

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1903

STATE OF LOUISIANA

VS.

BILLY ESTAY

JUDGMENT RENDERED: MARCH 23, 2007

ON APPEAL FROM THE
SEVENTEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 411,604, DIVISION A
PARISH OF LAFOURCHE, STATE OF LOUISIANA

HONORABLE JOHN LEBLANC, JUDGE

KRISTINE M. RUSSELL
THIBODAUX, LA

ATTORNEY FOR APPELLEE
STATE OF LOUISIANA

MARY E. ROPER
BATON ROUGE, LA

ATTORNEY FOR DEFENDANT/APPELLANT
BILLY ESTAY

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

BJC
WBN
JMM

MCDONALD, J.

The defendant, Billy Estay, was charged by bill of information with three counts of aggravated incest in violation of La. R.S. 14:78.1. He pled not guilty. Prior to trial, the defendant filed a “Motion in Limine” seeking approval to introduce testimonial evidence that the alleged victims herein staged a false kidnapping. In the motion, the defendant noted that the evidence was not intended to raise the issue of the victims’ character or prior sexual history, but to prove their motive for raising the allegations against the defendant. After considering the memoranda of the parties, the trial court denied the motion. The defendant was tried by a six-person jury and convicted as charged on all three counts. The defendant subsequently was sentenced to imprisonment at hard labor for fifteen years on count one, fifteen years on count two, and ten years on count three. The court ordered that the sentences be served consecutively. The court further ordered that the defendant submit to blood and saliva testing and register as a sex offender under the provisions of La. R.S. 15:535, et seq. The defendant now appeals, urging the following assignments of error:

1. The trial court erred in denying the defense’s motion in limine which sought to introduce a prior fabrication of kidnapping by the alleged victims to illustrate their motive for making the allegations against the defendant in this matter, where the sole evidence in this matter was the word of the alleged victims against that of the accused.
2. The trial court abused its discretion in denying the defense motion for mistrial when the state elicited testimony which reflected defendant’s refusal to give a recorded statement to the Sheriff’s Office and his request for an attorney.
3. The trial court abused its discretion in denying the defense motion for a new trial.

Finding no merit in the assigned errors, we affirm the defendant's convictions and sentences.

FACTS

In October 2004, during an inpatient stay at River Oaks Hospital (a psychiatric hospital), A.P.¹ revealed that the defendant had sexually abused her. This information was related to a representative of the Office of Community Services who, in turn, contacted the Lafourche Parish Sheriff's Office. Detective Lorenza Savage, a juvenile detective, was assigned to investigate the complaint. In connection with her investigation, Detective Savage interviewed A.P. and her two younger sisters, B.P. and T.P.² All three girls stated that the defendant, their stepfather, had sexually abused them. Sixteen-year-old A.P. stated that the abuse began when she was around seven or eight years old. The defendant would touch her in the vaginal area and insert his fingers into her vagina. A.P. stated that at the age of twelve, the abuse escalated. The defendant began inserting his penis into her vagina. Fourteen-year-old B.P. stated that on several occasions, the defendant would put his penis in her vagina. She explained that the defendant would lie next to her and put his hand inside her clothing to fondle her vagina. The youngest girl, thirteen-year-old T.P., also stated that the defendant inserted his finger into her vagina on several different occasions. T.P. explained that she asked the defendant to stop, but he refused.

Detective Savage also interviewed the defendant. According to Detective Savage, during the interview, after waiving his **Miranda** rights,

¹ In accordance with La. R.S. 46:1844(W), the victims herein are referenced only by their initials.

² Detective Shannon Gros, another Lafourche Parish Sheriff's Office juvenile detective, was also present during the interviews.

the defendant admitted that he did some of the things the victims claimed, but he denied that all of the allegations were true. The defendant admitted that there were times when he allowed the girls to sit on his erect, but clothed, penis and “ride him like they are having sex.” He further admitted that during these episodes he would fondle the girls under their shirts and French kiss them. The defendant claimed he did not believe he did anything wrong. The defendant denied ever having sexual intercourse with any of the girls.

ASSIGNMENT OF ERROR ONE

By this assignment of error, the defendant contends the trial court erred in denying his motion in limine. Specifically, he argues that evidence of a previous staged kidnapping by the victims should have been allowed to illustrate the victims’ motives for making the sexual abuse allegations in question. He asserts that the trial court’s exclusion of this evidence hampered his ability to present a defense.

The record before us reflects that on June 6, 2005, the defendant filed a motion in limine announcing his intention to introduce evidence of a staged kidnapping by the victims. In the memorandum in support of his motion in limine, the defendant explained that he intended to introduce testimonial evidence that the victims spent the night away from home without advising their parents of their whereabouts. In response, their mother, the defendant’s wife, contacted the police and filed missing-person reports. The next morning, the oldest girl telephoned her mother and explained that they stayed at a relative’s house and intentionally withheld the information regarding their location. The defendant, who maintained his innocence, claimed that evidence of the staged kidnapping incident was relevant to show that the alleged victims herein were eager to escape the

rules imposed by him and his wife and were willing to do anything to be released from parental authority. In its memorandum in opposition to the motion in limine, the state argued that the evidence the defendant sought to introduce was not only prohibited character evidence but was also irrelevant to the instant proceedings. The trial court denied the motion.

Louisiana Code of Evidence articles 607 and 608 provide as follows:

Art. 607. Attacking and supporting credibility generally

A. Who may attack credibility. The credibility of a witness may be attacked by any party, including the party calling him.

B. Time for attacking and supporting credibility. The credibility of a witness may not be attacked until the witness has been sworn, and the credibility of a witness may not be supported unless it has been attacked. However, a party may question any witness as to his relationship to the parties, interest in the lawsuit, or capacity to perceive or to recollect.

C. Attacking credibility intrinsically. Except as otherwise provided by legislation, a party, to attack the credibility of a witness, may examine him concerning any matter having a reasonable tendency to disprove the truthfulness or accuracy of his testimony.

D. Attacking credibility extrinsically. Except as otherwise provided by legislation:

(1) Extrinsic evidence to show a witness' bias, interest, corruption, or defect of capacity is admissible to attack the credibility of the witness.

(2) Other extrinsic evidence, including prior inconsistent statements and evidence contradicting the witness' testimony, is admissible when offered solely to attack the credibility of a witness unless the court determines that the probative value of the evidence on the issue of credibility is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice.

Art. 608. Attacking or supporting credibility by character evidence

A. Reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of general reputation only, but subject to these limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness.

(2) A foundation must first be established that the character witness is familiar with the reputation of the witness

whose credibility is in issue. The character witness shall not express his personal opinion as to the character of the witness whose credibility is in issue.

(3) Inquiry into specific acts on direct examination while qualifying the character witness or otherwise is prohibited.

B. Particular acts, vices, or courses of conduct.

Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required.

C. Cross-examination of character witnesses.

A witness who has testified to the character for truthfulness or untruthfulness of another witness may be cross-examined as to whether he has heard about particular acts of that witness bearing upon his credibility.

Pursuant to the language of the aforementioned articles, it is clear that the credibility of a witness may be attacked by any party through the use of extrinsic evidence provided a sufficient evidentiary foundation has been made. However, although La. C.E. art. 607(C) permits a party to attack the credibility of a witness by examining him concerning any matter having a reasonable tendency to disprove the truthfulness of his testimony, this grant is necessarily subject to the relevancy balance of La. C.E. art. 403 and to the limitation set forth in La. C.E. art. 608(B), generally precluding inquiry into particular acts, vices, or courses of conduct to attack character for truthfulness. See State v. Meshell, 567 So.2d 1181, 1184 (La. App. 3d Cir. 1990), writ denied, 572 So.2d 87 (La. 1991). Article 608 permits credibility of a witness to be attacked or supported only by evidence in the form of general reputation for truthfulness or veracity.

In the instant case, the testimony that the defendant sought to introduce related to a particular course of conduct of the victims, specifically, that they allegedly fabricated a story about being kidnapped. Because the defendant's intention was to ask about specific acts of alleged untruthfulness by the victims, the trial court was correct in excluding the

testimonial evidence in question. See State v. Hotoph, 99-243, p. 18 (La. App. 5th Cir. 11/10/99), 750 So.2d 1036, 1048, writs denied, 99-3477 (La. 6/30/00), 765 So.2d 1062, 2000-0150 (La. 6/30/00), 765 So.2d 1066. Relevance and admissibility calls are properly within the discretion of the trial judge, whose determination in these areas should not be overturned absent a clear abuse of discretion. See State v. Mosby, 595 So.2d 1135, 1139 (La. 1992).

Considering the foregoing, we find no error or abuse of discretion in the trial court's ruling prohibiting inquiry into particular acts, vices, or courses of conduct by the victims. The trial court was correct in excluding this type of character evidence. Furthermore, as the state correctly notes, the defendant does not assert, nor did he assert in the trial court, that he intended to introduce general character evidence. This assignment of error lacks merit.

ASSIGNMENTS OF ERROR TWO AND THREE

In these assignments of error, the defendant argues that the trial court abused its discretion in denying his motions for a mistrial and for a new trial based upon the state's wrongful disclosure of his refusal to provide a recorded statement to the investigating detectives and the state's improper reference to his request for an attorney.

During the trial of this matter, Detectives Savage and Gros testified regarding the circumstances surrounding the defendant's interview in connection with the investigation of the allegations in this case. According to both detectives, the defendant admitted to committing some of the acts described by the victims. During his trial testimony, the defendant denied making any such inculpatory statements. Also, during the cross-examination of each of the detectives, defense counsel questioned the accuracy of the

information relayed. In questioning Detective Gros regarding the accuracy of notes taken at the time of the interview, the following colloquy transpired:

[DEFENSE COUNSEL]:

And apparently a note was taken by Detective Savage that he said something did happen with the girls.

[DETECTIVE GROS]:

Uh-huh.

[DEFENSE COUNSEL]:

The question that was asked right before that and the response to that was in reference to [A.P.] alleging abuse by the mother, and that she would drink and use dope and abuse the children. That is when he responded to the question, things happened with the kids.

[DETECTIVE GROS]:

I guess. I didn't take the notes. I don't know. The notes aren't transcripts of what questions were taking place in the exact order of what they were. That question could have been asked several questions prior to, but it was something that stuck out in the interview, so she jotted it down. The notes are not transcripts of what took place.

[DEFENSE COUNSEL]:

And there is no transcript of what took place?

[DETECTIVE GROS]:

No, sir.

[DEFENSE COUNSEL]:

Because there was no audio?

[DETECTIVE GROS]:

No, sir.

[DEFENSE COUNSEL]:

There was no video?

[DETECTIVE GROS]:

There was an attempted audio.

[DEFENSE COUNSEL]:

But there was no audio?

[DETECTIVE GROS]:

No, sir.

[DEFENSE COUNSEL]:

Of the interview?

[DETECTIVE GROS]:

No, sir.

Thereafter, on redirect examination, the state questioned Detective Gros regarding the circumstances surrounding the lack of audio and/or video recording. In response to questioning, Detective Gros explained that after conducting the preliminary questioning wherein the defendant made the inculpatory statements, there was an attempt at an audio recording. Detective Gros further explained that the recording never materialized because the defendant requested to speak to a lawyer. At this point, counsel for the defendant objected. At the conclusion of a bench conference, the trial court overruled the objection. Later, after Detective Gros concluded her testimony, counsel for the defendant moved for a mandatory mistrial under La. C.Cr.P. art. 770(3) arguing that the testimony regarding the defendant's refusal to provide a recorded statement constituted a prejudicial reference to the defendant's failure to testify in his own defense. The trial court denied the motion finding that the issue regarding the lack of a transcript and/or recording of the defendant's statement was brought up by the defense on cross-examination. The court further noted that article 770(3), which deals with remarks or comments by the judge, district attorney, or a court official, regarding the defendant's failure to testify at trial, did not apply in this case.

The court further explained that the comment in question, which was made by a witness, was not prejudicial and did not in any way imply that the defendant failed to testify in his own defense. The court noted that any request for an admonishment would be denied.

Louisiana Code of Criminal Procedure article 770 provides for a mandatory mistrial when the judge, the district attorney, or a court official makes a prejudicial remark within the hearing of the jury. Remarks by witnesses fall under the discretionary mistrial provisions of La. C.Cr.P. art. 771, which, in pertinent part, provides as follows:

In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:

* * * *

(2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.

A mistrial under the provisions of article 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. **State v. Tran**, 98-2812, p. 3 (La. App. 1st Cir. 11/5/99), 743 So.2d 1275, 1280, writ denied, 99-3380 (La. 5/26/00), 762 So.2d 1101. Mistrial is a drastic remedy that is authorized only where substantial prejudice will otherwise result to the accused. **State v. Anderson**, 2000-1737, p. 19 (La. App. 1st Cir. 3/28/01), 784 So.2d 666, 682, writ denied, 2001-1558 (La. 4/19/02), 813 So.2d 421. A trial court's ruling denying a mistrial under La. C.Cr.P. art. 771 will not be disturbed absent an abuse of discretion. **State v. Givens**, 99-3518, p. 12 (La. 1/17/01), 776 So.2d 443, 454.

In **State v. Tribbet**, 415 So.2d 182, 184 (La. 1982), a police officer, while testifying on cross-examination by defense counsel, alluded to other crimes or arrests of the defendant. Citing **State v. Kimble**, 375 So.2d 924 (La. 1979), the supreme court reiterated its position that the state cannot be charged with testimony elicited by defense counsel implying that the defendant had previously committed the other crimes, and the defendant cannot claim reversible error on the basis of that which he elicited. **State v. Tribbet**, 415 So.2d at 184-185.

Applying the Supreme Court's ruling in **Tribbet** to the instant case, we find no error in the trial court's overruling the defense objection. Like the officer in **Tribbet**, Detective Gros was being cross-examined by defense counsel when she initially referred to the fact that the defendant did not provide a recorded statement. Thereafter, the prosecutor, on redirect, only revisited the door previously opened by the defense on this particular issue. The trial court did not err in refusing to charge the state with the testimony initially elicited by defense counsel.

Insofar as the defendant argues that the Supreme Court's decision in **State v. Wright**, 251 La. 511, 205 So.2d 381 (1967) mandates reversal of his conviction, we note that the facts and circumstances surrounding the **Wright** decision are clearly distinguishable. In **Wright**, a new trial was granted based upon remarks made by the prosecutor during closing arguments indicating that the defendant was an "ex-convict" and specifically commenting on the defendant's failure to testify at trial. The Court concluded that the remarks were "not only highly improper but neither necessary nor reasonable." **Wright**, 251 La. at 516, 205 So.2d at 383. As specifically noted by the Court in **Wright**, under the Constitution and under the well-settled jurisprudence, "a comment by the prosecution with respect to

the failure of the accused to take the stand constitutes reversible error.” **Wright**, 251 La. at 515, 205 So.2d at 383. See also La. C.Cr.P. art. 770(3). Herein, the testimony in question was made by a witness, not the prosecutor. The witness did not comment on the defendant’s failure to testify at trial or his criminal history. The testimony, which explained the lack of recording first raised by the defense, was neither unnecessary nor unreasonable. Thus, we find no error in the trial court’s denying the defendant’s motions for a mistrial and for a new trial.

These assignments of error lack merit.

For the foregoing reasons, the defendant’s convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.