

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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 21, 2004  
NOT TO BE PUBLISHED

**Supreme Court of Kentucky** **FINAL**

2002-SC-0627-MR

DATE 11-11-04 ELLAGrow: HJD.

DAVID BRENT THOMAS

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LEWIS G. PAISLEY, JUDGE  
2001-CR-0181

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Thomas of two counts of first-degree sodomy, first-degree sexual abuse and being a first-degree persistent felony offender. He was sentenced to a total of seventy years in prison.

The questions presented are whether the statements the victim made to an examining physician were erroneously admitted; whether other bad act evidence was improperly introduced; and whether Thomas was entitled to a competency hearing.

The grand jury indicted Thomas for two counts of first-degree sodomy, one count of first-degree sexual abuse and being a first-degree persistent felony offender. All of the current offenses involved a child under twelve. The prior felonies were for two counts of first-degree sexual abuse and first-degree sodomy.

At a pre-trial hearing on January 16, 2002, defense counsel informed the trial judge that Thomas wanted to change his plea to guilty and accept an offer from the Commonwealth. That offer was a recommendation of twenty years, enhanced to twenty-five years, for the first-degree sodomy charge, dismissal of the second sodomy charge and five years on the sexual abuse charge, the sentences to run consecutively for a total of thirty years in prison. During his guilty plea colloquy, Thomas stated that he was not suffering from any mental disease or illness. He signed the form to accept the plea, but when the trial judge inquired about the charges, Thomas would not admit his guilt. Consequently, the trial judge rejected the plea.

Two days after the failed plea, defense counsel made a motion to have Thomas evaluated for competency to stand trial. Defense counsel stated that he had difficulty explaining things to Thomas and just had some concerns, especially considering the possible sentence. The Commonwealth did not object. Five days later, the trial judge entered an order to have Thomas evaluated at KCPC. The order did not recite any specific concerns the trial judge had about the mental state of Thomas.

At a pre-trial hearing on May 3, 2002, defense counsel, the Commonwealth and the trial judge all acknowledged receiving a copy of the KCPC report. That report indicated that Thomas was competent to stand trial and was criminally responsible at the time of the offenses.

Approximately two weeks later at yet another pre-trial hearing, defense counsel informed the trial judge that his client suspected that he (defense counsel), the prosecution and the trial judge were all colluding against him. Defense counsel added that he did not think this indicated the need for a re-evaluation of Thomas. However, at a follow-up hearing later that afternoon, defense counsel moved for court-ordered funds

to conduct a private mental evaluation of Thomas and for a continuance. The motion was made despite Thomas' expressed dissatisfaction with the delay. The Commonwealth also objected, citing the already completed full in-patient evaluation by KCPC. The trial judge denied the motion for a continuance and the request for funds.

Trial began on May 20, 2002. During a pre-trial meeting in chambers, defense counsel inquired as to whether the trial judge had made formal findings regarding the competency of Thomas. Defense counsel also stated that he would stipulate to the content of the report, but that he could not waive Thomas' right to a hearing. Based on the report, the trial judge made a finding that Thomas was competent to stand trial. The trial judge also overruled a renewed motion by defense counsel for a continuance and the funds for a private mental evaluation of Thomas. The trial commenced without a competency hearing.

The victim testified that he met Thomas around the time of his eleventh birthday. His first encounter occurred when Thomas approached him and his mother and offered to settle an argument they were having. Thomas told them he was with a group that helped kids. According to the mother, the defendant represented himself as being with the Big Brothers organization. She stated that after this initial meeting, Thomas began to visit the victim, getting him ready for school in the morning and taking him places afterwards. The victim testified that on one of these mornings Thomas committed the sexual misconduct for which he was charged.

The jury found Thomas guilty of two counts of first-degree sodomy, first-degree sexual abuse and being a first-degree persistent felony offender. It recommended fifty years on each sodomy count and five years, enhanced to twenty, on the sexual abuse charge, the sentences to run consecutively for a total of 120 years. The trial judge

conformed the jury's sentence of 120 years within the statutory maximum of seventy years. This appeal followed.

### I. Testimony of the Examining Physician

Thomas argues that the trial judge erred to his substantial prejudice and denied him due process of law when he allowed the examining physician to relate to the jury the history given her by the alleged sexual abuse victim including the identity of the alleged perpetrator. The last witness called by the Commonwealth at trial was the doctor who examined the victim. At a bench conference prior to her testifying, the following exchange took place:

Court: What's she going to testify to?

Comm: She did a medical exam on the child and he made some disclosures to her.

Court: Okay, are there any issues here about, do you seek to introduce statements that the child made?

Comm: Yes, based on Stringer, I do.

Court: And, that's, what's the defendant's position on that?

Defense: Obviously, I object.

The Commonwealth then told the trial judge that Stringer eliminated the distinction between treating and examining physicians and that the latter could testify to the statements made to them in the course of the history. After the trial judge advised counsel that the correct case was Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001), he determined that the probative value of the evidence was not substantially outweighed by the danger of undue prejudice and he overruled the objection by defense counsel.

At the time defense counsel offered his general objection to the testimony of the doctor, it is unclear what he was specifically objecting to. However, it is apparent from the discussion that ensued that the issue presented to the trial judge for a ruling was whether the examining doctor could testify to the history taken from the victim. The trial judge applied the proper balancing test under Garrett, supra, and his ruling permitting the doctor to testify was not an abuse of discretion. Thereafter, the doctor testified as follows without objection.

Doctor . . . And so I asked him [the victim] how come he was in a foster home and then, should I tell them what he said?

Comm: Yes

Doctor: And he said that Dave did that sexual abuse on me.

Comm: Okay, and did he indicate who Dave was?

Doctor: He said the person's name was Dave Thomas.

Comm: What else did he tell you about Dave Thomas?

Doctor: He stated that Dave Thomas was a black dude. I asked him how he knew him and he said we were just walking and he just came by. I asked him did your mom know him and he said she didn't know him just then when we met him.

Comm: What else did he, what other information did he provide you in this history?

Doctor: I said, you said he done that sex abuse on you and I asked about it and he said he just came in the door, my mom was at work. The patient stated he took me to the bed and started doing nasty stuff to me. He stated he got on me when I was getting dressed and put his thing in my butt and that was all. I asked if he said anything and the patient said no. He said first he had some clothes on and then he started to take them off. The patient stated I didn't tell anybody because I was scared to. I think

I had asked the patient what the person had on and this is why he answered first he had some clothes on. . . .

Comm: What else did you ask him about?

Doctor: I asked did he touch your front privates and the patient said yeah. I asked what did he touch with, he stated with his hands. I asked did he touch you with his mouth, the patient said no. I stated when he put his thing in your butt did it hurt and the patient said yeah. The patient stated I was trying to tell him to get off, but he just didn't get off. I asked the patient what do you mean by his thing and the patient said his, you know, his private in the front.

Comm: And, did you ask him to describe that?

Doctor: I asked what did his private in the front look like and the patient stated black and big. I asked do you know if anything came out of his private and the patient said "unh unh" and I put in parentheses negative.

Comm: Is there anything else about the history that he gave you that was significant to this charge?

Doctor: He said that it happened one time.

Thomas now complains that the doctor impermissibly repeated the victim's identification of the perpetrator and the details of the sexual abuse. His failure to object to this testimony at trial on this basis, however, precludes appellate review. RCr 9.22.

## II. Bad Act Evidence

Thomas contends that the trial judge erred to his substantial prejudice and denied him his right to due process by allowing the Commonwealth to play unredacted, rambling tape-recorded conversations allegedly made by him wherein he admitted to numerous instances of theft, acts that had nothing to do with the crimes for which he was standing trial. We disagree.

The Commonwealth filed a notice to introduce KRE 404(b) evidence that consisted of tape-recorded conversations between Thomas and the victim, as well as commentary of the defendant alone in which he makes certain admissions. It asserted that the tapes demonstrated the defendant's motive, opportunity, intent, preparation and plan to commit the offenses which are charged in the indictment. The Commonwealth acknowledged that the tapes contained references by Thomas to petty thefts, but that the comments are so inextricably intertwined with the other comments regarding the victim that redaction would be nearly impossible. It suggested that an admonition would be appropriate.

The trial judge reviewed a transcript of the tapes and determined that it was not possible to redact the tapes because they would be rendered meaningless without the proper context. He also believed that an admonition would cure the problem. Defense counsel responded that he wanted the tapes suppressed, but failing that he would like an admonition. The tapes were played in their entirety and the trial judge admonished the jury to disregard any and all references to thefts made on these tapes and not hold them against the defendant or allow those references to prejudice him in any way.

We have reviewed the record and must agree with the decision of the trial judge to permit the tapes to be played in their entirety. Redaction would have resulted in a complete lack of context to the admissible evidence. The petty thefts and extraneous dialogue were so inextricably intertwined with the other evidence that separation of the two could not be accomplished without serious adverse effect to the Commonwealth. See KRE 404(b)(2). We are not persuaded by the authorities cited by Thomas. The thorough admonition given by the trial judge cured any problem associated with the admission of the other bad acts.



### III. Competency Hearing

The final issue raised by Thomas in his brief concerning the failure of the trial judge to hold a competency hearing is now moot. Pursuant to Thompson v. Commonwealth, Ky., 56 S.W.3d 406 (2001), we rendered an opinion and order on January 22, 2004, remanding this case for the trial judge to determine whether a retrospective competency hearing was possible and, if so, to hold such a hearing. On June 21, 2004, the trial judge entered an opinion and order which found that a retrospective competency hearing was possible and that as a result of such hearing, Thomas was competent to stand trial. Thomas has not appealed that decision. We have reviewed the record and find no error in the conclusions reached by the trial judge.

Thomas received a fundamentally fair trial and there was no violation of either the state or federal constitutions.

The judgment of conviction is affirmed.

All concur.

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