

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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

FINAL

2003-SC-0064-MR

DATE 7-8-04 ELLA GROWN, D.C.
APPELLANT

DECCOURSEY BANKS

V.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
2001-CR-0180

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Deccoursey Banks, was convicted of first-degree sodomy in Montgomery Circuit Court and received a sentence of twenty years' imprisonment. He appeals to this Court as a matter of right. Ky. Const. §110(2)(b). Appellant asserts the following errors: 1) the introduction of hearsay testimony by the victim's mother, 2) the introduction of the victim's testimony via closed circuit television, 3) the failure to suppress Appellant's confession to police, and 4) the failure to grant a directed verdict. For the following reasons, we affirm.

In late July 2001, the four-year-old victim, M.M., and her mother, Amy Johnson, visited Appellant at his residence in Jeffersonville, Kentucky. While Johnson was inside visiting with relatives, M.M. was playing in the yard near Appellant's storage shed. At trial, M.M. testified that she wandered into the shed, whereupon Appellant performed an

act of oral sodomy upon her. M.M. then reported the incident to her mother. The two promptly left Appellant's residence, but did not notify the police until a couple of months later at the insistence of the victim's grandmother. Appellant was interviewed twice by police and on the second occasion admitted the act of oral sodomy. Additional facts will be developed as necessary.

EXCITED UTTERANCE

Appellant asserts that the trial court erroneously admitted hearsay statements made by M.M. as an excited utterance under KRE 803(2). Johnson was permitted to testify over defense objection that, while she was inside Appellant's home, M.M. ran to her suddenly and said, "Papaw licked my coochie," indicating that Appellant had licked her vagina. There was no error.

KRE 803(2) provides that hearsay statements are admissible if the statement relates to a startling event or condition and was made under the stress of excitement caused by the event or condition. In Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 470 (1998), we listed several factors used to determine whether a statement is admissible under KRE 803(2):

- (i) lapse of time between the main act and the declaration,
- (ii) the opportunity or likelihood of fabrication,
- (iii) the inducement to fabrication,
- (iv) the actual excitement of the declarant,
- (v) the place of the declaration,
- (vi) the presence there of visible results of the act or occurrence to which the utterance relates,
- (vii) whether the utterance was made in response to a question, and
- (viii) whether the declaration was against interest or self-serving.

These factors are to be used as a guideline for determining admissibility rather than a true/false test. Id. The trial court's finding is entitled to deference and will only be overturned for clear error. Young v. Commonwealth, Ky., 50 S.W.3d 148, 167 (2001).

The trial court properly admitted the statement as an excited utterance. The statement was made within five to ten minutes after the startling event. M.M. rushed into the house and made the statement to her mother in the presence of several people without hesitation or prompting. There was further testimony that M.M. appeared embarrassed and that her normal demeanor and tone of voice had changed. The trial court's finding was based on substantial evidence and, therefore, will not be disturbed by this Court.

CLOSED CIRCUIT TELEVISION TESTIMONY

Appellant next contends that the trial court erred by allowing the victim to testify via closed circuit television pursuant to KRS 421.350, thus denying Appellant his right of confrontation. Specifically, Appellant argues that there was insufficient evidence for the trial court to make a finding of necessity for the closed circuit testimony and that Appellant was denied constant communication with counsel.

In Danner v. Commonwealth, Ky., 963 S.W.2d 632 (1998), cert. denied, 525 U.S. 1010, 119 S. Ct. 529, 142 L. Ed. 2d 439 (1998), this Court reiterated the factors that a trial court should consider when determining whether compelling need exists under KRS 421.350. Trial courts should consider the age and demeanor of the witness as well as the nature of the offense, the impact of the testimony in court, and the impact of facing the defendant. Id. at 634 (quoting Commonwealth v. Willis, Ky., 716 S.W.2d 224, 230 (1986)). This determination is within the sound discretion of the trial court and will not be overturned unless there is an abuse of discretion. Id.

The trial court properly determined a compelling need for the victim's testimony to be given via closed circuit television. After an in-camera hearing with a child therapist, the court determined that there was a necessity for the KRS 421.350 procedures because testifying in open court would emotionally harm M.M. The record also indicates that the trial court took into account M.M.'s age (four years) and the impact of facing Appellant considering both her testimony and emotional state. The trial court did not abuse its discretion.

Appellant also argues that the testimony via closed circuit television violated his confrontation rights because he was not allowed to be in continuous audio contact with counsel during the questioning of the victim.

KRS 421.350 does not violate a defendant's right to confrontation provided that: 1) the Commonwealth meets its burden of proving that the procedure is reasonably necessary to obtain the child's testimony, and 2) the Commonwealth provides the technical details such that the child's testimony is taken outside the sight and hearing of the defendant while at the same time the defendant can see and hear the child and maintain continuous audio contact with counsel. Price v. Commonwealth, Ky., 31 S.W.3d 885, 893 (2000) (citing Willis, supra). The failure to provide the defendant with continuous audio contact with counsel throughout the victim's testimony has been held to be error. Id. at 894.

However, the rights of a criminal defendant are subject to waiver, either by counsel or the defendant. Fugate v. Commonwealth, Ky., 62 S.W.3d 15 (2001). The violation of constitutional rights may be waived by the failure to make timely and appropriate objections just like other rights. Futrell v. Commonwealth, Ky., 437 S.W.2d 487, 488 (1969). If an attorney is aware of an issue and makes no objection, the failure

to object may constitute a waiver of an error having constitutional implications.

Salisbury v. Commonwealth, Ky. App., 556 S.W.2d 922, 927 (1977).

Upon review of the record, we find that the issue of continuous audio contact with counsel was waived. At an in-camera hearing, defense counsel objected to the use of closed circuit television based on the lack of necessity. After the court decided to allow the victim's testimony via closed circuit television, the prosecution and defense counsel discussed the procedures that were eventually used at trial. It was apparently agreed that Appellant would remain in the courtroom and take notes while M.M.'s testimony was broadcast from an adjacent room. After direct examination by the prosecution, a break was taken to enable Appellant to privately confer with counsel. Another break was taken after cross-examination, and so on. Appellant did not object to this aspect of the procedure at either the in-camera hearing or trial; thus, the issue was waived.

CONFESSION

Appellant argues that the trial court erred by failing to suppress his confession to the police. Appellant claims that his confession was the product of police coercion and trickery. At the outset of the interview, Appellant told police that he had some health problems and was under emotional stress because of recent deaths in his family. Appellant argues that the police manipulated their knowledge of his emotional condition in order to obtain the confession.

The test for determining whether a confession was the product of police coercion and, thus, involuntary is three part: 1) whether the police activity was "objectively coercive," 2) whether the coercion overbore the will of the defendant, and 3) whether the defendant showed that the coercive police activity was the "crucial motivating factor" behind the defendant's confession. Morgan v. Commonwealth, Ky., 809 S.W.2d 704,

707 (1991) (adopting federal due process standards of McCall v. Dutton, 863 F.2d 454 (6th Cir. 1988)). Coercion should be viewed in light of the totality of the circumstances surrounding the confession. Allee v. Commonwealth, Ky., 454 S.W.2d 336, 341 (1970), cert. granted, 400 U.S. 990, 91 S. Ct. 454, 27 L. Ed. 2d 438 (1971), case dismissed, 401 U.S. 950, 91 S. Ct. 1186, 28 L. Ed. 2d 234 (1971). Although mental state is a relevant factor in determining voluntariness, "this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional voluntariness." Price, supra, at 890 (quoting Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473 (1986)). The trial court's determination of the voluntariness of a confession is reviewed according to the abuse of discretion standard. Henson v. Commonwealth, Ky., 20 S.W.3d 466, 470 (2000).

The trial court properly admitted Appellant's recorded confession. At the suppression hearing, the trial judge determined that Appellant was not under arrest at the time of the confession and that he met with police voluntarily. Appellant was asked to submit to a polygraph examination and was informed of his Miranda rights. Appellant was advised of his right to stop the questioning at any time. The interviewing officer made sure Appellant understood his rights and obtained a written waiver. After Appellant failed the polygraph test, the officer continued to interrogate Appellant using standard police techniques such as minimizing the seriousness of the offense and offering the suspect excuses for committing the act. After several minutes Appellant confessed. There was no physical abuse, intimidation, or deprivation of food or sleep. Appellant was not induced into the confession by trickery or false promises. The total interrogation lasted about two and a half hours and Appellant was advised of his right to

leave. We cannot conclude that the police activity in this case was "objectively coercive" despite Appellant's statements regarding his mental state. The failure to satisfy this preliminary hurdle precludes analysis of the other two factors. McCall, supra. There was no abuse of discretion.

DIRECTED VERDICT

Finally, Appellant argues that he was entitled to a directed verdict because of insufficient evidence. This claim is without merit.

In Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), we stated the rule for a directed verdict as follows:

[T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, a defendant is only entitled to a directed verdict if it would be clearly unreasonable for a jury to find guilt. Id.

The directed verdict standard is far from satisfied in this case. Notwithstanding Appellant's confession, the Commonwealth also presented the testimony of M.M. and her mother. This case was properly submitted to the jury.

For the foregoing reasons, the judgment of the Montgomery Circuit Court is affirmed.

All concur.

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