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NOT TO BE PUBLISHED OPINION

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RENDERED: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000064-MR

JAMES SIMMONS — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY JON KALTENBACH, JUDGE
NO. 11-CR-00049

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A McCracken Circuit Court jury found Appellant, James R. Simmons, guilty of first-degree sexual abuse, third-degree sodomy, third-degree rape, and of being a second-degree persistent felony offender (PFO). For these crimes, Appellant received a twenty-year prison sentence. He now appeals as a matter of right, Ky. Const. §110(2)(b), alleging that: (1) he was denied a fair trial when text and Facebook messages were presented at his trial, and (2) he was denied fair sentencing when the Commonwealth commented on his failure to testify and suggested that Appellant should have expressed remorse for the alleged crimes. For the reasons that follow, we affirm Appellant's conviction and sentence.

I. BACKGROUND

Appellant, James "Jim Bob" Simmons had recently ended a relationship with his girlfriend, Tiffany Miller, when she accessed his Facebook account and discovered sexually suggestive messages between him and a female, E.J.[1] Miller told her father and brother about the messages she had discovered, and her brother informed her that E.J. was in fact a middle school student. Miller's father helped her print out the messages from Facebook, and he called Child Protective Services, who conducted an investigation into the matter.

Detective Kyle Knoll received the printouts and contacted the Facebook headquarters regarding how to retrieve messages between Appellant and E.J. Knoll obtained a search warrant, and received records from Facebook of the messages sent between Appellant and E.J. on two separate occasions.

During Knoll's interview with E.J., he discovered that E.J. and her mother had stayed with E.J.'s grandmother during the weekend in question, and that Appellant also happened to be staying there as well. Appellant and E.J. allegedly entered into a flirtatious dialogue via text messages and ultimately engaged in sexual intercourse that weekend. During the interview, E.J. admitted that she had deleted the text messages because she was afraid they would be discovered.[2]

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[1] The victim in this case will be referred to as E.J. in order to protect her identity given that she was a minor at the time of the incident in question.

[2] E.J. was afraid that the text messages would be discovered on her phone and therefore, deleted the messages. Before deleting the messages, however, E.J. wrote the messages in her diary.

Appellant was ultimately indicted by a McCracken County Grand Jury on one count of first-degree sexual abuse, one count of third-degree sodomy, and one count of third-degree rape. During trial, the Commonwealth presented evidence, over multiple objections by Appellant's counsel, of the Facebook conversations and the phone text messages between Appellant and E.J. Thereafter, Appellant was convicted of first-degree sexual abuse, third-degree sodomy, third-degree rape, and second-degree PFO. His sentence was enhanced as a result of his second-degree PFO conviction and he was sentenced to twenty years' imprisonment.

Further facts will be developed where necessary for analysis.

II. ANALYSIS

A. KRE 901 and KRE 1002

Appellant first argues that he was denied a fair trial when phone text and Facebook messages were erroneously presented at trial. Specifically, Appellant alleges the admission of the unauthenticated communications was in violation of KRE 901 and 1002 (The Best Evidence Rule).[3] In this regard, we review a trial court's evidentiary rulings for abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (*citing Woodward v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004)). "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or

[3] These issues were preserved by Defense Counsel's numerous objections to the admission of this evidence based upon the argument that neither the text nor Facebook messages had been authenticated.

unsupported by sound legal principles." *Id.* (*citing Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

1. KRE 901

Appellant charges that the text and Facebook messages were introduced without the proper authentication required by KRE 901. KRE 901 requires authentication, or identification, i.e., as a condition precedent to *admissibility* of said evidence, that the matter in question is what the proponent claims it to be. KRE 901

a. Text Messages

At trial, E.J. read the purported text messages aloud from her handwritten diary; however, her handwritten notes were not introduced into evidence. Therefore, Appellant's argument that the introduction of the text messages violated KRE 901 fails, as the messages were never admitted into evidence. In fact, the Commonwealth sought to introduce her handwritten diary as an exhibit, but was prohibited from doing so by the trial court when it sustained Appellant's objections to its introduction.

The trial court did, however, allow E.J to read from her diary[4] as during trial, she testified that she could not recall exactly what Appellant had said to

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[4] This testimony came in under KRE 803, which reads in pertinent part:

The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

. . . .

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted,

her during the message exchange. Given that the text messages were never admitted into evidence, there can be no violation of KRE 901. Thus, the trial court did not abuse its discretion in regards to this evidence.

b. Facebook Messages

Appellant also alleges the Facebook messages introduced were in violation of KRE 901, as they were not properly authenticated prior to admission. As noted, KRE 901 requires that evidence must be authenticated as a condition precedent to its admissibility; there must be sufficient evidence that it is what it purports to be.

Unlike the text messages, the Facebook messages were admitted in evidence and thus a proper foundation had to be laid prior to their admission.[5]

At trial with the court's approval, the Commonwealth introduced a print-out of the Facebook messages created by Miller's father and two records from Facebook's corporate office which had been produced pursuant to a search warrant. All three of these exhibits contained essentially the same information.

In this regard, several witnesses testified that the Facebook messages were in fact what they purported to be: (1) E.J., who was a party to the conversations, testified that the evidence was a conversation between Appellant and herself; (2) Miller's father testified that he viewed the Facebook account

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the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.

Appellant makes no argument regarding KRE 803(5).

[5] Prior to the beginning of trial, the court had reserved ruling on the admissibility of these messages, finding that they were not self-authenticating and thus, a foundation would need to be laid for their introduction.

and the messages on the printed pages were the messages that had been printed out and turned over to Child Protective Services; and (3) Detective Knoll testified that the Commonwealth's Exhibit's 3 and 4 were the result of the search warrant that he had obtained and sent to Facebook's corporate office.

Under KRE 901, the burden on the Commonwealth to authenticate a writing is "slight" and requires only a "prima facie showing." *Ordway v. Commonwealth*, 352 S.W.3d 584, 593 (Ky. 2011) (*citing Sanders v. Commonwealth*, 301 S.W.3d 497, 501 (Ky. 2010)). In fact, a writing's content, taken in conjunction with the circumstances, can be relied upon in determining authentication. *Id.* Ultimate responsibility for judging authenticity of documents, however, rests with the jury: The role of the judge, as a gatekeeper, is only to determine if an offering party has produced enough evidence for a reasonable jury to find authenticity. Robert G. Lawson, *The Kentucky Evidence Law Handbook*, 7.00 at 495 (4th ed. 2003) (*citing Bell v. Commonwealth*, 875 S.W.2d 882, 886-87 (Ky. 1994). The judge decides if the evidence is admissible, but "the trier of fact determines the authenticity of the evidence and its probative force." *Id.* (*quoting E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1398 (9th Cir. 1989)); *see also United States v. Mandycz*, 447 F.3d 951, 966 (6th Cir. 2006). Thus, a trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is what it purports to be and is in a substantially unchanged condition. *Grundy v. Commonwealth*, 25 S.W.3d 76, 80 (Ky. 2000).

KRE 901(b) lays out several ways in which the authentication requirement can be met. The most widely used method of authentication is testimony by one with personal knowledge that a writing is what it is claimed to be. *Bell*, 875 S.W.2d at 886-87. KRE 901(b)(1) describes this method of authentication as "testimony that a matter is what it is claimed to be," and thus provides a simple method by which many, if not most, writings can be authenticated. Robert G. Lawson, *The Kentucky Evidence Law Handbook*, 7.05[3] at 498 (4th ed. 2003).

Given the testimony presented, we hold the trial court did not abuse its discretion and properly admitted this evidence.

2. KRE 1002

Appellant further argues that the admission of the phone text messages violated KRE 1002, the Best Evidence Rule. According to KRE 1002, the original document must be admitted in order "[t]o prove the content of a writing, recording, or photograph . . . except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute." However, as stated the text messages were never admitted and E.J.'s recitation of them[6] was not in violation of KRE 1002 and thus, the trial court did not abuse its discretion.

[6] Again, Appellant made no argument here concerning KRE 803(5).

B. Silence

Appellant's last argument is that he was denied a fair sentencing phase and thus should have been granted a mistrial.[7] Specifically, Appellant alleges that his Fifth Amendment right to remain silent was violated when the Commonwealth commented on his failure to testify and suggested that he should have expressed remorse for the alleged crimes.

During closing arguments in the sentencing phase, the Commonwealth told the jury:

> What we ask you to do is to be fair. Do what's appropriate. One other thing I ask you to consider. The instruction is that you're not to consider, um, and hold against him in any way, the right to be silent. But there are opportunities through any number of persons, starting with Ms. Keeley. Starting with the family members. To express to you some acknowledgement of responsibility. To express to you some regret.

Appellant's counsel immediately objected, noting that the Commonwealth had improperly commented upon Appellant's silence. The objection was sustained. The Commonwealth, however, continued to push the issue, stating, "[w]here I'd like to do is, Ms. Keeley [(Appellant's counsel)], on his behalf, did not offer any regret, did not offer any semblance of responsibility." Appellant's counsel again objected and the Commonwealth kept trying to push the issue, and at this point Appellant moved for a mistrial. The trial court overruled the motion for a

[7] This issue was properly preserved by Appellant's numerous objections to these statements and the resulting motion for a mistrial.

mistrial, but did admonish the jury, instructing them that Appellant's silence was not to be used against him.[8]

We agree with Appellant that the prosecutor's statements concerning Appellant's silence to the jury, as detailed above, were erroneous. *See Doyle v. Ohio*, 426 U.S. 610 (1976). Furthermore, Fifth Amendment protections extend to the sentencing phase. *Estelle v. Smith*, 451 U.S. 454, 463 (1981) ("Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.").

Appellant argues that this error was so egregious that it could not be deemed harmless beyond a reasonable doubt. We disagree.

"Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 24 (1967). This analysis requires this Court "to determine whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* An error may not be deemed harmless beyond a reasonable doubt unless "there is no reasonable possibility that it contributed to the conviction." *Winstead v.*

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[8] In its admonition to the jury, the trial judge stated:

> Alright, ladies and gentlemen, I will admonish you that, uh, your instruction, you're instructed twice . . . the defendant is not compelled to testify and the fact the defendant did not testify in this case cannot be used as an inference of guilt and should not prejudice him in any way. And what that means is that to the extent that, uh, that, uh, there has been an argument that he didn't say this or he didn't say that, I'm admonishing you that that is not proper for you to consider and should not prejudice him in any way.

Commonwealth, 283 S.W.3d 678, 689 (Ky. 2009); *see also Chapman*, 386 U.S. 18.

Applying these standards, we hold that there is no reasonable possibility that the Commonwealth's statements, though erroneous, contributed to Appellant's sentence. The jury had heard evidence about Appellant's sexual relationship with a fourteen-year-old girl during the guilt phase of his trial. After finding him guilty of first-degree sexual abuse, third-degree sodomy, and third-degree rape at the conclusion of the guilt phase, the jury also heard evidence regarding Appellant's past crimes, including the fact that he was on parole at the time he committed the offenses against E.J. Given these facts, the error was harmless beyond a reasonable doubt.

Furthermore, the trial court's admonition of the jury cured any error that existed. We have held that:

> A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error. . . . There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) (internal citations omitted). As to the first circumstance under which we might hold that an admonition fails to cure an error, we hold that there is no probability, much less an overwhelming one, that the jury was unable to follow the trial court's admonition. The trial judge stated twice during his admonition that the jury

should not allow the Commonwealth's statements regarding Appellant's silence to "prejudice him in any way." As to the second circumstance, the Commonwealth's statements, while made in error, did have a factual basis and were neither inflammatory nor highly prejudicial. Therefore, although the Commonwealth erred by making statements during closing argument regarding Appellant's silence, the error was harmless beyond a reasonable doubt and the trial court's admonition to the jury cured said error.

III. CONCLUSION

For the aforementioned reasons, we affirm Appellant's convictions and corresponding sentence.

Minton, C.J., Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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