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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001816-MR

JUSTIN A. PRATT — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE DAVID WILLIAMS, JUDGE
ACTION NO. 15-CR-00039

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Justin A. Pratt brings this appeal from a November 10, 2016, judgment and sentence of imprisonment of the Monroe Circuit Court. The judgment was entered in accordance with a jury verdict finding him guilty of sexual abuse in the first degree, victim under twelve years of age, and sentencing him to six-years' imprisonment. We affirm.

In early 2015, Pratt began cohabitating with his girlfriend, L.B. L.B. had three children: M.B., S.B., and T.B. On the evening of June 29, 2015, L.B.'s children had cousins at the house for a sleepover. L.B. had gone to her bedroom as she was not feeling well, and Pratt was helping with the children. L.B.'s two-year-old daughter, T.B., had been put to bed in her bedroom and the other children were watching a movie in the family room. T.B. repeatedly came out of her bedroom into the family room. Each time, Pratt reprimanded T.B. and took her back to her bedroom. On about the third such occasion, T.B.'s ten-year old sister, M.B., became concerned that Pratt intended to severely punish T.B., so she followed Pratt back to T.B.'s bedroom. Pratt apparently noticed M.B. was following him down the hall and told M.B. to go back to the family room. M.B. pretended to go back to the family room but instead hid just out of Pratt's view. According to M.B., she witnessed T.B. laying across Pratt's lap without any underwear, Pratt pulling his hand away from T.B.'s bottom, and Pratt spanking T.B. When T.B. tried to resist, M.B. heard Pratt tell T.B. "if you don't let me do this the monsters will get you." Commonwealth's Brief at 1, citing to the trial video record. M.B. then returned to the family room to avoid being detected by Pratt.

T.B. almost immediately came out of her bedroom crying for her mother. T.B. had urinated and defecated on herself so Pratt took T.B. to her mother, L.B., and indicated T.B. needed to be cleaned up. Pratt offered to give

T.B. a bath; however, L.B. responded that she would give T.B. a bath as she had already started bathwater for herself. As T.B. got into the tub, L.B. noticed that T.B.'s bottom was red and swollen. L.B. asked T.B. what had happened and T.B. responded that Pratt had poked her bottom with his finger. Upon closer inspection, L.B. noticed the area around T.B.'s rectum was red, swollen, and bleeding. L.B. immediately confronted Pratt, and he denied the accusation. L.B. told Pratt to leave her home, and she took T.B. to the emergency room. At the hospital, it was determined that T.B. had an anal fissure. T.B.'s injuries were also confirmed the following day at the child advocacy center.

Pratt was subsequently indicted upon first-degree sexual abuse, victim under twelve years of age. Kentucky Revised Statutes (KRS) 510.110(1)(b)(2). Following a jury trial, Pratt was sentenced to six-years' imprisonment. This appeal follows.

On appeal, Pratt contends the trial court erred by admitting into evidence the hearsay statements of T.B., an incompetent witness.[1] More particularly, Pratt asserts the trial court erroneously permitted T.B.'s mother, L.B., to testify regarding statements T.B. made to her immediately following the incident of sexual abuse. Pratt specifically maintains that the trial court erred by

[1] The Commonwealth of Kentucky conceded that T.B. was an incompetent witness and would not testify at trial.

determining the statements were admissible under the hearsay exception permitting excited utterances. We disagree.

To begin, we note that our standard of review of a trial court's ruling as to admitting or excluding evidence is limited to determining whether the trial court abused its discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, (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.

Id. at 581 (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Hearsay testimony is defined in the Kentucky Rules of Evidence (KRE) 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is generally inadmissible at trial unless an exception is provided for in the Kentucky Rules of Evidence or Rules of the Kentucky Supreme Court. KRE 802. The exception relevant to this case is the excited utterance exception under KRE 803(2). KRE 803(2) defines an excited utterance as 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." And, pursuant to the excited utterance exception of KRE 803(2), the availability of the witness at trial is irrelevant.

The Kentucky Supreme Court addressed the excited utterance exception to the hearsay rule in *Noel v. Commonwealth*, 76 S.W.3d 923, 926 (Ky. 2002). In *Noel*, the Court explained that when statements are "made under the stress of the excitement caused by a startling occurrence are more likely the product of that excitement and, thus, more trustworthy than statements made after the declarant has had an opportunity to reflect on events and to fabricate." *Noel*, 76 S.W.3d at 926 (citing *Mounce v. Commonwealth*, 795 S.W.2d 375, 379 (Ky. 1990)). In other words, the excited utterance exception recognizes that a startling event or condition "may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." *Mounce*, 795 S.W.2d at 379 (citation omitted).

The *Noel* Court also identified factors to consider when determining whether a hearsay statement is admissible pursuant to the excited utterance exception of KRE 803(2):

> (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.

Noel, 76 S.W.3d at 926 (citation omitted). While no single factor is dispositive, the factors set forth in *Noel* "are guidelines to be considered in determining admissibility." *Id.* (citations omitted). And, the trial court's decision upon whether "to admit or exclude the evidence is entitled to deference." *Id.* at 926 (citations omitted). We will address each of the factors identified in *Noel* seriatim.

(i) Lapse of time between the act and declaration. T.B.'s statements were made almost immediately after the startling incident of sexual abuse. As summarized earlier, T.B. came out of her bedroom immediately after the incident of sexual abuse, visibly upset and crying for her mother. T.B. had urinated and defecated on herself and L.B. proceeded to give her a bath. As T.B. was getting into the bath, L.B. noticed T.B.'s bottom was red and swollen. L.B. touched T.B.'s bottom to evaluate the extent of her injuries, and T.B., screamed "[D]on't do that mommy." L.B. asked "What happened does you butt hurt?" T.B. responded, "Yes it hurts. Justin poked me." L.B. responded "Justin poked you with what?" T.B. replied, "Justin poked me with his finger." Commonwealth's Brief at 8, citing to the trial video record. The lapse of time between the incident of sexual abuse and the statements T.B. made to her mother was a matter of mere minutes. Thus, factor (i) clearly weighs in favor of admissibility of the statements T.B. made to L.B. as an excited utterance.

(ii) Opportunity or likelihood of fabrication. Given the extremely short amount of time that had transpired between the act of sexual abuse and T.B.'s statements to L.B., there was very little opportunity for T.B. to fabricate the events. Therefore, factor (ii) also weighs in favor of admissibility of the statements as an excited utterance.

(iii) Inducement to fabricate. T.B.'s statements were made in response to her mother's attempt to discern why T.B.'s bottom was red and swollen. L.B. did not ask T.B. any leading questions or attempt to sway T.B.'s responses. There is nothing in the record to demonstrate T.B. was induced to fabricate the allegation against Pratt. Therefore, we likewise believe factor (iii) weighs in favor of admitting the statements into evidence as an excited utterance.

(iv) Actual excitement of the declarant. T.B. was still under the influence of the "excitement" of the incident of sexual abuse when she told her mother about the incident. T.B. had urinated and defecated on herself, she was crying, and she was visibly very upset. It was obvious T.B. had experienced a traumatic event and was still acting in an excited manner. Thus, we believe factor (iv) also weighs in favor of admitting the statements T.B. made to L.B.

(v) Location of the statements. The excited utterances at issue in this case were made in the same location where the abuse occurred. The sexual abuse occurred in T.B.'s home, and the statements T.B. made to her mom were

made in their home as well. These statements were not made in a hospital or some other remote location, but rather were made contemporaneously where the abuse occurred. We believe factor (v) weighs in favor of admissibility.

(vi) Presence of physical results of the abuse. The injuries Pratt caused to T.B.'s rectum were visible. L.B. observed that the area around T.B.'s rectum was red, swollen, and bleeding. And, photographs taken after T.B. arrived at the hospital demonstrate the presence of the physical injuries Pratt inflicted upon T.B. As the physical results of the abuse were clearly present when the statements were made, factor (vi) also weighs in favor of admitting the statements as excited utterances.

(vii) Whether the utterance was made in response to a question. T.B.'s excited utterances were made in response to simple open-ended questions by her mother, L.B. L.B's inquiry was short and not suggestive of a particular answer. L.B.'s questions did not implicate Pratt. Thus, this factor (vii) also weighs in favor of admitting the statements into evidence.

(viii) Whether the statements were against her interest or self-serving. T.B.'s statements were neither self-serving nor against her interest. T.B. clearly had nothing to gain or to lose by stating that Pratt had sexually abused her. Upon the balance of these factors, we believe T.B.'s statements to her mother, L.B., fall within the excited utterance exception to the general rule excluding

hearsay. Thus, we do not believe the trial court erred by admitting these statements into evidence.

In the case *sub judice*, the application of the factors enumerated in *Noel*, 76 S.W.3d 923, lead us to the inescapable conclusion that the statements T.B. made to her mother, L.B., immediately following the incident of sexual abuse, fall within the excited utterance exception to the hearsay rule. These statements were made under the stress created by the startling nature of the sexual abuse and, thus, were properly admitted into evidence pursuant to KRE 803(2).

Pratt relies upon the case of *B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007) and argues that hearsay statements of an incompetent witness may never be admitted under any exception to the hearsay rule. We do not interpret *B.B.* so broadly and view *B.B.* as distinguishable.

In *B.B.*, a three-year-old child made statements to an emergency room nurse four days after the alleged sexual abuse occurred. The child was determined to be incompetent to testify, but the child's hearsay statements to the nurse were admitted into evidence under the exception for statements made for the purpose of medical treatment. The *B.B.* Court held that the child's hearsay statements were improperly admitted under the medical hearsay exception. *Id.* In so ruling, the Supreme Court viewed the child's hearsay statements to the nurse as lacking a guarantee of trustworthiness and reliability. *Id.*

By contrast, in this case, the trustworthiness and reliability of T.B.'s hearsay statements are aptly demonstrated by the unique circumstances surrounding those statements. As hereinabove stated, T.B.'s hearsay statements to her mother were made mere minutes after the abuse occurred and while T.B. was still under the immediate stress of the abuse. And, T.B.'s mother had no knowledge of the abuse when she questioned T.B. in the bath. Rather, T.B. responsively related to her mother how Pratt had violated her.

Accordingly, we conclude that the trial court did not abuse its discretion or otherwise err by admitting into evidence the statements of T.B. under the excited utterance exception to the hearsay rule.

Pratt also asserts that the trial court erroneously admitted certain testimony from three other witnesses at trial. Pratt concedes these issues were not preserved at trial but requests review for palpable error pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. RCr 10.26 provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Pursuant to RCr 10.26, a palpable error occurs if defendant's substantial rights were affected and a manifest injustice occurred. *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006).

Pratt specifically asserts that the trial court erroneously admitted the testimony of Detective Logan Richardson. In particular, Pratt asserts Detective Richardson interviewed several individuals at the hospital, including T.B.'s mother, L.B., and T.B.'s sister, M.B. Detective Richardson subsequently interviewed Pratt at the police station. Detective Richardson testified that the first part of Pratt's statements were consistent with the statements of both L.B. and M.B. Detective Richardson further testified that Pratt's version of the events departed from L.B. and M.B.'s version regarding the moments when the act of sexual abuse occurred. Pratt contends that as a result, Detective Richardson's "testimony vouched for and bolstered the testimony" of L.B. and M.B. We disagree. The testimony clearly reflects the detective's interrogation of witnesses relevant to the investigation of the alleged crime. Accordingly, Pratt has not demonstrated that his substantial rights were affected or that a manifest injustice occurred under RCr 10.26.

Pratt next asserts that the trial court erred by allowing L.B. to testify about the lingering effect the sexual abuse had upon T.B. L.B. testified that some three months after the abuse occurred, T.B. was still afraid to go into her bedroom alone. Pratt also argues the trial court erroneously admitted M.B.'s personal impression of Pratt. M.B. briefly testified that she did not trust Pratt because of the way he had treated her mother, L.B., without objection at trial. The

Commonwealth did not dwell on this testimony and immediately directed its questions of the witness to another topic. Pratt asserts that M.B.'s testimony was irrelevant pursuant to KRE 402, was unfairly prejudicial pursuant to KRE 403, and inadmissible as a prior bad act under 404(b). Again, we believe that any error in the admission of these statements by L.B. and M.B. do not rise to the level of palpable error under RCr 10.26 as Pratt has failed to demonstrate that his substantial rights were affected or that a manifest injustice resulted. To the extent there was any error in the admission of this testimony, it was harmless.

For the foregoing reasons, the judgment and sentence of imprisonment of the Monroe Circuit Court is affirmed.

ALL CONCUR.

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