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Supreme Court of Kentucky

2012-SC-000259-MR

TIMMY LEE JACKSON

APPELLANT

V.

ON APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
NO. 10-CR-00241

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Timmy Lee Jackson appeals as a matter of right from a judgment of the Bell Circuit Court sentencing him to fifty years' imprisonment for first-degree rape, four counts of first-degree sodomy, and first-degree sexual abuse. Ky. Const. § 110(2)(b). Jackson raises three errors on appeal. First, he argues that the trial court erred when it denied his motions for directed verdict on all counts. Second, Jackson claims that the trial court abused its discretion when it failed to sufficiently question a child witness in order to assess the child's testimonial competency. Finally, Jackson argues that the trial court erred in imposing a total sentence of fifty years' imprisonment. For the reasons stated herein, we affirm the judgment of the Bell Circuit Court.

FACTS

Timmy Lee Jackson was indicted for two counts of rape in the first degree, five counts of sodomy in the first degree, sexual abuse in the first

degree, and persistent felony offender in the second degree after a seven-year-old girl alleged that Jackson had sexual contact with her. The victim, "Kelly," was the daughter of Jackson's ex-girlfriend. Jackson had lived with Kelly and her mother for three years. Over the course of several interviews with various social workers, Kelly recounted multiple instances of rape, sodomy, and sexual abuse inflicted by Jackson. In addition to verbalizing her story, Kelly also used drawings and dolls to depict the alleged attacks. A physical examination, conducted eighteen months after the alleged abuse, was inconclusive regarding physical evidence of rape or sexual assault.

Kelly was permitted to testify at Jackson's trial following an in-chambers competency hearing. The jury also heard the testimony of a social worker, a teacher, and a police officer involved in Kelly's investigation. At the conclusion of the trial, the Bell County jury convicted Jackson of one count of first-degree rape, four counts of first-degree sodomy, and one count of first-degree sexual abuse. The jury recommended a twenty-year sentence for the rape and for each of the four sodomy convictions, and a ten-year sentence for the sexual abuse convictions. The jury further recommended that the rape and sexual abuse convictions run consecutively and that the sodomy convictions run concurrently. The trial court imposed a total sentence of fifty years' imprisonment.

ANALYSIS

I. Trial Court Did Not Err In Denying Motion For Directed Verdict.

At trial, Kelly testified that Jackson raped, sodomized, and sexually abused her on multiple occasions at two separate residences. She described Jackson putting his “private parts” between her legs, in her “behind-end,” and in her mouth. She further testified that he licked her “private part” and her “butt,” and that he put his finger in her “private part” and “wiggled it.” A tape of Kelly’s forensic interview with Counselor Tracey Miller was played for the jury. During that interview, Kelly discussed the sexual acts by making a series of drawings depicting herself and Jackson next to a bed, with the words “SEX,” “Oh yeah,” and “Do you want to see my private?” written on the page. In describing the drawings to Miller, Kelly indicated that Jackson had “stuck his private” in her “private,” “licked his tongue” over her private,” and put his “private” in her mouth. Kelly further explained to Miller that Jackson had put his “private” in her “butt-hole,” as well as his tongue, and that his hands had been in her “private.”

In addition to describing the instances of rape and abuse, Kelly also discussed other matters during her forensic interview. Kelly told Miller that Jackson killed her younger sister,¹ and that he also killed a “little blond girl” by cutting her neck, and later buried her body in a graveyard. Kelly also alleged that Jackson and her mother forced her to watch pornographic movies, that Jackson had a tattoo on his penis, and that her mother warned her not to tell Miller everything that her mother “used to do.” Kelly claimed that Jackson had

¹ Jackson acknowledges in his brief that he and Kelly’s mother did suffer the loss of an infant child.

threatened to beat her if she told anyone about the abuse. At the close of the Commonwealth's case-in-chief, Jackson moved for a directed verdict on all counts. The trial court denied the motion, and the case was submitted to the jury for deliberations.

Jackson now contends that the trial court erred by denying his motion for a directed verdict. As a basis for this challenge, Jackson argues that Kelly's testimony was unreliable, as portions of Kelly's story were clearly untrue. Jackson argues that Kelly's forensic interview was littered with mistruths, notably, the accusation that Jackson killed Kelly's little sister and a "little blond girl," that he had a tattoo on his penis, and that Jackson had "peed" in her mouth. Kelly's mother's failure to testify under subpoena, according to Jackson, further underscored the unreliability of Kelly's statements. He claims that Kelly's testimony was so "incredible," that corroboration was required and, without such corroboration, Jackson was entitled to a directed verdict of acquittal on all charges.

In ruling on a motion for a directed verdict, the trial court must draw all fair and reasonable inferences in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Questions relating to the weight and credibility of a witness's testimony should be reserved for the jury, and the trial court must assume that all evidence presented by the Commonwealth is true. *Id.* If the evidence is sufficient to induce a reasonable juror to find guilt beyond a reasonable doubt, then the defendant is not entitled to a directed verdict of acquittal. *Id.* On appellate review, the test is whether, if under the

evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is a directed verdict of acquittal appropriate. *Id.*

It is well recognized that a “corroboration in a child sexual abuse case is required only if the unsupported testimony of the victim is ‘. . . contradictory, or incredible, or inherently improbable.’” *Garrett v. Commonwealth*, 48 S.W.3d 6, 10 (Ky. 2001) (quoting *Robinson v. Commonwealth*, 459 S.W.2d 147, 150 (Ky. 1970)). “Otherwise, discrepancies in the victim’s testimony are matters of credibility going to the weight given by the jury to the child’s testimony.” *Id.* at 10 (citing *Commonwealth v. Cox*, 837 S.W.2d 898, 900 (Ky. 1992)). We must therefore determine whether Kelly’s trial testimony and forensic interview statements were so incredible as to require corroboration.

In *Garrett v. Commonwealth*, the trial court considered the defendant’s motions for directed verdicts regarding multiple counts of rape, sexual abuse, and sodomy when a child-victim gave contradictory statements to police officers concerning her age and the nature of the defendant’s alleged conduct. 48 S.W.3d at 10. The victim stated that during one alleged instance of rape, the penetration was “just a little bit” and that it “hurt.” *Id.* This Court concluded that “[t]here was nothing so contradictory, incredible or inherently improbable about this testimony as to require corroboration.” *Id.* The *Garrett* Court also determined that the trial court properly granted the defendant’s motion for directed verdicts on the charges where the victim’s account of her age did not correspond with the alleged timing of the charged conduct. *Id.* As for the charges that appropriately corresponded with the victim’s timeline, this

Court held that the trial court properly denied the motions for directed verdict and that the jury properly convicted the defendant of the charges supported by the victim's testimony. *Id.*

In this case, any discrepancies in Kelly's testimony could be fairly weighed by the jury in assessing her credibility. At trial Kelly admitted that she did not witness Jackson killing a "little blond girl" as she had stated during her forensic interview, but rather that Jackson had told her that he had killed a "little blond girl." Officer Shaw of the Bell County Police Department testified that there had been no investigation into the death of a "little blond girl" in Bell County during the timeline associated with Kelly's statements. Kelly further revealed at trial that she never saw a tattoo on Jackson's penis, but that her mother had told her that Jackson had such a tattoo. Finally, at trial, Kelly acknowledged that Jackson did not "pee" in her mouth. Concerning that statement, Kelly explained that she indicated that a substance came out of Jackson's "private part" and she characterized it as "pee" because she did not know what it was. In all of these instances, Kelly clarified at trial the statements she had made during the forensic interview. The reference to her sister clearly centers around the death of the baby conceived by Jackson and Kelly's mother while, as the Commonwealth posits, the little blond girl remarks hardly seem outlandish when Kelly clarified that the story was simply what Jackson had told her, a possible strategy of someone who wants a young victim to remain silent. As for the tattoo and her unawareness of the terminology for an ejaculation, there is simply nothing incredible about those statements.

Most importantly, Kelly's accounts of the criminal acts, both during the forensic interview and at trial, were consistent as to the acts themselves and the time-frame and locations where they were alleged to have occurred.

Jackson also argues that Crystal Williams influenced Kelly to make "untruthful accusations" against him, and that Williams's absence from the trial precluding her examination casts further doubt on the veracity of Kelly's interview statements. Our review of the record revealed that the defense subpoenaed Williams during the week preceding the trial. According to the prosecutor who had communicated with Williams, Williams did not have enough money to travel from Louisville to the Bell Circuit Court on the day following her release from Louisville Metro Corrections. As noted by the Commonwealth in its brief, Jackson was entitled to move for a continuance pursuant to Kentucky Rule of Criminal Procedure ("RCr") 9.04 in order to secure Williams's presence, but failed to do so. Furthermore, the absence of a defendant's witness, or rather, any inference that may be construed from that witness's absence, must be drawn in favor of the party opposing the directed verdict motion. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). All of the witnesses who conducted interviews with Kelly or were present at those interviews testified that no one induced Kelly to give any certain account of Jackson's conduct, and that she voluntarily gave statements and provided drawings during those interviews.

Finally, the allegedly contradictory statements made during the forensic interview and later clarified at trial were tangential to Kelly's consistent

testimony concerning acts of rape, sodomy, and sexual abuse. *See Bussey v. Commonwealth*, 797 S.W.2d 483, 484 (Ky. 1990) (“[T]o survive a motion for directed verdict, it is not necessary that every fact related by the victim be reasonable and probable.”). In that respect, Kelly’s testimony was not so contradictory or inherently incredible as to necessitate further corroboration. The discrepancies in Kelly’s statements, to the extent there were any, were matters of credibility for the jury to weigh. *Cox*, 837 S.W.2d at 900. Under the evidence as a whole, it was not clearly unreasonable for the jury to find Jackson guilty of the crimes charged. The trial court properly denied Jackson’s motion for directed verdicts.

II. The Competency Hearing Was Sufficient.

Jackson made an oral motion for a competency hearing during a pretrial conference asserting that Kelly had failed to verbalize the allegations, many of which defense counsel characterized as “mind-boggling.” An in-chambers competency hearing was held on January 12, 2011 with both the prosecutor and an attorney for Jackson present. At the beginning of the hearing, Kelly, who was nine-years-old at the time, stated that she could not “swear,” but promised to tell the truth. The judge then asked her a series of questions relating to school and her family members. Kelly was able to recite the names of her siblings, parents, and grandparents. She also recalled her street address and gave specific directions to her home. When asked if she “knew the difference between right and wrong” she indicated in the affirmative that she did. She further acknowledged that she understood that she must tell the

truth, explaining that the prosecutor had previously discussed the importance of telling the truth to the court. The trial court continued to ask Kelly questions about her school before declaring her to be competent to testify at trial. Both the prosecutor and defense counsel declined to ask Kelly any additional questions.

Jackson now argues that the trial court failed to sufficiently question Kelly in order to assess her competency to testify. Specifically, Jackson asserts that the trial court's questions failed to challenge Kelly's ability to determine the difference between the truth and a lie. The determination of whether a witness is competent to testify is within the sound discretion of the trial court, and such a determination may be disturbed by an appellate court only when there has been an abuse of that discretion. *Pendleton v. Commonwealth*, 83 S.W.3d 522, 525 (Ky. 2002). Jackson concedes that this issue is unpreserved and asks that we review the competency hearing for palpable error pursuant to RCr 10.26.² Under our palpable error standard of review, "an appellate court may consider an issue that was not preserved if it deems the error to be a palpable one which affected the defendant's substantial rights and resulted in manifest injustice." *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002).

Witness competency, including the competency of a child-witness, is governed by Kentucky Rule of Evidence ("KRE") 601. This rule establishes a

² Although Jackson asked the trial court to determine whether Kelly was competent to testify, no objection was made to Kelly testifying after the trial court held a hearing and declared her competent. Jackson's motion was solely for the trial court to make a determination as to Kelly's competency, specifically premised on her perceived inability to "verbalize" the accusations against Jackson. To that end, Jackson's challenge as to the sufficiency of the hearing is unpreserved.

“presumption of competency and permits disqualification of a witness only upon proof of incompetency.” *Price v. Commonwealth*, 31 S.W.3d 885, 891 (Ky. 2000). KRE 601(b) also provides the minimum qualifications for a witness:

(b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:

- (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
 - (2) Lacks the capacity to recollect facts;
 - (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter;
- or
- 4) Lacks the capacity to understand the obligation of a witness to tell the truth.

Based on KRE 601, this Court has identified three basic issues that a trial court must resolve when the competency of child witness is raised: whether the child is capable of observing and recollecting facts, whether the child is capable of narrating those facts to a court or jury, and whether the child has a moral sense of the obligation to tell the truth. *Moore v. Commonwealth*, 384 S.W.2d 498, 500 (Ky. 1964); see also *Kentucky v. Stincer*, 482 U.S. 730, 741, 107 S. Ct. 2658, 2665, 96 L. Ed. 2d 631 (1987). To that end, a cursory or superficial examination that fails to allow for an “accurate appraisal” of the witness’s competency is insufficient. *Id.*

Jackson now asserts that the portion of the trial court’s colloquy focusing on Kelly’s ability to be truthful was insufficient, comparing it to the deficient hearing in *Moore*, 384 S.W.2d 498. In *Moore*, this Court concluded that a trial court erred in declaring a child-witness competent to testify following a superficial and cursory examination that failed to truly test the

child's ability to testify competently. *Id.* at 499. Despite Jackson's contention to the contrary, the hearing in the instant case bears no resemblance to the hearing in *Moore*. In this case, the trial court's colloquy sufficiently addressed all of KRE 601(b)'s requirements. During the hearing, Kelly expressed a capacity to recollect and narrate specific facts, often expounding by offering a detailed response to simple questions. For example, when asked for her address, Kelly provided her street address as well as descriptive directions to her home. *Cf. Moore*, 384 S.W.2d at 500 (a child witness's monosyllabic answers to leading questions offered the trial court no assistance in determining competency). She also acknowledged understanding the difference between telling a lie and telling the truth, and further explained that she had discussed the importance of telling the truth with the prosecutor. During that exchange, Kelly recalled an example that the prosecutor had provided to assist in illustrating the significance of being truthful to the trial court. Unlike the child witness in *Moore*, the trial court's questions elicited answers that demonstrated Kelly's ability to "observe, recollect and truthfully narrate the facts." *Moore*, 384 S.W.2d 498, 500. The hearing clearly addressed the minimum requirements of KRE 601(b), and Kelly's ability to offer competent testimony was further established by her trial testimony. *See Swan v. Commonwealth*, 384 S.W.3d 77, 97-98 (Ky. 2012) (the trial court was able to assess a child-witness's competency based on his trial testimony).

Defense counsel was given the opportunity to question Kelly during the competency hearing, but declined to do so. Furthermore, Jackson never

alleged that Kelly suffered from any psychological disorder or mental illness that would have impaired her ability to testify requiring further vetting beyond what is mandated in KRE 601. *Cf. Perry v. Commonwealth*, 390 S.W.3d 122 (Ky. 2012) (trial court erred in denying an independent psychological examination of an alleged child victim after the reliability of the child's memory was put at issue by evidence of his impaired psychological condition). In conclusion, the trial court's examination of Kelly conformed with the minimum requirements of KRE 601(b). There was no abuse of discretion, and certainly no palpable error in deeming Kelly competent to testify.

III. Trial Court Did Not Err By Imposing the Fifty-Year Sentence.

At the conclusion of the penalty phase of Jackson's trial, the jury was given a set of instructions, including the following:

INSTRUCTION NO. 7

We recommend that the punishments fixed for the Defendant under Counts I-VI of the Indictment be served as follows:

(Any or all concurrently or consecutively)

The jury recommended a sentence of twenty years on each of Counts 1, 2, 3, 4, and 5 and a sentence of ten years on Count 6. The jury returned Instruction No. 7 with the following recommendation written in the blank provided:

Counts 1 and 6 consecutive Counts 2, 3, 4, 5 concurrently

After a brief discussion with the attorneys at the bench, the trial court calculated the total sentence as fifty years. The judgment reflects that the trial court considered that the jury intended the four twenty-year sentences for

Counts 2, 3, 4, and 5 to run concurrently to one another, and consecutive to the twenty and ten-year consecutive sentences for Counts 1 and 6 respectively.

Jackson challenges the imposition of the fifty-year sentence on multiple grounds. First, he argues that Instruction No. 7 failed to properly apprise the jury that the sentences could run consecutively or concurrently. Next, he asserts that the trial court failed to answer a question from the deliberating jury in open court in violation of RCr 9.74. Finally, Jackson claims that the trial court erred in imposing a fifty-year sentence when the jury had in fact recommended a thirty-year sentence. He requests that we apply our palpable error standard of review to consider these unpreserved errors.

Kentucky Revised Statute (KRS) 532.055(2) provides that following a sentencing hearing the “jury shall recommend whether the sentences shall be served concurrently or consecutively.” This Court has interpreted this statute to provide that where there are more than two offenses, the respective sentences may either run consecutively or concurrently, or partially consecutively and partially concurrently. *Stoker v. Commonwealth*, 828 S.W.2d 619, 627 (Ky. 1992). A trial court errs when it fails to fully inform the jury of its power to recommend that sentences should run partially concurrently and partially consecutively. *Lawson v. Commonwealth*, 85 S.W.3d 571, 581 (Ky. 2002).

Jackson argues that a note from the jury asking the trial court if it could make “2 counts consecutive and 4 counts concurrent” proves that the jury was unaware that it was free to recommend that the sentences run partially

concurrently and partially consecutively.³ However, it is clear that Instruction No. 7 does not fail in informing the jury that they may recommend that the sentences run consecutively or concurrently, as the phrase “[a]ny or all concurrently or consecutively” appears plainly on the verdict form. The words “any or all” in reference to Counts 1-6 of Jackson’s indictment properly indicated that a jury may recommend that a sentence be served partially consecutively, partially concurrently, fully consecutively, or fully concurrently. See *Stoker*, 828 S.W.2d at 627. Indeed, the verdict form itself reflects the jury understood that because under any reading of the verdict form, the jury ran two counts consecutively and at least four counts concurrently. Jackson concedes that the source of any confusion regarding the length of the jury’s recommended sentences arises from the absence of a place on the sentencing form to indicate the total number of years to be served. However, there is no authority, statutory or otherwise, mandating a “total sentence” recommendation on a jury form, however well-advised that practice might be. Therefore, we find no error in the manner in which the jury was instructed.

Jackson further contends that the trial court’s failure to address the jury’s question concerning concurrent and consecutive sentences in open court in his presence violated RCr 9.74. RCr 9.74 provides the following: “No information requested by the jury or any juror after the jury has retired for

³ The Commonwealth argues that we cannot consider the jury’s question because the trial court did not address the inquiry in open court. However, the questions, retained by the clerk of the court, were properly included in the record on appeal.

deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.” Violations of this rule may be harmless when such contact between judge and jury does not “concern issues central to the case.” *Welch v. Commonwealth*, 235 S.W.3d 555, 558 (Ky. 2007). However, when contact between the trial court and jury *does* involve a substantive issue of the case, the violation of RCr 9.74 cannot be deemed harmless as such contact “impugn[s] the fundamental fairness of an otherwise constitutionally acceptable trial.” *Id.*

We agree with Jackson that under RCr 9.74, the trial court erred in failing to address the jury’s questions in open court in his presence. However, this error is certainly harmless. In answering the jury’s question the trial court merely addressed a question of law. *Muncy v. Commonwealth*, 132 S.W.3d 845, 848 (Ky. 2004). Therefore, Jackson’s presence would not have affected the trial court’s response. *See Malone v. Commonwealth*, 364 S.W.3d 121, 133 (Ky. 2012) (finding harmless error when trial court replayed testimony for jury outside of the presence of the defendant). In fact, the trial court simply added clarification to a question that was answered in the verdict form itself – *i.e.*, whether the sentences may be fixed partially concurrently and partially consecutively. Furthermore, no new evidence was introduced when the trial court responded to the jury’s request. *Cf. Stokes v. Commonwealth*, 275 S.W.3d 185, 192 (Ky. 2008). Jackson has failed to articulate how his substantial rights were violated by the trial court’s *ex parte* contact with the

jury. See *Welch*, 235 S.W.3d at 558-59. Although the failure to address the request in open court in the presence of Jackson was procedurally violative of RCr 9.74, it was harmless error. See *McGuire v. Commonwealth*, 368 S.W.3d 100, 115 (Ky. 2012) (replaying of a portion of testimony outside the presence of the defendant did not affect the result of the trial nor did it threaten the defendant's right to due process, and therefore did not rise to the level of palpable error).

Jackson also complains that the trial court imposed a fifty-year sentence in contravention of the jury's recommendation, which he now reads as a thirty-year recommendation. This Court has held that due process entitles a criminal defendant to a jury recommendation as to how a sentence should be "fixed," therefore the jury's right to make a recommendation as to concurrent or consecutive sentences is "far from meaningless or *pro forma*." *Lawson*, 85 S.W.3d at 581-82. However, there was no palpable error in the imposition of the fifty-year sentence in this case. "A jury recommendation regarding whether sentences shall be served concurrently or consecutively pursuant to K.R.S. 532.055(2) is not mandatory or binding on a trial judge." *Nichols v. Commonwealth*, 839 S.W.2d 263, 265 (Ky. 1992) (citing *Dotson v. Commonwealth*, 740 S.W.2d 930 (Ky. 1987)). Indeed, the trial court retains the authority to determine how multiple sentences shall run. KRS 532.110(1).

Moreover, Jackson has failed to offer any tangible proof that the trial court disregarded the jury's recommendation. Instead, Jackson simply asserts that the trial court was "wrong about the calculation," and that the jury

“clearly” intended to recommend a thirty-year total sentence.⁴ However, it is not at all unreasonable to conclude that the jury in fact intended to recommend a fifty-year sentence. As discussed above, Instruction No. 7 properly informed the jury that they were entitled to recommend that sentences run partially concurrently and/or partially consecutively. The trial court’s interpretation of the recommendation—that the concurrent sentences of Counts 2, 3, 4, and 5 shall be served consecutive to consecutive sentences on Counts 1 and 6 – was a reasonable assessment of what was stated on the verdict form. Even if we were to accept Jackson’s argument that the jury in fact recommended that the twenty-year concurrent sentences for Counts 2, 3, 4, and 5 shall be served concurrently with the thirty-year sentences for Counts 1 and 6, the trial court was nevertheless entitled to impose a different sentence. See *Wombles v. Commonwealth*, 831 S.W.2d 172, 176 (Ky. 1992) (trial court acted within its discretion when it imposed consecutive sentences despite a jury recommendation that the sentences should run concurrently).

In sum, the trial court did not err when it imposed the fifty-year sentence. The jury was properly apprised of its power to recommend that Jackson’s sentences run partially concurrently and partially consecutively. Although the trial court erred when it failed to address a written question from the jury in open court with Jackson and all counsel present, its failure to comply with RCr 9.74 did not rise to the level of palpable error. Finally, the

⁴ Notably this thirty-year interpretation was never brought to the trial court’s attention. The judge and all trial counsel appear to have construed the form as containing a recommendation of fifty-years’ imprisonment.

jury's recommendation logically appears to be a fifty-year recommendation but, even if it was not, there was no palpable error in the court construing it that way or in otherwise sentencing Jackson to fifty years in prison.

CONCLUSION

For the reasons stated herein, we affirm the judgment of conviction and sentence of the Bell Circuit Court.

All sitting. All concur.

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