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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001362-MR

JAMES BRADLEY PHELPS — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 16-CR-00419

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: James Bradley Phelps appeals from his convictions and sentences for tampering with physical evidence, promoting a sexual performance by a minor and voyeurism, arguing that the Pulaski Circuit Court erred by failing to grant his motions for a directed verdict on each charge because there was no proof that a deleted video contained improper material.

Phelps shared a home with his wife, his son and his wife's four children from a previous marriage. As there were seven people living in the house and only one bathroom, often one person used the bathroom while another person showered.

Phelps was indicted on one count each of tampering with physical evidence, promoting a sexual performance by a minor and voyeurism. The basis for the charges was Phelps filming his sixteen-year-old stepdaughter, G.D. (victim), with his cell phone as she showered and then deleting the recording.

The matter proceeded to a jury trial. The jury heard testimony from victim; Officer Larry Patterson, who investigated and served the search warrant; Tom Bell, an investigator and forensic examiner with the Office of the Attorney General, and Phelps, who testified in his own defense.

According to testimony by victim, she typically took a shower after her mother left for work at around 4:30 p.m. On May 11, 2016, Phelps knocked on the bathroom door as victim was showering and told her he was going to come in and use the bathroom. According to victim's testimony, Phelps asked her if she was standing up or lying down. Later, victim testified she looked up and saw Phelps's phone in his hand above the shower curtain with the screen pointing down. She testified she could see herself on the screen.

Victim testified Phelps left and then when he returned a short time later, he held the phone in his hand above the shower curtain again. This time the phone was moving side to side. She again saw an image of herself on the screen. Victim testified that neither time when she saw the image did she see any of her private areas on the screen, and the person holding the phone could not see what was displayed on the screen.

Victim testified she stayed at another person's house that night and the following day reported to the police what occurred. She testified Phelps posted an apology to her on Facebook but later deleted it.

Officer Patterson testified he received victim's report. Victim told him that she could see the phone but did not see any of her private areas on the screen. Officer Patterson obtained a warrant to search Phelps's residence. Officer Patterson testified that when he arrived at Phelps's home to execute the search warrant and told Phelps the purpose of the warrant, Phelps spontaneously stated that it must have been about him holding his cell phone up while he was fixing the light fixture in the bathroom while victim was showering.

Officer Patterson testified Phelps's phone was seized but he was not arrested. Phelps voluntarily came to the police station and gave a recorded statement to Officer Patterson which was played for the jury. In the recording, Phelps claimed that while he was using the bathroom he noticed wiring hanging

out of the light fixture and reached up to fix the wiring with his cell phone in his other hand. He acknowledged using Facebook and checking his email while he was in the bathroom and stated that his video recorder might have accidentally been activated.

Bell testified about the forensic examination of Phelps's phone by Cellebrite software. While the phone was examined twice, Bell testified that neither time was any child pornography nor videos of victim found on the phone. Bell testified the first time the phone was examined, twenty videos were found with no deletions but none of the videos contained images of the victim. He testified the second time the phone was examined, after Cellebrite changed its software to account for more cell phone types, over 220 videos were found, with sixty deletions.

Bell testified that one of the deleted videos was created on May 11, 2016, at approximately 5:07 p.m., and later deleted. Bell could not say when this video was deleted. He testified the deleted video could not be recovered.

Phelps moved for a directed verdict at the close of the Commonwealth's case as to each charge. The trial court denied his motion.

Phelps testified in his own defense. He testified that the first time he went into the bathroom he felt a drop of water on his head and looked up to see

condensation on the wiring of the light fixture. He testified he used the rubberized corner of his phone to push the wiring up into the ceiling.

Phelps admitted that the second time he returned to the bathroom, he intentionally recorded victim in the shower for a few seconds. He testified he did not know what he was thinking in making such a recording and that he immediately regretted what he had done and deleted the video without watching it. He admitted he did not know what was recorded on the video that he deleted. Phelps also testified he did not recall asking victim whether she was standing up or lying down but that they often had conversations in the bathroom.

Phelps testified he did not know victim knew he had recorded her at the time he deleted the video, so he decided not to talk to her about it. He testified he posted a general apology to everyone for the trouble he had caused on Facebook but deleted it after his wife told him to do so.

Phelps renewed his motion for a directed verdict at the close of all evidence and again his motion was denied. The jury convicted Phelps on all counts.

Phelps filed a motion for judgment of acquittal/notwithstanding the verdict (JNOV). On July 27, 2017, the trial court denied his motion and then in accordance with the jury's verdict found Phelps guilty on all counts and sentenced him to five years on promoting a sexual performance of a minor, one year on

tampering with physical evidence, and six months on voyeurism in accordance with the jury's recommendations. These sentences were to run concurrently for a total of five years of incarceration, to be followed by five years of conditional discharge and placement on the sexual offender registry for twenty years.

Phelps argues the trial court erred when it denied his motions for a directed verdict and JNOV because the Commonwealth failed to present evidence sufficient to overcome the presumption of innocence and/or meet its burden of proof of guilt beyond a reasonable doubt on each charge.

In *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), the Kentucky Supreme Court restated the rule for a directed verdict as follows:

> On motion for 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.

"To defeat a directed verdict motion, the Commonwealth must only produce 'more than a mere scintilla of evidence.'" *Lackey v. Commonwealth*, 468 S.W.3d 348, 352 (Ky. 2015) (quoting *Benham*, 816 S.W.2d at 188).

"On appellate review, the test [for both] a directed verdict [and JNOV] 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." *Benham*, 816 S.W.2d at 187. *See Commonwealth v. Nourse*, 177 S.W.3d 691, 699 (Ky. 2005) (applying the *Benham* standard to review of the grant of a JNOV).

Intent is an element of each crime for which Phelps was convicted. As discussed in *Little v. Commonwealth*, 272 S.W.3d 180, 186 (Ky. 2008):

> [Intent] "may be inferred from the actions of a defendant or from the circumstances surrounding those actions." *Marshall v. Commonwealth*, 60 S.W.3d 513, 518 (Ky. 2001). Likewise, intent may be inferred from the defendant's knowledge. *Id.* Finally, we are mindful that a "person is presumed to intend the logical and probable consequences of his conduct[.]" *Parker v. Commonwealth*, 952 S.W.2d 209, 212 (Ky. 1997).

Phelps was convicted for tampering with physical evidence pursuant to Kentucky Revised Statutes (KRS) 524.100 which provides in relevant part as follows:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

Phelps relies on *Sexton v. Commonwealth*, 317 S.W.3d 62 (Ky. 2010), for the proposition that because there was no recording to view and neither victim nor Phelps knew whether victim's private areas were recorded, he could not be guilty of tampering with physical evidence. *Sexton* is at odds with the case before us as unlike Phelps, Sexton, a registered sex offender, denied doing any videotaping, much less videotaping of children and an officer who reviewed the videotape in Sexton's camera only found innocuous material recorded. *Id*. at 63. The Court stated:

> As it stands, the Commonwealth failed to produce any evidence that a videotape, filmed by Appellant, of children swimming at the Burnside pool even exists. Absent such a videotape, it strains the bounds of reason to conclude that Appellant in some way actively "conceal[ed] . . . physical evidence . . . with the intent to impair its verity or availability in the official proceeding." Because the Commonwealth did not present evidence that would prove all elements of tampering with physical evidence, it would be clearly unreasonable for a jury to find guilt. Accordingly, the trial court erred in denying a directed verdict on this charge.

Id. at 64-65.

These facts are in stark contrast to what occurred here. Phelps admitted that a recording of victim did exist and he deleted it. While Phelps argues that no one knows what he actually recorded, he admitted to videotaping victim while she was naked in the shower. Such conduct provides for a reasonable

inference by the jury in the Commonwealth's favor that Phelps's purpose was to record victim's genitals, pubic area, buttocks or nipples and he succeeded in doing so.

Phelps argues the Commonwealth could not prove he deleted the video with the intent to impair its availability at an official proceeding because he had no reason to suspect victim observed him recording her or that a criminal proceeding would be initiated. He argues deleting the video based on his awareness that he had been wrong to record victim in the shower is not the same as deleting it with knowledge that it could be used as evidence against him.

We disagree. The circumstances of how the video footage was created and deleted established Phelps's intent. His very awareness of what he did was connected with his knowledge that creating the video was illegal and could be used against him. It was reasonable for the jury to infer that at least part of the reason Phelps deleted the video was to prevent it from being used in any future prosecution, however unlikely he believed it to be that he might face criminal process in the future.

Phelps also argues the jury did not hear any evidence that the deleted video constituted physical evidence and in fact the video was not physical evidence. "'Physical evidence' means any article, object, document, record, or other thing of physical substance." KRS 524.010(6). In *Page v. Commonwealth*,

149 S.W.3d 416, 421 (Ky. 2004), the Kentucky Supreme Court embraced Montana's definition of "evidence" used for its tampering statute which is "the means of ascertaining in a judicial proceeding the truth respecting a question of fact, including but limited to witness testimony, writings, physical objects, or other things presented to the senses[,]" § 45-7-207, MCA,[1] as encompassing the Kentucky definition of physical evidence under KRS 524.010(6). The video recording on Phelps's phone was certainly a record of something which could be presented to the senses. There is no reasonable basis for treating digital videos and digital images differently than physical "taped" recordings and printed pictures. Accordingly, the video recording easily qualified as physical evidence.

Phelps argues he could not tamper with physical evidence because "deleting" the video did not destroy it but moved it to a different storage area on the phone where it was later overwritten by the cell phone's programing without Phelps's knowledge. This argument is without merit. By "deleting" it, Phelps at minimum "concealed" it. Additionally, he intended that it be destroyed and took an affirmative action which would make that happen. *Compare with Page*, 149 S.W.3d at 421-22 (holding that blood alcohol content was not physical evidence as the biochemical content of blood is in a state of flux that would naturally change as time elapsed). So, while Phelps may not have physically removed the video from

[1] Montana Code Annotated.

the phone, by pressing the delete button he caused it to later be overwritten by his phone. A guilty verdict on tampering with physical evidence under these circumstances was not clearly unreasonable and, thus, we uphold it.

Phelps was convicted of promoting a sexual performance by a minor. KRS 531.320(1) states that "[a] person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a minor." The relevant definitions for this crime related to Phelps's conduct are as follows:

> (3) "Obscene" means the predominate appeal of the matter taken as a whole is to a prurient interest in sexual conduct involving minors;
>
> (4) "Sexual conduct by a minor" means:
>
> . . .
>
> (d) The exposure, in an obscene manner, of the unclothed or apparently unclothed human . . . female genitals, pubic area or buttocks, or the female breast . . . in any resulting motion picture, photograph or other visual representation . . . ;
>
> (5) "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience;
>
> (6) "Sexual performance" means any performance or part thereof which includes sexual conduct by a minor; and
>
> (7) "Promote" means to prepare, publish, print, procure or manufacture, or to offer or agree to do the same.

KRS 531.300.

"The 'promotion' statute is violated when one either actively or passively prepares, agrees, or brings forth through their efforts the visual representation of a minor in a sexual performance before an audience." *Clark v. Commonwealth*, 267 S.W.3d 668, 678 (Ky. 2008).

"If the child is unaware that his or her genitals are being photographed," KRS 531.300(4)(d) allows prosecution where the exposure is "obscene" as defined in KRS 531.300(3). *Purcell v. Commonwealth*, 149 S.W.3d 382, 389 (Ky. 2004), *overruled on other grounds by Commonwealth v. Prater*, 324 S.W.3d 393, 397 n.7 (Ky. 2010). The content can be obscene not because the child is doing something obscene, but because to the audience "the predominate appeal of the matter taken as a whole is to a prurient interest in sexual conduct involving minors[.]" KRS 531.300(3). *See e.g. Williams v. Commonwealth*, 178 S.W.3d 491, 494 (Ky. 2005) (determining photos of the victim in the bathroom showing her in various stages of undress including at least one taken without her knowledge fit within the definition of KRS 531.300(4)(d)).

Phelps argues the elements for promoting a sexual performance by a minor were not met as there was no proof that the deleted video showed victim's breasts, genitals, pubic area, or buttocks, or, if it did, that they were displayed in an obscene manner. He argues that victim being naked was not enough without proof

that the phone recorded one of the enumerated body parts. He argues there was absolutely no evidence that the video he deleted contained any performance which included sexual conduct by a minor; it being plausible that victim was exposed is not enough, the Commonwealth must prove that one of those specific body parts was actually recorded. Phelps also argues there was no evidence that he directed victim to engage in a sexual performance by filming her.

It is a reasonable inference that by positioning and waving his phone down over the shower curtain while the phone was recording, that Phelps intended to and succeeded in filming obscene material which would appeal to a prurient interest. Under these circumstances the jury's verdict of guilty on the charge of promoting a sexual performance by a minor was not clearly unreasonable.

Phelps was also convicted of voyeurism. A person is guilty of voyeurism under KRS 531.090(1) when:

> (a) He or she intentionally:
>
> 1. Uses or causes the use of any camera, videotape, photooptical, photoelectric, or other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping the sexual conduct, genitals, an undergarment worn without being publicly visible, or nipple of the female breast of another person without that person's consent; or

> 2. Uses the unaided eye or any device designed to improve visual acuity for the purpose of observing or viewing the sexual conduct, genitals, an undergarment worn without being publicly visible, or nipple of the female breast of another person without that person's consent; or
>
> . . . and
>
> (b) The other person is in a place where a reasonable person would believe that his or her sexual conduct, genitals, undergarments, or nipple of the female breast will not be observed, viewed, photographed, filmed, or videotaped without his or her knowledge.

Phelps argues the elements of voyeurism were not met as there was no evidence that he used or caused the camera to record sexual conduct by victim, or to record her genitals or nipples, necessary elements where the jury was only instructed on KRS 531.090(1)(a)(1) and (1)(b) and not (1)(a)(2).

We again have no difficulty in upholding the jury's verdict. Phelps admitted he used his cell phone to make a video recording of victim while she was naked in the shower and then deleted the recording. The jury could reasonably infer that in doing so, Phelps recorded the victim's genitals or nipples without her consent and that the shower was a place where a reasonable person would believe that her genitals or nipples would not be filmed. The jury's verdict was not clearly unreasonable.

Accordingly, Phelps's convictions and sentences for tampering with physical evidence, promoting a sexual performance by a minor and voyeurism, imposed by the Pulaski Circuit Court after a jury verdict are affirmed.

ALL CONCUR.

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