

RENDERED: AUGUST 22, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000752-MR

DENNIS E. HOLLAND

APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 06-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON AND TAYLOR, JUDGES.

ACREE, JUDGE: Dennis Holland was convicted by a jury of first degree sexual abuse and of being a persistent felon in the second degree. He received an enhanced sentence of ten years in the penitentiary and appeals to this Court as a matter of right. For the reasons stated herein, we affirm.

Holland's conviction stems from a March 2006 incident in which he molested his nine-year-old neighbor, M.S. On appeal, he alleges prejudicial error because the trial court allowed his victim, M.S., to remain at the prosecutor's table throughout the trial and admitted improper hearsay evidence, Holland also alleges prosecutorial misconduct which denied him a fair trial. We will discuss each argument individually.

Holland's first claim of error is that the trial court violated Kentucky Rules of Evidence (KRE) 615 when it allowed M.S. to remain at the prosecutor's table throughout the trial, despite his objection. Holland directs us to KRE 615, which states:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:

- (1) A party who is a natural person;
- (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
- (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

Holland argues M.S. does not fit within any of the exceptions to this rule and thus it was improper to allow her sit at counsel table. We disagree.

“The thrust of KRE 615 is to ensure that witnesses do not alter their own testimony based on what they hear from other witnesses.” *Hatfield v.*

Commonwealth, 255 S.W.3d 590, 594, (Ky. 2008), *citing Smith v. Miller*, 127

S.W.3d 644, 646 (Ky. 2004). The rule does not authorize exclusion of a person whose presence is shown by a party to be essential to the presentation of the party's case. KRE 615(3). “Clearly, the impetus of KRE 615(3) is to validate the longstanding and fundamental practice of separation of witnesses, while upholding the authority of a trial judge to tailor that obligation under her discretion in situations that she deems of merit.” *Hatfield*, 255 S.W.3d at 594. The determination of whether a witness qualifies for the exemption found in clause (3) is within the trial court's discretion and is subject to review for an abuse of that discretion. *Id.*

The Commonwealth argued before the trial court that M.S. was essential to the presentation of its case because she was the “best individual to help the Commonwealth . . . develop testimony of witnesses” because “she was privy to the entirety of the case.” The Commonwealth further reassured the trial court that M.S.’s presence at counsel table would not compromise the underlying purpose of KRE 615 because the potential for M.S. to alter her testimony in light of other witnesses' testimony was non-existent as she was to be the first witness called.

We find no error in the trial court’s determination that M.S.’s presence was essential to presenting the Commonwealth’s case. “Whether a witness is essential, is and will remain under the discretion of Kentucky's trial judges. This Court will not attempt to supplant its judgment therein and abdicate a

time honored judicial tradition of allowing a trial judge to be the arbiter of the decisions placed before it.” *Id.*

Next, Holland argues that it was error to allow Detective Chris Collins to testify to hearsay from M.S.’s stepmother. Holland argues this was improper introduction of prior consistent statements and grounds for reversal.

Detective Collins was the investigating officer in this case. He was assigned the case after M.S.’s stepmother, P.S., called the police and reported the sexual abuse. Detective Collins initiated his investigation by calling P.S. When asked whether he was advised of the identity of the person the victim believed committed the crime, Detective Collins stated: “I was advised on the phone when I was talking to [P.S.]. She stated that the victim was also her stepdaughter, M.S.”

Generally, prior consistent statements of a witness are deemed prejudicial only when the witness' credibility is unfairly bolstered by the extraneous testimony. *See, e.g., Bussey v. Commonwealth*, 797 S.W.2d 483, 485 (Ky. 1990). In this case, the disputed testimony was limited in nature and of little significance. The officer's testimony merely confirmed an obvious and undisputed fact at trial - that the criminal investigation of Holland was initiated by P.S.’s report of sexual abuse. Accordingly, we hold that even if the testimony was erroneously admitted, it was not significant enough, either in time or in substance, to bolster the credibility of the victim and therefore, did not cause any manifest injustice to Holland. Finally, Holland argues that the Commonwealth's actions and comments constituted prosecutorial misconduct that mandates a new trial. Holland

directs this Court's attention to the aforementioned prior consistent statements in addition to the prosecutor's closing argument.

In closing argument, the Commonwealth commented on an expert called on behalf of Holland to testify concerning his IQ. The prosecutor stated:

Also the defense put on evidence that [Holland] is mentally retarded and for some reason that that makes, makes this okay or that he didn't know what he was doing.

Holland immediately objected and moved for a mistrial, stating the expert's testimony was for sentencing mitigation purposes only. The trial court overruled the objection and denied the motion, but did admonish the jury to disregard the Commonwealth's last statement.

Prosecutors are permitted wide latitude during closing arguments and are entitled to draw reasonable inferences from the evidence as well as respond to matters raised by the defense. *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005). When reviewing claims of prosecutorial misconduct, the reviewing Court "must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Prosecutorial misconduct will only rise to the level of reversible error if the misconduct is flagrant or if the proof of guilt is not overwhelming, if the defense counsel objected, and if the trial judge failed to cure the error by sufficiently admonishing the jury. *Barnes v. Commonwealth*, 91

S .W.3d 564, 568 (Ky. 2002).

Our review of the record fails to support an argument that the prosecution's comments rise to a level that would require reversal. Furthermore, the trial judge's admonishment was sufficient to cure any error.

We find no error in the trial court's proceedings.

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

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: I respectfully dissent. I believe the presence of a nine-year-old victim at the prosecutor's table throughout the trial of this action was in contravention of KRE 615, and otherwise unduly prejudicial to Holland, which warrants reversal and remanding for a new trial.

The Commonwealth argues that the child victim's presence was essential to the presentation of the Commonwealth's case and thus, the child should be permitted to sit through the entire trial of her alleged molester. Arguably, KRE 615 would allow the Commonwealth to have the child victim present during the entire trial if it is shown to be essential to the presentation of the Commonwealth's case. The record in this case reflects that the Commonwealth "stated to the court" that M.S. was essential to the presentation of the Commonwealth's case. There is no showing sufficient to meet the requirements of

the rule in the record to warrant the child's presence, other than as a witness, in my opinion.

Accordingly, I believe the presence of the nine-year-old victim throughout the entire jury trial of this action was unduly prejudicial to Holland. Additionally, I am troubled that the Commonwealth would find it "essential" for a child victim to be present and at the prosecutor's side during the entire trial. In determining whether the child's presence is essential to the Commonwealth, I believe it incumbent upon the trial court to also consider the consequences to the child in being present throughout the entire trial with her alleged molester. At minimum, to determine whether the child's presence is "essential," the trial court must balance the consequences for the child, the prejudicial effect on defendant and the actual necessity to present the Commonwealth's case. The record does not reflect that any of these matters were considered by the trial court and for these reasons I would reverse and remand for a new trial.

BRIEFS FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky