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RENDERED: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000410-MR

JAMES C. POTTER, II — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 08-CR-00386

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

James C. Potter, II appeals as a matter of right, Ky. Const. § 110, from a judgment of the McCracken Circuit Court convicting him of multiple sexual offenses against the victim, J.A. As a result of these convictions, he was sentenced to a total punishment of life imprisonment.

Potter now raises the following claims of error for our review: (1) that the trial court erred by permitting the Commonwealth to amend the indictment following the completion of the Commonwealth's evidence; (2) that the jury instructions for first-degree sexual abuse found in Instruction Nos. 5 and 8 resulted in a double jeopardy violation, and that the jury instructions for second-degree sexual abuse found in Instruction Nos. 16 and 19 resulted in a double jeopardy violation; (3) that the trial court erred when it denied his

request for a "taint hearing" to determine whether the victim's version of the facts had been manipulated; (4) that the trial court erred by allowing the Commonwealth to ask leading questions to the child witness; (5) that the trial court erred by allowing the Commonwealth to display "sex toys" that had not been used on the victim; and (6) that the trial court violated Kentucky law when it imposed misdemeanor fines upon him even though he is an indigent defendant.

Because the instructions for two of the first-degree sexual abuse convictions and two of the second-degree sexual abuse convictions resulted in double jeopardy violations under *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009), we reverse one of each of these two sets of convictions. Additionally, because the imposition of a $500.00 fine against Potter for each of his misdemeanor convictions of two counts of second-degree sexual abuse and one count of attempted second-degree sodomy violates KRS 534.040(4), we further reverse the imposition of these misdemeanor fines. We affirm upon all other issues.

I. FACTUAL AND PROCEDURAL BACKGROUND

The victim, J.A., was born in December 1994. Potter was a friend of J.A.'s mother and frequently babysat J.A. and her younger sister while their mother worked. Potter began abusing J.A. in July 2002.

In July 2008 J.A. disclosed that over an approximately six-year period, beginning when she was seven-years-old, Potter had engaged in multiple

instances of sexual contact with her. After a police investigation Potter was indicted for six counts of first-degree sexual abuse; four counts of first-degree sodomy; six counts of second-degree rape; and three counts of second-degree sexual abuse. The indictment alleged that Potter had committed the offenses from approximately July 8, 2002, through May 2008.

At trial J.A. described numerous sexual offenses committed against her by Potter.[1] Potter's defense was denial that he had committed any of the alleged crimes. At the conclusion of its case-in-chief the Commonwealth moved to amend the indictment to correspond with the evidence presented through J.A.'s trial testimony. The effect was to merge the three counts of first-degree rape into a single count; merge the four counts of first-degree sodomy into a single count; and merge three of the first-degree sexual abuse counts into a single count.

At the conclusion of the evidence the jury returned a verdict convicting Potter of three counts of first-degree sexual abuse; one count of first-degree rape; one count of first-degree sodomy; two counts of second-degree sexual abuse; one count of second-degree sodomy; two counts of second-degree rape; and one count of attempted second-degree sodomy. Pursuant to the jury's recommendation, Potter was sentenced to a total punishment of life imprisonment.

This appeal followed.

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[1] Based upon the arguments raised by Potter, a detailed discussion of the various crimes is unnecessary.

II. THE INDICTMENT WAS PROPERLY AMENDED

At the conclusion of its case-in-chief the Commonwealth moved to amend the indictment to conform to the evidence presented through J.A.'s trial testimony. Potter contends that the trial court erred by granting the Commonwealth's motion to amend.

More specifically, the Commonwealth sought the following amendments:

> 1. Count 5 of the indictment for first-degree rape (Instruction 6) was amended to reflect a change in the time period for commission of the crime from "in the three month period after December 16, 2003" to in the period of "July 8, 2002 through June of 2005." Because the time-frame for Count 5 as amended overlapped with the first-degree rape charges contained in Counts 9 and 12, and the charges were otherwise indistinguishable, those counts were dismissed.
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> 2. Count 8 of the indictment for first-degree sodomy (Instruction 7) was amended to reflect a change in the time period from "in the fall of 2004" to the period of "July 8, 2002 through June of 2005." Because the new time fame overlapped with the time periods in the first-degree sodomy charges contained in Counts 3, 6, and 13, and the charges were otherwise indistinguishable, these charges were dismissed.
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> 3. Count 4 of the indictment for first-degree sexual abuse (Instruction 5) was amended to change the time frame from "the three month period after December 16, 2003" to "the approximate period after July 8, 2002 through June of 2005." Because Counts 1, 2, 7, and 10 encompassed this same time period, and the charges were otherwise indistinguishable, those charges were likewise dismissed.

The trial court granted the Commonwealth's motion to amend over Potter's objection. Defense counsel argued that the amendment should not be granted because this made it "impossible" for her to do anything in Potter's

defense because her trial preparations were based upon the original dates as alleged in the indictment. She further argued that because the Commonwealth had failed to meet its burden in proving the charges as originally stated in the indictment, the proper remedy was dismissal of the charges rather than amendment of the indictment. Potter reiterates these arguments upon appeal.

RCr 6.16 states:

> The court may permit an indictment, information, complaint, or citation to be amended at any time before the verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

The amendment of the indictment satisfies RCr 6.16 because it was made before the verdict and did not charge Potter with a new or different offense. *Owens v. Commonwealth*, 329 S.W.3d 307, 315 (Ky. 2011); *Hawkins v. Commonwealth*, 481 S.W.2d 259, 260-261 (Ky. 1972) (An indictment may be amended at the close of all of the proof).

Potter had ample notice of the nature of the charges against him to prepare and present an effective defense, and he has failed to explain with specificity how he was prejudiced by the amendments. Potter's defense was that he was not involved with the criminal acts charged, regardless of the time period, and he does not suggest that the amendments undermined any particular alibi or any other particular aspect of his defense. Further, the amendments were compatible with the well established rule that young child victims are not required, or expected, to identify with specificity the date a

particular instance of abuse occurred. *Applegate v. Commonwealth*, 299 S.W.3d 266, 270 (Ky. 2009). Moreover, it is permissible to merge multiple occasions of sexual crimes into a single charge. *Id.* In addition, as noted by the Commonwealth, the amendments were arguably to Potter's benefit in the sense that two of the first-degree rape charges, three of the first-degree sodomy charges, and three of the first-degree sexual abuse charges were dismissed as a result of the amendments. As such, Potter has failed to show that his substantial rights were prejudiced as a result of the amendments.

In any event, rather than dismissal of the indictment, the appropriate relief under RCr 6.16 when "justice requires" it, is a continuance, which Potter did not request. Nor does Potter now suggest how he could have benefitted from a continuance. Because justice did not require a continuance under the circumstances of this case, the trial court did not abuse its discretion by granting the Commonwealth's motion to amend the indictment. *Wolbrecht v. Commonwealth*, 955 S.W.2d 533, 537 (Ky. 1997) ("Our case law provides that an indictment may be amended at any time to conform to the proof providing the substantial rights of the defendant are not prejudiced and no additional evidence is required to amend the offense.")

III. JURY INSTRUCTIONS 5 AND 8 AND 16 AND 19 RESULTED IN DOUBLE JEOPARDY VIOLATIONS

Potter next contends that double jeopardy violations occurred as a result of his two first-degree sexual abuse convictions under Instructions 5 and 8, and for his two second-degree sexual abuse convictions under Instructions 16

and 19. Potter concedes that the issue is not preserved but requests palpable error review.

"[I]t is now settled that a trial court errs in a case involving multiple charges if its instructions to the jury fail to factually differentiate between the separate offenses according to the evidence." *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009). If the jury instructions do not include factual differentiation between the charges, it is reversible error, even if the error is unpreserved. *Banks v. Commonwealth*, 313 S.W.3d 567, 571-572 (Ky. 2010).

> An examination of *Miller*, discloses that its principal purpose is to ensure that the instructions for each count are distinguishable enough to permit the jury to relate each verdict to a specific crime shown by the evidence. Clearly, simply varying the words of the instruction for each count, without any substantive difference in meaning, does not satisfy *Miller*. However, the test is not simply one of mutual exclusivity. So long as the instruction for each count enables the jury to identify the instruction with a specific crime established by the evidence and avoids the likelihood of confusion with other offenses presented against defendant in the same trial, then the instructions are adequately differentiated.

Id. at 573. Here, as argued by Potter and conceded by the Commonwealth, this standard was not met under Instruction Nos. 5 and 8 and Instruction Nos. 16 and 19.

1. Instruction Nos. 5 and 8

Instruction No. 5 stated as follows:

> You will find the defendant, James C. Potter II, guilty of First Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
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> A. That in this county in the approximate period *after July 8, 2002 through June of 2005*, and before the finding of the Indictment

herein, he subjected [J.A.] to sexual contact at the defendant's home by touching her vagina with his hands;

AND

B. That at the time of such contact, [J.A.] was less than 12 years of age. (Emphasis added).

Instruction No. 8 provided as follows:

You will find the defendant, James C. Potter II, guilty of First Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county *in the winter of 2004*, and before the finding of the Indictment herein, he subjected [J.A.] to sexual contact at the defendant's home by touching her vagina with his hand while watching a movie.

AND

B. That at the time of such contact, [J.A.] was less than 12 years of age. (Emphasis added).

In comparing the instructions, clearly the "winter of 2004" is included within "the approximate period between July 8, 2002 through June of 2005." Similarly, the criminal conduct described in each instruction is the touching of J.A.'s vagina by Potter with his hands. While the instructions are seemingly differentiated in that Instruction 5 required that the touching have occurred at "at the defendant's home" whereas Instruction 8 required the touching to have occurred while they were "watching a movie," and while this may in other circumstances be sufficient differentiation, nevertheless, here, J.A. testified that Potter touched her vagina while they were watching a movie at his residence, thereby negating the differentiation. Because it is possible that the

jury could have returned a guilty verdict on each of the instructions based upon a single instance when Potter touched J.A.'s vagina while they were watching a movie at Potter's residence, the instructions resulted in a double jeopardy violation, requiring that one of the first-degree sexual abuse convictions be reversed.

2. Instruction Nos. 16 and 19

Instruction No. 16 stated as follows:

> You will find the defendant, James C. Potter II, guilty of Second Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
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> A. That in this county *in the spring of 2008*, and before the finding of the Indictment herein, he subjected [J.A.] to sexual contact by touching her vagina with his hands;
>
> AND
>
> B. That at the time of such contact, [J.A.] was less than 14 years of age. (Emphasis added).

Instruction No. 19 stated as follows:

> You will find the defendant, James C. Potter II, guilty of Second Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county *in May of 2008*, and before the finding of the Indictment herein, he subjected [J.A.] to sexual contact by touching her vagina with his hands;
>
> AND
>
> B. That at the time of such contact, [J.A.] was less than 14 years of age. (Emphasis added).

For reasons similar to those stated above, a double jeopardy violation occurred as a result of the similar wording between Instruction No. 16 and Instruction No. 19. The criminal conduct described in the two instructions is the same, and the only differentiation is that the timing of the conduct is described in Instruction No. 16 as being "in the spring of 2008" whereas in Instruction No. 19 it is described as being "in May of 2008." Obviously May 2008 was in the spring of 2008, and, it follows, there was insufficient differentiation between the two charges. Because the jury believed that Potter touched J.A.'s vagina in May of 2008, it necessarily also believed that he touched her in the spring of 2008. Because this resulted in a double jeopardy violation, one of the two second-degree sexual abuse convictions must be reversed.

3. Conclusion

For the reasons stated, the convictions associated with Instruction 8 and Instruction 19 are reversed.

IV. THE TRIAL COURT PROPERLY DENIED POTTER'S MOTION FOR A "TAINT HEARING"

Potter next contends that the trial court erred by denying his request for a "taint hearing" to determine whether J.A.'s recollection of events was unduly influenced by her family, by her questioning by police and social workers, or by other persons involved with the investigation of the charges. He argues that a hearing was necessary to determine whether the events surrounding the allegation and investigation may have resulted in manipulation of the victim's

memory.

In *Pendleton v. Commonwealth*, 83 S.W.3d 522 (Ky. 2002), defense counsel moved to disqualify the child victim's testimony on the grounds that it was the product of interview techniques employed by the social worker that were "leading, suggestive, cajoling, and coercive." In discussing the issue in *Pendleton*, we cited with approval the trial court's view that "Kentucky does not follow the holding in *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (N.J. 1994), which upheld a taint hearing to determine whether interviewing techniques were so flawed as to distort a child witness's recollection of events and thereby undermine the reliability of the testimony," and determined that no error occurred as a result of the trial court's rejection of a "taint" analysis in assessing the child victim's competency to testify.

More recently, in *Jenkins v. Commonwealth*, 308 S.W.3d 704 (Ky. 2010), we considered the issue of alleged suggestive interviewing procedures of an alleged sexual abuse victim in the context of whether a defendant should be allowed to call a highly qualified forensic psychologist to provide expert testimony on the scientific principle that improper interviewing practices can result in unreliable allegations. We concluded that such expert testimony is scientifically reliable, otherwise admissible for the same reasons as any other qualified expert testimony would be, and that the trial court erred by excluding the testimony. Accordingly, the holding in *Pendleton* is now subject to the important caveat established in *Jenkins*.

Here, Potter did not proffer expert testimony in support of his theory, and so this case is more akin to *Pendleton* than *Jenkins*. Nevertheless, we believe that neither *Pendleton* nor *Jenkins* is applicable in this case. We reach this conclusion based upon the age of the victim and Potter's conflicting theories about why the victim implicated him in the crimes.

In *Jenkins*, we recognized that suggestibility (taint) relates to the reliability of evidence, not to competency or credibility. 308 S.W.3d at 711. Suggestibility, however, is primarily of concern with children of tender years,[2] and, further, does not appear to be implicated under the facts of this case. The alleged victim was fifteen years old at the time of trial. Further, Potter appears to argue that the victim *consciously made up* her story to diffuse the situation with her father, which implicates a situation far removed from the concept of taint, whereby the concern is that the victim *believes* the suggested story.

J.A. was otherwise found competent to testify, and Potter makes no opposing claim. Further, Potter was otherwise availed the opportunity to cross-examine the victim and her interviewers concerning any efforts to influence her testimony. We see no error.

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[2] *See* Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 Ariz.L.Rev. 927, 933 (1993) (maintaining that "[s]ocial science evidence of children's suggestibility indicates that persistent pretrial interrogation of child witnesses can impair the search for truth in litigation," and that "*preschool* children can be manipulated by interviewers to level false accusations") (emphasis added); *State v. Carrizales*, 528 N.W.2d 29, 36 fn 3 (Wis.App. 1995).

V. THE LEADING QUESTIONS TO J.A. WERE PROPER

Potter next contends that reversible error occurred when, on two occasions, the Commonwealth suggested the answer to the question it was asking J.A.

In the first instance the Commonwealth was asking where Potter had placed plastic rings in her vaginal area. As J.A. struggled to describe and explain exactly where Potter had placed the rings, the Commonwealth asked if J.A. knew what the word "clitoris" meant and J.A. responded that she did. The Commonwealth then asked her if that was where Potter placed the rings, and J.A. responded that it was. Potter objected to this as leading the witness, and the trial court overruled the objection, explaining "I think everybody else understood what she was saying, I think she maybe couldn't remember the word."

In the second instance, the Commonwealth was questioning J.A. about one of the occurrences and, while doing so, used the transcript of an interview J.A. had with Lori Brown of the Purchase Area Sexual Assault Center to refresh her memory. As the prosecutor did this, he referred to the time frame of "the winter of 2004" as when a particular touching occurred. In objecting to this interjection as leading, trial counsel acknowledged that the use of interview references was to refresh J.A.'s memory, and the trial court stated that it did not hear the prosecutor leading the witness.

KRE 611(c) provides that "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." Nevertheless, violations of this rule are subjected to a high standard before reversal will be imposed. As we stated in *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998), "[w]hile the use of leading questions on direct examination is generally unacceptable . . . judgments will not be reversed because of leading questions unless the trial judge abused his discretion and a shocking miscarriage of justice resulted." *Id.* at 27.

Here, we have significant doubts that the trial court abused its discretion in either of the instances cited; however, we need not examine that issue in detail because, in any event, we can say with certainty that a "shocking miscarriage of justice" did not result as a consequence of the two episodes. Potter is not entitled to relief under this argument.

VI. THE COMMONWEALTH'S INTRODUCTION OF POTTER'S "SEX TOYS" WAS PROPER

Potter next contends that error occurred as a result of the Commonwealth's displaying of a bag of "sex toys" retrieved from Potter's residence during its examination of J.A. Potter concedes that the alleged error is not preserved, but requests palpable error review under RCr 10.26.

During its direct examination of J.A. the Commonwealth showed J.A. a bag seized from Potter's residence which contained thirteen separate items. All of the items were sexual in nature and included vibrators, lotion, and condoms. J.A. testified that she had seen the bag in Potter's residence and stated that the

bag had "sex toys" in it. The Commonwealth went through the thirteen items found in the bag and asked J.A. if she had ever seen the items before and if Potter had used them on her. J.A. identified eight of the items as being ones that she had seen before and that Potter had used on her. J.A. testified that she had not seen the other five items.

Potter contends that the Commonwealth's displaying of the five items J.A. had not seen was error because the items were irrelevant and/or were inadmissible under the KRE 403 balancing test.

"A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief." *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996) *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008).

Most of the items in the bag had been used on J.A., and the items were therefore relevant to establishing the various sexual offenses committed against J.A. KRE 401. Even assuming, however, that the five items she had never seen should not have been interjected into the trial, considering the prejudicial effect of the eight items that were properly admitted, the marginal, additional prejudice associated with the displaying of the other five items did not result in a manifest injustice. From our review of the evidence, we cannot say that a

substantial possibility exists that the result of the trial would have been different had the Commonwealth not displayed the five additional items to the jury.

VII. BECAUSE POTTER IS AN INDIGENT THE IMPOSITION OF FINES WAS IMPROPER

Finally, Potter contends that the trial court erred by imposing a $500.00 fine for each of his misdemeanor convictions of two counts of second-degree sexual abuse and one count of attempted second-degree sodomy because he had previously been adjudicated as indigent.

KRS 534.040 generally permits fines to be imposed for misdemeanors at the discretion of the trial court or jury as the case may be. However, KRS 534.040(4) provides that "[f]ines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." Nor may court costs be levied upon defendants found to be indigent. KRS 23A.205(2). At the time of trial, Potter was receiving the services of a public defender, and, following his conviction, was granted the right to appeal in forma pauperis. Potter was clearly indigent. Thus, the trial court clearly erred in imposing a fine and court costs upon him. *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994); *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010).

Potter concedes that this error is not preserved for appellate review. "Nonetheless, since sentencing is jurisdictional it cannot be waived by failure to object." *Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985). "Thus,

sentencing issues may be raised for the first time on appeal and Appellant is proceeding properly before this Court." *Cummings v. Commonwealth*, 226 S.W.3d 62, 66 (Ky. 2007). Fines and costs, being part of the punishment imposed by the court, are part of the sentence imposed in a criminal case. Having the inherent jurisdiction to cure such sentencing errors, this Court vacates the fines imposed for the two counts of second-degree sexual abuse and one count of attempted second-degree sodomy. *Travis*, 327 S.W.3d at 459.

VIII. CONCLUSION

For the foregoing reasons the Judgment of the McCracken Circuit Court is affirmed in part, reversed in part, and the cause is remanded to the trial court for entry of a new judgment consistent with this opinion.

Minton, C.J., Abramson, Noble, Schroder, and Venters, JJ., concur. Cunningham, J. concurs in part and dissents in part with the majority in which Scott, J., joins, in all but the issue of the jury instructions and dissents as to that issue. He does not agree that the instructions were error, consistent with his dissent in *Banks v. Commonwealth*, 313 S.W.3d 567, 576 (Ky. 2010).

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