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Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000153-MR

RAY WILLIAM POWERS

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE JAMES T. JAMESON, JUDGE
INDICTMENT NO. 16-CR-00234

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, LAMBERT, AND SPALDING, JUDGES.

LAMBERT, JUDGE: Ray William Powers has directly appealed from the January 18, 2018, judgment of the Calloway Circuit Court convicting him of one count each of first-degree sodomy (incapable of consent/physically helpless) and of first-degree rape (incapable of consent/physically helpless), and sentencing him to seventeen years' imprisonment. Finding no error or abuse of discretion, we affirm.

In November 2016, the Calloway County grand jury returned a four-count indictment against Powers, charging him with one count each of first-degree sodomy (incapable of consent/physically helpless) pursuant to Kentucky Revised Statutes (KRS) 510.070, first-degree rape (incapable of consent/physically helpless) pursuant to KRS 510.040, tampering with evidence pursuant to KRS 524.100, and incest (forcible compulsion/incapable of consent) pursuant to KRS 530.020.¹ Powers was 48 years old at the time of the offense, which took place on September 21, 2016, at a storage unit. The victim² was Powers' 19-year-old cousin by adoption, who had been living with Powers and his wife since the previous summer. In the criminal complaint dated October 7, 2016, Kentucky State Police Officer Jody Cash described the circumstances as follows:

. . . . On 09/23/2016, [the victim] reported to Kentucky State Police that she had been sexually assaulted by her uncle, Ray Powers, on 09/21/2016 while at Garland Storage Unit #37 in Calloway County. [The victim] reported the following: she arrived at the storage unit to meet her uncle, by adoption, Ray Powers at approximately midnight. While there, [the victim] was provided alcohol by Mr. Powers. After drinking 3 or 4 "Straw-ber-itas", [the victim] became unable to move or speak. While still conscious but physically helpless, [the victim] recalled Mr. Powers removing one pant leg and performing oral and vaginal sex with her. [The victim] provided a sworn statement at the time of the report.

¹ The Commonwealth dismissed the tampering and incest charges prior to the jury trial in this matter.

² We shall not use the victim's name to protect her privacy.

During the investigation, video footage from Garland Storage confirmed two vehicles, one matching Mr. Powers' vehicle and one matching [the victim's] vehicle, at the storage unit from approximately midnight until approximately 0300 on 09/21/2016.

Also during the investigation, two phones belonging to Mr. Powers were taken into evidence. These phones were, by way of a search warrant, downloaded. Located in Mr. Powers' main phone, the one he was using on 09/21/2016, were numerous photos which pertain to this investigation. One specific video shows Mr. Powers performing oral sex on a female believed to be the victim. The female has one pants leg on and one pants leg off, exactly as the victim reported. Also, a ring belonging to the victim can be seen on her hand. During the videos and photos, the victim remains in the same physical position and appears to be physically helpless. The location of the videos/photos appears to be the same as the storage unit, as verified by the couch in both. Mr. Powers' face can be seen in the video of his performing oral sex. The photos and videos are time stamped 09/21/2016 between 0230 and 0245.

The videos and photos related to this investigation had been deleted from the phone prior to it being taken into evidence. However, the download was able to recover them.

Powers entered a plea of not guilty, was found to be indigent, and was appointed counsel. A jury trial was scheduled for October 2017.

Prior to trial, Powers filed a motion requesting a hearing to determine the admissibility of evidence of prior specific instances of consensual sexual behavior between the victim and another person pursuant to Kentucky Rules of

Evidence (KRE) 412(b)(1)(A).³ Powers was attempting to introduce evidence that the victim had had unprotected sex with her boyfriend after her alleged rape but before she had reported it. Powers wanted to offer this evidence to show that the victim's boyfriend was the source of semen, injury, or other physical evidence pursuant to the Rule.

The court held a hearing in chambers to consider Powers' motion. During the hearing, Powers' attorney stated that no injury to the victim had been alleged as a result of the assault and a rape kit had not been collected so there was no semen to be tested. However, she believed the evidence of the later sexual encounter with a third party was relevant. She stated that in her mind, a person would not have consensual sex with another person before reporting a prior rape. The Commonwealth disputed Powers' argument. The court held that the evidence was irrelevant without even reaching the KRE 412 question, while Powers argued that it was highly relevant to show the victim's state of mind. The court stated that without expert testimony to support the claim that such behavior was inconsistent with the behavior of someone who had been raped, it was not relevant evidence. The court also rejected Powers' argument that if the victim lied to her boyfriend about being raped to cover a legitimate encounter with Powers, this somehow made such evidence admissible. In discussing the boyfriend's possible testimony,

³ The motions, order, and recording of the hearing were sealed by the trial court.

the court stated that such information could be used to impeach any inconsistent testimony. By order entered October 9, 2017, the court denied Powers' motion and ruled that evidence of the victim's sexual encounter with her boyfriend after the alleged assault but prior to her hospital examination was not admissible in Powers' case-in-chief pursuant to KRE 401, 403, and 412.

The court held a jury trial in October 2017, after which the jury returned guilty verdicts on the sodomy and rape charges and recommended concurrent 17-year prison sentences. Prior to the entry of the final judgment, Powers moved the court for a judgment of acquittal pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.24 as well as the Kentucky and United States Constitutions. The basis for the motion was information obtained by Powers' investigator from the foreman of the jury. The foreman stated that she voted to find Powers guilty based upon her disregard of the toxicologist's testimony in light of her own belief as to the effect drugs might have on a person, her extrapolated belief that Powers had been grooming the victim for a long time, and her speculation that Powers had replaced the storage unit in a video recorder that might have held evidence with a blank storage unit. Powers argued that her verdict was not based on evidence that was presented during the trial. The court determined that the three instances raised in the motion could have been argued as reasonable inferences from the evidence during closing argument. Furthermore, the court

noted on the record that there was no evidence the juror did her own investigation, but rather she made her own inferences based on the evidence that was presented. Finally, the court did not find a basis to permit the juror in question to testify at the hearing. The court entered a written order denying Powers' motion by order entered December 15, 2017, concluding that "it is impossible to say that a reasonable juror could not believe beyond a reasonable doubt that the Defendant was guilty of rape in the first degree and sodomy in the first degree."

The court entered a final judgment on January 19, 2018, convicting Powers of the sodomy and rape charges and sentencing him to concurrent 17-year sentences pursuant to the jury's recommendation.⁴ Powers was also required to register as a lifetime sex offender. This appeal now follows.

On appeal, Powers raises three arguments. Namely, whether the trial court abused its discretion in refusing to admit evidence that the victim had a sexual encounter with her boyfriend after Powers raped her, whether unpreserved prosecutorial errors amounted to palpable error, and whether the court abused its discretion related to the juror misconduct issue. The Commonwealth disputes each argument.

⁴ We note that Powers entered an *Alford* plea to weapons and drug charges in a separate case (16-CR-00233), and the court held a sentencing hearing on both cases at the same time. We presume it is for this reason that the final judgment reflects that Powers entered a guilty plea when he was in fact convicted by a jury following a trial in the case that is before this Court.

For his first argument, Powers argues that the trial court should have permitted him to present evidence of the victim’s sexual behavior after the assault. It is well settled that an appellate court must review a trial court’s decision to admit or exclude evidence for abuse of discretion:

Trial courts must apply the rules of evidence to control the trial and to avoid the injection of collateral and overly prejudicial matters. To this end, the trial courts are given the power to determine the admissibility of all evidence and are given substantial leeway – sound discretion – in making those determinations. For this reason, an appellate court will review a trial court’s evidentiary rulings for an abuse of discretion, and will determine that a trial court acted within that discretion absent a showing that its decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Commonwealth v. Bell, 400 S.W.3d 278, 283 (Ky. 2013).

Kentucky’s Rules of Evidence provided the basis for admissibility in several sections. KRE 401 defines relevant evidence as “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.” Generally, “[a]ll relevant evidence is admissible,” unless otherwise provided, and “[e]vidence which is not relevant is not admissible.” KRE 402. KRE 403, however, provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of undue prejudice,

confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” KRE 412 sets forth Kentucky’s rape-shield law and specifically addresses the admissibility of evidence in rape cases. It provides in relevant part as follows:

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions:

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(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.

In the present case, the trial court found that the evidence Powers sought to introduce was irrelevant and inadmissible under KRE 401, 402, and 403. We do not need to reach the issue of whether the evidence is relevant because it is plainly excluded by KRE 412. That rule of evidence specifically deems inadmissible “[e]vidence offered to provide that any alleged victim engaged in other sexual behavior” unless a listed exception applies. In this case, none of the exceptions apply as the evidence was not being offered to provide that a person other than Powers was the source of the semen, injury, or other physical evidence; to prove the victim consented; or to provide other direct evidence related to the charged offense. We note that Powers sought the introduction of this evidence pursuant to KRE 412(b)(1)(A) and did not make any arguments under the other two exceptions. The evidence of the victim’s subsequent consensual sexual encounter with her boyfriend does not fall under any of these exceptions and is therefore inadmissible. The trial court did not abuse its discretion in excluding this evidence, and Powers’ constitutional right to confront his accuser and present his defense was not violated by the application of the rape-shield law.

Next, Powers requests that we review three instances of alleged misconduct by the Commonwealth Attorney for palpable error pursuant to RCr 10.26. In *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003), the Supreme Court defined a review for palpable error as follows:

A palpable error is one of that “affects the substantial rights of a party” and will result in “manifest injustice” if not considered by the court, and “[w]hat it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.”

(Footnotes omitted).

First, Powers claims that he established palpable error based upon comments made during the Commonwealth’s opening statement and during the lead investigator’s testimony characterizing statements Powers had made to the investigator as confessions. Powers told Officer Cash that he had had sex with the victim on the night in question and that his DNA would be in or on her.

In *Kiper v. Commonwealth*, 399 S.W.3d 736, 748 (Ky. 2012), the Supreme Court of Kentucky explained the proper purpose of an opening statement by the Commonwealth:

RCr 9.42(a) requires the prosecutor in his opening statement to “state to the jury the nature of the charge and the evidence upon which the Commonwealth relies to support it.” Thus, “[t]he only legitimate purpose of an opening statement is so to explain to the jury the issue they are to try that they may understand the bearing of

the evidence to be introduced.” *Lickliter v. Commonwealth*, 249 Ky. 95, 60 S.W.2d 355, 357 (1933); see *Fields v. Commonwealth*, 12 S.W.3d 275, 281 (Ky. 2000). Further, “it is never proper in an opening statement for counsel to argue the case or to give his personal opinions or inferences from the facts he expects to prove.” *Turner v. Commonwealth*, 240 S.W.2d 80, 81 (Ky. 1951).

Powers argued that he did not make any type of confession to a crime to the officer; rather, he stated he had engaged in consensual sexual activity with the victim, which was not a crime.

We agree with the Commonwealth that Powers has failed to establish any palpable error arose as a result of the prosecutor’s characterization. Even if the characterizations had been improper, there could be no prejudice because the prosecutor’s statements challenged by Powers arose from evidence that had been admitted. “Counsel, of course, although allowed wide latitude during closing arguments to comment on the evidence and to make reasonable inferences there from, ‘may not argue facts that are not in evidence or reasonably inferable from the evidence.’” *Jacobsen v. Commonwealth*, 376 S.W.3d 600, 611 (Ky. 2012) (quoting *Garrett v. Commonwealth*, 48 S.W.3d 6, 16 (Ky. 2001)). The prosecutor’s characterization was certainly a reasonable inference to be drawn from the evidence introduced at the trial.

Second, Powers asserts that evidence and comments about evidence concerning the familial relationship between Powers and the victim were irrelevant

and prejudicial. During the Commonwealth's opening statement, and upon Powers' objection, the trial court instructed the Commonwealth not to mention again that Powers and the victim were first cousins through her adoptive mother. However, Powers failed to renew his objection when the Commonwealth asked the victim questions about their familial relationship when she was testifying.

This Court addressed such a situation in *Rankin v. Commonwealth*, 265 S.W.3d 227, 235 (Ky. App. 2007), holding that there was no error:

In *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003), the court held that a defendant cannot seek additional relief when a trial court attempts to cure an error are accepted by a defendant without any request for additional curative measures. When a defendant by his own action accepts the trial court's curative action as adequate by not requesting additional curative measures, the defendant cannot complain that the trial court erred. *Id.* Because Rankin agreed with the trial court's approach and did not request any further curative measures, he received all the relief that he requested; thus, there is no error to review. *Id.*

Even if we were to review this issue, the result would nevertheless be the same. We find no merit in Powers' assertion that information concerning the familial relationship between him and the victim was at all prejudicial or would have impacted the jury's ultimate verdict because of the strength of the other evidence that was admitted. This includes Powers' admission to having had sexual intercourse with the victim and the video played for the jury showing the victim to be motionless and nonreactive.

Third, Powers contends that the prosecutor made improper comments during the opening statement related to the video recording of the incident; specifically, that he stated the victim had not moved for forty minutes. For the reasons set forth above, we find no merit in this argument or that any palpable error exists.

For his last argument, Powers asserts that the trial court abused its discretion in failing to hold a hearing pursuant to *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), to address his allegation of misconduct related to a juror's deliberation. *Remmer* provides:

In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id., 347 U.S. at 229, 74 S.Ct. at 451. He states that because it was not clear from the record as to what the juror based her presumptions on, a hearing was necessary, citing *United States v. Lanier*, 870 F.3d 546, 549 (6th Cir. 2017). Again, we find no abuse of discretion. As the trial court held, these were all reasonable inferences

the juror could make based upon the evidence admitted at trial. Therefore, the trial court did not abuse its discretion.

For the foregoing reasons, the judgment of conviction is affirmed.

ACREE, JUDGE, CONCURS IN RESULT ONLY.

SPALDING, JUDGE, CONCURRING IN RESULT BY SEPARATE
OPINION.

SPALDING, JUDGE: I concur in result only. I would hold that pursuant to *Montgomery v. Commonwealth*, 320 S.W.3d 28 (Ky. 2010), the evidence that Powers desired to be heard by the jury would qualify under the exception to the rule of exclusion set out in KRE 412(b)(1)(C). This exception allows evidence directly pertaining to the offense charged to escape application of the rape shield law. KRE 412 “is meant both to shield the victims of sex crimes from painful and embarrassing questions and disclosures about their private sexual activities as well as to preserve the fairness of the proceedings by excluding irrelevant attacks on the victim's character and guarding against distracting the jury with collateral matters.” *Montgomery*, 320 S.W.3d at 39. However, when the evidence pertains directly to the crime charged, KRE 412(b)(1)(C) provides an exception providing for its admission. The evidence Powers sought to admit relates directly to the timeline between the commission of the alleged offense and the reporting of the offense to

law enforcement. In my view, whatever a victim does immediately after an alleged offense is committed directly pertains to that offense.

However, the refusal to admit Powers' requested evidence is not sufficient to overturn his conviction. First, Powers did not seek to avail himself of this exception and thus the court below had no opportunity to address the issue. Hence, any error in excluding the evidence would have to be palpable for relief to be granted. Further, even had Powers argued for the inclusion of this evidence under KRE 412(b)(1)(C), any error would be harmless due to the overwhelming evidence of his guilt. The evidence of Powers' admission to the acts in question and the video of the victim in a helpless state preclude a finding of palpable error and make any error harmless in this matter. RCr 9.24; *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (when there is no substantial possibility evidence would change result, error is harmless).

The remaining issues raised by Powers are without merit and I agree with the analysis of the majority on those issues.

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