

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002624-MR

DAVID EARL PHIPPS

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 02-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. David Earl Phipps (hereinafter "Phipps") appeals his conviction and sentence on the charge of first-degree sexual abuse entered by the Bell Circuit Court following a trial by jury. We affirm.

On January 14, 2002, Phipps was indicted by the Bell County Grand Jury on the charge of first-degree sexual abuse in violation of KRS 510.110. The indictment alleged that "on or about the 13th day of March, 2000, in Bell County, Kentucky,

[David Earl Phipps] committed the following offense: Sexual Abuse in the First Degree by having sexual contact with K.P., a person less than 12 years old." Following several trial continuances, the matter was tried before a jury on November 7, 2002. At the conclusion of the trial, Phipps was found guilty and sentenced to four (4) years in the state penitentiary. This appeal followed.

On appeal, the only issue raised by Phipps is that the trial court erred by not granting his motion for a directed verdict. Phipps contends that the Commonwealth did not prove beyond a reasonable doubt that he subjected K.P. to sexual contact and that the jury finding him so was "clearly unreasonable." We disagree.

In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court set forth the standard to be applied to a motion for directed verdict as follows:

Despite the long-standing nature of the directed verdict rule found in [Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983)] and [Trowel v. Commonwealth, Ky., 550 S.W.2d 530 (1977)], some have difficulty in its application. In an effort to simplify the rule and make it abundantly clear, we restate the rule as follows:

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 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. Sawhill.

As stated in Sawhill, there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a scintilla of evidence.

Id. at 187, 188.

At trial, K.P., who was seven when she testified, answered the Commonwealth's questions as to what occurred on March 13, 2000, between her and Phipps as follows:

18. Now-now slow down, so they can hear you. Okay, slow down. Okay, tell them. You were watching television, and then what happened?

A. Then he turned it off. And he took me in the bedroom and he took my clothes off. He put me in the bed, and then he stuck his thing in me and all that white stuff came out.

19. Now when you say, he stuck his thing in you, I understand that you don't know a name for that, okay. Are you talking about something that is private?

REPORTER'S NOTE: The witness nodded in the affirmative.

20. I need you to say-say your answer. I see you shaking your head, but she has to write it down. Are you talking about a private area with him?

A. Yes.

21. And where did the white stuff come out of?

A. On the bed.

22. And the part that was his private area, where did he touch you with it?

A. In my private part.

23. Now do you remember, did this last very long? If you remember, if you don't, don't guess.

A. I don't know.

24. Okay, and do you remember whether or not it hurt?

A. It didn't hurt.

(trial transcript pp. 316, 317). In addition, K.P.'s mother, medical personnel, the treating physician, and the social worker verified that the child had made similar statements. It was also testified that K.P. was taken to the hospital because of her statements and that she was "red and raw" around her vaginal

area and that a urinalysis indicated blood in her urine. While none of this testimony or evidence is conclusive proof that sexual abuse occurred, it clearly indicates that the trial judge correctly determined that a reasonable juror would fairly find guilt beyond a reasonable doubt. The Commonwealth produced evidence that was considerably more than a mere scintilla and the case was properly presented to the jury for determination. See Benham, supra, at 188.

For the foregoing reasons, the judgment and sentence pursuant to jury verdict entered by the Bell Circuit Court is affirmed.

ALL CONCUR.

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