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RENDERED: FEBRUARY 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000793-MR

GARY CLACK — APPELLANT

V.

ON APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
NO. 10-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

Appellant, Gary Clack, appeals as a matter of right, Ky. Const. § 110, from a judgment of the Todd Circuit Court convicting him of four counts of first-degree rape, four counts of first-degree sodomy, and four counts of first-degree sexual abuse. The trial court imposed a twenty-year sentence for each of the rape and sodomy convictions, and a five-year sentence for each of the sexual abuse convictions, with all of the sentences to run concurrently with one another.

Clack raises the following claims of error: (1) that he was denied due process of law by the admission of irrelevant evidence in the form of the inconclusive opinion of Commonwealth's forensic sexual abuse expert on whether the physical aberrations he observed in connection with his

examination were the result of sexual abuse or another cause; and (2) that a double jeopardy violation occurred because the instructions on the four sexual abuse charges were insufficiently distinguished from the instructions on the four rape charges.

While we hold that the forensic evidence was relevant, and was properly admitted, Appellant is correct that a double jeopardy violation occurred as a result of an inadvertent overlap by each of the first-degree sexual abuse instructions with a corresponding first-degree rape instruction, thereby permitting a conviction for both rape and sexual abuse based on a single act of rape. We therefore reverse the four convictions for first-degree sexual abuse, but affirm Appellant's remaining convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence presented at trial indicates that the victim, A.W., is the daughter of a friend of Appellant's wife. In late 2009, A.W. disclosed that between August 30, 2007, and November 23, 2008, on four different occasions Appellant had engaged in sexual contact with her. Two of the occasions occurred at A.W.'s residence, and two of the occasions occurred at Appellant's residence. On each of the four occasions Appellant sexually touched her, had sexual intercourse with her, and had deviate sexual intercourse with her. A.W. was under the age of twelve at all relevant times.

As a result of A.W.'s disclosures, Appellant was indicted on four counts of first-degree rape, four counts of first-degree sodomy, and four counts of first-

degree sexual abuse. A trial on the charges was held in August 2010, resulting in guilty verdicts on all twelve counts. Pursuant to the jury's recommendation, the trial court fixed sentence at twenty years for each of the rape and sodomy convictions, and at five years for each of the sexual abuse convictions, with all of the sentences to run concurrently with one another. This appeal followed.

II. RELEVANCY OF SEXUAL ABUSE FORENSIC EVIDENCE

Appellant first contends that error occurred as a result of the admission of the testimony of Dr. Travis Calhoun, a forensic examiner for the Pennyrile Children's Advocacy Center, who examined A.W. for evidence of sexual abuse. Appellant alleges that this evidence was irrelevant, and thus inadmissible, because the examination was inconclusive concerning whether A.W. had been sexually abused. Appellant concedes that this argument is unpreserved, but requests palpable error review pursuant to RCr 10.26.

After A.W. made her allegations against Appellant, Dr. Calhoun examined her for evidence of sexual abuse. At trial, Dr. Calhoun testified that his examination revealed a "somewhat large caliber opening for a child of [A.W.'s] age," and that he believed the opening to be large and dilated for an eleven year-old child. He also testified that A.W. had "a small irregularity at the seven o'clock position, although not a complete tear of the hymen." He testified that irregularities discovered between the three and nine o'clock positions (such as here) are the most significant in abuse cases, but further noted that the

irregularity could be a normal variation unrelated to sexual abuse or rape.[1] He further observed that in one-third of the cases of intercourse resulting in pregnancy, there are normal findings of the hymen. He also stated that being raped or abused does not necessarily cause damage because vaginal tissue heals readily, and so even if there is no damage to the hymen, that would not exclude sexual abuse or rape. He additionally indicated that his observations did not refute what A.W. had told him, but that the irregularities he observed may have been a result of natural variations.

Appellant summarizes his argument that Dr Calhoun's testimony was irrelevant in his opening brief as follows:

> Calhoun's testimony was wholly irrelevant. He essentially informed the jury that A.W. may or may not have been sexually abused. The only reason he believed that abuse may have occurred was that A.W. told him that she had been fondled and penetrated in the vaginal area. The jury heard A.W.'s allegations against Gary Clack when she testified herself, so the additional references to her forensic interview were meaningless.
>
> The doctor presented the jury with no useful conclusions, and he hedged each of his findings. Again, Calhoun said his findings could be normal variations. He said that the variation in A.W.'s vaginal opening could be natural or significant. He opined that the tear could be the result of possible sexual assault trauma or occur naturally. He also said that nothing he saw refuted what A.W. told him, a far cry from saying that he did see something that supported what A.W. told him. These are not useful medical statements. A forensic examiner could make the same non-conclusions about a patient who claimed she was not sexually abused. The testimony was irrelevant and should not have been admitted.

In order to be admitted at trial, evidence must be relevant. KRE 402. Relevant evidence is "evidence having any tendency to make the existence of

[1] The references to the clock positions are from Dr. Calhoun's testimony and indicate the location of the injuries on the hymen.

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. *Moorman v. Commonwealth*, 325 S.W.3d 325, 332-333 (Ky. 2010). Relevancy is established by any showing of probativeness, however slight. *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999). "An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not . . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable." *Turner v. Commonwealth*, 914 S.W.2d 343, 346 (Ky. 1996), quoting R. Lawson, *The Kentucky Evidence Law Handbook* § 2.05 (3d ed. 1993); Cleary, *McCormick on Evidence* 542–43 (3d ed. 1984).

It is clear that Dr. Calhoun's forensic examination of A.W. and his conclusions and findings were relevant. He conducted the examination following A.W.'s disclosures of sexual abuse to determine if there was any physical evidence supporting the allegations. His opinion concerned a subject peculiarly within the knowledge of a trained physician and was likely to assist the jury in determining whether A.W. had been sexually assaulted by

Appellant.[2] *See* KRE 701; *Stringer v. Commonwealth*, 956 S.W.2d 883, 892 (Ky. 1997) (holding that medical examiner's findings of hypertrophy and tearing in the vaginal area and stretching and partial destruction of the hymen were 'compatible with [the victim's] history that she had given me' and with 'something being inserted in there, and, trying to stretch it' was properly admitted). If for no other reason, the evidence was relevant because the observations testified to by Dr. Calhoun, that is, the physical irregularities for an eleven year-old child, made it slightly more probable that the allegations were true. That is enough to establish relevancy.

Appellant's counsel ably cross-examined Dr. Calhoun as to the ambiguities and, moreover, emphasized the point to Clack's advantage in both his opening and closing arguments that Calhoun's findings were also consistent with no sexual abuse having taken place. Thus the evidence, because it was inconclusive as to *what* caused the irregularities, was also relevant to Appellant's position that no crimes were committed. It is often the case that relevant evidence will be ambiguous with the parties arguing in favor of conflicting interpretations. In such cases the proper procedure is to allow admission of the evidence and permit the jury to decide which interpretation of

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[2] It is worth noting that as a general matter a jury in a case like this would be *expecting* to hear testimony concerning physical evidence relating to the charges, and thus exclusion of the evidence may have tended to operate to the Commonwealth's disadvantage. Moreover, a core principle of our judicial system is that a trial is intended to be "a search for truth." *Brown v. Commonwealth*, 226 S.W.3d 74, 83 (Ky. 2007). That principle obviously is not served if evidence is excluded merely on the basis that it is ambiguous or inconclusive. Because it is so manifestly self-evident that a forensic sexual abuse medical examination in a sexual abuse case is relevant, this argument may fairly be regarded as frivolous.

the evidence is the most persuasive. As such, there was no error in the admission of this testimony. *Stringer*, 956 S.W.2d at 889 ("A sufficiently qualified witness may testify as to whether certain detailed occurrences would be a natural, sufficient, probable, or possible cause of a certain physical result[.]").

Because the forensic medical evidence was properly admitted, there was no error and, it follows, no manifest injustice occurred so as to entitle Appellant to relief under RCr 10.26.

III. DOUBLE JEOPARDY VIOLATION

Appellant additionally contends that a double jeopardy violation occurred because the instructions on the four sexual abuse charges were insufficiently distinguished from the instructions on the four rape charges. We agree that a double jeopardy violation occurred as a result of an inadvertent overlap by each of the first-degree sexual abuse instructions with a corresponding first-degree rape instruction, thereby permitting a conviction for both rape and sexual abuse for a single act of rape in each situation.

KRS 510.040 provides in relevant part as follows:

> (1) A person is guilty of rape in the first degree when:
> . . . .
>
> (b) He engages in sexual intercourse with another person who is incapable of consent because he:
>
> . . . .
>
> 2. Is less than twelve (12) years old.

KRS 510.110 provides, in relevant part, as follows:

> (1) A person is guilty of sexual abuse in the first degree when:
>
> . . . .
>
> (b) He subjects another person to sexual contact who is incapable of consent because he:
>
> . . . .
>
> 2. Is less than twelve (12) years old.

As can be seen, as relevant here, the only difference between first-degree rape and first-degree sexual abuse is that rape requires "sexual intercourse" whereas sexual abuse requires "sexual contact." The four first-degree rape instructions and the four first-degree sexual abuse instructions properly reflected the elements of the respective crimes pursuant to the above statutes. KRS 510.010, provides in relevant part, as follows:

> . . .
>
> (7) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party;
>
> (8) "Sexual intercourse" means sexual intercourse in its ordinary sense and includes penetration of the sex organs of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight; emission is not required . . . .

An examination of the definitions for sexual contact and sexual intercourse readily discloses that sexual intercourse is a type of sexual contact, and, therefore, if a defendant has sexual intercourse with a victim he necessarily has sexual contact with her.

With the above principles in mind, the double jeopardy problem which occurred in this case is well illustrated by Instruction Nos. 3 and 11. Instruction No. 3 stated as follows:

> You will find the Defendant guilty of First-Degree Rape under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Gary Clack's bedroom at a home on Cherry Street in Guthrie, Kentucky located in Todd County, while watching the movie "Saw," Gary Clack engaged in sexual intercourse with [A.W.];
>
> AND
>
> B. That at the time of such intercourse [A.W.] was less than 12 years of age.

Instruction No. 11 provided as follows:

> You will find the Defendant guilty of First-Degree Sex Abuse under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Gary Clack's bedroom at a home on Cherry Street in Guthrie, Kentucky located in Todd County, while watching the movie "Saw," Gary Clack subjected [A.W.] to sexual contact.
>
> AND
>
> B. That at the time of such intercourse [A.W.] was less than 12 years of age.

A review of these instructions reveals that the jury, by finding the Appellant guilty of rape under Instruction 3, per force likewise adjudged him guilty under Instruction 11, because by having sexual intercourse with the victim under Instruction 3, he necessarily had sexual contact with her under Instruction 11. Because there was otherwise no further differentiation to guide the jury, this is a double jeopardy violation. *Johnson v. Commonwealth,* 864

S.W.2d 266 (Ky. 1993). In addressing a similar situation in the *Johnson* case, we stated as follows:

> In view of all the evidence, and considering the complexity of this case, we believe that these instructions were inadequate to inform the jury of the entire applicable law. We first observe (although the issue was not raised) that sexual abuse in the first degree is a lesser-included offense of both rape in the first degree and sodomy in the first degree, while at the same time it was in this case a primary charge of the indictment, relating to a separate instance of sexual contact (the insertion of the foreign objects and the touching of the breasts). The instruction, couched in general terms of "sexual contact" without differentiating the act from those acts constituting rape and sodomy, permitted the jury to find Johnson guilty twice for the same act, e.g., intercourse constituting rape and intercourse constituting sexual contact and, therefore, sexual abuse.

Id. at 277; *see also Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009) (trial court erred in using identical jury instructions on multiple counts of third-degree rape and sodomy, none of which could be distinguished from the others as to what factually distinct crime each applied to).

Based upon our holdings in *Johnson* and *Miller*, the Commonwealth concedes the double jeopardy violation. Similar violations occurred with respect to related Instructions Nos. 4 and 12; 5 and 13; and 6 and 14.

We have held that double jeopardy violations of this type qualify as palpable error under RCr 10.26. *Banks v. Commonwealth*, 313 S.W.3d 567, 571-572 (Ky. 2010) (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; if the jury instructions do not include factual differentiation between the charges, it is reversible error, even if the error is unpreserved). As such we reverse each of the four convictions for first-degree sexual abuse.

As clarification, of course there may be a conviction for both rape and sexual abuse as a result of the same general episode if there are two independent acts of criminal conduct and the instructions sufficiently differentiate between the two criminal acts. Here, while there may well have been separate acts, one qualifying as rape (intercourse) and the other qualifying as sexual abuse (e.g., fondling), the instructions failed to adequately differentiate between the two criminal acts.

IV. CONCLUSION

For the foregoing reasons the rape and sodomy convictions and sentences are affirmed, the four first-degree sexual abuse convictions are reversed, and the cause is remanded to the Todd Circuit Court for additional proceedings consistent with this decision.

All sitting. All concur.

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