

**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**NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

# Supreme Court of Kentucky

2010-SC-000425-MR

ROBERT EUGENE DENNIS

APPELLANT

V. ON APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE JOSEPH W. CASTLEN, III, JUDGE  
NO. 06-CR-00760

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Robert Eugene Dennis, appeals as a matter of right from an order of the Daviess Circuit Court which reinstated his convictions for three counts of first-degree sodomy and one count of first-degree sexual abuse, and sentence of sixty-five years' imprisonment. Appellant now challenges the trial court's ruling that records from the Cabinet for Health and Family Services ("CHFS") provided insufficient evidence to prove that the victim's prior claims of sexual abuse were demonstrably false. For the reasons set forth herein, we affirm the trial court's order.

In Appellant's first appeal, *Dennis v. Commonwealth*, 306 S.W.3d 466, 475 (Ky. 2010) (hereinafter *Dennis I*), we established a standard to determine whether a sex crime victim's prior allegation of sexual abuse is "demonstrably false" and therefore admissible as evidence against the victim's veracity. "To

meet that [demonstrably false] standard, the proponent must show that there is a distinct and substantial probability that the prior accusation was false. This heightened standard of proof is meant to exclude the evidence where the proponent's only proof of falsity is the alleged perpetrator's denial and/or an inconclusive investigation of the allegation." *Id.* If the allegation is found to be "demonstrably false" then it must still be reviewed under KRE 608 and survive a KRE 403 balancing test before it will be found to be admissible. *Id.*

In *Dennis I*, based on the record before us at that time, we affirmed the trial court's ruling which prevented Appellant from cross-examining the victim about a prior sexual abuse claim. The victim, then five-years-old, had alleged that the family dog jumped in her lap and then subsequently her father, sister, and sister's boyfriend all touched her inappropriately. Based on this allegation, an investigation was opened by CHFS which turned up no evidence of sexual abuse.

In affirming the trial court ruling that the victim may not be cross examined about this prior claim, we analyzed the pre-trial hearing testimony of the CHFS worker who investigated the claim. She testified that the victim had trouble articulating her allegation and that no adults could verify the victim's story. However, the CHFS worker's testimony indicated that she did believe that the dog probably jumped in her lap and that the victim may have misinterpreted her family members' actions. Additionally the CHFS worker mentioned how it was possible that the victim could be referring to a time

when her family members helped clean her up after an accident. We concluded that her testimony “established no more than that the alleged perpetrators had denied any wrongdoing and that otherwise the allegations could not be substantiated,” and affirmed the trial court’s ruling which excluded any evidence regarding the victim’s prior sexual abuse claim. *Id.* at 476.

However, we vacated Appellant’s conviction and remanded the case back to the Daviess Circuit Court for an *in camera* review of certain CHFS records on the victim’s prior allegation of sexual abuse. Appellant discovered that these records were mistakenly omitted from the trial record during his appeal in *Dennis I*. We instructed the trial court to determine their admissibility under the demonstrably false standard.<sup>1</sup>

On remand, the trial court reviewed the records and found “1) that the CHFS records do not contain sufficient evidence of falsity of the victim’s testimony so as to allow the defendant to have introduced such as evidence at trial; 2) that these records do not bear materially on the falsity issue and should not be released to the defendant; and 3) that the records do not contain any exculpatory or otherwise discoverable materials.” The trial court thus reinstated the original judgment and sentence against Appellant.

Appellant now argues that the trial court ruling was erroneous because the CHFS records did contain evidence that the victim’s prior allegation of

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<sup>1</sup> If the trial court found sufficiently probative evidence in the CHFS records to show the victim’s prior allegation was demonstrably false, Appellant was entitled to a new trial. If no such evidence was found, Appellant’s conviction and sentence was to be reinstated. *Dennis I*, 306 S.W.3d at 477.

sexual abuse was demonstrably false. In particular, Appellant highlights several items which he believes cast doubt on the veracity of the victim's story. These include: the investigator's conclusion that the victim's story is "inconsistent" and "fragmented"; the victim's bizarre statement to the investigator that her sister could turn into a ghost; and the fact that the investigator could not find anyone to substantiate the victim's claims.

However, these items do not prove that the victim's prior allegation was *demonstrably false*. If anything, a review of the CHFS report bolsters the conclusion that the investigation was inconclusive. While the report does state that the victim's statements were "inconsistent and fragmented" we note that the report also stated that the victim had low communication skills. Also, the report indicates that any police investigation into the allegation was hindered by the victim's mother. Thus, we cannot hold that this investigation, potentially hindered by family members, and hampered by the victim's poor communication skills leads to a conclusion that the victim's claim was "demonstrably false." As stated in *Dennis I*, the demonstrably false standard is a heightened standard and a sexual abuse allegation investigation which was inconclusive does not meet this test. 306 S.W.3d at 475.

For the reasons set forth above, the order of the Daviess Circuit Court reinstating Appellant's convictions and sentence is affirmed.

All sitting. All concur.

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