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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001230-MR

TIMOTHY DAVID BELL

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
INDICTMENT NO. 03-CR-00360

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: Timothy David Bell appeals from a judgment of conviction from the Daviess Circuit Court in which he was convicted of three counts of sexual abuse in the first degree. Finding no error, we affirm.

On May 31, 2003, Bell went out drinking with his friend, Jarred Romines. Later that night Bell accompanied Romines back to Romines's home that Romines shared with his

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

girlfriend and his girlfriend's eight-year old daughter, B.L. Romines offered to let Bell stay the night and sleep on a couch in the living room.

Later that night, after everyone else had fallen asleep, Bell entered B.L.'s bedroom, woke her and ask if she wanted to watch a movie with him in the living room. The two then went into the living room and sat down on the couch. While watching the movie, Bell put his arm around B.L. and then placed his hand inside her underwear. B.L. told Bell to stop; instead, Bell exposed his penis and placed B.L.'s hand on it. Bell then made B.L. promise not to tell anyone about the incident.

In May 2003, Bell also visited another of his friends, Carl. During the visit, Bell and Carl drank alcohol and played computer games late into the night. Since Bell had previously lived with Carl and his family, Carl agreed to allow Bell to spend the night sleeping on a couch. Later, after everyone else had fallen asleep, Bell entered the bedroom of M.T., Carl's five-year old daughter, and touched her between the legs.

On June 11, 2003, after spending the evening drinking with Romines, Bell again stayed in Romines's home, gaining access to B.L again. After being questioned by Bell, B.L. told him that she had not told anyone about the previous incident of sexual abuse. Bell then touched B.L. again. The next morning, B.L. told her mother about the incident. B.L.'s mother told

Romines, who called the police. Later, Bell was arrested, and, while in police custody, Bell confessed to sexually abusing B.L.

On June 12th, M.T.'s mother found out that Bell had been arrested for sexually abusing B.L. M.T.'s mother spoke to M.T. about good and bad touches and asked if she had been touched in a bad way. M.T. began to cry but, eventually, told her mother that Bell had touched her. M.T.'s mother then contacted the police.

On August 6, 2003, a Daviess County grand jury indicted Bell on two counts of sexual abuse in the first degree regarding B.L., one count of sexual abuse in the first degree regarding M.T., one count of possession of marijuana and one count of alcohol intoxication. In March 2004, Bell moved the trial court to sever the offense regarding M.T. from the offenses regarding B.L. and argued that it would prejudice him if all three offenses were tried together. He claimed that the offense regarding M.T. was not sufficiently similar to the offenses regarding B.L. After holding a hearing on the issue, the trial court denied Bell's motion to sever.

Because of M.T.'s young age, Bell moved the trial court for a competency hearing. The trial court held a competency hearing on March 25, 2004. At the hearing, Bell submitted fifteen questions for the trial court to ask M.T. The trial court refused to use Bell's questions, commenting that

Bell was attempting to turn the competency hearing into a deposition. Ultimately, the trial court questioned M.T. for twenty-five minutes and, afterwards, found the child to be competent to testify at trial.

On March 26, 2004, Bell's case proceeded to trial, and he was convicted on all three counts of sexual abuse in the first degree. On June 6, 2004, the trial court sentenced Bell to ten years in prison. He now appeals to this Court.

SEVERANCE

On appeal, Bell argues that the trial court erred when it denied his motion to sever. Citing Roark v. Commonwealth, 90 S.W.3d 24 (Ky. 2002), Bell argues if the evidence necessary to prove each offense would not be admissible if separate trials were held regarding each offense, then joinder would cause undue prejudice. Bell argues that the incidents of sexual abuse regarding B.L. were not sufficiently similar to the incident of sexual abuse regarding M.T.; thus, the three offenses should not have been joined together. Bell insists he was unduly prejudiced by the joinder. In addition, Bell insists that he was not allowed to plead guilty to the offenses regarding B.L. because he did not confess to abusing M.T.

Kentucky Rule of Criminal Procedure (RCr) 9.12 permits a court to join two or more indictments for trial if the offenses could have been joined in a single indictment. RCr 6.18 states that separate offenses may

be joined in a single indictment "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." However, RCr 9.16 requires that offenses shall be separated for trial "[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses." The trial court is afforded broad discretion in regard to joinder and its decision will not be overturned absent a showing of clear abuse of that discretion.

A significant factor in determining whether joinder is proper, or whether prejudice exists, is the extent to which evidence of one offense would be admissible in a trial of the other offense. In this light, "evidence of independent sexual acts between the accused and persons other than the victim, if similar to the act charged, and not too remote in time, are admissible to show intent, motive or a common plan." (Citations omitted.) Berry v. Commonwealth, 84 S.W.3d 82, 87 (Ky.App. 2001).

Despite Bell's insistence to the contrary, the incidents of sexual abuse regarding B.L. and the incident regarding M.T. are sufficiently similar to support joinder. Both victims were prepubescent females and were approximately the same age. B.L. was eight years old, while M.T. was five years old. Bell used the same tactic to gain access to both children. He befriended the man in each household, the boyfriend of B.L.'s mother in B.L.'s case and M.T.'s father in M.T.'s case. He drank with both men and then, after getting drunk with each man, received permission to spend the night at their respective homes. Then,

after everyone else was asleep, Bell slipped into each child's bedroom. And, during each incident, he touched each child's vaginal area. We also note that each incident of abuse occurred within a relatively short time period. If separate trials had been held for each offense, the evidence regarding each offense would have been admissible in a separate trial for each offense. The trial court simply did not abuse its broad discretion when it denied Bell's motion to sever.

QUESTIONS SUBMITTED BY BELL AT THE COMPETENCY HEARING

In addition, Bell argues that the trial court erred when it refused to ask M.T. his fifteen questions. Bell points out that the trial court granted his motion for a competency hearing but then refused to ask M.T. his questions which were specifically about the incident of sexual abuse. Bell cites KRE 601, which deals with the competency of witnesses, and argues that specific questions regarding an alleged criminal incident are necessary to determine if the witness accurately perceived the incident and is capable of testifying about it.

The competency of witnesses is controlled by KRE 601. According to this rule:

- (a) General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.
- (b) Minimal qualifications. 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 qualifications for competency are minimal, and, as can be seen, all witnesses are presumed to be competent. This presumption applies to children as well as adults. Bart v. Commonwealth, 951 S.W.2d 576, 579 (Ky. 1997). Since the trial court is in the unique position to observe a witness testify, it is within the trial court's sound discretion to determine whether the witness is competent to testify. Id. When there is a question regarding a child witness's competency, the trial court is obligated to hold a hearing and carefully examine the child to determine if he or she is sufficiently intelligent to observe, to recall and to relate the facts. Id. In addition and perhaps most importantly, the trial court must determine if the child has developed a moral obligation to testify truthfully. Id.

The questions submitted by Bell would have challenged M.T.'s credibility but would have not tested her competency, and the court was under no obligations to use them. Moreover, we agree with the trial court that Bell was merely attempting to use the competency hearing as an opportunity to depose M.T.

Bell has failed to show that the trial court abused its discretion when it refused to use his questions during the competency hearing.

COMPETENCY OF CHILD VICTIM TO TESTIFY

Finally, Bell argues that the trial court erred when it determined that M.T. was competent to testify. He argues that M.T. lacked the capacity to describe the sexual abuse because she testified at trial that she did not know how old she was when Bell abused her; did not know in which house the abuse occurred; did not know the season in which the abuse occurred; did not know on what day the abuse had occurred and could not describe what Bell wore at the time he abused her.

During the competency hearing, M.T. responded to the trial court's questions and testified that she knew her first and last name; the street on which she lived; where she attended elementary school and the grade in which she was enrolled. M.T. also testified that she knew the alphabet; remembered what she had last received for Christmas; remembered what she had done the previous summer and what she had eaten for supper the night before. In addition, at the hearing, the trial court showed nine pictures to M.T. She was asked to evaluate each picture and determine whether the person in the picture was lying or telling the truth. She correctly evaluated each picture. The trial court then showed four more pictures to M.T. and

instructed her to pick out which person in the pictures would get in trouble for lying. She correctly performed this test as well. At the hearing, M.T. also testified that she knew the difference between telling the truth and lying, testified that she knew that she was supposed to always tell the truth and promised to testify truthfully at trial.

The testimony adduced at the competency hearing was more than sufficient to support the trial court's decision finding M.T. competent to testify. And we note that M.T.'s trial testimony upon which Bell relies to support his argument that M.T. was incompetent does not reflect upon her competency but reflects upon her credibility. The record supports that the trial court did not abused its considerable discretion in finding M.T. competent.

The judgment of conviction is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Euva D. May
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky