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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002657-DG

I.B., A CHILD UNDER EIGHTEEN — APPELLANT

DISCRETIONARY REVIEW
REGARDING FAYETTE CIRCUIT COURT, DIVISION III
v. HONORABLE JAMES D. ISHMAEL, JUDGE
ACTION NO. 06-XX-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY,[1] SENIOR JUDGES.

HENRY, SENIOR JUDGE: In 2006, a petition was filed charging I.B., a sixteen- year-old child, with sodomy in the first degree. We find there was error in the proceedings sufficient to warrant a reversal with a remand for further action consistent with this opinion.

[1] Senior Judges David C. Buckingham and Michael L. Henry, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Because of the lurid nature of this case and in keeping with our policy of protecting the identity of juveniles, we take great care to avoid any unnecessary specifics that could disclose the child's identity. The child was arraigned, entered a plea of not guilty and was held in detention. The County Attorney later moved to amend the charge to sexual abuse in the first degree and the child entered an admission of guilt to that charge. A week later, the child moved to withdraw the admission and the motion was granted. An adjudication hearing then took place and the trial court found the child guilty of sexual abuse in the first degree.. The child was committed to the Department of Juvenile Justice (DJJ) as a sexual offender and was placed in a distant group home. An appeal was taken to the Circuit Court, acting as a court of review, and the decisions of the trial court were affirmed. We granted discretionary review, and reverse.

The adult female victim was acquainted with the child's family and was invited to attend an adult birthday party at their home. She arrived with a bottle of rum and her two small children, one an infant. The victim was drinking heavily and pouring drinks for others at the party. From here, the versions of what happened change significantly depending on which witness is telling the story.

The victim testified the child asked her for a drink and after checking with the child's adult sister, the victim provided alcohol to the child. The sister denied giving permission to allow the underage child to drink alcohol. The child admitted to drinking alcohol and was intoxicated that evening.

The victim's version of the story is that she went upstairs to put her children to bed and passed out. She remembers waking up at some point, seeing a flash of light and hearing someone say “open her legs” and “I'm next”. The next thing she remembers is waking up with the lights on in the room, being in bed with her children and hearing I.B. say “I'm sorry”. There were other people in the room and she was shown a series of pictures from a digital camera that included her being unclothed and in bed with I.B. in a position used for performing mutual oral sex. There was another picture showing I.B. in a position that appeared to indicate the victim was receiving oral sex from the child. The pictures were eventually deleted from the camera.

The victim eventually left and went to the hospital where a rape kit was used to collect samples. Those samples indicated the presence of semen that was traced to the child's brother-in-law, presumably the person referred to by the statement “I'm next”. The victim described her condition that evening to the trial judge as being “passed out.” When asked directly by the trial judge whether she believed she was helpless, she responded “very”.

The child gave a statement to police and disclosed that although both were intoxicated, the two of them took the victim's children upstairs to put them to bed. When they entered the room, the victim remarked that she was interested in a sexual encounter. She then performed oral sex on the child. The child then reciprocated. A picture was taken with the digital camera showing the child performing oral sex on the victim.

The victim's four-year-old child testified that her mother got up during the night and vomited. The four-year-old testified that she told her mother not to let people kiss her like that. She also testified that she saw the camera being used twice. Everyone agrees the four year-old-child was present in the bed with the victim during the entire sordid event.

The trial judge found I.B. guilty of sexual abuse in the first degree and committed the child to DJJ as a sexual offender. The child was placed in a group home almost five hours' drive from the local jurisdiction and the child's family.

The child now brings five issues to our attention for review: first, counsel argues the Commonwealth did not produce sufficient evidence to prove guilt beyond a reasonable doubt; second, it is claimed that the child should be granted a new trial because the trial judge relied on improper evidence; third, it is argued that the trial judge admitted improper hearsay evidence; the fourth issue questions the competency of the four year old to testify; and finally, the child requests a new disposition hearing because DJJ refused to provide the defense with a copy of the sexual offender assessment prior to disposition. We agree there was error and reverse and remand this action for further proceedings consistent with this opinion.

We must first note that the record before us is limited to the circumstances and outcomes directly affecting the child. Evidence was introduced that the brother-in-law was arrested and charged with rape. While the outcome of that charge is beyond the scope of our present review, we note that on remand the trial court must be careful to

insure that the various witnesses are afforded the protections guaranteed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2D 694 (1966), and its progeny where applicable. We note this because, from the record before us, there appears to be ample evidence to charge others involved in this matter with significant crimes. Being a victim of crime does not render one immune from prosecution. Some of the acts alleged to have occurred at the birthday party are proscribed by Kentucky Revised Statutes (KRS) 530.070 (Unlawful transaction with a minor in the third degree for dispensing alcohol to a minor), KRS 530.064 (Unlawful transaction with a minor in the first degree for inducing a minor to engage in a sexual act) and KRS 531.320 (promoting a sexual performance by a minor). Any witnesses involved in criminal activity should be cautioned concerning their rights against self incrimination.

The trial court is vested with discretion to draw reasonable inferences from the testimony at a hearing. *Sowell v. Commonwealth,* 168 S.W.3d 429, 431 (Ky.App. 2005). Factual findings are conclusive provided they are supported by substantial evidence as they are in this case. *See Stewart v. Commonwealth,* 44 S.W.3d 376, 380 (Ky.App. 2000).

KRS 510.110(b) provides that a person is guilty of sexual abuse in the first degree when he "subjects another person to sexual contact who is incapable of consent because he or she: (1) is physically helpless." Sexual contact is "touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." KRS 510.010(7). Physically helpless means "that a person is unconscious

or for any other reason is physically unable to communicate unwillingness to an act." KRS 510.010(6). There is no question that there was sexual contact as defined by the statute. The child indicated in a statement to police a willingness to reciprocate the oral sexual encounter. The victim testified that she was so intoxicated that she was unconscious or unable to communicate her unwillingness to consent to a sexual act. Our review of the record indicates there was sufficient evidence for the trial judge to find that the victim was physically helpless and that she was subjected to knowing sexual contact by the child.

During the adjudication hearing the trial court reviewed the victim's statement to police and elicited information through questions from the bench, regarding the rape charge lodged against the brother-in-law. Our review of the record fails to disclose that the statement was ever admitted into evidence. Trial judges sitting as triers of fact are limited just as a jury is limited to decide the matter only on the evidence presented at trial. Likewise we are perplexed by the trial judge's inquiry during the adjudication hearing regarding the rape charge lodged against the brother-in-law. There was no allegation the child had any part in the rape. That event was completely outside the scope of the charges leveled against the child and had no bearing on the guilt of the child. During future proceedings, the trier of fact must be limited to considering only evidence that is relevant and properly admitted. Evidence is only relevant when it tends "to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." Kentucky Rules of Evidence (KRE) 401.

We next examine the testimony of the police officer. The detective testified about the statements made by the sister and brother-in-law to the victim that the camera used to take the pictures was stolen. That detective additionally testified about the results of the rape kit that was performed at the hospital. The detective was also allowed to testify to the statements made by the four-year-old child during interviews at the Children's Advocacy Center. All of this testimony was inadmissible hearsay.

Hearsay is any "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). The detective's testimony concerning the camera was so-called "double hearsay". The declarants were the sister and brother-in-law. They made these statements to the victim. She in turn repeated those statements to the detective who then testified concerning them at trial. The only purpose of the testimony was to provide information that the camera was stolen and not available as evidence. The truth of the matter asserted was that the camera was stolen.

The detective was also allowed to testify that the rape kit specimens matched the brother-in-law. The original declarant in this situation was the laboratory technician who performed the test. That person did not testify. Instead, the detective was improperly permitted to provide evidence that the brother-in-law engaged in sexual intercourse with the victim.

Finally, the detective was allowed to repeat the statement of the four-year-old child who made that unsworn statement outside of court. The four-year-old was permitted to testify at the hearing. Therefore, the child's prior statement should have been admitted only if it was: (1) inconsistent with her testimony; 2) consistent with her testimony, but offered to rebut an express or implied charge against her of recent fabrication or improper influence or motive; or was 3) one of identification of a person made after perceiving the person. KRE 801A. There is no indication in the record that any of those conditions applied to the child's statement.

The four-year-old child was allowed to testify after a brief exploration into her competency. The trial court limited itself to determining whether she could understand the difference between the truth and a lie. At the conclusion of the adjudication proceeding, the trial court noted that determining the credibility of the four year old child's testimony was difficult.

Witnesses must be able to accurately perceive the matters in question, be able to recollect facts, be able to adequately express themselves and be able to understand the obligation to tell the truth. KRE 601(b). There is nothing in the record to show that the trial judge explored any of the requirements except the ability to tell the truth. At one point the four-year-old child testified her mother never woke up all night. Yet at another point in her testimony she talked about her mother getting up and using the bathroom. This conflicting testimony brings into question the four-year-old child's ability to accurately perceive and recollect those facts. Only after a thorough examination of the

child's competency to testify will the trial court be able to make a rational decision whether to allow the testimony or not.

Even absent the errors discussed above, we would be forced to reverse and remand this matter because of the failure of the Department of Juvenile Justice to provide either the trial judge or the child's attorney with the sexual offender assessment prior to disposition. At the disposition hearing, the judge asked the DJJ worker if an assessment had been completed. The worker informed the judge it was complete but that DJJ would not provide it until after disposition and that it would then only be provided to the worker involved in the case. The trial judge was advised that the assessment recommended placement. The judge's statements conveyed some uneasiness with the recommendation given the possibility that DJJ would place the child outside the community based on a report that was never reviewed by the court. Defense counsel indicated that she had tried to secure the report in order to be able to evaluate it and potentially object to the findings but had also been denied access. Ultimately, the judge committed the child to DJJ as a sex offender and the child was placed in a group home many hours away from the community.

Although it should be obvious we find it necessary to stress that the practices and policies of the Department of Juvenile Justice can never be permitted to supersede the laws of the Commonwealth or the rights of a juvenile defendant. A juvenile sexual offender assessment "shall be prepared *in order to assist the courts* in determining whether the child should be declared a juvenile sexual offender, and to

provide information regarding the risk for reoffending and recommendations for treatment." KRS 635.505(3) (emphasis added). Merely preparing the report does not satisfy the requirements of the statute. The trial judge must have the information in the report in order to make a just determination of whether the child should be classified as a juvenile sexual offender. The trial judge is charged with making the determination of whether the child should be placed in a setting outside of the community. Input from DJJ should be provided so the judge can understand the options available for treatment. The judge is responsible for enforcing compliance with the provisions of KRS 600.020 requiring DJJ to utilize a treatment setting "which provides the least restrictive alternative." It is inconceivable how a judge could make those decisions when the only report or plan is kept private by the DJJ case worker.

A juvenile court judge is entitled to make "advisory recommendations" when a child is committed to DJJ. KRS 635.060(3). We know of no other evidence available in this case except the DJJ assessment that would allow the trial judge to make a reasonable determination of whether the child meets the definition of a juvenile sexual offender. *See* KRS 635.505(2).

A juvenile defendant retains the same rights at disposition as does an adult offender at sentencing. The child is entitled to have access to the assessment report prior to disposition so that he or she may confront the reliability of that report according to the rules of law. In *Hyatt v. Commonwealth,* 72 S.W.3d 566 (Ky. 2002) the Kentucky Supreme Court determined a defendant's due process rights were violated when a sexual

offender evaluation was admitted at sentencing without giving the defendant adequate time to review and potentially offer evidence to contradict or challenge the report. A child's rights are no less protected.

The record reveals that DJJ used what is known as the "ERASOR" evaluation tool in this case to assess the risk the child re-offending. Counsel argues that the assessment tool specifically states "there are currently no empirical data to support the predictive validity of any such tool for adolescent sexual offenders." Without having prior access to the assessment report, counsel would have no ability to effectively challenge the use of such an assessment tool if indeed it is not to be used to assess juvenile offenders. Absent prior knowledge, no effective challenge to placement could be made until after the child has been potentially placed in an environment that is not the least restrictive. *See* KRS 635.515(2). If a new trial results in an adjudication that the child is a sexual offender, DJJ shall not only prepare the assessment report but shall also provide access to that report prior to disposition not only to the trial judge but also to counsel on request.

The judgment of the Fayette Circuit Court is reversed and this matter is remanded, with directions that the case be remanded to the Fayette District Court for a new trial and proceedings consistent with this opinion.

THOMPSON, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, CONCURRING: I concur with the majority opinion, especially since the Commonwealth did not respond in its brief to four of the five arguments raised by the appellant. Without a response, I must conclude that the Commonwealth agrees that those arguments have merit.

BRIEF FOR APPELLANT:

Gail Robinson
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky
Frankfort, Kentucky

Diane Minnifield
Special Assistant Attorney General
Lexington, Kentucky