

NEW YORK COURT OF APPEALS

People v. Kelley

19 N.Y.3d 887 (2012) · Decided June 12, 2012

OPINION

PER CURIAM.

OPINION OF THE COURT Memorandum. The order of the Appellate Division should be modified, by vacating the convictions for course of sexual conduct against a child in the first degree and endangering the welfare of a child, and a new trial ordered as to those counts, and, as so modified, affirmed. Defendant was indicted for one count of course of sexual conduct against a child in the first degree in connection with various acts that he allegedly committed against his daughter prior to her thirteenth birthday; multiple counts of rape and incest for actions that purportedly occurred after his daughter became 13 years of age; two counts of endangering the welfare of a child; and 20 counts of criminal contempt for violations of an order of protection issued to the child and her mother.

During the investigation, the victim's mother turned over to police the underwear that her daughter had worn on the day of the *889alleged final incident, along with a bed sheet and a towel that her daughter claimed defendant ejaculated on (which the child described as defendant's usual behavior after he performed sexual acts with her). Analysis of the underwear revealed the presence of male DNA that did not belong to defendant.

A copy of the report detailing the testing of the underwear was provided to defense counsel before trial. For some unexplained reason, the towel was not tested for genetic material. Defendant's trial strategy focused on the lack of DNA evidence implicating him. Near the end of the People's direct case, defense counsel inquired of the prosecution why the towel had not been tested.

This lead to the People's discovery that the towel had not been examined for genetic material, so they arranged for testing. When the People advised the court of this development, defense counsel objected to the introduction of any evidence derived from the towel, arguing that defendant's right to a fair trial would be undermined since the centerpiece of his defense was the absence of any scientific evidence corroborating the child's accusations.

After defendant's direct testimony and cross-examination, the People disclosed that the towel had been analyzed and was found to contain defendant's semen and the DNA of a female, but not that of defendant's daughter. Defense counsel reiterated that the evidence should be precluded or a mistrial ordered because the proffered scientific proof had not been available during the formulation of defendant's defense and it was too late for the defense to shift its emphasis.

The trial court ruled that the People could introduce the DNA results and defendant could retake the stand, if he wished. The jury ultimately convicted defendant of first-degree course of sexual conduct against a child, endangering the welfare of a child and criminal contempt.

The Appellate Division affirmed (82 AD3d 463 [1st Dept 2011]) and a Judge of this Court granted leave to appeal (17 NY3d 807 [2011]). On these facts, the introduction of the scientific evidence pertaining to the genetic testing of the semen on the towel violated defendant's right to a fair trial. By the time the People discovered the testing oversight, defendant's contention that there was no DNA evidence to corroborate the charges had been placed before the jury, defendant had already testified and the trial was too far along for defense counsel to present a new defense theory.

The evidence also corroborated a particular aspect of the daughter's testimony—that defendant commonly *890ejaculated on a towel after intercourse—and her awareness of that fact indicated that she either had been exposed to or subjected to her father's sexual proclivities.

The trial court therefore should have precluded the submission of this evidence or declared a mistrial (see generally *People v Goins*, 73 NY2d 989, 991 [1989]). But the error was harmless as to the criminal contempt charges because defendant admitted his guilt regarding those crimes. Consequently, defendant is entitled to a new trial on the charges of first-degree course of sexual conduct against a child and endangering the welfare of a child.