

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000897-MR

RAYON MORRIS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 16-CR-00048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Rayon Morris brings this appeal from a May 9, 2017, final judgment and sentence of imprisonment of the Christian Circuit Court upon a jury verdict finding him guilty of assault in the first degree, sodomy in the first degree, and unlawful imprisonment in the first degree and sentencing him to a total of ten-years' imprisonment. We affirm.

Morris was indicted by a Christian County Grand Jury upon one count of rape in the first degree, domestic violence with serious physical injury (Kentucky Revised Statutes (KRS) 510.040)), one count of assault in the first degree, domestic violence (KRS 508.010), two counts of sodomy in the first degree, domestic violence with serious physical injury (KRS 510.070), and one count of unlawful imprisonment in the first degree (KRS 509.020).

The events leading to Morris's indictment are particularly disturbing. Morris and the victim, J.M., were married in 2009 and had two children together. By all accounts, the couple had a tumultuous marriage. In 2013, Morris confronted J.M. about an extra-marital affair; J.M. admitted to the affair. Following J.M.'s acknowledgment of the affair, Morris sometimes became violent toward J.M. By 2015, J.M. had moved out of the mobile home she shared with Morris and the children; the children remained in the home with Morris. Despite moving out, J.M. acknowledged that three to five times per week she would spend the evening and overnight with Morris and the children.

The record indicates that October 30, 2015, began as an ordinary day; both Morris and J.M. went to work. After leaving work, Morris and J.M. ran some errands and then took the children to purchase Halloween costumes. J.M. then went to the mobile home with Morris and the children. The children, who were approximately two and five years' old, were fed dinner, bathed, and put to bed.

Once the children were in bed, Morris and J.M. started watching a movie in Morris's bedroom. At some point, a friend of Morris's visited the home. Shortly after the friend departed, Morris also left in the vehicle he and J.M. shared. J.M. stayed and continued to watch the movie while the children slept. When Morris returned home, J.M. noticed his demeanor had changed. Based upon previous acts of domestic violence committed by Morris, J.M. believed this was not a good situation and decided she should leave.

As J.M. attempted to leave, Morris blocked the bedroom door and prevented her from leaving. Morris then hit J.M. in the face knocking her down. Morris told J.M. she would not be leaving and demanded that she take off her clothes and get into bed. According to J.M.'s testimony, Morris brutally beat, raped, and repeatedly sodomized J.M. over the course of the next several hours. Morris punched J.M. in the face with his fists, hit her repeatedly with a large flashlight, and hit her with the glass lid of a candle jar. During this violent rampage, Morris accused J.M. of cheating on him again and claimed he obtained a video from the internet of J.M. having anal sex with another man. When J.M. denied being the woman in the video, Morris would hit her again. When J.M. needed to use the bathroom, Morris would take J.M. to the bathroom and force her to perform oral sex upon him while she was seated on the toilet. Morris would then urinate in J.M.'s mouth and forced her to swallow the urine. If J.M. refused to

swallow Morris's urine, he would hit her. At some point during the overnight hours, J.M. attempted to leave again, but Morris told her she was not going anywhere. Fearing retribution, Morris stayed.

The following morning, J.M. heard Morris call a friend and ask to borrow a gun so he could use it on J.M. Before leaving, Morris used J.M.'s blood to write "F _ _ _" on the bedroom wall. Believing Morris intended to return with the gun and kill her, J.M. decided to attempt an escape. J.M. looked out the back door and did not see Morris or their vehicle, so she ran to a neighbor's home. Police were immediately called.

The Oak Grove Police Department responded to the call, and three police officers came to the neighbor's home. The officers took J.M.'s statement and also took photographs of her extensive injuries. During this time, J.M. told police she believed Morris had gone to get a gun and intended to return to kill her.

Fearing that Morris would return with a gun and being unsure of the location of the children, the police officers decided to go to Morris's trailer. Upon arriving at the trailer, officers noticed the back door was swinging open. Police knocked, but there was no response. Police then entered the open door of the trailer. Once the officers were satisfied that Morris and the children were not present, the officers noticed in plain view several incriminating items. Police observed the word "F _ _ _" written on the wall of the bedroom in blood, the

flashlight J.M. described being beaten with by Morris, blood-stained clothing, blood on the walls, and blood on the toilet.

Paramedics arrived and transported J.M. to the hospital. J.M. suffered serious physical injuries including swelling of her brain, an orbital fracture or broken eye socket, a concussion, two black eyes, blood coming from her ears, blood in her urine, bite marks on her shoulder, and bruising over her entire body, including her eyes, ears, lips, neck, thighs, hips, arms, and ribs. Morris beat J.M. so forcefully with the flashlight that an imprint of the flashlight button was visible on her ribs. J.M.'s injuries were perilously severe, and as a result, she was transferred by ambulance to Vanderbilt Hospital in Nashville.

J.M.'s orbital fracture required surgical intervention. The surgical repair involved permanently placing a metal plate and screws in J.M.'s face to keep her eye socket in place. Even after surgical repair of J.M.'s orbital fracture, one of her eyes remained smaller than the other, and she continued to endure migraines as well as pain and numbness in her face.

Morris eventually fled Kentucky and was arrested in South Carolina. Following a jury trial, Morris was adjudicated guilty of assault in the first degree, sodomy in the first degree, and unlawful imprisonment in the first degree. Morris was sentenced to a total of ten-years' imprisonment. This appeal follows.

Morris contends the trial court erred by denying his motion for a directed verdict of acquittal upon the charge of assault in the first degree. The standard of review upon the denial of a motion for directed verdict was articulated by the Kentucky Supreme Court in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Id. at 187; Kentucky Rules of Civil Procedure 50.01. Upon appellate review, the test is whether considering the whole of the evidence, “it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” *Benham*, 816 S.W.2d at 187.

Morris specifically asserts that the Commonwealth failed to prove beyond a reasonable doubt that he caused serious physical injury to J.M., and, as a result, a directed verdict of acquittal should have been granted.

Morris was found guilty of first-degree assault pursuant to KRS 508.010(1). Assault in the first degree is codified in KRS 508.010(1), which provides, in relevant part:

(1) A person is guilty of assault in the first degree when:

(a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument[.]

And, serious physical injury is defined as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.” KRS 500.080(15). Our review proceeds accordingly.

In the case *sub judice*, the record indicates that evidence was produced demonstrating that J.M. suffered the following injuries: swelling in her brain, an orbital fracture or broken eye socket, a concussion, two black eyes, blood coming from her ears, blood in her urine, bite marks on her shoulder, and bruising over her entire body, including her eyes, ears, lips, neck, thighs, hips, arms, and ribs.

Before surgery could be performed to repair the orbital fracture, J.M.’s eye began to sink back into her head. Even after the surgical repair, one eye remains smaller than the other, J.M. continues to suffer from migraines, and has pain in and around her eye. Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, there was certainly sufficient evidence to induce a reasonable juror to believe beyond a reasonable doubt that J.M. suffered serious physical injury resulting in prolonged impairment to her health. Therefore, we do not

believe the trial court erred by denying Morris's motion for a directed verdict upon the offense of assault in the first degree.

Morris next contends that the trial court erred by admitting into evidence the sexual assault kit collected at the emergency room. Morris asserts the evidence should have been excluded as (1) there was improper proof as to the chain of custody, and (2) the nurse that collected the kit did not testify at trial. We will address these contentions seriatim.

The chain of custody for a particular item of evidence goes to the very integrity of the evidence and is integral to the requirement of authentication pursuant to Kentucky Rules of Evidence (KRE) 901(a). KRE 901(a) provides:

General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

While the integrity of "items of physical evidence, which are clearly identifiable and distinguishable, does not require proof of a chain of custody, . . . [it] is required for blood samples or other specimens taken from a human body for purposes of analysis." *Robovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998) (citations omitted). However, even when blood or other specimens taken from the human body are involved "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not

been altered in any material respect.”” *Id.* at 8 (citations omitted). Any gap in the chain of custody ordinarily goes to the weight of the evidence rather than to the admissibility of the evidence. *Id.* at 8 (citations omitted). And, deficiencies in the chain of custody do not always render the evidence unreliable. *See Thomas v. Commonwealth*, 153 S.W.3d 772, 779 (Ky. 2004).

In the case *sub judice*, the victim, J.M., and the Emergency Room (ER) Nurse, Grace Blair, Officer Francis Scarcello of the Oak Grove Police Department, and two Kentucky State Police (KSP) lab employees testified regarding the sexual assault kit. Nurse Blair testified that she was the nurse charged with J.M.’s care in the emergency room and was her nurse until J.M. was transferred to Vanderbilt due to swelling in her brain. Nurse Blair testified she was in and out of J.M.’s room when the swabs for the sexual assault kit were being collected. Nurse Blair was familiar with sexual abuse kits being administered upon her patients, but the Sexual Assault Nurse Examiner (SANE) Nurse was charged with the duty of actually collecting the swabs for the sexual abuse kit.

Unfortunately, the SANE Nurse that collected swabs from J.M. had been deployed overseas for military service before trial and did not testify. In addition to Nurse Blair, Officer Scarcello of the Oak Grove Police Department also testified. Officer Scarcello testified that he transported the sexual assault kit from the emergency room to the evidence holding room at the police department. From the evidence

room at the police department, the kit was sent to KSP for testing. Two KSP lab employees testified they received the sexual assault kit from the Oak Grove Police Department and conducted the DNA analysis. Both KSP lab employees testified that their analysis revealed Morris's DNA on the anal, vaginal, and oral swabs taken from J.M. Although the SANE Nurse did not testify at trial, we believe the testimony of J.M. taken together with the testimony of Nurse Blair, Officer Scarcello, and the two KSP lab employees adequately perfected any break in the evidence's chain of custody. *See Thomas*, 153 S.W.3d 772. And, there was persuasive evidence presented to prove there was very little chance the contents of the kit or its results were altered. Again, we emphasize that any break in the chain of custody goes to the weight of the evidence rather than the admissibility of the evidence. *See id.* Thus, we conclude the trial court did not err by admitting the results of the sexual assault kit into evidence.

Morris next contends that admitting the results of the sexual assault kit into evidence without testimony from the SANE Nurse was error. Specifically, Morris asserts he was denied the right to cross-examine the SANE Nurse in violation of the Confrontation Clause of the United States Constitution as set out in the Sixth and Fourteenth Amendments. In support thereof, Morris relies upon *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009).

We view *Hartsfield* as distinguishable. *Id.* In *Hartsfield*, the defendant was indicted upon first-degree rape and first-degree sodomy. After the indictment but before trial, the victim died. The Commonwealth planned to introduce statements into evidence at trial that the victim had made to the SANE Nurse describing the details of the rape. The Court in *Hartsfield* held that the SANE Nurse's testimony recounting the detailed statements the victim made to her describing the rape would be testimonial and, thus, barred by the confrontation clause because the defendant "never had the opportunity to cross-examine" the victim. *Id.* at 245.

In the case *sub judice*, the testimonial statements J.M. made to the SANE Nurse were not introduced into evidence at trial. Rather, the DNA results of the sexual assault kit were introduced. The two KSP lab employees that conducted the lab analysis were present and did testify regarding those lab results. Thus, Morris had the opportunity to cross-examine the two lab employees. As such, we believe *Hartsfield* is distinguishable, and the trial court did not err by admitting the DNA results of the sexual assault kit. *See id.*

Morris also asserts that the trial court erred by not instructing the jury upon the lesser included offense of unlawful imprisonment in the second degree. More particularly, Morris asserts he was entitled to the instruction on the lesser

included offense because the jury could have believed Morris did not restrain J.M. under circumstances that exposed her to a risk of serious physical injury.

Unlawful imprisonment in the second degree is set forth in KRS 509.030 and requires that a person knowingly and unlawfully restrains another person. Unlawful imprisonment in the first degree, on the other hand, requires that in addition to knowingly and unlawfully restraining another person, the restraint must occur “under circumstances which expose that person to a risk of serious physical injury.” KRS 509.020(1). Thus, the only difference between the two offenses is that first-degree unlawful imprisonment requires that in addition to the knowing and unlawful restraint, the circumstances are such that the victim is exposed to a risk of serious physical injury.

A jury instruction upon a lesser included offense should only be given where “the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, but conclude that he is guilty of the lesser-included offense.” *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995) (citing *Luttrell v. Commonwealth*, 554 S.W.2d 75, 78 (Ky. 1977)). And, a trial court has a duty to instruct the jury upon the law of the case. Kentucky Rules of Criminal Procedure (RCr) 9.54; *Webb*, 904 S.W.2d 226.

Here, there was no basis for a reasonable juror to doubt that Morris was guilty of first-degree unlawful imprisonment to warrant an instruction that he

was guilty of unlawful imprisonment in the second degree. There was overwhelming evidence presented that Morris knowingly and unlawfully restrained J.M. under circumstances that exposed J.M. to a risk of serious physical injury. Morris prevented J.M. from leaving his bedroom and repeatedly beat her with a multitude of items, including his fists, a flashlight, and a glass candle lid, over the course of several hours. Morris beat J.M. so severely that he was able to write on the wall with her blood. Under the facts of this case, we do not believe the trial court erred by refusing Morris's request for an instruction on the lesser included offense of second-degree unlawful imprisonment as the evidence was not such that a reasonable juror could doubt Morris was guilty of first-degree unlawful imprisonment.

Morris also asserts the trial court erred by denying his motion to exclude evidence seized by police from his trailer. Morris specifically argues the warrantless entry and search of the mobile home violated his right to be free from unreasonable searches and seizures as guaranteed under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. We must disagree.

Upon review of a trial court's decision to deny a motion to exclude evidence, the court's findings of fact are deemed conclusive if not clearly

erroneous; however, issues of law are reviewed *de novo*. *Johnson v. Commonwealth*, 553 S.W.3d 213, 215-16 (Ky. 2018).

Under the Fourteenth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution, citizens of this Commonwealth are secure in their persons, homes, and belongings against unreasonable searches and seizures by government officials. *Kentucky v. King*, 563 U.S. 452, 459, (2011). Generally, police entry or search of a residence may only be accomplished by securing a warrant based upon probable cause to believe that evidence of a crime will be seized therein. *Payton v. New York*, 445 U.S. 573, 585-86 (1980). There are, however, well-recognized exceptions to the warrant requirement; one such exception is recognized in exigent circumstances. *Id.* at 581.

Under the exigent circumstances exception, a warrantless entry and into a residence may be permitted where there is both probable cause and exigent circumstances. *King v. Kentucky*, 386 S.W.3d 119, 122 (Ky. 2012). Exigent circumstances sufficient to justify a warrantless search include: rendering emergency aid, pursuit of a fleeing suspect, and prevention of “imminent destruction of evidence.” *Kentucky v. King*, 563 U.S. at 460; *see also Pace v. Commonwealth*, 529 S.W.3d 747, 753-55 (Ky. 2017). And, when an officer is lawfully in a residence based upon exigent circumstances, the plain-view exception to the warrant requirement is applicable. More specifically, “[t]he plain-view

exception to the warrant requirement applies when the object seized is plainly visible, the officer is lawfully in a position to view the object, and the incriminating nature of the object is immediately apparent.” *Kerr v. Commonwealth*, 400 S.W.3d 250, 266 (Ky. 2013).

In this case, testimony presented from J.M. and from police demonstrated the officers believed swift action was necessary to prevent imminent danger to the children. J.M. told police she believed Morris had gone to borrow a gun and that he intended to come back and kill her with the gun. Police were unsure exactly where Morris or the children were located. Police reasonably feared the children might be in the trailer, and that Morris might have returned to the trailer with a gun. Based upon this information, police decided to go to Morris’s trailer. As they approached the trailer, police noticed the back door was swinging open. Police knocked, but there was no response. In an attempt to locate the children and determine if Morris had returned with a gun, police entered and cleared the residence. Once the residence was cleared, police observed in plain view, the word “F _ _ _” written on the bedroom wall with blood, the flashlight described by J.M. and blood splattered throughout the home including on the toilet.

Based upon these facts, we are of the opinion that police entry into the trailer was justified under the exigent circumstances exception to the warrant requirement as the police believed the children’s lives could be in imminent

danger. *See Pace*, 529 S.W.3d at 747, 754-55. And, once police were properly inside the home, it was permissible for them to seize the incriminating items in plain view. *See Kerr*, 400 S.W.3d 250, 266. Consequently, the trial court properly denied Morris's motion to suppress the evidence derived from the warrantless entry into the trailer and seizure of items in plain view.

Morris finally contends that the trial court erred by limiting the defense's cross-examination of J.M. regarding the details of her 2013 extra-marital affair. By doing so, Morris alleges that the trial court violated his "constitutional right to present a defense [based upon extreme emotional disturbance or EED] and to fundamental fairness at trial was denied. 5th, 6th and 14th amend., U.S. Const.; §§ 2, 11, Ky. Const." Morris's Brief at 23. More particularly, Morris asserts that he should have been allowed to introduce evidence that J.M. became pregnant by the man she had an affair with in 2013 and that J.M. had communicated by text message with that man the night Morris committed the crimes against her.

The due process clause guarantees that a criminal defendant has a fundamental right to have a fair opportunity to present his defense. U.S. Const. amend. XIV; Section 11 of the Kentucky Constitution; *Harris v. Commonwealth*, 134 S.W.3d 603, 608 (Ky. 2004) (citations omitted). And, the trial court's exclusion of evidence may violate that constitutional guarantee where it

“significantly undermine[s] fundamental elements of the defendant’s defense.” *Id.* at 608 (quoting *United States v. Scheffer*, 523 U.S. 303 (1998)).

In this case, Morris alleges he should have been permitted to introduce evidence that J.M. became pregnant as the result of her extra-marital affair in 2013 and that J.M. had communicated with that man by text message on the night of October 30, 2015. Morris asserts that this evidence would have supported his defense that he acted under extreme emotional distress (EED) when he committed the violent crimes against J.M.

The evidence necessary to prove an EED defense is “that the defendant suffered ‘a temporary state of mind so enraged, inflamed, or disturbed as to overcome one’s judgment, and to cause one to act uncontrollably from [an] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.’” *Driver v. Commonwealth*, 361 S.W.3d 877, 888 (Ky. 2012) (citation omitted). And, the event that triggers the explosive violence by the defendant must be both “sudden and uninterrupted.” *Id.* at 888 (citation omitted). EED is not a mental disease or mental illness, and the defense cannot be based upon circumstances of gradual victimization. *Id.* at 888. Most importantly, the EED must be a reasonable explanation or excuse under the circumstances as the defendant believed they existed. *Id.* at 888.

In the case *sub judice*, the trial court allowed extensive questioning of J.M. concerning the extra-marital affair that occurred in 2013 and of Morris's belief that J.M. was the woman in the video of two individuals engaging in sex. During cross-examination, J.M. admitted to the affair but denied being the woman in the sex video. Morris did demonstrate by questioning J.M. that Morris left the mobile home and later returned enraged because of his belief that she was the woman in the sex video. J.M. was also questioned as to whether she received any text messages on the night of the crimes. J.M. replied that she had not. Thus, J.M. was cross-examined concerning the alleged text message which the defense believed came from the man she had the affair with in 2013. Therefore, we cannot conclude that reversible error occurred.

The trial court did rule that J.M.'s pregnancy in 2013 resulting from the affair was highly prejudicial and inadmissible. As noted, J.M.'s extramarital affair and pregnancy occurred in 2013, some two years prior to the date of the crimes. The pregnancy is simply too remote to the alleged EED event and the evidence of such pregnancy would have undoubtedly been highly prejudicial. Thus, we do not believe the court erred in this respect.

For the foregoing reasons, the final judgment and sentence of imprisonment of the Christian Circuit Court is affirmed.

ALL CONCUR.

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