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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2003-CA-000788-MR

DAVID VAUGHN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE DOUGLAS M. STEPHENS, JUDGE  
ACTION NO. 02-CR-00258

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: At the time of the trial in this case, KRE 608 provided that a witness' credibility was subject to attack by evidence in the form of opinion or reputation of character, but only as to general reputation in the community. The issue we must decide is whether, under KRE 608, the trial court erred by failing to permit David Vaughn to elicit from a schoolteacher testimony as to the victim's reputation for untruthfulness in

her school. As we conclude that the trial court properly excluded this testimony under the facts of this case, we affirm.

The essential facts are that Vaughn was charged with attempted sodomy in the first degree for an incident in August or September 2000 in which he allegedly pushed the head of his minor stepdaughter, B.D., towards his genitals.<sup>1</sup> B.D. allegedly reported the incident to her mother later that day, but Vaughn was not charged until approximately a year later, after Vaughn and B.D.'s mother separated.

At trial, Vaughn attempted to introduce the testimony of B.D.'s third grade teacher to establish B.D.'s reputation for untruthfulness in her school. The court sustained the Commonwealth's objection to the evidence as being opinion testimony which was inadmissible under KRE 608. By avowal, the teacher offered the following testimony regarding B.D.'s general reputation in her school:

Q: Are you aware of [B.D.'s] character reputation in the community of [school name]?

A: Yes, I am.

Q: And what is that reputation?

A: Ummm . . . she didn't have a real trustworthy reputation. In the classroom

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<sup>1</sup> More specifically, B.D. alleged that while her mother was running errands and her brother was playing videogames, Vaughn picked her up and carried her to his bedroom. B.D. claimed that Vaughn put her on the bed, got into the bed himself, and removed his pants before pushing her head toward his genitals. B.D. pushed away from Vaughn and ran from the room.

there would be constantly problems with the other kids and her . . . ummm . . . the other children would always be telling me one thing and she would be telling me another. Ummm . . . so I wouldn't say it was a real favorable reputation.

Q: Were you aware of her ability to tell the truth.

A: She didn't always tell the truth.

Q: And did she have a reputation in the community of [school name] of not being truthful?

A: Yes, I would say so.

The judge went on to ask the witness:

Ma'am, it may sound as if we are splitting hairs, but is what you're telling us is that based upon your dealing with this child you have concluded that she is not particularly trustworthy, not particularly responsible, not particularly honest, or are you saying that there is a generally accepted opinion where you work, and this child goes to school, that she is not trustworthy and not honest?

A: I would say that in my own opinion, there were many times I would feel that she was not always honest with me. I think in general at [school name] I think some of the people who had dealings with her would have some of the same things, would agree with that.

The jury convicted Vaughn of attempted sodomy in the first degree, and he was sentenced to ten years' imprisonment. This appeal follows.

At the time of the trial, KRE 608 provided that "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to the limitation that the evidence may refer only to general reputation in the community."

Although Vaughn argues that the trial court improperly excluded testimony regarding B.D.'s character, the Commonwealth asserts that the testimony was properly excluded as it did not fall within the parameters of KRE 608. While KRE 608, prior to its amendment in 2003 may have been self-contradictory and unclear,<sup>2</sup> Kentucky courts had clearly and consistently held that the rule did not permit the impeachment of witnesses by particular wrong acts.<sup>3</sup> So, to the extent that the teacher's testimony addressed specific instances of untruthfulness, her testimony was properly excluded.

The second, related issue is whether the trial court properly excluded the teacher's testimony as to B.D.'s reputation in her school. The Commonwealth argues that the teacher was unqualified to testify as to that issue because an elementary school does not qualify as a community. Based on the facts in this record, we agree.

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<sup>2</sup> Robert G. Lawson, *The Kentucky Evidence Law Handbook* §4.25, 202 (3<sup>rd</sup> ed. 1993).

<sup>3</sup> *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998).

"General reputation" has been defined as "not what another person may know or think about [someone], but it is the estimate in which he is held by the people generally with whom he associates and comes in contact with in everyday life."<sup>4</sup> In *Adcock v. Commonwealth*,<sup>5</sup> the court noted that "[t]he thrust of the inquiry is as to general reputation of the person in the community among people who know him, and **not to his reputation among a small segment of the community.**" (emphasis added).

Although courts in other states have recognized, when addressing the reputation of a child, that a child's community is necessarily smaller than an adult's community, they have not deviated from the general proposition that a community must be sufficiently large to provide a reliable indicia of a child's reputation for truthfulness or untruthfulness.<sup>6</sup> The rationale for this rule is that "[i]f the group is too insular, its opinion of the witness' reputation for truthfulness may not be reliable because it may have been formed with the same set of biases."<sup>7</sup>

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<sup>4</sup> *Citizens Bank of Morehead v. Hunt*, 287 Ky. 646, 154 S.W.2d 730, 731 (1941).

<sup>5</sup> 702 S.W.2d 440, 445 (Ky.1986).

<sup>6</sup> *Norton v. State*, 785 N.E.2d 625, 629-31 (Ind. App. 2003); *Commonwealth v. Healey*, 534 N.E.2d 301, 307 (Mass. App. 1989).

<sup>7</sup> *State v. Ricker*, 770 A.2d 1021, 1024 (Me. 2001).

In *Northeast Health Management, Inc. v. Cotton*,<sup>8</sup> this court held that co-workers were properly permitted to testify as to an individual's reputation for truthfulness or dishonesty in a workplace, thereby implicitly recognizing that a workplace could comprise the requisite community. The facts in *Northeast*, however, involved the reputation of the administrator of a hospital, which presumably had a large number of employees. In addition, the issues in the case revolved around a number of specific allegations of dishonesty which were intertwined with the plaintiffs' claims.

Here, the record shows that Vaughn failed to lay a sufficient foundation to establish that the school from which the teacher drew her opinion as to B.D.'s reputation was sufficiently large, with adequate contact with the child, to provide a trustworthy estimation of B.D.'s reputation in the community. The court did not err by failing to admit the teacher's testimony.

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

JUDGE TAYLOR CONCURS.

JUDGE JOHNSON CONCURS IN RESULT ONLY.

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<sup>8</sup> 56 S.W.3d 440 (Ky. App. 2001)

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