

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001411-MR

JAMES BAGBY

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 09-CR-00224

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: James Bagby brings this appeal from an August 29, 2011, judgment of the Taylor Circuit Court upon a jury verdict adjudicating appellant guilty of first-degree sexual abuse and sentencing him to five-years' imprisonment. We affirm.

Appellant was tried by a jury in March of 2011 and convicted of first-degree sexual abuse of a twelve-year old girl, J.C., arising from an incident that occurred in 2007. He was sentenced to five-years' imprisonment. Appellant brings this appeal based upon alleged errors at trial.

Appellant initially contends that the trial court erred by allowing J.C. to testify at trial, thus warranting a mistrial. In particular, appellant argues that J.C. was incompetent as a witness because:

She sobbed uncontrollably during direct examination and was completely unintelligible. She would not face the camera, and the prosecutor resorted to improper touching and consoling during J.C.'s testimony.

Appellant's Brief at 11. Essentially, appellant maintains that J.C. lacked the ability to adequately express herself and could not be understood by the jury as required by Kentucky Rules of Evidence (KRE) 601(b)(3).

The competency of a witness to testify is controlled by KRE 601, which reads:

- (a) General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.
- (b) Minimal qualifications. A person is disqualified to testify as a witness 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.

In its interpretation of KRE 601, our Supreme Court held that a witness is competent to testify if such witness:

[I]s able to perceive accurately that about which she is to testify, can recall the facts, can express herself intelligibly, and can understand the need to tell the truth.

Pendleton v. Com., 83 S.W.3d 522, 525 (Ky. 2002). Moreover, it is well-established that the “competency bar is low with a child’s competency.” *Id.* at 525. And, the competency of a witness is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Id.*

We have carefully reviewed the trial testimony of J.C. During her testimony, J.C. demonstrated her ability to narrate the facts and to be adequately understood by the jury. There were times when J.C. became extremely upset during her testimony, and as a result, some parts of her testimony were difficult to discern. However, the great majority of J.C.’s testimony was clear and intelligible. Most importantly, J.C. testified that appellant touched her, was “inside” her, and that she tried unsuccessfully to push him off of her. At the time of her testimony, J.C. was only sixteen years old. Considering her young age and the traumatic nature of the sexual abuse, it is entirely reasonable that J.C. would become emotionally distraught while testifying at trial. Considering the whole of J.C.’s

testimony at trial, we conclude that she adequately expressed herself so as to be reasonably understood by the jury. Thus, we cannot conclude that the trial court abused its discretion by determining that J.C. was competent to testify under KRE 601.

Appellant also alleges that the trial court erred by allowing J.C. to testify via closed circuit television. Appellant maintains that under Kentucky Revised Statutes (KRS) 421.350, only a child twelve years or younger may testify by closed circuit television.¹ It is undisputed that J.C. was sixteen years old at the time of the trial, but was twelve years of age at the time of the alleged assault. Thus, appellant argues that J.C. should not have been permitted to testify by closed circuit television. Additionally, even if the age requirement of KRS 421.350 was satisfied, appellant argues that no compelling need was demonstrated justifying the trial court's ruling that allowed J.C. to testify by closed circuit television. For the following reasons, we disagree.

KRS 421.350 permits the trial court to allow certain child victims to testify by videotape or by closed circuit television. It provides:

- (1) This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under [KRS 510.040](#) to [510.155](#), [529.030](#) to [529.050](#), [529.070](#), [530.020](#), [530.060](#), [530.064\(1\)\(a\)](#), [531.310](#), [531.320](#), [531.370](#), or any specified in [KRS 439.3401](#) and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or

¹ During trial, J.C. did not testify in open court; rather, J.C. testified in a room with only defense counsel, the Commonwealth, and the trial judge present. However, J.C.'s testimony was viewed in open court through closed circuit television by the jury.

younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection.

- (2) The court may, on the motion of the attorney for any party and upon a finding of compelling need, 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. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.
- (3) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by subsection (3) of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

- (a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;
 - (b) The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;
 - (c) Each voice on the recording is identified; and
 - (d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.
- (4) If the court orders the testimony of a child to be taken under subsection (2) or (3) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken, but shall be subject to being recalled during the course of the trial to give additional testimony under the same circumstances as with any other recalled witness, provided that the additional testimony is given utilizing the provisions of subsection (2) or (3) of this section.
- (5) For the purpose of subsections (2) and (3) of this section, “compelling need” is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

Our Supreme Court has interpreted KRS 421.350 as being applicable to any child who was twelve years old or younger when the crime was committed even if that child is older than twelve at the time of trial. *Danner v. Com.*, 963 S.W.2d 632 (Ky. 1998). In addition to the age requirement, the trial court must find a “compelling need” to utilize closed circuit television in order to meet the requirements of KRS 421.350. In determining a compelling need, there must exist a “substantial probability that the child would be unable to reasonably

communicate” due to the presence of defendant. KRS 421.350(5). And, on appeal, the trial court’s determination under KRS 421.350 will not be disturbed absent an abuse of discretion. *Danner*, 963 S.W.2d 632.

In this case, the record reveals that the trial court held a hearing to determine if J.C.’s testimony should be taken via closed circuit television per KRS 421.350. At the hearing, it was established that J.C. was twelve years old at the time of the offense. Additionally, Taylor County Deputy Sheriff Thomas Fink testified that J.C. was intimidated and that J.C. was hesitant to talk in front of appellant. J.C.’s mother, F.C., also testified that J.C. would become emotionally upset when seeing appellant and started crying upon seeing appellant in court. F.C. further stated that it was her belief that J.C. would be unable to testify in open court.

Upon consideration of the whole, we are unable to conclude the trial court abused its discretion by allowing J.C. to testify by closed circuit television under KRS 421.350. The evidence was more than sufficient to support the trial court’s determination of compelling need within the ambit of KRS 421.350.

Appellant finally maintains that the trial court committed reversible error by failing to present a missing evidence instruction to the jury. Appellant points to Deputy Fink’s testimony that he interviewed appellant and attempted to record the interview by audiotape; however, when the Deputy later played the audiotape only three words were allegedly audible – so the Deputy disposed of the audiotape. Appellant claims that the jury should have been instructed that it could infer that

the missing audiotaped interview would be adverse to the Commonwealth and favorable to appellant.

It is well-settled that the intentional destruction of exculpatory evidence by the Commonwealth constitutes a due process violation warranting a missing evidence instruction to the jury. *Coulthard v. Com.*, 230 S.W.3d 572 (Ky. 2007). To be entitled to a missing evidence instruction, it must be demonstrated that “the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed.” *Estep v. Com.*, 64 S.W.3d 805, 810 (Ky. 2002).

In this case, the circuit court declined to give a missing evidence instruction to the jury. According to Deputy Fink’s unrefuted testimony, the recording device used to record appellant’s interview malfunctioned and failed to record the interview. Thus, this is a case of a “failure to create evidence . . . , rather than a failure to preserve exculpatory evidence.” *Metcalf v. Com.*, 158 S.W.3d 740, 747 (Ky. 2005). The Commonwealth’s failure to create evidence does not implicate the due process clause; thus, a missing evidence instruction was not warranted. *See id.* Hence, we cannot say that the trial court erred by failing to give a missing evidence instruction to the jury.

We view any remaining contentions to be moot or without merit.

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

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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