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RENDERED: DECEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000801-MR

JOSEPH LONG — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
NO. 09-CR-00676

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Joseph Long, appeals as a matter of right, Ky. Const. § 110, from a judgment entered by the Kenton Circuit Court convicting him of incest, third-degree rape, and third-degree sodomy, and sentencing him to a total of twenty years' imprisonment.

In this appeal, Appellant raises the following claims of error: (1) that the trial court erred by permitting the victim's father to testify about the number of text messages the victim had exchanged with Appellant based upon the father's examination of the victim's unauthenticated cell phone account as accessed through the Internet; and (2) that error occurred as a result of the victim's testimony that she believed the text messages she was sending to and receiving from Appellant's cell phone number were being received and sent by Appellant. While permitting the victim's father to testify concerning the unauthenticated

information he obtained from the victim's Internet cell phone account was error, the information was cumulative to other evidence presented, and was therefore harmless. Further, the victim's testimony that she believed she was communicating with Appellant by texting was competent evidence, and not erroneously admitted. We accordingly affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

When the victim, K.M., was fourteen years-old, her mother, Lisa, began dating and living with Appellant. Soon thereafter, Appellant began having illegal sexual contact with K.M. About one month later, Appellant and Lisa were married, but his sexual activity with K.M continued.

Appellant and K.M. frequently exchanged text messages, including messages of a sexual nature, on their cell phones. The illegal sexual contact continued for about one year, when K.M. ran away from home and disclosed what had occurred.[1] As a result of K.M.'s disclosures Appellant was indicted for incest (KRS 530.020), third-degree rape (KRS 510.060), and third-degree sodomy (KRS 510.090).

Appellant's trial was held in September 2010. At the conclusion of the trial, the jury returned a verdict of guilty on all of the charges and recommended a total sentence of twenty years' imprisonment. Final judgment was entered on November 4, 2010, consistent with the jury's verdict and sentencing recommendation. This appeal followed.

[1] Because the details of the sexual contact are not relevant to the issues raised, we need not discuss the details of the illegal conduct.

II. THE ADMISSION OF THE INTERNET CELL PHONE ACCOUNT INFORMATION WAS ERROR, BUT THE ERROR WAS HARMLESS

Appellant first contends that the trial court erred by permitting K.M.'s father to testify about the results of his examination of the Internet account for K.M.'s cell phone.

K.M.'s cell phone was registered in her mother's name, but her father paid for the phone and had the password to access the customer account through the Internet. After K.M. made the allegations against Appellant, her father accessed the account and calculated that during June and July of 2009 there had been a total of approximately 1,500 text messages transmitted between K.M.'s and Appellant's cell phone numbers. During pretrial proceedings, Appellant sought to prevent the Commonwealth from presenting this information through K.M.'s father, but the trial court overruled his objection, and he was permitted to testify about his examination of the customer account.

It is self-evident that cell phone account records are business records and, therefore, may be admitted only if the standards for the admission of business records are complied with. Fundamental to these standards are the authentication requirements contained in KRE 901 and, as well, the applicable hearsay rules. We recently discussed substantially this precise issue in *Hunt v. Commonwealth*, 304 S.W.3d 15 (Ky. 2009),[2] wherein we stated:

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to

[2] In *Hunt* the evidence concerned a cellular phone bill received electronically by computer.

support a finding that the matter in question is what its proponent claims." KRE 901(a). For purposes of authentication, the condition of fact which must be fulfilled by every offer of real proof is whether the evidence is what its proponent claims. *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004). Part of the identification of evidence is a demonstration of its integrity - that it is in fact what its proponent claims it to be. *Rogers v. Commonwealth*, 992 S.W.2d 183, 187 (Ky. 1999).

Hunt attempted to introduce the telephone billing records for the truth of the matter contained therein; and, thus, the records must clear the hurdle for the admission of hearsay evidence. KRE 803(6) addresses the admissibility of business records under the hearsay rules. The rule states, as relevant here, as follows:

> The following are not excluded by the hearsay rules, even though the declarant is available as a witness:
>
> . . .
>
> (6) Records of regularly conducted activity. A . . . record, or data compilation, in any form, of acts, events, [or] conditions, . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . . .

Similarly, Professor Robert G. Lawson discusses the issue as follows:

> Business records are writings. Writings must be authenticated, i.e., accompanied by preliminary evidence sufficient to support a finding that they are what their proponents claim. This preliminary proof is commonly referred to as 'foundation.' KRE 803(6) requires 'testimony of the custodian or other qualified witness' concerning the prerequisites for admitting business records . . . . [I]t is 'essential' testimony without which business records 'must be excluded.'

> It is also well-settled that the foundation witness need not be the custodian of the records nor the person who made them. Anyone who can testify from personal knowledge about the circumstances surrounding the making and keeping of the records can qualify as a foundation witness. As stated by one authority, 'in the end the requirement may be satisfied by the testimony of anyone who is familiar with the manner in which the record was prepared, and even if he did not himself either prepare the record or even observe its preparation.'

Id at 39 - 40.

Here, the Commonwealth did not introduce the records through the testimony of the custodian of the cell phone records, an "other qualified witness." K.M.'s father had no personal knowledge of how the cell phone company prepared the records he testified about, its record-keeping procedures, or any other competent knowledge which would allow him to testify to the verity of the content of the records he accessed on the Internet. Nor did he have any knowledge of specific text messages or when they were sent. Additionally, the cell phone records are not self-authenticated per KRE 902(11).

Because the Internet text message information was not properly authenticated, the trial court abused its discretion by permitting the Commonwealth to introduce the evidence. Nevertheless, the admission of this evidence only requires reversal if it "affect[ed] the substantial rights" of Appellant. RCr 9.24. An error is harmless if we can determine "with fair assurance that the judgment was not substantially swayed by" it. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688 - 689 (Ky. 2009).

Here, K.M. testified that she and Appellant texted each other "a lot," and that they texted back and forth at night for five to six hours, non-stop, a couple of times per month. In addition, the Commonwealth properly subpoenaed and introduced text messages sent from Appellant's cell phone number to K.M.'s phone number. Accordingly, because the volume and frequency of texting between K.M. and Appellant was well established through other evidence, the admission of the unauthenticated business record information through K.M.'s father, though error, was harmless. *Commonwealth v. McBride*, 281 S.W.3d 799, 807 (Ky. 2009) (the admission of incompetent evidence that the defendant was a registered sex offender in Tennessee was cumulative and therefore harmless error).

III. THE ADMISSION OF THE VICTIM'S TESTIMONY THAT SHE BELIEVED APPELLANT TO BE HER TEXT MESSAGE CORRESPONDENT WAS PROPER

Appellant also argues that error occurred as a result of the victim's testimony that she believed the text messages she sent to Appellant's cell phone number were received by him and that the text messages she received from that cell phone number had been sent by him. Because no error occurred as a result of the admission of the evidence, Appellant is not entitled to relief.

During pretrial proceedings, Appellant sought to preclude K.M. from testifying that when she would send and receive text messages to and from Appellant's cell phone number that she thought she was texting back and forth with Appellant. The trial court granted the motion and ruled that K.M. could

testify only that she received a text message from a certain cell phone number, but she could not say that she thought it was from Appellant. This ruling was made about seven weeks prior to the commencement of trial.

Notwithstanding the trial court's pretrial ruling, during K.M.'s testimony the Commonwealth elicited on several occasions that K.M. believed that she was texting with Appellant when she received messages from his phone number and when she replied to those messages. Although this was in violation of the trial court's pretrial ruling, trial counsel did not object to the eliciting of K.M.'s testimony. The Commonwealth accordingly argues that the issue is not preserved. However, because the testimony was clearly admissible, we will not unduly extend our discussion with an inquiry into the preservation dispute.[3]

Pursuant to KRE 701, a witness may testify "in the form of an opinion or inference" if the testimony is rationally based on the perception of the witness, is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and is not based on scientific, technical, or other specialized knowledge. Testimony offered under KRE 701 is constrained,

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[3] *See* KRE 103(a)(1)(requiring timely objection to incompetent evidence); RCr 9.22 (requiring a contemporaneous objection to exclude evidence); and Lawson, *The Kentucky Evidence Law Handbook* (4th Ed.), p. 36 (2003) (The general rule is that an objection is not timely unless it is made "as soon as the basis for objection becomes apparent."). Though KRE 103(d) provides that "a motion in limine resolved by order of record is sufficient to preserve error for appellate review"; nevertheless, a party obviously may not obtain a successful pretrial ruling, acquiesce to the breach of the ruling at trial by failing to object to the violation, and then blithely claim preservation based upon the pretrial ruling. KRE 103(d) does not excuse a party from its duty to contemporaneously bring errors to the trial court's attention in the event the pretrial ruling is violated.

however, by KRE 602, which "further refines the scope of permissible lay opinion testimony, limiting it to matters of which the witness has personal knowledge." *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265 (Ky. 2009); *see also Mills v. Commonwealth*, 996 S.W.2d 473, 488 (Ky. 1999) ("KRE 701 must be read in conjunction with KRE 602, which limits a lay witness's testimony to matters to which he has personal knowledge."). Moreover, in *Hampton v. Commonwealth*, we explained that Kentucky's adoption of KRE 701 "signaled this Court's intention to follow the modern trend clearly favoring the admission of such lay opinion evidence," which "reflects the philosophy of this Court, and most courts in this country, to view KRE 701 as more inclusionary than exclusionary." 133 S.W.3d 438, 440–41 (Ky. 2004) (quoting *Clifford v. Commonwealth*, 7 S.W.3d 371, 377 (Ky. 1999)).

Here, K.M.'s testimony that she believed that she was texting back and forth with Appellant, was rationally based on K.M.'s perceptions. K.M. was familiar with and regularly interacted with Appellant. Further, she shared a household with him and was being sexually abused by him. Given this level of familiarity, it is extremely unlikely to suppose that K.M. could engage in a large number of text messages with her step-father over an extended period of time (including sexually explicit messages) and not know with near certainty, that he was her correspondent. *Hunt*, 304 S.W.3d at 35. ("The degree to which a witness may give an opinion, of course, is predicated in part upon whether and the extent to which the witness has sufficient life experiences that would permit making a judgment as to the matter involved."). While imposters no

doubt abound in the realm of the Internet, e-mails, and text messages, here, there was a sufficient factual predicate for K.M. to state her opinion that she believed she was texting with Appellant. Appellant, of course, was free to cross-examine her on the point.

In addition, K.M.'s testimony that she believed she was texting with Appellant was undoubtedly helpful to a clear understanding of her testimony and the determination of a fact in issue. The Commonwealth introduced sexually explicit text messages (obtained from Appellant's cell phone provider) exchanged between K.M. and Appellant's cell phone numbers, and so the testimony was decidedly relevant to a determination of whether Appellant had illegal sexual contact with K.M.

Further, the testimony was obviously not of a scientific or technical nature and was in conformance with KRS 602, which provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Obviously, K.M. had personal knowledge of the text messages.

In summary, the testimony was properly admitted at trial.

IV. CONCLUSION

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

All sitting. All concur.

COUNSEL FOR APPELLANT:

V. Gene Lewter
Department of Public Advocacy
100 Fair Oaks Lane
Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

William Bryan Jones
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, Kentucky 40601