

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001633-MR

PATRICK BROWN

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE W.A. KITCHEN, JUDGE
ACTION NO. 16-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, KRAMER AND MAZE, JUDGES.

KRAMER, JUDGE: Following a jury trial in McCracken Circuit Court, Patrick Joseph Brown was convicted of three counts of first-degree sexual abuse and sentenced to five years of imprisonment. Now on appeal, Brown contends he was entitled to a directed verdict because his conviction was based in large part upon

the testimony of his niece (and the person he was convicted of abusing), Ruth.¹ Ruth was seven years old at the time of the abuse and at the time she related the abuse to her parents and law enforcement. She was nine years old when she testified about it at trial. Brown claims that Ruth's age, various familial issues that might have influenced her version of events, and a lack of evidence directly corroborating her testimony impacted her credibility to such a degree that her testimony should have been disregarded as a matter of law. We disagree and therefore affirm.

Brown is the brother of Ruth's father, Josh Pulley. Ruth's mother is Sarah Pulley. In 2015, Brown and his wife, Jennifer, would visit the Pulley home in Paducah, Kentucky, and Ruth and her family would sometimes visit Brown's home which was also located in Paducah. During those visits, Brown was occasionally alone and out of sight with Ruth. On or about the evening of December 9, 2015, Ruth told Sarah that Brown had been touching her on some of those occasions. Sarah informed Josh, and the following day the two of them contacted the Paducah Police Department regarding Ruth's allegations. Ruth's case was assigned to Sergeant Ryan Conn, who contacted the Purchase Area Sexual Assault and Child Advocacy Center ("PASAC") to conduct a forensic interview of Ruth. PASAC interviewed Ruth five days later.

¹ A pseudonym is used in place of the minor victim's actual name.

Prior to the interview, Ruth underwent a medical examination as part of the ensuing police investigation. Dr. Kim Hall conducted the examination and later testified at trial that she found no physical findings of abuse. Dr. Hall testified she had not expected to find any physical findings considering the nature of Ruth's allegations; the most recent touching incident, according to Ruth, had occurred about a month beforehand. Dr. Hall further testified that during the examination, Ruth had made statements to the following effect: A man had come to Ruth's house and rubbed his hands on her chest and private areas; after the man had rubbed Ruth's private area, Ruth had felt a burning sensation when she urinated which had resolved prior to the examination; and, Ruth had been constipated since speaking with her mother about the alleged abuse.

The forensic interview was conducted by Nicole Wadley, who later testified at trial. There is no dispute that the interview was conducted in an appropriate setting and that Wadley was properly qualified to conduct the interview. For the sake of brevity, we will summarize what Ruth related to Wadley – and later at trial – about the touching. On the first occasion, she was sitting in a beanbag chair, playing videogames in her bedroom. She had a habit of chewing on her shirt when she played videogames and had taken it off because it was wet. Brown came into Ruth's bedroom and touched her bare breasts with his hand, using a rubbing motion. Ruth then went to her bed where Brown touched

her “private area.” Ruth had pants and underwear on at the time, and Brown used his hand to touch her underneath her panties, contacting her skin directly, using a rubbing motion.

On the second occasion, Ruth was sitting “criss-cross applesauce” in a chair in her grandmother’s bedroom, coloring. Her grandmother was in bed, asleep and snoring. Brown came into the bedroom and touched Ruth’s private area with his hand, directly rubbing her skin underneath her clothes.

On the third occasion, Ruth and Brown were playing hide-and-seek at Brown’s house. Ruth hid under the bed in the guestroom. Brown followed her into the room, got under the bed with her, and touched her “bum-bum” underneath her clothes, directly contacting her skin. Brown stopped touching her when his dogs ran into the room with family members following close behind.

Ruth could not recall at trial whether Brown had also exposed himself to her on any of those occasions but, during parts of her interview that were introduced as evidence, she indicated he had done so. There, Ruth stated, “every time [Brown] came,” he would show her his “private part, and he a boy.” She stated it “looked funny shaped,” that he would “pull down his pants a little bit” and make her “rub it” with her hand. She also stated during the interview that Brown had told her they would do “more stuff” when she was “eighteen, fifteen, thirteen

or something.” Wadley, the forensic interviewer, testified her impression was that Ruth did not seem to understand what “more stuff” meant.

Ruth also recalled at trial that Brown would stop touching her if he would hear someone or if someone called for him; that he told her he loved her more than anyone else; and that he said to her if she ever told anyone he touched her, he could get kicked out of the army and go to jail. Ruth also testified she was afraid to tell anyone about the incidents.

Sgt. Conn observed the interview through a closed-circuit television system. Thereafter, he investigated and photographed the interior of the Pulley home and was able to identify where, in that location, Ruth had indicated she had been abused.² After questioning Sarah and Josh about what Ruth had described during her interview, he was also able to construct an approximate timeline of when the alleged abuse might have occurred.

A few days later, Sgt. Conn then contacted Brown and interviewed him at his place of employment. At trial, Sgt. Conn testified that during the interview, Brown did not admit to any wrongdoing; but, that Brown confirmed he would frequently play videogames with Ruth in her room and that the two of them had a close relationship. Without being prompted, Brown stated he had been having marital problems. Brown also said that he wished his family had come to

² Sgt. Conn did not conduct a search of Brown’s home.

him with the allegations first so that he could have worked it out with them. And at the end of the interview, when Sgt. Conn decided to arrest Brown for sexual abuse, he recalled Brown had stated, “How can you arrest me? You don’t have any physical evidence.”

As discussed, Brown was ultimately tried and convicted of three counts of first-degree sexual abuse based on what is set forth above. His sole appellate argument concerns the sufficiency of the evidence.

Before addressing the merits of that argument, however, there is a preliminary matter concerning preservation. Despite contending he was entitled to a directed verdict based upon the sufficiency of the Commonwealth’s evidence, Brown and the Commonwealth represent in their respective briefs that he did not move for a directed verdict on that ground at trial. Rather, both parties to this appeal state that the directed verdict motion Brown made at trial related solely to a different issue involving the specificity of the first count of his indictment, which is an issue Brown chose not to press before this Court. Accordingly, Brown asks this Court to review his sufficiency of the evidence argument under the standard for palpable error; and the Commonwealth questions whether palpable error review is appropriate. *See Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836-37 (Ky. 2003) (indicating that a trial court’s failure to direct a verdict of acquittal on the

basis of the sufficiency of the evidence, notwithstanding the appellant's failure to preserve the issue, can be the subject of palpable error review).

We are a bit perplexed why Brown asks for palpable error review.

Over the course of representing in their respective briefs that Brown did *not* move for a directed verdict on sufficiency of evidence grounds, both Brown and the Commonwealth have cited exactly where Brown *also* moved for a directed verdict on sufficiency of evidence grounds, both at the close of the Commonwealth's evidence and again after the close of all of the evidence.³ *See id.* at 836 (explaining directed verdict motions made at the close of the Commonwealth's evidence, and again at the close of all evidence, properly preserve the issues raised in the motion for appellate review). Likewise, shortly after Brown renewed his motion, he renewed it *again* during the trial court's hearing with respect to the jury instructions:

BROWN'S ATTORNEY: I'm objecting to giving [the jury] any of these instructions on sex abuse first, so –

COURT: Okay. I'm going to give them instructions on sex abuse, first, unless you can specify something other

³ On August 15, 2017, the second day of Brown's two-day trial, Brown's trial attorney moved at the close of the Commonwealth's evidence for directed verdict "on all the case for insufficiency of the evidence but especially on count one." (VR: 8/15/17; 10:51:20-10:51:25). His counsel reiterated that the specificity of count one "was part of the motion. The other was sufficiency of the evidence as to all three counts." (VR: 8/15/17; 10:56:00-10:56:06). Afterward, the Court responded, "In the light most favorable to the Commonwealth for a directed verdict motion, I will deny it." (VR: 8/15/17; 10:56:06-10:56:10). After the close of all evidence, Brown's attorney then raised the same motion, stating "I need to renew my motion for directed verdict on the entire case, but especially as to count one." (VR: 8/15/17; 2:24:20-2:24:30).

than “objection.” Have you given me anything other than this part?

BROWN’S ATTORNEY: I don’t believe the evidence rises to a sufficient level to give this case to the jury. That’s my motion. That’s my directed verdict motion.

COURT: Okay. And where is it lacking?

BROWN’S ATTORNEY: I think we have, uh, an unbelievable story and that’s not corroborated by any other evidence.

COURT: Okay. But you’ve got a story. And it’s for the jury to decide who’s telling the truth here, not me.

BROWN’S ATTORNEY: Right. You, I think, but you’ve already overruled my motion.

COURT: Directed, directed the verdict? Yeah, I thought you were back with that. So, so why are you saying that, um, yeah.

BROWN’S ATTORNEY: Judge, I have to object to the giving of the instruction or I waive my DV argument.

COURT: I gotcha. I gotcha. I didn’t realize that. I’m a novice at this.

BROWN’S ATTORNEY: I’ve, uh, learned that the hard way before.

COURT: Okay. Well, I’m gonna let you put your objections in.

The record supports that Brown preserved his appellate argument that the trial court erred in denying his motion for directed verdict due to the sufficiency of the Commonwealth’s evidence. Regardless of whether we review

for palpable error or under a directed verdict standard, we affirm Brown's conviction. Accordingly, out of abundance of caution, we will review under the directed verdict standard, which is 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.

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).

To be clear, Brown does not contest the trial court's determination that Ruth was competent to testify against him. He does not contend that Ruth's testimony lacked enough detail or specificity of his alleged abuse. Rather, as set forth above, his sole argument is that she was not *credible*.

To that end, Brown points out that Ruth was the only witness who claimed any direct knowledge of his alleged abuse and that no other witness testified they ever saw him acting inappropriately toward her.⁴ He notes there were

⁴ Brown did not testify.

no physical signs on Ruth's body indicating he abused her. He cites the testimony of his expert witness, psychology professor Bradley McAuliff, who testified at length about how children can be suggestable and how their memories of events can be influenced by a variety of factors.

Brown devotes most of his brief to why, in his view, Ruth's memory of events might have been improperly influenced by her parents, Josh and Sarah. During the presentation of his defense, Brown attempted to demonstrate that Josh tended to overreact where Ruth was concerned. Brown elicited the testimony of his (and Josh's) brother, Charles, who stated that when Ruth was five years old, Josh had accused Charles's three-year-old son of inappropriately touching Ruth, too. As Charles recalled, the incident involved the two children kissing in another room, out of sight of the adults. Josh also admitted at trial that on a prior occasion, he had accused his niece, who is several years older than Ruth, of inappropriately hugging Ruth during a thunderstorm because Ruth had told him afterward that the hug had "made her feel uncomfortable" and "weird."

As for Sarah, Brown drew attention to her admission that the two of them had carried on a brief affair which had culminated in an act of sexual intercourse in February 2015. The affair eventually came to light in November 2015, when Jennifer began suspecting Brown of reconnecting with an old girlfriend and she began searching through Brown's text messages. Brown also

elicited the testimony of his (and Josh's) sister, Victoria Pulley, who stated that Jennifer and Sarah had informed her, in several text messages⁵ sent prior to Ruth's allegations, that they were planning to "ruin Patrick's life" for contacting his old girlfriend. Brown claims this amply demonstrated Sarah had a motive to influence Ruth's memories and perceptions of being abused.

But in making this argument, Brown misunderstands the scope of our review. For purposes of directed verdict review, this Court must affirm the trial court's decision to deny Brown's motion "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky. App. 2003) (citation omitted). Here, there was no such absence of proof, and the evidence was in dispute. Josh denied that he overreacted to Ruth's allegations; Sarah denied threatening to ruin Brown's life or influencing Ruth's perceptions of being abused; and Ruth's testimony was not "contradicted by incontrovertible physical evidence or an undisputed matter of common knowledge." *Potts v. Commonwealth*, 172 S.W.3d 345, 350 (Ky. 2005).

Accordingly, it was the prerogative of the jury to assess the credibility of the evidence; this Court is not at liberty to second-guess the jury's assessment merely

⁵ These purported text messages were never produced, and Sarah denied sending Victoria anything of the sort.

because it favored the evidence produced by the Commonwealth. *See Benham*, 816 S.W.2d at 187. Stated otherwise:

[T]estimony admitted into evidence must be disregarded during the directed verdict analysis when the substance of that testimony is so extraordinarily implausible or inherently impossible as to render it manifestly without probative value or patently unworthy of belief. The rule is not, as Appellant posits, that testimony admitted into evidence must be disregarded due to the witness's extraordinary lack of credibility as demonstrated by the usual manifestations of untrustworthiness.

Ross v. Commonwealth, 531 S.W.3d 471, 476 (Ky. 2017).

In light of the foregoing, we AFFIRM.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter
John Gerhart Landon
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky