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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

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NOT TO BE PUBLISHED

FINAL
DATE 4-24-03 E.A. Grau, D.C.

Supreme Court of Kentucky

2001-SC-0906-MR

CARL PENNINGTON, JR. — APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
99-CR-208-3

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2002-SC-0007-MR

BRIAN ASBURY — APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
99-CR-208-1

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellants Brian Asbury and Carl Pennington, Jr. were convicted of first-degree rape of a child under the age of twelve, KRS 510.040(1)(b)(2), and received sentences of forty and thirty-five years imprisonment, respectively. They appeal to this Court as a matter of right, Ky. Const. § 110(2)(b), proceeding as a single appellant, CR 73.01(3).

They contend that the trial court erred by (1) allowing the victim's emergency room doctor and therapist to repeat certain out-of-court statements made by the child pursuant to KRE 803(4); and (2) failing to allow Appellants to use substantively the trial court's ruling that the child victim was incompetent to testify. We affirm.

I. FACTS.

The victim, C.H., who was then five years old (DOB: May 27, 1993) reported soreness in her genital area and burning upon urination to workers at the Cathedral Day Care Center in Covington, Kentucky. The workers called C.H.'s mother, Angela Findley, who then took C.H. to St. Elizabeth Hospital North in Covington. Dr. James Combs, the emergency room physician at St. Elizabeth North, found that C.H. had labial lesions, a labial vesicular rash, and had contracted herpes genitalis.

Dr. Combs subsequently referred C.H. to Doug Williams, a social worker at St. Elizabeth North, to obtain a patient history and to assist Dr. Combs in determining whether it would be safe to allow C.H. to return home. C.H. told Williams that she had been sexually abused by Appellant Asbury, Findley's domestic partner, and Appellant Pennington, Asbury's friend and a frequent houseguest.

According to Willliams, C.H. told him that Asbury had carried her into a room where he and Pennington were watching pornographic movies, laid her down on the carpet in front of the television and removed her underwear. Asbury then licked her vagina, penetrated it with his finger, and placed his penis in her vagina. Pennington then also placed his penis in C.H.'s vagina. Williams found C.H. credible and reported the circumstances of the abuse to Dr. Combs. Dr. Combs determined that C.H. could not go home safely, and she was placed in the custody of the Cabinet for Families and

Children while a police investigation continued. When investigators interviewed C.H.'s younger brother, he described seeing Asbury and his sister undressed, and said that he was instructed to stay in the other room or he would be in trouble. A search of the residence uncovered a pornographic movie which C.H. had accurately described.

On March 2, 1999, C.H. saw Dr. Kim Wolfe, a psychology Ph.D.,[1] registered nurse, psychotherapist, and specialist in the area of childhood sexual abuse, and continued to see her thereafter on a regular basis until (at least) the time of trial. C.H. described to Dr. Wolfe a pattern of sexual abuse that had been ongoing for months, including the circumstances of the rape previously described to Doug Williams. On March 26, 1999, Dr. Wolfe recommended that, because of the severe physical and emotional damage C.H. had suffered, all visits between C.H. and Findley be supervised and occur no more frequently than every four to six weeks.

On April 15, 1999, Findley admitted to police investigators that she knew C.H. was being sexually abused, but had continued to live with Asbury. Findley was charged with one count of endangering the welfare of a minor and eventually pled guilty to that charge.

Appellants were charged with first-degree rape of a child less than twelve years old based on the incident described supra, and both pled not guilty. Prior to trial, they made a series of motions in limine that were largely successful. The trial court sustained Appellants' motion to declare C.H. incompetent to testify as a witness, holding as follows:

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[1]At the time of C.H.'s first appointment, Dr. Wolfe had not yet defended her dissertation.

> The Court has carefully listened to the direct and cross examination of C.H., and has observed her demeanor. Although she possessed the ability to recollect some facts, she lacked the capacity to understand her obligation to tell the truth. For example, she defined a lie "as something that happened." She acknowledged that she did not know what it meant to tell a lie or to tell the truth. She could not give a clear example of either a lie or the truth. Moreover, she was somewhat limited in her ability to recollect and narrate facts. She stated she could not recall what bad thing happened to her, but something bad happened. She could not recall when or where the "thing happened." She does not possess the capacity to recollect and relate facts with an understanding to tell the truth. Therefore, the Court concludes that the minor child, C.H., does not possess the requisite competency to testify at trial, and the Defendant's motion to exclude her testimony is sustained.

The trial court also suppressed: (1) Asbury's prior conviction of sexual misconduct; (2) evidence of Findley's prior conviction of child endangerment; (3) any testimony by Doug Williams, the social worker who first interviewed C.H., as to statements C.H. made to him; and (4) statements made to police officers by C.H.'s younger brother.

However, the trial court overruled Appellants' motions: (1) to exclude any statements C.H. made to Drs. Combs and Wolfe; (2) to allow Appellants to use the trial court's competency ruling as substantive evidence; (3) to exclude, pursuant to KRE 404(b), evidence of other abuse perpetrated against C.H. by Appellants in the months surrounding the charged rape; and (4) to exclude St. Elizabeth Hospital North reports containing Williams's notes. Appellants appeal only on the basis of the first two of these rulings.

II. HEARSAY.

Appellants' hearsay challenge is impeded immediately by their failure to specify the statements that they allege were improperly admitted by the trial court. See United States v. LaHue, 261 F.3d 993, 1009 (10th Cir. 2001) (hearsay issue waived on appeal where defendants "fail[ed] to identify the specific statements the district court allegedly

admitted in error."); United States v. Jorgensen, 144 F.3d 550, 562 (8th Cir. 1998) ("Because the defendants have failed to specify by record references any particular coconspirator statements which the court allegedly erroneously admitted, we do not address their contention that the court erred in initially admitting them."). No contemporaneous hearsay objections were made to any specific statement by Drs. Combs or Wolfe.[2] We therefore confine our review to the propriety of the trial court's pretrial ruling that Dr. Combs and Dr. Wolfe could testify to statements C.H. made to them within the parameters of KRE 803(4).

KRE 803 provides:

> The following are not excluded by the hearsay rules, even though the declarant is available as a witness:
>
> . . . .
>
> (4) Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

In Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001), we settled two disputed issues regarding this rule. First, "the Rule does not distinguish between statements made to treating and examining physicians . . . ." Id. at 13. Thus, although the trial court found

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[2]Indeed, Dr. Combs could only recall that Williams had talked to C.H., and that his conclusion after hearing Williams's report (Combs did not testify as to any specifics of the report) was that it was not safe for C.H. to go home. Defense counsel and Combs engaged in the following colloquy:

> Q: Do you recall talking to the child at all yourself?
>
> A No.
>
> Q: So you don't recall anything the child may have told you, or what you might have told her?
>
> A: No.

(and Appellants do not contest) that Drs. Combs and Wolfe examined C.H. for purposes of treatment rather than as "physicians who merely examine for the purpose of collecting evidence," id. at 17 (Lambert, C.J., concurring), this issue is now immaterial to the proper application of the rule. Second, in Garrett we overruled the judge-made "balancing test" described in Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990), a case relied upon heavily by Appellants. After Garrett, our task is simply to apply KRE 803(4) as written.

It is undisputed that the facial requirements of KRE 803(4) were met in this case. The trial court found that "the statements made by C.H. to [Drs. Combs and Wolfe] were necessary to assist them to make accurate diagnosis and render appropriate treatment to her." Both needed to know who had abused C.H. in order to determine whether she could go home without risk of being further abused and, consequently, reinfected with herpes genitalis. Dr. Combs made the initial determination in the negative and Dr. Wolfe later determined that C.H. should continue to stay away from home. Dr. Wolfe, who was responsible for treating C.H.'s psychological injuries, testified that she needed to know exactly what had happened to C.H. in order to map out a course of treatment. Thus, the facial requirements of the rule were met. See Garrett, supra, at 11 (noting that even prior to the adoption of the Kentucky Rules of Evidence, "statements identifying the perpetrator have been held 'reasonably pertinent' to diagnosis and treatment of a child sexual abuse victim where the treatment was for psychological injuries and the abuser lived with the child . . . .").

The trial court recognized, in its thoughtful and careful opinion, that Edwards v. Commonwealth, Ky., 833 S.W.2d 842 (1992), was nearly identical to the instant case. Edwards approved the admission, through an examining doctor and therapist, of

statements by a child declarant identifying his abuser and describing the abuse. Id. at 845. As in the instant case, the examining doctor in Edwards "testified that he had to know who the abuser was in order to prevent future harm to the child and to prevent the spread of a sexually transmitted disease, chlamydia, for which J.L. had tested positive in his rectal area." Id. at 844. And, as in the instant case, the clinical psychologist in Edwards testified "that the information received from the victim was necessary for her evaluation and treatment of the child and that, based upon the answers given, she could make recommendations as to the treatment appropriate to relieve the symptoms demonstrated by the child." Id. at 845. Finally, as in Edwards, the trial court demonstrated its "objectivity and fairness" by excluding statements made to the social worker. Id. The two cases could hardly be more similar; thus, Edwards applies here with all the force of stare decisis.

Appellants muster only one argument, i.e., that KRE 803(4) does not apply to statements made by a child declarant who has been found incompetent to testify. We have repeatedly rejected this argument. E.g., Edwards, supra, at 845 (admitting statements despite ruling that child was incompetent to testify); Souder v. Commonwealth, Ky., 719 S.W.2d 730, 733-34 (1986) (holding that child victim's competency is irrelevant to the question of admitting the child's hearsay statements); see also Idaho v. Wright, 497 U.S. 805, 824, 110 S.Ct. 3139, 3151, 111 L.Ed.2d 638 (1989) (rejecting contention that the child's prior statements are presumptively unreliable simply because child was declared incompetent to testify at trial); Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988) ("The fact that a young child may be incompetent to testify at trial affects neither prong of the two-part test for admitting evidence under 803(4).").

Appellants point to Professor Lawson's observation that when a child is declared incompetent because of a "lack of capacity to perceive," that quality might also render the prior out-of-court statement unreliable. Robert G. Lawson, The Kentucky Evidence Law Handbook § 3.35, at 169 (3d ed. Michie 1993). However, that observation is inapplicable to the present case. The trial court found no deficiency in C.H.'s capacity to perceive anything, including the identity of her rapists. As Professor Lawson recognizes, no presumption of unreliability should attach to a child's hearsay statements simply because the trial court finds, as here, that factors such as her ability to relate facts or lack of understanding of the need to tell the truth make her "too immature for examination and cross-examination in the courtroom." Id. Thus, the trial court properly applied KRE 803(4).

III. COMPETENCY RULING.

Appellants also contend that the trial court should have allowed them to use the competency ruling substantively during the trial, such as during their cross-examinations of Drs. Combs and Wolfe. However, rulings of the trial court are not "evidence," and therefore may not be considered by the jury. Beam v. Foltz, 832 F.2d 1401, 1408 (6th Cir. 1987) (noting with approval a jury instruction that "rulings by the court were not evidence and should not be considered as evidence."); see also United States v. Puig-Infante, 19 F.3d 929, 950 (5th Cir. 1994) (noting with approval a jury instruction that "judge's statements were not evidence."); Care Travel Co., Ltd. v. Pan American World Airways, Inc., 944 F.2d 983, 993 (2d Cir. 1991) (same); Haines v. Powermatic Houdaille, Inc., 661 F.2d 94, 95 (8th Cir. 1981) (same). Appellants cite no

authority suggesting that an incompetency ruling by a trial court is admissible as substantive evidence at trial.

Ironically, Appellants suggest that their inability to use this non-evidence deprived them of their Sixth Amendment right to cross-examine witnesses. Yet, it was Appellants' own motion in limine that prevented the declarant, C.H., from taking the stand. If Appellants had truly wished to impeach C.H.'s credibility by attacking her competency at trial, they could have withdrawn their disqualification motion and subjected her to cross-examination, eliciting, as did the trial judge, the fact that she could not clearly differentiate between the truth and a lie. Instead, they asked the trial court to disqualify C.H. as a witness and received precisely the relief they requested.

Accordingly, the judgments of conviction entered and the sentences imposed by the Kenton Circuit Court are affirmed.

All concur.

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