

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001590-MR

DAVID BIEDENHARN

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 02-CR-00302

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellant, David Biedenharn, appeals the judgment of the Campbell Circuit Court sentencing him to two (2) years imprisonment, probated for a period of five (5) years. On May 28, 2003, the jury returned a verdict finding appellant guilty of first degree sexual abuse of eight year old, K.B. For the reasons stated hereafter, we affirm.

In May 2001, appellant visited the home of his half-brother, also K.B.'s father, in Campbell County, Kentucky. After K.B.'s father went to bed for the evening, appellant and

K.B. stayed up playing games in an adjacent room. As K.B. attempted to fall asleep on the couch, appellant placed his hand down K.B.'s underwear and touched his private parts. K.B. kept his eyes closed, but rolled over and moved to the edge of the couch because this made him feel uncomfortable.

On appeal, appellant first argues that the trial court erroneously overruled his pre-trial motion for a psychological examination of K.B. Appellant's reasoning is based on the facts that K.B. did not inform anyone about the sexual contact until he learned that his mother was subsequently sexually assaulted while staying at a friend's house. As a result of the mother's assault, appellant contends that K.B. concocted or transferred his alleged sexual abuse to appellant. Appellant argues that based on the similarities between the two incidents, a psychological examination of K.B. was warranted in accordance with the holding in *Mack v. Commonwealth*, Ky., 860 S.W.2d 275 (1993). We disagree.

In *Mack*, the defendant requested a psychological examination of the child victim who had suffered sexual and physical abuse several years prior to the current alleged abuse. The defense argued that the records from the child's treating facility would show that she transferred the previous sexual abuse to the present defendant. Finding that the trial court

erred in overruling the CR 35.01 motion,¹ the Kentucky Supreme Court held that "due process and fundamental fairness **may, depending on the circumstances**, entitle the defendant to have the alleged victim examined by an independent expert, if not a defense expert." *Id.* at 277 (emphasis added).² See also *Turner v. Commonwealth*, Ky., 767 S.W.2d 557, 559 (1988).

Here, unlike the child victim in *Mack*, there is absolutely no indication that K.B. suffered prior sexual abuse or that he exhibited propensities to lie. Thus, no prior experience exists, which could be transferred to the appellant. Appellant's reliance on *Mack* is misplaced, as the court explicitly confined the holding to the facts of that case, and therefore we decline to extend the reasoning to the present circumstances.

Even so, we note that the only similar fact between K.B.'s experience and his mother's is that both incidents

¹ CR 35.01 gives the trial court authority to order a party to submit to a physical or mental examination if such a condition is in controversy. Guided by due process concerns, the court in *Mack* extended the scope of that rule to cover nonparty victims of sexual abuse. 860 S.W.2d at 277. Appellant's motion herein cited *Mack*, not CR 35.01, as providing the court with authority to order the psychological exam.

² The facts in *Mack* stand in contrast to those in the present case. In *Mack*, the victim had been treated for prior sexual abuse, and records indicated that the child "had exhibited propensities to lie, cheat and manipulate." 860 S.W.2d at 277. The court went on to state: "We believe that the circumstances in the present case indicate a substantial possibility that a defense or independent expert would provide genuinely relevant and beneficial evidence on the questions of concoction or transference resulting from the child's unfortunate past. Given the facts of this case, we are persuaded that a psychological or psychiatric examination of the prosecuting witness would have significant positive potential" *Id.* at 277.

occurred on a couch while attempting to sleep.³ More importantly, K.B., ten years old at trial, was thoroughly cross-examined about the events leading up to the sexual abuse and K.B. provided a detailed account about the sexual contact. K.B.'s trial testimony indicated that he understood and acknowledged the differences between his experience and his mother's sexual assault.⁴ This is clearly a matter of credibility. And, it is within the exclusive province of the jury to assess the sincerity of the witness and to believe or disbelieve the witness' testimony. *Leigh v. Commonwealth, Ky.*, 481 S.W.2d 75, 79 (1972). Accordingly, we find no error.

Appellant next argues that the trial court abused its discretion in overruling his motion for a mistrial based on statements made by the victim's father. During re-direct examination, the Commonwealth questioned the victim's father regarding appellant's eviction from his apartment. The father testified that he "thought" appellant had first stayed in a "fat farm" or "mental institution, one of the two," before appellant

³ The police report indicated that the mother was sexually assaulted on a couch as the perpetrator watched pornographic television, fondled her private area and attempted to pull her pants down. Here, appellant did not watch pornography as he touched K.B. and appellant never attempted to remove K.B.'s pants.

⁴ Upon the conclusion of K.B.'s pre-trial competency hearing, the trial court concluded that K.B. "clearly understands his obligation to testify truthfully in this matter." It is within the sound discretion of the trial judge to determine the competency of a child witness and whether he knows the difference between the truth and lies. *Bart v. Commonwealth, Ky.*, 951 S.W.2d 576, 579 (1977).

stayed in the father's home. Overruling appellant's motion for a mistrial, the trial court admonished the jury to disregard the father's response.

"It is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition." *Clay v. Commonwealth*, Ky.App., 867 S.W.2d 200, 204 (1993). A mistrial is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity." *Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672, 678 (1985) (quoting *Wiley v. Commonwealth*, Ky.App., 575 S.W.2d 166, 168 (1978)). A trial court has discretion in deciding whether to declare a mistrial, and its discretion should not be disturbed absent an abuse of discretion. *Jones v. Commonwealth*, Ky.App., 662 S.W.2d 483, 484 (1983) ("Here again we must rely upon the good sense of the trial court in declaring a mistrial unless a matter of substance is involved").

In the present case, the father's response indicating that appellant might have been to a "fat farm" or a "mental institution" did not present the trial court with an urgent or real necessity to declare a mistrial. Based on a careful review of the testimony, it does not appear that the statements had any effect upon the jury and appellant presented no evidence to the contrary. Accordingly, appellant failed to overcome the

presumption that the admonition cured any resulting prejudice.
Therefore, we find no abuse of discretion.

The trial court's judgment is affirmed.

BARBER, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND WILL NOT FURNISH
OPINION.

BRIEF FOR APPELLANT:

Thomas Alig, Jr.
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Anitria M. Alo
Assistant Attorney General
Office of Attorney General
Frankfort, Kentucky