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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-000202-MR

DATE 11-23-05 E.A. Gravitt P.C.

RICKY LYNN LANGSTON — APPELLANT

V.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
NO. 02-CR-00136

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Ricky Lynn Langston, was convicted of one count of sodomy in the first degree and one count of bribing a witness. The jury recommended a sentence of twenty years for sodomy and one year for bribing a witness, to run consecutively. The court entered a judgment sentencing Appellant to serve twenty-one years. Appellant appeals to this Court as a matter of right,[1] asserting two claims of reversible error: (1) that "[t]he trial court erred to the Appellant's substantial prejudice when it failed to direct a verdict of acquittal when the prosecution failed to prove that the alleged crime occurred in Graves County"; and (2) that "[t]he trial court erred to the Appellant's substantial prejudice when it allowed an inaudible tape to be played for the jury." Discovering no reversible error, we affirm.

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[1] KY. CONST. § 110(2)(b).

Appellant is the step-father of A.R.[2] The sodomy charge arises from an act committed by Appellant more than twenty-five years ago, when A.R. was roughly four years old. A.R. initiated an investigation in January of 2002 when she told the Mayfield Police Department that on or about 1978 Appellant forced her to perform oral sex. A.R. asserted that one night, Appellant woke her from her sleep to go and get candy. She testified that Appellant, instead of going to the store, drove to a gravel road. There, Appellant stopped the vehicle and ordered A.R. to perform oral sex on him. A.R. also testified that Appellant grabbed her by her hair and forced her to comply. A.R. vomited, cried, and pleaded to go home. Appellant flung A.R. into the floorboard and told her that if she ever told anyone he would kill her mother, brother, and sister. As a result of the 2002 investigation by Kentucky State Police Detective Caskey, charges were formally brought by the Commonwealth against Appellant.

Prior to the commencement of Appellant's trial, Appellant offered A.R. five-thousand dollars and a car provided that she would drop the charges against him. A.R. contacted Detective Caskey and reported that Appellant attempted to bribe her. At trial, the jury convicted Appellant of sodomy in the first degree and bribing a witness. Appellant was sentenced to twenty-one years.

Appellant first argues that the Commonwealth failed to prove that the crime occurred in Graves County and therefore venue was not established. This issue is preserved for review by Appellant's motion for directed verdict, and its renewal at the close of all evidence.[3] This court must view the evidence in favor of the Commonwealth

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[2] A.R. was a minor at the time of the abuse and therefore her initials will be used.

[3] Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998) (affirming the rule announced in Kimbrough v. Commonwealth, 550 S.W.2d 525, 529 (Ky. 1977)).

in reviewing Appellant's motion for directed verdict.[4] If a reasonable juror could find Appellant guilty of the crimes charged against him, a directed verdict should not be granted.[5]

The victim, A.R., testified at trial as to where the crime occurred. She testified that Appellant took her from her home in Graves County and drove her to a gravel road, "somewhere she had never been before." KRS 452.510 provides that the venue of a criminal prosecution is in the county in which the offense was committed.[6] Further, "KRS 452.620 provides that when there is a reasonable doubt as to whether the offense was committed in the county where the indictment is returned or in some other county, the proper venue is in the county where the indictment was returned."[7] Appellant argues that KRS 452.620 is limited to situations where a tug-of-war exists between counties as to who is to prosecute the case. However, Appellant cites no authority or case law for this interpretation. Under KRS 452.620, the rule remains that "slight evidence will be sufficient to sustain the venue and slight circumstances, from which the jury might infer the place where the crime was committed, are held to be sufficient."[8] Appellant argues that A.R.'s testimony is the only evidence produced by the Commonwealth regarding venue and that, standing alone, it does not create the slight evidence necessary to meet the requirements of KRS 452.620. However, A.R.'s testimony, along with the presumption that a trial is held in the appropriate county,[9]

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[4] Commonwealth v. Benham, 816 S.W.2d 186,187 (Ky. 1991).
[5] Id., at 187.
[6] Commonwealth v. Cheeks, 698 S.W.2d 832 (Ky. 1985) (explaining the importance of KRS 452.510).
[7] Bedell v. Commonwealth, 870 S.W.2d 779, 781 (Ky. 1994) (illustrating KRS 452.620).
[8] Hendron v. Commonwealth, 487 S.W.2d 275, 277 (Ky. App. 1972); Hardin v. Commonwealth, 437 S.W.2d 931 (Ky. App. 1968).
[9] Bedell, 870 S.W.2d at 781.

does create the slight evidence needed to sustain venue. A.R. maintained through direct and cross examination that although she was unaware of the gravel road's actual location, it was in Graves County. Appellant asserts that A.R.'s credibility is low and therefore cannot be the sole basis for establishing venue. However, it is an established rule that the credibility of witnesses and the weight and value to be given to their testimony is a question for the jury.[10] Therefore, the jury was presented with enough evidence that it could find Graves County was the proper venue.

Appellant's second argument arises from the admission into evidence of an audio recording made during Detective Caskey's interrogation of Appellant. The trial judge heard arguments regarding the contents of the audiotape in his chambers. After the trial judge ruled that certain discussions between Detective Caskey and Appellant were irrelevant, the audiotape was introduced on the first day of trial by the Commonwealth. When the tape was played at trial, the jury interrupted to express that it could not hear the tape. The jury said that although Detective Caskey's voice was clear, it could not understand what the Appellant was saying. The judge suggested that a different tape player might enhance the voices. The judge ordered the Commonwealth to redact the irrelevant portions of the tape and to improve the audiotape's sound. Prior to the commencement of the second day of trial, Appellant moved to suppress the enhanced audiotape because it was not presented to Appellant during discovery. The judge denied the motion on the basis that the tape was only altered by redaction, per the motion by Appellant, and that the tape was now easier to hear.

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[10] Benham, 816 S.W2d at 187; See, Evans v. Commonwealth, 3 Ky. L. Rptr. 30, 79 Ky. 414 (1881); Davis v. Commonwealth, 147 S.W.3d 709 (Ky. 2004).

Appellant asserts that the trial court erred by arbitrarily not reviewing the tape before it was presented to the jury the second time. Furthermore, the trial court abused its discretion by allowing the Commonwealth to introduce the audiotape when it was mostly inaudible. Appellant preserved this issue by his motion to suppress the audiotape.

When reviewing the admissibility of evidence, the standard of review is whether the trial court abused its discretion by denying Appellant's motion to suppress.[11] The test for abuse of discretion is whether the trial court's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[12] The trial judge requested that the tape's sound be enhanced only after the jury expressed its inability to make out Appellant's answers during Detective Caskey's interrogation. When the tape was played on the second day of trial, neither the jury nor Appellant objected to the tape's audibility. Further, even if the enhanced audiotape should have been reviewed by the trial court, it remains within the trial court's discretion to do so.[13] The playing of a clearer, more intelligible, redacted audiotape created no prejudice.[14]

The second argument Appellant makes concerning the audiotape is in regard to the testimony of Detective Caskey. Appellant asserts that it was palpable error because Detective Caskey's testimony amounted to an impermissible interpretation of an inaudible tape recording. As in Clifford v. Commonwealth, Detective

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[11] Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).
[12] Id., at 945.
[13] Johnson v. Commonwealth, 90 S.W.3d 39, 45 (Ky. 2003) (citing United States v. Bryant, 480 F.2d 785, 789 (2nd Cir. 1973), (even though the trial court should have reviewed the audiotapes before admitting them, failure to do so was not in and of itself error).
[14] See, Sanborn v. Commonwealth, 754 S.W.2d 534, 540 (Ky. 1988) (citing United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983)); Johnson v. Commonwealth, 90

Caskey did not purport to interpret the tape recording.[15] Caskey testified to what he, himself, was told by Appellant during the interrogation. Even if Detective Caskey's testimony could be described as an interpretation of the audiotape, which this Court maintains it cannot, it would not amount to palpable error because the tape itself was heard by the jury.[16]

Third, Appellant asserts that the Commonwealth's inclusion of a transcribed portion of the audiotape in its brief to this Court constitutes extreme prejudice and that the transcript should be stricken from the Commonwealth's brief. Appellant has made no argument that the transcript contained specific inaccuracies or errors.[17] This Court has listened to the tapes and agrees with Appellant that portions of the tape are difficult to understand. However, by no means are those portions wholly inaudible.[18] Appellant's counsel passed up the opportunity in its reply brief to provide a substitute version different than that offered by the Commonwealth. Moreover, the transcript in the Commonwealth's brief was not used during the jury trial. Nothing prevents a party from transcribing evidence presented at trial and repeating what was said therein to support its argument. Therefore, the transcript contained in the Commonwealth's brief is not relevant to any issue on appeal.

S.W.3d 39, 45 (Ky. 2003) (holding if recording is sufficiently audible to be probative, it is not an abuse of discretion to admit them).

[15] 7 S.W.3d 371, 374 (Ky. 1999); Gordon v. Commonwealth, 916 S.W.2d 176, 180 (Ky. 1995); see also, United States v. Cylkouski, 556 F.2d 799 (6th Cir. 1977) (holding that parties to telephone conversations could testify with respect to those conversations even though the tapes of the conversations had been suppressed).

[16] See, Perdue v. Commonwealth, 916 S.W.2d 148, 155 (Ky. 1996) (holding that even though prosecutor misquoted statement made by the defendant on an audiotape, such an error was "harmless" since the audiotape was made available to the jurors for review during deliberations).

[17] Norton v. Commonwealth, 890 S.W.2d 632 (Ky. App. 1994).

[18] Johnson 90 S.W.3d at 45.

The judgment of the Graves Circuit Court is affirmed.

All concur.

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