

RENDERED: NOVEMBER 30, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001473-MR

RONALD LEE PORTER, JR.

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE ROBERT B. CONLEY, JUDGE  
ACTION NO. 05-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,<sup>1</sup> SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Ronald Lee Porter, Jr., appeals from a Final Judgment and Sentence entered upon a jury verdict by the Greenup Circuit Court adjudging him guilty of first-degree sexual abuse and sentencing him to five years imprisonment. We affirm.

---

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

## FACTUAL AND PROCEDURAL BACKGROUND

On April 28, 2005, Porter was indicted for first-degree sexual abuse. See KRS<sup>2</sup> 510.110. The indictment resulted from the allegation that on January 22, 2005, Porter fondled the vaginal area of his nine-year old stepdaughter, M.H.

Following a jury trial, Porter was convicted by the jury as charged under the indictment. The jury recommended a sentence of five years imprisonment. On June 15, 2006, the trial court entered final judgment and sentence consistent with the jury's verdict and sentencing recommendation. This appeal followed.

## SUFFICIENCY OF EVIDENCE/DIRECTED VERDICT

Porter contends that there was not sufficient evidence to support the jury's guilty verdict. Porter concedes that this argument is not preserved because he failed to move for a directed verdict at the conclusion of the defense case. We accordingly review this argument pursuant to the palpable error standard as stated in RCr<sup>3</sup> 10.26 (A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error).

When ruling on a motion for a directed verdict of acquittal, the trial court is required to consider all evidence presented in the light most favorable to the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On

<sup>2</sup> Kentucky Revised Statutes.

<sup>3</sup> Kentucky Rules of Criminal Procedure.

appeal, the standard of review is whether or not it was clearly unreasonable for the fact-finder to find guilt. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky.1983). Under these standards, we conclude there was sufficient evidence to support the jury's verdict.

KRS 510.110 provides that

(1) A person is guilty of sexual abuse in the first degree when:

...

(b) He or she subjects another person to sexual contact who is incapable of consent because he or she:

...

2. Is less than twelve (12) years old;

...

KRS 510.010(7) defines sexual contact as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]”

M.H. was nine years old on January 22, 2005, the date of the incident. At trial, M.H. testified to the effect that Porter fondled her under her panties in her vaginal area. It has been held that a rape victim's testimony alone is sufficient to support a conviction. *Fletcher v. Commonwealth*, 250 Ky. 597, 63 S.W.2d 780, 781 (1933). We believe the rule has equal applicability here. Thus, M.H.'s testimony alone is sufficient to support Potter's conviction for first-degree sexual abuse.

Potter argues, however, to the effect that M.H. gave inconsistent statements during her pretrial interviews to police and social workers which, in turn, conflicted with her trial testimony. He also argues that her testimony appears to have been coached by

her mother and influenced by the leading questions of the prosecutor. However, the jury has the sole responsibility to weigh the evidence and judge the credibility of all witnesses. It is not bound to accept the testimony of any witness, including the accused, as true. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-65 (1941). A jury may believe or disbelieve all or any part of a witness' testimony. *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926). Thus, it was for the jury to weigh the significance of the allegedly inconsistent statements, the alleged indicia of coaching, and the supposed suggestive questioning of the prosecutor.

In summary, even if Porter had properly moved for a directed verdict at the close of all the evidence, he would not have been entitled to such under the *Benham* standards. As such, no palpable error occurred.

#### COMPETENCY OF VICTIM

Next, Porter contends that the trial court failed to properly ascertain the competency of M.H. to testify as a witness at trial. He alleges that it is evident from the trial proceedings that M.H. lacked the capacity to understand the obligation of a witness to tell the truth, and that she demonstrated no sense of her obligation to tell the truth.

The competency of witnesses is controlled by KRE<sup>4</sup> 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:

---

<sup>4</sup> Kentucky Rules of Evidence.

- (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.

Age is not determinative of competency and there is no minimum age for testimonial capacity. *Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998); *Pendleton v. Commonwealth*, 83 S.W.3d 522 525 (Ky. 2002). However, “[w]hen the competency of an infant to testify is properly raised it is then the duty of the trial court to carefully examine the witness to ascertain whether she (or he) is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth.” *Capps v. Commonwealth*, 560 S.W.2d 559, 560 (Ky. 1977) (quoting *Moore v. Commonwealth*, 384 S.W.2d 498, 500 (Ky. 1964)). All the same, the competency bar is low with a child's competency depending on her level of development and upon the subject matter at hand. *Jarvis v. Commonwealth*, 960 S.W.2d 466 (Ky. 1998).

The trial court has the sound discretion to determine whether a witness is competent to testify. *Pendleton v. Commonwealth*, 685 S.W.2d 549, 551 (Ky. 1985). In reviewing the trial court's exercise of its discretion, we bear in mind that it is in the unique position to observe witnesses and to determine their competency. *See Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978).

Prior to M.H.'s testimony the trial court questioned her for the purpose of determining her competency. In response to the questioning M.H. indicated that she knew the difference between a true story and a false story and acknowledged by her own oath that she understood her responsibility to tell the truth. Moreover, she proved through her conduct and demeanor during her actual testimony that she was a competent witness. A review of M.H.'s testimony reveals that she was able to recount the events of January 22, 2005, was able to identify Porter as the perpetrator, and could provide details of the acts committed against her. Furthermore, Porter had the ability to cross-examine M.H. and undermine her credibility and competency with the jury.

Based upon our review of the trial court's inquiry into M.H.'s competency and her subsequent testimony from the stand, we are constrained to conclude that the trial court did not abuse its discretion in determining that M.H. was competent to testify pursuant to KRE 601.

#### LEADING QUESTIONING OF THE VICTIM

Next, Porter contends that error occurred based upon the prosecutor's leading and suggestive questioning of M.H. Porter identifies no specific improper questioning under this argument heading; however, in his statement of the case Porter states

Then, under very leading examination by the Assistant Commonwealth's Attorney, and very reluctantly after long pauses, M.H. testified that Ronnie touched her with his hand "under my panties[.]" She said, "I don't, I don't know the name for that" when asked where he touched her. The [prosecutor] then said (while nodding her head up and down)

“Down like where you go pee, that you pee out of, that's the part of your body, OK, is that what you mean when you say 'private area'?” and M.H. never responded. (VCR timer references omitted).

Leading questions should not be used on direct examination unless necessary to develop the witness' testimony. KRE 611(c). However, we must review the judge's decision here with an understanding that “[w]hile the use of leading questions on direct examination is generally unacceptable . . . judgments will not be reversed because of leading questions unless the trial judge abused his discretion and a shocking miscarriage of justice resulted.” *Tamme v. Commonwealth*, 973 S.W.2d 13, 27 (Ky. 1998) (citations omitted). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Embry v. Turner*, 185 S.W.3d 209, 217 (Ky.App. 2006). In following this standard, we also note that trial courts are obligated to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) Make the interrogation and presentation effective for the ascertainment of the truth; (2) Avoid needless consumption of time; and (3) Protect witnesses from harassment or undue embarrassment.” *Id.*; KRE 611(a).

We first note that, unled, M.H. testified that Porter touched her on her “private part” with his hand. Thus, the leading questioning by the prosecutor was merely clarification of what M.H. meant by her “private part.”

Further, bearing in mind that the testifying witness was nine-years old, was testifying under extraordinarily difficult circumstances, was understandably nervous, and

was relating traumatic events in a public forum, we do not believe the trial court abused its discretion in allowing the Commonwealth some leeway in eliciting M.H.'s testimony by limited leading questioning.

### IMPROPER CLOSING ARGUMENT

Next, Porter contends that error occurred in the Commonwealth's closing argument when the prosecutor made improper statements. Porter acknowledges that this allegation of error is not preserved, but requests review pursuant to KRE 10.26.

The statements by the prosecutor that Porter contends were improper and resulted in error are as follows:

1. "I know plenty of girls that I know were sexually abused who couldn't testify." (Emphasis in original).
2. "If sticking your hand down girls' panties is not sexual abuse, I need to get out of this business."
3. "Well, I know in my heart what I felt . . . but this little girl's no liar - I submit to you that the Defendant, however, did lie to you on the witness stand."

Both counsel are permitted "great leeway" in closing argument. *Foley v. Commonwealth*, 953 S.W.2d 924, 939 (Ky. 1997). Further, a prosecutor can state his opinion of a defendant's guilt if his opinion is based on the evidence. *Tamme v. Commonwealth*, 759 S.W.2d 51, 54 (Ky. 1988). Further, he may use "strong words" and even make a "fiery plea" to the jury. *Id.* In analyzing claims of improper argument, this Court must "determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." *Slaughter v. Commonwealth*,

744 S.W.2d 407, 411 (Ky. 1987), cert. denied, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989). "The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor." *Id.* at 411-12.

In this case, the prosecutor's remarks did not exceed the leeway normally granted to both parties in closing argument. More inflammatory statements have been held to be within bounds. *See, e.g., Slaven v. Commonwealth*, 962 S.W.2d 845, 859 (Ky. 1997) ("I think he's a cold-blooded murderer from the evidence that we've shown you.") As such, we find no reversible error in connection with the prosecutor's closing arguments.

#### IMPROPER SENTENCING PHASE EVIDENCE

Next, Porter argues that error occurred as a result of the Commonwealth's introducing various information into evidence during the sentencing phase of the trial. Porter again concedes that this issue is not properly preserved, but requests review under the palpable error standard.

Specifically, Porter alleges that the following information was improperly admitted into evidence: information concerning (1) good time (and other) credits; (2) sexual offender treatment programs; (3) the sexual offender registry; (4) whether sexual offenders are segregated from the general population; and (5) whether prisoners are more likely to be paroled at an early date if they follow prison rules.

In support of his position, Porter relies upon the truth in sentencing statute, KRS 532.055(2)(a), which lists factors which "may be offered by the Commonwealth

relevant to sentencing[.]” Porter alleges that since the above items are not included in the list, their submission into evidence was error.

In *Cornelison v. Commonwealth*, 990 S.W.2d 609 (Ky. 1999), the Supreme Court addressed this argument in the context of good time credits. Therein, it stated as follows:

Appellant interprets this statute [KRS 532.055(2)(a)] as an exhaustive list and argues that since evidence of good time credit is not included, it must be excluded. "Expressio unius est exclusio alterius...." *Burgin v. Forbes*, 293 Ky. 456, 169 S.W.2d 321, 325 (1943).

However, use of the word "including" leaves no doubt that the list is illustrative rather than exhaustive. We have never been called upon to address whether evidence of factors not specifically enumerated in the statute, but which affect the duration of a sentence of imprisonment, is admissible in the sentencing phase of a felony trial. However, we have held that "it is recognized policy, in furtherance of justice, to provide full and accurate information to a sentencing jury." *Offutt v. Commonwealth*, Ky., 799 S.W.2d 815, 817 (1990); *see also Huff v. Commonwealth*, Ky., 763 S.W.2d 106 (1988). We have also held that the purpose of KRS 532.055 is to insure having a jury well informed about all pertinent information relating to the person on trial. *Commonwealth v. Bass*, Ky., 777 S.W.2d 233, 234 (1989). The evidence with respect to potential good time credit is no less relevant nor more speculative than evidence with respect to parole eligibility. Neither constitutes a guarantee of a reduction of the sentence; but both potentially affect the actual duration of a period of imprisonment imposed by the jury against the defendant.

Id. at 610 - 611.

We are persuaded that, like good time credits, information concerning sexual offender treatment programs, the sexual offender registry, whether sexual

offenders are segregated from the general population, and whether prisoners are more likely to be paroled at an early date if they follow prison rules are relevant to having a jury well informed about all pertinent information relating to sentencing. As such, there was no error in admitting this evidence at trial.

#### WAIVER OF RIGHT TO PRESENT MITIGATION EVIDENCE

At the conclusion of the presentation of the Commonwealth's truth in sentencing evidence, the trial court asked trial counsel if there was any evidence to be presented on behalf of the defense. Trial counsel responded that there was not. Porter's final allegation of error is that the trial court erred by failing to determine whether his waiver of his right to present mitigating evidence was knowingly and voluntarily made. As this assignment of error was unpreserved, we review it under the palpable error standard contained in RCr 10.26.

We construe Porter's argument as being that the trial court was required to sua sponte conduct an inquiry into whether his waiver of the presentation of mitigation evidence was knowingly and voluntarily made. While there is authority for the proposition that the trial court is required to inquire into a waiver of mitigation evidence made by a defendant over the advice of counsel to present such evidence in a death penalty case (*see St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2000)) - and it may have been the best practice to have followed in the case at bar - we discern no manifest injustice in the trial court's failure to pursue such an inquiry.

The only mitigation evidence we are cited which would have been presented is that “Porter had never been convicted of a felony; that his criminal record consisted primarily of traffic offenses - nothing of violence or mayhem, and certainly nothing to even suggest any sexual offenses”; and that “[h]e maintained two long-term intimate relationships and raised three children and two grandchildren.”

A palpable error exists if, upon consideration of the entire case, there is a substantial possibility that the outcome would be different had the error not occurred. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). Even if the trial court had sua sponte inquired of Porter concerning whether he wanted to present mitigation evidence and Porter had insisted upon presenting the mitigation evidence identified above, we are persuaded that there is not a reasonable possibility that the outcome of his sentence would have been different. Accordingly, we find no manifest injustice under this assignment of error.

As noted by the Commonwealth, though couched otherwise, this argument is, in essence, an allegation that trial counsel erred by failing to present mitigating evidence, and instead incompetently waived the opportunity to do so. Thus, the argument is fundamentally an allegation of ineffective assistance of trial counsel for failure to present mitigating evidence. Such claims generally will not be reviewed on direct appeal because there usually is no record or trial court ruling specifically on the issue and there is a potential problem of conflict of interest for trial counsel filing notices of direct appeal. *See Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998); *Hibbs v.*

*Commonwealth*, 570 S.W.2d 642, 643 (Ky.App. 1978). If Porter believes he received ineffective assistance as a result of trial counsel's failure to present mitigation evidence, his remedy is to pursue this claim through a post-conviction motion pursuant to RCr 11.42.

CONCLUSION

For the foregoing reasons the judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lloyd E. Spear  
Vanceburg, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

George G. Seelig  
Assistant Attorney General  
Frankfort, Kentucky