

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001954-MR

DANIEL C. CLARK

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE THOMAS L. WALLER, JUDGE  
ACTION NO. 02-CR-00136

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR  
JUDGE.<sup>1</sup>

BARBER, JUDGE: Appellant, Daniel Clark (Clark), takes a direct appeal from the Bullitt Circuit Court judgment convicting him of two counts of first degree sexual abuse. We affirm the conviction.

Clark was accused of sexually abusing two young boys. Clark was a long time friend of the boys' family, and had spent

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

unsupervised time with the boys for many years. Clark was charged with two counts of first degree sexual abuse for actions occurring at the boys' home and while he was on trips with the boys. He was also charged with one count of first degree sodomy. He was acquitted of the sodomy charge at trial, but convicted on both charges of first degree sexual abuse.

Clark claims error in the trial court's refusal to introduce the videotapes of the statements made by the minor victims to a social worker. Clark asserts that these videotapes would reveal the suggestive nature of the questioning by the social worker. Clark argues that the statements given on the videotape were contrary to the statements given by the children at trial and were therefore properly admissible as prior inconsistent statements pursuant to CR 43.08. Clark contends that the tapes reveal "coaching" of the children in order to influence their statements.

The Commonwealth claims that defense counsel failed to lay a proper foundation for admission of any alleged prior inconsistent statements. The minor witnesses were not questioned regarding the prior statements, other than being asked whether they previously spoke with a social worker. The children were not asked questions regarding the content of the earlier statements or facts surrounding the prior statements. Cross-examination regarding such statements is required prior to

introduction of the inconsistent statements. Norton v. Commonwealth, 471 S.W.2d 302, 305 (Ky. 1971). This is so even where the witness is of tender years. Noel v. Commonwealth, 76 S.W.3d 923, 925 (Ky. 2002). Failure to lay a foundation, as required by KRE 613, requires exclusion of the prior statements. A trial court ruling on the admissibility of evidence will only be reversed on appeal where an abuse of discretion is shown. Burgess v. Taylor, 44 S.W.3d 806, 815 (Ky.App. 2001). The trial court's exclusion of the earlier videotapes is proper.

Clark contends that the trial court erred in refusing to instruct the jury on sexual abuse in the second degree. The testimony with regard to one of the victims was that the alleged abuse took place from 1999 through May, 2002. Clark contended that the minor turned 12 in 2001. No specific dates were given with regard to the contact between Clark and the victim. Clark argues that any conduct occurring after the victim turned 12 should have been charged under KRS 510.120, and therefore, was sexual abuse in the second degree rather than sexual abuse in the first degree. The Commonwealth shows this Court that the victim was born in November, 1989, and therefore did not turn 12 until November, 2001. The court noted that the testimony indicated that the child had been under the age of 12 when the abuse occurred, even if no exact dates were provided by the witness. For this reason, the court denied the defense motion

for directed verdict on the first degree sexual abuse charge. Clark has shown no reversible error in the court's ruling.

Clark claims error in the admission of the testimony of a victim in Clark's 1988 conviction. He argues that introduction of this testimony violated KRE 404(b). The record also includes statements by the victims and their mother when the victims told their uncles of the abuse, the uncles admitted that as children, Clark had also sexually abused them. Clark served only a portion of his sentence on the 1988 charges. He was then released, with directions that he not be in a position of trust with children for fifteen years. At trial Clark admitted that he knew he was not allowed unsupervised contact with children. Clark also admitted that he had spent time alone with the boys between 1999 and 2002.

In an earlier trial in 1988, Clark was convicted of first degree sodomy and first degree sexual abuse on charges stemming from his abuse of a minor boy while he was a priest at a school. The abuse took place primarily during "counseling sessions" at the school, but also on a camping trip outside school grounds. The trial court permitted the Commonwealth to introduce evidence of Clark's earlier conviction. Over defense objection, the victim from the 1988 case testified during Clark's trial regarding the method of abuse.

Clark claims that the incidents in the 1988 case were not sufficiently similar to the charges in the present action, such that the earlier evidence could be introduced to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Clark contends that since the 1988 incidents occurred primarily at school, and the charges in the present case stemmed from actions at the boys' home or on trips with them, that prior evidence was not sufficiently related.

KRE 404(b) states that evidence of other crimes may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." Robert Lawson, The Kentucky Evidence Law Handbook, 4<sup>th</sup> Ed. (2003), Section 2.25(1). The Kentucky Supreme Court held that:

If the prior wrongful act, or a particular aspect thereof, is so similar to the charged offense as to show a modus operandi which tends to prove an element of the charged offense, remoteness alone does not require the suppression of the evidence of the prior misconduct.

Commonwealth v. English, 993 S.W.2d 941, 944 (Ky. 1999).

The trial court reviewed the claims of improper conduct, and noted that the conduct complained of was markedly similar in all cases. It ruled that the place in which the conduct occurred was less relevant than the type of conduct.

The court also noted that the victims were all similar in age, and that the actions allegedly taken by Clark were identical. The court ruled that the probative value of the evidence outweighed its prejudicial nature. Such a determination is properly made by the trial court. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). The trial court's ruling will not be disturbed absent a showing of an abuse of discretion. Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996). No abuse of discretion was shown by Clark herein. The ruling of the Bullitt Circuit Court is affirmed.

COMBS, CHIEF JUDGE, CONCURS.

MILLER, SENIOR JUDGE, DISSENTS.

MILLER, SENIOR JUDGE, DISSENTING: I dissent. In my view, in the interest of justice, the victims' video-taped statements to the social worker should have been admitted. It was prejudicial error not to do so. I would reverse and remand for re-trial.

BRIEF FOR APPELLANT:

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