

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001377-MR

G. G.

APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 12-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, KRAMER¹ AND STUMBO, JUDGES.

STUMBO, JUDGE: G. G. (hereinafter referred to as "Stepfather")² appeals from a Trial Order and Judgment of the Edmonson Circuit Court reflecting a jury verdict of guilty on one count of Unlawful Transaction with Minor, First Degree, and five counts of Sexual Abuse, First Degree. Stepfather argues that the Edmonson

¹ Judge Joy A. Kramer, formerly Joy A. Moore.

² Due to the nature of the criminal charges and the age of the victim, no names will be used.

Circuit Court committed reversible error in denying his motion for a continuance.

We find no error and AFFIRM the Order and Judgment on appeal.

"Child" was born to "Mother" on February 2, 1995. Child's father is not a party to these proceedings. When Child was about four years old, Mother and Child moved into the residence of Stepfather. Mother married Stepfather the following year.

The record reveals that the same year in which Child and Mother moved into Stepfather's house, he began touching Child in an inappropriate and sexual manner. The nature of the touching is detailed in the record and need not be recited herein. Suffice it to say that Stepfather touched Child in a sexual manner variously ranging from seldom to several times a day until she reached the age of 15. Child told Mother about the sexual touching on at least two occasions, but Mother chose not to believe Child nor to confront Stepfather about it. As Child grew older, she developed a compulsion to cut herself on her wrists and ankles. She would later testify that she felt hopeless, overpowered and invisible.

When Child was 15 years old, she confided with her school friends about her tendency to self harm and they reported her statements to school authorities. An investigation followed, which resulted in Child acknowledging the molestation and cutting to a social worker and Kentucky State Trooper Jeremy Hodges. Trooper Hodges then interviewed Stepfather, who admitted the nature and duration of the touching.

Thereafter, Stepfather was charged with 60 counts of Sexual Abuse, First Degree, and Unlawful Transaction with Minor, First Degree. Mother was charged as a co-defendant and divorced Stepfather during the pendency of the proceedings. After preliminary matters and discovery were undertaken, a jury trial was scheduled for February 13, 2013. On the date of trial, Stepfather made an oral motion for a continuance. As a basis for the motion, Stepfather, through counsel, argued that he had just been informed that Mother accepted a plea offer and would be testifying against Stepfather. The motion was denied, and after counsel stated that he was not ready to proceed, the trial commenced. At the conclusion of the trial, the jury returned a guilty verdict on 6 of the 60 counts and Stepfather was sentenced to a total sentence of 10 years in prison. This appeal followed.

Stepfather now argues that the Edmonson Circuit Court committed reversible error in denying his motion for a continuance. After directing our attention to the factors to be considered in ruling on a motion for a continuance as set out in *Eldred v. Commonwealth*, 906 S.W.2d 694, 699 (Ky. 1994), Stepfather notes that the record is silent as to any analysis of these factors. Because the record is silent as to any analysis of the *Eldred* factors, Stepfather maintains that "only assumptions can be made as to the reasoning behind the trial judge's decision." Stepfather goes on to argue that because appellate review can only be effective with a clear record, *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky. App. 2002), the matter must be reversed and remanded for a new trial.

The decision to grant a motion for a continuance falls within the sound discretion of the trial court. RCr 9.04;³ *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991)(*overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)). *Eldred, supra*, sets out several factors to be considered in making this determination. These factors include 1) the length of the delay, 2) whether there have been any prior continuances, 3) the inconvenience to the parties, witnesses, counsel and court, 4) whether the delay was caused by the accused, 5) the availability of counsel, if at issue, 6) the complexity of the case, and 7) whether denying the continuance would lead to any identifiable prejudice. *Id.* at 699.⁴

The standard of review of a trial court's denial of a motion for a continuance is whether it committed an abuse of discretion. *Morgan v. Commonwealth*, 421 S.W.3d 388, 392 (Ky. 2014). Abuse of discretion is found if the trial court's decision was “arbitrary, unreasonable, unfair or unsupported by sound legal principles.” *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky. App. 2008)(citation omitted).

The essence of Stepfather's claim of error is that the trial court's decision *might* have constituted an abuse of discretion and that "only assumptions can be made", thus requiring reversal and remand. We are not persuaded by this

³ The Commonwealth incorrectly cites to RCr 9.02.

⁴ *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994) was abrogated on other grounds by *Commonwealth v. Barroso*, 122 S.W.3d 554, 563-64 (Ky. 2003).

argument. Rather than assuming that trial court's denial was unsupported, the burden rests with Stepfather to overcome the strong presumption that the trial court's ruling was correct. *City of Louisville v. Allen*, 385 S.W.2d 179, 184 (Ky. 1964)(*overruled in part on other grounds by Nolan v. Spears*, 432 S.W.2d 425 (Ky. 1968)). This burden would be met by demonstrating that the Edmonson Circuit Court's denial of the motion for a continuance constituted an abuse of discretion. *Snodgrass, supra*. Stepfather has not met this burden. Stepfather has not argued, much less demonstrated, that the *Eldred* factors bolstered his motion.

Arguendo, even if Stepfather had demonstrated that sufficient cause was shown in support of a continuance, RCr 9.04 *allows* the court, but does not *require* it, to grant a continuance, stating that the court "upon motion and sufficient cause shown by either party, *may* grant a postponement of the hearing or trial[.]" RCr 9.04 (emphasis added). Our review of the record does not demonstrate that the *Eldred* factors compelled a continuance. In addition, Stepfather received a copy of Mother's discovery interview at least four months prior to trial, Mother and Stepfather were divorced before the trial commenced, and it was not wholly unanticipated that Mother, as co-defendant, would accept a plea offer and testify at the trial. We find no error.

For the foregoing reasons, we AFFIRM the Trial Order and Judgment of the Edmonson Circuit Court.

ALL CONCUR.

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