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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-13-03 ELA Grawith, D.C.

2002-SC-0209-MR

PAUL HURT — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
00-CR-487

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Jefferson Circuit Court jury convicted Appellant, Paul Hurt, of three counts of sodomy in the first degree and two counts of sexual abuse in the first degree. He was sentenced to concurrent terms of imprisonment for life on each of the sodomy convictions and for five years on each of the sexual abuse convictions. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), contending that the trial court erred by (1) finding the victim, minor child R.F., competent to testify at trial and (2) denying both his motion for a directed verdict and his motion for a judgment notwithstanding the verdict; and further that the Commonwealth's attorney (3) committed prosecutorial misconduct in her closing argument to such a degree as to constitute palpable error warranting a new trial. Finding no error, we affirm.

I. FACTS.

Beginning in September 1999 until the end of January 2000, R.F., then age six, resided on Judge Boulevard in Jefferson County with her biological mother, Lenora Hurt, her two-year-old half-brother, C.H., and Appellant, her stepfather. Through the first week of November 1999, Shannon and Jennifer Allen, friends of Appellant, and two of their children, J.R. and A.S., also lived with the Hurts. All of the offenses for which Appellant was convicted allegedly occurred while R.F. resided with Appellant on Judge Boulevard.

R.F. recounted one abuse incident that purportedly occurred in a bedroom she shared with C.H. while the Allens were living with the Hurts. According to R.F., one evening while her mother was downstairs watching television, Appellant entered the bedroom, where R.F. was half asleep on the top bunk of a bunk bed. She testified that Appellant moved her toward the end of the bed, pulled her underwear down, and performed oral sodomy on her while C.H. was asleep in the bottom bunk.

R.F. testified that all of the other abuse incidents occurred before her mother would return from work and while she was home alone with Appellant and C.H. Apparently, these incidents occurred after the Allens moved out of the residence because Mr. Allen was unemployed and, thus, usually at home when R.F. would return from school. Also, the Allen children usually arrived home from school before R.F. Appellant testified that on those occasions when he would arrive home before his wife, he and R.F. would be alone in the house for only ten to twenty minutes before his wife arrived.

R.F. described a routine pattern of abuse occurring every time that she and Appellant were home alone after she returned from school. R.F. maintained that he

would pick her up and carry her into his bedroom, place her on the bed, and lock the door so that C.H. could not enter the room. Appellant would then cover her face with a blanket, remove his clothes and R.F.'s pants, and perform various sexual acts on her. According to R.F., Appellant put his tongue in her "private" and used his fingers to touch and rub her "private" and performed these acts on multiple separate occasions. When asked how many times Appellant touched her with his fingers, R.F. replied, "More than once." She gave a similar response regarding the alleged incidents when Appellant performed oral sodomy on her, stating that it happened "more times." She also described an incident when he put his "private" on her "private." When asked whether Appellant's "private" had touched any other part of her body, R.F. responded that on one occasion, he inserted it into her "bottom hole." R.F. also described one occasion when Appellant stuck his "private" in her mouth and made her head move up and down.

In early February, R.F. told her stepmother that Appellant had sexually abused her. The stepmother reported the allegations to the Jefferson County Crimes Against Children Unit. She then took R.F. to Children First, a treatment and support center for abused children, for an interview and physical examination.

Appellant denied all of R.F.'s allegations of sexual abuse. He testified that he first learned of R.F.'s allegations when a Child Protective Services investigator came to his house. Later, a police detective came to Appellant's workplace, took him to Children First for questioning, then placed him under arrest.

The three convictions of sodomy correspond to R.F.'s allegations that: (1) Appellant repeatedly performed oral sodomy on her; (2) she performed an act of oral sodomy on Appellant; and (3) Appellant performed anal sodomy on her. The two convictions of sexual abuse correspond to R.F.'s allegations that (1) Appellant

repeatedly touched her genitals with his fingers; and (2) Appellant placed his genitals on her genitals.

II. R.F.'S COMPETENCY TO TESTIFY.

Appellant challenges the trial judge's conclusion that R.F., age eight at the time of trial, was competent to testify. Kentucky Rule of Evidence (KRE) 601(b) states that a witness is disqualified to testify if the trial court determines that she lacks the capacity: (1) to accurately perceive the matters that are the subject of testimony; (2) to recollect the facts; (3) to express herself so as to be understood; or (4) to understand the obligation of a witness to be truthful. The rule also establishes a presumption in favor of a witness's competency: "Every person is competent to be a witness except as otherwise provided in these rules or by statute." KRE 601(a). The mere fact that the witness in question is a child does not shift or eliminate that presumption. Bart v. Commonwealth, Ky., 951 S.W.2d 576, 579 (1997) ("This presumption of competency includes infants."). The rule mirrors the requirements set forth in the pre-Code case of Moore v. Commonwealth, Ky., 384 S.W.2d 498 (1964).

> 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.

Id. at 500 (emphasis added). Competency determinations will not be disturbed absent a clear abuse of discretion. Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 525 (2002). Appellant attacks the trial court's ruling for three reasons, none of which rises to that level.

Appellant first challenges R.F.'s recollection of past events on the grounds that, during her competency hearing, R.F. gave the name of her county of residence rather

than an exact street address when asked where she lived. Appellant also notes that she did not remember where she lived prior to her last address, or how long she had lived there:

Com: And where do you live now?

R.F.: Spencer County.

* * *

Def.: How long have you lived in Spencer County?

R.F.: I don't know.

Def.: Where did you live before Spencer County?

R.F.: Gilmore Lane.

Def.: How long did you live on Gilmore Lane?

R.F.: Probably one or two years.

Def.: Do you know where you lived before Gilmore Lane?

R.F. No.

However, as evidenced by the commentary accompanying KRE 601, its drafters intended judges to exclude witnesses from testifying only under the narrowest of circumstances.

> This provision serves to establish a minimum standard of testimonial competency for witnesses. It is designed to empower the judge to exclude the testimony of a witness who is 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.

Commentary to KRE 601, Evidence Rules Study Committee, Final Draft (1989). See also Price v. Commonwealth, Ky., 31 S.W.3d 885, 891 (2000) (witness's inability to recall all specific details surrounding alleged abuse affected only credibility, not

competency); Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 468 (1998) (child competent to testify even though "she did not remember her last birthday, where she lived, or who brought her to court that day"). R.F.'s responses fall well within the ambit of Rule 601's minimum requirements, especially in light of her accurate responses to a significant number of the questions posed during the competency hearing, e.g., she spelled her name correctly, accurately identified her parents and stepparents, gave her age, birth date, telephone number, grade in school, and the names of her teachers. The following testimony indicates her ability to accurately recollect past events:

Com.: Now where did you go to school in the first grade [the grade she was in when the alleged abuse occurred]?

R.F.: Slaughter.

Com.: And when you went to Slaughter, who did you live with?

R.F.: Paul and Lenora and [C.H.].

Com.: And do you know where you lived?

R.F.: Judge Boulevard, but I don't know the address.

Com.: And do you remember your teacher's name in the first grade?

R.F.: Miss Tarquinio.

Second, Appellant challenges R.F.'s capacity for truthfulness on the grounds that when asked how many brothers and sisters she had, she identified two brothers who did not live with her at the time of the alleged abuse but failed to mention C.H. (perhaps because she had already mentioned him):

Def.: Do you have any brothers or sisters?

R.F.: Two brothers.

Def.: And what are their names?

R.F.: Aaron and Chas.

Appellant also maintains that R.F. recanted previous allegations and made claims concerning events that were "impossible." KRE 601 does not require the trial judge to determine the credibility of the witness's testimony but only to determine the witness's capacity to perceive, recollect, and express, and to understand the obligation to tell the truth. Whether her testimony is true or false goes to the credibility of the witness, not her competency to testify. Wombles v. Commonwealth, Ky., 831 S.W.2d 172, 174 (1992) (citing Capps v. Commonwealth, Ky., 560 S.W.2d 559, 560 (1977)). The portions of R.F.'s testimony of which Appellant complains are probative of her incredibility rather than her incompetency to testify. What is relevant to R.F.'s competency is that she clearly understood the difference between truth and falsehood and understood her obligation to tell the truth.

Com.: Do you know what it means to tell the truth?

R.F.: Something that happened . . . Something that did happen.

Com.: Do you know what it means to tell a lie?

R.F.: Something that didn't happen.

Com.: Is telling the truth a good thing or a bad thing?

R.F.: Good thing.

Com.: Is telling a lie a good thing or a bad thing?

R.F.: Bad thing.

Com.: As the judge asked you before, if he tells you to tell that you promise or swear to tell the truth, what will you do?

R.F.: Promise.

These responses were sufficient to meet the minimum standards required by KRE 601(b)(4).

Appellant last challenges R.F.'s competency on the grounds that she could not accurately perceive reality. To support this contention, he pointed to R.F.'s belief in "Santa Claus," her statement that she had her dog for either "one year or two weeks," and that she did not know how long she had lived in Spencer County:

Def.: Is there a Santa Claus?

* * *

R.F.: Yes.

* * *

Judge: Do you remember what you got for Christmas last year? Or what the best present you [got] last year?

R.F.: Yes.

Judge: And what was that?

R.F.: A dog.

Judge: A real live dog? Pretty neat. What's your dog's name?

R.F.: We had to get rid of her, but her name was Cheyenne.

Judge: How long did you have her?

R.F.: Probably for one year or two weeks.

Judge: Ok. So you didn't have her very long.

R.F.: Shakes her head "no."

Again, we note that Rule 601 sets a minimum standard for competency. Demonstrating the flexibility of that standard, we found in Bart v. Commonwealth, supra, that a trial court did not abuse discretion by permitting a witness to testify even though she stated that she heard voices and saw demons and various deceased relatives. Id. at 578-79.

> Yet a review of the videotaped hearing also reveals a polite and rather articulate fifteen year old who testified that she knew the difference between the truth and lies. The victim demonstrated the ability to observe, recollect, and relate the facts.

Id. at 579. Likewise the trial judge in the case sub judice did not abuse his discretion in permitting R.F. to testify even though she believed in Santa Claus and was confused as to how long she owned her dog.

III. SUFFICIENCY OF THE EVIDENCE.

The trial court did not err in denying Appellant's motion for a directed verdict and subsequent motion for a judgment notwithstanding the verdict (motion for judgment of acquittal, RCr 10.24). An appellate court may only reverse a trial court's denial of a directed verdict if, in light of all of the evidence, no reasonable jury could have made a finding of guilt. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). The same standard applies when a motion for judgment of acquittal is premised upon insufficiency of the evidence.

Appellant first claims that the trial court should have granted his motion for a directed verdict because it was physically impossible for him to have committed one of the acts of abuse alleged by R.F. He contends that because of the height of R.F.'s bunk bed, it was physically impossible for him to orally sodomize her while she lay upon it. He also relies on the trial judge's characterization of the bunk bed incident as a "factual improbability" and argues that because the judge acknowledged the factual dubiousness of the allegation, he erred in not granting a directed verdict. The judge actually stated:

> First of all, I don't agree that it's a factual impossibility. It may be a factual improbability, and I'm sure you'll argue that . . . . Given the directed verdict standard, the court would not go so far as to say it's a factual impossibility.

The trial court correctly acknowledged the high standard for a directed verdict. "For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true." Benham, supra, at 187. Credibility determinations are

reserved for the jury. Id. Nor does the record establish that it would have been impossible for Appellant to commit the act. The only evidence in the record relevant to this issue is a photograph of the bed with no reference to height, testimony from Appellant that the top of the bunk bed came to his chin, and R.F.'s testimony as to her version of the incident. We note in passing that nothing would have prevented Appellant from standing on a chair at the foot of the bed while performing the alleged act of oral sodomy. Certainly, it would not be unreasonable for a jury to conclude that the incident occurred and that it was physically possible for Appellant to have committed the act as R.F. testified.

Appellant also contends that the Commonwealth failed to prove that any of the abuse occurred within the time frame specified by the indictment, i.e., between September 1, 1999, and January 31, 2000. This was the time period after the family moved into the Judge Boulevard residence and before R.F. was removed from the home because of the abuse allegations. R.F. testified that all of the abuse occurred while she was living with Appellant on Judge Boulevard and Appellant admitted that he lived with R.F. at that address during that time period. That evidence alone was sufficient for a reasonable jury to conclude that the abuse occurred during the specified time period. Nevertheless, the only time element necessary to prove first-degree sodomy and first-degree sexual abuse of a child is that the offense occurred prior to the child's twelfth birthday. KRS 510.070(1)(b)2; KRS 510.110(1)(b)2; Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 886 (1997). The Commonwealth proved that the offenses occurred when R.F. was six years old.

IV. ALLEGED PROSECUTORIAL MISCONDUCT.

Appellant contends that the Commonwealth's closing argument rose to the level of prosecutorial misconduct because it contained a threat to the jury. Specifically, Appellant challenges the following statement: "If you choose not to believe [R.F.], then he [Appellant] gets away with the perfect crime." Appellant did not object to this statement at trial.

Prosecutorial misconduct in a closing argument will result in reversal only under the following circumstances:

> [I]f the misconduct is "flagrant" or if each of the following three conditions is satisfied:
> (1) Proof of defendant's guilt is not overwhelming;
> (2) Defense counsel objected; and
> (3) The trial court failed to cure the error with a sufficient admonishment to the jury.

Barnes v. Commonwealth, Ky., 91 S.W.3d 564, 568 (2002) (citing United States v. Carroll, 26 F.3d 1380, 1390 (6th Cir. 1994) (emphasis in original)).

Because Appellant failed to object to the prosecutor's statement, he must prove that the statement amounted to flagrant misconduct. It does not. The Commonwealth has "reasonable latitude" in presenting a case to the jury. Lynem v. Commonwealth, Ky., 565 S.W.2d 141, 145 (1978). In Kentucky, a prosecutor may express an opinion as to a defendant's guilt so long as the opinion is based on an interpretation of the evidence. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 39 (1998). Appellant mischaracterizes the prosecutor's statement as a "threat." The statement did not threaten the jury with public condemnation or imply that acquittal of Appellant would, itself, constitute a crime, both impermissible prosecutorial tactics. See Barnes, supra, at 567-68. Rather, it entreated the jury to find guilt based on the evidence—R.F.'s testimony and credibility as opposed to that of Appellant. See Wallen v.

Commonwealth, Ky., 657 S.W.2d 232, 234 (1983) ("We have condemned argument only where the prosecutor suggests that the jury convict or punish on grounds or for reasons not reasonably inferred from the evidence."). The prosecutor's argument here amounted to nothing more than an assertion of her belief that R.F. was telling the truth and that Appellant was lying, and that to believe Appellant's testimony over R.F.'s would result in the acquittal of a guilty man. A closing argument "is just that – an argument." Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 412 (1988). This particular argument in no way resembles flagrant misconduct.

Accordingly, the judgment of conviction and the sentences imposed by the Jefferson Circuit Court are affirmed.

All concur.

COUNSEL FOR APPELLANT:

Mark Hyatt Gaston
Suite 800
239 South Fifth Street
Louisville, KY 40202

COUNSEL FOR APPELLEE:

A. B. Chandler, III
Attorney General
State Capitol
Frankfort, KY 40601

William Robert Long, Jr.
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204