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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001065-MR

DAVID PAUL EVERLY — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
ACTION NO. 99-CR-00147

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: David Paul Everly appeals from a judgment of the Bullitt Circuit Court wherein he was convicted of first-degree sex abuse after a jury trial and was sentenced to two years in prison followed by a three-year period of conditional discharge. We affirm.

T.S.[1], Everly's step-daughter, testified at the trial that on July 13, 1999, Everly touched her vagina with his hand and made her touch his penis with her hand. The jury apparently

[1] We will refer to the child by her initials.

believed T.S.'s testimony, and it found Everly guilty of first-degree sex abuse. The sentence was set at two years in prison in accordance with the jury's recommendation, and an additional three-year period of conditional discharge was made a part of the judgment pursuant to KRS[2] 532.060(3). This appeal followed.

Everly's first argument is that the trial court denied him the rights of confrontation, fundamental fairness, counsel, and due process by allowing T.S. to testify off the witness stand in a chair within a circle that included the judge, the court reporter, the prosecutor, and his attorney, but not him. Prior to T.S. being called as a witness to testify in front of the jury, the prosecutor asked the court to permit her to testify in the aforementioned manner. Everly's attorney objected and requested that T.S. be required to testify from the witness stand like other witnesses. The trial court granted the prosecutor's request and stated, "[g]enerally speaking the Court has always allowed young children to testify by sitting in a chair in close proximity to the jury. The Court will allow Defense Counsel to place a chair close by the child as well as the Commonwealth and in close proximity to the Defendant."

Everly argues that the procedure allowed by the court denied him the right to confront T.S. as a witness because he could only see her back. Further, he argues that the procedure

[2] Kentucky Revised Statutes.

prevented him from communicating with counsel during the course of T.S.'s testimony. Thus, he asserts that he was denied the right to counsel. Additionally, he maintains that the procedure used by the court should not have been employed without a requisite finding of necessity that must be determined on a case-by-case basis. Further, he contends that there was no "compelling need" for the procedure used.

This was not a case in which the procedures of KRS 421.350 were used and the child was not required to testify in the courtroom. Since Everly was permitted to remain in the same room with T.S. during her testimony "there was no implication of the confrontation clauses of the Sixth Amendment of the United States Constitution or Section of Eleven of our Constitution." See Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 886 (1997).

Furthermore, the fact that Everly was not within T.S.'s field of vision does not mean that his right of confrontation was violated. As the Kentucky Supreme Court stated in Commonwealth v. Willis, Ky., 716 S.W.2d 224 (1996), "[t]here is no constitutional right to eyeball to eyeball confrontation." Id. at 230. The Willis court also stated that "[t]here is no authority under traditional court room procedures which specifically requires any witness to look at the defendant." Id. at 231. In short, the confrontation clauses of

the United States Constitution and the Kentucky Constitution were not violated in this case.

Everly argues that his right of counsel was violated because he was not allowed to remain in continuous audio contact with his attorney during T.S.'s testimony. See Willis, 716 S.W.2d at 231. In Price v. Commonwealth, Ky., 31 S.W.3d 885 (2000), the Kentucky Supreme Court reversed an attempted rape conviction and held that the continuous audio contact requirement was violated where the defendant and his attorney were in different rooms when the victim testified. Id. at 894. In that case the trial court advised the defendant that if he wished to consult directly with his attorney, he should notify the bailiff who would notify the judge and that the trial would be stopped and his attorney would be permitted to leave the courtroom in order to consult with him. Id. at 892.

The Price case is distinguishable. The requirement that the defendant be allowed to maintain continuous audio contact with his attorney was not violated in the case *sub judice.* Both Everly and his attorney were in the courtroom, although they were not seated directly next to each other. There is no indication that the right to counsel and the right of Everly to continuously consult with his attorney was violated in any manner.

Everly also maintains that the procedure used by the court should not have been employed because there was no showing of a "compelling need" to do so. In support of his argument, Everly cites George v. Commonwealth, Ky., 885 S.W.2d 938 (1994). We agree with Everly that, in order for an alternative procedure to be employed pursuant to KRS 421.350, there must be a finding of a "compelling need." See KRS 421.350(2) and (3). However, the procedure used in this case was not an alternate procedure employed pursuant to KRS 421.350. KRS 421.350 involves the procedures to be used when a child alleged victim of illegal sexual activities testifies from a place outside the courtroom or on tape before the proceeding. In this case the child testified in the courtroom in front of the jury. Thus, since the statute was not applicable, it was not necessary that a "compelling need" be shown.

Everly's second argument is that the trial court denied him the right to present a complete defense by barring the introduction of a letter written by T.S. to her mother prior to the incident. Everly maintains that the letter was relevant to show that T.S. desperately wanted to live with her mother and would do anything to do so. We have reviewed the content of the letter which was read into the trial record by the trial judge outside the presence of the jury. We agree with the Commonwealth that the letter does not reflect that T.S. was

desperate to see her mother; rather, T.S. stated in the letter that she missed her mother and wanted to be with her again. Furthermore, the letter does not state that T.S. would do anything to live with her mother.

Relevancy "is a determination which rests largely in the discretion of the trial court." Transit Authority of River City v. Vinson, Ky. App., 703 S.W.2d 482, 484 (1985), quoting Glens Falls Ins. Co. v. Ogden, Ky., 310 S.W.2d 547 (1958). Further, "[t]his court will not disturb a lower court's discretionary ruling on appeal absent an abuse of discretion." Id. We conclude that the trial court did not abuse its discretion in refusing to admit the letter into evidence.

Everly's third argument is that the trial court erred by allowing T.S.'s mother to testify at length concerning her questioning of T.S. immediately following the incident. The testimony indicated that immediately after the incident occurred, T.S.'s mother took her to a back bedroom and questioned her extensively about what, if anything, had happened. Although T.S. initially insisted that Everly had done nothing improper, after persistent questioning she finally stated that Everly had improperly touched her.

When this line of questioning by the prosecutor occurred, Everly's attorney did not initially object. However, when the subject was again approached by the prosecutor later in

the testimony, Everly's attorney raised an objection. The objection was that the testimony was hearsay, but the prosecutor responded that the testimony was subject to the excited utterance exception to the hearsay rule. The trial court overruled the objection.

First, the issue was only partially preserved for our review, if at all. Second, we agree that it was admissible pursuant to the excited utterance exception to the hearsay rule. See KRE[3] 803(2). Third, we conclude that any error in this regard was harmless. See RCr[4] 9.24. It does not appear that the testimony was as damaging to Everly as he would have us to believe. In fact, it indicates that T.S. initially denied that the incident had occurred and admitted it only after continued questioning by her mother.

Everly's fourth argument is that the evidence was insufficient to support his conviction. The case turned on the credibility of T.S. as a witness. It has long been the law in Kentucky that the matter of the credibility of witnesses is for the fact finder, the jury in this case, to determine. Adkins v. Mead, Ky., 246 S.W.2d 980 (1952). The jury found the testimony of T.S. to be credible, and we conclude that her testimony was sufficient to support the conviction.

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[3] Kentucky Rules of Evidence.

[4] Kentucky Rules of Criminal Procedure.

Everly's last argument is that the trial court erred in allowing the jury to be given misleading evidence during the sentencing phase of the trial. He states that the jury was not informed regarding parole eligibility for sex offenders, good time credit, and the three-year period of conditional discharge. Because any error in this regard was not properly preserved, Everly argues that we should treat the error as palpable error pursuant to RCr 10.26.[5]

We reject the argument for several reasons. First, any error made was not preserved for our review. Second, Everly could have introduced the evidence on his own behalf. See Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 855 (1996). Third, we do not believe that any error made was palpable error which resulted in manifest injustice to Everly.

The judgment of the Bullitt Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. I have heard about this circle of chairs before and I am beginning to not like it. If the appellant's version of the facts is correct, he was excluded from the circle which alone does not violate the confrontation

[5] Were we to accept Everly's argument, then we would remand for a new sentencing hearing in which Everly could be sentenced from one to five years in prison. In other words, he might receive the same sentence (two years), one year less, or up to three years more.

clause because a defendant is not entitled to get in a witness's face. However, when the witness's back is to the defendant and he cannot communicate with his lawyer, the witness is not testifying in the presence of the defendant and the procedural safeguards of KRS 421.350 should be used. This would also assure a defendant the right to communicate with counsel during the witness's direct testimony or during cross-examination.

Another concern I have is the mother's testimony concerning her questioning of T.S. in the back room. What the child said was labeled an excited utterance and allowed in as an exception to the hearsay rule. I disagree. In the dead of night, sound travels. A vigilant mother sleeping in a recliner next to a child on the floor under a blanket may well have heard a zipper going down. And she can testify to that and to what she did. Likewise, T.S. can testify as to what happened under the cover. But the mother's testimony after that was hearsay. What happened next is not an excited utterance. Immediately after the incident, T.S.'s mother took her to a back bedroom and questioned her extensively about what happened. T.S. initially denied anything happened and only after a very heated and emotional interrogation did T.S. finally admit something happened.

Do not get me wrong. I agree the mother was vigilant and I too would have taken my child to the back room and

questioned the child until I thought I knew what really happened. The problem occurs when the trial court then allows on direct examination, the mother's testimony of what the child told her mother in response to questions. That is not res gestae but pure hearsay.

I debated for awhile as to whether these errors were harmless. As much as I do not want to risk a child abuser going free, I also do not want to risk convicting someone by denying them the right of confrontation, the right to effective counsel during confrontation, and on hearsay evidence. I would vacate the conviction and remand for a new trial.

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