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RENDERED: JANUARY 25, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

NO. 2006-SC-00088-MR

DATE Feb 15, 07 E. A. Gray, Jr. D.C.

JAMES RICHARD TURLEY

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
INDICTMENT NO. 04-CR-01509

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury convicted James R. Turley of two counts of first-degree sodomy and one count of first-degree sexual abuse for which the trial court entered judgment imposing a maximum sentence of twenty years' imprisonment. On appeal, Turley argues for reversal of the judgment because the trial court allowed introduction of inadmissible evidence in the form of (1) a letter addressed to Turley from the alleged victim, and (2) the testimony of another victim who claimed that Turley had attempted sexual misconduct toward her in the past. Finding no reversible error, we affirm the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY.

Eleven-year old R.T. told her school counselor that her father, James Turley, had touched her vaginal area with his hand and mouth while she feigned sleep. In the ensuing investigation, the police questioned Turley and searched his home. Turley admitted touching R.T.'s vaginal area with his mouth and hands. And he was eventually charged with two counts of first-degree sodomy, one count of first-degree sexual abuse, one count of possession of marijuana, and two counts of possession of matter portraying sexual performance by a minor.

At trial, Turley admitted touching R.T.'s vaginal area twice; but he insisted that he was doing so to try to confirm her virginity. Turley denied touching R.T. with his mouth, instead testifying that he spit on his hands before touching her vaginal area. But R.T. testified that Turley touched her with both his hands and his mouth. R.T. also testified that Turley had touched her on previous occasions; although, she did not recall the precise dates of that touching.¹

Denying Turley's motion in limine, the trial court allowed Turley's wife's niece, S.H., who was about fourteen at the time of the alleged events, to testify that one evening while she was asleep on a couch, she was awakened because she sensed that someone was touching the zipper of her jeans. When she opened her eyes, Turley was standing near her. S.H. admitted that she disliked Turley and that she did not actually observe him touching her inappropriately.

¹ That previous, unspecified touching was the basis for one of the sodomy charges.

At the close of the trial, the trial court dismissed, on the Commonwealth's motion, one of the counts of possession of matter portraying a sexual performance of a minor. The remainder of the charges against Turley went to the jury, who acquitted him on the other count of possession of matter portraying a sexual performance by a minor, but convicted him of all other counts. The jury fixed punishment at twenty years' imprisonment for each first-degree sodomy conviction and five years' imprisonment for the first-degree sexual abuse conviction, to be served concurrently. The jury also recommended a thirty-day sentence for the possession of marijuana conviction.² The trial court sentenced Turley in accordance with the jury's recommendation for the felony convictions after which he filed this appeal as a matter of right.³

II. ANALYSIS.

A. The Introduction of a Letter from R.T. to Turley was Harmless Error.

Turley contends that the introduction into evidence, over his objection, of a letter written by R.T. to him was reversible error. We use the abuse of discretion standard when reviewing a trial court's decision to admit allegedly improper evidence.⁴ Under that standard, we agree with Turley that the trial court erred when it allowed the letter to come into evidence; but we hold that

² Turley's appeal raises no issues concerning the marijuana possession conviction, even though the final judgment raised Turley's penalty for that offense to twelve months' imprisonment.

³ See Ky. Const. § 110(2)(b).

⁴ Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994) ("[r]ulings upon admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion.").

its introduction was harmless error in light of the overwhelming evidence adduced by the Commonwealth.

In its entirety, the letter in question states:

Dear Dad,

I get in trouble a lot do you but I get a lot of toys and I get a lot of money it is like I am rich but I'm not I am just a plain 9 getting ready to be 10 I just wish I can just be a regular third Grader getting ready to be a 4th grader dad treat me like a regular kid please.

R.T. admitted writing the letter, but she testified that she did not recall why she wrote it. She agreed that there was nothing in the letter referring to any sexual touching. But Turley contends that allowing this letter into evidence prejudiced him because the Commonwealth insinuated during closing argument that the letter was written in response to sexual abuse by Turley. The Commonwealth responds to that argument by stating that the letter was properly introduced to “explain the nature of the relationship between [Turley] and R.T. and her sentiments toward her father.”

The paramount question before the jury was whether Turley engaged in sexually related touching of R.T. And the meaning of this letter is unclear. But it is clear that it contains nothing to aid the jury in deciding the paramount question. So the letter was irrelevant and inadmissible under Kentucky Rules of Evidence (KRE) 402.⁵

⁵ KRE 402 provides, in part, that “[e]vidence which is not relevant is not admissible.” “Relevant evidence” is defined in KRE 401 to mean “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

The mere fact that the letter was improperly introduced does not necessarily mean that Turley is entitled to a new trial because “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]”⁶ We must determine whether the improper introduction of this irrelevant letter was a harmless error.

Harmless error analysis requires an appellate to consider whether, on the whole case, there is a substantial possibility that without the error, the result would have been any different.⁷ Because we do not believe that a substantial probability exists that the outcome of this trial would have changed without this letter, we hold that its admission was harmless error. Given the circumstances of this case and the strong nature of the Commonwealth’s evidence against Turley, we fail to see how the introduction of the letter, which R.T. apparently wrote over one year before the touching that led to the indictment, prejudiced Turley’s substantial rights or was so inconsistent with the notions of justice and fairness as to require reversal of Turley’s conviction. The strong evidence against Turley came from Turley himself. He admitted inappropriately touching his daughter during police questioning. And he admitted at trial that he had touched R.T.’s vaginal area with his hand in an alleged attempt to confirm her virginity.

⁶ KRE 103(a). *See also* Kentucky Rules of Criminal Procedure (RCr) 9.24 (“[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.”).

⁷ Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

**B. Was the Introduction of S.H.'s Allegation
of Turley's Prior Attempted Sexual Abuse
Toward Her Reversible Error?**

Turley contends that reversible error occurred when S.H. was permitted to testify about an incident where she was allegedly awakened by someone trying to unzip her pants and, upon awakening, observed Turley near her. According to Turley, S.H.'s testimony was impermissible evidence of a prior bad act, which showed only that Turley had a disposition to commit sexual-abuse-type crimes against young females.

The admissibility of other crimes or wrongs by the accused is governed by KRE 404(b), which provides, in relevant part, that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

As stated previously, we review a trial court's decision to admit evidence under an abuse of discretion standard.⁸ But we have made clear that the exceptions contained in KRE 404(b) are to be strictly construed since the rule itself is exclusionary in nature.⁹ So "trial courts must apply the rule cautiously, with an eye [toward] eliminating evidence which is relevant only as proof of an accused's

⁸ Simpson, 889 S.W.2d at 783.

⁹ Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994) ("[b]ecause the degree of potential prejudice associated with evidence of this nature is significantly higher, exceptions allowing evidence of collateral criminal acts must be strictly construed. As a result, the thrust of KRE 404(b) has always been interpreted as *exclusionary* in nature.") (Internal quotation marks and citations omitted).

propensity to commit a certain type of crime.”¹⁰ In order to assist trial courts in determining whether KRE 404(b) material is admissible, we have set forth a three-part test: “(1) Is the evidence relevant? (2) Does it have probative value? (3) Is its probative value substantially outweighed by its prejudicial effect?”¹¹

As to the first two prongs of the test, we agree with the trial court that the evidence regarding the allegedly attempted sexually oriented misconduct toward S.H. was relevant and had probative value. The evidence contradicted Turley’s contention that he had touched R.T.’s vaginal area as an examination to attest her virginity, not for sexual gratification. So the evidence was relevant and probative to the issue of Turley’s knowledge, or motive, or intent, or common plan.

The third prong of the KRE 404(b) analysis presents a more difficult issue—balancing the probative value against the potential prejudice—because the trial court apparently made no express findings on that issue. But we need not remand to the trial court for explicit findings on this issue for two reasons.

First, given the nature of its ruling, we are not in doubt from our review of the record that the court believed the probative value of S.H.’s testimony to have outweighed the potential prejudice to Turley. Second, we have resolved the balancing test ourselves in a similar case in which the trial court did not expressly perform the required balancing test.¹² In that case, we held that “[w]e are not required to defer to discretion that was never exercised”; and we

¹⁰ *Id.*

¹¹ Purcell v. Commonwealth, 149 S.W.3d 382, 399-400 (Ky. 2004).

¹² *Id.* at 400-01.

proceeded to perform the balancing test ourselves.¹³ Similarly, in the case at hand, although better practice would have certainly been for the trial court to have made findings reflecting its performance of the balancing test, we will further the interest of judicial economy by performing the test ourselves, rather than delaying the outcome of this case by remanding it for the entry of an order, the holding of which is a foregone conclusion.

Turley doubtlessly was prejudiced by S.H.'s testimony. But we believe that the probative value of that testimony outweighed the prejudice in that S.H.'s testimony was relevant to counter Turley's explanation that he was merely performing a gynecological-type examination of R.T. Had Turley not put his motive and intent at issue through his statement that he was only trying somehow to verify R.T.'s virginity when he touched her vaginal area, perhaps S.H.'s testimony would have been inadmissible. However, because Turley's motive and intent were clearly at issue, S.H.'s testimony was properly admitted. In sum, taking into account the entirety of the testimony in this case, we believe that the trial court did not err in finding S.H.'s testimony to be admissible.

III. CONCLUSION.

For the reasons set forth previously herein, the trial court's judgment is affirmed.

All concur.

¹³ *Id.* at 401.

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