

Supreme Court of Kentucky

2020-SC-0492-MR

DARREN BOUNDS

APPELLANT

V. ON APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE DANIEL ZALLA, JUDGE
NO. 17-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION OF THE COURT BY JUSTICE VANMETER

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Darren Bounds appeals as a matter of right¹ his convictions on twenty counts of possession of matter portraying a sexual act of a minor.² The primary issue we must resolve is whether the Campbell Circuit Court erred in denying Bounds' motion for directed verdict on the grounds that the Commonwealth failed to prove Bounds knowingly possessed child pornography. Following a thorough review of the record and the arguments by counsel, we hold that the trial court did not err on this basis. We hold, however, that one of Bounds' convictions violated double jeopardy and must be

¹ Kentucky Const. § 110(2)(b).

² Kentucky Revised Statutes (KRS) 531.355.

vacated. We therefore remand to the trial court for the entry of a new judgment to reflect this holding.

I. Facts and Procedural Background.

In 2016, Bounds was accused of sexually abusing his daughter, D.H. The Kenton County Grand Jury initially indicted Bounds, in January 2017, on five counts relating to the sexual abuse.³ During its investigation of these allegations, in November 2016, Campbell County Police executed a search warrant for the residence where Bounds resided with his mother. From Bounds' bedroom in the house's basement, officers seized numerous items: Bounds' computer from under his desk, CDs, three hard drives (all connected to or located in his computer), knives, swords, sex toys (some of which were charging in the computer's USB ports), and flash drives. The three hard drives contained images of child pornography.

Detective Steve Kush of the Campbell County Police Department performed a forensic evaluation of this evidence. He testified that three hard drives were a) Seagate 1 terabyte (TB) which was wired into the computer and operated as its main C: drive; b) Western Digital 1 TB, unconnected to the computer but located in its bottom compartment or "swap bay;" and c) Western Digital 4 TB located in and connected to the computer. Det. Kush testified that

³ The initial indictment in this case, counts 1-5, charged Bounds with one count of rape in the first degree, two counts of sodomy in the first degree, one count of sexual abuse in the first degree, and one count of resisting arrest. The sexual offenses were all alleged to have been committed against D.H. Those charges were severed from the instant child pornography charges and remain pending.

he uncovered hundreds of child pornography videos and images from these drives.

The Kenton County Grand Jury then issued a supplemental indictment charging Bounds with twenty counts of possession of matter portraying a sexual act of a minor. These counts were based on twenty videos or images: nine files from the Seagate, counts 6, 7 and 11-17; three files from the Western Digital 1 TB, counts 8-10; and eight files from the Western Digital 4 TB, counts 18-25. The files on the Seagate and the Western Digital 1 TB were in the “recycle bins” of those drives. The files on the Western Digital 4 TB were in a folder named “Bryan’s Stuff” in a subfolder designated as “iterations of tax forms 2005-2016.” Det. Kush testified that he found no tax materials in that folder.⁴ Bounds is familiarly known by his middle name, Bryan.

Det. Kush testified the viewable files and images were in the main folders of the hard drives or in their recycle bins, to which Bounds had access. The computer contained data that demonstrated the folders with child pornography had been accessed many times, including just hours prior to the police seizure of the computer and its hard drives. Det. Kush testified that this computer’s user was very frequently viewing and downloading child pornography.

⁴ In addition, Det. Kush testified that 1,292 images of child pornography were found on the Western Digital 4 TB in the Bryan’s Stuff folder. In addition 411 previously deleted images were found on the Seagate drive’s “unallocated space.” Unallocated space is a computer location where items are stored after being emptied or deleted. Other than the twenty items which formed the basis of the indictment, none of these items were used to support the indicted charges.

A trial of the child pornography counts was held in December 2019. Prior to trial, the Commonwealth filed a motion pursuant to KRE⁵ 404(b) of its intent to introduce evidence of the additional uncharged images found on Bounds' computer and hard drives. Bounds objected and additionally moved to exclude "[e]vidence of possession of other child pornography, anime or child erotica." The trial court granted the Commonwealth's motion, determining that the evidence was relevant to show modus operandi, intent and absence of mistake.

At trial, Bounds' defense was that he had not knowingly possessed the child pornography. He suggested that four other people had access to the house and his room and could have downloaded the files: his mother, Deborah Kidwell; her live-in-boyfriend, Rick Gleason; Bounds' daughter, D.H.; and D.H.'s older half-sister, D.R. In addition, Bounds argued that one of the hard drives could have been refurbished and possibly contained the files and images prior to Bounds' purchase. After the conclusion of the Commonwealth's proof, Bounds moved for a directed verdict. His counsel merely stated that the Commonwealth failed to meet its burden that Bounds had knowingly possessed child pornography. The trial court denied the motion. Bounds presented no evidence.

The jury found Bounds guilty on all twenty counts of possession of matter portraying a sexual act of a minor. The jury recommended a sentence

⁵ Kentucky Rules of Evidence.

of five years on each count, to run consecutively, with the sentence statutorily capped at 20 years. KRS 532.110(1)(b); KRS 532.080(6)(b). The trial court accepted the jury's recommendation and imposed a twenty-year sentence. Bounds appeals to this Court as a matter of right.

II. Analysis.

Bounds makes three arguments. First, insufficient evidence supported the charges against Bounds. Second, Bounds' convictions on counts 15 and 17 violate double jeopardy since they relate to exhibits with the same file name and hash value. And third, the trial court erred in granting the Commonwealth's motion to present evidence of uncharged crimes pursuant to KRE 404(b). We address these arguments in turn.

A. Sufficiency of the Evidence.

When reviewing a trial court's denial of directed verdict, our standard is straightforward:

On a 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 purposes 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.

Hunter v. Commonwealth, 587 S.W.3d 298, 310 (Ky. 2019) (quoting *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)).

Bounds argues that to sustain a conviction under KRS 531.335, the Commonwealth was required to show not merely that the images were on his computer, but that he knowingly possessed them. *See United States v. Dobbs*, 629 F.3d 1199, 1207 (10th Cir. 2011) (stating a “defendant[] cannot be convicted for having the ability to control something [he does] not even know exists[]”); *Crabtree v. Commonwealth*, 455 S.W.3d 390, 409 (Ky. 2014) (“[t]he Commonwealth has the burden to prove that the defendant, in fact, committed the crime, not that he may have committed the crime[]”). Bounds points to the fact that he worked long hours and was frequently gone from the residence; the computer was not password protected; his room was easily accessible; Rick Gleason, according to Deborah Kidwell, had downloaded inappropriate content on her work computer approximately 6 years earlier;⁶ D.H. and D.J. visited often and accessed the computer.

By contrast, the Commonwealth argues that it did, in fact, present sufficient evidence to induce a reasonable juror to find guilt beyond a reasonable doubt.⁷ *Crabtree*, 455 S.W.3d at 396. The Commonwealth points out that all the images were found on Bounds’ devices, specifically three different hard drives. The devices were all located in Bounds’ room in the residence’s basement. Multiple witnesses described the devices as belonging to Bounds. Each hard drive had images of child pornography. On the Western

⁶ Gleason died in September 2019 and was thus unavailable to testify at trial.

⁷ The Commonwealth argues that Bounds failed to properly preserve this issue. Having reviewed the record and the arguments of counsel, we find that that issue was preserved.

Digital 4 TB hard drive, images were found in a subfolder titled “iterations of tax forms 2005-2016” within a folder titled “Bryan’s Stuff.” No tax documents or information was found. Det. Kush’s testimony was that even the images in a device’s “recycle bin” remained accessible, could be restored and almost all retraceable to Bounds’ computer. Further, all Recycle Bin images, except two (counts 8 and 9), contained security identification numbers specific to Bounds’ computer. The other two images were created by an unidentified computer but were located on a removable hard drive located in a swap bay of Bounds’ computer.

As to other persons possibly accessing Bounds’ computer, Kidwell testified she never saw Rick Gleason access Bounds’ computer and she denied that she ever downloaded child pornography on it. D.J. testified that while she was occasionally allowed to use the computer, she said she never saw any inappropriate images on it and she never downloaded child pornography. She also testified that her eight-year-old half-sister, D.H., was never permitted to use the computer unsupervised.

Many of the images had file names or terminology associated with child pornography. A software program, Tribler, necessary to download the pornography from a bit torrent network had been installed on the computer. In fact, according to Det. Kush, this software was downloaded just five days after the computer’s operating system was installed. A default folder was created to hold the downloaded images. On Bounds’ computer, this location was a “tax” subfolder titled “Deductibles 2008” within another folder named “Tax

Exemptions and Receipts.” These folders were located within the “Bryan’s Stuff” folder.

Finally, D.H. testified that Bounds showed her at least one image of child pornography on his computer.

Based on the forgoing, the Commonwealth produced more than sufficient evidence that Bounds knowingly possessed child pornography on his computer. *See Crabtree*, 455 S.W.3d at 400-02 (detailing proof sufficient to meet directed verdict standard in prosecution under KRS 531.335). The trial court did not err in denying Bounds’ motion for directed verdict.

B. Double Jeopardy (Counts 15 and 17).

Bounds’ second argument is that his convictions are tainted by double jeopardy since they relate to exhibits with the same file name and hash value. Bounds acknowledges that this argument is not preserved but requests palpable error review. RCr⁸ 10.26. Our case law supports that a conviction violating double jeopardy is subject to palpable error review. *See, e.g., Kiper v. Commonwealth*, 399 S.W.3d 736, 740 (Ky. 2012) (“review of the unpreserved claim of a violation of statutory double jeopardy is proper upon application of the palpable error rule[.]”).

The file in question, as shown by the jury instruction numbers 13 and 15, was designated “(pthc Pedo) Cexc c 11 N 13-neTHNMN GGG.avi.” The Commonwealth and Bounds acknowledge that images in question were from a

⁸ Kentucky Rules of Criminal Procedure.

single downloaded video depicting different individuals and minors engaging in discrete acts of sexual conduct. Bounds argues that the one video constituted a continuing course of conduct which may only be punished once. Ky. Const. § 13; KRS 505.020(1)(c). The Commonwealth, on the other hand, argues that because the video depicted different acts involving different individuals, Bounds was properly charged and convicted with two counts. We agree with Bounds. In our view, the video in question constitutes one offense for which bounds may be punished once. *See Commonwealth v. Grubb*, 862 S.W.2d 883, 885 (Ky. 1993) (holding that under Section 13 of the Kentucky Constitution, the Commonwealth may “carve out of a single criminal episode the most serious offense, but not to punish a single episode as a multiple offense[.]”), *overruled on other grounds by Johnson v. Commonwealth*, 553 S.W.3d 213 (Ky. 2018).

Bounds argues that this result compels remand for a new trial since the jury instructions implicated non-unanimous verdicts on instruction numbers 13 and 15, citing *Miller v. Commonwealth*, 283 S.W.3d 690, 694-96 (Ky. 2009), as well as a new penalty phase since “the sentence rendered by the jury was predicated on 20 separate convictions.” We are unable to agree with either assertion. In this case, both images in the video clearly “depicted an actual sexual performance by a minor.” Each count included a special verdict form by which the jury unanimously found that the image portrayed a sexual performance by a minor. Further, the sentence was not predicated on 20 one-year sentences. Bounds received 20 five-year sentences which the jury

recommended be served consecutively. In other words, a 100-year sentence. The 20-year sentence received by Bounds was actually a matter of legislative grace. KRS 532.110(1)(b); KRS 532.080(6)(b). The remedy, as suggested by the Commonwealth, is remand to the trial court with direction for it to set aside one of the offending convictions, either Count 15 or 17. The result will be 19 convictions, with recommended sentences of five years. Bounds' resulting sentence of 20 years is not impacted.

C. KRE 404(b).

Bounds' third and final argument is that the trial court erred in granting the Commonwealth's motion to present evidence of uncharged crimes pursuant to KRE 404(b). In this case, Det. Kush found a total of 1,292 images of child pornography on Bounds' hard drives. The Commonwealth was permitted to mention this in opening and in closing, and Det. Kush testified to it as well. As noted herein, the Commonwealth sent Bounds notice of its intent to introduce the evidence; Bounds objected. The trial court addressed the issue in the following written order:

Here, the Commonwealth intends to present evidence of the presence of uncharged images of child pornography, animae, child erotica, videos of child pornography, and other miscellaneous pornography found on Defendant's computer. On September 6, 2019, the Commonwealth sent the Defendant notice pursuant to KRE 404(c) that it will present 404(b) material at trial.

KRE 404(b) reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (I) if offered for some other purpose, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or (2) if so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party.

The Commonwealth is introducing this evidence to show intent, absence of mistake, preparation, identity, and plan. The Defendant argues that under KRE 403, the evidence should be excluded because it would be substantially more prejudicial than probative.

In conducting a KRE 404(b) or KRE 403 analysis, the Court should conduct a three part[] inquiry pursuant to *Daniel v. Commonwealth*:

The trial judge should consider the following:
One-is the evidence relevant for some purpose other than to prove criminal predisposition of the accused? Two-is proof of the other crime sufficiently probative of its commission to warrant introduction of the evidence against the accused? Three-Does the probative value of the evidence outweigh the potential for prejudice to the accused?

905 S.W.2d 76, 78 (Ky. 1995).

The evidence in question is relevant to the case, as it is being admitted for purposes other than to prove the criminal predisposition of the Defendant. The Commonwealth intends to utilize this evidence to prove intent, absence of mistake, preparation, identity, and plan, as allowed by KRS 404(b)(1). The Commonwealth argues that the number of uncharged images goes to Defendant's plan/modus operandi, as the images were saved in the same location as the charged images. Further, the Commonwealth must prove the Defendant's possession was not a mistake. The Commonwealth intends to do so by showing that the number of images on his computer demonstrates his possession was intentional and not a one-time mistake.

The evidence is sufficiently probative because the jury could reasonably infer that the other bad acts [occurred] and that the Defendant committed such acts. This evidence is probative in that the uncharged images were in Defendant's

possession, as they were found on the same computer as the charged images.

Finally, the probative value of the evidence outweighs the potential for prejudice to the accused in this case. In making this analysis:

[A] variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Newcomb v. Commonwealth, 410 S.W.3d 63[, 77] [(Ky.) 2013].

Here, the evidence is strong that the uncharged images also belonged to the Defendant, as they were found on the same computer as the charged images. The crimes are the exact same: possession of matter portraying a sexual performance by a minor. The crimes were committed at the exact same time. The other proof is eyewitness testimony, which may be cross-examined by the Defendant.

The Commonwealth points out [it is] “entitled to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background, and perspective.” *Norton v. Commonwealth*, 890 S.W.2d 632, 638 (Ky. App. 1994). By allowing the uncharged acts into evidence, the Commonwealth will not be limited to “an artificial, fragmented picture of what happened over the period of time.”

For the above reasons, the probative value of admitting these uncharged acts outweighs the potential for prejudice against the Defendant.

The Court finds that the uncharged images of child pornography may be admitted under KRE 404(b).

Our standard of review as to the admission or exclusion of evidence is whether the trial court abused its discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by

sound legal principles.” *Id.* The trial court cited and applied the three-part test for KRE 404(b).⁹

Bounds argues that the trial court erred since his defense was premised on creating reasonable doubt as to who may have downloaded the images to Bounds’ computer due to a lack of password protection on the computer and the access other people had to it. Bounds thus argues that the extra images were of limited relevance and also unduly prejudicial. The Commonwealth, conversely, asserts that because Bounds’ defense was based on a lack of his knowledge that the images were on his computer, the extra images were properly referred to demonstrate knowledge, intent, lack of mistake. We agree with the Commonwealth.

The trial court did not abuse its discretion in permitting reference to the extra images. Importantly, the testimony about and reference to the extra images was limited in that they were not shown to the jury. *See Helton v. Commonwealth*, 595 S.W.3d 128, 137-40 (Ky. 2020) (holding that trial court did not abuse its discretion in allowing limited testimony about eighty-eight child pornography videos and a DVD containing images of child pornography).

Concurrently with the rendition of this case, we have issued an opinion in *Minch v. Commonwealth*, 2020-SC-0366-MR (Ky. Sept. 30, 2021) in which we reach a different conclusion as to the admissibility under KRE 404(b) of

⁹ As the source of the three-part test, the trial court quoted this Court’s opinion in *Daniel v. Commonwealth*. No error occurred as a result of this citation since *Daniel* relied on our earlier opinion, *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994), which we frequently cite for analyzing KRE 404(b) issues.

additional images of child pornography found on the defendant's computer. While the results in these two cases may seem contradictory, important factual distinctions exist. In *Minch*, the defendant did not contest knowledge of any images and, just as importantly, the Commonwealth's charges involving images were tried along with the charges of use of a minor in a sexual performance, KRS 531.310, and sexual abuse of minor, KRS 510.110. While the joinder of the charges was not prejudicial, the admission of or reference to the additional non-charged images greatly increased the risk of prejudicial harm outweighing their probative value. By contrast, in this case, Bounds asserted lack of knowledge of any images on his computer, thereby bringing his knowledge directly into issue, which is one of the permitted purposes in KRE 404(b). Additionally, the location of the images in a folder designated as "Bryan's stuff," and a subfolder referring to tax matters but in which no tax materials were found, supports relevance and probative value. See *United States v. Caldwell*, 181 F.3d 104 (6th Cir.1999) (holding that orderly location of items of child pornography and erotica was admissible to refute defendant's claim of lack of knowledge). Finally, in this case, the trial court severed Bounds' rape, sodomy and sexual abuse charges, indicted under KRS Chapter 510, from the child pornography charges thereby eliminating the undue prejudice to Bounds that the jury might convict him of the former charges based on his large collection of child pornography images.

III. Conclusion.

Based on the foregoing, we affirm in part and reverse in part. We remand this matter to the Campbell Circuit Court with direction to vacate one of Bounds' convictions, either count 15 or count 17, and to enter a new judgment accordingly.

All sitting. All concur.

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