

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001802-MR

JOHN M. BIGGS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 06-CR-00247

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: □ FORMTEXT □ □ ACREE, DIXON, AND TAYLOR □, JUDGES.

TAYLOR, JUDGE: John M. Biggs brings this appeal from an August 7, 2007, judgment of the Christian Circuit Court upon a jury verdict finding him guilty of sexual abuse in the first degree and sentencing him to three-years' imprisonment. We affirm.

Appellant was indicted by the Christian County Grand Jury upon the offense of sexual abuse in the first degree. Appellant was accused of sexually

abusing a four-year-old child with whom he was then living. The child claimed that appellant came into her bedroom, removed her clothing, covered her arms with a towel, and touched her vagina.

A jury ultimately found appellant guilty of sexual abuse in the first degree, and appellant was sentenced to three-years' imprisonment. This appeal follows.

Appellant's first argument is that the circuit court committed error by denying his motion for a directed verdict of acquittal upon the offense of sexual abuse in the first degree. For the reasons stated, we disagree.

A defendant is entitled to a directed verdict of acquittal if under the evidence as a whole it would have been clearly unreasonable for a jury to find guilt. *Com. v. Benham*, 816 S.W.2d 186 (Ky. 1991). The elements necessary to sustain a conviction for sexual abuse in the first degree are codified in Kentucky Revised Statutes (KRS) 510.110. KRS 510.110(1)(b)(2) states that a person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact who is incapable of consent because he or she is less than twelve years of age.¹ Sexual contact is statutorily defined in KRS 510.010(7) as any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.

Appellant alleges the evidence was insufficient to support his conviction upon sexual abuse in the first degree. Specifically, appellant points to

¹ It is uncontroverted that the child was less than twelve years of age at the time of the offense.

the inconsistencies in the child's testimony and the child's discussion of her testimony with her parents.

During the first day of trial, the child testified that no one had touched her vagina and that she had never told anyone that she had been touched. During the second day of trial, however, the child testified that appellant had touched her vagina. The child also testified that she had discussed her testimony with her parents prior to the second day of trial. The child's mother testified that she and her husband told the child that she did not have to testify if she did not want to. The child's mother further testified that she did not tell the child what to say or encourage her to say anything untruthful.

It is well-settled law in this Commonwealth that judging the weight and credibility of witnesses is solely within the province of the jury and the court shall not substitute its own judgment. *Com. v. Jones*, 880 S.W.2d 544 (Ky. 1994). The jury had the opportunity to hear both versions of the conflicting testimony offered by the child. They also heard both the child and the child's mother recount their discussion of the child's testimony. The jury apparently found credible the child's testimony describing the abuse inflicted upon her and identifying appellant as the perpetrator. Additionally, it is important to note that other evidence suggested that the child had been sexually abused. A pediatrician who examined the child testified that there existed redness and irritation around her vagina that could have been caused by sexual abuse. There was also evidence that the child frequently touched herself and attempted to kiss her baby sister's vagina during a

diaper changing. The child had also been accused of inappropriately touching a cousin.

Under the evidence as a whole, we hold that the jury's finding of guilt on the charge of sexual abuse in the first degree was not clearly unreasonable. Thus, the circuit court did not err by denying appellant's motion for directed verdict.

Appellant next contends that the circuit court erred by ruling that the child was competent to testify. Again, we disagree.

Kentucky Rules of Evidence (KRE) 601 provides that generally every person is competent to be a witness. However, a person may be disqualified if the trial court determines that he:

- (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
- (2) Lacks the capacity to recollect facts;
- (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
- (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

KRE 601(b). Additionally, Kentucky does not require a minimum age for the testamentary capacity of a child. *Pendleton v. Com.*, 83 S.W.3d 522 (Ky. 2002).

Courts also recognize “[t]he competency bar is low with a child’s competency depending on her level of development and upon the subject matter at hand.” *Id.* at 525 (citing *Jarvis v. Com.*, 960 S.W.2d 466 (Ky. 1998)). A competency finding by a trial court is given great deference unless there exists a clear abuse of discretion.

Jarvis, 960 S.W.2d 466.

In particular, appellant questions the child's competency to testify under subsections (2), (3), and (4) of KRE 601(b): the child's ability to recollect facts, adequately express herself, and her capacity to understand the obligation to tell the truth. We will address these issues seriatim.

Under KRE 601(b)(2), the child demonstrated her ability to recall facts by correctly answering questions posed to her. She was able to state the names of her parents, aunt and uncle, and her teacher. She also knew the names and ages of her sister and cousins. The child held up five fingers to signify her age and stated that she used to live in Alabama with her grandmother. Furthermore, the crucial part of the child's testimony involved a single act performed by someone familiar to her. These circumstances weigh in favor of finding the child competent. *Jarvis*, 960 S.W.2d 466. Therefore, we hold the child's ability to recall facts was sufficient to satisfy KRE 601(b)(2).

Under KRE 601(b)(3), the child also demonstrated an ability to express herself in an understandable manner. Although she did experience moments of frustration and uncooperativeness, her answers were typically clear and discernible. Additionally, courts in this state have allowed testimony by young witnesses who have limited communication abilities. *Wombles v. Com.*, 831 S.W.2d 172 (Ky. 1992). We hold that the child demonstrated an ability to express herself in an understandable manner sufficient to satisfy KRE 601(b)(3).

Under KRE 601(b)(4), the child was also able to demonstrate that she could distinguish between truth and untruth and further could understand the

consequences of not telling the truth. She correctly stated that it was a lie when told she was wearing a black shirt and correctly stated that it was the truth when told she was wearing a pink shirt. She also stated that telling something that really happened was the truth. The child also affirmed that it was good to tell the truth and stated that she would get in trouble if she lied. Furthermore, she agreed that she would not say something happened if it had not occurred and agreed that she would tell the truth during her testimony. Accordingly, we hold that the child possessed an understanding of the truth and of the obligation to truthfully testify sufficient to satisfy KRE 601(b)(4).

In sum, we are of the opinion that the trial court did not abuse its discretion in finding the child competent to testify under KRE 601(b).

Appellant also contends that the child was not properly sworn prior to testifying in accordance with KRE 603, which provides:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Courts in this jurisdiction have recognized that no particular word or form is necessary so long as the witness acknowledges he will tell the truth, comprehends the nature of truth, and understands the consequences of lying.

Bright v. Com., 86 S.W. 527 (Ky. 1905); *Whitaker v. Com.*, 179 S.W.2d 448 (Ky. 1944). As previously stated, the child in this case demonstrated her ability to distinguish the truth from untruth. Furthermore, she promised to tell the truth

during her testimony and understood that she would get in trouble if she lied.

Thus, we hold that the requirements of KRE 603 were satisfied with respect to the child.

Appellant's final contention is that he was denied due process of law by the prosecutorial misconduct of the Commonwealth. We find this argument to also be without merit.

When considering an allegation of prosecutorial misconduct, the court must determine whether the conduct was such that the accused was denied his fundamental right of due process. *Slaughter v. Com.*, 744 S.W.2d 407 (Ky. 1987). The relevant inquiry is the overall fairness of the trial rather than the culpability of the prosecutor. *Id.* In order to warrant reversal, the misconduct must be so egregious that the trial becomes fundamentally unfair. *Partin v. Com.*, 918 S.W.2d. 219 (Ky. 1996), *overruled on other grounds by Chestnut v. Com.*, 250 S.W.3d 288 (Ky. 2008).

Appellant essentially claims that the trial strategy employed by the Commonwealth inappropriately prejudiced the jury to the extent that they could not render an impartial verdict. Specifically, appellant complains that the prosecutor improperly elicited testimony concerning witnesses' belief in the veracity of the child's allegations, improperly stated to the jury during closing arguments that the child's parents believed her testimony, and improperly questioned appellant about a prior DUI charge.

In light of the entire proceeding, we believe that appellant received a fundamentally fair trial. The sum of the evidence was more than sufficient to warrant a verdict of guilt upon the charged offense, and considering appellant received less than the maximum sentence, we do not believe that the conduct of the prosecutor affected the outcome of the trial. *See Stahl v. Com.*, 50 S.W.2d 952, 244 Ky. 356 (1932). Therefore, we hold that the conduct of the prosecutor did not render appellant's trial fundamentally unfair and appellant was not denied his fundamental right of due process.

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

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