

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000194-MR

JACOB CONDER

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE SAMUEL T. WRIGHT III, JUDGE  
ACTION NO. 10-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART  
AND REMANDING

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BEFORE: LAMBERT, THOMPSON AND VANMETER, JUDGES.

VANMETER, JUDGE: Jacob Conder appeals from the Letcher Circuit Court's judgment convicting him of sexual abuse in the first degree, sentencing him to one-year imprisonment, and ordering him to pay court costs. For the following reasons, we affirm in part, reverse in part and remand.

Conder, along with a group of minors and adults associated with the Cross Point Baptist Church in Owensboro, Kentucky, participated in a “mission trip” to Letcher County, Kentucky, from June 21 through June 27, 2009. During the trip, the group stayed at Jeremiah Missionary Baptist Church (“Jeremiah Missionary”) in Letcher County. At the time of the trip, Conder was 22-years-old. W.M., 15-years-old at the time, was also on the trip.

On Thursday evening of the trip, Conder, W.M., and a group of other minors watched a movie on a laptop in the sanctuary of Jeremiah Missionary. W.M. testified that she was lying on the floor next to Conder during the movie, when he began moving his hand towards her and touching her hip. W.M. stated that Conder quickly moved his hand inside her pants, underneath her underwear, towards her pubic hair area, and then quickly removed his hand. A friend of W.M testified she saw Conder pulling his hand from the back of W.M’s pants, and told W.M. if she was uncomfortable she should move closer to her. W.M. moved closer to the friend and away from Conder, but Conder followed. W.M. stated Conder touched W.M.’s hip again and put his hand down the front of her pants, underneath her underwear and moved it towards her pubic hair area.

Conder testified that he did not stick his hands down W.M.’s pants, but admitted to touching her throughout the trip. He stated that if he did touch W.M. underneath her clothing, such touching was inadvertent, and he was unaware it happened. Conder was convicted of sexual abuse in the first degree and sentenced

to one-year imprisonment. The trial court also ordered Conder to pay \$130 in court costs. This appeal followed.

Conder argues the trial court erred by denying his motion for a directed verdict on the basis that insufficient evidence existed to prove that he touched W.M. in an intimate area, acted intentionally for the purpose of sexual gratification, and that W.M.'s testimony was insufficiently corroborated. 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).

Conder was convicted of violating KRS<sup>1</sup> 510.110, which provides in part:

(1) A person is guilty of sexual abuse in the first degree when:

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<sup>1</sup> Kentucky Revised Statutes.

(c) Being twenty-one (21) years old or more, he or she:

1. Subjects another person who is less than sixteen (16) years old to sexual contact[.]

“Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]”

KRS 510.010(7).

In this case, W.M. testified that on two occasions Conder put his hand down the front of her pants, inside her underwear, towards her private area, and touched her pubic hair region. The Kentucky Supreme Court has held that, “the term ‘other intimate parts’ . . . encompasses parts of the body of the victim other than sexual organs alone.” *Bills v. Commonwealth*, 851 S.W.2d 466, 472 (Ky. 1993). In *Bills*, the Court found that the act of removing clothing could constitute a touching of the victim’s sexual and other intimate parts of her body. It follows that W.M.’s testimony that Conder put his hand down her pants and underneath her underwear is sufficient evidence for the jury to conclude that Conder touched her “sexual or other intimate parts” of her body.

Turning to the element of sexual gratification, we note that whether a defendant intended to seek sexual gratification from touching the victim “can be inferred from the actions of an accused and the surrounding circumstances.” *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1998). As we previously stated, evidence was presented that Conder put his hand down W.M.’s pants and underneath her underwear. In addition, W.M. testified that Conder was lying next

to her on the floor, and would also touch and massage her hips. When W.M. moved away, she stated that Conder followed and repeated the touching. Further, testimony was elicited that during the trip Conder continuously touched, poked, and tickled W.M. on her sides and hips prior to Thursday night. Such evidence is sufficient for the jury to infer that Conder intentionally put his hand down W.M.'s pants for the purpose of sexual gratification.

In regards to Conder's claim that W.M.'s testimony was insufficiently corroborated, this issue was not preserved for appellate review. Consequently, the error may be "noticed on appeal only if the error is 'palpable' and 'affects the substantial rights of a party[.]'" *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). Kentucky law suggests "a palpable error 'affects the substantial rights of a party' only if 'it is more likely than ordinary error to have affected the judgment.'" *Id.* (citations omitted).

Conder directs us to *Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001), which stands for the proposition that a victim's testimony in a child sexual abuse case must be corroborated if the testimony is "contradictory, or incredible, or inherently improbable." *Id.* at 10 (citations omitted). However, we find W.M.'s testimony to have been clear. Conder argues that W.M. testified he was massaging her back and stuck his hands down the front of her pants, but another minor in the sanctuary testified to seeing Conder remove his hand from the back of W.M.'s pants. Still, W.M. did not contradict her own testimony in regards to Conder's placing his hand in her pants, nor does the eyewitness testimony render W.M.'s

testimony incredible or improbable. Accordingly, we find no palpable error in this regard.

In his final point raised on appeal, Conder claims that because he was recognized as indigent, the trial court erred by ordering him to pay court costs. In light of the Kentucky Supreme Court's recent holding in *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012), we remand this matter to the trial court.

For many years courts have found it to be palpable error to impose court costs on an indigent defendant. See *Edmonson v. Commonwealth*, 725 S.W.2d 595, 596 (Ky. 1987). However, recently the Kentucky Supreme Court held that the language of KRS 31.110(1)(b), which provides for the waiver of costs for indigent defendants, no longer controlled over KRS 23A.205(2), which affords the trial court discretion in imposing court costs. See *Maynes*, 361 S.W.3d 922; *Smith v. Commonwealth*, 361 S.W.3d 908 (Ky. 2012). Thus, a court has discretion to impose costs on an indigent defendant "unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." KRS 23A.205(2). Accordingly, we reverse the trial court's imposition of court costs, and remand for a determination of whether Conder meets the criteria of KRS 23A.205.

The judgment of the Letcher Circuit Court is affirmed in part, reversed in part and remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Jackson Balliet  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

John Paul Varo  
Assistant Attorney General  
Frankfort, Kentucky