

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001809-ME

B.S.S.

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 15-J-00131-001

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
K.S. (MOTHER); AND K.S. (CHILD)

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON; JONES; AND NICKELL, JUDGES.

JONES, JUDGE: The Appellant, B.S.S., (hereinafter referred to as “Father”) appeals from an order of the Carter Circuit Court finding that he abused his three-year-old daughter, K.S. Father argues that we should reverse: (1) because the trial court erroneously concluded that certain out-of-court-statements by K.S. were

admissible under KRE¹ 803(2), the excited utterance exception to hearsay rule; and (2) because the trial court's finding that Father sexually abused K.S. is not supported by substantial evidence. For the reasons set forth below, we AFFIRM.

I. BACKGROUND

K.S., the alleged victim, was born on August 24, 2011. On May 5, 2015, the Cabinet for Health and Family Services ("Cabinet") received a report that K.S. was possibly the victim of sexual abuse. The report indicated that: (1) K.S. suddenly began resisting contact with Father; (2) that she cried and would not take a bath anymore; (3) that K.S. had reported that Father spanked her vagina; and (4) that her vagina hurt.

After receiving the report, the Cabinet began an investigation, which included a Hope's Place forensic interview with K.S. and a medical examination. At the conclusion of the investigation, the Cabinet recommended Father have no contact with the child and required Mother to sign a prevention plan to that effect.

Thereafter, on July 15, 2015, the Commonwealth filed a Dependency Neglect and Abuse ("DNA") petition alleging that Father sexually abused K.S.

The petition states:

Worker received a report with allegations about sexual abuse. During the investigation the worker had the child go to a Hope's place interview where the child stated that her dad touched her "twat" and said it made her sad. Child has expressed fear of her father and does not want to be around him. Before the Hope's Place exam the mother, [] had taken the child to a well-child exam and it was found the child disclosed about sexual abuse.

¹ Kentucky Rules of Evidence.

Worker has requested a certified copy of these records. The mother disclosed concerns about the father and the child was having nightmares about him and feared being alone with him. Due to the disclosure at Hope's Place she was sent for a medical exam. The medical exam had findings that were indicative of sexual abuse as well as behaviors indicative of sexual abuse. The father's attorney was contacted by Detective Cook for an interview. The detective is still awaiting an interview from [Father] at this time. [Mother] has the child and [Father] is not allowed contact at this time.

The trial court conducted a DNA hearing over the course of two days.

Mother testified that an incident occurred one evening as she was leaving her sister's house. She testified that when K.S. was told she was going back home to see Father, K.S. ran and hid beside a table. Mother further testified that K.S. was fine with them going home until she learned that Father was there at which time she became very distressed. Mother explained that K.S.'s distress was so severe that she had to use physical force to get K.S. out of her sister's house and into the car. Mother testified that K.S. was struggling and crying while being carried to the car. Mother then testified that K.S. said: "I don't want to see my dad. He spansks me, mom. He spansks me like this" at which time Mother stated that K.S. hit her vagina. Later, after K.S. made these initial statements, Mother explained that she made a video of K.S. on her cell phone, recording similar statements by K.S. The video was not introduced during direct examination.

Mother also testified about several changes in K.S.'s behavior that caused her concern including: clinginess, not wanting to be alone, problems during bath time, and nightmares which included kicking, screaming, and crying out.

Mother testified that she also observed K.S. shying away from physical contact with Father. She explained that K.S. would not hug or kiss Father anymore and actually ran away from him at times.

During Mother's direct examination, Father objected to Mother being allowed to testify about K.S.'s statements to her on hearsay grounds. The trial court overruled Father's objection after concluding that the statements constituted excited utterances. During Father's portion of the hearing, his counsel requested that the video Mother made of K.S.'s statements be played for the court. The video, which shows K.S. repeating her earlier statements about Father's actions toward her, was then played for the trial court.

At the hearing, the trial court also heard evidence from Dr. Lauren Miller, a medical doctor with a subspecialty in performing pediatric sexual abuse exams. Dr. Miller testified that she performed a sexual abuse exam on K.S. on June 10, 2015. During her exam, Dr. Miller obtained a medical history and conducted a review of K.S.'s behavioral and physical problems. Dr. Miller testified that she did not directly question K.S. about the alleged sexual abuse as part of her examination. Dr. Miller testified that from her physical exam she found a small notch in the posterior aspect of K.S.'s hymen – a non-specific finding. Dr. Miller explained that because this was a non-specific finding it was consistent with sexual abuse, but could possibly have been something else. Dr. Miller also testified that in her opinion, as set forth in her post-examination report, K.S.'s behavior was consistent with past sexual abuse and emotional harm.

Following the hearing, the court entered its findings of fact and conclusions of law. The court's order states that based on the evidence presented, it found: "the petition as true as the child disclosed that her father 'spanked' her vagina"; that K.S. exhibited an "unusual and extreme" fear of the father; and the physical exam revealed non-specific notch in the child's hymen." Based on its findings, the trial court concluded that Father abused K.S. pursuant to KRS² 600.020(1)(a)(5)-(6). This appeal followed.

II. Analysis

A. Hearsay – Excited Utterance Exception

Father argues that the trial court erred in admitting improper hearsay testimony. We review a trial court's ruling regarding the admission or exclusion of evidence for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The central issue is whether K.S.'s out-of-court statements to Mother were properly admitted by the trial court under the excited utterance exception to the hearsay rule. KRE 803(2) provides that an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

² Kentucky Revised Statutes.

At the outset, it is important to distinguish which statements made by K.S. are the proper subject of our review. In arguing against the admissibility of K.S.'s statements to Mother, Father centers his argument on the statements made by K.S. on the video recorded on Mother's cell phone. The video, however, was not introduced by the Commonwealth. Mother simply testified that she recorded the statements during her direct examination without further elaboration. While Father objected to Mother's testimony, he did not assert a continuing objection; therefore, his prior objection was not sufficient to preserve an issue concerning later admission of the videotape. *See Davis v. Commonwealth*, 147 S.W.3d 709, 722 (Ky. 2004). Additionally, and perhaps more importantly, we cannot ignore the fact that the video itself was played for the trial court at the request of Father's counsel as part of Father's defense. It was not introduced by the Commonwealth as part of its case-in-chief. We believe it would be distortion of justice to allow Father to ask for the introduction of evidence before the trial court on the one hand, and then later argue before the appellate court that the trial court erred in granting his request. Any other rule would allow a savvy litigant to manufacture grounds for reversal. We will not condone such a practice.

Even if we were to review the introduction of videotape for palpable error, it would not, standing alone, merit reversal. K.S.'s statements in the video were consistent with Mother's testimony about the unrecorded statements K.S. made to her before the recording. Assuming that Mother's testimony concerning the unrecorded statements was admissible, any error in admitting the video is

harmless. Even without the video, the substance of K.S.'s statement would have been before the trial court. Thus, we must conclude that the outcome would have been the same with or without the video evidence. *See Davis*, 147 S.W.3d at 726.

This leads us to the real question in this case: did the trial court err in concluding that K.S.'s unrecorded statements to Mother were excited utterances, and therefore, admissible under KRS 803(2). In determining whether a statement is admissible as an excited utterance, courts are to consider the totality of the surrounding circumstances, and those circumstances "must give the impression that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation." *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 245 (Ky. 2009). The true test is "not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue." *Preston v. Commonwealth*, 406 S.W.2d 398, 401 (Ky. 1966).

The circumstances that must be examined in each case are: 1) the lapse of time between the main act and the declaration; 2) the opportunity or likelihood of fabrication; 3) the inducement to fabrication; 4) the actual excitement of the declarant; 5) the place of the declaration; 6) the presence there of visible results of the act or occurrence to which the utterance relates; 7) whether the utterance was made in response to a question; and 8) whether the declaration was against interest or self-serving. *See Souder v. Commonwealth*, 719 S.W.2d 730, 733 (Ky. 1986).

These criteria do not pose a true-false test for admissibility, but rather act only as guidelines to be considered in determining admissibility. *R.C. v. Commonwealth*, 101 S.W.3d 897, 902 (Ky. App. 2002). They are not a litmus test. Indeed, the formulation of such a test would be virtually impossible given the wide variety of factual situations in which these statements are made. It is for this reason that appellate courts have recognized wide discretion in trial courts to determine whether in fact a declarant was at the time of an offered statement under the influence of an exciting event. *Id.*

Even though there was some lapse of time between the event in question and K.S.'s unrecorded statements to Mother, we believe the trial court properly considered the relevant facts and reached a reasoned and proper determination that they were admissible under KRE 803(2) as excited utterances. The event (sexual abuse at the hands of a parent) is traumatic and emotional for a young child. The child suffers an emotional assault to the parent-child relationship in addition to the physical assault on her body. The event is also likely to be particularly distressing to a young child unfamiliar with the concept of sexual touching. It is not unrealistic to expect that the distress of the event will continue for some time as the child continues to process what occurred and tries to make sense of it in her mind.

K.S. was three at the time she made the statements. She was also exhibiting behavior such as crying and kicking at the time she made them. This behavior is indicative of both distress and spontaneity. Furthermore, there was

nothing to suggest that K.S.'s mother or any other person had questioned her about possible abuse by Father at any point prior to her making the statements. There was no opportunity for fabrication and no inducement was offered.³

The determination of what evidence falls within the excited utterance exception to the hearsay rule must be based on the facts and circumstance of each particular case. The trial court was in a superior position to make this determination with respect to K.S.'s statements after evaluating all the relevant circumstances. Based on the nature of the circumstances placed before the trial court, we believe it properly exercised its discretion when it determined that the statements were made while K.S. was still under the influence of the excitement and distress produced by the prior sexual abuse.⁴ We find no abuse of discretion concerning the admission of K.S.'s statements to her mother.

B. Sufficient Evidence

Father's second and last argument concerns the sufficiency of evidence. Father contends that the record does not contain substantial evidence to support the trial court's ultimate findings and conclusions. In reviewing decisions

³ Father also argues that K.S.'s statements were prompted by her mother because they were made in response to questions. However, as we have explained, the questioning of K.S., which appears on the video, is not K.S.'s initial excited utterance. This video was a later recording of a subsequent statement, which was not introduced in the Commonwealth's case in chief. It was only placed into evidence after Father requested it. In short, there was no evidence offered that K.S.'s initial statements were the product of reflection, deliberation or questioning.

⁴Father argues that no evidence was ever produced to show the presence of visible results of any sexual abuse on the child as it relates to the child's utterance. However, Dr. Miller testified that her physical examination of K.S. showed a non-specific notch in her hymen, which could have been consistent with past sexual abuse. Dr. Miller's report also indicates that K.S.'s behavior was consistent with having been sexually abused.

of the family court, the appellate standard of review is abuse of discretion.

Coffman v. Rankin, 260 S.W.3d 767, 770 (Ky. 2008). Abuse of discretion implies that the decision of the court was unreasonable or unfair. *Id.* Under this standard, factual findings will not be disturbed absent clear error. *See R.C.R. v.*

Commonwealth, Cabinet for Human Resources, 988 S.W.2d 36, 39 (Ky. App. 1998)(“In a trial without a jury, the findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be clearly erroneous.”). Therefore, the test on appellate review is whether the court’s findings are clearly erroneous, whether the trial court applied the correct law, or whether it abused its discretion. *Coffman*, 260 S.W.3d at 770.

Our sole inquiry here is whether sufficient evidence exists in the record to support the trial court’s finding of abuse pursuant to KRS 600.020(1). The definition of an abused or neglected child includes “a child whose health and welfare is harmed or threatened with harm when . . . his parent . . . commits . . . an act of sexual abuse . . . upon the child.” KRS 600.020(1)(a)(5).

Father’s argument regarding the sufficiency of the evidence, centers around the fact that Dr. Miller’s physical examination was inconclusive with respect to past sexual abuse. There is no statutory requirement that a finding of sexual abuse must be supported by conclusive medical evidence. In fact, our Supreme Court has recognized in criminal sex abuse cases that even “the testimony of a single witness is enough to support a conviction.” *King v. Commonwealth*, 472 S.W.3d 523, 526 (Ky. 2015).

In this case, the evidence when considered as a whole was certainly sufficient to support the trial court's findings and conclusions. K.S.'s mother testified about K.S.'s seemingly irrational fear of Father, K.S.'s statements to mother suggested that Father touched her vagina inappropriately, Dr. Miller's physical examination revealed a notch in K.S.'s hymen, and Dr. Miller concluded that K.S.'s behavior was consistent with having been sexually abused.

Considering the totality of the evidence, we cannot conclude that the court's findings were clearly erroneous or constituted an abuse of discretion. Substantial evidence supports the trial court's findings that Father sexually abused K.S., and therefore, its ultimate conclusion that K.S. was an abused child as defined by KRS 600.020.

III. CONCLUSION

For the reasons set forth above, we AFFIRM the Carter Family Court.

ALL CONCUR.

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