

RENDERED: FEBRUARY 14, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2012-CA-001750-MR

TROY ALLEN GILBERT

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT  
HONORABLE STOCKTON B. WOOD, JUDGE  
ACTION NO. 12-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, Troy Gilbert, appeals from his conviction and sentence in Fleming Circuit Court for first-degree criminal abuse and being a persistent felony offender (“PFO”) in the first degree. Specifically, Troy challenges the trial court’s decision denying his motion for a directed verdict and overruling his objection to the tendering of a jury instruction on an alternative

theory of criminal abuse. Finding no error in either of the trial court's decisions, we affirm.

### **Background**

On November 25, 2011, an anonymous caller reported that Andrea Alcorn had physically assaulted her two-year-old daughter, H.G, who is also Troy's daughter. Officials received a second call minutes later from Andrea's seven-year-old daughter, and H.G.'s half-sister, E.B., reporting that H.G. was injured. A worker with the Cabinet for Health and Family Services (CHFS) arrived soon after and met with Andrea and H.G. He observed severe bruising on H.G.'s face and two knots on her head. When the worker asked Andrea how H.G. had been injured, Andrea stated that H.G. fell down a neighbor's steps.

Upon questioning other witnesses, the CHFS worker discovered that no one, including the neighbor, had seen or heard of H.G. falling down the steps. A trooper with the Kentucky State Police arrived and was immediately met by H.G. who, when asked, indicated that someone had hit her. Andrea was arrested and all four of her children were taken into protective custody. Troy was not at the residence during this investigation; however, he returned and was arrested later that day. During the police investigation, Andrea admitted that she had physically disciplined H.G. on the day in question, but that Troy had inflicted the injuries to H.G.'s head and face. Officials charged both Troy and Andrew with H.G.'s abuse.

At Troy's trial, Andrea testified that she spanked H.G. that day for wetting her pants. She testified that while she was in the restroom, she heard a

smacking sound coming from a room containing Troy and her daughters. She then heard H.G. crying. Andrea stated that Troy immediately left the house and when she pursued him, H.G. followed and fell down the steps of the home.

E.B. also testified; however she stated that Andrea and Troy took H.G. into the bathroom where she then heard a smacking sound, H.G. crying, and Andrea repeatedly yelling “quit it!” E.B. later testified that she saw Troy hit H.G. An acquaintance of Andrea’s and Troy’s testified that E.B. told her shortly after the incident that Andrea dragged H.G. into the bathroom by her hair and hit her. The doctor who examined H.G.’s injuries also testified, stating that her injuries were consistent not with a fall but with an open hand slap.

At the conclusion of the Commonwealth’s case, Troy’s counsel made a motion for a directed verdict which the trial court denied. Counsel renewed this motion at the end of all proof and the trial court again denied it. Before the jury began its deliberations, Troy’s counsel also objected to a proposed jury instruction, Instruction No. 5, which allowed the jury to find Troy guilty based on his permitting Andrea to abuse H.G. Another instruction allowed the jury to find in the alternative that Troy himself had abused H.G. The trial court overruled Troy’s objection and permitted the jury instruction, stating that there was enough evidence for the jury to infer Troy’s knowledge of the abuse, given the size of the home and the fact that H.G. was Troy’s biological child.

The jury found Troy guilty of first-degree criminal abuse under Instruction No. 5 and of being a PFO. The jury sentenced Troy to ten years’

imprisonment, enhanced to fifteen years due to his conviction as a PFO. Troy now appeals from this conviction and sentence.

### **Analysis**

Troy's argument on appeal is two-fold. He first argues that the trial court erred in denying his motion for a directed verdict because the evidence at trial was insufficient to support his conviction. Troy also argues that the trial court improperly permitted a jury instruction proffering the alternative theory that he permitted Andrea to abuse H.G. We address both arguments in-turn.

#### **I. Directed Verdict**

Directed verdict is appropriate if the Commonwealth has produced no more than a mere scintilla of evidence; if the evidence is more than a scintilla and it would be reasonable for the jury to return a verdict of guilty based on it, then the motion should be denied. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In reviewing a trial court's decision regarding directed verdict, we, like the trial court, must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth and assume that the evidence for the Commonwealth is true, reserving for the jury questions as to credibility and weight to be given to testimony. *Id.* A defendant is entitled to a directed verdict only if, in light of all of this, "it would be clearly unreasonable for a jury to find guilt." *Id.*

A directed verdict motion is reviewed in light of the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth*, 354

S.W.3d 565, 575 (Ky. 2011). Accordingly, we look to KRS 508.100(1), the statute concerning first-degree criminal abuse, which states:

- (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.

As the plain language of the statute establishes, two alternative theories of a defendant's guilt exist: (1) The defendant himself inflicted the alleged abuse; or (2) he intentionally *permitted* the alleged abuse.

#### **A. Preservation of the Issue for Appeal**

As a preliminary matter, the Commonwealth claims that Troy's motion for directed verdict was too general and did not sufficiently preserve the question of its denial for appeal. We address this question first as our answer will dictate by what standard we review the trial court's decision.

Kentucky Rules of Civil Procedure (CR) 50.01 states that "[a] motion for directed verdict shall state the specific grounds therefor." Our Supreme Court has stated that failure to state specific grounds for a motion for directed verdict will foreclose appellate review of the trial court's denial of that motion. *Gibbs v. Commonwealth*, 208 S.W.3d 848, 857 (Ky. 2006) (overruled on other grounds by *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010)). The Court has also held

that “moving summarily for a directed verdict or making a general assertion of insufficient evidence is not enough” to satisfy the specificity requirement.

*Commonwealth v. Jones*, 283 S.W.3d 665, 669 (Ky. 2009) (citing to *Gibbs* and *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005)). “[A] motion must state specific grounds for relief and should identify which elements of the alleged offense the Commonwealth has failed to prove.” *Id.*

Troy’s motion was not specific enough to preserve the issue for appeal. At the close of the Commonwealth’s case, Troy’s trial counsel stated, “Judge, I’d like to make a motion for a directed verdict. I don’t feel the Commonwealth has met their burden. I don’t feel there’s any way [from] the testimony here today a reasonable juror could convict my client.” Counsel resumed his motion at the close of all proof, stating simply that he did not believe there was “credible evidence” upon which a reasonable juror could base a conviction. This motion, while timely made and renewed, did not cite any evidence or lack thereof which required a summary verdict of acquittal. Such generality deprived the trial court of any meaningful opportunity to rule on the merits of that claim. Hence, Troy failed to preserve the issue for this Court’s consideration and we review the trial court’s decision regarding his directed verdict motions for palpable error only under Rules of Criminal Procedure (RCr) 10.26.<sup>1</sup>

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<sup>1</sup> RCr 10.26 defines “substantial error” as “[a] palpable error which affects the substantial rights of a party” and the Rule permits an appellate court to consider allegations of such error although the error was insufficiently preserved. Under the Rule, “appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.” If indeed the trial court erred in the manner Troy alleges and the error resulted in his conviction, this would constitute palpable error, as it is a violation of due process. *See Schoenbachler v. Commonwealth*, 95 S.W.3d 830

## **B. Sufficiency of the Evidence**

Even disregarding the issue of preservation and our review for palpable error, the trial court's refusal to enter a directed verdict withstands the typically dispositive question of sufficiency of the evidence. Troy contends that a reasonable juror could not conclude from the evidence of record that he abused H.G., that he permitted Andrea to abuse H.G., or that his actions caused H.G. injury or cruel punishment. He cites to E.B.'s "conflicting statements," Andrea's testimony that H.G. fell down the stairs, and the alleged lack of testimony establishing causation between his actions and H.G.'s injuries. Overall, Troy contends that there was "no credible evidence from anyone that [Troy] allowed or saw Andrea abuse H.G." or that he "was present when the abuse on H.G. occurred." The testimony at trial renders Troy's argument unpersuasive.

E.B. testified to Troy's presence in the room where she heard H.G. being hit. This directly contradicts Troy's argument that there was no testimony showing that he permitted Andrea to abuse H.G. or that he was in the residence during the abuse. Rather, this crucial testimony created a question of fact concerning the satisfaction of the elements of KRS 508.100(1).

Troy also states that there was no testimony that his actions caused the injuries to H.G. The record proves this assertion to be false as well. Aside from Andrea's unequivocal testimony that Troy caused H.G.'s injuries, both Andrea and E.B. testified that they could hear, but not see H.G. being repeatedly smacked in a

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(Ky. 2003); *see also Acosta v. Commonwealth*, 391 S.W.3d 809 (Ky. 2013).

room which contained Troy and H.G. An expert medical witness also testified that H.G.'s injuries were consistent with an open hand smack. Given these facts, and resolving the reasonable inference they create in favor of the Commonwealth, it would not have been "clearly unreasonable" for a jury to find that Troy's action, or inaction, caused H.G. to suffer injury or cruel punishment.

We also wish to address Troy's repeated challenges to the testimony we reference above on the grounds that it was "inconsistent" or not credible. In cases where the credibility of a witness is at issue, a directed verdict is only appropriate, "if circumstances ... [are] so incredible or improbable or so at variance with natural laws or common human experience as to be patently untrue." *Bussey v. Commonwealth*, 797 S.W.2d 483, 484 (Ky. 1990), quoting *Holland v. Commonwealth*, 272 S.W.2d 458, 459 (Ky. 1954). This is not true of this case.

Indeed, E.B.'s testimony was inconsistent at times and her version of events was very different from Andrea's. However, the law could not be clearer that questions of fact, as well as the weight and credibility to be assigned testimony, are reserved exclusively to a jury. *See Benham, supra*. E.B.'s conflicting statements at trial and to other witnesses, the conflict between Andrea's claim the abuse happened outside the bathroom and E.B.'s statement that it occurred inside the bathroom, and Andrea's initial assertion that E.B. was injured falling down steps do not rise to the level of being "patently untrue" and hence, they did not compel a directed verdict. On the contrary, they created questions of



fact which, along with the witnesses' credibility and sufficiency of the evidence under KRS 508.100, were questions the trial court rightfully reserved for the jury.

## **II. Instruction of the Jury on Alternative Theories of Abuse**

Troy next contends that the trial court erred in permitting an alternative jury instruction regarding the criminal abuse charge to be tendered to the jury. Instruction No. 5 informed the jury that it may also find Troy guilty of first-degree criminal abuse if it finds that he permitted Andrea to abuse H.G. Troy argues on appeal that the evidence in the record did not permit this instruction to be furnished to the jury. Again citing to the evidence of record, we disagree.<sup>2</sup>

“Instructions must be based upon the evidence and they must properly and intelligibly state the law.” *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (quoting *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981)). “An instruction on an alternate theory of the same offense is appropriate when the theory is reasonably supported by the evidence.” *Barbour v. Commonwealth*, 824 S.W.3d 861, 863 (Ky. 1992). Finally, “appellate review of

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<sup>2</sup> We do not mean to imply, through reference to the same evidence we cite regarding Troy's motion for a directed verdict, that his lack of success on that motion in any way affects our decision regarding the propriety of the jury instruction. On the contrary, “[t]he fact that [the defendant] was not entitled to a directed verdict ... does not necessarily mean that the trial court acted properly in instructing the jury on all the alternate methods of committing criminal abuse in the first degree.” *Mason v. Commonwealth*, 331 S.W.3d 610, 618 (Ky.2011). While we analyze the issue regarding the jury instruction in light of the same evidence, our decision affirming the trial court's denial of a directed verdict does not inform that analysis.

jury instructions is a matter of law and, thus, *de novo*.”<sup>3</sup> *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006).

Troy attempts to portray the testimony and evidence in this case as comparable to that presented in *Acosta, supra*, in which our Supreme Court found insufficient basis for an instruction on the theory that the defendant actually inflicted abuse as opposed to merely permitting the abuse. In *Acosta*, the Court found no evidence that the defendant was present when the abuse occurred and no evidence that anyone saw or heard the defendant abusing her child. 391 S.W.3d 809, 820. Given this lack of proof, the Court held that allowing the jury to consider the theory that the defendant actually abused her child required the jury “to move beyond fair and reasonable inferences from the evidence to rank speculation.” *Id.*

Taken together, the testimony given in this case, unlike that in *Acosta*, constituted sufficient support for the theory of Troy’s guilt put forth in Instruction No. 5. As we have already said, E.B.’s testimony was that Andrea, not Troy, caused H.G.’s injuries and that Troy was present in the room while H.G. was slapped repeatedly. Furthermore, Trooper Waggener testified that H.G. told him Andrea hit her. Unlike in *Acosta*, this testimony does not create Troy’s mere opportunity to permit abuse, nor does it require the jury to make an impermissible inference or to speculate that John permitted Andrea to abuse their child. Rather,

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<sup>3</sup> Unlike Troy’s argument on appeal concerning the denial of his directed verdict motion, Troy preserved the matter of the jury instruction for appeal through his objection prior to its submission to the jury.

the testimony we cite above, while indeed contradicted by Andrea's testimony, placed Troy in the room with Andrea and H.G. while Andrea repeatedly slapped H.G. This was sufficient support for presentation to the jury of the theory that Troy permitted, but did not actually undertake, the physical abuse of his child.

### **Conclusion**

For the foregoing reasons, we find that the trial court did not err in denying Troy's motion for directed verdict, nor did it err in permitting the jury to consider alternative theories of his guilt under the same statute. Therefore, the Fleming Circuit Court's order of conviction and sentence is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Shannon Dupree  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Heather M. Fryman  
Frankfort, Kentucky