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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MAY 18, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-0976-MR

JAMES GIVIDEN — APPELLANT

V.

APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN CONRAD, JUDGE
02-CR-017

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

Appellant, James Robert Gividen, was convicted of twelve counts of first-degree rape of his step-daughter. He alleges four errors on this appeal: (1) the trial court's denial of his motions to strike two jurors for cause; (2) the trial court's denial of his motion for a directed verdict; (3) the trial court's granting of the Commonwealth's motion to amend the indictment; and (4) the admission of the photograph of the victim's anus. Finding no merit in his claims of error, we affirm.

II. Background

On September 11, 2001, Appellant argued with his then thirteen-year-old step-daughter, H.B., in front of H.B.'s mother. During the course of the argument, H.B. accused Appellant of having sexually abused her repeatedly, specifically by having sexual intercourse with her. H.B. also accused Appellant of having sexually abused her younger half-sister, C.G., who was Appellant's biological child.

The next day, having been contacted about the sexual abuse claim by social services, Detective Larimore of the Kentucky State Police interviewed H.B. and her mother. H.B. repeated her allegations that Appellant had had sexual intercourse with her, but Detective Larimore declined to arrest Appellant at that time. On February 8, 2002, H.B. was physically examined by Dr. Betty Spivack, a forensic pediatrician. Appellant was subsequently indicted for twelve counts of first-degree rape of H.B., one count of first-degree rape of C.G., six counts of first-degree sodomy, and nineteen counts of witness intimidation. His trial took place in September and October of 2003.

At trial Detective Larimore testified generally that he investigated the crime and referred H.B. to Dr. Spivack for a physical examination. On cross-examination, he testified that H.B. told him that she had sexual intercourse with Appellant at least twelve times from 1994 to 1996, when she was age six to eight. He also testified that H.B. told him she had performed oral sex on Appellant several times during that period.

H.B. was fifteen years old at the time of trial. She also testified that she and Appellant had sex at least twelve times, though she claimed the incidents occurred from 1996 to 1997, when she was ages eight and nine, ending when her half-brother was born. She remembered few details about the incidents. For example, she replied that she could not remember when asked about a variety of things, including whether she experienced any bleeding, whether Appellant had ever used a condom, whether she ever had any soreness or bruises, and whether there was anything distinctive about Appellant's genitals. When asked about the day she first made the allegations, she revealed that she could not remember much. For example, she could not remember the subject of the argument that led to the revelations or whether she had gone to school that day.

Though she could recall few details about the incidents, she did testify that they occurred in the bedroom her mother shared with Appellant, that they happened when Appellant sent her mother out to buy alcohol, and that she and Appellant completely disrobed when they had sex. On one occasion, she refused to have sex with Appellant, only to have him tell her that her sister C.G. would "do it with" him. She claims that she then observed Appellant having sex with C.G. She also testified that on another occasion, her mother returned home while she and Appellant were having sex, but that they had stopped and dressed quickly without her mother catching them. H.B. claimed that she had waited a long time to disclose the abuse because Appellant threatened her and her family.

H.B. also testified that she had never performed oral sex on Appellant, but that on several occasions he had put his mouth on her genitals. On the first day of her testimony, H.B. admitted on cross-examination that this was the first time she ever mentioned that Appellant had put his mouth on her. The next day she denied having made the admission, claiming that she had misunderstood the question Appellant's attorney asked her the previous day.

H.B. also testified about her other sexual activity. When asked about alleged sexual abuse by her biological father when she was only three or four years old, H.B. replied that she did not remember anything. She did admit to having had consensual sex one time with her former boyfriend. She claimed this sex act occurred on Wednesday, February 13, 2002—five days after her examination by Dr. Spivack. She was sure of the date because she claimed it occurred the day before Valentine's Day when she was on her way home from church on a Wednesday night.

Dr. Spivack testified as to her findings from the physical examination she performed on H.B. She described the procedures she employed during the examination, including the taking of several digital photographs. She concluded that H.B.'s hymen was abnormal for someone her age and that, in her opinion, its state indicated H.B. had been subjected to repeated, penetrating trauma, rather than a single instance. She also testified that the trauma could not have occurred in the few weeks leading up to the physical examination because there was no discernible scar tissue. Dr. Spivack also discounted the possibility that H.B.'s abnormal hymen could be the result of sexual trauma when H.B. was only three or four years old because trauma at that age would not have been so localized. Several of the digital photographs Dr. Spivack took, including several of H.B.'s genitals and one of her anus, were introduced into evidence during this testimony. Appellant's attorney objected to the introduction of the photograph of H.B.'s anus.

Other evidence introduced at trial indicated that H.B.'s biological father had been accused of sexually molesting her in Indiana when she was only three or four years old. Though the report from the investigating authorities in that state noted that "child molestation [was] indicated," there was also evidence that H.B.'s mother may have fabricated the allegations during a custody battle. H.B.'s former boyfriend also testified, claiming that he and H.B. had sex shortly after Christmas of 2001. Appellant's attorney characterized this testimony as meaning that the youths had sex at least several weeks before H.B.'s examination by Dr. Spivack.

The Commonwealth moved to amend the indictment at the end of its proof. Specifically, the Commonwealth sought to change the felony level listed under the rape counts of the indictment from "class B" to "class A." The trial court granted the motion.

Also at that time, Appellant's attorney moved for a directed verdict based on insufficiency of the evidence, but the trial court denied the motion. Appellant's attorney did not renew this motion at the end of his evidence.

The jury convicted Appellant of twelve counts of first-degree rape, and Appellant was sentenced to thirty years in prison. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

III. Analysis

A. Jurors

During voire dire of potential jurors, Appellant moved to strike two members of the panel—numbers 57 and 27—for cause. The trial court denied Appellant's motions as to both jurors. Appellant subsequently employed peremptory strikes to remove both jurors. Appellant now asks that we review the trial court's failure to grant the for-cause strikes under Thomas v. Commonwealth, 864 S.W.2d 252 (Ky. 1993), which held that it was per se reversible error when the trial court failed to dismiss a juror who should have been struck for cause, so long as the defendant used all of his or her peremptory strikes.

We have since departed from the per se reversal rule of Thomas and no longer presume prejudice where a defendant uses a peremptory strike to remove a juror who should have been struck for cause. See Morgan v. Commonwealth, ___ S.W.3d ___ (Ky. 2006). We noted in Morgan:

> A defendant's right to be tried by an impartial jury is infringed only if an unqualified juror participates in the decision. As long as the jury that actually hears and decides the case is impartial, there is no constitutional violation. Even if a juror should have been removed for cause, such error does not violate the constitutional right to an impartial jury if the person did not actually sit on the jury.

Id. at ___ (citations omitted). Our decision in Morgan recognizes that peremptory strikes are merely a means to an end—namely, trial by an impartial jury—and that they should not be treated in such a way as to allow a defendant to manufacture error on appeal. If a defendant employs peremptory strikes to remove questionable jurors, any unintentional error committed by the trial court in failing to strike a juror for cause is rendered harmless. Thus, the relevant inquiry is whether an unqualified juror actually sat on the jury. The objectionable jurors in this case were removed with peremptory strikes, and there is no suggestion that any of the jurors who actually decided the case were biased, unfair, or otherwise unqualified. Accordingly, the trial court's error, if any, was cured by the defendant's use of his peremptory challenges.

B. Directed Verdict

Appellant claims he was entitled to a directed verdict of acquittal as to the first-degree rape counts due to insufficiency of the evidence. We begin by noting that while Appellant's attorney moved for a directed verdict at the end of the Commonwealth's proof, he failed to renew the motion at the close of all the evidence.

> It is black-letter law that, in order to preserve an insufficiency-of-the-evidence allegation for appellate review, "[a] defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence[.]" In other words, a motion for directed verdict made after the close of the Commonwealth's case-in-chief, but not renewed at the close of all evidence—i.e., after the defense presents its evidence (if it does so) or after the Commonwealth's rebuttal evidence—is insufficient to preserve an error based upon insufficiency of the evidence.

Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (quoting Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998)) (footnotes omitted, alterations in original). Thus, we are forced to conclude that Appellant did not properly preserve the error. Despite this failure, Appellant asks us to review the claimed error as palpable error under RCr 10.26. As we noted in Schoenbachler, "the trial result necessarily

would have been different if the trial court had directed a verdict in Appellant's favor." Id. at 837. Because a directed verdict error necessarily affects the substantial rights of a defendant, we must inevitably examine the merits of any directed verdict claim. See id.

Appellant primarily attacks the credibility of H.B.'s testimony, noting that H.B. had difficulty remembering many details of the incidents and that portions of her testimony were contradicted by her earlier statements to police officers and social workers and by the testimony of her former boyfriend. Appellant cites Davis v. Commonwealth, 290 Ky. 745, 162 S.W.2d 778 (1942), Kentucky Power Company v. Dillon, 345 S.W.2d 486 (Ky. 1961), and Coney Island Company v. Brown, 290 Ky. 750, 162 S.W.2d 785 (1942), for the proposition that we should reverse a conviction that is based on incredible testimony. This is an incorrect reading of these cases. As our predecessor court noted in Davis:

> Ordinarily this court, as other appellate courts, will not interfere with the verdict where there is substantial testimony to support it. This usually involves the quality as well as the quantity of the evidence, the credibility of witnesses and the weight to be accorded their testimony being regarded as outside the province of the reviewing court.

Id. at 779-80. The rare exception, on which Appellant attempts to rely, is "where the verdict is against the weight of the evidence, as where the jury disregarded a defense which was almost conclusively established . . . ." Id. at 780. In such limited cases, reversal is warranted. The verdict in Davis, which was based on limited circumstantial evidence and flew in the face of rock-hard evidence of the defendant's alibi, was one of those rare cases, thus it was reversed.

However, there simply is no such failure of the evidence in this case. That a witness's testimony may have conflicted with her earlier statements or the testimony of

other witnesses, thus calling the witness's credibility into question, is not the sort of virtually conclusive proof of innocence contemplated by Davis. And it certainly is not a sufficient reason to grant a directed verdict. Assessing the credibility of witnesses and determining the weight to accord their testimony is the province of the jury. In light of the testimony of H.B. and the other witnesses, particularly that offered by Dr. Spivack, we cannot say that "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). Thus, it was not error for the trial court to refuse to direct a verdict of acquittal.

C. Amending the Indictment

Appellant also claims that the trial court erred when it allowed the Commonwealth to amend the description of the level of felony of the first-degree rape counts in the indictment's caption from "class B" to "class A." Appellant argues that the amendment was improper because it subjected him to an increased penalty, and likely had a negative impact on plea negotiations.

Our Rules of Criminal Procedure include a specific provision allowing amendment of an indictment.

> The court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

RCr 6.16. As we have previously noted, "in case of a variance between the language of the caption and the language of the body of an indictment, the language of the body controls." Riley v. Commonwealth, 120 S.W.3d 622, 630 (Ky. 2003).

The substance of the counts in the indictment—the allegations that Appellant had engaged in sexual intercourse with a person less than twelve years of age—was not

changed. KRS 510.040 specifically states that first-degree rape is a class A felony when the victim is less than twelve years old. Thus, we conclude that the change in the description of the level of the felony did not charge an additional or different offense. Id. at 631.

We must also determine whether the amendment prejudiced Appellant's substantial rights. Appellant's attorney indicated some surprise when the Commonwealth moved for the amendment, stating that he had not looked at the statute and had been depending on the indictment's description of the crime as a class B felony. When stating the reasons for his objection, he specifically noted the late date of the amendment. He did not ask for a continuance. Though the timing of the amendment is somewhat troubling, as it occurred in the middle of trial, that concern is alleviated by the fact that the Commonwealth had originally moved to amend the indictment so that the charge would be listed as a class A felony in May 2002—more than a year before trial. Thus, Appellant had ample notice of both the Commonwealth's intent to amend the indictment and the nature of the proposed amendment. Moreover, the body of the indictment, which clearly stated the operative fact of the victim's age and was not changed after it was returned by the grand jury, was sufficient to put Appellant on notice of the penalty he faced. As such, we cannot say that the amendment of the indictment affected Appellant's substantial rights or that the trial court abused its discretion in granting the Commonwealth's motion.

In the course of discussing the amendment of the level of the felony, Appellant's brief mentions that the dates of the rapes charged in the indictment were amended on the first morning of trial. The indictment originally stated that the rapes occurred in 1994, 1995, and 1996. After the amendment, it stated that the rapes occurred between

August 7, 1996 and May 12, 1997. There does not appear to be any objection to this amendment in the record, which may explain why Appellant only mentions it in passing in his brief. Any claimed error as to this amendment was unpreserved.

D. Photograph

Finally, Appellant alleges that the trial court erred by allowing the admission of a photograph of H.B.'s anus that was taken by Dr. Spivack during H.B.'s medical examination. Appellant claims that the photograph was irrelevant, since there was no allegation of anal sex, and highly inflammatory. In essence, Appellant claims that the trial court improperly weighed the photograph's probativeness and prejudicial effect under KRE 403.

We disagree with Appellant's contention that the photograph was irrelevant. The photograph was introduced as part of a group of photographs during Dr. Spivack's discussion of the medical examination she performed after H.B.'s allegations of sexual abuse. While the condition of H.B.'s anus was not a directly contested fact, it was nevertheless indirectly relevant in that it showed the thoroughness of Dr. Spivack's examination, which, in turn, was critical in showing that H.B.'s genitals had been damaged due to repeated sexual penetration. The photograph also showed a lack of the sort of wide-spread damage that Dr. Spivack testified would have resulted had H.B. been sexually abused when she was three years old. Thus, we conclude that the photograph was at least minimally probative.

While the subject of the photograph is certainly unpleasant, "[i]t is the general rule that a photograph, otherwise admissible, does not become inadmissible simply because it is gruesome and the crime is heinous." Holland v. Commonwealth, 703 S.W.2d 876, 879 (Ky. 1985). We simply cannot say that the photograph in question is

the sort of truly-irrelevant photograph offered solely to inflame the passions of the jury that we condemned in Holland. See id. at 880. The photograph's probativeness, while limited, was not outweighed by its prejudicial effect. Thus, we conclude that the trial court did not abuse its discretion in allowing the photograph to be admitted into evidence.

IV. Conclusion

For the foregoing reasons, the judgment of the Trimble Circuit Court is affirmed.

Lambert, C.J.; Graves, Johnstone, Roach, Scott and Wintersheimer, JJ., concur. Cooper, J., dissents without separate opinion.

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