

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001450-MR

SCOTT E. BRAMEL

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 01-CR-00061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Montgomery Circuit Court after a jury found appellant guilty of first degree sexual abuse. For the reasons stated hereafter, we affirm.

Appellant lived with and planned to marry the mother of the seven-year-old female child whom he was convicted of abusing. During the night of March 16, 2001, the child had

nightmares and went into the couple's bedroom several times. Eventually the mother permitted the child to get into bed with the couple, the child settled in between the two adults, and the mother returned to sleep. According to appellant's brief,

either in his sleep, or on the verge of wakefulness, [he] reached over to rub [the mother's] genitals, which was his usual method of instigating sexual intercourse between the two. However, the person whose genitals he was actually touching were [sic] [the child], not [the mother]. He stopped as soon as he realized he was touching [the child] and not her mother.

The child then left the bed to sleep elsewhere until the next morning, when she told her mother of the incident. The adults agreed to contact the child's therapist, who in turn reported the incident to the Cabinet for Families and Children.

Appellant eventually was indicted and tried on a charge of first degree sexual abuse. In accordance with the jury's recommendation, the trial court sentenced him to one year imprisonment, probated for three years. This appeal followed.

Although appellant asserts that the trial court erred by failing to grant his motion for a directed verdict, the record shows that the motion which was made at the close of the Commonwealth's evidence was not renewed at the close of all of the evidence. Absent such a renewal, which would have provided the trial court with "the opportunity to pass on the issue in light of all the evidence," this issue was not preserved for

appellate review. Baker v. Commonwealth, Ky., 54 S.W.2d 973, 974 (1998). See also Kimbrough v. Commonwealth, Ky., 550 S.W.2d 525, 529 (1977).

Appellant also contends that the trial court erred "when it allowed the Commonwealth to argue transferred intent" as to his touching of the child. However, our review of the record fails to show that the Commonwealth made, or that appellant properly objected to, any such argument below.

Here, the dispute centered not on whether appellant touched the child, but on whether he touched her for sexual gratification purposes. The Commonwealth's opening statement included assertions that "I believe the evidence will show that the defendant voluntarily touched [the child] in order for sexual gratification," and that "there was a touch - a sexual touch to the private area of this little girl for sexual gratification." After the close of its evidence, the Commonwealth continued to advance its theory of knowing conduct by asserting that "I think that the evidence has shown that he was awake, and the touch was towards [the child], and that this was normal contact for him to touch in a manner for sexual gratification."

Appellant's counsel in turn admitted during closing argument that there had been some contact between appellant and the child. However, counsel asserted that "I'm not really sure

what theory the Commonwealth has as to why Scott is guilty," and that "the Commonwealth may present to you a theory that there is some sort of transferred intent on the part of Scott."

Appellant's counsel then continued to refer to the transferred intent theory throughout the remainder of the closing argument.

Despite appellant's multiple references to the transferred intent theory, our review of the entire record shows that the Commonwealth never raised or discussed the theory of transferred intent at any time during the trial. Instead, during closing argument the Commonwealth advised the jurors that their function was to determine whether at the time of the touching appellant "was awake," whether "he knew that [the child] was there," and whether "he had the intent to please his sexual gratification." In other words, contrary to appellant's contention, the Commonwealth's argument turned on whether the sexual contact occurred as a result of appellant's knowing and intentional behavior regarding the child, rather than as a result of mistake or transferred intent. Given these circumstances, there is simply nothing in the record to support appellant's argument that the court erroneously permitted the Commonwealth to argue the theory of transferred intent. Hence, appellant is not entitled to relief on this ground.

The court's judgment is affirmed.

ALL CONCUR.

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