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RENDERED: JUNE 16, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000661-MR

JAMES ROBINSON — APPELLANT

V.

ON APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
NOS. 13-CR-00022 AND 13-CR-00063-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

A Lincoln County Grand Jury indicted Appellant, James Robinson, of first-degree sodomy (victim under the age of twelve), seven counts of use of a minor in a sexual performance (victim under the age of sixteen), five counts of first-degree sexual abuse (victim under the age of twelve), and two counts of first-degree sexual abuse (victim under the age of sixteen). The trial court granted Appellant's motions for directed verdicts of acquittal for two of the seven counts of use of a minor in a sexual performance. A Lincoln Circuit Court jury found Appellant guilty of the remaining charges. Appellant was sentenced to concurrent sentences of life imprisonment for sodomy, twenty years' imprisonment for each count of use of a minor in a sexual performance, ten years' imprisonment for each count of first-degree sexual abuse (victim under the age of twelve), and five years' imprisonment for first-degree sexual abuse (victim under the age of sixteen). Appellant now appeals as a matter of

right, Ky. Const. § 110(2)(b), and raises the following issues: (1) the trial court erred in not directing verdicts of acquittal on four of Appellant's charges of use of a minor in a sexual performance, (2) the trial court erred in allowing a child under the age of twelve to testify via closed-circuit television outside Appellant's physical presence, (3) Appellant's convictions for use of a minor in a sexual performance and first-degree sexual abuse relating to the same victim violated his right to be free from double jeopardy, and (4) the trial court erred by denying Appellant's motion for a mistrial.

I. BACKGROUND

Appellant frequently visited his brother, Timothy Robinson, at the mobile home Timothy shared with his wife, their seven children, and his stepdaughter, Suzie.[1] Appellant and Timothy were tried as co-defendants on multiple allegations of sex crimes involving several of Timothy's children and stepdaughter. Five of the children testified for the Commonwealth at trial. Among the various crimes, the Commonwealth charged both brothers with the sodomy of Timothy's son, Simon, who was under twelve years old at the time of the offense. Appellant does not appeal the sodomy conviction for which he received a life sentence. We will develop further facts below as necessary for our analysis.

[1] In keeping with this Court's practice, we use pseudonyms for the minor children.

II. ANALYSIS

A. Directed Verdicts

Appellant argues that the trial court erred to his substantial prejudice when it failed to grant his motions for directed verdicts of acquittal on four separate charges of use of a minor in a sexual performance. For the following reasons, we hold the trial court did not err in its denial of these motions.

In *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), we restated the long-held standards under which a trial court considers motions for directed verdict:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserv[e] to the jury questions as to the credibility and weight to be given to such testimony.

We also set out the standards under which appellate courts review a trial court's ruling on a motion for directed verdict. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Id.* With these standards in mind, we turn to Appellant's arguments involving his motions for directed verdicts.

1. Count One

Count one charged Appellant with using Timothy's stepdaughter Suzie, a minor under the age of sixteen, in a sexual performance. Appellant moved for

a directed verdict at trial, insisting that the Commonwealth failed to introduce testimony that Appellant had used Suzie in a sexual performance. The Commonwealth indicated the charge was based on an incident about which Timothy's oldest son, Simon, testified. Simon stated he saw Appellant rubbing Suzie's breasts and vagina in the living room of the mobile home Timothy and his wife shared with their seven children and Suzie. The trial court overruled the motion at that point, and again when defense counsel renewed the motion at the close of its case.

While Suzie remembered a social worker interviewing her, she testified she did not make allegations against Appellant. She went on to state that she told the truth in the interview and if she had said anything to the social worker, it would have been true. She denied that Appellant had ever tried to sit next to her and said she did not remember anything happening in the family's van when Appellant was sitting beside her. Appellant also denied ever touching Suzie inappropriately. Furthermore, the pediatrician who examined Suzie testified that her findings were normal. Based on this testimony, Appellant now argues that the trial court should have granted Appellant's motion for a directed verdict as to the charge that he used Suzie in a sexual performance, as it was clearly unreasonable for a jury to find guilt on that charge.

Appellant points out that Suzie did not deny all allegations of abuse, as she testified that Timothy had sex with her. He argues it is unreasonable to

believe that Suzie would tell the truth about abuse perpetrated by her stepfather, yet then lie to cover up for her step-uncle.

The Commonwealth had the burden of proving every element of the charge against Appellant beyond a reasonable doubt. KRS 500.070(1). Further, the evidence the Commonwealth presents must be of substance, amounting to more than a mere scintilla. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). Appellant argues that the Commonwealth failed to prove every fact necessary beyond a reasonable doubt and that it would have been clearly unreasonable for a jury to find Appellant guilty on this charge in violation of his due process rights afforded by the United States and Kentucky Constitutions. However, in spite of Suzie's lack of memory in making the allegations and Appellant's denials, Simon testified at trial that he witnessed Appellant inappropriately touching Suzie.[2]

Simon testified that Appellant would rub, kiss, and try to have sex with Suzie both inside and outside the trailer. Simon specifically described an incident in which Appellant made Suzie sit on his lap in the living room and rubbed her breasts. He went on to testify that Appellant would ask Suzie to sit on his lap and rub her breasts and her vagina under her clothes.

The trial court did not err in allowing this matter to survive Appellant's motion for a directed verdict and sending it to the jury. The trial court was

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[2] While other witnesses also testified about Appellant inappropriately touching Suzie, only Simon testified as to the events described in the jury instructions on this particular charge.

tasked with assuming that "the evidence for the Commonwealth [was] true" while "reserving to the jury questions as to the credibility and weight to be given to such testimony." *Benham*, 816 S.W.2d at 187. We cannot hold that the trial court erred when it did just that. Even though Suzie denied any memory of making the allegations and Appellant testified that the events in question did not occur, Simon testified that the very events contained in the jury instruction on this charge did indeed take place. The evidence was sufficient for a reasonable juror to find Appellant guilty beyond a reasonable doubt. We hold that, under the evidence taken as a whole, it was not clearly unreasonable for a jury to find Appellant guilty of using Suzie in a sexual performance.

2. Counts Two, Three, and Four

Appellant next argues that the trial court erred when it did not grant his motions for directed verdicts as to counts two, three, and four, which charged him with three counts of use of a minor in a sexual performance with Timothy's three youngest sons. All of these charges arise from the same type of event and the evidence presented for each charge is identical, so we will consider them together. Two of the three boys did not testify at trial due to their age. The child who did testify did not testify concerning the events related to this charge.

Mary Crowe was Appellant's former girlfriend of more than twelve years, as well as his former sister-in-law. She went to Timothy's home with Appellant on several occasions and Crowe testified Appellant always drank during these visits. Specifically, she testified that, on July 4, 2012, Appellant unzipped his

pants halfway, grabbed Simon by the back of the head, and told Simon he was going to make him "suck his dick." Crowe said this date stood out to her because it was one of the first times she saw Appellant engage in this behavior.

As to Timothy's three youngest sons, Crowe testified that Appellant engaged in similar conduct. Specifically, Crowe testified that Appellant partially unzipped his pants while grabbing the boys by the back of the head (Crowe visually demonstrated a motion as if she were pulling a head to her crotch) and telling them to "suck his dick". Crowe also testified that Appellant would act as if he were going to grab the boys' penises and tell them he was going to "bend them over and fuck them in the ass."

The use of a minor in a sexual performance charges as to these three boys all arose from the acts detailed in Crowe's testimony. KRS 531.310(1) provides: "[a] person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance." Sexual performance is defined in KRS 531.300(6) as "any performance or part thereof which includes sexual conduct by a minor." Moreover, performance is defined in KRS 531.300(5) as "any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience." Finally, KRS 531.300 (4) reads:

"Sexual conduct by a minor" means:

> (a) Acts of masturbation, homosexuality, lesbianism, beastiality, sexual intercourse, or deviant sexual intercourse, actual or simulated;
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> (b) Physical contact with, or willful or intentional exhibition of the genitals;

> (c) Flagellation or excretion for the purpose of sexual stimulation or gratification; or
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> (d) The exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area or buttocks, or the female breast, whether or not subsequently obscured by a mark placed thereon, or otherwise altered, in any resulting motion picture, photograph or other visual representation, exclusive of exposure portrayed in matter of a private, family nature not intended for distribution outside the family[.]

We note that, while "deviant sexual intercourse" is the phrase used in KRS 531.300 (4)(a) above, the term is not defined in this chapter. However, "deviate sexual intercourse" is defined in KRS 510.010(1)—admittedly another chapter—as: "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign object manipulated by another person."[3]

Appellant goes on to argue that while his conduct was crude, it did not involve a performance, as there was "no play, motion picture, photograph, dance, or any other related visual performance." However, as this Court has pointed out, "[t]he plain language of KRS 531.300(5) defines performance as

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[3] While KRS 531.300 and 510.100 are contained in different chapters, the definition from the latter aids our analysis as both chapters are part of the criminal code and both proscribe sexual offenses against children. Furthermore, we note the difference between the words "deviant" and "deviate" is negligible since both are cognate forms of the word "deviance'—differentiated merely by usage and part of speech. A deviant is one who deviates, or one who engages in deviance; and deviance is defined as "[t]he quality, state, or condition of departing from established norms, esp. in social customs; the condition of being different, esp. in a bad or abnormal way. — deviate (dee-vee-ayt), vb. — deviant, adj. & n. — deviate (dee-vee-ət), n." *Black's Law Dictionary* (10th ed. 2014).

not only a play, motion picture, photograph or dance, but also 'any other visual representation' exhibited before an 'audience.' Clearly, common sense dictates that there can be an audience of one . . . ." *Woodard v. Commonwealth*, 219 S.W.3d 723, 727 (Ky. 2007), *overruled on other grounds by Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010). The acts in question were visual representations exhibited before an audience of at least one. Therefore, these actions constituted performances.

Appellant next argues that the acts Crowe described did not amount to "sexual conduct by a minor" as specified in KRS 531.300(4). Crowe testified that Appellant would unzip his own pants halfway, grab the boys' heads (Crowe visually demonstrated a motion as if she were pulling a head to her crotch), and say "[c]ome here, boy. I'm going to make you suck my dick." We hold that the conduct described by Crowe constituted simulated deviant sexual intercourse, as contemplated by the statute.

Appellant argues in passing that he should have actually been charged with misdemeanor attempted sexual misconduct; however, as the record on this argument was not developed below, we will not address it now.

The evidence was sufficient for a reasonable juror to find Appellant guilty beyond a reasonable doubt. We hold that, under the evidence taken as a whole, it was not clearly unreasonable for a jury to find Appellant guilty of using Timothy's three youngest sons in sexual performances.

B. Testimony of Child via Closed-Circuit Television

The Commonwealth filed a motion to allow Richard (Timothy's second-oldest son) to testify via closed-circuit television pursuant to KRS 421.350, which reads, in pertinent part:

> (2) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.
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> . . . .
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> (5) For the purpose of subsections (2) and (3) of this section, "compelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

In support of its motion, the Commonwealth submitted an affidavit from Richard's therapist.[4] Appellant did not contest the trial court's consideration of

[4] The Commonwealth tendered a document from a second therapist, this one also signed by a notary. However, the trial court did not consider this other document as it did not include the phrase "sworn to and subscribed before me" in the notary's acknowledgement. The trial court afforded the Commonwealth the opportunity to correct the error by having the letter properly acknowledged, but the Commonwealth failed to do so before trial resumed the next day. Therefore, the trial court stated it would not consider this letter in its determination of the statute's application—and relied entirely on the properly-acknowledged affidavit.

this affidavit and declined the court's offer to require the witness appear in court for cross-examination.[5] Appellant objected on two grounds: first, that §11 of the Kentucky Constitution affords him the opportunity "to meet . . . witnesses face to face" rather than "face to television screen"; and, secondly, that Richard's conditions did not rise to the level of "compelling need" as defined by KRS 421.350(5). He argues that the trial court erred in denying his objections concerning Richard's testimony via closed-circuit television and, thereby, denied Appellant his rights under the United States and Kentucky Constitutions to confront witnesses against him.

First, as to Appellant's contention that he was entitled to "face to face" confrontation pursuant to §11 of the Kentucky Constitution, we point out that this Court has long held the use of closed-circuit testimony in appropriate circumstances constitutional. *Commonwealth v. Willis* 716 S.W. 2d 224 (Ky. 1986); *Price v. Commonwealth* 31 S.W. 3d 885 (Ky. 2000). The United States Supreme Court has also held this procedure comports with the Sixth Amendment's requirements, as it "adequately ensures the accuracy of the testimony and preserves the adversary nature of trial." *Maryland v. Craig*, 497 U.S. 836, 857 (1990). We decline to further address this argument and reaffirm our precedent on this issue.

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[5] Because the issue of the trial court's use of an affidavit (as opposed to in-court testimony) is not before us—and was conceded by the parties at trial—we will not address it.

Appellant next asserts that the trial court erred in allowing Richard to testify via closed-circuit television because the Commonwealth failed to demonstrate a compelling need, as required by KRS 421.350. We review a trial court's determination of compelling need under this statute for an abuse of discretion. *Willis*, 716 S.W.2d at 229-30. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In *Price*, 31 S.W.3d at 893, we quoted the United States Supreme Court in holding that:

> "The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that *the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.* . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.,* more than 'mere nervousness or excitement or some reluctance to testify.'"

(Quoting *Craig*, 497 U.S. at 855–56, (internal citations omitted) (emphasis added)). Furthermore, KRS 421.350(5) defines compelling need as: "the substantial probability that the child would be unable to reasonably

communicate because of serious emotional distress *produced by the defendant's presence.*" (Emphasis added.) Therefore, both our statute and the relevant case law on the issue require that the need for the child to testify by closed-circuit television be based on trauma the child would experience due to the presence of the defendant.

The only evidence the trial court considered on this issue was the affidavit of one of Richard's therapists. After careful examination of this evidence, we hold that the affidavit fails to establish a causal connection between trauma to Richard and Appellant's presence.[6] Both our case law and our statute are clear on this point—in order for a trial court to permit a child to testify outside the presence of the defendant, a nexus must be shown between trauma to the child witness and the presence of the defendant. Therefore, we hold that the trial court abused its discretion in determining that the Commonwealth demonstrated a compelling need for Richard to testify via closed-circuit television, as its holding was unsupported by sound legal principles. *English*, 993 S.W.2d at 945. We must now determine if this error was harmless beyond a reasonable doubt.

This error violated Appellant's right to confront witnesses against him guaranteed by the Sixth Amendment of the United States Constitution and §11

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[6] The letter from another of Richard's therapists did include this necessary link between trauma to Richard and Appellant's presence in the court room. However, as previously stated, the Commonwealth failed to have this letter properly acknowledged by a notary. Therefore, the trial court specifically stated it would not consider this letter—and we will not either.

of the Kentucky Constitution. However, harmless error review is not precluded when an error involves a federal constitutional right. *Chapman v. California*, 386 U.S. 18, (1967); *e.g.*, *Talbott v. Commonwealth*, 968 S.W.2d 76, 83-84 (Ky. 1998). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24); *e.g. Heard v. Commonwealth*, 217 S.W.3d 240, 244 (Ky. 2007).

In *Staples v. Commonwealth*, this court recently said, "[h]armless error analysis applied to a constitutional error, such as the Confrontation Clause violation . . . involves considering the improper evidence in the context of the entire trial and asking whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Staples v. Commonwealth*, 454 S.W.3d 803, 826-27 (Ky. 2014)(internal quotations omitted). Thus, we must determine whether there is a reasonable possibility Richard's testimony might have contributed to Appellant's conviction.

In *Price*, we refused to reverse all of the appellant's convictions after holding the appellant's rights under the Confrontation Clause had been violated; rather, we reversed and remanded only the convictions related to the witness's problematic testimony. 31 S.W.3d at 894. We find no reason to depart from that precedent today. Therefore, in conducting this analysis, we must first determine in which of Appellant's convictions the jury could have relied on Richard's testimony in making its determination.

Richard's testimony only concerned Appellant's inappropriate touching of Suzie and Richard. Even though Richard testified Appellant inappropriately touched Suzie, his testimony in this regard did not relate to the incident upon which the jury instructions for use of a minor in a sexual performance (with Suzie as the victim) were based—those instructions were based solely on Simon's testimony. Therefore, even though Richard offered testimony relating to Appellant's actions toward Suzie, we believe there is no reasonable possibility this testimony contributed to that conviction, and we hold any error as to this conviction is harmless beyond a reasonable doubt.

Richard provided the only testimony the Commonwealth offered for Appellant's conviction for first-degree sexual abuse with Richard as the victim. Because the Commonwealth offered no other proof on this charge, there is more than a reasonable possibility his testimony contributed to Appellant's conviction. Thus, we only reverse the conviction upon which Richard's testimony directly contributed—first-degree sexual abuse in which he was the victim.

C. Double Jeopardy

Appellant next asserts his convictions for use of a minor in a sexual performance and first-degree sexual abuse arising out of the same conduct violate his right to be free from double jeopardy, as guaranteed by the Fifth Amendment to the United States Constitution and §13 of the Kentucky Constitution.

In *Blockburger v. United States,* the United States Supreme Court held double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute "requires proof of an additional fact which the other does not." 284 U.S. 299, 304 (1932). While Kentucky courts departed from the *Blockburger* rule for a time, this Court stated in *Commonwealth v. Burge*: "we return to the *Blockburger* analysis. We are to determine whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not. Put differently, is one offense included within another?" 947 S.W.2d 805, 811 (Ky. 1996) (internal citations omitted). We will analyze the statutes under *Burge*.

As previously noted, the offense of use of a minor in a sexual performance is found in KRS 531.310(1): "[a] person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance." "Sexual performance" is defined in KRS 531.300(6) as "any performance or part thereof which includes sexual conduct by a minor." "Performance" is defined as "any play, motion picture, photograph or dance or any other visual representation exhibited before an audience." KRS 531.300(5). Finally, the statute defines "[s]exual conduct by a minor" as "physical contact with, or willful or intentional exhibition of the genitals." KRS 531.300(4)(b).

The offense of first-degree sexual abuse is found in KRS 510.110(1): "[a] person is guilty of sexual abuse in the first degree when . . . [b]eing twenty-one

(21) years old or more, he or she . . . [s]ubjects another person who is less than sixteen (16) years old to sexual contact . . . ." KRS 510.110(1). The statute later defines sexual contact as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." KRS 510.010(7).

These are two distinct statutes, each requiring proof of an additional fact that the other does not. Appellant complains, however, that the jury instructions authorized a double jeopardy violation. We disagree. Under the jury instructions, in order for Appellant to be convicted of use of a minor in a sexual performance, the jury had to find that Appellant rubbed Suzie's breasts and vagina in front of an audience; whereas for first-degree sexual abuse, the jury had to find that Appellant was at least twenty-one years of age when he touched Suzie's breasts and vagina.

In *Johnson v. Commonwealth*, 292 S.W.3d 889, 897 (2009), we held convictions for rape and incest did not violate double jeopardy because "[r]ape requires proof of age, whereas incest does not; incest requires proof of relationship, whereas rape does not." We found age to be a sufficient distinguishing element in *Johnson*, and we find no reason to deviate here. *See also Burge*, 947 S.W.2d at 810 (holding the appellant's right to be free from double jeopardy was not violated as "the age of the victim is an element of statutory rape, but not incest, and the relationship of the victim to the defendant is an element of incest, but not rape").

These two distinct statutes each require proof of a fact that the other does not. Namely, use of a minor in a sexual performance requires proof of an audience, whereas sexual abuse requires proof of Appellant's age. Therefore, we hold Appellant's right to be free from double jeopardy was not violated.

D. Mistrial

Appellant argues that the trial court abused its discretion and denied him a fair trial before an impartial jury when it failed to grant his motion for a mistrial. We disagree.

A mistrial is an extreme remedy granted only when no other remedies are available to cure a fundamental defect in the court's proceedings. *Brown v. Commonwealth*, 416 S.W.3d 302, 312 (Ky. 2013). "It is well established that the decision to grant a mistrial is within the trial court's discretion, and such a ruling will not be disturbed absent a showing of an abuse of that discretion." *Woodard*, 147 S.W.3d at 68. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

Trial courts are in the best position to determine if a person's conduct in the courtroom rises to the level of depriving a defendant of the right to a fair trial before an impartial jury. It is impossible for the record to fully reflect the plethora of information a trial judge analyzes as a trial progresses; however, appellate courts only have the record before us upon which to base our decision. Matters not disclosed in the record cannot be considered on appeal; therefore, this Court must assume a matter not preserved in the record

supports the decision of the trial court. *Hatfield v. Commonwealth*, 250 S.W.3d 590, 600-01 (Ky. 2008).

The alleged incident in the instant case is not contained in the record. However, what is reflected in the record is that Appellant's counsel approached the bench and alleged the detective sitting at bar with the Commonwealth was silently mocking or parroting both defense counsel and a witness. The trial court informed all parties at a bench conference that it did not observe the alleged conduct despite access to camera monitors covering the courtroom. The trial court then questioned Timothy's counsel and counsel for the Commonwealth, both of whom denied observing the alleged conduct. The probability that conduct requiring mistrial could occur outside the awareness of the court, counsel for the co-defendant, and the Commonwealth, all while being unpreserved on the record is miniscule. Therefore, in instances where the record does not reflect alleged conduct the appellant believes warrants a mistrial, appellate courts must defer to the sound judgment of the trial court. Based on the record before us, this Court holds the trial court did not abuse its discretion in denying Appellant's motion for mistrial, nor did the trial court deprive the defendant of a fair trial before an impartial jury.

E. Cumulative Error

Appellant argues that if we hold the trial court erred multiple times, we must reverse all his convictions and their corresponding sentences. In fact, "the doctrine [of cumulative error] is necessary only to address 'multiple errors, [which] although harmless individually, may be deemed reversible if their

cumulative effect is to render the trial fundamentally unfair.'" *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012) (quoting *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010)). Since we only hold the trial court erred in a single instance, there was no cumulative error, and we do not reverse Appellant's remaining convictions and their corresponding sentences.

III. CONCLUSION

For the foregoing reasons, we affirm all of Appellant's convictions and sentences apart from his conviction and corresponding sentence for sexually abusing Richard, which we reverse and remand to the trial court for further proceedings consistent with this opinion.

Minton, C.J., Noble, Venters, Wright, JJ, concur. Cunningham, J., concurs in part and dissents in part by separate opinion in which Hughes and Keller, JJ., join.

CUNNINGHAM, J., CONCURRING IN PART and DISSENTING IN PART: I concur with the Majority except for the reversing of the charge of first degree sexual abuse on Richard. We hold there is reversible error on that charge for allowing the victim to testify via closed-circuit television. In doing so we found that the trial court failed to make an adequate finding of a compelling need to allow such a procedure as required by KRS 421.350.

We state in our Majority opinion that "After careful examination of this evidence, we hold that the affidavit fails to establish a casual connection between the trauma to Richard and Appellant's presence." We do not elaborate as to why the affidavit falls short of the requirement of KRS 421.350. As noted

in the Majority opinion, the standard for reviewing that issue is whether the trial court abused its discretion in allowing Richard to testify via closed-circuit television. I have examined the affidavit of the therapist Gary Davis which the trial court relied on in allowing the method of testifying. While it may be a close call I think the affidavit is sufficient for the trial judge to make the decision he made. Therefore, I do not believe he abused his discretion in that ruling. I would affirm on this charge as well.

Hughes and Keller, JJ., join.

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