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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: DECEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-007-MR

DATE 1-12-06 E.A. Grow, D.C.

GERALD ELVIS BROWN — APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN GRISE, JUDGE
04-CR-00210

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from the Warren Circuit Court's jury verdict entered October 14, 2004. Appellant was sentenced to a total of 35 years imprisonment on three counts of first-degree rape, two counts of first-degree sodomy and persistent felony offender in the first-degree. Appellant appeals to this Court as a matter of right, pursuant to Ky. Const. §110(2)(b), arguing there was insufficient evidence to convict him of three counts of rape and two counts of sodomy. Appellant also argues he was substantially prejudiced and denied a fair and impartial jury when the court denied his motion to strike a venire person for cause. After review of the record, we affirm the trial court.

I. Facts

Between August 2003 and February 2004, Appellant, Gerald Elvis Brown, resided with his wife Lisa and her two daughters in a trailer on lot 26, Memphis Junction

Road in Warren County. The two daughters were victim H.H., approximately six years old, and her younger sister Alison.

In February 2004, H.H. told her mother's ex-boyfriend, Steven Massey, who remained close with H.H. even after his separation from her mother years prior, that her step-father, Appellant herein, had made her perform oral sex on him as well as have sexual intercourse with him. Massey wrote a statement detailing what H.H. had told him, signed it and left it with H.H.'s grandmother, Frieda Glass. He later explained he did not tell the police himself because he did not like courts and did not want to get involved.

The police interviewed H.H. and then brought Appellant and his wife in for questioning. Appellant was questioned mainly about an incident alleged to have occurred in the parking lot of a local hospital. On December 7, 2003, Appellant, Lisa, Frieda Glass, H.H. and her younger sister all rode in a van together to the hospital to take Frieda for an appointment. Lisa and Ms. Glass went into the hospital, leaving Appellant and the two girls alone.[1] H.H. told Detective Raley she performed oral sex on Appellant in the van and testified in court that he had put "his privates in her privates" on this and other occasions. H.H. testified that Appellant had also put "his privates in her privates" and in her mouth in the bathroom of their trailer. Appellant denied any wrong-doing when questioned by the investigators.

Appellant was the sole focus of the detectives' investigation. When they came to arrest Appellant, he initially ran. The following day he turned himself in to the police. Appellant was indicted on four counts of first-degree rape, five counts of first-degree

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[1] Appellant testified the younger daughter, Alison, was asleep in the back of the van. Therefore, there were no other witnesses of what transpired other than H.H. and Appellant.

sodomy, one count of sexual abuse in the first-degree and persistent felony offender in the first degree.

The Commonwealth moved to dismiss several counts of the indictment (relating to one count of rape, three counts of sodomy and one count of sexual abuse) at the close of its evidence as a result of H.H.'s testimony, which clarified only that Appellant had put "his privates in hers" more than twice and had put his "privates" in her mouth more than once. H.H. testified she could not remember if and/or how many other times either act may have occurred or if H.H. had ever used his hands to touch her "privates" (regarding the sexual abuse charge).

At trial, Dr. Patricia Falkner-Simmons testified regarding her medical findings after examining H.H. She reported H.H.'s hymen had an irregular border and other characteristics that would indicate sexual abuse some time during H.H.'s life. She was unable to specify when the abuse had occurred. Dr. Falkner-Simmons also testified H.H. tested positive for Chlamydia.

After this discovery, Appellant was court ordered to be tested for sexually transmitted diseases. He tested negative for Chlamydia and the defense argued that due to Appellant's incarceration, he would have had no opportunity to take prescription medication to cure such a condition if he were infected.

William Waters testified for the defense, offering a possible motive for H.H. to fabricate these allegations against Appellant. Waters testified that the summer before the allegations surfaced, H.H. had asked him if she would be able to go live with her grandmother (Frieda Glass) if she made a statement against Appellant.

Based on its weighing of the above evidence, the jury found Appellant guilty of three counts of first-degree rape, two counts of first-degree sodomy and persistent felony offender in the first-degree.

II. Issues

A. Directed Verdict

In order to convict Appellant of three counts of first-degree rape, the jury had to believe beyond a reasonable doubt that in Warren County, on or between August 6, 2003 and February 10, 2004, Appellant engaged in sexual intercourse with H.H. on three different occasions and that at the time of such intercourse H.H. was less than twelve years of age. Likewise, to convict Appellant of two counts of first-degree sodomy, the jury had to believe beyond a reasonable doubt that on or between the previous dates, Appellant engaged in deviate sexual intercourse with H.H. on two separate occasions and that at the time of such intercourse, H.H. was less than twelve years of age.

It is undisputed that at all times pertinent to this case, the victim, H.H., was less than twelve years of age. Appellant's argument on appeal focuses mainly on the lack of dates and factual specifics given by H.H. during her testimony in order to better separate and define the alleged offenses. Appellant argues the failure of the Commonwealth to prove a distinct factual basis for each charge, coupled with the fact that Appellant tested negative for Chlamydia while in jail, entitles him to a directed verdict of acquittal.

We review a motion for directed verdict under the standard articulated in Commonwealth v. Benham, 816 S.W.2d 186 (Ky.1991). 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 reserve 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 is the defendant entitled to a directed verdict of acquittal. Id. at 187.

Appellant claims the evidence was insufficient to prove his guilt because H.H. failed to testify to specific dates and times when the acts of sexual abuse occurred. In a felony case, the failure to prove the specific date of the offense is of no consequence unless time is a material ingredient of the offense. Peyton v. Commonwealth, 288 Ky. 601, 157 S.W.2d 106 (1941). In Hampton v. Commonwealth, 666 S.W.2d 737 (Ky. 1984), a child sex abuse case, the testimony concerning the dates of the offenses was confused and somewhat uncertain. In one instance, the child testified the offenses occurred on the same date at another place; in another instance, he testified to an offense occurring on "another Saturday." We held that the evidence was as specific as is usually found in such cases and ample to separately identify the various offenses charged. In Farler v. Commonwealth, 880 S.W.2d 882 (Ky.App. 1994), the child victim could not pinpoint the exact dates on which the incidents occurred. However, she testified that all of the sexual contact occurred before she reached twelve years of age and after the defendant had reached eighteen years of age. "In our view, it was not necessary that [the victim] give specific dates that the offenses occurred. It would be wholly unreasonable to expect a child of such tender years to remember specific

dates...." Id. at 886. We agree with this logic. The offenses alleged in this case obviously occurred when H.H. was less than twelve years of age, and that was the only relevant time element necessary to support these convictions. KRS 510.070(1)(b)2; KRS 510.040(1)(b)2.[2]

> Because time is not essential to the crime of sodomy [or rape], and in recognition of the impossibility of ascertaining specific dates in cases of sexual abuse of children, especially where there is a continuous series of abusive acts, the courts have consistently rejected contentions identical to that made by [the Appellant] herein absent an affirmative showing of prejudice.

State v. Burch, 740 S.W.2d 293, 296 (Mo.App. 1987)(internal citations omitted).

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 H.H.'s direct testimony over Appellant's denial. The credibility and weight given to a witness's testimony are exclusively the jury's responsibility. Sawhill v. Commonwealth, 660 S.W.2d 3, 5 (Ky. 1983).

As to Appellant's argument that the Commonwealth failed to give a distinct factual basis for each alleged offense, we think it's important to remember we are dealing with a six year old child who is most likely incapable of describing with precise detail the horrible acts she alleges were done to her. Of significance, though, is the fact that H.H. was found competent to testify in this case. She stated the most important thing she was to do while testifying in court was to "tell the truth."

H.H. described Appellant placing "his privates in hers" in the bathroom of her trailer and in the van on the night of Frieda Glass' hospital visit, December 7, 2003. She testified he had put "his privates in hers" more than two times. She testified he put his "privates" in her mouth in the bathroom of her trailer more than once.

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[2] This argument mirrors logic found in Stringer v. Commonwealth, 956 S.W.2d 883, 885-886 (Ky. 1997).

H.H. was able to describe "white stuff" coming out of Appellant's "privates" and testified that the "white stuff" tasted bad. She could distinguish between good touches and bad touches, and repeatedly testified no one had told her how to answer the questions asked of her in court.

Once again, the credibility and weight given to a witness's testimony are exclusively the jury's responsibility. Id. We believe the Commonwealth produced enough evidence for these issues to reach the jury and it was not clearly unreasonable that the jury could find the Appellant guilty of the offenses charged.

B. Motion to Strike For Cause

During voir dire, a prospective juror, Mr. Hamm, approached the bench. He informed the court that he had three young daughters and that he wasn't sure if he "could sit through [the case] and be open minded . . . ." In a bench conference, the judge asked Mr. Hamm, before the prosecution put on any evidence, whether he felt bias towards one side or the other. Mr. Hamm stated he could not say he was biased, because he had not heard anything about the case yet. The judge asked whether Mr. Hamm harbored any bias or prejudice against the Appellant, which was answered in the negative. The prosecution then asked Mr. Hamm if he could listen to all the proof and if the Commonwealth did not meet its burden of guilt beyond a reasonable doubt, if he could find the Appellant not guilty. Mr. Hamm responded "Yes. I think so."

After Mr. Hamm was sent back to the venire, the trial judge indicated that he was going to overrule Appellant's motion to strike for cause, because if he were stricken, many people would have to be stricken. The judge acknowledged that these types of cases were troubling and that people naturally harbor positive feelings towards children, but that in his opinion, Mr. Hamm had stated that he could hear the case fairly and

impartially. Inevitably, Appellant utilized one of his peremptory challenges to remove Mr. Hamm and notes he used all of his peremptory challenges, arguing he was prejudiced by the court's failure to strike Mr. Hamm for cause.

Under RCr 9.36, "when there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." The decision of whether to excuse for cause is within the sound discretion of the trial judge. Peters v. Commonwealth, 505 S.W.2d 764, 765 (Ky. 1974). Unless the action of the trial court is clearly erroneous, we will not reverse it. Scruggs v. Commonwealth, 566 S.W.2d 405 (Ky. 1978).

We note that impartiality is a state of mind, and whether a juror possesses this state of mind must be reviewed by looking at the totality of the circumstances, not any one answer to a question by the court. See Montgomery v. Commonwealth, 819 S.W.2d 713, 717-18 (Ky. 1991).

We cannot say the action of the trial court in this instance is clearly erroneous as the totality of the circumstances indicates Mr. Hamm would be able to render a fair and impartial verdict on the evidence. Most people would harbor bad feelings or thoughts about the idea of raping or sodomizing a young child. Like the judge indicated, dismissing one juror for cause who had pre-conceived ideas about such crimes, would most likely result in the need to dismiss most, if not all, prospective jurors for the same societal ideas. The trial judge did not abuse his discretion in denying Appellant's motion to strike for cause.

For the above-stated reasons, we affirm the judgment of the Warren Circuit Court.

All concur.

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