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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000883-MR

RONNIE GRIMES APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 16-CR-00702

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Ronnie Grimes appeals from the Hardin Circuit Court's final judgment and sentence of imprisonment entered May 15, 2018. At his jury trial, Grimes was convicted of first-degree sexual abuse of a child under age twelve, and he was thereafter sentenced to seven and one-half years' imprisonment. We affirm.

I. Background

In August 2016, Doreen Grimes lived in Hardin County, Kentucky, where she ran a childcare business out of the family home. Jane,[1] who was six years old at the time, was one of the children in Doreen's charge, and Doreen watched her every day. Jane's parents had used Doreen's services for years, not only for Jane, but for Jane's older siblings as well. Doreen's husband, Ronnie Grimes ("Grimes"), was often present in the living room of the home, where he would watch movies with the children.

At some point on or about August 1, 2016, Jane was sitting on Grimes's lap in the living room when he slid his hand underneath her underwear and touched her vagina. Jane informed her parents of the incident when she got home that same day, and her parents immediately reported the matter to the police. The lead investigator on the case, Detective Christina Priddy of the Hardin County Sheriff's Office, interviewed Jane, her family, and Grimes. Grimes initially denied wrongdoing. Detective Priddy noticed that Grimes's body language appeared "closed off" when she interviewed him and believed a male interrogator would be more successful at questioning Grimes about the incident. Accordingly, she enlisted the aid of a male officer, Detective Schoonover with the Kentucky State Police, who asked Grimes if he would come in for a polygraph examination and an

[1] We have elected to use a pseudonym to protect the privacy of the child victim in this case.

interview. Grimes agreed. Grimes initially denied touching Jane; however, after failing the polygraph, Grimes confessed to touching Jane's vagina. In his admissions to Detective Schoonover, Grimes specifically stated he "pinched her" on her vagina and "she liked it." Detective Priddy was not in the room with Grimes and Detective Schoonover, but she watched the interview from the next room on a video monitor.

The Hardin County grand jury thereafter indicted Grimes on one count of first-degree sexual abuse (victim under age twelve).[2] In response to defense motions, the Hardin Circuit Court excluded the polygraph examination at trial but permitted the Commonwealth to introduce Grimes's admissions to Detective Schoonover following the polygraph. At trial, Jane and Detective Priddy testified for the Commonwealth. Through Detective Priddy, the Commonwealth showed the jury a video of Grimes's admissions to Detective Schoonover, with references to the polygraph examination redacted from the recording. Doreen and Grimes's daughter, Christina, testified for the defense. Doreen and Christina testified they had never seen Grimes touch a child inappropriately. However, they were unaware Grimes had admitted touching Jane. Grimes himself did not testify.

Following deliberation, the jury found Grimes guilty of first-degree sexual abuse and fixed his sentence at seven and one-half years' imprisonment.

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[2] Kentucky Revised Statutes (KRS) 510.110(1)(b), a Class C felony.

The trial court entered its final judgment on May 15, 2018, sentencing Grimes in accordance with the jury's verdict. This appeal followed.

II. Analysis

Grimes presents four arguments on appeal. First, he argues the trial court erroneously allowed Jane to testify, despite assertions she was not a competent witness under Kentucky Rule of Evidence (KRE) 601. Second, Grimes argues the trial court erroneously allowed the jury to hear Detective Schoonover's out-of-court statements in the video, thereby violating his right to confront witnesses against him under the Sixth Amendment of the United States Constitution. Third, Grimes argues the trial court erroneously denied his motion to exclude his admissions following the polygraph examination, contending the admissions were involuntary. Fourth and finally, Grimes argues the Commonwealth inappropriately questioned Jane when it referred to her earlier promise to tell the truth in court.

For his first issue on appeal, Grimes argues the trial court should not have found Jane, who was nearly eight years old at the time of trial, competent to testify as a witness. KRE 601(a) states "[e]very person is competent to be a witness except as otherwise provided in these rules or by statute." The next part of the rule includes a provision whereby a potential witness is disqualified to testify if the trial court determines he or she "[l]acks the capacity to recollect facts[.]" KRE

601(b)(2). Grimes points to several points in Jane's testimony during her competency hearing when she could not remember certain extraneous details, *e.g.*, which summer the incident allegedly occurred, her favorite present at her last birthday, or the names of any of the other children at Doreen's house. Based on Jane's inability to remember a number of details about her life, Grimes asserts the trial court should not have found her to be a competent witness under KRE 601.

"Age is not determinative of competency and there is no minimum age for testimonial capacity." *Huddleston v. Commonwealth*, 542 S.W.3d 237, 244 (Ky. 2018) (quoting *Pendleton v. Commonwealth*, 83 S.W.3d 522, 525 (Ky. 2002)). KRE 601 presumes competency, and "the burden of proving incompetence rests on the party that asserts the incompetence." *Howard v. Commonwealth*, 318 S.W.3d 607, 612 (Ky. App. 2010) (citation omitted).

> When the competency of an infant to testify is properly raised it is then the duty of the trial court to carefully examine the witness to ascertain whether she (or he) is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth.

Wombles v. Commonwealth, 831 S.W.2d 172, 174 (Ky. 1992) (citation omitted). "The determination of whether a child witness is competent to testify is within the sound discretion of the trial court, and unless there is a clear abuse of discretion, a trial court's ruling on competency will not be reversed on appeal." *Howard*, 318 S.W.3d at 612 (citations omitted).

Although Grimes accurately points to portions of Jane's testimony in which she could not recall particular details, he fails to give credence to the many portions of Jane's testimony recalling other essential facts. Jane knew she lived in a house in Radcliff with her parents, brother, sister, and a dog. She knew where she and her siblings went to school. She knew her age and grade in school. More importantly, Jane could recollect facts relevant to the case. Jane knew Doreen was her babysitter, and Grimes was Doreen's husband. She remembered sitting on Grimes's lap. She remembered when he touched what she referred to as her "private," and, when asked, she showed the jury what this meant by pointing to her vagina. She told the jury she did not like it when Grimes touched her. Jane remembered telling her sister and her parents about the incident the same day it happened. Finally, and most importantly, Jane told the trial court she knew the difference between the truth and a lie, and she knew to tell the truth while in court.

The trial court determined Jane was competent, finding she could recall and communicate about incidents in her life and she understood the obligation to tell the truth. Grimes has not met his burden in showing Jane was not competent in light of the trial court's findings. The trial court did not abuse its discretion in finding Jane competent to testify.

For his second issue on appeal, Grimes argues the trial court erroneously allowed the jury to hear Detective Schoonover's questioning in the

video of his interrogation. Detective Schoonover did not testify at trial himself—the video was introduced through Detective Priddy, who observed the interrogation through a video monitor as it transpired. Therefore, Grimes asserts introduction of the video containing Detective Schoonover's interrogation of him violated his right to confront witnesses against him under the Sixth Amendment of the United States Constitution.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004). *Crawford* explicitly deems the admission of testimonial hearsay at trial to be a violation of the Confrontation Clause unless

> the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness; "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69, 124 S. Ct. at 1374.

King v. Commonwealth, 554 S.W.3d 343, 362 (Ky. 2018). However, *Crawford* limits its application only to testimonial *hearsay*: "The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369; *see* KRE 801(c) ("Hearsay" is 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.”).

The Kentucky Supreme Court has considered the issue of how recorded statements interact with *Crawford* in *Turner v. Commonwealth*, 248 S.W.3d 543 (Ky. 2008). The issue in *Turner* involved a recording of an informant conversing with the defendant wherein the defendant made damaging admissions. Our Supreme Court held the informant’s statements were not hearsay and thus did not violate *Crawford*; the statements were “offered not for their truth, but ‘to put [the defendant]’s admissions on the tapes into context, making the admissions intelligible for the jury.’” *Id*. at 545 (quoting *United States v. Nettles*, 476 F.3d 508, 517 (7th Cir. 2007)). Similarly, in the case *sub judice*, Detective Schoonover’s recorded questions were not offered for their own truth, but to place Grimes’s admissions in context for the jury. The trial court did not err in allowing the jury to hear Detective Schoonover’s questions which led to Grimes’s admissions.

For his third issue on appeal, Grimes contends the trial court erroneously denied his motion to exclude his admissions following the polygraph examination, contending the admissions were involuntary. Grimes argues his will was overborne when Detective Schoonover confronted him with the fact of his failed polygraph examination, which subsequently led to his incriminating

admissions. Grimes posits that a polygraph result is neither reliable nor admissible in court, pursuant to *Morgan v. Commonwealth*, 809 S.W.2d 704, 706 (Ky. 1991). Consequently, Grimes argues being confronted with a failed polygraph result is the functional equivalent of using falsified forensic evidence to gain admissions, which the Kentucky Supreme Court condemned as coercive. *Gray v. Commonwealth*, 480 S.W.3d 253, 263-64 (Ky. 2016).

Although Grimes is correct that polygraph results are inadmissible at trial, our courts have repeatedly held that incriminating statements made in circumstances *surrounding* a polygraph are nonetheless admissible. *See Commonwealth v. Hall*, 14 S.W.3d 30, 32 (Ky. App. 1999) (holding incriminating statements prior to a polygraph examination are admissible); *see also Powell v. Commonwealth*, 994 S.W.2d 1, 3 (Ky. App. 1997) (holding incriminating statements following a polygraph are admissible). Grimes's attempt to equate incriminating statements surrounding a polygraph examination to a police officer's use of deliberately fabricated forensic evidence to coerce admissions finds no support in our case law.

Additionally, there are no facts indicating Grimes's will was overborne and his admissions coerced.

> In determining whether a confession was coerced, a court considers: (1) whether police activity was objectively coercive; (2) whether the coercion overwhelmed the will of the defendant; and (3) whether the defendant has

> shown that the coercive activity was the "crucial motivating factor" behind his confession.

Gray v. Commonwealth, 480 S.W.3d at 260 (footnotes omitted). As required by *Gray*, the trial court denied Grimes's pretrial motion to suppress his admissions, finding "that the police activity was not objectively coercive; that the police activity did not overwhelm the will of the defendant; and the police activity did not constitute an improper 'crucial motivating factor' behind his confession." The court noted how the interview was "calm, courteous and respectful." Furthermore, the court emphasized how the detective only asked Grimes to tell the truth "and did not suggest details of what the truth would be." Our review of the record does not refute the trial court's findings. We discern no error.

For his fourth and final issue on appeal, Grimes contends the Commonwealth improperly questioned Jane on direct examination with regard to telling the truth in court. The jury heard the following exchange:

> Commonwealth: Have you and I talked about what's going to happen in court today?
>
> Jane: Yes.
>
> Commonwealth: And what did Ms. Theresa [the prosecutor, speaking of herself in the third-person] tell you about talking in court?
>
> Jane: To tell the truth.

Although he did not object at the time, Grimes now contends this exchange amounted to improper bolstering, because a witness is not "allowed to bolster his or her own testimony unless and until it has been attacked in some way." *Brown v. Commonwealth*, 313 S.W.3d 577, 628 (Ky. 2010) (citations omitted). This assertion of error is unpreserved, and Grimes requests review for palpable error under Kentucky Rule of Criminal Procedure (RCr) 10.26:

> Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule's requirement of manifest injustice requires showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014) (citations and internal quotation marks omitted). "For an error to be palpable, it must . . . involve prejudice more egregious than that occurring in reversible error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citation and internal quotation marks omitted). In addition, "[a]n error is palpable only if it is shocking or jurisprudentially intolerable." *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (citation and internal quotation marks omitted).

The Kentucky Supreme Court considered a similar issue in *Tackett v. Commonwealth*, 445 S.W.3d 20 (Ky. 2014). There, the Supreme Court considered

whether a witness's testimony "that he was accurately telling the truth and had no reason to lie . . . amounted to impermissible bolstering." *Id.* at 33. The Supreme Court reasoned this was not palpably erroneous, in part because the witness "had already sworn to tell the truth and . . . his testimony that he was doing so posed 'little risk of short-circuiting the jury's credibility determination.'" *Id*. (quoting *Brown*, 313 S.W.3d at 628). We conclude a similar result is warranted here. The jury had just heard Jane swear to tell the truth when she took the stand. No manifest injustice occurred when the jury heard the Commonwealth remind Jane of her oath.

III. Conclusion

For the foregoing reasons, we affirm the trial court's judgment and sentence of conviction entered May 15, 2018.

ALL CONCUR.

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