

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000818-DG

D.T.B., A CHILD UNDER EIGHTEEN

APPELLANT

ON DISCRETIONARY REVIEW FROM WHITLEY CIRCUIT COURT
v. HONORABLE DAN BALLOU, JUDGE
ACTION NO. 12-XX-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND
REMANDING

** ** *

BEFORE: COMBS, STUMBO, AND THOMPSON, JUDGES.

COMBS, JUDGE: This case is before us on a grant of discretionary review to D.T.B., the appellant. D.T.B., a minor, was adjudicated guilty of sexual abuse in the first degree and was committed to the Department of Juvenile Justice as a juvenile sex offender. After our review, we vacate and remand.

In January 2011, D.T.B., who was a male of fifteen years of age, was placed with foster parents who were caring for another foster child. They also had two children of their own: C.C, age three, and a child seven years of age. On March 8, 2011, C.C.'s father discovered D.T.B. and C.C. together on D.T.B.'s bed under what he perceived to be suspicious circumstances. Based on this incident, the Commonwealth pursued charges which resulted in an adjudication hearing before the district court on April 2, 2012.

Because the alleged victim was three years of age and the parties agreed that he was incompetent to testify, the Commonwealth sought to introduce statements that C.C. made to Tracy Miller. Miller is employed by the Child Advocacy Center as a therapist and forensic interviewer. C.C.'s disclosures to her were made during his interview. Forensic interviews are a standard component of sexual abuse investigations. They are utilized to obtain information about the alleged abuse; they also serve the purpose of determining the extent of children's injuries and whether they need medical or mental therapy.

The court permitted Miller to testify about statements that C.C. made during his interview. However, the court did not allow her to give any testimony regarding the identity of an alleged perpetrator.

The Commonwealth also introduced testimony from KSP Trooper Michael King and C.C.'s father, who related the incident that he had witnessed. D.T.B. offered the report from C.C.'s medical examination, which concludes as follows: "[t]here is no actual physical evidence of sexual abuse in this case [*sic*] however

the lack of physical evidence does not exclude the possibility that sexual abuse or assault has occurred.” Finally, D.T.B. testified in his own behalf, denying that he had done anything inappropriate to C.C.

In its disposition order of July 24, 2012, the district court found that D.T.B. was a juvenile sex offender and ordered mandatory commitment to the Department of Juvenile Justice. D.T.B. appealed to the Whitley Circuit Court. On March 5, 2013, the circuit court affirmed the findings of the district court. D.T.B. filed a motion for discretionary review in this Court on May 18, 2013. We granted review on August 12, 2013.

D.T.B. claims that the proceedings against him were flawed because the court erroneously admitted Miller’s testimony concerning the statements made to her by C.C.

Our standard of review for evidentiary issues is whether the trial court abused its discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (*overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008)). Our Supreme Court has defined abuse of discretion as a court’s acting arbitrarily, unreasonably, unfairly, or in a manner “unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The district court admitted the disputed testimony pursuant to Kentucky Rules of Evidence (KRE) 803(4), which provides the following exception to the prohibition against hearsay testimony and allows admission of:

Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

D.T.B. argues that Miller's forensic interview of C.C. was not undertaken for medical treatment or diagnosis and that, therefore, it did not meet the qualifications for the exception. We disagree.

Miller testified that she is a licensed therapist¹ employed by the Center for Children's Advocacy. In that capacity, she conducts forensic interviews of alleged victims of abuse. As noted above, one of the primary purposes of a forensic interview is to determine what sort of injuries the child has suffered and whether the child needs further treatment – physical or psychological. Our Supreme Court has held that statements made by an alleged victim during an assessment performed by a therapist are admissible under KRE 803(4). *Commonwealth for Health & Family Services. v. A.G.G.*, 190 S.W.3d 338, 344 (Ky. 2006). It would appear that Miller's testimony was acceptable according to this exception.

Nonetheless, Kentucky law currently would exclude Miller's testimony because of C.C.'s incompetence. Two cases spanning twenty-seven years both clearly stand for the precedent that a child who is incompetent to testify cannot do so by recourse to KRE 803(4) under the circumstances of this case.

¹ In its brief, the Commonwealth cites to several cases which hold that the testimony of social workers regarding children's statements is inadmissible. However, those cases are irrelevant here because Miller is a therapist, not a social worker. See *Alexander v. Commonwealth*, 2008 WL 4291541 at *3 (Ky. Sept. 18, 2008).

In *Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990), the Supreme Court of Kentucky declared unconstitutional a statute that sought to permit the vicarious testimony of a child victim in a manner similar to the case before us. The Court held that the statute had usurped the power of the judiciary alone to determine the competency of children to testify as witnesses. In violating the constitutional separation of powers doctrine, the statute also violated constitutional guaranties of due process and the right of an accused to confront his accusers:

Fundamental guarantees to the criminally accused of due process and confrontation, established by both the United States and Kentucky Constitutions, are transgressed by a statute purporting to permit conviction based on hearsay where no traditionally acceptable and applicable reasons for exceptions apply. The reasons for exceptions to the hearsay rule are grounded not just on need, but on guarantees of trustworthiness which are the substantial equivalent of cross-examination. The statute presently under consideration fails to meet such essential requirements. As stated in *Commonwealth v. Willis*, Ky., 716 S.W.2d224, 233 (1986), Leibson, J., concurring:

“It is important to protect the sensibilities of a child, but it is more important to protect the accused’s right to properly defend himself within the law as guaranteed by the Constitution. No person should be convicted of a felony and sent off to prison when he has not been able to defend himself as guaranteed by the Constitution of the United States and the Constitution of the Commonwealth of Kentucky.”

Id. at 382-383.

The *Drumm* Court then proceeded to adopt a federal rule (the counterpart of our Kentucky rule, KRE 803(4) , at the center of the case before us) to permit treating physicians to testify as to diagnostic, investigative hearsay. In a strong dissent joined by two other Justices, Justice Vance protested adoption of the rule pertaining to physician testimony as follows:

I think, also, that we should be particularly cautious about admitting into evidence the out-of-court statements to a physician of any child who is not competent to testify in person because a child whose understanding is not sufficient to allow him to testify might well also fail to understand that the recovery of his health is dependent upon the truth of his statements to the doctor.

The reason we exclude hearsay testimony in any case is that the declarant is not subject to cross-examination and that there is no sufficient guarantee of the trustworthiness of the out-of-court statement. That is the difficulty here. There is no way to determine the trustworthiness of the out-of-court statements of a child whose lack of understanding renders him incompetent to testify. *If the out-of-court statements are not allowed in evidence, a child molester may go free. If they are allowed into evidence, an entirely innocent person may be imprisoned.*

Id. at 386-387. (Emphasis added.)

Justice Vance aptly summarized the countervailing principles of jurisprudence at issue in *Drumm* and in the case before us. His dissent expressing his reservations about KRE 803(4) was reiterated by the Supreme Court in *B.B. v.*

Commonwealth, 226 W.W.3d. 47 (Ky 2007). Citing extensively from that dissent, the court in *B.B.* held as follows:

...we adopt the view of Professor Lawson, that testimonial incompetence of 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.

Id. at 51.

In the case before us, Kentucky precedent dictates that the error was not harmless. The test for harmless error is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946). There is no doubt that Miller's testimony in repeating C.C.'s statements had substantial and compelling influence. The Commonwealth's only other proof was the testimony of C.C.'s father, who said that he did not see what was happening underneath blankets. The medical report was inconclusive, and D.T.B. testified that he had not inappropriately touched C.C. Therefore, we are compelled to remand for a new proceeding.

This case presents to us once again the seemingly inscrutable dilemma of attempting to vindicate the most helpless of victims -- minor children -- and yet to insure the presumption of innocence to the accused with the due process right to confrontation entailed in that guarantee. We can offer neither wisdom nor rule to resolve that conundrum since Kentucky law is clear that the

vicarious testimony of the child is barred. It is up to the Supreme Court to address and hopefully to resolve the inequity inherent in the decision that we are compelled to reach. It would appear that *B.B., supra*, bans all testimony (that of physician, therapist, nurse, or social worker) that emanates from one incompetent to testify. Perhaps the Supreme Court can craft a remedy to insure the safety of the young victims as well as the protection of the accused -- such as videotaping the interview of a child victim for impartial jury review.

Because we are remanding, it is unnecessary for us to address D.T.B.'s remaining arguments.

We vacate the order of the Whitley Circuit Court and remand to the district court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Renee VandenWallBake
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky