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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001039-MR

BEMON GARTLEY — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 09-CR-00084

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND KELLER, JUDGES.

ACREE, CHIEF JUDGE: Appellant Bemon Gartley appeals the judgment of the McCracken Circuit Court convicting him of first-degree sexual abuse of a victim under twelve years of age and sentencing him to ten years' imprisonment. On appeal, Gartley alleges numerous trial errors which he claims mandate a new trial. Because we do not find his arguments persuasive, we affirm.

I. Facts and Procedure

On February 27, 2009, the McCracken County grand jury returned an indictment charging Gartley with first-degree sexual abuse. The charge stemmed from an allegation by Gartley's then six-year-old granddaughter, C.H., that between October 31, 2008, and November 27, 2008, Gartley subjected C.H. to inappropriate sexual contact. The grand jury subsequently issued a superseding indictment also charging Gartley with first-degree sodomy.

Because the evidence against Gartley would consist largely of C.H.'s testimony, the circuit court held a pretrial competency hearing to determine if C.H. was competent to testify. After questioning C.H., the circuit court determined that she was competent to testify pursuant to Kentucky Rules of Evidence (KRE) 601(b).

The circuit court also held a hearing on Gartley's motion to suppress statements he made on the grounds that he made them while in law enforcement custody and prior to being Mirandized.[1] The circuit court denied Gartley's motion.

Thereafter, the circuit court conducted a hearing to address two other motions – the Commonwealth's motion to permit C.H. to testify outside the courtroom and Gartley's motion to exclude KRE 404(b) evidence. The circuit court granted the former and denied the latter.

Gartley's trial took place on March 15, 2010. C.H. testified in the circuit judge's chambers, outside the presence of the jurors who watched her

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

testimony on closed circuit television. C.H. testified that she was seven years old and told the court her birth date. She then testified that "her mom's dad" had touched her private areas. C.H. described "private areas" as where "you pee from" and where "you poop from." C.H. explained that Gartley touched her when she was at his apartment and her mom was at work. C.H.'s older brother and younger sister were also there and, while C.H. could not remember what time this happened, she did recall it was nighttime.

Throughout her testimony, C.H. frequently struggled to respond to the Commonwealth's more personal questions, often answering while she rested her head on her arm that lay across the table. At one point, the prosecutor drew a picture of a person and asked C.H. to point to where Gartley touched her; C.H. pointed to the area between the drawing's legs; when asked by the Commonwealth, she drew a circle around the area she indicated. The Commonwealth then drew another picture of a person and asked C.H. to circle what Gartley used to touch her between her legs; C.H. circled Gartley's hands. C.H. then enlarged the drawing's mouth and explained that Gartley had also touched her with his tongue. C.H. clarified that Gartley touched her on the outside of her front private area with his fingers and tongue, she was lying down on the couch when it happened, and her clothes were down near her feet. She did not recall making an additional statement to Mary Foley, a forensic examiner, that Gartley's finger also went inside her front private area. C.H. also remembered being examined by a doctor, but did not recall telling the doctor that Gartley had penetrated her with his finger. C.H. did not

recall how long Gartley touched her, nor did she remember when the incident occurred, but did say she thought it was a year ago. She could remember she was watching television, but could not remember what program she was watching.

C.H.'s mother testified that, on a subsequent Sunday afternoon in 2008, C.H. did not want to go to Gartley's residence for him to babysit her. Mother explained that C.H. became upset and refused to go to Gartley's apartment. Eventually, C.H. revealed to Mother what Gartley had done to her. Mother then spoke to Gartley and, though Gartley initially denied the allegations, he later stated that if C.H. said he did it, then he did it. He said he was not going to call C.H. a liar, and he may have been drunk or under the influence of pills which was why he could not remember anything. Mother promptly took C.H. to the emergency room.

At the emergency room, Dr. Tariq Sayyad conducted a visual examination of C.H.'s genitalia and did not discover bruising, cuts, or other evidence of trauma. However, Dr. Sayyad recommended C.H. visit a pediatric gynecologist to receive a more thorough examination.

Pediatrician Kimberly Burch then examined C.H. When Dr. Burch took C.H.'s medical history, C.H. told her she was touched in the front and that it hurt. Additionally, during the examination, Dr. Burch used a colposcope to examine the cells of C.H.'s cervix and vagina allowing direct observation and study of the living tissue. Dr. Burch discovered a labial adhesion with "an abnormal insertion," and a rectal fissure. Dr. Burch explained that these findings were consistent with C.H.'s history, but were not definite evidence of sexual abuse,

since the injuries could have been caused by diaper rash, irritation from wiping, localized infection, birth defect, or trauma. Dr. Burch also testified that, while she did not find evidence of bruising, bleeding, tears, or scars, she would not expect to find evidence of these injuries one year after the alleged incident occurred. Dr. Burch further testified that her ultimate finding was a normal exam with the aforementioned anomalies, and that C.H. was a talkative, happy, and healthy child.

Mary Foley, a forensic examiner with the Purchase Area Sexual Assault Center, testified that she interviewed C.H. on January 8, 2009, and again on November 25, 2009, regarding Gartley's alleged conduct. During the January 2009 interview, C.H. told Foley that she was watching a cartoon, "Sponge Bob Square Pants," when the incident occurred. Additionally, during the November 2009 interview, C.H. told Foley that Gartley touched her in her vaginal area with his finger, that his finger went inside but not all the way inside, and that it hurt. Foley clarified that, during the January interview, C.H. told her Gartley did not use any other body parts to touch her private areas; however, during the November interview, C.H. told her Gartley also touched her private area with his tongue.

Gartley did not testify. However, Detective Troy Turner with the Paducah Police Department recounted an interview he conducted with Gartley prior to his arrest on January 9, 2009. When asked about Gartley's initial response to C.H.'s allegations, Detective Turner testified that Gartley stated he did not remember touching C.H. because he was in a blackout state. Gartley told Detective Turner that he had consumed a pint of rum and taken approximately five

Loratab pills prior to the children's arrival. Detective Turner also repeated Gartley's statement that, "if someone is in bed with me, I have a tendency to move my hands around."

Detective Turner went on to recount Gartley's description of similar occurrences when he touched someone in bed. The detective testified that Gartley stated that, while in Chicago, he was "high" and he woke up with his hands on his fourteen-year-old niece's thighs. According to the detective, Gartley also said his wife or girlfriend had told him that when he slept with her after consuming drugs or alcohol he would engage in behavior similar to that C.H. alleged, though he had no personal recollection of it. Further, Gartley admitted that, on two occasions, he passed out near male friends and woke up groping their genitals. Finally, Detective Turner testified that, when he asked Gartley about the particular incident involving C.H., Gartley said, "C.H. would not lie on me."

The jury found Gartley guilty of first-degree sexual abuse, but not guilty of first-degree sodomy. The jury recommended a sentence of ten years and on May 13, 2010, the circuit court sentenced Gartley consistent with that recommendation. This appeal followed. As additional facts become relevant, they will be discussed.

II. Analysis

Gartley presents five arguments. First he argues the circuit court abused its discretion in finding C.H. competent to testify at trial. Second, that the court erred in finding that a "compelling need" existed for C.H. to testify outside the courtroom. Third, that the circuit court improperly admitted evidence pursuant to

KRE 404(b). Fourth, that the circuit court erred in overruling Gartley's motion to suppress evidence. Fifth, that the circuit court erred in denying his directed verdict motion. We are unpersuaded by these arguments.

A. Finding C.H. Competent to Testify Was Not Error

Gartley asserts C.H. was incompetent to testify because she was unable to sufficiently recall and narrate facts as required by KRE 601(b). As a result, Gartley argues, the Commonwealth's use of an incompetent witness violated his right to confront and cross-examine the witness against him guaranteed by §11 of the Kentucky Constitution and the Sixth Amendment to the United States Constitution, mandating reversal for a new trial. We disagree.

KRE 601 governs witness competency. It provides that "[e]very person is competent" to testify unless the trial court finds he or she: "(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(a), (b). In other words, KRE 601 presumes a witness is competent to testify and "permits disqualification of a witness only upon proof of incompetency." *Price v. Commonwealth*, 31 S.W.3d 885, 891 (Ky. 2000); *see also Bart v. Commonwealth*, 951 S.W.2d 576, 579 (Ky. 1997) (competency presumption includes children).

"Age is not determinative of competency and there is no minimum age for testimonial capacity." *Pendleton v. Commonwealth*, 83 S.W.3d 522, 525

(Ky. 2002); *Harp v. Commonwealth,* 266 S.W.3d 813, 822 (Ky. 2008). However, "[w]hen the competency of a child witness is at issue, 'it is then the duty of the trial court to carefully examine the witness to ascertain whether she (or he) is sufficiently intelligent to observe, recollect, and narrate the facts and has a moral sense of obligation to speak the truth.'" *Howard v. Commonwealth*, 318 S.W.3d 607, 612 (Ky. App. 2010) (quoting *Moore v. Commonwealth*, 384 S.W.3d 498, 500 (Ky. 1964)).

In cases such as that before us, "[t]he determination of whether a child witness is competent to testify" rests within the trial court's sound discretion, "and unless there is a clear abuse of discretion, a trial court's ruling on competency will not be reversed on appeal." *Howard*, 318 S.W.3d at 612. A trial court abuses its discretion when its decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We have considered Gartley's arguments for why the trial court abused the discretion, but are unpersuaded.

Gartley first claims C.H. was incapable of accurately recalling facts on the grounds that, during the competency hearing, she could not recall her street address, while she could recall Halloween in detail there were pictures in her home of that occasion which affected her memory, and the parties and the court had to coax C.H. into the courtroom by offering her French fries and candy.

A review of the March 1, 2010 competency hearing, in full, however, reveals that C.H.'s answers to the circuit judge's questions fell well within the

sphere of KRE 601's minimum requirements, especially in light of C.H.'s accurate responses to nearly, if not all, of the questions posed by the court. Notably, C.H. accurately identified her brother's and sister's names and ages. She correctly recalled that she previously lived in Chicago, her grade in school, her brother's grade in school, the name of her current school and teacher, the names of her prior schools and teachers, and the grades she made in school. While C.H. did not know if she lived near her school, she accurately told the circuit judge she took the bus to school. C.H. also described what happens on Halloween, identified what costume she wore and what costume her brother wore on the previous Halloween, and remembered what costume she wore when she was in preschool. Moreover, C.H. told the circuit judge that she liked math and science, but she did not like spelling; reading was just "okay." Throughout the competency hearing, C.H. spoke clearly and articulately, though quietly at times. C.H.'s responses to the circuit judge's questions demonstrated her ability to observe, recollect, and relate facts. *See* KRE 601(b)(1) – (3).

C.H. also demonstrated a capacity for truthfulness. When asked by the circuit judge if saying C.H. wore a frog costume on Halloween when she really wore a vampire costume was a truth or lie, C.H. immediately responded that it was a lie. C.H. also told the circuit judge that calling a chair white when, in fact, it was black was also a lie. C.H. stated that she knew the difference between the truth and a lie, and she knew it was good to tell the truth and bad to tell a lie. Finally, C.H. admitted that she did not always tell the truth at home when she got in trouble, but

if she knew something was important she would tell the truth. C.H.'s testimony demonstrated her moral obligation to tell the truth. *See* KRE 601(b)(4).

Gartley next claims that C.H. was incompetent to testify because her trial testimony was not consistent with her prior recollection of the incident, and she could only remember details when the Commonwealth asked her leading questions. However, a child witness is not deemed incompetent as a result of her "inability to recall each and every detail of life [or the incident at issue] with mathematical precision." *Harp*, 266 S.W.3d at 823. In fact, as explained by our Supreme Court, a child witness's inability to "recollect all of the specific details surrounding her abuse by [the defendant] . . . affect[s] only the credibility of her testimony, not her competency to testify." *Price,* 31 S.W.3d at 891; *see also Wombles v. Commonwealth*, 831 S.W.2d 172, 174 (Ky. 1992) ("Whether the [child's] testimony is true or not goes toward the credibility of the witness, not her competency to testify."); *Capps v. Commonwealth*, 560 S.W.2d 559, 560 (Ky. 1977) ("The judge having found [the child] competent to testify, the jury was entitled to weigh her testimony as it would the testimony of any other witness."); *Howard*, 318 S.W.3d at 612-13 (explaining that, in pointing to inconsistencies in the child witness's trial testimony to demonstrate the child was incompetent to testify, the appellant was "confusing the issue of [the child's] credibility with that of competency, which are two different issues entirely").

In sum, having carefully reviewed the record, including the competency hearing, we find the circuit court did not abuse its discretion in finding C.H. competent to testify.

B. Permitting C.H. to Testify Outside the Courtroom Was Not Abuse of Discretion

Gartley asserts the trial court erred when it found a "compelling need" for C.H. to testify outside the courtroom, pursuant to Kentucky Revised Statutes (KRS) 421.350. The result, Gartley argues, was a violation of his Sixth Amendment right to confront the witnesses against him, as well as his right under § 11 of the Kentucky Constitution to "meet the witnesses face to face."

We review a trial court's finding of a compelling need pursuant to KRS 421.350 for abuse of discretion. *Kurtz v. Commonwealth*, 172 S.W.3d 409, 411 (Ky. 2005). Abuse of discretion may occur "where a child was allowed to testify outside the presence of the accused provided 'the prosecution [was] unable to show any necessity for the use of [KRS 431.250].'" *Danner v. Commonwealth*, 963 S.W.2d 632, 635 (Ky. 1998) (quoting *Commonwealth v. Willis*, 716 S.W.2d 223, 229-30 (Ky. 1986)).

KRS 421.350 authorizes a trial court, in certain proceedings involving a child victim who is twelve years of age or younger at the time of the offense, upon motion "and upon a finding of compelling need, [to] order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact

in the proceeding." KRS 421.350(1), (2).[2] KRS 421.350(5) defines a "compelling need" as the "substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence." Accordingly, for a child to testify outside the courtroom, the circuit court must make a dual inquiry: (1) whether the child was twelve years of age or younger at the time the offense occurred; and (2) whether a compelling need exists for the child's testimony to be taken in a room other than the courtroom. *See* KRS 421.350; *Danner*, 963 S.W.2d at 633-35.

Here, it is undisputed that C.H. was six years old at the time of the incident. Therefore, Gartley only disputes that a compelling need existed for C.H.'s testimony to be taken outside the courtroom. Gartley argues the compelling need standard was not satisfied because C.H.'s elusive behavior could have just as easily resulted from shyness, not trauma. We disagree.

"[T]he trial court must have wide discretion to consider the age and demeanor of the child witness, the nature of the offense, and the likely impact of testimony in court or facing the defendant." *Willis*, 716 S.W.2d at 230.

> The requisite finding of [a compelling need] must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . .

[2] As an alternative to using a closed circuit television to broadcast the child's testimony, KRS 421.350(3) also permits the child's testimony to "be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding."

> Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, *albeit* with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify."

Price, 31 S.W.3d at 893 (quoting *Maryland v. Craig*, 497 U.S. 836, 855-56, 110 S.Ct. 3157, 3169, 111 L.Ed.2d 666 (1990)).

At the hearing to determine whether a compelling need existed, Amberly Walker, a victim and family advocate with the Purchase Area Sexual Assault Center, testified that, immediately preceding C.H.'s prior competency hearing, the little girl opened the courtroom door, saw Gartley, wheeled around, froze, and began to cry. Walker testified that it took the circuit judge, C.H.'s parents, and others approximately forty-five minutes to convince C.H. to enter the courtroom. Upon entering, C.H. maneuvered to avoid any eye contact with Gartley. She sat or lay on the steps or floor of the witness box during her interview with the circuit judge; by doing so, her view of Gartley was consistently blocked. At no point would C.H. sit in the witness chair. Additionally, after the competency hearing, Walker spoke with C.H. regarding what would happen during the trial itself. Discussing Gartley, C.H. told Walker that she did not "want to say his name" and indicated that she was afraid. Walker testified that, in her opinion, C.H.

would not be able to communicate what happened and would suffer emotional distress if required to testify in the courtroom in Gartley's presence.

The circuit judge stated on the record that he personally observed some of the behavior to which Walker testified. The circuit judge also noted that, during the competency hearing itself, he asked C.H. general and non-intimidating questions but recognized that, during trial, counsel would be required to ask C.H. sensitive questions regarding Gartley's alleged sexual acts. The circuit court then determined that C.H. would be traumatized and that her emotional distress would be substantial if required to testify in the courtroom.

We find the circuit court did not abuse its discretion in finding a compelling need existed for C.H. to testify outside the courtroom pursuant to KRS 421.350.

C. Admitting KRE 404(b) Evidence Was Not an Abuse of Discretion

Before trial, the Commonwealth gave notice that it intended to introduce, under KRE 404(b), certain of Gartley's admissions of prior bad acts. After a hearing, the circuit court found admissible Gartley's statements "that he was drunk and high on drugs" at the time of the alleged incident, and "that he has on prior occasions had unwanted sexual contact with other people when he has been drunk or high on drugs." Gartley contends it was an abuse of discretion to admit this evidence. We disagree.

KRE 404(b) makes inadmissible evidence of "any acts offered to prove character in order to show action in conformity therewith." *Davis v.*

Commonwealth, 147 S.W.3d 709, 723 (Ky.2004) (citing R. Lawson, The Kentucky Evidence Law Handbook, § 2.25[2], at 125 (3d ed. Michie 1993)). "The proscription in KRE 404(b) does not apply to evidence that is probative for a purpose other than proving a person's character in order to show action in conformity therewith." *Davis*, 147 S.W.3d at 723. "KRE 404(b)(1) enumerates some of [these] 'other purposes,' including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [though these] listed purposes are illustrative rather than exhaustive.'" *Id.* (citing Lawson, supra, § 2.25[2], at 151). Even if these criteria are met, the evidence must also pass the probative-prejudice test of KRE 403. Thus, we review the admissibility of evidence of "other crimes, wrongs, or acts" under the three-part test set out in *Bell v. Commonwealth*, 875 S.W.2d 882, 889-91 (Ky. 1994).

The first inquiry under *Bell* concerns relevance: "Is the . . . evidence relevant for some purpose other than to prove the criminal disposition of the accused?" *Id.* Evidence of prior bad acts "is admissible if the evidence tends to prove a particular way of doing an act . . . ." *Meece*, 348 S.W.3d at 662 (quoting *Commonwealth v. Hodge*, 380 Mass. 858, 406 N.E.2d 1015, 1019 (1980) (citing *Commonwealth v. Davis*, 376 Mass. 777, 384 N.E.2d 181 (1978)). In this case, the evidence tended to prove the circumstances and "particular way" in which Gartley went about exposing those near him to unwanted sexual contact. These statements were Gartley's explanation of how the incident could have happened despite his failure to recollect its occurrence. Because he denied the charges against him,

evidence of the particular way in which his previous behavior had resulted in unwanted sexual contact was relevant to explain not only why and how it happened in this case, but whether it happened at all. The circuit court ruled "that the evidence solicited is admissible under KRE 404(b) as to proof of motive, intent, plan, knowledge, or absence of mistake or fraud." (Order, March 12, 2010; R. 129). We can find no abuse of discretion in the circuit court's determination that the evidence was relevant in that it tended to prove (or, arguably, disprove) these things.

The second inquiry under *Bell* addresses the probativeness of the evidence: "Is evidence of the [other crime, wrong, or act] sufficiently probative of [its actual] commission by the accused to warrant its introduction into evidence?" *Bell*, 875 S.W.2d at 890. We believe the Court had this second inquiry in mind when it said, "whether prior sexual misconduct by a defendant is admissible [is] a difficult, fact-specific inquiry." *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). However, this inquiry is quite a bit less difficult when the defendant himself admits to the prior bad act. In such a case, and in this case, the probativeness hurdle is readily cleared.

Finally, *Bell* instructs us to consider KRE 403 and ask: "Does the potential for prejudice from the use of [this] evidence substantially outweigh its probative value?" *Id.* "It is within the discretion of the trial court to determine whether the probative value of proffered evidence is substantially outweighed by undue prejudice." *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 67 (Ky. 1996).

"[F]or a trial court's decision to be an abuse of discretion, we must find that the decision 'was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Clark*, 223 S.W.3d at 95 (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). In this case, the circuit court's ruling was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Therefore, we do not find an abuse of discretion.

We first note that all relevant evidence is prejudicial because, by definition, relevant evidence has a tendency to prove or disprove one party's version of the facts that conflicts with a version posed by another party. See KRE 401; and *Gell v. Town of Aulander*, 252 F.R.D. 297, 306 (E.D.N.C. 2008)("All relevant evidence is 'prejudicial'[.]"). For that reason, KRE 403 does not bar all prejudicial evidence; only evidence that is unfairly prejudicial is excludable. The test is for *undue* prejudice or influence. *Price*, 31 S.W.3d at 888 (explaining "the real issue is whether [Appellant] was unduly prejudiced, *i.e.*, whether the prejudice to him was unnecessary and unreasonable"); *Meece*, 348 S.W.3d at 663 ("This evidence, of course, was prejudicial to [the defendant] but it was not unfairly prejudicial."). Gartley has failed to establish how, if at all, these statements caused him undue or unfair prejudice. The fact is that Gartley's statements, that he has blacked out and unknowingly engaged in unwanted contact with others, could have been understood by the jury as evidence that he lacked the necessary *mens rea* to commit the crime with which he was charged. We see no abuse of discretion in

admitting this evidence over Gartley's objection that its prejudicial effect outweighed its probative value.

Gartley contends now, as he did before the circuit court, that his statements could not be offered as "modus operandi" evidence indicative of a "signature crime." We discount this argument because the circuit court rejected that as a basis for the ruling. As the circuit court indicated, "signature crime" evidence is used to assist in *identifying* the perpetrator of the crime currently charged based on a prior conviction or bad act so "'striking[ly] similar[]' in factual details . . . that 'if the [charged] act occurred, then the defendant almost certainly was the perpetrator[.]'" *Woodlee v. Commonwealth*, 306 S.W.3d 461, 464 (Ky. 2010). The circuit court indicated that it did not believe the evidence was offered for that purpose.[3, 4]

In sum, because Gartley's statements are relevant and their probative value is not substantially outweighed by their prejudicial effect, we cannot say the circuit court abused its discretion in admitting such statements under KRE 404(b).

D. Motion to Suppress/Miranda Violation

[3] At the KRE 404(b) hearing, the circuit judge illustrated his correct understanding of "signature crime" evidence. He hypothesized a case in which the evidence showed the currently charged crime was committed by an unidentified masked man wearing blue tights and a cape who swooped from a bridge. He concluded that evidence of the defendant's prior conviction for perpetrating the same crime by wearing a mask and blue tights and swooping from a bridge would be admissible. He indicated that Gartley's statements were not such evidence.

[4] "Signature crime" evidence can also be used to establish the "*corpus delicti* – whether the event occurred at all." *Clark*, 223 S.W.3d at 96-97 (internal quotation marks and citation omitted). But *Clark* also noted that the identity and *corpus delicti* questions are invariably intertwined. *Clark*, 223 S.W.39 at 97 & fn. 20.

Gartley next asserts the circuit court erred by denying his motion to suppress statements made to police. Specifically, Gartley argues that, because he was subject to a custodial interrogation without benefit of his *Miranda* warnings, he was deprived of his constitutional right against self-incrimination.

"When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law." *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006); *Bradley v. Commonwealth*, 327 S.W.3d 512, 514 (Ky. 2010). For that reason, "[w]e review the question of whether a defendant was in custody *de novo*." *Smith v. Commonwealth*, 312 S.W.3d 353, 357 (Ky. 2010).

We begin by noting that *Miranda* only applies to situations involving a custodial interrogation. *Cecil v. Commonwealth,* 297 S.W.3d 12, 16 (Ky. 2009); *Smith*, 312 S.W.3d at 358 ("Miranda warnings are only required when the suspect being questioned is in custody."). Certainly, a "threshold issue . . . in any case involving a perceived violation of Miranda rights . . . is whether the defendant was subject to a custodial interrogation at the time he claims he was denied any of his Miranda rights." *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006). Thus, the relevant question becomes "when is a person in custody"?

Custody occurs when police, by the exercise of physical force or show of authority, restrain an individual's liberty. *Smith,* 312 S.W.3d at 358; *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006) ("Custodial interrogation has been defined as questioning initiated by law enforcement after a

person has been taken into custody or otherwise deprived of freedom of action in any significant way."). As a result, a person is "in custody," necessitating *Miranda* warnings, when there is a "restraint on his freedom . . . or a restraint on his freedom of movement to the degree associated with formal arrest." *Cecil*, 297 S.W.3d at 16.

The test for determining if a person is "in custody" is whether, under the totality of the circumstances, "a reasonable person would have believed he or she was free to leave." *Id.* (citing *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999)). A defendant's "subjective belief that he is not free to leave is not, standing alone, dispositive of whether there is custody for *Miranda* purposes." *Smith*, 312 S.W.3d at 358, fn 2. Instead, "all relevant factors must be weighed, and then an ultimate determination made based upon the totality of the circumstances." *Id.*

In examining the totality of the circumstances, "[t]he United States Supreme Court has identified [several] factors that suggest . . . a suspect is in custody [including]: the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request might be compelled." *Id.* at 358 (citing *U.S. v. Mendenhall*, 446 U.S. 544, 554–55, 100 S.Ct. 1870, 1877, 64 L.Ed .2d 497 (1980)). Additionally,

> [o]ther factors which have been used to determine custody for Miranda purposes include: (1) the purpose of the questioning; (2) whether the place of the questioning

> was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions.

Id. at 358-59 (citing *U.S. v. Salvo*, 133 F.3d 943, 950 (6th Cir. 1998)).

In sum, to resolve whether a particular situation constitutes a custodial interrogation for *Miranda* purposes, a reviewing court must engage in a two-part query: "[f]irst, what are the circumstances surrounding the interrogation; and second, under those circumstances, would a reasonable person have felt he was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 465, 133 L.Ed.2d 383 (1995).

The circumstances surrounding this interrogation are these. At the suppression hearing, Detective Turner testified that on January 9, 2009, he, along with another detective, traveled to Gartley's apartment and, upon arrival, asked Gartley to accompany them to the police station. Detective Turner also informed Gartley that he would bring him home after the interview. Gartley originally asked for the interview to take place at his apartment; however, after further discussion, Gartley voluntarily agreed to accompany Detective Turner to the police department. Detective Turner testified that Gartley was not under arrest or placed in handcuffs. Gartley rode with Detective Turner in the front seat of an unmarked

police car; the second detective rode in the back seat behind Gartley. Upon arrival, Gartley accompanied Detective Turner into the police department through a locked, side door to an interview room. The interview room was located in an area of the police station inaccessible to the general public. Gartley's interview lasted approximately two-and-one-half hours. Detective Turner conducted the majority of Gartley's interview while Detective Laird, Detective Turner's sergeant, conducted approximately one-third of the interview. For a short period of time, both detectives were present in the interview room. Throughout the interview, Gartley sat, unrestrained, in a chair against a wall and was often left alone in the interview room. At one point, Gartley requested to use the restroom, which Detective Laird readily granted. At the conclusion of the interview, Detective Turner placed Gartley under arrest.

Next, under this particular set of circumstances, we must determine how a reasonable person placed in Gartley's position would have perceived the situation and, applying an "objective test," whether there was a restraint on Gartley's "freedom of movement to the degree associated with formal arrest." *Thompson*, 516 U.S. at 112, 116 S.Ct. at 465 (internal quotation marks omitted).

In conducting our review, our Supreme Court's decision in *Fugett v. Commonwealth*, 250 S.W.3d 604 (Ky. 2008), though not directly on point, provides guidance. In *Fugett*, the police learned Fugett may have been a witness to a recent shooting. Two detectives approached Fugett, identified themselves, and asked if Fugett would be willing to go to police headquarters and answer some

questions. The detectives also informed Fugett that he did not have to go with them, and he was free to leave. Fugett willingly agreed to accompany the detectives and, without handcuffs, rode in the back of the detectives' car to headquarters. Upon arrival, the detectives escorted Fugett through a non-public, secure entrance to an interview room. Throughout his interview, Fugett was often left alone, never restrained, offered sodas and cigarettes, and allowed free use of the restroom. Fugett eventually admitted that he played a role in the shooting at issue. At this point, Fugett was given his *Miranda* warnings and, subsequently, Fugett confessed to shooting the victim. Fugett was ultimately charged with and found guilty of two counts of second-degree manslaughter and one count of tampering with physical evidence. *Fugett*, 250 S.W.3d at 616-17.

Thereafter, Fugett filed a motion to suppress his statements made to police on the grounds that, from the time he was taken to police headquarters for questioning, he was in custody and entitled to his *Miranda* warnings. The circuit court denied Fugett's motion. On appeal, the Kentucky Supreme Court also rejected Fugett's claim that he was in custody. *Fugett*, 250 S.W.3d at 618. Specifically, the Court emphasized that, from the beginning, the detectives informed Fugett that it was his choice to come to headquarters and answer questions, he was never restrained, he was free to leave the interview room and use the restroom, at no time did the detectives deny a request by Fugett to stop the interview or allow him to leave, and at no time did the detectives assert authority over him or threaten the use of physical force. *Id.*

In the case now under review, as in *Fugett*, Gartley voluntarily accompanied Detective Turner to the police station; he was not arrested, placed in handcuffs, or otherwise restrained; he freely left the interview room to use the restroom; at no point did Gartley either ask to stop or leave the interview; neither detective asserted authority over Gartley or threatened him with physical harm. Additionally, while Detective Turner did not inform Gartley that he was free to leave, he did tell him that he would take him home at the conclusion of the interview. Considering the *Mendenhall* factors, we note that for the bulk of the interview Detective Laird and Detective Turner interviewed Gartley separately and, in doing so, employed calm, conversational tones,[5] neither detective physically touched Gartley and, while both detectives carried a gun, neither removed his gun from its holster during Gartley's interview. Moreover, the mere fact that Gartley's interview occurred at the police department did not render him in custody. *See California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam) (explaining that "*Miranda* warnings are not required simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect"); *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (finding a suspect was not in custody simply by virtue of his voluntary submission to questioning at the police department).

[5] During the suppression hearing, Detective Turner admitted that he was "probably up in" Gartley's "face at one point in the interview." A review of Gartley's police interview reveals that, while Detective Turner raised his voice at one point during the interview, it would be a mischaracterization to state that Turner was yelling or was physically or verbally abusive.

Of course, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Beheler*, 463 U.S. at 1124, 103 S.Ct. at 3519. Nonetheless, under the totality of the circumstances before us, we cannot say that there was a restraint on Gartley's liberty or freedom of movement to the degree associated with a formal arrest, as required to constitute custody. *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528–29, 128 L.Ed.2d 293 (1994) (explaining that in determining whether a person was in custody, "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest" (quoting *Beheler*, 463 U.S. at 1125, 103 S.Ct. at 3520)). We find the circuit court properly determined that Gartley was not in custody and, therefore, we hold that the circuit court did not err in denying Gartley's motion to suppress.

E. Directed Verdict

Finally, Gartley contends the circuit court erred when it failed to grant his motion for a directed verdict. Gartley asserts that, because C.H. was incompetent to testify, there was insufficient evidence to support his conviction of first-degree sexual abuse. This argument lacks merit.

A circuit court should deny a motion for directed verdict if, based upon the fair and reasonable inferences drawn in the Commonwealth's favor, "the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable

doubt that the defendant is guilty[.]" *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appeal, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[;] only then the defendant is entitled to a directed verdict of acquittal." *Id.*

To convict Gartley of first-degree sexual abuse, the jury had to find he subjected "another person to sexual contact who is . . . (b) less than 12 years old[.]" KRS 510.110(2)(b). KRS 510.070(7) defines sexual contact 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." Accordingly, the circuit court properly denied Gartley's motion for a directed verdict of acquittal if the Commonwealth submitted sufficient evidence that Gartley subjected C.H. to sexual consent and C.H. is less than 12 years of age. KRS 510.110(2)(b).

In support of his argument that there was insufficient evidence of sexual abuse, Gartley contends that, because C.H. was incompetent to testify, the Commonwealth failed to prove beyond a reasonable doubt that Gartley subjected C.H. to sexual contact. Gartley also points to Dr. Burch's testimony that, while she did find an anomaly, namely a labial adhesion, this finding is inconclusive as to sexual contact because it could have been caused by non-criminal conduct such as a very severe diaper rash, irritation from extended wiping and rubbing of the area in trying to clean it, a localized infection, or a birth defect. As a result, Gartley argues, the Commonwealth failed to prove the first element of first-degree sexual

abuse; *i.e.*, that he subjected C.H. to sexual contact, entitling him to a directed verdict of acquittal.

We do not find Gartley's argument persuasive. There was ample testimony admitted at trial "to induce a reasonable juror to believe beyond a reasonable doubt that" Gartley was guilty of first-degree sexual abuse. *Benham*, 816 S.W.2d at 187. First, as already explained, the circuit court correctly determined that C.H. was competent to testify. Second, at trial, the prosecutor drew an outline of a human body and asked C.H. to point on the drawing where Gartley touched her; C.H. drew a circle between the legs depicted in the drawing. C.H. also testified that Gartley used his fingers and tongue to touch her there. C.H. further informed the jury that the incident occurred between Halloween and Thanksgiving of 2008, and her birthday was May 17, 2002, indicating she was six-years old when the sexual act occurred. Additionally, Gartley's daughter testified that Gartley stated that "if C.H. said he did it, he must have done it and he was not going to call her a liar." Forensic examiner Mary Foley testified that, during an interview with C.H. on November 25, 2009, C.H. told her that Gartley had touched her on her vaginal area, that his finger went inside but not all the way, and that it hurt. Finally, Dr. Burch testified that C.H. told her that she was touched in the front and it hurt. Dr. Burch also testified that she discovered on C.H. a labial adhesion, with "an abnormal insertion," and a rectal fissure which, though not conclusive evidence of sexual abuse, were consistent with C.H.'s history.

Clearly, the Commonwealth presented "more than a mere scintilla of evidence" at trial. *Benham*, 816 S.W.2d at 188. In light of this testimony, it was clearly reasonable under KRS 510.110 for the jury to conclude that Gartley engaged in a sexual act with a child less than 12 years of age. Accordingly, the circuit court did not err in denying Gartley's directed verdict motion.

III. Conclusion

For the foregoing reasons, the McCracken Circuit Court's May 13, 2010 Final Judgment/Sentence of Imprisonment is affirmed.

COMBS AND KELLER, JUDGES, CONCUR IN RESULT ONLY.

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