

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: FEBRUARY 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2006-SC-000089-MR

DATE 3/13/08 *Ena Groun, DC*

TERRY JEROME COMER

APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
NOS. 04-CR-002606 AND 04-CR-002761

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is on appeal from the Jefferson Circuit Court where Appellant, Terry Comer, was convicted on counts of rape, sodomy, use of a minor in sexual performance, and sex abuse. Appellant now appeals to this Court as a matter of right. Ky. Const. Sec. 110(2)(b).

Appellant raises one claim of error: that the trial was rendered fundamentally unfair by the substantive use of out-of-court statements by a witness. Finding that Appellant waived his right to challenge these statements, this Court affirms the decision of the trial court.

I. Background

This case involves charges that Appellant sexually abused his step-daughters, his step-nieces and some of their friends. The Commonwealth's case in chief consisted of the examination of each child, followed by testimony of adults who had spoken to them about the incidents.

One of the adults who testified was Valleri Mason, a forensic interviewer with Child Advocacy Center of Family and Children First, a community, non-profit organization. Mason testified regarding the interviews she conducted with the victims and was cross-examined by Appellant's counsel.

The jury found Appellant guilty of all but three of the 39 charges facing him. Appellant subsequently filed a motion for judgment notwithstanding the verdict, or in the alternative, a new trial. The trial court denied Appellant's motion. Appellant now alleges that KRE 801(A), which purports to allow substantive use of out-of-court statements of a witness, violates Section 11 of the Constitution which gives a person accused of a crime the right to meet the witnesses against him in open court.

II. Hearsay Statements

It is unnecessary to address the merits of Appellant's argument that KRE 801(A) and Section 11 of the Kentucky Constitution are incongruent because Appellant waived his right to challenge the rule.

During the Commonwealth's examination of Mason, she confirmed that, during her interview, one of the girls wrote answers to a few of her questions rather than stating her responses. Mason then read portions of these written responses, without objection from Appellant. During cross-examination, Appellant's counsel asked Mason

to confirm whether the girls told her of specific instances of abuse and directed her to pages of her report for this purpose.

Appellant's counsel told the jury in opening statements that he intended to show how the girls' stories had changed over time and reiterated in closing that major details had changed. The fact that Appellant's counsel expressed this trial strategy in opening and closing statements, and then did not object contemporaneously to Mason's testimony, indicates that Appellant's counsel wanted to inquire into these out-of-court statements in an attempt to demonstrate the evolving nature of their stories. Furthermore, the specificity of the questions from Appellant's counsel during cross-examination certainly demonstrates that the decision not to object to Mason's testimony was intentional.

Federal courts have uniformly held that counsel can waive a criminal defendant's Sixth Amendment Right of Confrontation "so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." United States v. Reveles, 190 F.3d 678, 683 n. 6 (5th Cir.1999) (quoting United States v. Stephens, 609 F.2d 230, 232-33 (5th Cir.1980)). See also United States v. Cooper, 243 F.3d 411, 418 (7th Cir.2001), quoted in Parsons v. Commonwealth, 144 S.W.3d 775, 783 (Ky 2004).

Finding that Appellant waived his right to challenge KRE 801A(a), this Court will not reach the merits of Appellant's constitutional claims. See Stephenson v. Woodward, 182 S.W.3d 162, 168 (Ky. 2006).

III. Conclusion

For the foregoing reasons, Appellant's conviction is affirmed.

All sitting. Lambert, C.J.; Abramson, Cunningham, Minton, Noble and Scott, JJ.,
concur. Schroder, J., concurs in result only.

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