

RENDERED: October 31, 2003; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001888-MR

KENNETH MARTIN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE DOUGLAS M. STEPHENS, JUDGE  
ACTION NO. 01-CR-00686

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BAKER AND SCHRODER, JUDGES; and HUDDLESTON, SENIOR  
JUDGE.<sup>1</sup>

BAKER, JUDGE: Kenneth Martin brings this appeal from an August  
29, 2002, judgment of the Kenton Circuit Court. We affirm.

Appellant was indicted by the Kenton County Grand Jury  
upon two counts of second degree rape and upon one count of  
first degree sexual abuse. Appellant allegedly committed the

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<sup>1</sup> Senior Status Joseph R. Huddleston sitting as Special Judge by assignment of  
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

aforementioned offenses upon a juvenile, age thirteen. A jury ultimately found appellant guilty of first degree sexual abuse, and the trial court sentenced appellant to five years' imprisonment. This appeal follows.

Appellant asserts the trial court committed reversible error by allowing a Commonwealth's witness to read from a transcription of a destroyed audiotape. Detective Jim Coots apparently took appellant's statement after he was arrested; appellant's statement was then recorded by audiotape. Detective Coots testified that he gave the audiotape recording of appellant's statement to his secretary, and the secretary typed a transcript of the audiotape. Apparently, the secretary was unable to understand portions of the audiotape and typed "inaudible" to indicate those portions. After receiving the transcript, Detective Coots stated that he listened to the audiotape and also was unable to decipher the inaudible portions thereof. Thereafter, the prosecutor requested a copy of the audiotape. Detective Coots gave the audiotape to the police lab to be copied. Upon return of the audiotape from the police lab, Detective Coots testified that the original audiotape was blank and the "copied" audiotape was also blank.

During trial, Detective Coots affirmed that the transcript of the audiotape was accurate. He read portions of

the transcript during his testimony and was questioned by both the Commonwealth and defense counsel concerning same.

We initially observe that the destruction of the audiotape appears to have been accidental; there was no allegation of improper motive on the part of the police department.

We view the Commonwealth's use of the transcript during Detective Coots testimony as proper; our reasoning being that it constituted a "past recollection recorded" under Ky. R. Evid. (KRE) 803(5):

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.

It is undisputed that Detective Coots was present during the taking of appellant's statement and, thus, "once had knowledge" of same. It is also clear that Detective Coots lacked the present memory at trial to clearly recount appellant's statement with the detail to which it was recorded on the transcript. However, Detective Coots did verify the general accuracy of the transcript as required by KRE 803(5). Upon the whole, we are of the opinion that the transcript was

properly utilized by the Commonwealth during Detective Coots' testimony under KRE 803(5).

Appellant alternatively contends that the transcript should have been admitted into evidence. The trial court allowed the totality of the transcript to be used during the examination and cross-examination of Detective Coots, but the transcript was never admitted into evidence as an exhibit. Upon examination of the record, we were unable to locate a copy of the transcript. Under these circumstances, we must reject appellant's contention.

Appellant next argues that the trial court erred by failing to give the lesser included jury instruction of second degree sexual abuse. We disagree.

It is well-established that:

An instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.

Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 298 (1993).

In this appeal, the relevant elements of first degree sexual abuse are that the perpetrator subjected the victim to sexual contact and the victim was incapable of consent because she was physically helpless; the relevant elements of second degree sexual abuse are that the perpetrator subjected the

victim, who was less than fourteen years of age, to sexual contact. Thus, the crucial distinction between first degree and second degree sexual abuse is whether the victim was "physically helpless" at the time of the abuse. "Physically helpless" is defined as meaning "a person [who] is unconscious or for any other reason is physically unable to communicate a willingness to act."

The thirteen year old victim testified that she was asleep and was awakened by appellant's hand and/or penis penetrating her. The evidence showed that the victim was asleep when the attack began. Considering this evidence, we cannot say that a reasonable juror could have entertained a reasonable doubt upon appellant's guilt of first degree sexual abuse, but rather believed beyond a reasonable doubt that appellant was guilty of second degree sexual abuse. Simply put, the Commonwealth proved beyond a reasonable doubt that the victim was "physically helpless." Hence, we hold that appellant was not entitled to a jury instruction upon the offense of second degree sexual abuse.

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

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR  
APPELLEE:

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