

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

NO. 2018-CA-001209-MR

DONALD TYLER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE KATHLEEN LAPE, JUDGE  
ACTION NO. 17-CR-00244

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, JONES AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Donald Tyler (“Appellant”) appeals from an order and judgment of the Kenton Circuit Court reflecting a jury verdict of guilty on one count each of failure to comply with sex offender registration, first offense,<sup>1</sup> and

---

<sup>1</sup> Kentucky Revised Statutes (KRS) 17.510(11).

first-degree persistent felony offender (“PFO”).<sup>2</sup> Appellant argues that the Kenton Circuit Court erred in failing to conclude that a witness was incompetent to testify, and that the Commonwealth improperly failed to inform him about the witness’s brain injury. He also maintains that phone calls from jail were improperly admitted, and that the court abused its discretion in allowing the admission of a registration form signed after the indictment period. For the reasons addressed below, we find no error and AFFIRM the order and judgment on appeal.

#### Facts and Procedural History

On May 31, 2018, a Kenton County jury returned a guilty verdict against Appellant on the offenses of failure to comply with sex offender registration, first offense, and first-degree PFO. The jury recommended a sentence of five years in prison, enhanced to 18 years by application of the PFO. On July 9, 2018, Appellant was sentenced to 12 years in prison.

Appellant’s charges arose after two Covington, Kentucky, police officers came to the home of Appellant’s aunt, Rosemary Green, to ensure that Appellant, a registered sex offender, resided at the location as he had so registered. Green told the officers that Appellant had not resided at that location for about a year, and was living in Newport, Kentucky, with his girlfriend. Officers returned to Green’s registered residence one week later again looking for Appellant, who

---

<sup>2</sup> KRS 532.080(3).

could not be located. The officers observed a stack of unopened mail addressed to Appellant, and saw that Appellant's personal effects were not in his former bedroom.

Thereafter, other officers located Appellant and arrested him. He was tried before a Kenton County jury and found guilty of the charged offenses. This appeal followed.

### Arguments and Analysis

Appellant now argues that the trial court erred by finding Green competent to testify, and for not granting a defense motion for a mistrial after a *Brady*<sup>3</sup> violation. Prior to Green's testifying at trial, Appellant, through counsel, objected to her testifying, stating that he questioned her competence and also believed the Commonwealth had improperly withheld exculpatory information about her credibility. Specifically, Appellant alleged that the Commonwealth had information about a medical condition affecting Green's ability to remember the events at issue. In support of the motion, evidence was adduced that Green had undergone brain surgery about 8 years earlier, that she had recently fallen and that there were some things she could not remember. Appellant argues that the Kenton Circuit Court should have barred her from testifying due to her incompetence, and

---

<sup>3</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

that a *Brady* violation occurred when the Commonwealth failed to inform Appellant of Green's problems with her memory.

All persons are presumed to be competent to testify, but this presumption can be overcome if certain factors are met. Kentucky Rules of Evidence (KRE) 601; *Huddleston v. Commonwealth*, 542 S.W.3d 237, 244 (Ky. 2018). In order to prove incompetency, the moving party must demonstrate that the witness lacks: 1) the capacity to perceive matters accurately about which he will testify; 2) the capacity to recollect the facts; 3) the capacity to express himself; or 4) an understanding that he must tell the truth. KRE 601. The trial court's finding of competency will not be reversed unless there is a showing of abuse of discretion. *Huddleston*, 542 S.W.3d at 244.

In the matter before us, Green acknowledged that "I have brain problems" and that she could not remember Covington police officers coming to her house to locate Appellant. However, Green also knew that Appellant was her nephew and used to live with her, and she remembered other details about her life including her age and address, and that her brother and grandchildren lived with her. Upon considering these facts, the circuit court overruled Appellant's motion and noted that Appellant could attempt to impeach Green's testimony. We conclude that this testimony fails to demonstrate the existence of any of the four

elements set out in KRE 601, and do not find that the trial court's ruling on this issue constitutes an abuse of discretion. *Huddleston, supra*.

As to the alleged *Brady* violation, in which Appellant argued that the Commonwealth improperly withheld exculpatory information as to Green's competency, reversal is only justified when there is a reasonable probability that the outcome of the proceeding would have been different if the exculpatory information had been revealed. *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002). The Commonwealth asserts that it had no exculpatory information and no medical records as to Green, and that even if it did, such information was not exculpatory. Even if the Commonwealth possessed information about Green's competence that it improperly withheld, which Appellant has not shown, Appellant has failed to demonstrate that there is a reasonable probability that the outcome of the proceeding would have been different but for this information. We find no error.

Appellant next argues that the admission of jail phone calls constituted an abuse of discretion. On the day of trial, the defense objected to the admission of three phone calls made by Appellant from jail on the evening of his arrest. The court excluded the first of these calls. The second call was to an unknown female in which Appellant said in relevant part, "Yeah, I should have stayed at home. I knew this day was going to come[.]" The third call was to an

unknown female and Appellant's minor daughter, in which Appellant may have indirectly asked the child to convince Green to recant her statement to police.

Appellant argued that the admission of these calls constituted hearsay, violated the confrontation clause, and that the calls were not relevant.

We review evidentiary rulings 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." *Id.* at 581 (citation omitted).

In considering Appellant's objection as to the second and third phone calls, the Kenton Circuit Court held that the calls were both relevant and admissible as they tended to demonstrate that Appellant was aware of his failure to register his residence. We agree. The transcripts of the second and third phone calls arguably bolster the Commonwealth's underlying argument, *to wit*, that Appellant failed to register at his actual address. The circuit court's conclusion on this issue was not arbitrary, unreasonable, unfair nor unsupported by sound legal principles. *Id.* Accordingly, we find no error on this issue.

Appellant's final argument is that Exhibit 28, a sexual offender registration form, was improperly admitted into evidence by the trial court. After Appellant was released on bond, he executed a sexual offender registration form that acknowledged he was a 20-year registrant. Appellant argues that the trial

court improperly failed to conclude that the admission of this exhibit was highly prejudicial because it was signed after the indictment period. Appellant signed the form on January 31, 2017, or about one week after the indictment period ended on January 22, 2017. The Commonwealth asserted that Appellant's signature on the form evinced his knowledge that he had a duty to register. Appellant argued that the form was irrelevant and prejudicial because it could not demonstrate what Appellant knew or did not know during the indictment period. The trial court allowed its introduction, along with several other verification and registration forms to which Appellant did not object.

Again, we review evidentiary rulings for abuse of discretion. *Id.* at 577. Exhibit 28 had only limited probative value at best, KRE 403, as it was executed after the period addressed in the indictment. As such, we conclude that Exhibit 28 was not relevant evidence and was therefore inadmissible. KRS 401. However, given the entirety of the record, including the number of verification and registration forms properly admitted, we also conclude that the error is harmless.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the

proceeding that does not affect the substantial rights of the parties.

Kentucky Rules of Criminal Procedure (RCr) 9.24.

The admission of Exhibit 28 was not “inconsistent with substantial justice,” and error, if any, did not affect Appellant’s substantial rights. RCr 9.24. As such, the error does not form a basis for reversing the judgment on appeal.

Conclusion

For the foregoing reasons, we AFFIRM the order and judgment of the Kenton Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Emily Holt Rhorer  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky

Jesse L. Robbins  
Assistant Attorney General  
Frankfort, Kentucky