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RENDERED: JUNE 16, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000393-MR

WILLIAM BRADLEY STIGALL — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
NO. 07-CR-00176

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING AND VACATING IN PART

Appellant, William Bradley Stigall, was convicted by a Laurel Circuit Court jury of first-degree rape and sentenced to twenty-eight years' imprisonment. He now appeals as a matter of right. Ky. Const. § 110(2)(b).

I. Background

On April 4, 2007, Contessa Ellington, her five children, and husband went to visit her mother, Darlene Stigall. Contessa's sixteen-year-old brother, Appellant, was "hanging out" at his mother's house that day. He and Contessa's three sons remained at the house while some of the family, including Contessa and her daughters, left to look at trailers. Upon returning to the house, L.E., Contessa's five-year-old daughter, went inside to use the bathroom. L.E. would later report to police that she opened the door to find Appellant already in the bathroom. She further claimed that when she

attempted to leave the bathroom, Appellant grabbed her, put his hand over her mouth, fondled, and raped her. L.E. also testified that Appellant warned her not to tell anyone or he would kill her mother. The rape ended abruptly when L.E.'s brother knocked on the door.

L.E. stayed with Contessa's sister-in-law, Margo Byrd, that evening and eventually broke down crying and relayed the details of the rape. Byrd, a pediatric nurse, examined L.E. and noticed redness in her vaginal area. L.E. was taken to the emergency room and examined by the SANE nurse, who noted redness or first stage bruising in L.E.'s right labia. The nurse advised L.E.'s parents to take her to the Cumberland Valley Children's Advocacy Center (TLC House), because the emergency room did not have proper equipment to examine victims less than thirteen years of age.

Two days after the incident, Detective Stacey Anderkin, a Kentucky State Police Detective specializing in child sex abuse cases, interviewed L.E. at the TLC house. Several days later, Dr. Jackie Crawford, a TLC House physician, examined L.E. and again noted bruising and swelling to L.E.'s labia minora, as well as scarring and tearing of L.E.'s hymen. Dr. Crawford would later testify that her findings were consistent with a sexual assault.

Appellant was eventually indicted and tried on one count of First-Degree Rape and one count of First-Degree Sexual Abuse.[1] The first jury was unable to reach a verdict, forcing the court to declare a mistrial. Appellant was retried

[1] The district court granted the Commonwealth's motion to certify Appellant as a Youthful Offender and transfer the case to circuit court. Appellant raises no issues related to this transfer.

approximately six months later, convicted, and sentenced to twenty-eight years' imprisonment.

On appeal, Appellant raises four issues for our review. He contends that the trial court erred when it failed to direct a verdict of acquittal for the offense of first-degree rape; that he was denied due process of law by impermissible bolstering of L.E.'s testimony; that he was substantially prejudiced and denied due process of law by the trial court's failure to order a competency hearing; and that the trial court erred by assessing costs on an indigent defendant.

For reasons that follow, we affirm Appellant's convictions and sentence, but vacate the portion of the sentence imposing court costs.

II. Analysis

A. Directed Verdict

Appellant first argues that the trial court deprived him of due process of law when it failed to direct a verdict of acquittal for the offense of first-degree rape. He claims that there was insufficient evidence demonstrating an opportunity to commit the rape, as well as insufficient physical evidence—no hair, blood, or semen—linking him to the rape. Specifically, he points out five witnesses—himself, his father, mother, aunt, and a neighbor—that testified he was outside during the timeframe the rape allegedly occurred.

The Commonwealth responds by arguing that matters of credibility and weight given to testimony are reserved for the jury, not the trial court considering the motion. The Commonwealth contends that it introduced the

victim's testimony that Appellant raped her and medical testimony that L.E.'s injuries were consistent with sexual assault. Therefore, the Commonwealth argues, based on the ample evidence, it was not clearly unreasonable for the jury to find Appellant guilty of first-degree rape. We agree.

When considering a motion for directed verdict:

> [T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). On appellate review, we affirm the trial court's denial of a directed verdict "[i]f under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty . . . ." *Commonwealth v. Sawhill,* 660 S.W.2d 3, 5 (Ky. 1983) (internal citation and quotations omitted). We went on in *Benham* to further clarify the minimal burden to withstand a directed verdict motion, stating that "the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces *no more* than a mere scintilla of evidence." *Benham,* 816 S.W.2d at 187-88 (emphasis added).

In applying this standard to the present case, we conclude that the trial court did not err in denying Appellant's motion for directed verdict. As with most sex crimes, especially those involving minors, the only witnesses are the perpetrator and victim. Here, the jury heard the victim testify that Appellant

trapped her in the bathroom, covered her mouth, raped her, and threatened to kill her mother if she told anyone. Medical evidence corroborated L.E.'s accusation of forced vaginal intercourse, as Dr. Crawford testified that L.E's hymen was torn and that there was bruising and swelling on the right side of her labia minora.

Appellant's arguments—that he lacked the opportunity, there was minimal physical evidence, and he was accused as a cover-up—are also unpersuasive at this level. This is a matter-of-right appeal, not a retrial for this Court to reevaluate, based on a cold record, the victim's credibility. Notwithstanding Appellant's overstated characterization of the evidence, we limit our review to whether the Commonwealth produced more than a mere scintilla of evidence, leaving credibility and weight of evidence determinations for the jury. Here, victim testimony, corroborated by medical evidence, was substantially more than the "mere scintilla" necessary to withstand a motion for directed verdict. Therefore, we conclude that the trial court properly denied Appellant's motion for directed verdict.

B. Bolstering of L.E.'s Testimony

Appellant next contends that a portion of Detective Anderkin's testimony on recall improperly bolstered L.E.'s testimony and thus violated his due process rights. Specifically, Appellant takes issue with the testimony regarding L.E.'s purported escape from the bathroom.

Several days after the incident, L.E. reported to Anderkin that she escaped when one of her brothers knocked on the door. This description was consistent with her testimony at the second trial. However, at the first trial, L.E. testified that she was able to get out of the bathroom when Appellant slipped. Appellant sought to highlight this inconsistency at the second trial and asked L.E. whether she remembered being previously asked if anyone knocked on the bathroom during the incident. L.E. responded that she did not.

Subsequent to Appellant's cross-examination of L.E., Anderkin was recalled by the Commonwealth, and testified that L.E.'s testimony at trial regarding the knocking on the door was consistent with what L.E. initially reported to her. Appellant alleges Anderkin bolstered L.E.'s testimony through the following exchange:

> Commonwealth: You've heard [L.E.] testify, you've heard the rest of [L.E.'s] testimony today, have you not?
>
> Anderkin: Yes I have.
>
> Commonwealth: Were there any other inconsistencies in [L.E.'s] testimony that you found striking?
>
> Anderkin: No, Sir.

Then, when making its closing argument, the Commonwealth stated:

> I asked Detective Anderkin, 'the knocking on the door, did [L.E.] tell you that two days later, when you interviewed her?' 'Yes, she did.' 'Anything else different in her story.' 'No.' She's been pointing at him for three years now and a day. That's not changed.

Appellant contends that Anderkin, as a witness, cannot vouch for the

truthfulness of another witness. He further argues that Anderkin's testimony was not a prior consistent statement under KRE 801(a)(2), as he only challenged L.E.'s testimony regarding the escape, not the entirety of her testimony.[2] As such, Appellant claims that the "striking inconsistencies" question went well beyond rebutting an implied charge of fabrication under KRE 801(a)(2), and was pure bolstering. However, he concedes the issue is unpreserved. Therefore, our review is limited to determining whether any error was palpable, i.e., "so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006); RCr 10.26.

Although Appellant primarily focuses his argument on whether Anderkin's rebuttal testimony was a prior consistent statement under KRE 801A(a)(2), that framework is inapplicable. Notably, Anderkin did not repeat any of L.E.'s out-of-court *statements*; rather, she merely stated *her* opinion that there were no striking inconsistencies in L.E.'s initial statement and L.E.'s testimony at the (second) trial. Thus, the only cogent argument Appellant presents relates to the propriety of Anderkin's purported bolstering testimony.

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[2] Appellant briefly contends that Anderkin's claim that L.E. has been consistent "does not seem to be accurate" because "both the uniform citation and juvenile complaint filled out by Det. Anderkin in this case states that Mr. Stigall fondled L.E.'s breasts. That was not testified to at this trial or at [the first] trial." This non sequitur argument lacks legal citation, a request for relief, and is not properly briefed. CR 76.12 (4)(c)(v) mandates that a brief shall contain arguments with "*citations* of authority pertinent to each *issue of law* . . . ." (Emphasis added). We will not consider arguments that fail to conform with our rules.

"Generally, a witness may not vouch for the truthfulness of another witness." *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997). Recently, we were confronted with a similar unpreserved bolstering allegation, arising when a detective testified that various witnesses' testimony was consistent with his investigation. *Roach v. Commonwealth*, 313 S.W.3d 101 (2010). Although we reasoned that the detective's testimony "did not directly assert that the other witnesses were truthful," his assertion, regarding the consistency of the witnesses' testimony, suggested that he believed their accounts to be credible. *Id.* at 113. However, we found no palpable error since without the detective's testimony, the jury could have compared his investigation results with the other witnesses' testimony and observed no troubling inconsistencies.

Here, the contested portion of Anderkin's testimony—that L.E.'s testimony was not strikingly inconsistent with her initial confession—did not directly assert that L.E. was truthful, but did infer victim credibility. However, such testimony was, at best, indirect bolstering. Borrowing our reasoning from *Roach*, we likewise conclude that such bolstering was minimally impactful in light of the vast evidence of guilt, and, therefore, does not amount to palpable error.

Finally, the above reasoning is equally applicable to Appellant's assertion that he was further prejudiced by the Commonwealth's reference to Anderkin's statement during closing argument. Moreover, we note that counsel have great

leeway in their closing statements, because a closing argument "is just that—*an argument.*" *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987) (emphasis in original). Additionally, "[c]ounsel may draw reasonable inferences from the evidence and propound their explanations of the evidence and why the evidence supports their particular theory of the case." *Wheeler v. Commonwealth*, 121 S.W.3d 173, 180-181 (Ky. 2003). Consequently, we cannot say that with the wide leeway allotted to closing arguments, in addition to the other evidence of guilt, that the Commonwealth's reference to Anderkin's statement during closing was palpable error.

C. Potential Incompetency to Stand Trial.

Appellant next argues that he was substantially prejudiced and denied due process when the trial court failed to order a mental examination to determine his competency to stand trial. In support of this contention, Appellant points out that his first attorney filed a motion,[3] *prior to this first trial*, for a competency evaluation in connection with a motion to withdraw as counsel. That motion conclusively opined that: Appellant did not appreciate the gravity of the charges or the legal repercussions of a conviction, he did not participate or assist in his defense, could not understand what was or was not a proper defense, and rejected a plea offer without giving a reason.[4] Appellant also contends that his competency was called into question by the fact that he

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[3] The motion was filed on June 4, 2008. The first trial was held on October 5, 2009.

[4] Appellant's original trial counsel appears to have parroted the substance of the relevant rule for determining incompetency. *See* KRS 504.060(4) ("lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense.").

failed to retain another attorney for three months after his initial counsel withdrew.

Although his motion for a competency evaluation was filed almost two years prior to his second trial,[5] the trial court neither ruled on the motion, nor does it appear that subsequent defense counsel raised the issue.[6] Conveniently, Appellant seems to suggest that he was competent for the first trial—which ended with a hung jury—but after the second trial resulted in conviction, his competency was apparently implicated by events occurring *before* the first trial (the motion and failure to expediently secure replacement counsel). We find no merit in Appellant's argument.

Under Kentucky law, a defendant is incompetent when he lacks "capacity to appreciate the nature and consequences of the proceedings against [him] or to participate rationally in [his] own defense." KRS 504.060(4). However, "[c]ompetency to stand trial pertains to the defendant's mental state *at the time of trial* . . . ." *Bishop v. Caudill*, 118 S.W.3d 159, 162 (Ky. 2003) (emphasis added). "If upon arraignment, or during any stage of the proceedings, the court *has reasonable grounds* to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition." KRS 504.100(1) (emphasis added). "It is within the trial court's discretion to determine whether there are 'reasonable grounds' to believe a defendant may be incompetent to

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[5] His second trial commenced on April 5, 2010.

[6] His counsel did move for a criminal responsibility hearing, which was conducted July 31, 2009. Appellant was found to be criminally responsible.

stand trial." *Bishop*, 118 S.W.3d at 162. We therefore review the trial court's implicit finding that was no "reasonable grounds" to believe Appellant was incompetent for abuse of discretion.

Here, Appellant's entire argument is based on events that occurred *prior* to his *first* trial. This appeal, quite plainly, is the result of his conviction at the second jury trial. As emphasized above, a defendant's competency to stand trial is assessed "*at the time of trial.*" *Id.* Thus, apart from the dubious merits of Appellant's claim that his generic competency motion and failure to secure replacement counsel implicated his competency, we note that both events preceded his *first* trial, and are thus inapposite to the determination of his competency at his *second* trial. Consequently, Appellant fails to identify *any* evidence demonstrating "reasonable grounds" to doubt his competency to stand trial for the second time. Therefore, we conclude that the trial court did not abuse its discretion in not ordering an examination.

D. Assessment of Court Costs on an Indigent Defendant

Appellant finally contends that the trial court erred when it imposed court costs of $155.00, despite finding him indigent. He notes that his indigent status was further evinced by the fact that he received the services of a public defender at trial and was granted the right to appeal *in forma pauperis*. We agree.

As we have stated several times over the last year, "court costs [may not] be levied upon defendants found to be indigent." *Travis v. Commonwealth*, 327

S.W.3d 456, 459 (Ky. 2010). Although this issue was not preserved, sentencing is jurisdictional and cannot be waived by failure to object. *Id.* Therefore, we vacate the trial court's imposition of court costs.

III. Conclusion

For these reasons, we affirm Appellant's conviction and sentence, save the portion ordering him to pay court costs, which we reverse and vacate.

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

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