

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000183-MR

KARL KRAUS

APPELLANT

APPEAL FROM LIVINGSTON CIRCUIT COURT
v. HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NOS. 01-CR-00274 & 02-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Karl Kraus appeals from a judgment convicting him of one count of first-degree sexual abuse, for which he was sentenced to five years' imprisonment. Kraus advances six arguments in support of his contention that the judgment of conviction should be reversed: 1) that the trial judge abused his discretion in concluding that the mentally handicapped victims were competent to testify; 2) that the

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

decision to allow the victims to testify via close-circuit camera violated his right of confrontation; 3) that it was error to allow the prosecutor to ask him whether the victim's mother lied during her testimony; 4) that the prosecutor improperly introduced his prior criminal record into the guilt phase of the proceedings; 5) that it was error to exclude evidence of a civil suit filed in behalf of the victims against his employer; and 6) that he was entitled to a directed verdict of acquittal. We affirm.

Appellant was employed by Security Taxi which provides transportation services to Creative Enterprises, a sheltered workshop/day program for mentally and physically handicapped people. Jessica Hale and Rachel Riley utilized the Security Taxi Service for that purpose. Due to a cerebral hemorrhage suffered as an infant, Jessica, aged 24 at trial, functions at about the level of a thirteen or fourteen-year-old child. Rachel, aged forty-nine at the time of trial, functions at about the level of a four or five-year-old child. The charges against appellant stem from an incident which occurred on May 21, 2002 when the women were returned to their homes late and not in the normal order. Both women were acting in an uncharacteristic manner and, upon questioning by their mothers, accused appellant of sexual assault. Prior to trial, two hearings were conducted as to the victims' competence to testify due to their diminished

mental capacities; as to whether interpreters would be useful given their limited communication skills; and as to the manner in which their testimony would be received. After extensive questioning of the women, the trial judge was satisfied as to their ability to discern truth from falsehood and to relate historical events. Because of their physical and mental disabilities, the trial judge concluded that interpreters would assist the jury in understanding the women's testimony, emphasizing the interpreter's duty to merely relate what the witnesses were saying. The trial judge also concluded that the use of closed-circuit television equipment was necessary given the women's anxiety concerning the trial and reaction to the mention of appellant's name. The trial judge specifically noted that if the women had an extremely emotional reaction to being in appellant's presence, a mistrial would have to be declared. When the trial judge asked appellant's counsel if he objected to the closed-circuit testimony, counsel stated that he was not "adamantly" opposed to it, but that he was more concerned that the interpreters would act like victim advocates. The jury ultimately convicted appellant Kraus of one count first-degree sexual assault regarding Jessica Hale, but they informed the trial judge that they could not reach a verdict on the charges of rape, sodomy and first-degree sexual abuse regarding Rachel

Riley. Accordingly, a mistrial was declared on the latter charges.

Appellant first argues in this appeal that the trial judge erred in determining that the victims were competent to testify. We note as a preliminary matter that we need to address only the competency of Jessica Hale, as her testimony is the only allegedly incompetent testimony which resulted in a conviction. KRE² 601(b) sets out the minimal qualifications as to the competency of witnesses:

A person is disqualified to testify as a witness if the trial court determines that he:

- (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
- (2) Lacks the capacity to recollect facts;
- (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
- (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

The trial judge questioned Jessica at length on the record and found her competent to testify despite obvious limitations in her ability to express herself verbally. The Court in Pendleton v. Commonwealth,³ emphasized that trial judges are in a unique position to observe witnesses and to determine their competency to testify and that only upon a showing of

² Kentucky Rules of Evidence.

³ 83 S.W.3d 522, 525 (Ky. 2002).

abuse of discretion will the trial judge's determination be overturned. Clearly, there is no such showing in this case.

It is noteworthy that the trial judge took great pains to create a record sufficient for appellate review of his decision to allow Jessica to testify. That record discloses careful questioning of the victim and thoughtful consideration of how best to protect the rights of both appellant and victim. Despite her limited verbal abilities, Jessica demonstrated that she could understand questions posed to her, recollect facts, and comprehend the necessity of answering truthfully. We therefore find absolutely no basis for setting aside the trial court's decision as to the competency of Jessica Hale.

Appellant's second allegation of error focuses upon the decision to allow the victims to testify via closed-circuit television in a fashion similar to that provided for child victims of sexual abuse by KRS 421.350. Appellant maintains that utilization of this procedure constituted an impermissible enlargement of that statute and violated his constitutional right to confront the witnesses against him. We disagree.

In Commonwealth v. Willis,⁴ the Supreme Court of Kentucky addressed the constitutionality of KRS 421.350 in the context of a criminal defendant's Sixth Amendment rights and the rights afforded by the "face to face" language of the

⁴ 716 S.W.2d 224 (Ky. 1986).

confrontation clause of the Kentucky Constitution. We are convinced that the rationale set out to support the Court's conclusion that the statute does no violence to a defendant's confrontation rights applies with equal force to this situation:

The legislative authorization of video tape or closed circuit trial testimony by certain child victims pursuant to KRS 421.350 does not violate a defendant's right to confrontation as protected by the constitution.

Mattox v. United States, [156 U.S. 237], does not support the argument that confrontation requires visual contact between the defendant and the witness. Mattox authorizes admission of dying declarations and the court observed that the general prohibition against hearsay evidence must occasionally give way to considerations of public policy and the necessities of the case.

Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed. 297 (1973), states that the right to confront and cross-examine is not absolute and may in appropriate cases be compromised to accommodate other legitimate interests in the criminal trial process.

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 597 (1980), states in part that the confrontation clause reflects a preference for face-to-face confrontation but that a primary interest secured by the right is the right of cross-examination. The U.S. Supreme Court recognizes that competing interests may warrant dispensing with confrontation at trial.

Generally the preference for face-to-face confrontation establishes a rule of necessity where the prosecution must demonstrate unavailability prior to introduction of a hearsay statement. Its underlying purpose is to augment accuracy in the truth finding process by insuring the

defendant an effective means to test adverse evidence. . . .

The videotaped or televised testimony under §§ 3 or 4 of the statute is not hearsay. It is the functional equivalent of testimony in court. The testimony is taken with the court, counsel and the defendant present in person. Full cross-examination is authorized. The defendant and the jury can see and hear the witness and assess credibility by observation of the demeanor of the witness.

The motion to take the victim's testimony pursuant to KRS 421.350 does not limit the defendant's right to cross-examination in any way. . . .

* * *

We realize that the statute in question does limit the manner of confrontation, but it does not infringe on the right of confrontation, and a proper balancing of the competing interests of society in general and the accused require that the statute be upheld.⁵

The Court also stressed the fact that utilization of the statute was not automatic and that a showing of necessity was a prerequisite. In making a determination as to necessity, the trial judge is to be accorded "wide discretion to consider the age and demeanor of the child witness, the nature of the offense and the likely impact of testimony in court or facing the defendant."⁶ The Supreme Court concluded its constitutional analysis by stating that there is "no constitutional right to

⁵ Id. at 228-29.

⁶ Id. at 230.

eyeball to eyeball confrontation," and by emphasizing the proper focus of the application of the right:⁷

The right to be present at trial and the right to confrontation must be applied in such a way as to produce a fair result and enhance the truth-determining process. The right to confront does not confer an automatic right to intimidate. The sound discretion of the trial judge is the best gauge to determine the fairness of the proceeding.

Thus, we find no impermissible expansion of the statute in the procedure utilized by the trial judge. After determining that KRS 421.350 was inapplicable due to the victims' ages at the time of the offense, the trial judge fully explained his rationale for his decision that a similar procedure could be utilized. Using the analysis cited from Willis as support, the trial judge concluded that appellant's right of confrontation was not absolute and that he had the discretion to fashion a procedure which best protected the appellant's rights as well as those of the victims in this case. The special needs of the victims in this case satisfied the "necessity" prerequisite to deviating from the normal face-to-face method of confrontation, but it did not deprive appellant of any right. We therefore find no error in the use of the closed-circuit television system based upon the trial court's finding

⁷ Id. at 231.

of necessity for its use. In our view, the trial judge not only enhanced the truth-finding process, but produced a fair result.

The third allegation of error centers on an exchange which occurred during cross-examination of appellant concerning whether appellant was late in bringing Jessica home the day of the assault. After appellant denied being late on that day, the prosecutor asked why Janet Hale, Jessica's mother, would say appellant was late if he had not been late. Appellant responded, "\$500,000.00," in an apparent reference to a civil suit filed against appellant's employer, the transportation service. While we agree that it was error to ask appellant to characterize the testimony of another witness as a lie, given the totality of the evidence in this case, we are firmly convinced that exclusion of the improper testimony would not have altered the jury's decision and accordingly the error must be construed to be harmless under the circumstances.⁸

The fourth assignment of error concerns the alleged improper introduction of appellant's criminal history into the guilt phase of the proceeding. During the prosecution's opening statement he referred to the testimony of the lead investigating officer of the Kentucky State Police as to appellant's response when she informed him that there were accusations against him of sexual assault by persons on his transport bus. The prosecutor

⁸ Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003).

stated that Officer Janet Gabbard would testify that appellant initially denied the accusation and then stated, "that's not my MO, read my record." That statement was repeated during Officer Gabbard's actual testimony. After an objection to the statement was overruled by the trial judge, the statement was repeated and the questioning then proceeded in a different direction. Appellant maintains that introduction of this testimony constitutes improper impeachment with his criminal record. Again, we disagree.

A similar situation was addressed by the Court in Thurman v. Commonwealth.⁹ In that case, the Court held that the defendant's statement to police officers that he had married his wife to keep her from testifying against him was independently admissible as a statement tending to show guilt. Review of this record makes clear that introduction of appellant's statement as to his "MO" was not intended to impeach appellant's credibility but was offered as an admission of a party which falls precisely within the admissibility requirements of KRE 801A(b)(1). Introduction of the statement did not constitute error.

Appellant next argues that it was error to exclude evidence of a civil action filed by the victims' families against Security Taxi. Although the trial judge sustained an objection as to questioning of the mother of one of the victims

⁹ 975 S.W.2d 888 (Ky. 1995).

concerning this litigation, counsel for appellant made reference to the litigation in his opening statement and, as noted previously, appellant himself cited the litigation was a motive for Jessica's mother to lie about the time of her arrival home on the day of the assault. The civil suit was not filed against appellant, but against his employer for hiring him in spite of a previous record of sexual assault. The trial judge ruled that the civil suit was a collateral matter which might result in the introduction into the record of matters prejudicial to appellant—presumably his prior assault. It was the prerogative of the trial judge to balance the probative value of this evidence against its potential prejudice to appellant.¹⁰ We find no abuse of the discretion afforded the trial judge in his decision to exclude this line of questioning.

Finally, appellant argues that it was clearly unreasonable for the jury to have found him guilty of this offense and thus he was entitled to a directed verdict of acquittal. Appellant concedes that this issue was not properly preserved for our review and asks that we nevertheless consider the matter as palpable error under RCr 10.26. Despite the lack of preservation, we have nevertheless carefully reviewed the record in our consideration of other alleged errors and, on the basis of that review, we have little difficulty disposing of

¹⁰ KRE 403.

appellant's contention. There is present in this record ample evidence from which the jury could conclude that appellant did in fact commit the crime for which he was convicted.

Accordingly, a finding of guilt was not clearly unreasonable and appellant was not entitled to a directed verdict of acquittal.

The judgment of the Livingston Circuit Court is affirmed.

ALL CONCUR.

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