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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001948-MR

CECIL BENNETT — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 16-CR-00588

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: Cecil Bennett appeals the Campbell Circuit Court's judgment upon a jury verdict convicting him of two counts of first-degree sexual abuse and sentencing him to six years' imprisonment. Bennett argues the trial court committed reversible error by untimely disclosing an exculpatory school record and excluding investigator testimony, thereby effectively depriving him of due

process by limiting his defense and denying him the ability to impeach witnesses. Finding no error, we affirm.

BACKGROUND

The victim in this case is S.C. She is the daughter of Tammy Riley's late husband's cousin. S.C. and her two-year-old sister came to live with them in 2000, when S.C. was four years old.

By the time S.C. turned sixteen and her sister was fourteen, in 2012, the household had grown. Tammy then had custody of her three-year-old grandson. Her fiancé, William "Bill" Caudill, was also living in the home, and he had custody of his step-granddaughter (four years old) and step-grandson (seven years old).

Around this time, forty-seven-year-old Bennett asked his cousin, Bill, if he could stay for a short time in an empty room in the basement. Bennett had just lost his apartment and needed a place to stay. Bill obliged.

All the children were assigned age-appropriate chores and received an allowance. S.C. was the oldest and her chores included caring for the younger children. She told a child advocacy counselor that sometimes she felt like a "teen-mom."

One night after a late arrival home from a camping trip, Tammy saw Bennett and S.C. watching a movie in the living room on the first floor. Because

of the late hour, Tammy said, "Movie night is over," and told S.C. it was time to go to bed. S.C.'s room was on the second floor. Tammy suggested to Bennett it was time for him to go down to his room in the basement, too. S.C. complied, but needed to go to the bathroom first.

The only bathroom in the home adjoined the living room. As she exited the bathroom, Bennett surprised her, turned her around, pushed her against the door, and lifted her off the ground by putting his hand under her bottom. He slid his hand beneath her shorts and inserted his fingers into her vagina. She slapped him. S.C. testified that Bennett threatened to kill her if she told anyone. Tammy then returned to the living room and asked what the noise was she heard. S.C. said it was nothing.

The next day, Bill asked S.C. to move laundry from the washer to the dryer. The laundry room was in the basement where Bennett resided. S.C. did not see Bennett's car parked on the street and thought he was absent from the home. She proceeded downstairs and started the chore. As she was placing clothes in the dryer, Bennett surprised her again, pushed her against the dryer, lifted her as he had the night before, and again inserted his fingers in her vagina. S.C. screamed and immediately went upstairs to tell Tammy. Tammy then told Bill. Bill attempted to confront Bennett as Bennett was fleeing the house. Bennett got to his car, drove away, and never returned.

Tammy took S.C. to the hospital, where she underwent a sexual assault exam. S.C. also spoke with a police officer.

Bennett had relocated to Kansas. That may explain the delay in prosecuting this case. Four years after the incident, the Commonwealth indicted Bennett on two counts of first-degree sexual abuse.

At some point during pretrial discovery, Bennett's counsel learned that S.C.'s school counselor had spoken to S.C. about an incident involving Tammy and S.C. in the autumn of 2011. There was an accusation that Tammy had struck S.C. The counselor referred the matter to the Cabinet for Families and Children. The Cabinet, whose representative made periodic site visits anyway, sent a worker who investigated but could not substantiate the incident.

Bennett's counsel requested access to the Cabinet's record and school counseling records regarding the incident. He believed the records would show S.C. lied to school counselors and Cabinet workers in the past. He was developing a defense theory that S.C. had fabricated false claims to give the Cabinet a reason to remove her to a different foster home.

Both the prosecution and defense counsel agreed the records should be reviewed *in camera* for any relevant information prior to release. The judge reviewed the records but did not release them, having determined they contained no information relevant to the charged crimes.

At trial, defense counsel asked Tammy on cross-examination whether S.C. had told a school counselor that Tammy had slapped her. Tammy said she had and explained a Cabinet investigation found no substantiation. (Video Record (V.R.) 7/11/17; 4:34:30.) Defense counsel also asked Bill, on cross-examination, the same question and Bill gave essentially the same answer. (V.R. 7/11/17; 5:22:00.)

When defense counsel cross-examined S.C. regarding this incident, she contradicted Tammy and Bill, denying that she told a school counselor that Tammy slapped her. About eleven minutes after this exchange, the judge called a recess and asked the attorneys to chambers. In this conference, the judge released the one-page record she had reviewed *in camera*, expressing her view that until S.C. denied telling her counselor Tammy struck her, the record contained no relevant information.

The subject record is a "Counseling Contact Log" and the only entry in the entire log is dated November 29, 2011, (9:56 a.m.), more than six months before the crime; it makes no mention of Bennett. In its entirety, it says:

> [S.C.] was brought to me by my NKU intern who discovered that [S.C.] was hit in the face by her mother this morning. After speaking with [S.C.] and getting specific details I contacted the Cabinet who will be sending a social worker to meet with [S.C.] today.[1]

[1] There is also a reference number but nothing in the record indicates its meaning or significance.

Although this record does not say S.C. told either the intern or the counselor directly that Tammy struck her, Bennett has taken the position that it implies as much and wanted to have it admitted into evidence for substantive and impeachment purposes.

After the conference in chambers, defense counsel returned to questioning S.C. about the incident in more detail.

> Q: You said that, Tammy never, Tammy Riley your mother, never slapped you?
>
> A: No.
>
> Q: And you never told a counselor at school that Tammy Riley slapped you?
>
> A: No.
>
> Q: So, you never told [names the school counselor] that Tammy Riley slapped you?
>
> A: No. We got disciplined, but not, she never smacked me.
>
> Q: Okay, so you never told [the school counselor] that the authorities needed to investigate?
>
> A: Um, not from me being smacked.

(V.R. 7/12/17; 11:22:34.)

After completing cross-examination of S.C., defense counsel told the trial court that he needed to call the counselor to testify and to introduce the school

record. The judge gave the defense the rest of the day, and the next morning, to locate and subpoena the counselor. Defense counsel was unsuccessful.

When trial resumed, the defense attempted to introduce the school records through Ron Kinmen, Director of Student Services at Dayton Independent Schools. The trial court held that, notwithstanding Kinmen's ability to authenticate the record, it remained inadmissible on hearsay grounds. He testified by avowal, thereby preserving this issue for appeal.

Defense counsel also believed two other prosecution witnesses testified inconsistently with interviews they had given to defense investigator Paul Long. Long said the two witnesses, S.C.'s boyfriend and S.C.'s sister, had told him S.C. described her assault to them in some detail. But S.C. testified she had not told either what had happened to her. S.C.'s boyfriend testified that S.C. had called him from the hospital but was not very forthcoming about the details. S.C.'s sister testified that Tammy had explained the incident to her and not S.C.

Defense counsel wanted Long to testify about the discrepancies. The trial court disallowed the testimony because defense counsel had not laid a proper foundation when questioning the boyfriend and sister. The defense moved to recall those witnesses for that purpose, but the trial court denied the request.

After the close of evidence, the jury deliberated and found Bennett guilty on both counts of sexual abuse and sentenced him to three years on each count, with the terms to run consecutively. This appeal followed.

STANDARD OF REVIEW

The standard of review regarding admission of evidence is whether there has been an abuse of discretion. *Mason v. Commonwealth*, 559 S.W.3d 337, 342 (Ky. 2018). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

ANALYSIS

Initial ruling of non-disclosure and non-admissibility of school record

Bennett argues the trial court erred in two ways regarding the one-page, one-paragraph school counselor's record he claimed showed S.C. reported that Tammy struck her. First, says Bennett, withholding the school record prejudiced his ability to present the substance of his defense theory – that S.C. wanted to leave the home and began making false representations of abuse, first against Tammy, and then against Bennett. Second, he says not allowing the counselor's note into evidence prevented his effective impeachment of S.C.'s credibility. We are not persuaded by either argument.

To support Bennett's theory of the case, he needed proof that S.C. falsely accused Tammy of slapping her. The school record only indirectly supports that fact. It does not say S.C. told anyone anything, but rather that an intern "discovered" Tammy had struck S.C. It is a conclusory statement by the intern, not S.C., that caused the counselor to proceed. How this discovery occurred remains speculative on this record and is no less likely to have been prompted by a classmate's statement to the intern as by S.C.'s own statement. Nor does the record's author, the school counselor, say S.C. told her Tammy struck her. It says only that she talked with S.C. and after "getting specific details" made a report to the Cabinet. That does not refute S.C.'s testimony that she told a school counselor that the authorities needed to investigate, but "not from me being smacked."

It is clear from the cross-examination of Tammy and Bill that Bennett knew all the facts necessary to identify the counselor before trial, to subpoena her, and to have her testify on his behalf. Disclosing the record was not necessary to accomplish that. Bennett's assertion that he was deprived of ample time to investigate S.C.'s allegation that Tammy slapped her is somewhat disingenuous.

Furthermore, before trial, Bennett could only infer that S.C. accused Tammy of slapping her. He presumed the counselor would confirm his inference. But, to Bennett's benefit, Tammy and Bill had drawn the same inference on better information than Bennett had, and they confirmed it with their testimony. If the

counselor's testimony confirmed the inference, too, it would have been cumulative evidence; if the counselor's testimony about the "specific details" S.C. told her was *not* that Tammy had struck her, it would have undermined Bennett's theory of the case.

Focusing on the specific evidentiary rulings, we still find the trial court did not abuse its discretion. The trial court initially found the record not relevant. That ruling was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles; therefore, it was not an abuse of discretion.

KRE[2] 401 defines relevant evidence as "evidence having any tendency 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." On its face, the school record says nothing about any fact of consequence to the determination of whether Bennett sexually abused S.C.

Whatever happened between mother and daughter in November 2011 has no obvious or apparent relevance to the crime with which Bennett was charged. We can find no abuse of discretion on this point.

Having affirmed the trial court's ruling that the record had no initial relevance, it logically follows that the record cannot be considered exculpatory evidence that should have been disclosed to Bennett sooner.

[2] Kentucky Rules of Evidence.

> Exculpatory evidence is defined as "evidence favorable to the accused and material to guilt or punishment, including impeachment evidence." [*Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003)]. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 433-38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (discussing the materiality standard); *Strickler v. Greene*, 527 U.S. 263, 289-96, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (same).

Dunn v. Commonwealth, 360 S.W.3d 751, 767-68 (Ky. 2012).

We conclude the record was not only irrelevant; it was immaterial. The result of the proceeding would not have been different if the record had been disclosed to Bennett sooner. Bennett clearly knew of the incident. Otherwise his cross-examination of Tammy and Bill would not have included questions about it. The jury heard Tammy and Bill testify that S.C. did tell someone Tammy struck her in a more conclusory way than even the record itself portrays. Then the jury heard S.C. deny it. If Bennett's goal was to have the jury hear S.C. had falsely accused Tammy of striking her, that goal was met. If his further goal was to have her testimony about the incident refuted to undercut her credibility as a witness, he accomplished that goal as well. *McKinney v. Commonwealth*, 60 S.W.3d 499, 504 (Ky. 2001) (jury is "free to weigh the credibility of each witness and draw its own conclusions").

And although Bennett argues the case against him "depended entirely upon the credibility of a sophomore in high school who wanted to leave her foster home[,]" (Appellant's brief, p. 1), the case was based on much more evidence than that. There was evidence that when Bennett committed the first act of sexual abuse Tammy heard a noise coming from near the bathroom and came into that area of the house for an explanation. Tammy and Bill testified to the actions of S.C. and Bennett immediately after the second assault and those actions were consistent with the commission of the charged crime. There was evidence of Bennett's flight from the premises with no other explanation than his guilt. "[E]vidence of flight . . . has a tendency to make the existence of the defendant's guilt more probable: a guilty person probably would act like a guilty person." *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 219 (Ky. 2003). Testimony from law enforcement and medical professionals also supported the conviction.

Bennett's argument that this Court should find his constitutional due process rights violated is not persuasive. An exclusion of evidence will be declared unconstitutional only when it "*significantly undermines* fundamental elements of the defendant's defense." *Harris v. Commonwealth*, 134 S.W.3d 603, 608 (Ky. 2004) (emphasis added) (brackets omitted) (quoting *United States v. Scheffer*, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-68, 140 L.Ed.2d 413 (1998)). Excluding the record did not significantly undermine fundamental elements of

Bennett's defense. We find no due process violation because we find no abuse in the trial court's initial ruling that the record was irrelevant. We further find the school record was neither exculpatory nor material.

Subsequent ruling record was inadmissible for impeachment purposes

Bennett argues that after the trial court disclosed the school record, it erred by prohibiting him from using it to impeach S.C. He claims the document is admissible pursuant to KRE 803(6), the business records exception to the hearsay rule, and that it was error to prohibit its use for impeachment. We disagree.

We first note that Bennett's brief does not include a reference to the record showing whether the issue was properly preserved and, if so, in what manner. Therefore, we proceed presuming Bennett did not argue at trial the hearsay rule's business records exception contained in KRE 803(6).

In any event, that rule is not controlling here. Rather, KRE 608 is the applicable rule; it provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry under

> this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.

KRE 608(b).

This rule prohibits the use of the record to impeach S.C. but does establish the basis upon which to cross-examine her, which is exactly what Bennett did. *Miller v. Commonwealth*, 585 S.W.3d 238, 243 (Ky. App. 2018), *disc. rev. denied* (Ky. Oct. 24, 2019) ("KRE 608(b) . . . allows *inquiry* into a witness's specific instances of past conduct for purposes of impeachment, not *extrinsic evidence*.").

Furthermore, our Supreme Court has said, "[A]lthough there is no provision in the Kentucky Rules of Evidence prohibiting impeachment on collateral facts, we have consistently recognized that prohibition as a valid principle of evidence." *Metcalf v. Commonwealth*, 158 S.W.3d 740, 745 (Ky. 2005) (citations omitted). This rule has been modified when the other party opens the door to the collateral fact on direct examination, but remains a rule of prohibition otherwise, as our Supreme Court recently stated as follows:

> "[O]ur case law continues to hold that impeachment on collateral matters by extrinsic evidence is not allowed." We identified in [*Commonwealth v.*] *Prater* [324 S.W.3d 393, 397 (Ky. 2010)] that "decisions on collateralness fall within the discretion of the judge and are reviewed for abuse of that discretion . . . ." We must note, however, that this rule announced in *Prater* applies ***"when a party has opened the door to such issues."*** We also note that the

> party that "opened the door" to the impeachment in *Prater* was the *opposing* party.

Tigue v. Commonwealth, 600 S.W.3d 140, 153 (Ky. 2018) (emphasis in original) (footnotes omitted).

The incident resulting in the Cabinet's investigation in 2011 was a collateral matter; extrinsic evidence regarding that matter for purposes of impeachment is still prohibited. *Id.*

Boyfriend's and sister's prior inconsistent statements

Bennett next argues the trial court erred by excluding Paul Long's testimony from his notes, and the notes themselves, regarding interviews he conducted with S.C.'s boyfriend and S.C.'s sister. Bennett argues both testified inconsistently and could have been impeached by proof of prior inconsistent statements to Long. The trial court held that Bennett failed to establish the requisite foundation to allow the admission of Long's testimony. We agree.

KRE 613 governs the standard for confronting a witness with a prior statement. It provides:

> Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the trial or hearing of the witness sought to be

> contradicted, and when the court finds that the impeaching party has acted in good faith.

KRE 613(a); *see also Mounce v. Commonwealth*, 795 S.W.2d 375, 378 (Ky. 1990) ("Evidence of these inconsistent statements may not be introduced unless the witness who is alleged to have made the statement is examined about it with respect to the circumstances of time, place, and persons present.").

When the boyfriend and the sister were on the stand, Bennett failed to ask them questions about their respective conversations with Long sufficient to satisfy this rule. The trial court did not abuse its discretion in disallowing Long's testimony in this area.

Bennett further claims the court erred by refusing to allow him to recall the boyfriend and the sister, so he could establish the requisite foundation. Again, we disagree.

The trial court has wide discretion in allowing a witness to be recalled. *McQueen v. Commonwealth*, 88 S.W. 1047, 1048 (Ky. 1905); *Veach v. Commonwealth*, 572 S.W.2d 417, 419 (Ky. 1978); *Kinser v. Commonwealth*, 741 S.W.2d 648, 652 (Ky. 1987). As the trial court correctly pointed out, Bennett called the boyfriend and the sister as defense witnesses. When he finished examination and passed the witnesses, respectively, for the prosecution's cross-examination, he thereby limited any subsequent redirect questioning to the substance of the cross-examination. *Brown v. Commonwealth*, 174 S.W.3d 421,

431 (Ky. 2005) ("[R]edirect examination should be limited to questions explaining matters that have been developed on cross-examination."). As the trial court also pointed out, Bennett would not have been allowed to ask the foundational questions on redirect.

The trial court "shall 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." KRE 611(a). We review a trial court's exercise of that control for abuse of discretion. *Burke v. Commonwealth*, 506 S.W.3d 307, 321 (Ky. 2016). Here, we find no abuse of discretion in the trial court's decision not to allow Bennett to recall the two witnesses.

CONCLUSION

For the foregoing reasons, we affirm.

ALL CONCUR.

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