

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2004-SC-0649-MR

DATE 7-7-05 EJA/Grouitt/DC.

JAMES E. EDWARDS

APPELLANT

V.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, JUDGE
2002-CR-0481

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James E. Edwards, was convicted by a Barren County jury in April 2004, of two counts of first-degree sodomy and two counts of first-degree sexual abuse. The jury recommended twenty-year sentences for each of the two sodomy counts and five-year sentences for each of the sexual abuse counts. Appellant appeals to this court as a matter of right. Ky. Const. § 110 (2)(b). He assigns error to the trial court's denial of his motion for directed verdict pertaining to all four counts of the indictment. We affirm.

Facts

The Barren County Grand Jury indicted Appellant on November 13, 2002, on four charges. Counts 1 and 2 charged Appellant with the offense of first-degree sodomy in violation of KRS 510.070 by performing oral sex on A.M., who was less than twelve years old, and forcing A.M. to perform oral sex on Appellant. Counts 3 and 4

charged Appellant with first-degree sexual abuse for forcing A.M. to engage in sexual touching of Appellant and for Appellant's similar acts on A.M. in violation of KRS 510.110.

A.M.'s relationship with Appellant began at the age of about five or six, when her mother began to date him. Eventually, A.M., her mother, and half-sister moved in with Appellant before A.M.'s mother's marriage to him in the years following. At trial, A.M. testified that she was between the ages of nine and ten when Appellant began to sexually abuse her. She related that the abuse occurred over an extended period of time, usually when her mother was at work and her half-sister was away visiting relatives.

A.M. kept the knowledge of this abuse private for several years because, "[Appellant] told me if I ever told my mom, I would never see her again." Only after A.M., her mother, and her half-sister moved out of Appellant's home in June 2002, did A.M., then age fourteen, relate her account of the alleged sexual abuse to a family friend. This friend later told A.M.'s mother, who reported the alleged abuse to authorities.

At trial, A.M., then sixteen years old, testified in some detail about several occasions when Appellant allegedly sexually abused her as a child. Her testimony included accounts of the types of abuse, the locations where the abuse happened, and conversations with Appellant regarding the abuse. In response to the allegations, Appellant testified on his own behalf at trial and claimed that A.M.'s testimony was fabricated as part of a scheme to ensure that her mother would get his land and home through their divorce proceedings. The jury chose to believe A.M.'s account and found

Appellant guilty of all four charges. Appellant now argues that the trial court erred in denying his motion for a directed verdict of acquittal on all charges.

Appellant's Argument

Appellant asserts that the jury was not presented sufficient evidence to find him guilty of the four charges, and accordingly his motion for directed verdict was improperly denied. The standard for determining whether a defendant is entitled to a directed verdict is clear:

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 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) (emphasis added).

Appellant argues that the prosecution's witnesses supplied inconsistent testimony that made the jury's findings of guilt "unreasonable." To support this claim, he first emphasizes arguably inconsistent testimony between A.M. and an examining physician, Dr. Jeffrey Blackerby. Dr. Blackerby examined A.M. in October 2002, approximately three months after A.M. first reported the abuse to an adult. Dr. Blackerby stated that he saw no medical evidence of the alleged sexual abuse, but also testified that a lack of physical evidence was not surprising given that the alleged abuse involved only oral sex and fondling.

The jury could have decided that A.M.'s testimony regarding the abuse was credible, even though physical evidence to support her testimony was lacking. Dr. Blackerby's testimony gives a reasonable explanation for the lack of physical evidence and did not undermine A.M.'s account of the incidents to the extent that it would have rendered her testimony "unreasonable" to believe. "The credibility and the weight to be given the testimony are questions for the jury exclusively." Sawhill v. Commonwealth, 660 S.W.2d 3, 5 (Ky. 1983). The jury simply believed the testimony of A.M. over the denial of Appellant and the conclusions of the attending physician.

Second, Appellant claims that because the witnesses' testimony as to the times that the abuse occurred varied greatly, the witnesses are inherently untrustworthy. For example, Dr. Blackerby testified that A.M. had told him the abuse had occurred up to August 1999. On cross-examination, however, Dr. Blackerby first testified that he was told that the abuse occurred between August 1999 and June 2002. Later in the cross-examination, Dr. Blackerby testified that the forced oral sex between A.M. and Appellant stopped "apparently in August 1999."

Dr. Blackerby's testimony, which places the abuse as occurring sometime between 1999 and 2002, also varies slightly from A.M.'s own testimony that the abuse occurred when she was in the third and fourth grade, which would have been in 1997 and 1998. Although A.M. testified that she was sure the alleged abuse occurred during this time, she was not certain of what she actually told Dr. Blackerby.

Although it does not resolve the matter factually, it is noteworthy that Julie Griffey, A.M.'s counselor, corroborated A.M.'s testimony by placing the abuse as having occurred between 1997 and 1998. Ms. Griffey based her testimony on her observation that A.M.'s memories of the abuse were consistent with someone between the ages of

nine and ten years old, which A.M. was during those years. In the end, what matters most for this issue are not the exact dates of the alleged abuse, but whether the jury chose to believe A.M.'s direct testimony over Appellant's denial. The credibility and weight given to each witness's testimony are exclusively the jury's responsibility.

Sawhill, 660 S.W.2d at 5. Again, after weighing the evidence, the jury simply chose to believe A.M.'s testimony over Appellant's denial even in the face of some minor factual uncertainties.

The same standard and reasoning also applies to Appellant's next contention, that A.M.'s testimony was further discredited by medical evidence presented at trial. One week before trial, A.M. told a counselor that she remembered a scar on Appellant's penis that would identify him as her abuser. A.M. spoke of this identifying feature at trial and claimed that Appellant told her that the scar had been caused by a zipper. In turn, Appellant presented testimony by Dr. Charles Townsend that there was no such mark on Appellant's body. Dr. Townsend also testified, however, that scars can fade and get lighter. Given the length of time that had passed since the alleged abuse occurred and the type of injury involved, a jury reasonably could have chosen to disregard this inconsistency or weigh it against the body of evidence as a whole. Id.

Conclusion

Although Appellant claims error in the trial court's denial of his motion for directed verdict, his argument is essentially that he disagrees with the jury's decision and the credibility of the evidence upon which its findings were made. As we have

stated, it is the proper function of the jury to weigh evidence and determine credibility of witnesses. Id. Accordingly, we affirm the judgment of the Barren Circuit Court.

Lambert, C.J.; Cooper, Graves, Johnstone, Scott, and Wintersheimer, JJ.,
sitting. All concur.

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