RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

MODIFIED: April 15, 2005; 10:00 a.m.

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002707-MR

PAUL EBERTSHAUSER — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
ACTION NO. 99-CR-00175

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Paul Ebertshauser appeals the final judgment and sentence of imprisonment entered by the Bullitt Circuit Court on November 21, 2003. The judgment reflected a jury verdict which found Ebertshauser guilty of first-degree sexual abuse, a class D felony in violation of KRS 510.110, and imposed a one (1) year sentence. Ebertshauser raises three (3) issues on appeal. We affirm.

Ebertshauser was indicted on December 21, 1999, on the charge of first-degree sexual abuse. The indictment charged the following:

> That on or about the 18th day of April 1999, in Bullitt County, Kentucky, [Ebertshauser] committed the offense of Sexual Abuse in the First Degree by engaging in sexual contact with J.P. a minor less than 12 years of age.

The underlying facts supporting the indictment reveal the following sequence of events. Ebertshauser and his wife, Dana, were babysitting J.P. on April 17, 1999, while J.P.'s mother attended "Thunder over Louisville." Dana is J.P.'s half-sister's grandmother. The Ebertshausers have babysat the children in the past, but J.P. had never stayed overnight unless her mother or another adult had stayed with her. During the day, the Ebertshausers and the children attended a party at a neighbor's home. Alcoholic beverages were consumed by the various adults in attendance. After the party ended, the Ebertshausers and the children returned home. On this night, J.P. was to sleep on the floor in the same bedroom as the Ebertshausers. J.P. testified that sometime during the night she awoke in bed with the Ebertshausers and that Paul Ebertshauser was fondling her genitals and then digitally penetrated her vagina. After this occurred, Ebertshauser left the bed and entered the bathroom. J.P. then left the bed and

fell back asleep on the floor. J.P. did not report this incident until July 31, 1999, when she told her mother.

The case was originally brought to trial on January 15, 2002, but that trial ended in a mistrial after J.P. had already testified. Eventually, the case was retried on October 7, 2003. This trial ended in a jury verdict finding Ebertshauser guilty of first-degree sexual abuse and sentencing him to one year. Following a pre-sentencing investigation and a hearing on whether or not Ebertshauser was eligible for probation in light of KRS 532.045, the Bullitt Circuit Court entered judgment imposing the one year sentence and finding Ebertshauser was not eligible for probation. Ebertshauser was released on an appeal bond and this appeal followed.

On appeal, Ebertshauser claims his conviction and sentence should be reversed based upon three trial errors. First, he contends the trial court erred by denying his motion for a directed verdict at the completion of the Commonwealth's case because the Commonwealth had failed to prove venue. Related to this issue is Ebertshauser's claim that the trial court erred by permitting the Commonwealth to reopen its case and present evidence of proper venue. Next, Ebertshauser claims the trial court erred by refusing to permit him to use testimony from the first trial to show inconsistencies in J.P.'s testimony at the second trial. Finally, Ebertshauser argues that the

trial court erred in its interpretation of KRS 532.045 in denying him probation because the court found he was in a position of authority when the sexual abuse occurred. We will address each issue in the order presented in the parties' briefs.

We first address Ebertshauser's claim that the trial court erred by permitting the Commonwealth to reopen its case and present proof that the crime occurred in Bullitt County, Kentucky. During the trial, the Commonwealth established only that the alleged abuse occurred at Ebertshauser's residence located at 165 Mockingbird Lane. Ebertshauser requested a directed verdict and specifically argued that the Commonwealth failed to establish proper venue. After discussing the issue for several minutes, the court made the following statement:

> THE COURT: Well, Mr. Ferguson [the Assistant Commonwealth Attorney], the Court disagrees that it is not the burden of the Commonwealth to show that the alleged crime took place in the county where the indictment was returned, that being Bullitt County.
>
> The Court made a note at the time that the Commonwealth presented its evidence that there had been no showing that the offense took place in Bullitt County.
>
> On the other hand, in Rounds v. Commonwealth, [Ky., 139 S.W.2d 736 (1940)], it is stated that it only takes slight evidence, either direct or circumstantial, to sustain the venue since that does not affect the issue of guilt or innocence. So

> the question is whether or not there was sufficient slight circumstantial evidence to show that venue was in Bullitt County.

The parties made additional arguments and the court added:

> THE COURT: I don't believe, Mr. Farris [Ebertshauser's attorney], that this Court should grant a Directed Verdict on that issue.
>
> What I am going to do, I am going to allow the Commonwealth an opportunity to re-open its case to establish the venue.
>
> So I will withhold a ruling on that Motion and see if the Commonwealth wants to do that. If they don't, then I may change my mind.

To which the Commonwealth responded:

> THE COMMONWEALTH: Yes, sir. We will re-open our case.

The Commonwealth, over Ebertshauser's objection, recalled Detective Rick Melton of the Kentucky State Police who testified that the sexual abuse occurred at 165 Mockingbird Lane which is in the city of Shepherdsville, and in Bullitt County.

There can be no dispute that the burden to prove proper venue rests on the Commonwealth. KRS 452.510 provides as follows:

> **452.510 Criminal prosecutions**
>
> Unless otherwise provided by law, the venue of criminal prosecutions and penal actions is in the county or city in which the offense was committed.

In Commonwealth v. Cheeks, 698 S.W.2d 832 (Ky. 1985), the Supreme Court of Kentucky explained the reason why proper venue is so important when it stated:

> The circuit courts of this state are never without "jurisdiction" to preside over the prosecution of offenses committed in Kentucky; rather, KRS 452.510 stipulates that "venue" is improper in the circuit court of a county other than that in which the offense has been committed. The purpose of mandating the prosecution of a case in the county in which the offense has been committed is to insure that the defendant is tried by an impartial jury from the vicinity in which the offense has been committed. The Constitution of Kentucky, Section 11 reads in part:
>
> > "...and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage... ."
>
> According to Ballatine, vicinage is "the area surrounding a particular place, specifically the place where the cause of action is alleged to have arisen or where a crime is alleged to have been committed." Prosecution in the county in which the offense has been committed also insures that witnesses and evidence are more readily available to both the prosecutor and the defendant. "Venue" then is merely a statutory prescription that the prosecution be in the county in which the offense has been committed and that the prosecution is in a court which has "jurisdiction" to preside over the case, i.e. the circuit court of that county. The statutory prescription also requires proof by the prosecutor that the offense did in fact occur in the county in which the case is

> being prosecuted. It has generally been held in this state that it is not necessary to show direct evidence that the crime occurred in the county of its prosecution, but the fact may be inferred from evidence and circumstances which would allow the jury to infer where the crime was committed. See Gilley v. Commonwealth, 280 Ky. 306, 133 S.W.2d 67 (1939); Rounds v. Commonwealth, 282 Ky. 657, 139 S.W.2d 736 (1940); Vinson v. Commonwealth, Ky., 248 S.W.2d 430 (1952); Byrd v. Commonwealth, Ky., 283 S.W.2d 191 (1955); Woosley v. Commonwealth, Ky., 293 S.W.2d 625 (1956).

Id. at 835.

In the case before us, the trial court acknowledged that the Commonwealth had not presented sufficient proof of venue at the time Ebertshauser made his motion for a directed verdict. But the court, sua sponte, permitted the Commonwealth to re-open its case to establish this essential element of proof.[1] Upon re-opening, venue was established. Thus, the issue is not whether the ruling on the motion for directed verdict was proper but rather did the trial court err in permitting the Commonwealth to re-open its case. Ebertshauser argues that the trial court abused its discretion when it allowed the Commonwealth to re-open its case and establish venue. But in the next sentence, he concedes that it is within the sound discretion of the court to permit the case to be re-opened for further testimony, citing Scheben v. George Wiedemann Brewing

[1] Transcript of Testimony Volume II, page 12 from jury trial on August 8, 2003. "The Court: What I am going to do, I am going to allow the Commonwealth an opportunity to re-open its case to establish the venue.

Co., 170 S.W. 948 (Ky. 1914). He also cites to Martin v. Commonwealth, 141 S.W.54 (Ky. 1911), for the proposition that the court's discretion is to be exercised wisely under the facts of each particular case, and for the purpose of promoting justice. The Commonwealth notes that Ebertshauser fails to cite to any authority that would prohibit such a re-opening in a criminal prosecution and this Court has not found any in its research of the issue. Instead, there are many cases that have permitted re-opening to allow such to insure that substantial justice is done. See Montgomery v. Commonwealth, 262 S.W.2d 475 (Ky. 1953); Bowman v. Commonwealth, 438 S.W.2d 488 (Ky. 1968); Shaw v. Commonwealth, 497 S.W.2d 706 (Ky. 1973); Hays v. Commonwealth, 625 S.W.2d 575 (Ky. 1981). While it is obviously the better practice for the Commonwealth to present proof of all essential elements in its case in chief prior to "resting", we believe the trial court did not abuse its discretion in allowing the Commonwealth to re-open its case to present evidence of proper venue.

Ebertshauser's second claim of error is his contention that the circuit court erred in refusing to admit in this trial prior inconsistent statements made by J.P. He contends that two statements made by J.P. in this trial regarding how her underwear got pulled down and testimony that Ebertshauser told her several times that she would be sleeping in his bedroom were

inconsistent with testimony from the first trial. He contends these statements are covered by KRE 801A(a)(1) which states:

> (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
>
> (1) Inconsistent with the declarant's testimony;

KRE 613(a), regarding statements of witnesses, states:

> Examining witness concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the trial or hearing of the witness sought to be contradicted, and when the court finds that the impeaching party has acted in good faith.

The Commonwealth counters by stating that Ebertshauser did in fact get the first inconsistent statement before the jury and that he failed to comply with KRE 613(a) as to the second statement. And the Commonwealth adds that when given an opportunity to comply, Ebertshauser let the statement drop and

resumed questioning J.P. on other aspects of her allegations. Thus, the Commonwealth argues that there was no error and if there was, it was not preserved. The transcript of testimony heard at the second trial reveals the following exchanges between the parties and J.P.:

> DIRECT EXAMINATION BY THE COMMONWEALTH:
>
> Q. How did you know where to go to sleep that night?
>
> A. Because Paul told me where I was going to sleep.
>
> Q. When did he do that?
>
> A. Three to four times earlier that day.
>
> Q. Tell us about that, [J.P.].
>
> A. Whenever I got there - - a little bit after I got there Paul told me that I was going to be sleeping in his room with him, and Dana, and Marissa. And then he told me again at Penny and John's and then he told me right before I went to bed.
>
> Q. Did you say anything to him when he said that you would be sleeping in their bedroom?
>
> A. No.
>
> Q. Did you ask about what bed you would be sleeping on?
>
> A. No.
>
> Q. When it came time to go to bed, you said you followed him upstairs?
>
> A. Yes.

Q. What did you do?

A. Me and Dana got some covers and laid them on the floor beside the playpen where Marissa was sleeping. And I laid down on the covers and covered up and went to sleep.

Q. You laid down and went to sleep?

A. Yes.

Q. Did you sleep the whole night through?

A. No.

Q. What happened?

A. I woke up with the Defendant and his wife's bed and I was between them laying on my right side. And his wife was in front of me and he was behind me, and he had his hand between my legs with his finger in my vagina.

Q. Do you remember what you were wearing when you went to sleep that night?

A. Yes, sir.

Q. What was that?

A. I was wearing a nightgown and underwear.

Q. When you woke up in the bed were you still wearing the nightgown and underwear?

A. I was wearing a nightgown but my underwear were pulled down.

Q. Did you pull your underwear down?

A. No.

Q. How did it get down?

A. I guess the Defendant pulled them down.

Q. Were you aware of him doing that?

A. No.

Q. Did you ever try to pull your underwear up?

A. Yes.

Q. Can you tell me about that?

A. I tried to pull my underwear up and he pulled them back down.

Q. Was that before or after he had put his finger in your vagina?

A. After.

. . .

CROSS EXAMINATION BY MS. RAKES: (CONTINUING) [Another Attorney Representing Ebertshauser]

Q. [J.P.], you do recall testifying in January of 2002. Correct?

A. Yes.

Q. Okay. When you testified in January, you never testified that after Paul pulled down your panties you pulled them back up and then he pulled them back down. Is that correct?

A. Yes.

Q. Is it correct that you didn't testify the same way back in January. Right?

A. Yes.

Q. Okay. So that's something new today?

A. Yes.

> Q. Okay. And you never testified in January of 2002 that during the day of April 17th, 1999, Paul, on three or four occasions, talked about you spending the night in their bedroom.
>
> THE COMMONWEALTH: I'm sorry, Your Honor. May we approach?
>
> (BENCH CONFERENCE – NOT TRANSCRIBED)

Following the bench conference, Ebertshauser did not ask any more questions relating to conversations as to where J.P. was going to sleep that night. Ebertshauser argued that the court denied him the right to show inconsistencies in J.P.'s testimony from her previous testimony in the first trial. The Commonwealth argued that this was not an inconsistency but rather an omission because she had not testified about this at the first trial. Both parties concede that a trial court's ruling on admissibility of evidence is within the sound discretion of the trial judge and are reviewed under the abuse of discretion standard. Simpson v. Commonwealth, 889 S.W.2d 781 (Ky. 1994). See also, U.S. v. Strother, 49 F.3d 869 (2nd Circuit 1995). As to the first statement, we agree with the Commonwealth that Ebertshauser effectively presented the inconsistency of J.P.'s testimony from the first trial to the second. As to the second contested statement dealing with alleged statements made by Ebertshauser as to where J.P. would sleep that night, both parties cite to U.S. v. Meserve, 271 F.3d

314 (1st Circuit, 2001). In Meserve, the defendant claimed that the court erred by not allowing him to cross-examine a witness concerning a discrepancy between her trial testimony and her grand jury testimony. Similar to this case the issue was the witness's omission of certain testimony before the grand jury but included in her trial testimony. The Meserve Court held:

> Pursuant to the Federal Rules of Evidence, a witness's credibility may be impeached by asking him about prior inconsistent statements. Fed.R.Evid. 613(a); United States v. Hudson, 970 F.2d 948, 953-54 (1st Cir.1992). The rule applies "when two statements, one made at trial and one made previously, are irreconcilably at odds." United States v. Winchenbach, 197 F.3d 548, 558 (1st Cir.1999). Prior statements such as the grand jury testimony at issue here, that omit details included in a witness's trial testimony are inconsistent if it would have been "natural" for the witness to include the details in the earlier statement. United States v. Stock, 948 F.2d 1299, 1301 (D.C.Cir.1991) (citing Jenkins v. Anderson, 447 U.S. 231, 239, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980)). This test is an elastic one, because the "naturalness" of a witness's decision not to include certain information in an earlier statement may depend on the "nuances of the prior statement's context, as well as [the witness's] own loquacity." Id.
>
> District courts have broad discretion concerning whether two statements are in fact inconsistent, and thus whether the witness may be impeached by the prior statement. Udemba v. Nicoli, 237 F.3d 8, 18 (1st Cir.2001) (citing United States v. Agajanian, 852 F.2d 56, 58 (2nd Cir.1988); United States v. Jones, 808 F.2d 561, 568 (7th Cir.1986)). Nevertheless, under certain

> circumstances, a district court's refusal to permit a witness to be questioned about a prior inconsistent statement may constitute reversible error. See, e.g., Stock, 948 F.2d at 1301 (citing United States v. Standard Oil Co., 316 F.2d 884, 891-92 (7th Cir. 1963); United States v. Ayotte, 741 F.2d 865, 870-71 (6th Cir.1984)).
>
> Here, however, the district court did not abuse its wide discretion by refusing to allow Meserve to cross-examine Grant regarding the omission from her grand jury testimony of certain details about which she testified at trial. Before the grand jury, Grant was not asked whether she remembered anyone coming into the Chez Paris on the night of the crime nor whether she saw any of the victims of the crime at any point. Although Meserve argues that questions about whether Meserve recognized any of the workers at the Ferris Market and about Grant and Meserve's activities after they went to the Chez Paris should have prompted Grant to mention that she saw Craig at the Chez Paris that night, such nuances are peripheral and not directly inconsistent. Thus the district court did not abuse its discretion by refusing to allow Grant to be questioned about her prior omission. The right to confrontation through cross-examination is not unlimited. A district court has "wide latitude … to impose reasonable limits on … cross-examination based on concerns about … interrogation that is repetitive or only marginally relevant." Van Arsdall, 475 U.S. at 679, 106 S.Ct. 1431. The district court appropriately exercised its authority under the circumstances of this case.

Id. at 271 F.3d at 320-21.

We believe, based upon the reasoning set forth above, that the circuit court in this case did not abuse its discretion by refusing to allow Ebertshauser to attempt to impeach J.P.'s

testimony by using a prior omission. In this case, J.P. was eight years old when the crime allegedly occurred and only eleven at the time of the first trial. We do not believe her failure to include a statement about a fact that she was not directly asked can be used to impeach her credibility. In Noel v. Commonwealth, 76 S.W.3d 923, 930-31 (Ky. 2002), the Supreme Court of Kentucky held the age of the witness/victim is a factor in this determination when it stated:

> Appellant asserts that the rule should be further relaxed in this case because of C.M.'s tender years and the alleged difficulty in cross-examining her. We note that, although the opinion in Drumm [v. Commonwealth, 783 S.W.2d 380 (Ky. 1993)], did not state the age of the witness/victim at the time of his testimony, it did state that he was six years old at the time the sexual offense was perpetrated against him. Id. at 380. And while it is sometimes difficult to elicit desired responses during cross-examination of a child of tender years, the fact remains that, here, the question was never asked. Thus, the trial judge correctly admonished the jury to disregard the impeachment evidence elicited from Steve Ethington.

Finally, we should also note that had we believed (which we do not) that the trial court erred in this matter, we would find that any error was harmless. Ebertshauser was permitted to aggressively cross-examine J.P. and to attack both her credibility and motives. He also testified and had witnesses testify on his behalf who questioned J.P.'s testimony,

her memory as to details, her credibility and her motives. In reviewing the transcripts of the entire trial, the court's refusal to allow J.P. to answer this one specific question had no impact on the outcome of the jury trial.

The last issue raised by Ebertshauser is that the trial court improperly classified him as being in "a position of authority" and "position of special trust" for purposes of sentencing. Pursuant to KRS 532.045 probation shall not be granted to a person who occupies a position of special trust and commits an act of substantial sexual conduct. The trial court had informed Ebertshauser prior to sentencing that he did not believe Ebertshauser eligible for probation. Specifically, at the conclusion of the trial, the following exchange took place (at trial transcript page 227):

> THE COURT: I could stand corrected, but since Mr. Ebertshauser was in the position of trust with [J.P.], I do not believe he's eligible for probation, conditional discharge, or alternative sentencing, although this is a Class D. Felony.
>
> MR. FARRIS: We need to evaluate that.
>
> THE COURT: I will give you an opportunity to argue that. I don't think there is any question about the fact that the family relationship and the fact she was staying at his house overnight, that he was in a position of trust as far as she was concerned.

Ebertshauser filed a motion on October 23, 2003, requesting a hearing on this issue. Apparently a hearing on his motion was held on November 5, 2003. However, there is no transcript of the hearing included in the appellate record. In an order entered November 6, 2003, the circuit court found "that Ebertshauser was in a position of special trust under KRS 532.045(b), defined as a position occupied by a person in a position of authority who, by reason of that position, is able to exercise undue influence over the minor." Based upon this finding, the following final judgment and sentence of imprisonment, in relevant part, denying him probation was entered on November 21, 2003:

> The Court informed the Defendant and his counsel of the factual contents and conclusions contained in the written report of the pre-sentence investigation prepared by the Division of Probation and Parole. The Court having given due consideration to the report prepared by the Division of Probation and Parole and the Defendant having been given time within which to controvert the factual contents and conclusions contained in said report, the Court having given due consideration to the nature and circumstances of the crime, and the Court having determined by order entered November 6, 2003 that the Defendant was not eligible for probation as a result of his position of authority at the time of the commission of the crime under KRS 532.045(b) and having further found that should the Court of Appeals disagree with Court's interpretation of the statute that the Court would not in any event probate,

> conditionally discharge the Defendant due to:
>
> a. The deliberate nature of the Defendant's crime.
>
> b. The risk that the Defendant would commit another sexual offense during any period of probation or conditional discharge.
>
> No sufficient cause having been shown why judgment should not be pronounced and sentence imposed, IT IS HEREBY ORDERED AND ADJUDGED as follows:
>
> The Court finds the Defendant guilty of 1st DEGREE SEXUAL ABUSE, a Class D Felony in violation of KRS 510.110. The Court fixes the Defendant's sentence at One (1) year in the penitentiary.

While neither party cites to KRS 533.030 or Adams v. Commonwealth, 46 S.W.3d 572 (Ky. App. 2000), we believe each to be controlling on this issue. KRS 533.030(6), in relevant part, states:

> Any prohibitions against probation, shock probation, or conditional discharge under KRS 533.060(2) or 532.045 shall not apply to persons convicted of a misdemeanor or Class D felony and sentenced to a period of confinement or home incarceration under this section.

In Adams, the Court held:

> It appears, however, that the Legislature has more recently demonstrated its intent to reduce prison overcrowding by its amendments to KRS 532.080, which allow probation for PFO I and PFO II offenders when the felonies are Class D nonviolent felonies, and KRS

> 533.030, which exempts Class D felons from the prohibitions against probation in KRS 533.060(2) and KRS 532.045.

Based on the above, it is clear that the trial court erred in denying Ebertshauser probation based upon KRS 532.045 in that his conviction was for a Class D Felony.

However, the trial court proceeded to also deny Ebertshauser probation on the more traditional reasons of: (a) the deliberate nature of [Ebertshauser's] crime; and (b) the risk that [Ebertshauser] would commit another sexual offense during any period of probation or conditional discharge. Ebertshauser's appellate brief does not address this aspect of the trial court's final judgment while the Commonwealth merely states that because of this finding, if the trial court erred as to KRS 532.045, it would be harmless error. Ebertshauser fails to present any legal argument as to the court's denial of probation based upon the two conditions set forth above. It is clear that in this Commonwealth probation is a privilege rather than a right. Tiryung v. Commonwealth, 717 S.W.2d 503, 504 (Ky. App. 1986). As such, Kentucky case law holds that the determination of whether or not to grant probation is left to the discretion of the trial court. Turner v. Commonwealth, 914 S.W.2d 343, 347 (Ky. 1996). Thus, the standard of review is abuse of discretion. The trial court did permit Ebertshauser to be released on an appeal bond with specific conditions pending

the outcome of his appeal. This fact may reveal that the court did not view Ebertshauser as a threat to the victim or community overall. However, he did specifically consider probation and rejected it based upon the conditions set forth in his final judgment and sentence of imprisonment. While another court may have granted probation in this case, we do not believe it was an abuse of discretion not to do so considering the type of charge, the age of the victim or the position of trust held by Ebertshauser.

For the foregoing reasons, we affirm the final judgment of the Bullitt Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eric Griffin Farris
Lorie B. Rakes
Shepherdsville, KY

ORAL ARGUMENT FOR APPELLANT:

Lee R. Remington
Shepherdsville, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Kenneth Wayne Riggs
Assistant Attorney General
Frankfort, KY

ORAL ARGUMENT FOR APPELLEE:

Kenneth Wayne Riggs
Assistant Attorney General
Frankfort, KY