of the charges than his attorneys did.

According to Dr. Noonan, Helm "plays down the criminality" of his actions. He understood that, under the law, he was culpable for his criminal behavior. He simply took a "broader view," and wanted to "qualify or mitigate" his actions by comparing them to others and other situations. For example, Helm noted that Jerry Lee Lewis married a young cousin, and stated that his actions would not have been criminal in Mexico. He also asked his attorneys to provide him with information on the age of consent in other jurisdictions.

With regard to the issue of assisting his attorneys, Dr. Noonan noted that Helm was assisting his attorneys by conveying his point of view and his value system, giving his rationalizations for what occurred, and providing his views on relationships between men and young females. While Dr. Noonan acknowledged that this was "probably not a great deal of help" to his attorneys,

it nevertheless met the standard for competency to stand trial. The trial court again found Helm competent to stand trial.

Before the start of Helm's trial, his attorneys announced "not ready" because of Helm's continued unwillingness to take the advice of counsel, and to accept that what he had done was wrong. His attorneys stated that, while he recognized that what he had done violated the law, he simply felt the penalty was too harsh. Helm's counsel renewed the competency motion prior to Helm testifying, but the motion was denied.

Helm testified candidly and at length about his relationship with T.C. and M.C. He said he had a "major crush" on T.C., and he "wanted her to be mine." He testified that he knew what he had done was wrong, but minimized it. He equated his sexual contact with T.C. with the time he allowed her to drive his car. He also seemed more concerned about the fact that he had allowed T.C. to smoke cigarettes. Regarding the beginning of his relationship with T.C., Helm stated that there was "something about twelve" that "stuck in [his] head" with regard to the law. Helm explained that his first sexual encounter with M.C. was a present for her thirteenth birthday.

Helm also testified by avowal, outside the presence of the jury, about his religious beliefs in an attempt by Helm's attorneys to elicit that his religious beliefs influenced his actions. However, Helm explained that he was a non-practicing Mormon at the time of the events in this case, and that his church would not condone his actions.

After Helm testified, his counsel renewed the earlier competency motion, arguing that Helm's testimony provided the best evidence of his incompetency. His attorneys asserted that he had not provided them with any type of defense, and therefore he had not adequately assisted them. Helm's competency motion was again denied.

"We begin with the unassailable proposition that a defendant found to be incompetent to stand trial may not be 'tried, convicted or sentenced so long as the incompetency continues.'"⁵ A defendant is incompetent to stand trial if, "as a result of mental condition," he lacks the "capacity to appreciate the nature and consequences of the proceedings against [him] or to participate rationally in [his] own defense[.]"⁶ On appellate review, "[w]e may disturb a trial court's competency determination only if the trial court's decision is clearly erroneous (*i.e.*, not supported by substantial evidence)."⁷

Upon review of the record, we cannot say that the trial court's competency determination was clearly erroneous. The evidence established that Helm understood that his actions were illegal; he simply disagreed with the law. Helm attempted to mitigate or minimize the seriousness of his actions, but this does not amount to lacking the capacity to appreciate the nature and consequences of the proceedings. Helm stated several times that he knew that what he had done was wrong. He also appreciated the

⁵ *Chapman v. Commonwealth*, 265 S.W.3d 156, 173 (Ky. 2007) (quoting KRS 504.090).

⁶ KRS 504.060(4).

⁷ *Chapman*, 265 S.W.3d at 174 (citing *Thompson v. Commonwealth*, 147 S.W.3d 22, 33 (Ky. 2004)) (footnote omitted).

criminality of having sex with underage girls when he waited until each girl turned twelve, because he knew there was “something about twelve” in the law. In addition, capacity determinations are based on the defendant’s mental state at the time of trial.⁸ Any lack of understanding of the consequences of his actions at the time of Helm’s crimes no longer existed by the time of trial, as the evidence clearly demonstrated.

Nor can we say that Helm was unable to participate rationally in his own defense. Helm’s argument is essentially that, because he insisted on testifying and admitting his guilt, and because he did not have a valid defense to the charges against him, he failed to rationally assist his counsel. We cannot agree. A competent defendant must be able to make a “reasoned choice” among the alternatives available to him.⁹ Helm made a reasoned choice to testify and to admit to some of the charges. Whether Helm’s choice was a wise one is not the issue. But it is also worth noting that the jury acquitted Helm of the most serious charges. The fact that Helm viewed the circumstances in a way that did not present a strong defense is not the same as being unable to participate rationally in his own defense.

As far as Helm’s religious beliefs, Helm admitted he was not following his religion at the time of the crimes in this case. But, to whatever extent Helm’s crimes may have been influenced by his religious beliefs, we note that firmly

⁸ *Bishop v. Caudill*, 118 S.W.3d 159, 162 (Ky. 2003).

⁹ *Id.* at 163 (citing *Godinez v. Moran*, 509 U.S. 389, 397-98 (1993)).

held religious beliefs generally do not signal incompetence.¹⁰ The trial court did not clearly err in finding Helm competent to stand trial.

II. The Trial Court's Error In Admitting Helm's Improperly Obtained Confession Was Harmless Beyond A Reasonable Doubt

Helm argues that the trial court erred in denying motions to suppress the portion of his confession related to M.C. Detective Ennis interviewed Helm on September 13, 2006. The video recording of the interview was played for the jury, and is a part of the record.

Though he was not under arrest, Detective Ennis explained Helm's *Miranda*¹¹ rights to him, and Helm signed a waiver in her presence. Helm spoke openly and candidly about T.C., his sexual relationship with her, and T.C.'s relationship with her mother. Eventually, the conversation moved to M.C., T.C.'s younger sister.

Helm: [M.C.] is at the breaking point now. Her other daughter [M.C.], she don't know what to think.

Ennis: Well have you ever had sex with [M.C.]?

Helm: Do I really have to tell you?

Ennis: Yeah.

Helm: [M.C.] ain't said nothing to nobody. She don't want to hurt her mom's feelings or nothing [inaudible].

Ennis: So you did have sex with [M.C.]?

¹⁰ See *Ford v. Bowersox*, 256 F.3d 783, 787 (8th Cir. 2001); *Valdez v. Ward*, 219 F.3d 1222, 1241 (10th Cir. 2000).

¹¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Helm: I can't answer that.

Ennis: I can go ask [M.C.] first.

Helm: You go right on. Go ask [M.C.] first.

Ennis: [Laughing] Why are you going to make me do all that work?

Helm: It's your job.

Ennis: I know, but Lord.

Helm: It's your job.

Ennis: You're going to make me earn . . .

Helm: [M.C.] is a sweetheart. That girl here. She was a total sweetheart.

Ennis: So you have had a relationship with [M.C.] too?

Helm: I ain't telling you.

Ennis: I already know. I already know. I mean it's like out there. It ain't no big deal. It's not like you are forcing these girls.

Helm: I don't want to hurt [M.C.] any more than that.

Ennis: [writing notes on paper]

Helm: Don't write it on there. I didn't say nothing.

Ennis: [Laughing] You are pretty sharp aren't you? I just put [M.C.] too and I have a line drawn out. That's all I wrote.

Helm then proceeded to tell Detective Ennis how his relationship with

M.C. developed. He eventually admitted to numerous acts of sex and sodomy with M.C.

Helm moved to suppress the portion of his confession coming after he asked, "Do I really have to tell you?" and Detective Ennis informed him that he did. The trial court overruled the motion, finding that Helm was not invoking his right to remain silent, but was instead expressing concern for M.C.'s privacy.

A suspect is in custody, and *Miranda* applies, when there is a "restraint of his freedom or . . . a restraint on freedom of movement to the degree associated with formal arrest."¹² "The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave."¹³ One significant factor is "the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled."¹⁴

Helm was not in custody when the interview with Detective Ennis began. However, by the time Detective Ennis asked Helm about M.C., Helm had confessed to multiple crimes against T.C. In addition, Detective Ennis told Helm that he had to answer her question. We therefore conclude that a reasonable person would not have believed he was free to leave at this point,

¹² *Cecil v. Commonwealth*, 297 S.W.3d 12, 16 (Ky. 2009) (quoting *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006)).

¹³ *Id.* (citing *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999)).

¹⁴ *Id.* (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

and Helm was in custody at the time Detective Ennis asked him if he had had sex with M.C.

Helm did not unequivocally invoke his right to remain silent. However, Detective Ennis's incorrect response to Helm's question rendered Helm's subsequent waiver of his right to remain silent involuntary. A suspect's waiver of his right to remain silent "must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[.]'"¹⁵ The trial court therefore erred in failing to suppress Helm's statements following Detective Ennis's telling Helm that "Yeah," he had to answer her question.

Helm asks this Court to reverse and remand for a new trial, at which his statements to Detective Ennis about M.C. will be suppressed. The question, then, is whether the error was harmless. Constitutional errors must be harmless beyond a reasonable doubt,¹⁶ and that standard is met in this case.

The statements that should have been suppressed deal exclusively with Helm's contact with M.C. M.C. testified about these events at trial. Helm also testified at length, against the advice of counsel, about his sexual relationship

¹⁵ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (U.S. 2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)) (emphasis added). See also *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("The voluntariness of a waiver of this [Fifth Amendment] privilege has always depended on the absence of police overreaching") (citing *Moran*, 475 U.S. at 421; *Fare v. Michael C.*, 442 U.S. 707, 726-27 (1979)); 8 LESLIE W. ABRAMSON, KENTUCKY PRACTICE: CRIMINAL PRACTICE AND PROCEDURE, §19.20 (4th ed. 2003 & 2009 supp.) ("Any indication that the suspect was threatened, tricked, or cajoled by police overreaching into a waiver will render it involuntary.").

¹⁶ *Chapman v. California*, 386 U.S. 18 (1967); *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 n.1 (Ky. 2009).

with M.C. Helm made the same admissions at trial that he had made in the portion of the confession that should have been suppressed. In addition, where there were differences in Helm's statements at trial and in the video confession, the jury tended to believe Helm's statements at trial. For example, in his confession, Helm stated that he first had sex with M.C. when she was eleven-and-a-half or twelve. At trial, Helm stated that he first had sex with M.C. when she turned thirteen. The jury acquitted Helm of all charges where M.C. was alleged to have been under twelve years of age. Because M.C. testified at trial, and because Helm testified and admitted having a sexual relationship with M.C., the error in not suppressing the portions of Helm's confession related to M.C. was harmless beyond a reasonable doubt.

III. Remand Is Necessary To Correct Sentencing Errors

Finally, two errors in Helm's sentence require remand for correction. At final sentencing, the trial court imposed a \$1,000 fine. Helm's attorneys asked that the fine be waived, explaining that they had been hired by Helm's family, and that Helm himself had no financial resources. Given that Helm possibly stood to inherit from his father's estate, the trial court declined to find him indigent at that time. One month later, another circuit judge granted defense counsel's motion to withdraw from representation, found Helm to be indigent, and appointed the Department of Public Advocacy to represent Helm on this appeal.

KRS 534.030 provides for the imposition of fines upon persons convicted

of a felony. However, KRS 534.030(4) states, “Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.” Because Helm was determined to be indigent, a fine could not properly be imposed pursuant to KRS 534.030(4).

Second, the Trial Verdict and Judgment, as well as the Judgment and Order Imposing Sentence, erroneously states that, on Count 2, Helm was convicted of second-degree rape. However, the jury actually convicted Helm of first-degree sexual abuse under Count 2.¹⁷ Because of the error, Helm agreed to an illegal sentence of 10 years’ imprisonment for a Class D felony.¹⁸

Helm’s sentence is hereby vacated, and the case remanded for a new penalty phase or other proceedings consistent with this opinion. In all other respects, the judgment of the Hardin Circuit Court is affirmed.

All sitting. Minton, C.J.; Abramson, Schroder, and Venters, JJ., concur. Cunningham, Noble, and Scott, JJ., concur in result only.

¹⁷ The jury foreperson filled out the verdict forms in an unusual manner, which likely resulted in the confusion. But a review of the record makes it clear that Helm was convicted of first-degree sexual abuse under Count 2.

¹⁸ See *McClanahan v. Commonwealth*, 308 S.W.3d 694, 699 (Ky. 2010) (holding that sentences may not exceed the statutorily prescribed range).

COUNSEL FOR APPELLANT:

Susan Jackson Balliet
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Bryan Darwin Morrow
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601