

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
April 1, 2014 Session

**STATE OF TENNESSEE v. COY MCKAUGHAN**

**Appeal from the Criminal Court for Shelby County**  
**No. 10-00690 James Lammey, Jr., Judge**

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**No. W2013-00676-CCA-R3-CD - Filed June 2, 2014**

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In this appeal, the Defendant contends that the trial court committed reversible error by admitting the video-recorded forensic interview of the child-victim at trial. Specifically, he contends that the admission of the interview was improper for the following reason: Tennessee Code Annotated section 24-7-123, the statute under which the video interview was admitted, is unconstitutional because it is in conflict with the existing rules of evidence and established case law and violates the separation of powers clause of the Tennessee Constitution. After reviewing the record and the applicable authorities, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

R. Todd Mosley, Memphis, Tennessee, for the appellant, Coy McKaughan.

Robert E. Cooper, Jr., Attorney General and Reporter; J. Ross Dyer, Senior Counsel; Amy P. Weirich, District Attorney General; Jennifer Nichols and Terre Fratesi, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**  
**FACTUAL BACKGROUND**

Because this appeal is solely focused on the constitutionality of Tennessee Code Annotated section 24-7-123, we will limit our recitation of the background information to the procedural history of the case and a brief recount of the facts relevant to this appeal. The Defendant was indicted on January 28, 2010, for the September 3, 2009 aggravated sexual battery, a Class B felony, of his then six-year-old step-daughter. The State requested a

hearing to determine the admissibility of a video recording of the victim's forensic interview, and that hearing was held on November 29, 2012. After hearing the testimony from the victim, the team services director, and the forensic examiner, both employed with the Memphis Child Advocacy Center, and watching the interview, the trial court determined that the evidence was reliable and ruled that it was admissible at trial. The Defendant's trial was held December 10-13, 2012. At trial, that video interview was admitted, and the victim also testified. At the conclusion of the trial, the jury found the Defendant guilty as charged in the indictment. Subsequently, the trial court sentenced him to serve twelve years at 100 percent in the Department of Correction. The Defendant then filed a motion for new trial, alleging, among other things, that "the trial court erred in allowing the State to introduce the video of the forensic interview with the victim." The trial court overruled the Defendant's motion via form order on February 22, 2013, and the Defendant filed a timely appeal.

### ANALYSIS

On appeal, the Defendant contends that the trial court erred by allowing a video recording of the child-victim's forensic interview to be admitted at trial. The Defendant contends that Tennessee Code Annotated section 24-7-123, the statute under which the video interview was admitted, is unconstitutional because (1) it is in conflict with the existing rules of evidence; (2) it is contrary to established case law; and (3) it violates the separation of powers clause of the Tennessee Constitution. The Defendant asserts that, for these reasons, the admission of the interview constituted reversible error. The State responds that the video interview was properly admitted because Tennessee Code Annotated section 24-7-123 is neither in conflict with any existing Tennessee case law nor the rules of evidence; further, section 24-7-123 does not violate the separation of powers clause. The State explains that our state supreme court has upheld legislative proscription of the rules of evidence as long as it does not "strike at the very heart of a court's exercise of judicial power"; the statute at issue does not violate such notion as it is simply permissive, and discretion regarding admission of the evidence remains with the trial court. We agree with the State.

Tennessee Code Annotated section 24-7-123 allows a child-victim's forensic interview to be introduced into evidence, at the discretion of the trial judge, if certain requirements are met. It states,

a video recording of an interview of a child by a forensic interviewer containing a statement made by the child under thirteen (13) years of age describing any act of sexual contact performed with or on the child by another is admissible and may be considered for its bearing on any matter to which it is relevant in evidence at the trial of the person for any offense arising from the

sexual contact if the requirements of this section are met.<sup>1</sup>

See Tenn. Code Ann. § 24-7-123(a) (footnote added). The statute goes on to provide that the video recording must be shown to the trial court in a hearing, conducted pre-trial, and possess “particularized guarantees of trustworthiness[.]” which is to be determined by the court. See id. § 24-7-123(b)(2). In making such determination, the statute outlines several factors for the trial court to consider:

- (A) The mental and physical age and maturity of the child;
- (B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;
- (C) The timing of the child’s statement;
- (D) The nature and duration of the alleged abuse;
- (E) Whether the child’s young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child’s knowledge and experience;
- (F) Whether the statement is spontaneous or directly responsive to questions;
- (G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;
- (H) Whether extrinsic evidence exists to show the defendant’s opportunity to commit the act complained of in the child’s statement;
- (I) The relationship of the child to the offender;
- (J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and
- (K) Any other factor deemed appropriate by the court[.]

Id. § 24-7-123(2) (A)-(K) (emphasis added). If the court determines that the video recording

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<sup>1</sup>The Defendant is not appealing on grounds that the requirements of the statute at issue were not met, only that the statute is unconstitutional; therefore, we will restrict our analysis to the latter.

is not trustworthy, the inquiry ends, and the evidence will not be admitted. See id. Ultimately, discretion regarding the admissibility of the evidence remains with the trial court.

### *I. Conflict with the Rules of Evidence*

The Defendant first asserts that Tennessee Code Annotated section 24-7-123 directly conflicts with Tennessee Rule of Evidence 803(25), which allows for the introduction of children's hearsay statements in certain civil cases. Rule 803(25) states,

Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation. Declarants of age thirteen or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

The Defendant essentially argues that because Tennessee Code Annotated section 24-7-123 allows for the introduction of a child's forensic interview in criminal cases, it conflicts with the already existing Rule 803(25). Although Rule 803(25) solely applies to civil cases, there is nothing in the language of that rule that precludes such evidence's admission in a criminal case nor that would foreclose the possibility that another rule might authorize the same. Therefore, the Defendant's assertion that Rule 803(25) and section 24-7-123 conflict is without merit.

### *II. Contrary to Established Case Law*

The Defendant further contends that section 24-7-123 is contrary to established case law, noting that in State v. Ackerman, 397 S.W.3d 617 (Tenn. Crim. App. 2012), this court held that forensic interviews were inadmissible hearsay. In Ackerman, the State sought to introduce the child-victim's forensic interview as evidence of a prior inconsistent statement. Id. at 635; see Tenn. R. Evid. 613(b), 803(26). The child was very young at the time the alleged abuse occurred, and at trial, she testified that she had no memory of the incident but that she had made the statements in the video and that they were "the truth." Id. at 638-39.

On appeal, this court found that admission of the evidence under Rule 613(b) was improper because the child's statements describing the abuse on the video and her statement in court that she had no recollection of the incident were not inconsistent, as required by this particular rule. See id. ("To be admissible as substantive evidence via Rule 803(26), a statement must first be admissible as a prior inconsistent statement via Rule 613(b)."). The court held that because the video recording was hearsay and did not satisfy the requirements for admission as a prior inconsistent statement under Rule 613(b), thus precluding its applicability under Rule 803(26), it should not have been admitted. Id. at 639 (reviewing other avenues of admission and concluding that the recording was also inadmissible under Rule 803(5) because the record established that "the video recording was not made by the victim, and no proof satisfied the adoption requirement of 803(5)").

Contrary to that in Ackerman, the forensic interview in the present case was admitted pursuant to Tennessee Code Annotated section 24-7-123 and not the Rules of Evidence. Therefore, while Ackerman did hold in that particular case that the interview was inadmissible hearsay, its analysis relied solely upon the admissibility of the video recording under Tennessee Rules of Evidence 803(26) – via 613(b) – and 803(5). That court did not hold, as the Defendant contends, that all child forensic interviews were per se inadmissible hearsay. Thus, Ackerman is easily distinguishable from the instant case, and the Defendant's argument – that applying section 24-7-123 to admit the victim's forensic interview was unconstitutional because it conflicts with existing case law – is without merit.

### *III. Violates the Separation of Powers Clause*

Finally, the Defendant contends that Tennessee Code Annotated section 24-7-123 is unconstitutional because it violates the separation of powers clause of the Tennessee Constitution. Article II, section 1, of the Tennessee Constitution states, "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial." Section 2 further states, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." The judiciary has "the inherent power to promulgate rules governing the practice and procedure of the courts of the state[,]" and as a general rule, "this power cannot be constitutionally exercised by any other branch of government." State v. Mallard, 40 S.W.3d 473, 481 (Tenn. 2001). However, in Richardson v. Young, 125 S.W. 664 (Tenn. 1910), the Tennessee Supreme Court noted that although many early political scientists thought that the "absolute separation" of the legislative, executive, and judicial branches was "essential to a republican form of government," the Tennessee Constitution rejected this strict separation. Id. at 668. Furthermore, our supreme court has repeatedly stated that, despite the clear expression of the separation of powers doctrine in Article II and elsewhere, "it is impossible to preserve perfectly the theoretical

lines of demarcation between the executive, legislative and judicial branches” and that “there is, by necessity, a certain amount of overlap because the three branches of government are interdependent.” Mallard, 40 S.W.3d at 481 (quoting Petition of Burson, 909 S.W.2d 768, 774 (Tenn. 1995)) (internal quotation marks omitted); Underwood v. State, 529 S.W.2d 45, 47 (Tenn. 1975); see Bank of Commerce & Trust Co. v. Senter, 260 S.W. 144, 151 (Tenn. 1924); see also Richardson, 125 S.W. at 668 (explaining that “many important matters [were] vested in each [branch of government,] powers and authority that in strictness would belong exclusively to the others; and in some instances all departments are vested with the same power, to be exercised concerning different matters, and this is especially noticeable in the vestiture of political powers”).

With this principle in mind, Tennessee courts have “consented to the application of procedural or evidentiary rules promulgated by the legislature . . . [w]hen legislative enactments (1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court[.]” Mallard, 40 S.W.3d at 481; see e.g., Newton v. Cox, 878 S.W.2d 105, 112 (Tenn. 1994) (upholding legislative regulation of attorneys when the regulation (1) did not “directly conflict with the Supreme Court’s authority,” and (2) was merely “designed to declare” public policy). The court also noted that “the consent of the courts to legislative regulation of inherent judicial authority is purely out of considerations of inter-branch comity,” which is “beneficial to all, and consistent with constitutional principles.” Mallard, 40 S.W.3d at 481. Further, “[w]hile it is sometimes difficult to practically ascertain where [a]rticle II, section 2 draws the line, the distinction may be simply stated as that between cooperation and coercion.” Id. at 481-82.

In Mallard, the defendant challenged a statute requiring the admission of prior convictions relating to controlled substances when Tennessee Rule of Evidence 404(b) would otherwise render that evidence inadmissible. Id. at 477. The court noted that the inherent powers of the judiciary include “the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved.” Id. at 483 (citing Morrow v. Corbin, 62 S.W.2d 641, 645 (Tex. 1933)). Therefore, “any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand.” Id. The court stated that if the statute at issue were strictly construed, it would “represent a legislative attempt to remove a judge’s discretion to determine what evidence is logically or legally relevant to an ultimate fact of consequence.” Id. Nevertheless, the court, “presum[ing] that the legislature did not intend to infringe upon the proper exercise of the judicial power[.]” stated that “it seem[ed] clear that the legislature intended only to suggest factors for trial courts to consider when assessing whether an object constitutes drug paraphernalia in order to minimize the risk of arbitrary or discriminatory

enforcement of the law” and that, when read in this way, the statute passed constitutional muster. Id. The court further stated that “[b]ecause the legislature did not intend for the factors in [the statute] to be absolute or preemptive, and because the legislature did not intend to remove the discretion of the trial judge to determine the logical or legal relevance of such evidence, the statute supplements the rules of evidence and should be permitted to operate to the fullest extent allowed by the rules.” Id. at 485 (emphasis added).

Recently, in Mansell v. Bridgestone Firestone, 417 S.W.3d 393 (Tenn. 2013), our supreme court interpreted and applied Mallard in the context of the workers’ compensation statute. See id. at 402-06. In Mansell, the employee argued that the statute creating the medical impairment rating (“MIR”) process was unconstitutional because it conflicted with the Rules of Evidence, which govern the appointment of experts as well as the admission of their testimony. Id. at 404. The court noted that “because the MIR statutes are specifically tailored to certain, limited circumstances within the overall workers’ compensation scheme, [it could not] conclude that the MIR process ‘strike[s] at the heart of the court’s exercise of judicial power.’” Id. at 406 (quoting Martin v. Lear Corp., 90 S.W.3d 626, 631 (Tenn. 2002)). Therefore, although the court recognized that the MIR statutes did place some limitations on the ability of a trial court to determine the admissibility of expert testimony, the statutes were not in conflict with the rules of evidence. Id. at 404-05. Further, despite “the court’s preliminary ‘gatekeeper’ function [being] somewhat restricted,” our supreme court observed that the statute did not “dictate the ultimate judicial determination of the court.” Id. at 405 n.6.

We conclude that both Mallard and Mansell are analogous to the instant case. While section 24-7-123 does provide an avenue for otherwise inadmissible evidence to be admitted at trial, which is an encroachment on the inherent powers of the judiciary, the ultimate decision on its reliability and admissibility remains within the trial court’s sound discretion. Further, even though the legislature sets out a list of factors in the statute for the trial court to consider when making the determination of whether the evidence has guarantees of trustworthiness, the list is merely suggestive, and the very last factor is a catchall that provides the trial court with even more discretion regarding what facts it deems appropriate to consider. Most importantly, as noted by our supreme court, “we have a ‘duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution.’” State v. White, 362 S.W.3d 559, 566 (Tenn. 2012) (citing Davis–Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 529 (Tenn. 1993)); see also Keen v. State, 398 S.W.3d 594, 615 (Tenn. 2012) cert. denied, (U.S. 2013) (Justice Wade noting that “a fundamental rule of statutory construction is that this Court has ‘an obligation to interpret statutes in a way that preserves their constitutionality’” and that, if possible, “we should avoid an interpretation of legislation that ‘places it on a collision course’ with the state or federal constitutions.”); Jackson v.

Smith, 387 S.W.3d 486, 495 (Tenn. 2012). Therefore, akin to the Mallard court, we elect to view section 24-7-123 as a permissible “supplement” to the rules of evidence because it neither attempts to remove the trial court’s discretion to determine what evidence is logically or legally relevant to an ultimate fact of consequence nor completely usurps the court’s preliminary “gatekeeper” function and dictate “the ultimate judicial determination[.]” See Mallard, 40 S.W.3d at 481; Mansell, 417 S.W.3d at 405. As such, the Defendant’s assertion that Tennessee Code Annotated section 24-7-123 violates the separation of powers clause is without merit, and he is not entitled to relief on this issue.

### CONCLUSION

Based upon the foregoing, we affirm the judgment of the trial court.

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D. KELLY THOMAS, JR., JUDGE