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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000792-MR

NATHANIEL WAYNE BRICE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 16-CR-01147

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Nathaniel Wayne Brice appeals from the Fayette Circuit Court's order overruling his motion to vacate his conviction made pursuant to Kentucky Rules of Criminal Procedure (RCr) 13.04 and Kentucky Rules of Civil Procedure (CR) 60.02 and based upon Brice's claims of newly-discovered

evidence in his case, namely the victim's recantation of her story. Finding no error, we affirm.

### BACKGROUND

In March of 2017, Brice entered a plea of guilty, pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to one count of sexual misconduct. The complaining witness was his half-sister, M.B., who was twelve years old at the time of the allegations. M.B.'s allegations, as narrated in the uniform citation, were as follows:

The victim advised [Brice] had made sexual contact with her by forcible compulsion. The victim[,] who is 12[,] advised the subject kissed her, and fondled her breasts. Subject admitted to hugging the victim from behind and rubbing her breasts, as well as kissing the victim.

Brice was sentenced to twelve months imprisonment, probated for two years.

In February of 2018, less than one year after the events involving M.B., Brice was charged with a new sex-related offense involving a different victim. Based on the new charges, the Commonwealth sought to revoke Brice's probation in the case involving M.B.

Thereafter, Brice's attorney filed a motion to vacate conviction pursuant to RCr 13.04 and CR 60.02 based solely on the newly-discovered evidence of M.B.'s recantation. Brice included a signed affidavit from M.B. with his motion, in which M.B. disavowed her previous allegations and stated:

I, M.B., at age 12 was visiting my aunt and uncle ... on a regular basis. [They] wanted me to live with them and often-purchased items I wanted that my family sometimes could not afford such as a new school wardrobe, Vans, school supplies, iPad, and fish for tank they bought me. [They] threatened me that if I did not say those things against my brother, they would say Nathaniel raped me ... I was afraid for my brother, so I said what they wanted me to say and that was my brother, Nathaniel Brice touched me inappropriately so that I would not return home to my family forcing me to stay with my aunt and uncle...[.]

The trial court held an evidentiary hearing on Brice's motion. M.B., at that point 14 years of age, testified at the hearing that the only time Brice did anything improper to her was when she was six years old and he was twelve years old, stating "he had kissed me, but my parents walked in and he got grounded. That was the only time." M.B. again assigned responsibility to her aunt and uncle for her allegedly false allegations against Brice, testifying that it was only after her aunt and uncle moved out of state that she felt safe in revealing that her prior statements were false.

At the hearing, the trial court also questioned M.B. concerning the victim impact statement that she had submitted prior to recanting her allegations, in which she had written, in part: "Honestly, I want [Brice] on probation so he can get help and keep his job, but I also want him to go to jail so he will see what it's like so he will never want to go back. I also want help for his anger and counseling for the sexual abuse." In response to the trial court's inquiries concerning the

foregoing statements, M.B. asserted that she had no memory of writing such statements in her victim impact statement.

At the conclusion of M.B.'s testimony, defense counsel called Brice as a witness. The trial court, however, declined to allow Brice to testify due to its belief that any testimony offered by Brice was not relevant to the substance of Brice's motion to vacate – specifically, M.B.'s recantation of her previous allegations against Brice. The trial court further stated: "I will take judicial notice [Brice] would tell me it did not happen, but I don't think that has anything to do with the victim recanting."

At the conclusion of the hearing, the trial court stated that it had "no basis" to find that M.B.'s original allegations were untrue. In terms of a possible explanation for M.B.'s sudden withdrawal of her previous allegations, the trial court stated its belief that M.B. knew that Brice was facing jail time due to the revocation of his probation based on his new charges, and that she did not want to see her brother go to jail. The trial court further noted that Brice "told me [as part of his *Alford* plea,] he thought there was sufficient evidence that a reasonable jury could find him guilty."

The trial court subsequently entered a written order denying the motion to vacate, and Brice thereafter filed this appeal. Further facts will be discussed as they become relevant.

## ANALYSIS

Brice first argues that the trial court improperly took judicial notice of its view of what the contents of Brice's testimony would be in support of his CR 60.02 motion and erred in not allowing him to testify at the hearing. The following exchange occurred at the hearing after defense counsel called Brice as their witness:

Court: I'm not really sure how Mr. Brice's testimony has anything to do with this child recanting.

Counsel: It has to do with, it keeps being talked about that he pled guilty. I think it has to do with why he pled guilty. Because it was an *Alford* plea...

Court: It was an *Alford* plea, he told me there was sufficient evidence that a reasonable jury could find him guilty. That hasn't changed, right?

Counsel: I think – yes – but I think the, as I stated earlier, there's a case that says we have to prove the original statement was false. This is corroborating evidence that the original statement was false.

Court: Whose original statement?

Counsel: Victim's.

Court: So, you're now going to let him take the stand and tell me it did not happen? I will take judicial notice he would tell me it did not happen, but I don't think that has anything to do with the victim recanting. I really don't.

I mean, unless he was somehow involved in knowing what was going on when she said it, when she's changed

her story, knows about the aunt and uncle, if he knows something about all that, yeah, but him telling me why he entered an *Alford* plea, I don't think that's relevant. Is there anything like that that he needs to talk to me about?

Counsel: No, he wrote a letter originally to the court and he states in there that nothing happened except when they were kids so it's stuff like that.

The hearing thereafter concluded.

Because “determinations as to the relevance and admissibility of evidence are left to the sound discretion of the trial court[,]” we may reverse a trial court’s decision to exclude evidence only “after a finding that the decision amounted to an abuse of discretion.” *Johnson v. Com.*, 184 S.W.3d 544, 551 (Ky. 2005). An abuse of discretion exists where the trial court’s “decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). Absent a “flagrant miscarriage of justice,” we will affirm the trial court. *Gross v. Com.*, 648 S.W.2d 853, 858 (Ky. 1983).

To determine whether the trial court erred, we turn first to Kentucky Rules of Evidence (KRE) 103(a), which states the following, in pertinent part:

Error may not be predicated upon a ruling which ...  
excludes evidence *unless a substantial right of the party  
is affected*; and

...

If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(Emphasis added). Further, KRE 103(e) states:

A palpable error in applying the Kentucky Rules of Evidence *which affects the substantial rights of a party* may be considered by a trial 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.

(Emphasis added). Therefore, under both rules, Brice may claim no error unless he establishes that his substantial rights were affected by the trial court's exclusion of his testimony.

In this case, Brice's substantial rights were not affected under either KRE 103(a) or (e). Pursuant to KRE 402, "[e]vidence which is not relevant is not admissible." "Relevant evidence" means evidence having any tendency to make the existence of *any fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence." KRE 401 (emphasis added). For purposes of a CR 60.02 hearing, "[t]he question of guilt or innocence of the accused is not a necessary subject of the inquiry." *Anderson v. Buchanan*, 292 Ky. 810, 168 S.W.2d 48, 54 (1943) (discussing a writ of *coram nobis*, the precursor to the current motion to vacate a conviction under CR 60.02); *see also Gross*, 648 S.W.2d at 856 ("CR 60.02 was enacted as a substitute for the

common law writ of *coram nobis*.”). Rather, “[t]he question embraces the genuineness and good faith of the repudiation ...[.]” *Anderson*, at 54. The Kentucky Supreme Court “has attempted to make abundantly clear . . . that CR 60.02 . . . motions are not to be used to relitigate previously determined issues.” *Baze v. Com.*, 276 S.W.3d 761, 766 (Ky. 2008) (internal citations omitted).

Clearly, the intended purpose of Brice’s testimony in this case was to claim his innocence – defense counsel admitted as much in its opportunity to respond, stating, “[n]o, he wrote a letter originally to the court and he states in there that nothing happened except when they were kids so it’s stuff like that.” The purpose of the CR 60.02 hearing, however, was to determine the impact and veracity of M.B.’s recantation. The trial court was not required and was in fact not allowed under the rules of evidence, to hear matters that were irrelevant to the matter being adjudicated. Brice’s substantial rights were not affected by the trial court’s exclusion of irrelevant evidence from the CR 60.02 hearing, and we can discern no “flagrant miscarriage of justice” or other error committed by the trial court. *Gross*, at 858.

Brice further maintains that the trial court infringed upon both his state and federal due process rights when it refused to allow him to testify at the hearing. However, Brice’s due process rights were not implicated, as due process requires “simply that all affected parties be given ‘the opportunity to be heard at a



meaningful time and in a meaningful manner.”” *Marchese v. Aebersold*, 530 S.W.3d 441, 448 (Ky. 2017) (internal quotation marks and citations omitted). Moreover, “[d]ue process is flexible *and calls for such procedural protections as the particular situation demands.*” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) (emphasis added).

Here, Brice was given the opportunity to be heard, as the trial court gave defense counsel the chance to explain to the court the reasons why Brice’s testimony would be relevant to the sole issue raised in his CR 60.02 motion. This particular situation demanded an opportunity be given for Brice to explain why his testimony was relevant to the specific issue raised in his CR 60.02 motion, and the trial court gave him such an opportunity. We disagree that the trial court infringed upon Brice’s constitutional rights when it excluded his testimony.

Brice next argues that the trial court abused its discretion when it found M.B.’s recantation not to be credible, as the only testimony that M.B. gave under oath was the testimony recanting her statement, which exposed her to the risk of perjury. Motions made pursuant to CR 60.02 are limited to afford special and extraordinary relief not available in other proceedings. *McQueen v. Com.*, 948 S.W.2d 415, 416 (Ky. 1997). Pursuant to CR 60.02, the

court may, upon such terms as are just, relieve a party ... from its final judgment ... upon the following grounds:  
... (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a

new trial under Rule 59.02; ... or (f) any other reason of an extraordinary nature justifying relief.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Com.*, 337 S.W.3d 639, 640 (Ky. App. 2010).

Brice claims that he is entitled to relief under both CR 60.02(b) and (f). Kentucky jurisprudence, however, has recognized that “there are special rules for situations of recanted testimony.” *Thacker v. Com.*, 453 S.W.2d 566, 568 (Ky. 1970). The *Thacker* Court noted that the traditional rule that a new trial will be granted based on newly discovered evidence when it is apparent that a different result would have been reached at the trial “does not apply to the situation of recanted testimony of principal witnesses.” *Id.* When the “mere recantation of testimony” is involved, the granting of a new trial is only justified “in extraordinary and unusual circumstances.” *Id.* Recanting testimony should be viewed with suspicion and given very little weight. *Id.*; *Hensley v. Com.*, 488 S.W.2d 338, 339 (Ky. 1972). Statements recanting testimony

will form the basis for a new trial *only when the court is satisfied of their truth*; the trial judge is in the best position to make the determination because he has observed the witnesses and can often discern and assay the incidents, the influences and the motives that prompted the recantation; and *his rejection of the recanting testimony will not lightly be set aside by an appellate court.*

*Thacker*, 453 S.W.2d at 568 (internal citations omitted) (emphasis added).

In this case, the trial court's order denying Brice's CR 60.02 motion explained the factors central to its decision and considered the victim's new testimony in light of the surrounding evidence, stating:

After considering the new statements made by the now 14 year old victim, the Court is suspicious of the truthfulness of her now sworn testimony. The fact that the victim is aware that [Brice] is facing a new sexual offense charge and possible probation revocation, seems like a sufficient motive to change her story. The victim's testimony that her aunt and uncle threatened her and coerced her into making up the original charges against [Brice] are totally unsupported.

The trial court, which was in the best position to “observe[ ] the witnesses[,]” “discern and assay the incidents,” and “the influences and the motives that prompted the recantation[,]” analyzed the victim's recantation, weighed the associated evidence, and was not satisfied that the recantation was truthful as required by the holding in *Thacker*. 453 S.W.2d at 568. Like the court in *Thacker*, we perceive no basis upon which we might disturb the decision of the trial judge in denying Brice's motion for a new trial, “which decision involved factors particularly in h[er] province to weigh.” *Id.* at 569. Nothing in the opinion of the trial court could be construed as “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *English*, 993 S.W.2d at 945 (citation omitted). Again, perceiving no “flagrant miscarriage of justice,” we affirm the trial court's denial of

Brice's motion to set aside his conviction under CR 60.02. *Gross*, 648 S.W.2d at 858.

Brice raises one other argument in his brief contending that his admissions to police were coerced. Brice's argument concerning his admissions were not raised in his CR 60.02 motion, and this Court will not address those arguments on appeal. *Parker v. Com.*, 465 S.W.2d 280, 281 (Ky. 1971).

For the foregoing reasons, we affirm the Fayette Circuit Court's judgment.

ALL CONCUR.

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