

RENDERED: SEPTEMBER 10, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002028-MR

ROSA J. JOHNSON

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 07-CR-00016-002

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2008-CA-002391-MR

MARK ANTHONY RUTHERFORD

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 07-CR-00016-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

VANMETER, JUDGE: Mark Anthony Rutherford appeals from the judgment of the Whitley Circuit Court sentencing him to eight years' imprisonment for child abuse in the first degree. Rosa J. Johnson appeals from the judgment of the Whitley Circuit Court sentencing her to twelve months' imprisonment, probated for two years, for child abuse in the third degree. For the following reasons, we affirm both judgments.

These appeals arise from the prosecution of Rutherford and Johnson as co-defendants for the abuse of Johnson's daughter. In January 2007, Rutherford and Johnson resided together with Johnson's minor daughter from a previous relationship. On the evening of January 9, 2007, Rutherford spanked Johnson's daughter twice for spilling apple juice on the couch. Rutherford claimed after the spanking the daughter fell while he playfully chased her around the house. Additionally, Rutherford claimed that on the same night he accidentally struck the daughter with his belt when he swung it around a doorway without knowing she was on the other side.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

The following day, while the daughter was at daycare, an employee of the daycare noticed bruises on her back. The employee contacted child protection services which sent two people to investigate the matter. The investigators examined the daughter and observed bruises on her back, buttock, and left leg that implicated strikes with a belt. The investigators then contacted Detective Tim Helton of the Kentucky State Police.

After viewing the bruises, Det. Helton asked Rutherford and Johnson to drive to the police station for questioning. Johnson initially told a police officer that she was at the home during the spanking incident and witnessed Rutherford lightly spank her daughter two to three times. However, after viewing pictures of the bruises, Johnson told the police she was actually at the grocery store when the spanking occurred, and Rutherford had asked her to lie to the police before the interview.

Rutherford and Johnson were tried as co-defendants before a jury on July 23, 2008. At the close of the Commonwealth's case-in-chief, both Rutherford and Johnson moved for a directed verdict, which the trial court denied.

Rutherford was convicted of criminal abuse in the first degree and sentenced to eight years. Johnson was convicted of criminal abuse in the third degree and sentenced to twelve months, probated for two years. These appeals followed.

Both Rutherford and Johnson contend the trial court erred by denying their motions for a directed verdict because the Commonwealth failed to present sufficient evidence of each crime. Specifically, Rutherford claims the

Commonwealth did not prove he intentionally spanked the child or that he caused cruel punishment to the child. Johnson contends the Commonwealth did not provide evidence she was at the home during the spanking. We disagree.

Upon consideration of a motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citations omitted).

Rutherford was convicted of criminal abuse in the first degree, defined by KRS 508.100 as follows:

(1) A person is guilty of criminal abuse in the first degree when he intentionally abuses another person or permits another person of whom he has actual custody to be abused and thereby:

(a) Causes serious physical injury; or

(b) Places him in a situation that may cause him serious physical injury; or

(c) Causes torture, cruel confinement or cruel punishment;

to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

In this case, Rutherford told the police he spanked the child on the evening of January 9, 2007, and later testified that he did spank the child. Despite Rutherford's argument that no evidence was presented to show he caused cruel punishment to the child, the Commonwealth presented evidence of the extensive bruising on the child's back, buttocks, and thighs the day after the spanking. Thus, sufficient evidence was presented for the jury to conclude Rutherford spanked the child and the spanking caused the extensive bruising. Kentucky law is clear that the jury's function is "to determine whether the amount of force used during a spanking constitutes cruel punishment." *Canler v. Commonwealth*, 870 S.W.2d 219, 222 (Ky. 1994). Since sufficient evidence existed for the jury to conclude beyond a reasonable doubt that Rutherford spanked the child and that the spanking was cruel punishment, the trial court did not err by denying Rutherford's motion for a directed verdict.

Johnson was convicted of criminal abuse in the third degree, defined by KRS 508.120 as follows:

(1) A person is guilty of criminal abuse in the third degree when he recklessly abuses another person or permits another person of whom he has actual custody to be abused and thereby:

(a) Causes serious physical injury; or

(b) Places him in a situation that may cause him serious physical injury; or

(c) Causes torture, cruel confinement or cruel punishment;

to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

Here, although Johnson testified to being out of the house when the spanking incident occurred, the Commonwealth presented evidence that Johnson originally told police that she was at home when Rutherford spanked the child. Additionally, though Johnson testified she was not aware of the severe bruises until she saw pictures at the police station, evidence was presented that she dressed the child the morning after the spanking, though Johnson claimed it was in the dark and she could not see any bruises. When conflicting testimony is presented, it is the jury's role "to determine the credibility of the witnesses and the weight to be given their testimony, and in the exercise of that function they may believe one witness though contradicted by a number of others, or one set of witnesses to the exclusion of others." *Bowling v. Commonwealth*, 318 S.W.2d 53, 55 (Ky. 1958). Thus, sufficient evidence was presented for the jury to conclude Johnson recklessly permitted Rutherford to abuse her child. Accordingly, the trial court did not err by denying Johnson's motion for a directed verdict.

The judgments of the Whitley Circuit Court are affirmed.

DIXON, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, CONCURS IN PART AND
DISSENTS IN PART.

LAMBERT, SENIOR JUDGE, CONCURRING IN PART AND

DISSENTING IN PART: I concur with the majority opinion with respect to the conviction of Appellant Anthony Rutherford. However, I dissent with respect to Appellant Rosa J. Johnson.

I believe the trial court erred in failing to grant Johnson's motion for directed verdict. There was no evidence that she participated in the abuse of the child and only the slightest evidence that she was at all complicit in the abuse inflicted on the child.

The only evidence of her presence at the time the abuse occurred was clearly contrived to protect Rutherford. She then recanted her initial story to police on seeing the bruises on the child and revealed that she was away at a grocery store. The majority opinion concedes that, at the earliest, she became aware of the abuse well after it occurred.

The Commonwealth must present evidence from which a reasonable jury could believe beyond a reasonable doubt that the defendant is guilty of the crime charged. In my view, the Commonwealth's evidence failed to reach this threshold. *Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky. 1977). *Johnson v. Commonwealth*, 885 S.W.2d 951 (Ky. 1994).

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