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RENDERED: NOVEMBER 18, 2010

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000483-MR

FINAL

DATE 12-9-10 E.A. Graw P.C.

CHRISTINA ST. CLAIR

APPELLANT

V. ON APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
NO. 08-CR-00185

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Christina St. Clair appeals as a matter of right from an August 19, 2009 Judgment of the Greenup Circuit Court convicting her of two counts of first-degree Sodomy, in violation of Kentucky Revised Statute (KRS) 510.070, three counts of complicity to first-degree sodomy, in violation of KRS 510.070 and KRS 502.020, and two counts of complicity to first-degree sexual abuse, in violation of KRS 510.110 and KRS 502.020. In accord with the jury's recommendation, the trial court sentenced St. Clair to concurrent terms of imprisonment, resulting in a twenty-year sentence. The Commonwealth alleged, and the jury found, that during 2005 and 2006, St. Clair compelled her two daughters, C.S. and S.S., then ages six to seven and five to six, respectively, to perform oral sex on her and on one of her boyfriends. In the

younger daughter's case, St. Clair also compelled her to perform oral sex on a second boyfriend and to submit to sexual contact by both men. The sole ground of St. Clair's appeal is that her trial was rendered unfair when the Commonwealth asked her whether she believed that her daughters, both of whom testified at trial, were lying. Because the Commonwealth's question was not timely objected to and did not render the trial fundamentally unfair, we affirm.

RELEVANT FACTS

The Commonwealth's proof, principally the testimony of the two girls, tended to show that on numerous occasions during the time period alleged, St. Clair compelled her daughters to engage in oral sex by threatening to whip and to ground them if they refused. S.S. testified that during some of the episodes when she was thus compelled to sodomize St. Clair's boyfriends, they also touched her vaginal area and her chest. The girls also testified that one of the boyfriends was abusive toward their mother and was mean to them. In January 2007, his abusiveness resulted in the girls' being removed from St. Clair's custody and placed first in foster care and then in the custody of their paternal grandmother and her husband.

S.S. testified that during one of her mother's visits after the girls had joined their grandmother's household, St. Clair told them that she hoped to regain custody. Because she did not want to be returned to the former "situation," S.S. then told her grandmother's husband about the sexual

activity. C.S. confirmed S.S.'s allegations, and the matter was referred first to social workers and then to the police.

A Greenup County grand jury indicted St. Clair in August 2008. She was tried in May 2009. St. Clair testified in her defense, denied the allegations in their entirety, and asserted that the paternal grandmother and her husband had induced the girls to bring false charges so as to thwart her chances of regaining custody. As noted, the jury rejected this defense. On appeal, St. Clair maintains that the prosecutor's improper cross-examination of her deprived her of a fair trial.

ANALYSIS

During her brief direct examination, St. Clair testified that she loved her daughters and that she had not forced them to engage in sexual activity either with her or with others. Early in his cross-examination, the prosecutor then questioned her as follows:

Commonwealth: You're telling us, I guess, that your children, both your girls, just came in here and lied?

St. Clair: Yes sir, I am.

Commonwealth: And that you never allowed them to be, um, allowed them sexual contact with either of these men?

St. Clair: Yes sir, that's what I'm telling you. That yes, they came in here and lied, and no I did not allow that.

Commonwealth: Those girls love you; they said they did.

St. Clair: And I love them.

Commonwealth: And, um, you're the only mother they've ever known, correct?

St. Clair: Yes.

Commonwealth: Buford [the abusive boyfriend] is gone, isn't he? How long have you been rid of Buford?

St. Clair: Yes; two years approximately.

Commonwealth: So no reason to be afraid of Buford now, is there?

St. Clair: No.

Commonwealth: The children are in the permanent custody, are they not, of the grandparents?

St. Clair: Yes.

Commonwealth: And have been for a year and a half or more, correct?

St. Clair: Yes.

Commonwealth: So there's no reason for the children to come down here and lie on you. There's no custody case left.

Only at this point, a minute and a half and several questions after St. Clair was first asked whether she believed her daughters had lied, did defense counsel object on the ground that by asking St. Clair to provide a reason for the girls' alleged dishonesty the prosecutor was asking her to speculate about facts she could not know. The trial court admonished the prosecutor not to invite the witness to speculate. Instead of simply asking whether St. Clair knew of any reason the children might have for lying, the prosecutor again asked, "Isn't it

correct that the children have no reason to lie on you?” When defense counsel made the same objection, the prosecutor tried again: “Why would the children say these awful things about you?” The same objection was this time overruled, and St. Clair answered that the grandparents had induced the girls’ allegations and their testimony. Several minutes later, at the end of his cross-examination, the prosecutor once again asked, “Tell me why the children would tell these lies?” Defense counsel again objected, this time noting that it is improper to ask a witness to comment on another witness’s credibility, and also noting that the question had been asked and answered. The objection was overruled, however, and St. Clair repeated that the children lied at the grandparents’ behest.

As St. Clair correctly notes, in *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), we observed that

[a] witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force. Our decision in *Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324 (1928), has long been the standard for proper cross-examination. The Supreme Court of Rhode Island recently commented appropriately on tactics such as the prosecutor employed here, as follows:

With few exceptions, it is improper to require a witness to comment on the credibility of another witness. A witness’s opinion about the truth of the testimony of another witness is not permitted. Neither expert nor lay witnesses may testify that another witness or a defendant is lying or faking. That determination is

within the exclusive province of the jury. *State v. James*, 557 A.2d 471, 473 (R.I. 1989).

949 S.W.2d at 583. In *Moss*, a burglary case, the defendant was asked if one of the testifying police officers had lied. In *State v. James*, however, the Rhode Island case we cited with approval, the defendant was charged with having sexually assaulted his daughters, and his defense, like St. Clair's defense in this case, was that the allegations were false. The court held that it was improper for the prosecutor to ask, several times and over repeated objection, whether he considered his daughters truthful. Not only did those questions violate the fundamental rule that one witness is not to comment on the credibility of another, but, as the Court noted, those questions were also argumentative. They were asked not so much to elicit information, since the answer was obvious, but were meant rather to cast the father in the unflattering light of one willing to impugn his own daughters. As we observed in *Moss*, that use of cross-examination not to question, but to insinuate the defendant-witness's bad character, is improper. Had St. Clair objected to the prosecutor's initial question in this case asking her to characterize the girls' testimonies as lies, it may well be that the court should have foreclosed that line of inquiry.

As noted, however, there was no objection to that initial question, and instead St. Clair readily volunteered her opinion that the girls had lied. Where a *Moss* violation has not been objected to, relief is appropriate only if the question rendered the trial fundamentally unfair. *Moss, supra; Caudill v.*

Commonwealth, 120 S.W.3d 635 (Ky. 2003); *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998). Since St. Clair's defense was precisely that her daughters had testified to what they knew were fabricated allegations, we cannot say that her being asked to state that defense in bald terms amounted to a fundamental unfairness or that it was at all likely to have affected the outcome of the trial. Once St. Clair volunteered her opinion that the girls had lied, moreover, it was not improper for the prosecutor to ask her for the basis of that opinion. The trial court did not err, therefore, by permitting the prosecutor to elicit St. Clair's testimony that the grandparents had instigated the allegations against her. St. Clair's objection to the prosecutor's final question—"Tell me why these children would tell these lies?"—arguably should have been sustained either on the basis of *Moss* or on the ground that the question had been asked and answered, but even if the trial court erred, at that point the error was clearly harmless.

CONCLUSION

In sum, although we reiterate that it is generally improper for one witness to be asked to characterize or to comment upon the credibility of another's testimony, in this case any impropriety was allowed to pass without objection and was not such as to render the trial fundamentally unfair. Accordingly, we affirm the August 19, 2009 Judgment of the Greenup Circuit Court.

All sitting. All concur.

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