

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

# Supreme Court of Kentucky

1999-SC-0897-MR

**FINAL**

DATE 2-13-03 E11A Crow: H.D.C.

DENVER DENNIS ALLEN

APPELLANT

V. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE GREGORY BARTLETT, JUDGE  
ACTION NO. 99-CR-00174

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

A circuit court jury found Appellant, Denver Dennis Allen, guilty of two counts of first-degree sodomy: count one being that Appellant committed first-degree sodomy against K.M. and count two being that he committed first-degree sodomy against N.B. Accordingly, he was sentenced to two terms of twenty-three years imprisonment, to run concurrently. He now seeks to have this Court reverse both convictions and remand his case for a new trial on both counts or, alternatively, reverse and remand the first-degree sodomy conviction with respect to K.M.

K.M. and N.B. were neighborhood friends. During the 1998-1999 school year, the two girls, ages ten and eleven respectively, would visit Appellant at his apartment in order to get cigarettes. The girls testified that he would also give them beer, wine, and food stamps. While at his home, Appellant would show the girls

pornographic magazines which depicted women "licking" each other. On several occasions, Appellant asked K.M. and N.B. if he could perform oral sex on them. According to testimony at trial, during two separate visits, Appellant sodomized the girls by performing oral sex on each.

On April 9, 1999, a Kenton Circuit Court Grand Jury indicted Appellant on two counts of first-degree sodomy. The trial for both counts commenced on July 13, 1999. The Commonwealth called K.M., one of the victims who at the time of trial was eleven years old, as a witness. She was a difficult witness to examine on both direct and cross, although more so during cross-examination. The Commonwealth's entire direct examination occurred in the courtroom. On direct, K.M. would cry and lay her head down when questioned about the sodomy. Her emotional state heightened, however, when defense counsel began his cross-examination. Before the cross started, the trial judge permitted the Commonwealth's Attorney to place an easel between K.M. and the defendant. As the defense attorney began to question K.M., her behavior deteriorated: she cried, refused to answer questions, and placed her head on the table in front of her. The trial court recessed twice and had two victim advocates sit at the witness stand beside K.M., but that did not help her condition. Then the trial judge moved K.M. to his chambers where only he, the two attorneys, and the victim advocate were present. Cross-examination was conducted in chambers and the jury watched via closed circuit television. K.M. remained very emotional and silent for much of the examination. After it was over, the jury advised the judge that it was unable to hear K.M.'s responses on the television. Accordingly, the judge replayed the video tape cross-examination for the jury the next morning.

On July 14, 1999, the jury convicted Allen on both counts of first-degree

sodomy, and the trial court sentenced him to twenty-three years imprisonment.

Appellant now appeals as a matter of right. Ky. Const. § 110(2)(b).

Appellant asserts three claims of error: (1) that the trial court abused its discretion when it allowed K.M. to testify via closed circuit television, thereby violating the procedures outlined in KRS 421.350(2) and KRS 421.350(4) and violating Appellant's federal and state constitutional rights to confrontation and to a fair and impartial jury trial; (2) that the trial court erred to Appellant's substantial prejudice by allowing two different victim advocates, as well as a police officer, to remain with K.M. during her testimony thereby violating KRS 421.350(2); and (3) the trial court erred by overruling defense counsel's motions to strike the entire testimony of K.M. on the basis of incompetency.

#### **I. KRS 421.350(2) and (5)**

The first issue Appellant raises is that the trial court abused its discretion when it failed to comply with the procedures outlined in KRS 421.350(2) and KRS 421.350(5)<sup>1</sup> by allowing K.M., a victim in this case, to testify via closed circuit television. He argues that allowing the closed circuit television testimony denied him his federal and state constitutional rights to confrontation and to a fair and impartial trial. U.S. Const. amends. VI, XIV; Ky. Const. §§ 2, 11.

KRS 421.350(2), entitled: "Testimony of child allegedly victim of illegal sexual activity," provides:

The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the

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<sup>1</sup>Throughout the briefs, both parties cite to the "compelling need" definition as subsection (4), however the definition is actually found in subsection (5).

courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

KRS 421.350(2). This statute defines a child as one who is twelve years of age or younger. KRS 421.350(1). Essentially, the statute allows the trial court to obtain the child victim's testimony via closed circuit television upon a showing that there is a compelling need to do so. KRS 421.350(5) defines "compelling need." It provides that: "For the purpose of subsection (2) . . . of this section, 'compelling need' is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence."

This Court has recently held that to lawfully permit a child witness to testify via closed-circuit television pursuant to KRS 421.350(2), the proof must demonstrate a "compelling need" for such action. In Price v. Commonwealth,<sup>2</sup> during the testimony of the child victim, the appellant was excluded from the courtroom and was required to watch the proceedings from another room on closed-circuit television. This was so, despite the fact that the testimony of the child witness "was lucid and unemotional."<sup>3</sup> We held the trial court to have erred and commented as follows:

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<sup>2</sup>Ky., 31 S.W.3d 885 (2000).

<sup>3</sup>Id. at 891.

No hearing was held nor finding made with respect to whether there was a compelling need to employ [KRS 421.350(2)]. . . . The record does not contain a motion by the Commonwealth to permit [the child] to testify outside the presence of Appellant. The procedure described in KRS 421.350(2) may not be utilized absent proof and a specific finding of a compelling need therefor.<sup>4</sup>

Appellant, herein, makes much of the absence of a motion by the Commonwealth and the absence of an express finding of a “compelling need.” Relying on the language quoted hereinabove, Appellant contends that Price mandates reversal.

This case differs significantly from Price. Here, the child witness was reluctant, perhaps uncooperative, and certainly highly emotional. The trial court attempted to fashion a means to elicit the testimony by placing an easel between the child and the defendant to block her view, but this was unsuccessful. The trial court also sought other means to minimize any anxiety, but to no avail. After a recess to give K.M. an opportunity to regain her composure, the Commonwealth suggested that K.M. testify outside the courtroom and, over the defendant’s objection, the trial court granted the motion and allowed the statutory procedure to be followed. While the trial court did not expressly find a compelling need, from the circumstances and the trial court’s failed attempts to otherwise obtain the testimony, there is no doubt that the court believed there was a compelling need.

This case is more analogous to Danner v. Commonwealth<sup>5</sup> in which the victim was twelve or younger when the crimes were committed, but older than twelve when she gave testimony. Despite her age, we held the statute to be ambiguous in certain respects and relied extensively on trial court discretion. Herein, there were

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<sup>4</sup>Id. at 894.

<sup>5</sup>Ky., 963 S.W.2d 632 (1998).

ample grounds for the trial court to determine the existence of a compelling need and utilization of KRS 421.350(2). The trial court's ruling, though not expressly stated, leaves no doubt that such a determination was made. Under no circumstances did the trial court lightly regard the right of the defendant to be present at all stages of the trial and his right to confront the witness face to face.<sup>6</sup> There was no abuse of discretion.

## **II. Victim Advocates**

Appellant's second argument is that the trial court erred to his substantial prejudice when it allowed two different victim advocates and a police officer, who was a testifying witness for the Commonwealth, to remain with K.M. during her testimony.

During the trial, K.M. became upset. As a result, the trial court allowed two different victim advocates to sit beside K.M., at different times during cross-examination, in order to calm and comfort her in hopes of getting her to answer the questions. In addition, a testifying witness for the Commonwealth, Detective Marty Epperson, also joined K.M., but the trial court sustained an objection to the detective's presence. The record reflects that the trial court overruled the objection to the presence of the advocates because:

The statute mandates that we accommodate child witnesses in many respects. Shorten the length of their testimony, making them comfortable, blocking their sight line to the defendant, in these kind of cases and so on. Unless they are telling her what to say, which I don't think is true, if they are merely trying to calm her down, so we can get through this, that's perfectly acceptable.

As a result, one of the victim advocates remained with K.M. during her entire testimony on cross-examination. Appellant now argues that this bolstered K.M.'s credibility,

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<sup>6</sup>See Temple v. Commonwealth, 77 Ky. (14 Bush) 769 (1879).

thereby denying him a fair and impartial jury trial.

Both Appellant and the Commonwealth assert that KRS 421.350 allows testifying child witnesses to be accommodated during trial. Appellant, however, argues that allowing the advocate to accompany the victim on the stand is going too far. He even cites to other states to make this argument. He fails, however, to cite to KRS 421.575. This statute, entitled: "Role of victim advocates in court proceedings," provides that:

In all court proceedings, a victim advocate, upon request of the victim, shall be allowed to accompany the victim during the proceeding to provide moral and emotional support. The victim advocate shall be allowed to confer orally and in writing with the victim in a reasonable manner. However, the victim advocate shall not provide legal advice or legal counsel to the crime victim in violation of KRS 421.570 and 524.130.

KRS 421.575. At a minimum, the trial court has discretion under the statute to permit the victim advocate to sit with a child victim during her testimony.

### **III. Competency**

Appellant's final argument is that the trial court erred to his substantial prejudice when it overruled his motion to strike the entire testimony of K.M. on the basis of incompetency. The governing rule is KRE 601, entitled "Competency." It provides:

- (a) General. Every person is competent to be a witness except as otherwise provided for in these rules or by statute.
- (b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:
  - (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
  - (2) Lacks the capacity to recollect facts;
  - (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
  - (4) Lacks the capacity to understand the obligation of a witness to tell the truth.



KRE 601. Appellant's argument, specifically, is that K.M. "lacked the capacity to express [herself] so as to be understood, either directly or through an interpreter."<sup>7</sup> Therefore, he argues, the trial court abused its discretion when it ultimately admitted her testimony.

This Court recently addressed the issue of competency of a child witness.<sup>8</sup> In that case, the appellant argued that the eleven-year-old child witness was incompetent to testify against him because of inconsistencies in her testimony about the sexual abuse he committed against her. That case is factually distinguishable from the present one because there the witness had difficulty recollecting facts. KRE 601(b)(2). However, the Court made clear that "KRE 601 recognizes a presumption of competency and permits disqualification of a witness only upon proof of incompetency."<sup>9</sup> The Court looked to the Commentary to KRE 601 for guidance. It provides:

This provision serves to establish a minimum standard of testimonial competency for witnesses. It is designed to empower the trial judge to exclude the testimony of a witness who is so mentally incapacitated or so mentally immature that no testimony of probative worth could be expected from the witness. It should be applied grudgingly, only against the "incapable" witness and never against the "incredible" witness, since the triers of fact are particularly adept at judging credibility.<sup>10</sup>

During her testimony, K.M. cried, placed her head on the desk in front of her, and refused to answer many questions. This happened during both the direct and

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<sup>7</sup>KRE 601(b)(3).

<sup>8</sup>See Price v. Commonwealth.

<sup>9</sup>Price, 31 S.W.3d at 891.

<sup>10</sup>Commentary to KRE 601, Evidence Rules Study Committee, Final Draft (1989).

cross examinations, although the record reflects that it was more difficult to examine her on cross. Twice during cross-examination, the trial court expressed concern about K.M.'s competency to testify. However, at the end of her testimony, the record reflects that after defense counsel's motion to strike K.M.'s testimony, the trial court stated:

[K.M.'s] difficulty in answering questions occurred on direct as well as cross. She has limited information to give the jury, not able to give a lot of information is a plus. The difficulty in questioning her is balanced by the fact that she was not able to give that much information on direct anyway. It was not as if she gave sterling information on direct and then shut down on cross. . . .

It is clear from the record that K.M. was a very difficult witness to examine, especially during cross-examination. At one point during that examination, the trial court instructed defense counsel to stop asking questions dealing with the events of the sodomy, which was the heart of the case against Appellant. Defense counsel objected to the admission of her testimony on two separate occasions, both of which the trial court overruled.

This Court has held that “[a] decision by the trial court [concerning evidentiary matters] will not be disturbed in the absence of an abuse of discretion.”<sup>11</sup> It is well established that “[i]t is within the sound discretion of the trial court to determine whether a witness is competent to testify.”<sup>12</sup> This is because “[t]he trial judge is in the unique position to observe witnesses and to determine their competency.”<sup>13</sup> The standard that the trial court should use when determining whether a child witness is

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<sup>11</sup> Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996).

<sup>12</sup> Wombles v. Commonwealth, Ky., 831 S.W.2d 172, 174 (1992) (citing Pendleton v. Commonwealth, Ky., 685 S.W.2d 549, 551 (1985)).

<sup>13</sup> Id. (quoting Stincer v. Commonwealth, Ky., 712 S.W.2d 939 (1986)).

competent to testify is “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.”<sup>14</sup> The trial court committed no abuse of discretion when it admitted K.M.’s testimony over the objections by defense counsel. It is clear from the record that the court had reservations about K.M.’s competency from its own comments at side-bar, but resolved the close question in favor of allowing the testimony.

For the foregoing reasons, we affirm the final judgment of the Kenton Circuit Court.

Lambert, C.J., and Cooper, Graves, Johnstone, Keller, and Wintersheimer, JJ., concur. Stumbo, J., dissents by separate opinion.

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<sup>14</sup> Capps v. Commonwealth, Ky., 560 S.W.2d 559, 560 (1977) (quoting Moore v. Commonwealth, Ky., 384 S.W.2d 498 (1964)).

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## DISSENTING OPINION BY JUSTICE STUMBO

Respectfully, I must dissent. While I have great sympathy for the difficulty inherent in obtaining coherent, competent testimony from child victims of sexual abuse, in the case herein, the trial court erred in implementing KRS 421.350(2) so as to obtain the testimony of K.M. without first making a finding of a compelling need. Prior to the making of such a finding there must be a motion by the Commonwealth and a specific finding of necessity. In Price v. Commonwealth, Ky., 31 S.W.3d 885, 894 (2000), we stated:

No hearing was held nor finding made with respect to whether there was a compelling need to employ [KRS.421.350(2)] . . . The record does not contain a motion by the Commonwealth to permit [the child] to testify outside the presence of Appellant. The procedure described in KRS 421.350(2) may not be utilized absent proof and a specific finding of a compelling need therefor.

The requirements of the statute must be met before the Constitutional right to confront

witnesses is to be compromised. This is reversible error.

Additionally, and more importantly, I doubt that the child victim in this case was competent to testify at this trial. She was eleven years old at the time of the trial and was difficult to examine on both direct and cross examination. During the direct examination, K.M. cried and laid her head down when questioned about the sodomy charge. When cross examination began, K.M. became even more emotional even though an easel was placed between the victim and the defendant. She refused to answer questions, cried and placed her head on the table in front of her. Court was recessed twice to allow the child to regain her composure and the trial judge permitted two victim's advocates to sit with her at the witness stand. She was still unable to respond to defense counsel's questions. Finally, K.M., counsel and the trial judge moved to chambers and the examination continued with the jury watching via closed circuit television. At one point during the cross examination, the trial court instructed counsel to cease asking questions dealing with the sodomy count, which was in fact the heart of the case against Appellant. On two occasions during the cross, the trial court expressed concern over K.M.'s competency and twice counsel moved to strike her testimony. After the testimony was completed, the jury advised the court that they were unable to hear K.M.'s responses on the television so the court had to have the tape played for the jury the next day.

While it is within the sound discretion of the trial court to determine whether a witness is competent to testify, this particular testimony degenerated into a painful exercise in torture for the child involved. The jury twice saw an inarticulate child reduced to tears and unable to answer questions that went to the heart of the case against the defendant against whom she was testifying. While she may have had the

capacity to observe and recollect the facts about which she testified, she was certainly not able to narrate them in a coherent fashion due to her highly emotional state. I would reverse and remand for a new trial.