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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000628-MR

ETHAN HUGHES APPELLANT

v.

APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NO. 10-CR-00044

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

COMBS, JUDGE: Ethan Hughes appeals his conviction of rape in the second degree in the Crittenden Circuit Court. After our review of the record and the law, we affirm.

On the weekend of November 7-9, 2008, Hughes met and engaged in a sexual relationship with C.H., who was twelve years of age at the time. Hughes

was nineteen years of age. Four days before her thirteenth birthday, C.H. delivered a baby boy. DNA tests confirmed that Hughes was the child's father, and he was charged with second-degree rape.

A jury trial was held on January 27, 2012. C.H. testified that when they met, she told Hughes that she was sixteen. Other witnesses testified that in 2008, they heard both C.H. and her mother represent that C.H. was sixteen. Hughes testified that he believed that C.H. was sixteen. Nonetheless, the prosecution presented pictures of C.H. that were taken when she was twelve years of age, and the jury found Hughes guilty of second-degree rape. He received a sentence of ten years' incarceration. This appeal follows.

On appeal, Hughes presents multiple evidentiary issues. Our standard of review for evidentiary issues is whether the trial court abused its discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (*overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008)). Our Supreme Court has defined *abuse of discretion* as a court's acting arbitrarily, unreasonably, unfairly, or in a manner "unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Hughes was charged and prosecuted pursuant to Kentucky Revised Statute[s] (KRS) 510.050(1)(a), which defines *rape in the second degree* as the act of sexual intercourse between a person who is eighteen years or more and/with a person under the age of fourteen years. Hughes relied on KRS 510.030 for his defense:

> In any prosecution under this chapter in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old, . . . the defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent.

KRS 500.010 provides that "[t]he commentary accompanying this code may be used as an aid in construing the provisions of this code." The commentary regarding KRS 510.030 is dispositive of two of Hughes's arguments. Therefore, we will examine them first.

Hughes first argues that the trial court erred in disallowing the testimony of a police detective concerning his interview with another young man, who stated that C.H. had told him that she was sixteen years old. Hughes sought to introduce the testimony in order to impeach C.H.'s testimony that she had not told anyone other than Hughes that she was sixteen. The Commonwealth argued that its introduction would violate Kentucky Rule[s] of Evidence (KRE) 412, which bars testimony concerning a victim's prior sexual activity. The court agreed, reasoning that the detective had interviewed the other young man because C.H. had initially named him as a putative father of her child. The court declined to allow this evidence to be presented to the jury due to the likelihood that the jury would speculate about C.H.'s sexual history. We agree.

The commentary following KRS 510.030 provides in relevant part:

> In any prosecution for an offense under this chapter in which the victim is deemed "incapable of consent" because he is less than 16 years old, evidence relating to

> prior unchastity on the part of the victim ***shall not be admissible*** in mitigation of the offense charged. This determination is consistent with prior Kentucky law. However, in any prosecution under this chapter in which the victim is 16 or older, evidence of prior unchastity on the part of the victim would be admissible on the question of consent. (Emphasis added.)

That commentary addresses the very situation that faced the trial court. The jury was aware that local police had conducted an investigation into the case after social services discovered that C.H. was pregnant at the age of twelve. Under those circumstances, testimony by an officer related to interviewing a young man other than Hughes would clearly imply promiscuity on her part – the very result that is forbidden by the statute.

Furthermore, C.H., Hughes, and several other witnesses testified that C.H. had told Hughes that she was sixteen. C.H. was not on trial. The issue was ***Hughes's*** belief. Whether C.H. had told ***others*** that she was sixteen was ***irrelevant to his belief.*** One of Hughes's witnesses testified that she believed C.H. was sixteen, and another of his witnesses testified that C.H. often told people that she was sixteen. The substance of the testimony was, in effect, presented to the jury without any implications that C.H. was sexually active other than her relationship with Hughes. Thus, we conclude that the trial court did not err in excluding the police officer's testimony.

Hughes next argues that the trial court and the Commonwealth improperly informed the jury that the defendant bore the burden of proving his defense; *i.e.,* that he believed C.H. was sixteen years old. In addressing this argument, we again

turn to the pertinent statute. KRS 510.030 provides that ignorance of lack of capacity to consent may be proven as exculpatory by the defendant. The accompanying commentary elaborates as follows:

> The prosecution is not required affirmatively to establish knowledge of incapacity to consent because this would place an unduly heavy burden on the state. The defendant must raise lack of knowledge of the particular condition as a defense. . . . The statute does not expressly require that the mistake be "reasonable." Since the accused must raise the defense and since usually there is no source of information about his mistake other than the accused himself, this means that as a practical matter the accused will need to take the stand to testify in his own behalf. At this point the factfinders should be competent to judge his credibility, so that no express requirement of "reasonable mistake" is necessary.

Thus, the statute itself shifts the evidentiary burden as to exculpation to the defendant. The jury's instructions duly reflected the commentary: "You shall consider what he actually believed and not whether it was a reasonable belief. The burden of proof for this defense is on the Defendant."

In this case, Hughes testified in his own behalf. He provided several reasons for not realizing C.H.'s age. He testified that (1) he did not realize that she was in sixth grade because their encounter occurred on a weekend; (2) he had "beer goggles"; (*i.e.,* he had been drinking too much to make a sound judgment); and (3) C.H.'s mother had told him that she was sixteen. The jury had the choice to believe him or not to believe him, and they chose not to believe him. There was no error committed by the court.

Hughes next contends that his rights to due process were compromised by the examination of a potential witness outside his presence. After the Commonwealth rested its case, the court met with both counsel in chambers. Hughes's counsel wanted to present testimony from Geoffrey McNary, a friend of Hughes. Counsel intended for McNary to testify that he (McNary) had believed that C.H. was sixteen around the time that Hughes met her. The court summoned McNary to chambers. There, under oath, he previewed his testimony with counsel and the court. After questioning McNary, Hughes's counsel made a strategic decision not to proffer McNary's testimony.

Hughes now claims that he was unduly prejudiced by his absence from the *in camera* hearing, which he has characterized as a "deposition." Depositions are governed by Kentucky Rule[s] of Civil Procedure (CR) 27. According to CR 27.01, a party must petition the court and serve each person named in the petition according to CR 4. All parties are present at a deposition -- as well as a court reporter. In contrast, what happened in court in the course of the trial itself was an *in camera* review for the purpose of determining if McNary's testimony would be admissible as a matter of law. We cannot agree with its characterization as a deposition.

Additionally, Hughes did not preserve this claim of error. At the time of the conference, his counsel informed the court that Hughes did not need to be present. No objection was made as to this course of conduct. Therefore, we will conduct an

analysis for palpable error pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 10.26.

Our Supreme Court has held that a palpable error is one that results in "manifest injustice" affecting a party's substantial rights. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). It explained that an appellate court may recognize palpable error as one that "seriously affects the fairness, integrity, or public reputation of judicial proceedings" and thus that an appellate court should probe the record to determine if the error was "shocking or jurisprudently intolerable." *Id*. at 4.

Hughes is correct that a defendant has the right to be present at every critical stage of proceedings. RCr 8.28(1). He has cited *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003). In *Caudill*, the Supreme Court held that a defendant did not have to be present when only matters of law are being determined. Hughes argues that in this case, he was prejudiced by not being present because his counsel ultimately decided not to present the testimony. We cannot agree. We have reviewed the *in camera* hearing. Its purpose was to determine if a witness's proffered testimony was admissible. The trial court found that it was admissible. However, McNary's testimony directly contradicted Hughes's arguments. McNary said that C.H. did not act as if she were sixteen and that he thought she might have been fifteen at the most. Therefore, Hughes's counsel declined to present McNary to the jury for the obviously prejudicial impact that it would have produced. Hughes does not offer any proof of how his presence would have

caused a different outcome. The integrity of the proceedings was not affected by Hughes's absence from the court's chambers. No manifest error occurred; nor did the trial court abuse its discretion.

Hughes also argues that the trial court abused its discretion by allowing the jury to see a photograph of C.H. in the hospital with her baby that was taken the day after the child's birth.

In order to be admissible, photographs must be relevant, and their probative value must outweigh their prejudicial effect. *Chestnut v. Commonwealth*, 250 S.W.3d 288, 302 (Ky. 2008). "Mere prejudice alone will not exclude a relevant photograph; the prejudicial effect must be substantial. In this regard, a trial judge has broad discretion in determining the admissibility of photographic evidence." *Id*. (citing *Woodall v. Commonwealth*, 63 S.W.3d 104, 130 (Ky. 2001)).

Hughes suggests that because C.H. was not wearing makeup in the photograph, it was extremely prejudicial and did not have probative value. We disagree. When she testified, C.H. was fifteen years of age. The only issue at trial was whether Hughes had believed that she was sixteen when she was twelve; her appearance at the time that Hughes met her had probative value. C.H. testified that she was only wearing eye makeup when she and Hughes met. Furthermore, the photograph depicted C.H. ***nine months after*** Hughes met her – a substantial period of time in adolescent development. If anything, a photograph taken that much later could only have benefited Hughes because of the added maturity of nearly another year of age. Additionally, we note that Hughes admitted that he had fathered the

child. We cannot agree that the court abused its discretion in allowing the jury to view the photograph.

Hughes's final argument is that he should have been allowed to testify about C.H.'s previous sexual activity because the Commonwealth asked him if he had suspected that he was the child's father. There is no merit to this argument. As we already pointed out, the official commentary to KRS 500.030 prohibits reference to the previous sexual activity of a person who is under sixteen years of age. KRE 412(b)(1) provides the following exceptions as to the admissibility of the sexual history of a victim:

> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution;
> (C) any other evidence directly pertaining to the offense charged.

None of the exceptions applies in this case. There was no question that Hughes had a sexual relationship with C.H. when she was twelve years old. The trial court did not err by preventing him from discussing any other putative fathers.

We affirm the Crittenden Circuit Court.

DIXON, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: I respectfully dissent from the majority opinion.

Hughes was charged with second-degree rape. While Hughes presents several issues which may have resulted in error, I address only the admissibility of a photograph of C.H. in the hospital holding a child because of its clear inadmissibility and resultant reversible error.

I agree with Hughes that the relevance is minimal (lack of make-up and in a hospital bed holding her child) and that the prejudice resulting from introduction of the photograph is extreme and reversible error. First, if the intent of introducing the photograph was to show how C.H. appeared on the date she and Hughes had sex, then the lack of make-up would certainly be a relevant factor. Curiously, make-up often has the effect of making the old look younger and the young look older. C.H. wearing makeup on the date in question would likely make her appear older and the introduction of a photograph to the jury of C.H. without makeup would, in all likelihood, give her a younger appearance. This is particularly relevant in light of the defense put forth by Hughes concerning his belief of C.H.'s age on the date of their encounter. If the purpose of the photograph was to show how C.H. appeared when encountered by Hughes, the photo presented a picture of C.H. that could only be viewed as far from the truth. Thus, both its relevance and probative value was minimal. This photograph should have been excluded because of minimal relevance and because the probative value

was clearly outweighed by the extreme undue prejudice to Hughes; failure to do so resulted in reversible error.

Second, C.H.'s newborn child is included in the photograph. There is no contention that a sex act did not occur, so how could the fact that a child was born from said act be relevant to the elements of a rape charge? To the contrary, I do understand how a jury would be extremely prejudiced toward Hughes as a result of a child born of their brief encounter.

I would reverse and remand for a new trial.

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