

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002508-MR

MICHAEL WAYNE FLEMING

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
INDICTMENT NO. 02-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

DYCHE, JUDGE. Michael Fleming was convicted by a jury of the offenses of Sexual Abuse, First Degree (KRS 510.110), and Use of a Minor in a Sexual Performance (KRS 531.310), and sentenced to five years and ten years, respectively. The victims were his step-daughters, who were nine and twelve years of age at the time of trial. He now appeals from the latter conviction. We affirm.

Fleming first argues that the trial court should have directed a verdict of acquittal at the conclusion of the evidence on behalf of the Commonwealth. The testimony of the young girl was that on five occasions, Fleming had her disrobe and lie on a bed with her legs spread apart so he could view her genitals. There was no valid medical reason for such an examination. Fleming maintains that such conduct does not run afoul of KRS 531.310(1), which provides,

A person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance.

KRS 531.300 includes the following definitions:

(4) "Sexual conduct by a minor" means:

(a) Acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse, or deviant sexual intercourse, actual or simulated;

(b) Physical contact with, or willful or intentional exhibition of the genitals;

(c) Flagellation or excretion for the purpose of sexual stimulation or gratification; or

(d) The exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area or buttocks, or the female breast, whether or not subsequently obscured by a mark placed thereon, or otherwise altered, in any resulting motion picture, photograph or other visual representation, exclusive of exposure portrayed in matter of a private,

family nature not intended for distribution outside the family;

(5) "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience;

(6) "Sexual performance" means any performance or part thereof which includes sexual conduct by a minor . . . .

It is the "position of the Appellant that not every exposure of genitals by a minor constitutes a sexual performance."

Unfortunately for Fleming, this Court and the Supreme Court of Kentucky have held that conduct strikingly similar to that in which he engaged violates the above statutes. Gilbert v. Commonwealth, Ky., 838 S.W.2d 376 (1991); Alcorn v. Commonwealth, Ky. App., 910 S.W.2d 716 (1995). There was no error in denial of the directed verdict motion.

Fleming next attempts to challenge the constitutionality of the statute.

This latter concern was never presented to the trial court for a ruling; thus, accordingly there was no action thereon for appellate review. ". . . The policy of RCr 9.22 and 10.12 is to require a defendant in a criminal case to present to the trial court those questions of law which may become issues on appeal. The appellate court reviews for errors, and a nonruling is not reviewable when the issue has not been presented to the trial court for decision." Turner v. Commonwealth, Ky., 460 S.W.2d 345, 346 (1970).

Todd v. Commonwealth, Ky., 716 S.W.2d 242, 248 (1986). Even if the issue had been preserved, the statute has withstood constitutional challenges, and we are bound by that decision. Payne v. Commonwealth, Ky., 623 S.W.2d 867 (1981); SCR 1.030(8).

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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