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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001115-MR

SAMUEL PATTON

APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 10-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: JONES, D. LAMBERT, AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: This matter is before the Court on appeal from the Edmonson Circuit Court's order denying the motion of the Appellant and defendant below, Samuel Patton, to withdraw his post-verdict guilty plea and his waiver of the right to appeal. Patton also seeks review of the conviction itself. Having reviewed the record, for the reasons herein described, we reverse.

I. FACTUAL AND PROCEDURAL HISTORY

On March 20, 2014, after the close of the guilt phase of his trial, a jury found Patton found guilty of first degree rape of a victim under twelve years old and unlawful transaction with a minor in the third degree. Rather than proceeding immediately to the sentencing phase of the trial, Patton's counsel began negotiations with the Commonwealth. Those negotiations proved successful, as the parties emerged from negotiations with an agreed sentence of 17 years, where Patton would otherwise have faced a sentence of twenty to fifty years, or life, pursuant to KRS 532.060(2)(a).

Patton accepted the agreement and signed a written Motion to Enter Guilty Plea (form AOC-491), and engaged in a standard oral plea colloquy pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1209, 23 L.Ed.2d (1969). Because Patton was found guilty by a jury, the trial court informed him that he had the right to appeal the verdict. After having agreed to the sentence, Patton was presented with his rights both in writing on the form and orally in the colloquy. He was asked if he was knowingly, voluntarily, and intelligently, entering into the agreement and whether he understood that he was waiving his right to appeal to a higher court. He answered in the affirmative to the trial court's questions, and signed the form, indicating agreement.

At his next appearance in May 2014, Patton moved to withdraw his waiver. He argued that the plea agreement was void because a jury had convicted him of the offenses charged prior to his entry into the agreement. He further

argued that his waiver was not undertaken knowingly, voluntarily, and intelligently, because the presiding judge of the trial court had previously advised Patton of his belief that no appealable errors had occurred during the trial. The trial court denied the motion and sentenced him in June to a term of incarceration consistent with the agreement.

This appeal followed, wherein Patton advances the same arguments he raised before the trial court. He argues that the trial court erred during the guilt phase of his trial by improperly admitting hearsay witness statements into evidence. The threshold issue, however, is whether the trial court properly found that Patton had the requisite knowledge, volition, and intelligence, to enter into the plea agreement and the appurtenant waiver of his rights.

II. ANALYSIS

A. STANDARD OF REVIEW

A defendant's right to appeal is a basic constitutional right that may be waived by entering a guilty plea. *Johnson v. Commonwealth*, 120 S.W.3d 704, 706 (Ky. 2003). However, for the waiver to be effective, the guilty plea containing the waiver must have been given knowingly, voluntarily, and intelligently "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. U.S.*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). We review a trial court's determination that a defendant knowingly and voluntarily entered a guilty plea for clear error; that is, whether substantial evidence supported the determination. *Dunlap v. Commonwealth*, 435 S.W.3d 537, 557 (Ky. 2013).

If Patton's plea was entered knowingly, voluntarily, and intelligently he is precluded from challenging the evidence presented against him at trial. *Bishop v. Commonwealth*, 357 S.W.3d 549, 552 (Ky.App. 2011); *Taylor v. Commonwealth* 724 S.W.2d 223, 225 (Ky.App. 1986).

Admissibility of evidence is entirely within the discretion of the trial court. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). Therefore, evidentiary rulings of a trial court are reviewed for abuse of discretion. *Dunlap v. Commonwealth*, 435 S.W.3d 537, 553 (Ky. 2013).

B. PATTON'S PLEA AGREEMENT WAS NOT ENTERED INTO KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY

The Court first addresses Patton's assertion that the entry of the plea agreement could not have possibly been knowingly, voluntarily, and intelligently, made, because it was a violation of the double jeopardy protections in the Fifth Amendment of the U.S. Constitution, as applied to the states by the Fourteenth Amendment. Regarding double jeopardy, Section 13 of the Kentucky Constitution provides: “[n]o person shall, for the same offense, be twice put in jeopardy of his life or limb....” This contention that Patton faced jeopardy for life and limb twice is disingenuous. Though he was “found” guilty twice in a procedurally peculiar manner, it is not without precedent, and those precedents failed to note double jeopardy concerns. See *Simms v. Commonwealth*, 354 S.W.3d 141 (Ky.App. 2011); *Johnson, supra*; *U.S. v. Tosh*, 668 F.3d 374 (6th Cir. 2012).

Patton also argued that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently made, owing to the combination of the plea colloquy and the waiver language in the agreement. This Court agrees. The plea colloquy, which included the court advising Patton that the entry of the guilty plea waived his right to appeal, occurred shortly after the trial court advised Patton that he did have the right to appeal the jury's verdict. The standard *Boykin* colloquy is not appropriate in the situation where a defendant enters into a plea agreement after a jury verdict. This procedure undoubtedly created confusion, which was not assuaged by the trial court's failure to explain to Patton which of the rights affected by the waiver remained applicable. This creates a clear question as to whether Patton possessed the requisite knowledge of the full array of likely consequences of the plea. In light of this failure, this Court must conclude that the trial court's finding, that the plea was not knowingly, voluntarily, and intelligently made, was not supported by substantial evidence.

C. THE TRIAL COURT'S ADMISSION OF HEARSAY EVIDENCE WAS REVERSIBLE ERROR

Patton argues that his trial was replete with evidentiary errors regarding inadmissible hearsay evidence. Specifically, he contends that the witnesses testified of the victim's prior consistent statements, which was an impermissible bolstering of the victim's credibility under the Kentucky Rules of Evidence ("KRE"). The Commonwealth introduced the testimony of four witnesses in its case-in-chief: the victim, her mother, the investigating officer, and

the physician who examined her at the Children's Advocacy Center (hereinafter "CAC").

Each of the witnesses, other than the victim, testified that the victim had given them a statement related to the events of the night she claimed to have been raped by Patton. Patton did not object to the statements during the testimony of the victim's mother and the investigating officer, but did object to the testimony of the physician. Consequently, the error is not preserved as to the testimony of the mother and the investigating officer, and Patton requested palpable error review pursuant to Rule of Criminal Procedure ("RCr") 10.26. According to that rule, this Court must reverse when an error, though unpreserved, would work a "manifest injustice" if allowed to stand. On the other hand, because Patton did object to the testimony offered by the physician, the proper standard of review is abuse of discretion. This Court will examine the testimony of the mother and the officer under the palpable error standard, and the doctor's testimony under an abuse of discretion standard.

The victim's mother, Cheryl Coffey, testified that she first learned of Patton's encounter with her daughter days after the event, as the result of notes she and her daughter passed under a locked door. Coffey testified that her daughter had refused to come out of her bedroom, so Coffey wrote a series of questions on paper which she slipped under the door. The victim wrote her responses on the paper and slipped them back to her mother. Coffey testified as to the content of

these notes, and that they prompted her to conclude her daughter had been sexually assaulted in some way by Patton. She then contacted law enforcement.

The investigating officer, Edmonson County Deputy Sheriff Mike Vincent, spoke with the victim, and testified to the content of their conversation. Vincent's testimony included a hearsay statement from the victim identifying her rapist as Patton. Vincent then concluded the victim should be examined by a physician, and brought her to the CAC on March 2, 2010.

The doctor who examined the victim at the CAC was Dr. Jeffrey Blackerby, who described the facility as a place for children to "work out the details of sexual abuse" where staff would take a history of the patient, examine them, and "come to some conclusion as to what actually happened." Though he did not personally take the victim's patient history, Blackerby testified as to the content of the victim's statement, during which she twice identified Patton as her rapist. Blackerby testified that the victim recounted that she had no history of sexual activity prior to her encounter with Patton. Blackerby also conducted a physical examination of the victim, noting physical signs of a "partially healed tear in the hymen" and concluded, vehemently, that it must have been the result of a "penetrating type injur[y] to the vagina." Blackerby bolstered his own testimony by stating that he had consulted with another, unnamed, physician employed by the CAC, who reached the same conclusion.

The victim's credibility was a critical factor for the jury in the trial, as it was only by her testimony that the identity of her attacker and the non-

consensual character of the sexual activity could truly be established. All other evidence presented at trial on those two crucial facts was derived from her prior statements to the other witnesses. At no point did Patton offer evidence to indicate the victim had fabricated her testimony, had been improperly influenced, or held an improper motive. The testimony of Coffey and Vincent could therefore not have fallen under the exception to the prohibition on hearsay evidence found in KRE¹ 801A(a)(2), and its presentation to the jury was erroneous.

The testimony offered by Coffey and Vincent clearly served the purpose of a pre-emptive strike against an attack on the victim's credibility which never materialized. When analyzing KRE 801A(a)(2), the Kentucky Supreme Court has previously held that “[i]t is improper to permit a witness to testify that another witness has made prior consistent statements, absent an express or implied charge against the declarant of recent fabrication or improper influence.... Otherwise the witness is simply vouching for the truthfulness of the declarant's statement, which we have held to be reversible error.” *Dickerson v. Commonwealth*, 174 S.W.3d 451, 472 (Ky. 2005) (citing *Bussey v. Commonwealth*, 797 S.W.2d 483 (Ky. 1990)). “This Court has consistently recognized that this type of hearsay testimony is highly prejudicial, and unfairly bolsters the credibility of the alleged victim.” *Alford v. Commonwealth*, 338 S.W.3d 240, 246 (Ky. 2011).

¹ Kentucky Rules of Evidence.

The *Alford* Court even found that the trial court's admission of a detective's testimony as to the content of a recorded statement of an alleged child sexual abuse victim, when combined with testimony of a physician who repeated the allegations made by the victim (including identifying the perpetrator) during an examination, rose to the level of palpable error. *Id.* at 246-47.

In another factually similar case, *Hoff v. Commonwealth*, 394 S.W.3d 368 (Ky. 2011), the Supreme Court held that it was palpable error to allow a testifying physician to recount hearsay statements on the stand from a child victim of sexual abuse which identified the perpetrator. *Id.* at 379. The Court found the doctor's testimony, which twice quoted the victim's statement that her father had abused her, was inadmissible hearsay, but more importantly, found it to be "highly prejudicial for a doctor or other professional to repeat the hearsay statement of a child identifying the child's abuser." *Id.* at 373 (citing *Alford* at 248; *Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010)).

This Court agrees with Patton's assertion that the doctor's testimony here was even more prejudicial than that presented in *Hoff*. Not only did Blackerby's testimony improperly bolster the victim's by naming Patton as her attacker, but he also bolstered his own testimony by testifying that some other doctor independently confirmed his medical findings.

Applying this authority to the facts presented here, this Court concludes that the trial court abused its discretion in allowing Blackerby to testify unfettered by the prohibitions against bolstering the credibility of witnesses when it

has not been impeached. Further, the extreme prejudicial effect of such incompetent testimony, calls into doubt the substantial justice of the jury's verdict. The same can also be said of the testimony of Coffey and Vincent, which are so factually similar to evidence which appellate courts have held to be palpable error that it defies those decisions to attempt to distinguish them. The Court also therefore finds that the admission of their testimony rises to the level of palpable error.

While Patton calls on this Court to reverse the conviction based on the cumulative effect of the many evidentiary errors of the trial court, such reliance is unnecessary. “If an error is sufficient on its own to warrant reversal, a Court need not rely on cumulative error to overturn the case.” *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012). Any of the trial court's rulings on the testimony of Blackerby, Coffey, or Vincent, merit reversal on their own.

III. CONCLUSION

For the foregoing reasons, this Court concludes the trial court committed reversible error both when it refused to allow Patton to withdraw his waiver of his right to appeal the jury's verdict, and when it permitted the bolstering testimony of Coffey, Vincent and Blackerby to be presented to the jury during the guilt phase of the trial. Accordingly, the trial court's rulings are hereby REVERSED Appellant's conviction is hereby VACATED.

JONES, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

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