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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000053-MR

RONNIE W. SHIRLEY — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE JOHN T. ALEXANDER, JUDGE
ACTION NO. 16-CI-00315

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT, AND SPALDING, JUDGES.

SPALDING, JUDGE: Ronnie Shirley appeals from a judgment convicting him of two counts of first-degree sexual abuse, one count of fourth-degree assault, and being a second-degree persistent felony offender for which he was sentenced to ten years' imprisonment. Finding no reversible error in any of the arguments presented, we affirm.

In June 2016, Glasgow Police responded to a call concerning an alleged assault on Sarah,[1] the girlfriend of appellant Shirley. Upon arriving at the residence of Marna Kirkpatrick where Sarah had gone after the alleged assault, Sergeant Jesse Barton interviewed Sarah whom he described as upset and crying. Sarah showed Sgt. Barton red marks all over her body where she appeared to have been beaten. In the course of the investigation, Sarah also informed Sgt. Barton that appellant had sexually abused her daughter who was eight-years-old at the time.

In addition to a written statement Sarah made concerning her allegations, a second officer who had arrived at Kirkpatrick's house recorded his interview with Sarah on his body camera. Sarah made recorded statements that appellant had beaten her with a belt and that he had admitted to inappropriately touching her young daughter. On the recording, Sarah alleged that appellant stated that he was sorry that he had touched the child and that, because he was intoxicated, he thought he had been touching Sarah. Sarah later reiterated these statements to a social worker, again stating that after she had confronted appellant about his inappropriate contact with the child, he stated that he had been drunk and did not mean to touch the child.

[1] In order to protect the identity of the child victim, we refer to the child's relatives by first names only or other by descriptive information.

The Barren County grand jury subsequently indicted appellant on charges of first-degree sodomy (child under 12), first-degree sexual abuse (child under 12), fourth-degree assault (domestic violence), second-degree criminal abuse (child under 12),[2] and being a second-degree persistent felony offender (PFO). The Commonwealth later amended the indictment to two counts of first-degree sexual abuse, one count of fourth-degree assault, and the PFO charge.

The trial testimony included the recorded testimony of the child and the in-court testimony of Sarah, Sarah's mother, her mother's sisters, and appellant. The day before trial, the child testified at a closed, recorded hearing with only counsel and appellant present. Speaking from behind a screen, she stated that the sexual abuse occurred on two occasions, providing specific testimony as to where the abuse occurred and describing the nature of the touching. The child stated that after the second occasion she called her grandmother and told her "Nanny, he touched me again." The child also stated that, after going outside to play, she came back into the residence to use the bathroom where she saw her mother with scratches and marks all over her body.

At trial, the child's mother Sarah denied that any abuse occurred, stating that a dog dragged her across blacktop pavement causing the marks

[2] It appears from the record that this charge involved a different child and was severed from the indictment and tried separately.

observed by the police. When confronted with her written statement and the video statement taken by the police, Sarah stated that she had lied and that she had been highly intoxicated at the time she made the statements. The child's grandmother testified that after receiving the phone call from the child regarding the abuse, she called her two sisters and they all came to appellant's residence. They helped Sarah pack some belongings, clothes, and toys so that she and the child could leave the residence they shared with appellant. Appellant's testimony consisted of a denial of any wrongdoing and an assertion that the abuse allegations were part of a plot against him by Sarah's family. After deliberation, the jury returned the guilty verdict which precipitated the judgment at issue in this appeal.

Appellant advances two primary arguments in support of his contention that the judgment must be reversed: 1) that the trial court erred in refusing to give tendered instructions on reasonable doubt and burden of proof; and 2) that the trial court erred in admitting hearsay statements attributed to the child through the testimony of her grandmother and her two great-aunts. We commence with an analysis of appellant's argument concerning the instructions.

The tendered instructions at issue in this appeal read as follows:

REASONABLE DOUBT

> The jury is instructed that a reasonable doubt may arise only from the evidence and the burden is upon the Commonwealth, through prosecution, to prove the

> accused guilty beyond a reasonable doubt of every essential element of the offense charged.
>
> BURDEN OF PROOF
>
> The burden of proof in this case rests upon the prosecution from the beginning to the end of the trial to establish beyond a reasonable doubt every fact essential to the conviction of Ronnie Shirley of a particular offense. This includes the burden to prove mental state at the time of the offense. Ronnie Shirley has no burden to sustain. It is enough that his evidence if, when taken with the prosecution's, raises a reasonable doubt as to his guilt of a particular offense or degree of offense—in which case he must be found not guilty of that offense.

In examining the failure to give a requested instruction, we review the trial court's decision for abuse of discretion. *Commonwealth v. Caudill*, 540 S.W.3d 364 (Ky. 2018) (citing *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015)). The well-established 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). Considering the trial court's decision in light of these principles, we cannot say that the refusal to give the requested instructed constituted any such abuse.

In refusing appellant's tendered instructions, the trial court expressed its belief that the standard instruction on presumption of innocence sufficiently covered the matter. And, in fact, the trial court instructed the jury with the model

instruction for presumption of innocence set out in Cooper's KENTUCKY INSTRUCTIONS TO JURIES (CRIMINAL):

> The law presumes a defendant to be innocent of a crime and the Indictment shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

Id. at Section 2.02 (5th ed. 2012). Appellant does not argue that the trial court's instruction is erroneous; rather, he argues that his tendered instructions were better, providing fuller and clearer guidance for the jury in applying the concept of reasonable doubt. We do not agree.

In our view, the term "reasonable doubt" is within the comprehension of persons of ordinary intelligence. As our Supreme Court observed in *Commonwealth v. Callahan*:

> Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further defining or refining. **All persons who possess the qualifications for jurors know that a doubt of the guilt of the accused, honestly entertained, is a reasonable doubt**.

675 S.W.2d 391, 393 (Ky. 1984) (quoting 9 WIGMORE, EVIDENCE, Section 2497 (Chadbourn rev. 1981), page 412) (emphasis added). Thus, like the trial court, we are convinced that appellant's proposed instructions are contrary to Kentucky's principle of "bare bones" jury instructions which provide the jury with only

enough information to instruct it on what it must believe from the evidence in order to resolve every issue of fact. *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008). Hence, the trial court did not err in giving the standard instruction on presumption of innocence rather than appellant's tendered instructions.

Next, appellant insists that the trial court erred in permitting the Commonwealth to introduce three hearsay statements the child made to her grandmother and to her great-aunts, Nell and Faye. We note that in reviewing a trial court's decision to admit such hearsay statements, "[w]hether a particular statement is admissible under a hearsay exception depends on the circumstances of each case and is a preliminary question of fact to be determined under KRE 104(a)." *Ernst v. Commonwealth*, 160 S.W.3d 744, 752 (Ky. 2005) (citing *Noel v. Commonwealth*, 76 S.W.3d 923, 926 (Ky. 2002)). Further, a "trial court's findings of fact under KRE 104(a) will not be disturbed unless clearly erroneous." *Id.* (citing *Young v. Commonwealth*, 50 S.W.3d 148, 167 (Ky. 2001)). With these principles in mind, we turn to the trial court's conclusion that each of the statements was admissible as falling within the excited utterance exception to the hearsay rule defined in KRE 803(2).

Prior to trial, the Commonwealth moved to introduce certain statements the child made to relatives concerning the sexual abuse. After orally granting the Commonwealth's motion on the basis of an in-chambers hearing, the

trial court ordered the Commonwealth to file a written motion which the trial court granted by written order. The first statement the Commonwealth sought to introduce occurred during a phone call the child made to her grandmother on the night of the second incident of abuse. In that call, the child whispered the unprompted statement "Nanny, he has done it to me again." The child made this statement while she was still at the residence where the abuse occurred and appellant was still present at the home.

The second statement the Commonwealth sought to introduce occurred when the child's great-aunt Nell arrived at the residence with her grandmother on the night the abuse occurred. The child ran up to Nell and allegedly stated "he done it again." The child made the third statement to another great-aunt, Faye, who arrived at the residence sometime after the child's grandmother and Nell. Faye saw the child sitting in a car outside the residence and, as she approached the vehicle before going inside the residence, the child purportedly stated, "don't let him hurt me anymore." In its written order, the trial court determined that the first two statements were admissible under KRE 803(2), the excited utterance exception to the hearsay rule. Regarding the third statement to Faye, the trial court found that the statement "don't let him hurt me anymore" was not hearsay as it was not in a strict sense, an assertion. However, assuming that the statement did qualify as hearsay, the trial court found it admissible under

the exception set out in KRE 803(3) as a "statement of the declarant's then existing state of mind, emotion, or physical condition[.]" The trial court determined that the statement represented the child's emotional state when the declaration was made. We note that the third statement referenced in the Commonwealth's motion differed from Faye's actual trial testimony. Rather than testifying that the child stated, "don't let him hurt me anymore," Faye testified that the child said, "it's happened again." There is no mention in any of the briefs of the discrepancy between the Commonwealth's statement concerning Faye's purported testimony in its motion and her actual testimony at trial, nor any argument regarding the import of that discrepancy. We will focus our review, therefore, on Faye's actual trial testimony.

There can be little dispute that each of these statements is hearsay. The question is whether they were properly admitted under the excited utterance exception to the hearsay rule set out in KRE 803(2): "[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." We are convinced that the trial court did not err in finding each of the child's hearsay statements admissible under this exception.

We begin our analysis of the admissibility of the child's statements by reiterating the principle that "spontaneity, as opposed to mere proximity in time, is

a most important consideration." *Thomas v. Commonwealth*, 170 S.W.3d 343, 350 (Ky. 2005). In addition, our Supreme Court offers guidance in determining admissibility under the excited utterance exception by delineating the "eight most significant criteria" in making that determination:

> (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.

Jarvis v. Commonwealth, 960 S.W.2d 466, 470 (Ky. 1998). The *Jarvis* court also emphasized that these criteria "do not pose a true-false test for admissibility, but rather only act as a guideline for consideration of admissibility." *Id*. (citing *Smith v. Commonwealth*, 788 S.W.2d 266, 268 (Ky. 1990)). Neither does the list of criteria "relieve the Commonwealth of its obligation of proffering evidence to support a finding that [the declarant's] statements are admissible as excited utterances." *Id*.

Application of the *Jarvis* criteria to the facts of this case confirms the propriety of the trial court's decision to admit the statements. First, as to lapse of time, the statements were all made on the day of the second incident of abuse, relatively soon after the occurrence. Second, there was little or no opportunity for

the child to have fabricated or to have been couched in making the statements. Third, there was no evidence that the child had been induced to fabricate the statements. Fourth, as to the child's level of excitement, all the testimony indicated that the child was excited, scared, and even panicked. Fifth, all the statements were made at the scene of the alleged offense. Sixth, the child was visibly upset and she had observed marks of physical abuse on her mother. Seventh, none of the statements was made in response to a question. And finally, none of the child's statements could be considered to be self-serving.

As previously stated, all of these factors need not be present in order for a statement to qualify as an excited utterance. The eight criteria simply represent a method for fleshing out what the KRE 803 definition of excited utterance actually means. Yet, applying the criteria to the child's statements in this case, virtually all of them point to admissibility as excited utterances. It is also important to note that the child was eight-years-old at the time of the offence and the time she made the statements. Both the nature of the events and her age must be considered in determining the duration and level of her excitement. In sum, considering all these factors, the trial court did not err in finding the child's statements admissible as excited utterances.

Accordingly, the judgment of the Barren Circuit Court is affirmed.

ALL CONCUR.

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