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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000730-MR

JERRY MONROE HARRISTON — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NOS. 10-CR-00131 & 10-CR-00167

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART;
REVERSING IN PART;
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MAZE AND THOMPSON, JUDGES.

MAZE, JUDGE: Jerry M. Harriston appeals from a judgment of the Bell Circuit Court convicting him of sexual abuse in the first degree and being a persistent felony offender in the second degree. Harriston contends that the trial court erred in excluding testimonial evidence and in imposing court costs.

Harriston was initially charged with one count of sexual abuse in the second degree, which was later amended to sexual abuse in the first degree when it was discovered that the victim was less than twelve years of age. The charge stemmed from an episode which occurred while Harriston and his nine-year-old son were living with Charlisa Partin and her four children. The children slept in two bedrooms at one end of the house, Partin's two daughters in one room and the three boys in the other. Harriston and Partin slept on the couch in the living room. The bedrooms were not visible from the living room. The children's bedtime was 8 p.m., but they were allowed to watch television in their rooms. Harriston usually gave the boys "high fives" before going to bed and would hug the girls, E.P. and her younger sister, S.P.

On March 11, 2009, the entire family was watching the television program "American Idol." Harriston went to the bedrooms to follow the nightly routine with the children. He talked to S.P. about a cell phone he had given her, and hugged the girls goodnight. He returned to the living room to continue watching the show. His favorite contestant was voted to remain on the show, and Harriston went back down the hallway, yelling the contestant's name. He planned to heckle S.P. about it, but discovered that she was already asleep. According to Harriston, E.P. was not asleep, and she jumped out of bed to hug him and attempted to kiss him. Harriston claimed that he turned his head and she kissed him on the jaw. C.H., Harriston's son, testified that he witnessed this incident. According to Harriston, he told E.P. he would not say anything to her mother about her attempt

to kiss him. He claims that he did not want E.P. to be in trouble and that he feared Partin might use corporal punishment on her. He claims that he had tried to tell Partin in the past that he thought E.P. had a crush on him.

According to E.P., however, Harriston kissed her, put his tongue in her mouth, and caressed her buttocks. She also claimed that he later came back down the hall and told her not to tell anyone what had happened.

The next day, E.P. told two friends at school that Harriston had kissed her and rubbed her buttocks. One of these children told her mother, who was a teacher at the school. The episode was reported to the authorities and Harriston was charged with sexual abuse in the first degree and with being a persistent felony offender in the second degree (PFO) stemming from a conviction in 2001 for trafficking in a controlled substance. The charges were consolidated for trial. The jury found Harriston guilty on both charges. The trial court sentenced him in accordance with the jury's recommendation to five years on the sexual abuse charge, enhanced to ten years by the PFO. The trial court also imposed court costs in the amount of $151. This appeal followed.

Harriston argues that the trial court improperly excluded the following evidence: (1) the testimony of Daniel Bingham, a boyfriend of Partin's, regarding telephone conversations with defense investigator Liz Toohey; (2) the testimony of Harriston's son regarding what E.P. had said to him on a previous occasion; (3) Harriston's own testimony regarding what women at Partin's workplace said after

he gave her a Valentine's Day card and stuffed animal, and what Partin said to him in a telephone conversation about gifts he had purchased for E.P.'s sister.

Our standard when reviewing a question of admissibility of evidence is whether the trial court abused its discretion. *Johnson v. Commonwealth*, 105 S.W.3d 430, 438 (Ky.2003). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

Daniel Bingham's testimony

Daniel Bingham was a witness for the Commonwealth. He had a past relationship with Partin before she began living with Harriston, and was dating her again at the time of Harriston's trial. After Bingham and Partin broke up, Bingham called Harriston and left a message on his voicemail which was played for the jury. In the message, Bingham claimed to have personal knowledge that E.P.'s allegations against Harriston were false.

On direct examination, Bingham in effect recanted, testifying that he was drunk and had been smoking pot when he left the message for Harriston, whom he had never met. He explained that he was angry about the breakup of his relationship with Partin, and left the message as a way to retaliate against her. He said that E.P. had never spoken to him about her allegations against Harriston. He also testified that he made other attempts at the time to upset and embarrass Partin.

On cross-examination, defense counsel tried to impeach Bingham by showing that the statements he made in the voicemail were actually true. Bingham

was asked whether he had met with various people, including Liz Toohey, an investigator for the defense. Defense counsel referred to phone calls between Bingham and Toohey that had occurred on two specific dates. Bingham said he had never spoken with Toohey. At that point, the prosecutor objected to the testimony on the grounds that Toohey could not offer impeachment testimony against Bingham because she had been present in the courtroom all day, seated at defense counsel's table. The trial court sustained the objection and admonished the jury to disregard Bingham's testimony regarding the calls to Toohey.

Harriston maintains that Bingham's testimony that he had never met with Toohey was false. He argues that he had the right to cross-examine and impeach Bingham about this testimony, and that he was deprived of his right to present his defense. Kentucky Rules of Evidence (KRE) 801A(a)(1) provides in part that

> A statement is not excluded by the hearsay rule, even though the declarant [Toohey] 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[.]"

The rule of evidence governing separation of witnesses provides as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
>
> (1) A party who is a natural person;

> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
>
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

KRE 615.

"The rationale behind the rule is the recognition that a witness who has heard the testimony of previous witnesses may be inclined, consciously or subconsciously, to tailor his testimony so that it conforms to the testimony given by other witnesses." *McGuire v. Commonwealth*, 368 S.W.3d 112-13 (Ky. 2012), *citing Smith v. Miller*, 127 S.W.3d 644, 646 (Ky.2004). "Under KRE 615, witness separation is mandatory 'in the absence of one of the enumerated exceptions.'" *Hatfield v. Commonwealth*, 250 S.W.3d 590, 594 (Ky.2008) (quoting *Mills v. Commonwealth*, 95 S.W.3d 838, 841(Ky. 2003)).

Harrison argues that subsection (2) of KRE 615 permits both the prosecution and the defense to have a designee (such as Toohey) sit at counsel table and not be excluded from testifying. We, however, agree with the Commonwealth that the plain language of subsection (2) permits only a party which is not a natural person, such as the Commonwealth, to have a designated representative.

Witnesses may nonetheless be exempted from the general exclusionary rule under subsection (3), if a showing is made that their testimony is essential to the presentation of the case. "Whether a witness is essential, is and will remain under the discretion of Kentucky's trial judges." *Id.* Defense counsel did not make such

a showing in this case, arguing only that Toohey's testimony would be proper impeachment of Bingham and that her presence at the trial would not change her testimony in any way.

Harriston argues that a distinction should not be made between allowing the testimony of investigators for the Commonwealth and for the defense, contending that the best course would have been to allow Toohey to testify, subject to proper impeachment on cross-examination. He relies on *Capshaw v. Commonwealth*, 253 S.W.3d 557 (Ky. App. 2007), a case in which the appellant alleged that the separation of witnesses rule was violated and collusion occurred when a police detective spoke with the victim and her mother about some evidence during a trial recess and then testified. The Supreme Court held that the trial court did not abuse its discretion in allowing the detective to testify. *Capshaw* does not, however, stand for the proposition that investigators who have not been separated should be allowed to testify in all cases as long as they are subject to impeachment on cross-examination; such a holding would negate the provisions of KRE 615 and impinge upon the discretion afforded to the trial court. Toohey's testimony may well have been admissible if the requisite showing had been made by the defense that her testimony was essential, as required under subsection (3). The trial court did not abuse its discretion in ruling that Toohey could not testify and that consequently Bingham could not testify regarding his alleged conversations with her.

Testimony of Harriston's son

Harriston's twelve-year-old son, C.H., was asked by defense counsel whether the victim, E.P., had ever slapped him. He answered in the affirmative. Defense counsel then asked him to explain what occurred. When C.H. tried to relate what E.P. had said to him, the Commonwealth attorney objected, on the grounds of hearsay and relevance. Defense counsel argued that E.P.'s statements were not hearsay because she had testified at trial. The Commonwealth attorney asked which statement by E.P. the defense was trying to impeach. Defense counsel responded that she was not trying to impeach E.P., but rather was trying to bring in evidence to show that E.P. was manipulating the situation because her mother was not meeting her emotional needs. The Commonwealth attorney argued that defense counsel was attempting to introduce evidence that E.P. slapped C.H. because he had caught her masturbating. The Commonwealth attorney contended that this testimony would be evidence of sexual behavior that had to be excluded under KRE 412 because no proper notice had been given. Defense counsel disagreed, stating that masturbation was not necessarily sexual behavior. She conceded, however, that she had not observed the notice and hearing requirements of KRE 412. She explained that the evidence was important to show that E.P. had made up her allegations against Harriston in order to avoid getting into trouble. She explained that C.H. had caught E.P. masturbating and told his father, and that E.P.'s fear that Harriston would tell her mother caused her to fabricate her allegations against him. The trial court ruled that the testimony concerning C.H.

catching E.P. masturbating was not admissible because the requirements of KRE 412 had not been met.

KRE 412 (a) (1) provides that "Evidence offered to prove that any alleged victim engaged in other sexual behavior" or any "alleged victim's sexual predisposition" is generally inadmissible in any civil or criminal proceeding involving alleged sexual misconduct. There are three exceptions to this rule in criminal proceedings:

> (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; and
>
> (C) any other evidence directly pertaining to the offense charged.

KRE 412(b)(1).

The rule further provides that any party intending to offer evidence under one of these exceptions must do the following:

> (A) file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
>
> (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

Before admitting such evidence, the trial court is required to "conduct a hearing in camera and afford the victim and parties a right to attend and be heard." KRE 412 (c)(2).

We agree that the testimony regarding E.P.'s alleged masturbation fell within KRE 412(a)(1), as evidence offered at least in part to prove that E.P. engaged in other sexual behavior or sexual predisposition. Harrison argues that the evidence was not being offered for the truth of the matter asserted, and hence was not hearsay. The evidence nonetheless fell within the parameters of KRE 412, and thus the requirements of that statute had to be observed before it could be admitted. The evidence was, nonetheless, highly prejudicial and may have been interpreted by the jury to mean that E.P. engaged in sexual behavior. The evidence may still have been admissible under KRE 412(b)(C) to show E.P. had a motive to lie about the offense charged, but by defense counsel's own admission, a motion had not been filed or served, nor had a hearing been conducted, as required under KRE 412. The trial court did not abuse its discretion in excluding the testimony.

Harriston's testimony

Next, Harriston argues that the trial court erred in excluding his testimony regarding what some women at Partin's workplace said after he gave her a Valentine's Day card and stuffed animal. Harriston argues that the testimony was improperly excluded under the hearsay rule because it was not being offered for the truth of the matter asserted. Harriston does not divulge the content of the

testimony, beyond vaguely stating that it was for the purpose of "giving the whole story."

He also argues that the trial court erred in excluding, on hearsay grounds, his testimony regarding what E.P.'s sister (who had not testified) had told him about a cell phone he had purchased for her. Again, Harriston has not described the content of the testimony, its significance to his case or provided any citations to the record to show why the exclusion of the evidence was reversible error.

Because Harriston's arguments regarding his excluded testimony are so vague as to evade our ability to meaningfully review the alleged errors, we will not consider them. *Lukjan v. Commonwealth*, 358 S.W.3d 33, 45-46 (Ky.App. 2012).

Imposition of court costs

Finally, Harriston argues that the trial court erred in imposing court costs in the amount of $155, to be paid upon his release. Harriston argues that the imposition of costs is incompatible with an order signed by the trial court at his sentencing hearing, which states that Harriston "is a pauper within the meaning of KRS [Kentucky Revised Statutes] 453.190 and KRS 31.110(2)(b)" and grants him leave to pursue his appeal in formal pauperis.

Court costs may be imposed on an indigent defendant, "unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." *Smith v. Commonwealth*, 361 S.W.3d 908, 921 (Ky. 2012) (citing KRS 23A.205).

The Commonwealth argues that Harriston had the burden of showing that he was a "poor person" as defined by statute and that because he failed to make this argument he has waived the error. "Fines and costs, being part of the punishment imposed by the court, are a part of the sentence imposed in a criminal case." *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010). "Sentencing is jurisdictional. Subject matter jurisdiction may be raised at any time and cannot be consented to, agreed to, or waived by the parties." *Gaither v. Commonwealth*, 963 S.W.2d 621, 622 (Ky. 1997).

In this case, the trial court found that Harriston met the definition of a poor person as defined by KRS 453.190. Before imposing court costs, the trial court was also required to consider his ability to pay court costs now and in the foreseeable future. The imposition of court costs must therefore be reversed, and the matter remanded for further consideration by the trial court.

Conclusion

We reverse only that portion of the judgment which imposes court costs, and remand for further proceedings in accordance with this opinion. The judgment is affirmed in all other respects.

CAPERTON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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