

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002060-MR

JASON GRIFFITH

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 12-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING, IN PART,
REVERSING, IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Jason Griffith appeals from the Campbell Circuit Court's October 22, 2010 Judgment and Sentence on Plea of Not Guilty. A jury found Griffith guilty of possessing matter portraying a sexual performance by a minor. For the following reasons, we affirm in part, reverse in part, and remand.

I. Facts and Procedure

A daughter, M.G. (Daughter), was born to Griffith and Barb Todd, an unmarried couple, in 1999. Several years later, Griffith, Barb, and Daughter moved in with Griffith's parents. Griffith's niece (Niece), born on December 23, 1992, also lived in the home. Griffith often referred to Niece as his step-daughter. On or about January 2011, Barb and Daughter moved to a new residence; Griffith remained at his parents' house. That summer, Barb asked to borrow Griffith's computer for Daughter's use; Griffith agreed, and the computer was transported to Barb's house.

In July 2011, Daughter told Barb that she had had sexual contact with Griffith. Barb notified the Newport Police Department. Detective Renee South investigated the allegation.

Around this same time, Barb discovered a nude photograph of Niece on Griffith's computer. Barb asked her nephew, Corey Matthews, to scrutinize Griffith's computer for similar files. Corey discovered a folder containing photographs and videos of what appeared to be young girls engaging in sexual acts, including a self-produced video of Niece. The video depicted Niece, unclothed, touching her breasts and vagina. Daughter also produced a thumb drive that allegedly came from Griffith's house that contained similar files. Barb again called the Newport Police Department, and Detective South responded. Detective South took possession of Griffith's computer and the thumb drive.

Detective South interviewed Griffith. Griffith admitted to watching adult pornography, but denied viewing or downloading child pornography. Griffith clarified that Niece's former boyfriend sent the images and video of Niece to him. Griffith claimed he retained possession of the video solely to prove to Niece, whom he thought of as a daughter, that her former boyfriend was no good. Griffith stated he did not know whether the images and video were still on his computer.

Detective South asked Officer Bill Baker, the Investigative Manager for the Cyber Crimes Branch of the Attorney General's office, to examine Griffith's computer. Officer Baker conducted his investigation on November 15, 2011. Officer Baker first determined that Griffith was the computer's registered owner. Officer Baker then discovered on the computer's hard drive four video files, including Niece's self-produced video, and nine images depicting nude children engaged in sexual conduct.

On January 26, 2012, a grand jury indicted Griffith on nine counts of possession of matters portraying a sexual performance by a minor, and three counts of first-degree sexual abuse related to Daughter. The matter came on for trial on August 7, 2012. At trial, Niece testified that she was 17 years old when she made the sexually-explicit video for her boyfriend. She denied sending the video to Griffith.

Griffith testified in his own defense. He reiterated that Niece's video came from her boyfriend, and he only possessed it "to prove a point . . . that [the boyfriend was] not the right person for her." Griffith stated unequivocally that he

had, in fact, deleted the video of Niece. He testified there was no child pornography on his computer, and that he had no idea how the videos Barb discovered came to be on his computer.

Griffith was convicted of one count of possession of matter portraying a minor in a sexual performance related to Niece's self-produced video. The jury acquitted Griffith of all the other charges, including sexually abusing Daughter. For the possession offense, the jury recommended a five-year imprisonment sentence. The circuit court accepted the jury's recommendation and, by Judgment and Sentence entered on October 22, 2012, sentenced Griffith accordingly. Griffith appealed.

We will discuss additional facts as they become relevant.

II. Analysis

Griffith presents numerous arguments before this Court. He asserts he was entitled to a directed verdict on the possession charge. He also argues the circuit court: (i) abused its discretion when it admitted certain KRE¹ 404(b) evidence; (ii) imposed improper sentencing conditions upon him; and (iii) erroneously required him to pay a partial public-defender fee.

A. Possession of Matter Portraying a Sexual Performance by a Minor

Griffith first argues he was entitled to a directed verdict on the charge of possession of matter portraying a sexual performance by a minor. Griffith

¹ Kentucky Rules of Evidence.

asserts the Commonwealth failed to prove he “possessed” the video of Niece, an essential element of the crime.

“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[.]” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (internal citations omitted). The Commonwealth must produce “evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.” *Id.* at 187-88.

Under KRS² 531.335, a person is guilty of possession of matter portraying a sexual performance by a minor if he or she, with knowledge of the matter’s content, character, and that the sexual performance is by a minor, knowingly has in his or her possession or control any matter visually depicting an actual sexual performance by a minor. “‘Possession’ means to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object[.]” KRS 500.080(14).

Griffith argues there was no proof presented that he retained the video for his own prurient interest, or even retained it at all. Instead, Griffith contends, the evidence at trial conclusively established he had the video on his computer only to demonstrate to Niece that her boyfriend was a predator wholly lacking in character. After he made that point, Griffith argues, he deleted the video. Griffith further claims he did not have possession of the computer when the video was discovered,

² Kentucky Revised Statute.

and claims there was no evidence of child pornography being on the computer until it was in Barb's hands. As a result, Griffith argues the evidence at trial leaves no room for an inference by the jury that he possessed or otherwise exercised dominion or control over the video of Niece.

We conclude the circuit court properly denied Griffith's motion for a directed verdict; there was sufficient direct and circumstantial evidence for a reasonable juror to believe that Griffith possessed the video of Niece. *See Graves v. Commonwealth*, 17 S.W.3d 858, 862 (Ky. 2000) ("Conviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt."). Griffith was the registered owner of the computer. Detective South testified that Griffith admitted that he, at one time, possessed the video of Niece. Likewise, Griffith admitted at trial that he received the video and possessed it on his computer, *albeit* for the limited purpose of confronting Niece about the video. While the video was on Griffith's computer, however, he certainly was able to exercise dominion and control over it because, at that moment, he had the ability to save, copy, e-mail, print, or share the video. *See People v. Flick*, 790 N.W.2d 295, 305 (Mich. 2010) (noting the numerous ways a person can exercise dominion and control over an image or video on his or her computer).

Whether Griffith actually deleted the video after confronting Niece was a hotly disputed fact at trial. Griffith testified that he did. However, the Commonwealth presented circumstantial evidence that Griffith did not delete the

video. The Commonwealth's position was that Griffith, instead of deleting the video, chose to retain it and therefore knowingly possessed it. That inference was supported by Detective South's testimony that, at the time she interviewed Griffith in the fall of 2011, he was unable to recall if he in fact deleted the video; Barb and Corey's separate yet consistent testimony that Corey found the video on Griffith's computer in July 2011; and Officer Barker's testimony that, in the course of his analysis of the computer in November 2011, he located the video on the unit's hard drive.

Witness credibility and the weight of evidence are reserved to the exclusive province of the jury. *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). The jury is free to disregard testimony, and "to assign[] greater belief to the accuracy and reliability of" one witness over another or others. *Beaumont v. Commonwealth*, 295 S.W.3d 60, 67 (Ky. 2009) (citation omitted). We may not substitute our judgment on such matters for that of the jury. *Brewer v. Commonwealth*, 206 S.W.3d 313, 319 (Ky. 2006). Based on the evidence as a whole, we cannot say it was clearly unreasonable for the jury to conclude Griffith possessed the video of Niece.

As a corollary to the above, Griffith argues that prosecuting a parent investigating a child's self-produced pornography runs contrary to the legislature's intent. In support of his position, Griffith points out that the statute was recently amended in 2013 to make it a criminal act to "[i]ntentionally view[] any matter which visually depicts an actual sexual performance by a minor person." KRS

531.335(1)(b). The statute goes on to clarify, however, that “[t]he provisions of subsection (1)(b) of this section: . . . (c) Shall not apply to viewing the matter by a minor or the minor’s parents or guardians, or to school administrators investigating violations of subsection (1)(b) of this section.” KRS 531.335(2)(c).

While we agree with Griffith that KRS 531.335 is not designed to punish parents seeking to investigate and address illicit or otherwise inappropriate behavior by their children, we find no basis to reverse Griffith’s conviction in this case. First, Griffith was convicted of *possessing* material portraying a sexual performance by a minor, KRS 531.335(1)(a), not *viewing* such material, KRS 531.335(1)(b). The qualifiers contained in KRS 531.335(2), noted above, relate only to viewing, not possessing, child pornography. Second, Griffith is neither Niece’s parent nor her guardian, nor is he a school official. Third, and perhaps most importantly, KRS 531.335(2)(c) was not in effect in 2011 when Griffith committed the criminal act charged, and there is no indication that the legislature intended for the amended statute to be retroactively applied. *Rodgers v. Commonwealth*, 285 S.W.3d 740, 751 (Ky. 2009)(“Under KRS 446.110, unless the General Assembly unmistakably intends otherwise, substantive changes to criminal statutes will not be retroactively applied”).

On this issue, we affirm.

B. KRE 404(b)

We next turn to Griffith’s argument that the circuit court erred in admitting certain KRE 404(b) evidence. Griffith contends that the circuit court abused its

discretion when, over Griffith's objection, the court allowed the Commonwealth to present evidence of prior acts of violence by Griffith to demonstrate that Daughter was afraid of Griffith and to explain why Daughter did not disclose the alleged sexual abuse by Griffith at an earlier time. We disagree.

Daughter testified at trial that she was afraid to report the sexual abuse out of fear of Griffith. Citing several specific examples, Daughter testified Griffith abused her, frequently hit or slapped her, and exposed her to pornography. She also testified she did not disclose the sexual abuse because Griffith threatened to kill her. Daughter also claimed Griffith one time held a knife to Niece's throat. Griffith objected to the knife statement and moved for a mistrial. The circuit court denied Griffith's motion, but strongly admonished the jury not to consider the evidence. Daughter testified she only divulged Griffith's sexual abuse when she knew he could not get to her anymore.

We review the circuit court's decision to admit evidence for an abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). In deciding whether to admit evidence described in KRE 404(b), the circuit court must consider the (1) relevance, (2) probativeness, and (3) prejudicial effect of that evidence. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994).

Assuming solely for argument's sake that Daughter's testimony was indeed irrelevant and lacking probative value, we are convinced Griffith suffered no prejudice by its admission. The jury acquitted Griffith of all charges pertaining to Daughter. It is reasonable to assume, then, that the jury found Daughter's

testimony to be less than credible and afforded it no weight. Consequently, Griffith is unable to demonstrate any prejudice stemming from the admission of Daughter's testimony concerning the alleged prior acts of violence by Griffith.³ On this issue, we also affirm.

C. Sentencing Conditions

Griffith also contends the circuit court, laboring under the erroneous belief that Griffith was a sexual offender as opposed to a registrant, imposed improper sentencing conditions upon Griffith. Those conditions include requiring Griffith to: complete the Sex Offender Treatment Program (SOTP); be subject to a polygraph test; undergo a human immunodeficiency virus (HIV) test; be subject to a five-year period of conditional discharge following release from incarceration; and have no contact with minors without permission or possess sexually-arousing materials. The Commonwealth agrees that, in accordance with *Landriere v. Commonwealth*, 329 S.W.3d 278, 281 (Ky. 2010), those portions of the judgment of conviction should be reversed.

Kentucky's Sex Offender Registration Act carefully distinguishes between a registrant who is convicted of an offense against a minor and a registrant who is a sexual offender. KRS 17.500(5)(a). A "criminal offense against a minor" includes

³ We are cognizant that Daughter's testimony included a statement that Griffith held a knife to Niece's throat, and that Griffith was convicted of possessing material portraying a sexual performance by Niece. However, the circuit court ardently admonished the jury to disregard the knife statement. When an admonition is given it is presumed the jury will abide by the admonition and disregard the evidence. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). We are convinced the admonition in this case cured any error or prejudice resulting from Daughter's statement. *See id.* ("the admonition thus cures any error").

“[a]ny offense involving a minor or depictions of a minor, as set forth in KRS Chapter 531.” KRS 17.500(3)(a)(10). Here, Griffith was found guilty of violating KRS 531.335; he is a registrant. KRS 17.500(5)(a). He is not, however, a sexual offender. “A ‘sexual offender’ is a person who is convicted of or pleads guilty to a ‘sex crime,’ as defined in KRS 17.500(8). *Ladriere*, 329 S.W.3d at 281.

Possession of matter portraying a sexual performance by a minor does not fall within the statutory definition of a “sex crime.” KRS 17.500(8). While all registrants are subject to registration, KRS 17.520, and residential restrictions, KRS 17.545, only sexual offenders are subject to other sentencing conditions, such as completion of the SOTP; HIV testing; and the statutory period of conditional discharge and accompanying conditions, including the prohibition against both contact with minors and the possession of sexually-arousing materials. *Ladriere*, 329 S.W.3d at 282. Accordingly, those portions of the circuit court’s judgment imposing these conditions must be reversed.

D. Public Defender Fee

Finally, Griffith argues the circuit court abused its discretion when it imposed upon him a \$125.00 partial public-defender fee, to be paid, upon his release from incarceration, in monthly installments of \$50.00. Griffith contends he is a poor person unable to pay the fee.

An indigent or needy person is one unable to pay attorney’s fees. KRS 31.110. For that reason, “a defendant is entitled to a public defender when he is indigent or a “needy person” under KRS 31.110[.]” *Miller v. Commonwealth*, 391

S.W.3d 857, 870 (Ky. 2013). “Need,” however, is a matter of degree. *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012). A defendant’s indigent (needy) status does not automatically prohibit the circuit court from requiring him “to contribute to his defense if he is able to make such payments.” *Goncalves v. Commonwealth*, 404 S.W.3d 180, 209 (Ky. 2013). Thus, a partial public-defender fee can be assessed if the trial court determines, at sentencing, that the defendant is “able to pay.” *Miller*, 391 S.W.3d at 870; *Gonclaves*, 404 S.W.3d at 209 (“Similarly, a determination of whether an indigent defendant can pay a partial fee for his or her representation must be made when he or she is convicted and sentenced.”).

In addition to being declared a “needy person,” a defendant may also qualify as a “poor person.” A poor person is one unable to pay court costs. KRS 23A.205; KRS 453.190(2) (defining a “poor person” as one “who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing”).

These two classifications, *i.e.*, needy and poor, are not mutually exclusive; while an indigent person may not be able to pay attorney’s fees, he or she may, in fact, be able to pay court costs. *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012) (explaining a “person may qualify as ‘needy’ under KRS 31.110 because he cannot afford the services of an attorney yet not be ‘poor’ under KRS 23A.205”). The inverse, however, does not necessarily hold true. Thus, while a “person can be a ‘needy person’ without being a ‘poor person’ . . . it does not

appear that a person can be ‘poor’ under KRS 453.190 but nevertheless ‘able to pay a partial fee for legal representation.’” *Miller v. Commonwealth*, 391 S.W.3d 857, 871-72 (Ky. 2013). Stated differently, “a person who cannot pay court costs surely cannot pay a partial public defender fee.” *Id.* at 871.

In its October 22, 2012 Judgment and Sentence, the circuit court in this case found Griffith to be a needy person able to contribute to his defense. In so finding, the circuit court noted that Griffith had taken computer classes and held odd jobs. The circuit court did not declare Griffith to be a poor person. Indeed, the judgment is wholly silent on this issue. However, during the sentencing hearing, the circuit court verbally waived court costs, implying that Griffith is in fact a poor person. KRS 23A.205 (“The taxation of court costs against a defendant . . . shall be mandatory . . . unless the court finds that the defendant is a poor person[.]”).

We are certainly aware that “[c]ircuit courts speak ‘only through written orders entered upon the official record.’” *Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky. App. 2012) (citation omitted). We are also convinced that the circuit court did not intend to rule inconsistently. We think the most prudent course of action is to reverse the imposition of the partial public-defender fee and remand for additional findings. Griffith’s indigent status is not in dispute. Therefore, on remand the circuit court need only determine if Griffith is a poor person within the meaning of KRS 23A.205. If the circuit court finds Griffith not to be a poor person, it shall reinstate the \$125.00 partial public-defender fee. If the circuit court

finds Griffith to be a poor person, no public defendant fee may be imposed upon Griffith.

III. Conclusion

We reverse the Campbell Circuit Court's October 22, 2012 Judgment and Sentence only to the extent that it improperly imposed certain sentencing conditions and a partial public-defender fee upon Griffith. We remand for entry of a judgment consistent with this opinion. In all other respects, the judgment is affirmed.

ALL CONCUR.

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