

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000714-MR

DARRELL SMALLWOOD

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE THOMAS L. WALLER, JUDGE  
ACTION NO. 02-CR-00200

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Darrell Smallwood appeals from a final judgment of the Bullitt Circuit Court wherein he was convicted of sex offenses and sentenced to five years in prison. He asserts five separate trial errors and contends that the judgment rendered against him should be reversed. We affirm.

Smallwood and his wife were nurses' aides at the Green Meadows Nursing Home in Bullitt County. Their job duties included tending to the basic needs of the nursing home residents, including changing bed clothing and adult diapers

(briefs) and cleaning the residents after bowel movements and/or urination.

The charges against Smallwood arose as a result of complaints made by two residents at the nursing home.<sup>1</sup> D.J. was a 56-year-old female who suffered from multiple sclerosis. B.M. was a 33-year-old female who also suffered from multiple sclerosis. Neither was able to walk on her own, and both wore briefs that the nurses' aides changed for them.

D.J. alleged that in September 2002 Smallwood inserted his fingers inside her vagina while changing her briefs. She claimed that Smallwood was pretending to check her for a bladder infection, but she told him that she did not have an infection and directed him to leave her room. D.J. also testified at trial that Smallwood refused to leave the room and said, "I will close the door and pull the curtain and we can have sex and nobody can't see it." D.J. stated that when she refused Smallwood's advances, he left the room.

B.M. alleged that in July and August 2002, Smallwood inappropriately inserted his fingers into her vagina when changing her briefs. She testified that this abuse occurred on five different occasions. B.M. also stated that on the fifth

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<sup>1</sup> We will refer to the victims by their initials due to the nature of the crimes. Also, there was a third complainant, but the charges as to that individual were dismissed prior to trial.

occasion, she asked Smallwood where his wife was and he told her to go ahead and scream because his wife was in another hall.

B.M. testified that she was scared because Smallwood said no one would hear her if she screamed. She also testified that Smallwood exposed himself to her on one of the occasions.

In late September 2002, Detective Jonathan Tapp interviewed the two women at the nursing home. They accused Smallwood of sexually abusing them in the above-stated manner. On October 17, 2002, Detective Tapp interviewed Smallwood. Smallwood initially denied any type of sexual contact with either patient. He also denied that he ever exposed himself to B.M.

After Detective Tapp suggested to Smallwood that there were video cameras in the room, Smallwood claimed that B.M. asked him several times to show her his penis and that he did so. He also admitted that he had masturbated B.M., but he claimed that he did so at her request. After initially stating that he had done this to B.M. only once, he later stated, "it may have been five times."

In December 2002, a Bullitt County grand jury indicted Smallwood on eight counts of first-degree sexual abuse and one count of indecent exposure.<sup>2</sup> Two years later, the case was tried

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<sup>2</sup> Two of the counts of sexual abuse related to the third alleged victim and were dismissed.

by a jury in Bullitt County, and the jury rendered a verdict finding Smallwood guilty of one count of first-degree sexual abuse, four counts of third-degree sexual abuse, and one count of indecent exposure. All counts related to incidents involving B.M. The jury acquitted Smallwood of the offense relating to D.J.

In March 2005, the court entered a judgment against Smallwood, sentencing him to five years in prison for one count of first-degree sexual abuse, 90 days on each of four counts of third-degree sexual abuse, and 90 days for one count of indecent exposure. All sentences were ordered to run concurrently for a total of five years. Additionally, the court sentenced Smallwood to an additional three-year period of conditional discharge to be served following his five-year sentence. This appeal by Smallwood followed.

Smallwood's first argument is that the trial court abused its discretion in failing to grant him a continuance based on discovery violations by the Commonwealth. In order to address this argument, it is necessary to address the facts. On October 22, 2003, Smallwood filed a Motion for Supplemental Discovery and Exculpatory Evidence. Therein, he moved the court to order the Commonwealth to furnish him his personnel file at the nursing home; his timesheets; nursing/medical chart records including medical diagnosis, treatments, and medications for the

victims; the victims' counseling records; visitor sign-in sheets; video tapes depicting visitors to the victims' rooms; the right to view and inspect the rooms; and all exculpatory evidence.

The court held a hearing on the motion on October 29, 2003. On October 31, 2003, the court entered an order allowing Smallwood to subpoena his personnel files, timesheets, visitor sign-in sheets, and copies of any video tapes. On November 1, 2003, the court entered an order again allowing Smallwood to subpoena his personnel records, timesheets, and visitor sign-in sheets. The order also allowed him the right to view and inspect the victims' rooms. Additionally, the order directed the Commonwealth to "use its best efforts to obtain for the Defendant the medical diagnosis of each individual and a list of medications, if any, the victim was taking at the time of the alleged offense." The order confirmed the trial date of December 9, 2003.

Smallwood's attorney had the clerk issue a subpoena for his personnel file, timesheets, visitor sign-in sheets, and video tapes. The subpoena directed the records custodian at the nursing home to produce the items stated therein at the clerk's office by November 19, 2003. The subpoena was served on the nursing home on November 7, 2003. The nursing home produced the items pursuant to the subpoena to the clerk's office on November

20, 2003, although neither Smallwood nor the Commonwealth has acknowledged this fact in their briefs. The items produced included the nursing home's records concerning the medical diagnosis and the medication charts for each of the victims covering the time periods during which the incidents were alleged to have occurred.

On November 12, 2003, Smallwood's attorney informed the court she had not yet received the medical diagnosis and medication information the court had instructed the Commonwealth to use its best efforts to obtain. The Commonwealth replied that the nursing home had indicated the information would be forthcoming. In fact, the material was included in the nursing home's disclosures filed on November 20, 2003.

On December 1, 2003, Smallwood's attorney informed the court that she still had not received the medical diagnosis and medication information from the Commonwealth. At a hearing held pretrial on December 16, 2003, Smallwood's attorney acknowledged she learned, following the December 1 hearing, that the information had been provided on November 20, 2003.

Due to the closure of Kentucky courts for the governor's inauguration on December 9, Smallwood's trial was continued until December 16, 2003. Between December 1 and December 16, Smallwood's attorney filed subpoenas asking for the complete medical records of both D.J. and B.M. The subpoenas

issued by Smallwood's attorney requested the records be produced on December 16, 2003, the day of the trial.

The trial commenced on the morning of December 16, 2003, and the additional medical records of the two victims were produced in response to the subpoena issued by Smallwood's attorney. Smallwood's attorney requested a continuance in order to review the records. Following the selection of the jury, the court continued the case through the lunch hour and directed that the proceedings would start back at 2:30 p.m. with competency hearings concerning the two victims. The jury was discharged until the following morning.

Smallwood's attorney reviewed the medical records and learned that B.M. had claimed in the past that she had been raped. Smallwood's attorney also learned that B.M. had been seeing a psychiatrist following the incidents with Smallwood.<sup>3</sup> Counsel's renewed motion for a continuance was again denied. On the following morning, Smallwood's counsel again moved for a continuance due to the alleged failure of the Commonwealth to turn over exculpatory evidence regarding B.M., including her treatment for short-term memory loss. That motion was likewise denied.

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<sup>3</sup> The fact that counseling was recommended by the nursing home staff following their investigation of the allegations is contained in the materials filed on November 20, 2003.

Smallwood bases his argument that the court erred in failing to grant him a continuance on his allegation that the Commonwealth violated discovery orders. We disagree. First, the nursing home produced the requested records by filing them with the court on November 20. As for the victims' complete medical records, the court did not order the Commonwealth to produce them. Rather, it merely ordered the Commonwealth to "use its best efforts to obtain for the Defendant the medical diagnosis of each victim and a list of medications, if any, the victim was taking at the time of the alleged offense." In fact, this material was in the nursing home's November 20, 2003, disclosure. Thus, there was compliance with the court-ordered discovery, and we fail to see any violation by the Commonwealth of the court's discovery orders.<sup>4</sup>

Whether or not a motion to continue a trial should be granted lies within the trial court's discretion. See Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds by Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). We find no abuse of discretion in the court's denial of Smallwood's motion. Smallwood's attorney had the opportunity to

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<sup>4</sup> The medical records that were delivered the day of the trial were subpoenaed by the defense for that time. The material, reportedly a file box full, was far more extensive than the material the court had directed the Commonwealth to use its best efforts to obtain from the nursing home. Further, the Commonwealth correctly notes that the court indicated at the time it issued its discovery order that it was not requiring the Commonwealth to obtain the victims' full medical records.

review the records through the lunch hour and until the competency hearing commenced at 2:30 p.m. on the afternoon of the first day of the trial. Furthermore, the records were available for review thereafter, and witnesses were not called in the case until the following day.

In addition, we are not persuaded by Smallwood's argument that he was prejudiced because he did not learn until his attorney reviewed the medical records that B.M. had previously claimed she had been raped and that she suffered from short-term memory loss. During the trial, Smallwood's attorney never questioned B.M. concerning her earlier claim that she had been raped. Further, his attorney had the opportunity to cross-examine B.M. concerning her short-term memory loss and its effect on the credibility and weight to be given her testimony. In short, we conclude that the court did not abuse its discretion in denying Smallwood's motion for a continuance.

Smallwood's second argument is that the trial court denied his right to a unanimous verdict "by using a combination instruction when there was no evidence of forcible compulsion." As to B.M., the jury was instructed on five counts of first-degree sexual abuse and one count of indecent exposure. Each count of first-degree sexual abuse contained a lesser-included

instruction on third-degree sexual abuse. KRS<sup>5</sup> 510.110(1) provides that a person may be found guilty of first-degree sexual abuse if he either subjects another person to sexual contact by forcible compulsion or subjects another person to sexual contact who is incapable of consent because he or she is physically helpless. The indictment as to both B.M. and D.J. alleged first-degree sexual abuse in that the victim was physically helpless. The indictment made no mention of sexual contact by forcible compulsion.

At the conclusion of the evidence, the Commonwealth moved the court to add forcible compulsion language to the jury instructions so that the jury could find guilt based on either physical helplessness or forcible compulsion. The court initially denied the Commonwealth's motion. Thereafter, Smallwood moved the court to instruct the jury on a lesser-included offense of third-degree sexual abuse. See KRS 510.120. An element of this offense is lack of consent. The next morning the court granted Smallwood's motion to include the lesser-included offense of third-degree sexual abuse, and it also reversed its previous ruling and granted the Commonwealth's motion to instruct the jury on forcible compulsion. Smallwood asserts that this was error.

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<sup>5</sup> Kentucky Revised Statutes.

The jury found Smallwood not guilty as to D.J. However, it found him guilty of one count of first-degree sexual abuse and four counts of third-degree sexual abuse as to B.M. Thus, his argument relates to the single count of first-degree sexual abuse regarding B.M.

B.M. testified that when Smallwood touched her, she did not alert the staff in the nursing home because she did not have a beeper close by. She also testified that she was concerned for her safety when these incidents occurred because Smallwood could walk and she could not. Furthermore, there was evidence that Smallwood told B.M. that she could go ahead and scream because no one would hear her. We conclude that this testimony supported the giving of an instruction including forcible compulsion. Therefore, we find no error in this regard.

Smallwood's third argument is that the court denied him due process during the sentencing portion of the trial when it allowed the assistant prosecutor to introduce through his testimony a document entitled "Certification on Calculation of Parole Eligibility." Over Smallwood's objection, the court allowed the document to be introduced pursuant to KRE<sup>6</sup> 803(6). The short answer to this argument by Smallwood is that the document was a self-authenticated public record that was

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<sup>6</sup> Kentucky Rules of Evidence.

admissible pursuant to KRE 1005 and KRE 902. See Skimmerhorn v. Commonwealth, 998 S.W.2d 771, 775-77 (Ky.App. 1998).

Smallwood's fourth argument is that the trial court abused its discretion by failing to grant separate trials in connection with the charges for the two victims. In other words, Smallwood argues that the trial of the offense in connection with D.J. should have been separated from the trial of the offenses concerning B.M. We disagree.

RCr<sup>7</sup> 9.16 provides in pertinent part that "[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses . . . the court shall order separate trials of counts . . . ." The basis of Smallwood's argument is that he admitted sexual contact with B.M. and claimed it was consensual but denied sexual contact with D.J. Noting that he was acquitted as to the offense concerning D.J., Smallwood argues that he was unduly prejudiced by not being able to choose to testify on his own behalf regarding the allegations by one victim but not the other.

"The trial judge has broad discretion in regard to joinder and the decision of the trial judge will not be overturned in the absence of a demonstration of a clear abuse of discretion." Violett v. Commonwealth, 907 S.W.2d 773, 775 (Ky. 1995). "A significant factor in determining whether joinder of

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<sup>7</sup> Kentucky Rules of Criminal Procedure.

offenses for trial is unduly prejudicial is whether evidence of one of the offenses would be admissible in a separate trial for the other offense." Id.

The allegations and circumstances regarding D.J. were very similar to those regarding B.M. Both were patients in the same nursing home who suffered from multiple sclerosis. Further, the alleged incidents were close in time and involved the same inappropriate manner of touching. We conclude that the evidence as to one victim would have been admissible in a separate trial for the other offense. Thus, we find no abuse of discretion by the joinder of the offenses for trial.

Smallwood's last argument is that the trial court erred in denying his directed verdict motion as to B.M. because B.M. was not physically helpless. KRS 510.010(6) defines "physically helpless" as "that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act."

This issue was not preserved for appellate review. At the conclusion of the evidence, Smallwood's attorney made only a general motion for a directed verdict as to the counts of the indictment relating to B.M. No reference was made to any lack of evidence that B.M. was "physically helpless."

CR<sup>8</sup> 50.01 requires that a directed verdict motion "shall state the specific grounds therefore." "Kentucky appellate courts have steadfastly held that the failure to do so will foreclose appellate review of the trial court's denial of the directed verdict motion." Pate v. Commonwealth, 134 S.W.3d 593, 597-98 (Ky. 2004). Because any error in this regard was not preserved for our review, we will not address the argument on its merits.

The judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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<sup>8</sup> Kentucky Rules of Civil Procedure.