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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-001152-MR

BRIDGET HARRIS — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 06-CR-00219

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM, SENIOR JUDGE.

WINE, JUDGE: Following a jury trial, the Madison Circuit Court entered a judgment of conviction finding Bridget Harris ("Bridget") guilty of one count of first-degree criminal abuse. The jury fixed Bridget's sentence at five years imprisonment, which the trial court imposed. On appeal, Bridget argues that the trial court erred by admitting hearsay statements by a child witness after previously

finding that the child was not competent to testify. Bridget also argues that the statements were not admissible under any exception to the hearsay rule. Finally, Bridget contends that she was unfairly prejudiced by the Commonwealth's improper reference to prior bad acts. We agree with Bridget that the trial court erred by allowing admission of the hearsay statements. Therefore, the conviction must be set aside and this matter remanded for a new trial.

The facts surrounding the instigation of charges against Bridget are not in dispute. Bridget and Charles Harris ("Charles") were married in 2002 and had two children, S.H. and A.H. (ages 6 and 5 respectively at the time of trial). They were divorced in 2005 and Charles was awarded sole custody of both children. However, Charles and the children moved to Bridget's apartment in Richmond in May of 2006. During the summer of 2006, he left the children with Bridget for several periods while he worked out-of-town construction jobs.

In early August, 2006, Charles left for another construction job in Jackson County, again leaving the children with Bridget. Bridget testified that she attempted to enroll the children in school, but she could not do so without having some type of custody. Bridget and Charles discussed the matter over the phone several times on August 10, but the discussions devolved into arguments.

Following these arguments, Bridget filed a petition for emergency custody of the children. Charles returned to Richmond and went to the Richmond Police Department to seek their assistance in getting the children. Upon being informed of Bridget's pending petition for emergency custody, Charles and several

police officers went to Bridget's apartment to get the children. They arrived at about 12:30 a.m. on August 11.

After another argument, Charles took the children to his mother's house in Owsley County. The next day, he took the children to the office of Patricia Reynolds ("Reynolds"), a social worker who had been previously involved with the family in Owsley County. At that meeting, Reynolds noticed three small lesions on A.H.'s arm. When asked, A.H. told Reynolds and Charles that Bridget had burned her with a cigarette. Reynolds took pictures of the lesions and then took the child to the Family Practice Clinic in Booneville. A.H. repeated her statement to Stacey Smallwood ("Smallwood"), the nurse practitioner who examined her.

Based on this incident, a Madison County grand jury indicted Bridget on one count of first-degree criminal abuse. Prior to trial, the court conducted a hearing to determine A.H.'s competency to testify. After the hearing, the trial court found that A.H. was not competent to testify. However, the trial court denied Bridget's motion to exclude A.H.'s statements to Charles, Reynolds and Smallwood.

Bridget argues that the recent decision by the Kentucky Supreme Court in *B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007), requires exclusion of these statements. She further argues that the hearsay statements were not admissible under any exception to the hearsay rule. We agree.

In *B.B. v. Commonwealth*, *supra*, the Kentucky Supreme Court addressed the test for determining the competency of a witness to testify. Unlike the present case, the trial court in *B.B.* found that the child witness was competent to testify. The child witness in *B.B.*, like A.H. in this case, gave conflicting, nonsensical and non-responsive answers to questions at the competency hearing. Further, the child witness in *B.B.* did not understand the difference between lying and telling the truth, between right and wrong, or between real and make-believe. Finally, the child was unable to grasp the concepts of lying, the consequences of lying, or the importance of telling the truth. Based on the standards set out in Kentucky Rules of Evidence ("KRE") 601, the Kentucky Supreme Court found that the trial court abused its discretion in finding the child competent to testify. *B.B. v. Commonwealth*, 226 S.W.3d at 49-51.

After finding that the child was not competent to testify, the Supreme Court then addressed the admission of the child's statements to the emergency room nurse under the hearsay exception for statements for purposes of medical treatment or diagnosis. KRE 803(4). The Court noted the purpose of the hearsay exclusion is that the declarant is not subject to cross-examination and there is no sufficient guarantee of the trustworthiness of the out-of-court statement. *B.B. v. Commonwealth*, 226 S.W.3d at 51. The exceptions to the hearsay rule recognize that there are certain situations which bolster the reliability of such statements because the declarant is less likely to lie in these circumstances.

However, the Court found that a "child whose understanding is not sufficient to allow him to testify might well also fail to understand that recovery of his health is dependent upon the truth of his statements to the doctor." *Id., quoting Drumm v. Commonwealth*, 783 S.W.2d 380, 386 (Ky. 1990) (*Vance, J., dissenting*). Thus, the Court concluded that the child's testimonial incompetence would also extend to the hearsay. *Id.* In reaching this conclusion, the Court expressly overruled *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986), and *Edwards v. Commonwealth*, 833 S.W.2d 842 (Ky. 1992), to the extent those cases "hold that testimonial incompetence is not a consideration in determining the admissibility of out-of-court statements . . . ." Rather, we adopt the view of Professor Lawson, that testimonial incompetence of a declarant should be an obstacle to the admission of the declarant's out-of-court statements if the reason for the incompetence is one which would affect the reliability of the hearsay. Robert G. Lawson, *The Kentucky Evidence Law Handbook* 675 n. 53 (4th ed. 2003)." *Id*.

The circumstances of this case are very similar to those presented in *B.B. v. Commonwealth*. The trial court found A.H. to be incompetent to testify based on the same type of evidence as was presented in *B.B.* Similarly, the trial court in this case also allowed admission of the child's hearsay statements to medical personnel and a social worker. In response, however, the Commonwealth argues that *B.B. v. Commonwealth* does not automatically require exclusion of the hearsay statements of incompetent declarants.

We agree to the extent that the Court in *B.B. v. Commonwealth* emphasized that the declarant's incompetence is merely a consideration in determining the admissibility of the hearsay statements. *Id.* And as Lawson's treatise points out, the reason for the testimonial incompetence of a declarant should be important to rulings on admissibility of her out-of-court statements. Where the declarant simply lacks an ability to understand questions and formulate answers, the basis for testimonial incompetence raises no questions about the reliability of the hearsay. *Lawson*, at 675 n. 53.

However, we disagree with the Commonwealth that the present case is distinguishable from *B.B. v. Commonwealth* to any significant degree. As the Commonwealth concedes, A.H. gave inconsistent, contradictory and disjointed accounts of the incident. At one point, A.H. denied that Bridget had burned her, stating that she had burned herself on a stove. Indeed, she tended to agree with whatever question was asked of her. Although A.H. could give responsive answers to biographical questions, she demonstrated little practical understanding about the obligation to tell the truth. Moreover, A.H.'s statements at the competency hearing clearly showed that she was unable to accurately distinguish between reality and imagination. And in finding A.H. incompetent to testify, the trial court expressed reservations that A.H. met any of the minimal qualifications set out in KRE 601(b), with the exception that the witness demonstrated the ability to perceive.

Furthermore, the Commonwealth explicitly relied on *Edwards* and *Souder* in arguing that A.H.'s hearsay statements were admissible despite her

incompetence to testify. Given the holding in *B.B. v. Commonwealth* overruling these cases and the similar factual situation, we must conclude that the trial court, which did not have the benefit of the ruling in *B.B. v. Commonwealth*, erred by allowing admission of A.H.'s hearsay statements to Smallwood. Since these statements were clearly critical to the Commonwealth's case, we must set aside the conviction and remand this matter for a new trial.

Since we are remanding for a new trial, we will briefly address the other issues raised in Bridget's appeal. The Commonwealth argues that A.H.'s statements to Reynolds and Smallwood were admissible under the exception set out in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In *Crawford*, the United States Supreme Court held that a witness's testimonial out-of-court statements are barred under the Confrontation Clause, regardless of whether the statement is deemed reliable under a hearsay exception, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 51, 124 S.Ct. at 1364. The Commonwealth contends that A.H.'s statements to Reynolds and Smallwood were not "non-testimonial" in nature, and therefore not subject to the Confrontation Clause.

But in this case, the distinction is not relevant. The Court in *Crawford* stated that non-testimonial statements are not subject to Confrontation Clause scrutiny but may be admissible under the hearsay rules. *Id.* at 68, 124 S.Ct. at 1374. We have previously found that A.H.'s statements to Smallwood were not sufficiently reliable to warrant admission under KRE 803(4). Thus, even if the

statements are "non-testimonial," they are still not admissible under any hearsay exception.

On the other hand, A.H.'s statements to Reynolds were made in furtherance of the investigation of the alleged abuse and, therefore, would qualify as "testimonial" under *Crawford*. *Id.* at 52, 124 S.Ct. at 1364-65. Furthermore, as *B.B. v. Commonwealth* points out, there is no recognized exception to the hearsay rule for social workers or the results of their investigations. 226 S.W.3d at 51. *See also Souder*, 719 S.W.2d at 734. Consequently, the trial court erred by admitting A.H.'s statements to Reynolds.

The final evidentiary issue concerns the admission of A.H.'s statement to Charles. The Commonwealth maintains that the statements are admissible as prior consistent statements. Under KRE 801A(a)(2), a prior consistent statement may be "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]" But since none of A.H.'s statements otherwise meets the requirements for admissibility, her statements to Charles likewise cannot be admitted as a prior consistent statement or under KRE 806.

Lastly, Bridget contends that her trial was tainted by the Commonwealth's improper reference to prior bad acts in violation of KRE 404(b). Since we are remanding this matter for a new trial, the trial court will have another opportunity to consider whether these references are appropriate under the circumstances.

Accordingly, the judgment of conviction by the Madison Circuit Court is reversed, and this matter is remanded for a new trial in accord with this opinion.

ALL CONCUR.

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