

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000158-MR

JOHN TIM JENKINS

APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NOS. 04-CR-00005 & 04-CR-00034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REMANDING

** ** * * * **

BEFORE: ABRAMSON, JUDGE; KNOPF AND ROSENBLUM, SENIOR JUDGES.¹

KNOPF, SENIOR JUDGE: Appellant John Tim Jenkins was convicted and sentenced to five years' imprisonment for one count of sexual abuse in the first degree and received a \$250 fine for his conviction on one count of indecent exposure. The charges stem from conduct at a recreational facility involving an eight-year-old child who was Jenkins' little brother in the Big Brothers/Little Brothers program. Jenkins argues in this appeal that the trial court erred: 1) in refusing to permit testimony from his forensic psychologist

¹ Senior Judges William L. Knopf and Paul W. Rosenblum sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

concerning unreliable reporting by child witnesses; 2) in improperly restricting cross-examination of the Commonwealth's lead investigator; 3) in permitting constructive amendment of the indictment to include uncharged conduct; 4) in refusing to grant a mistrial on the basis of improper closing argument; 5) in failing to grant a directed verdict of acquittal on the indecent exposure charge; 6) in permitting late night jury deliberations which resulted in coerced verdicts; and 7) in providing only limited disclosure of the child victim's psychotherapy records. He also argues that the cumulative effect of these errors deprived him of the due process guaranteed by the United States and Kentucky Constitutions. Because we are convinced that the absence of specific findings as to the KRE 702 admissibility of the testimony of the defense expert, Dr. Campbell, precludes meaningful review of the trial judge's decision to exclude him as a witness, we remand the case for proper findings as to that issue.

The events which precipitated the charges against Jenkins occurred on October 8, 2003 at the Falling Springs Arts and Recreation Center in Versailles, Kentucky. In 2001, Jenkins had been placed with J.S. for participation in the Big Brothers program. On the evening of the incident, Jenkins picked up J.S., then age eight, and B.F., then age six, to go swimming at the recreation center. A lifeguard observed what she considered to be inappropriate conduct by Jenkins while playing with the boys in the pool. Although she stated that she could not tell exactly what he was doing, it appeared to her that Jenkins was swimming up under the boys and nibbling on their thighs. Other lifeguards became concerned about Jenkins' inappropriate conduct with the boys. Two male lifeguards followed the three when they went into the locker room. The

male lifeguards subsequently observed Jenkins take the two boys into a single small shower and all three were naked. After Jenkins remained in the shower with the boys for what the lifeguards considered to be an inordinately long time, the police were summoned.

Upon arrival at the recreation center, the police officers separated Jenkins from the boys. B.F. was taken home and J.S. was transported to the police station where an interview was conducted. The boy was interviewed again the following day. B.F. was also interviewed twice the next day.

As a result of information obtained in the course of these interviews, Jenkins was initially indicted on charges of first-degree sexual abuse for subjecting J.S. to sexual contact during the period from August to September 2003. Count 2 of that indictment charged sexual abuse of J.S. on October 8, 2003. Counts 3 and 4 charged Jenkins with indecent exposure based upon the allegation that he had exposed his genitals in the presence of J.S. and B.F. on October 8, 2003. During a subsequent interview conducted in March 2004, J.S. alleged that he had been sodomized, leading to an indictment for two counts of first-degree sodomy.

At the trial on these charges, Jenkins sought to introduce expert testimony from Dr. Terrance Campbell, a forensic psychologist, who was, as stated in his brief, “prepared to testify concerning improper questioning techniques which can result in unreliable reporting by child witnesses, and specifically, the improper questioning methods utilized by [the persons who interviewed J.S. and B.F].” After a thorough hearing at which Dr. Campbell’s testimony was introduced by avowal, the trial judge

excluded the testimony on the basis that Kentucky law does not permit testimony designed to show that a witness was not being truthful. We are convinced, however, that the opinion of the Supreme Court of Kentucky in *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997), and that of this Court in *Meadows v. Commonwealth*, 178 S.W.3d 527 (Ky.App. 2005), compel a conclusion that Dr. Campbell's testimony may have been admissible, subject to the findings required by *Stringer*.

In *Stringer*, the Supreme Court retreated from its previous position that expert testimony which encompasses the ultimate issue in a case is impermissible, stating:

The real question should not be whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion "will assist the trier of fact to understand the evidence or to determine a fact in issue." Generally, expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science and skill, and when the subject matter is outside the common knowledge of jurors.

956 S.W.2d at 889-90. This Court recently addressed a similar issue in *Meadows*, concluding that *Stringer* requires a re-assessment of prior decisions concerning the admissibility of expert testimony concerning the credibility of child witnesses:

Meadows asserts that Dr. Compton's testimony that T.H.'s injuries were consistent with the events of the sexual assault as she described them "leads inextricably ... to a conclusion that [she] was telling the truth, thus she was raped and Joey Meadows was the culprit." He asserts that this was improper expert opinion testimony on the ultimate issue of guilt. *Meadows* cites *Newkirk v. Commonwealth* [937 S.W.2d 690 (Ky.1997)] for the proposition that such testimony is barred: "[W]here the determination of credibility is synonymous with the ultimate fact of guilt or innocence, expert opinion is inadmissible." But *Meadows* fails to consider that the

Kentucky Supreme Court more recently held in *Stringer v. Commonwealth* that it was "depart[ing] from the 'ultimate issue' rule."

* * *

At issue in *Stringer* was whether the trial court properly admitted a gynecologist's testimony in a child sexual abuse case that his physical findings from a vaginal exam of the alleged victim were consistent with something being inserted into the victim's vagina and consistent with the history of sexual abuse which she gave the doctor. The Supreme Court held that this was not the equivalent of testimony that the defendant was guilty but, rather, testimony relevant to determining that the ultimate fact at issue was more probable. Because the Court determined that the opinion "concerned a subject peculiarly within the knowledge of a trained physician and was likely to assist the jury in determining whether [the alleged victim] had been sexually abused" by the defendant, it held that the testimony was admissible. We can find no meaningful distinction between the testimony at issue in *Stringer* and Dr. Compton's testimony that his physical findings regarding T.H. were consistent with the history of sexual assault which she recounted to him. Therefore, we hold that the trial court did not err in admitting this evidence.

178 S.W.3d at 538-39, footnotes omitted. While it is conceivable that this type of medical evidence might be distinguished from the nature of the evidence Dr. Campbell intended to offer, Chief Justice Lambert in his concurring in result opinion in *Stringer* predicted the difficulty in excluding such evidence in future cases:

The proffered testimony of Dr. Campbell consists precisely of the profile generalities we have prohibited the Commonwealth from introducing in the long line of cases culminating in *Newkirk v. Commonwealth*, supra. Without interviewing the children himself, Dr. Campbell implied that, due to the extreme suggestibility of children and certain non-standard practices in the investigation of abuse, the child witnesses' testimony was not reliable.

There is no meaningful distinction between this testimony and that which was excluded in *Newkirk* and other

cases as evidence of "child sexual abuse accommodation syndrome" or some facet thereof. This case well illustrates the mischief of such testimony and shows that allowing opinion testimony of this nature invites a war between "experts" which will serve only to confuse the jury and diminish its historic role of assessing witness credibility. The trial court properly excluded this testimony.

This issue also confirms this Court's wisdom when it refused to adopt Rule 704 of the Federal Rules of Evidence, a rule which allows expert opinion testimony upon ultimate issues of fact. Sadly, and despite its protest to the contrary, the majority in this case has amended the Rules of Evidence by adoption of Rule 704, contrary to the express provisions of KRE 1102 and 1103. KRE 1102(c) provides: "Neither the Supreme Court nor the General Assembly should undertake to amend or add to the Kentucky Rules of Evidence ..."

While the trial court properly excluded Dr. Campbell's proffered testimony in this case, when such testimony is offered in the next case, the majority opinion may result in its admission.

956 S.W.2d 883, 895-96 (Ky. 1997). The testimony at which Chief Justice Lambert directed his comments was from the same Dr. Campbell whose almost identical testimony is at issue in this case. Although Dr. Campbell's testimony was disallowed in *Stringer* as too speculative because he admittedly had no opportunity to review tapes of the interviews of the child victim in that case, that impediment to the introduction of his testimony is not present here as he testified by avowal that had access to transcripts of the interviews of J.S. However, like the situation in *Stringer*, Dr. Campbell had not personally interviewed J.S.

Finally in this regard, because the trial judge's determination as to the inadmissibility of the evidence was predicated upon his belief that it amounted to impermissible comment upon a witness's testimony, he made no findings as to the factors

required by KRE 702. As noted in *Stringer* at page 891, expert testimony is admissible if it satisfies the following criteria:

Thus, KRE 702 authorizes the introduction of expert opinion testimony where:

(1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

We are thus convinced that this case must be remanded to the trial court for specific findings on these factors. Absent such findings, we are unable to determine whether there was an abuse of discretion in the exclusion of Dr. Campbell's testimony.

Jenkins next asserts that his ability to properly cross-examine the Commonwealth's lead investigator was infringed by the trial court's refusal to allow the playing of an audiotape of his interviews with J.S. conducted on October 8 and 9, 2003. He alleges that his purpose for playing the tape was to show that J.S. "was prompted throughout the entire interview." The trial judge explained his decision to disallow the tape stating that the audio-taped statements were hearsay and that introduction of the tape during the detective's testimony would effectively impeach "this child with his statement before he ever gets on the stand...." The trial judge also noted that cross-examination of the detective and J.S. was sufficient to probe the question of the reliability of J.S.'s statements during the interview. We find no abuse of discretion in the trial judge's decision.

KRE 801(c) defines “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Despite Jenkins’ insistence that the taped statements were not being offered to prove the truth of the matter asserted, we agree with the trial judge that they are nevertheless impermissible in the manner in which they were offered. KRE 801A confines the use of statements like that such to be introduced to the following:

- (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
 - (1) Inconsistent with the declarant's testimony;
 - (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or
 - (3) One of identification of a person made after perceiving the person.

Not only was the tape not offered during the declarant’s testimony, Jenkins’ admitted purpose for utilizing the taped statements does not fall into any of enumerated criteria for admission. Under these circumstances, the trial judge did not err in concluding that the statement as offered constituted impermissible hearsay. Furthermore, we concur in the trial court’s assessment that counsel could achieve his stated purpose in offering the tape through cross-examination of the detective and J.S. as to the manner in which the interviews were conducted. Importantly, and as admitted in oral argument, there was no prohibition on using a transcription of the taped interviews for that purpose. Accordingly, we perceive no infringement of Jenkins’ right of confrontation.

In his third assignment of error, Jenkins argues that his conviction for sexual abuse was predicated upon uncharged conduct disclosed for the first time during the trial testimony of J.S. and B.F., insisting that the admission of this testimony had the effect of constructively amending the indictment. The Commonwealth responds that this issue was not properly preserved by a contemporaneous objection and that, when the issue was raised, Jenkins did not argue constructive amendment but alleged only a violation of KRE 404(b). Despite our concern about preservation, we will briefly address the issue.

Jenkins points to the fact that the sexual abuse indictment had been premised upon J.S.'s statements that during play in the pool, Jenkins had put his hand up his shorts and touched his genitals. At trial, J.S. testified that Jenkins had put his mouth toward his "privates" while in the shower. J.S. acknowledged that he had not previously disclosed this account to anyone. Likewise, B.F. testified that he had seen Jenkins touch J.S.'s "privates" while he was briefly in the shower with them. As was the case with J.S., B.F. had not previously given this account of the activities in the shower. However, we are convinced that this testimony did not result in a constructive amendment of the indictment nor did it deprive Jenkins of his constitutional right to confront the witnesses against him or to effective assistance of counsel.

Jenkins was charged with first degree sexual abuse stemming from the incidents which occurred at the recreation center on October 8, 2003. The specific allegation was that he subjected J.S. to sexual contact and that J.S. was incapable of consent because he was less than twelve years of age. KRS 510.010(8) defines

“sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.” As our Supreme Court recently reiterated in *Ernst v. Commonwealth*, 160 S.W.3d 744, 751-52 (Ky. 2005), an indictment is sufficient under Kentucky law if:

it contains “a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged.” RCr 6.10(2). The indictment need not detail the essential elements of the charged crime, so long as it “fairly informs the accused of the nature of the charged crime … and ‘if it informs the accused of the specific offense with which he is charged and does not mislead him.’”

Utilizing this criterion, we have no doubt that Jenkins was fairly apprised of the nature of the crime charged with sufficient specificity that he was neither misled nor surprised to the extent that his ability to mount a defense was compromised in any way.

Whether the touching occurred in the pool or in the shower, it took place in the course of an uninterrupted sequence of events which occurred at the recreation center. The discrepancies in J.S. and J.F.’s recitation of those events at trial from the accounts in their statements to investigators merely go to credibility, a matter which could be, and was, probed in the course of cross-examination. Because Jenkins is unable to demonstrate prejudice to his defense by reason of the trial testimony of J.S. and B.F., there can be no reversible error.

Jenkins’ fourth allegation of error focuses upon prosecutorial misconduct during closing argument. As outlined by the Supreme Court in *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002), reversal due to prosecutorial misconduct in closing is warranted only:

if the misconduct is “flagrant” or if each of the following three conditions is satisfied:

- (1) Proof of defendant's guilt is not overwhelming;
- (2) Defense counsel objected; and
- (3) The trial court failed to cure the error with a sufficient admonishment to the jury.

Our review of the prosecutor’s comments convinces us that his statements were not “flagrant” nor sufficiently egregious to have deprived Jenkins of his right to due process.

The first allegedly objectionable comment was an attempt to explain to the jury what was going on during the many bench conferences which had occurred during the trial, stating:

You know, certain tapes can be played, certain people can say this. But just because you haven’t heard some of those things, it doesn’t mean this case hasn’t been proven to you beyond a reasonable doubt.

We perceive no grounds for reversal in that statement.

The second allegedly objectionable comment was directed at the discrepancies in J.S.’s story. The prosecutor argued that J.S. had divulged more information about what had transpired as he became more comfortable with the investigators and added:

I guarantee there’s a whole lot more we don’t know about still today. I guarantee there’s a whole lot more.

The trial court denied the motion for mistrial but admonished the jury that they were not to consider extraneous matters and that they were limited in their deliberations to

“matters in evidence.” We are convinced that this admonishment effectively cured any error attributable to that statement.

The final comment cited as warranting a mistrial occurred when the prosecutor stated that Jenkins “is one of the most offensive people you’ll ever meet. Someone who sexually abuses young, vulnerable **children**.” At the bench conference on Jenkins’ objection to the use of the word “children” when only crimes against J.S. had been charged, the prosecutor immediately acknowledged her error in not having used the word “child.” The trial court denied the mistrial motion but required the prosecutor to tell the jury that it was only one child involved. We agree with the Commonwealth that the prosecutor’s correction of her comments to the jury was tantamount to an admonition and had the same curative effect. Thus, we find no reversible error in the allegations of misconduct either singly or in combination.

Nor do we find error in the failure to grant Jenkins’ motion for a directed verdict on the indecent exposure charge. Under KRS 510.148, the crime of first-degree “indecent exposure” is accomplished when a defendant “intentionally exposes his genitals under circumstances in which he knows or should know that his conduct is likely to cause affront or alarm to a person under the age of eighteen (18) years.” The elements of that crime were sufficiently proven by the Commonwealth to withstand Jenkins’ motion.

The Commonwealth presented evidence that at a time when single showers were available, he directed the boys to take off their trunks to shower off the chlorine from the pool and entered a single small shower with J.S. while they were both naked.

B.F. testified that he looked in that shower stall and saw Jenkins touch J.S. on his “privates.” Drawing all reasonable inferences from this evidence, the jury could reasonably find Jenkins knew or should have known that this exposure of his genitals would likely cause affront or alarm to a young boy to whom he was not related. Under the well-established standard set out in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky.1991), Jenkins was not entitled to a directed verdict of acquittal on the indecent exposure charge.

Jenkins also complains that the length and hours of the jury’s deliberations deprived him of a fair trial. Matters concerning the extent and timing of jury deliberations are addressed to the sound discretion of the trial judge. Because the record discloses no abuse of that discretion in this case, we find no basis for reversal.

Here, the jury commenced their deliberations at 4:45 p.m. and at 12:10 a.m. announced that they were deadlocked. Over Jenkins’ objection, the trial court instructed the jurors pursuant to RCr 9.57 and sent them back for further deliberations. Under these circumstances, Jenkins posits that the late night deliberations resulted in a coerced verdict. On these facts alone, we cannot agree.

While Jenkins points to no hard and fast rule in this Commonwealth regarding late night jury deliberations, clearly there are situations so egregious as to amount to a deprivation of due process. For example, the Court in *Tarrence v. Commonwealth*, 265 S.W.2d 40, 52 (Ky.1953), observed that there are limits to the amount of time a jury can effectively deliberate:

However, it strikes us that where a jury has gone through an all-day trial, keeping or permitting them to continue their deliberations practically all night without interruption might result in an unjust verdict from tired minds.

The length and timing of the deliberations in Jenkins' case did not reach that threshold and did not deprive him of a fair trial. As previously stated, absent evidence of abuse, we must defer to the trial judge's exercise of discretion in the area of the length and timing of jury deliberations. *Gilbert v. Commonwealth*, 21 Ky. Law Rep. 416, 51 S.W. 590 (1899). Nevertheless, we again emphasize that there are situations in which the spirit of a fair trial would be violated if jurors, by virtue of deliberations extending well-beyond the limits of normal endurance, were too exhausted to render a reasoned verdict. However, that situation did not obtain in this case and is not cause for reversal of Jenkins' convictions.

The penultimate issue presented for our review centers upon Jenkins' request for production of J.S.'s psychotherapy records. After an *in camera* review of the records, the trial court granted Jenkins' motion for production but limited disclosure to a single matter potentially exculpatory in nature. Jenkins asks this Court to review the sealed records to determine whether the trial court followed the dictates of *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003), which provides:

If, as here, discovery is denied, a conviction occurs, and an appeal is taken, the appellate court, upon request, can review the records and determine whether the trial judge's ruling was an abuse of discretion. Appellee has not made that request in this case. However, in the interests of judicial economy, we have reviewed the records and determined that the trial judge correctly determined that they contain no exculpatory information.

If the *in camera* inspection reveals exculpatory evidence, *i.e.*, evidence favorable to the accused and material to guilt or punishment, including impeachment evidence, that evidence must be disclosed to the defendant if unavailable from less intrusive sources.

122 S.W.3d at 564, footnote omitted. Suffice it to say that a review of the records in question confirms the decision of the trial judge as to the limited release of matters contained therein, as well as his compliance with *Barroso*.

Finally, Jenkins argues that the cumulative effect of the alleged errors deprived him of the due process guaranteed by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States constitution and Sections 10 and 11 of the Kentucky Constitution. Review of Jenkins' contentions disclosed a single error regarding the failure to make specific findings as to whether Dr. Campbell's testimony satisfied the KRE 702 criteria for admission and remand is limited to that issue. There is thus no basis for a claim of cumulative effect.

Accordingly, the case is remanded for the trial court to make specific findings in conformity with *Stringer* as to the admissibility of Dr. Campbell's testimony regarding improper interview techniques. If upon reconsideration, the trial court determines that Dr. Campbell's testimony should have been admitted, a new trial must be granted. On the other hand, if the trial court remains convinced that Dr. Campbell's testimony was properly excluded for failure to satisfy the KRE 702 factors for admission, the judgment will stand affirmed subject to the defendant's right to appeal the propriety of the trial court's decision to exclude Dr. Campbell's testimony.

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