

RENDERED: OCTOBER 21, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001373-MR

WILLIAM POSEY

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 03-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: William Posey appeals from a jury verdict
and judgment convicting him of five counts of third-degree
sodomy. Posey contends that he was entitled to a directed
verdict of acquittal on all of the charges because the evidence

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

was wholly inadequate to support his convictions. Finding no error, we affirm.

The conduct underlying Posey's convictions occurred in 2001, the year that his victim, J.R.B., became sixteen years of age. J.R.B.'s mother worked at a beauty salon operated by Posey's wife, which was located next to the Poseys' home. Early in 2001, while J.R.B. was still fifteen years of age, she frequently stopped at the salon after school on the days that her mother was working. On some days, she waited for her mother at the Poseys' home. She would play card games with William Posey and his mother-in-law, who cared for the Poseys' baby.

During the summer of 2001, Posey and J.R.B. began a sexual relationship that lasted for nearly two years. Posey was more than twice the age of J.R.B. According to J.R.B.'s testimony, Posey told her that he and his wife were having marital problems; that he was going to divorce his wife; and that the two of them would some day be free to marry. They planned to move away together when J.R.B. reached the age of eighteen.

Although Posey did not separate from his wife or seek a dissolution of his marriage, he and J.R.B. continued their relationship until it was exposed in April of 2003. Learning of the affair, J.R.B.'s mother informed Posey's wife and obtained a restraining order to keep Posey away from her daughter. When

J.R.B.'s father learned of the situation, he ran his automobile into the Poseys' residence. The state police began an investigation of Posey's sexual misconduct with the teenager.

In June 2003, after Posey was ordered not to have any contact with J.R.B., he had a letter delivered to her in which he recited in part as follows:

NA² Babydoll, I love you so much. We can get through this together and have a life together no matter what your parents are telling you, as long as that's what you want. You know my heart as I know yours. My feelings are only growing stronger for you through all this, all of this is worth it to be with you. You make me who I am. I can't be me without you by my side. . . . They can't do much at all to me in court, **only your testimony could keep us apart.**

. . . .

My lawyer told me that as long as you said this and knew all this -- that we didn't do anything before you were 16 and it was 50/50, consensual [*sic*] -- then there is no reason for us to not be together after you are 18. He said that anything like emails or anything like that doesn't matter. All that matters about me and us is that you stay strong on the stand and what you say. He also said that you need to be strong and not cry and tell everyone that you love me and that you are soon going to be 18 and that you want to be with me. . . . **I could go to jail or prison and be on probation unless you are strong for us and say these things for us.** You know that I will be with you as long as you choose me. (Emphasis added.)

² A pet name for J.R.B.

Although Posey instructed J.R.B. to destroy the letter, she turned it over to her mother. On July 29, 2003, the Russell County Grand Jury returned an indictment charging Posey with eight counts of third-degree sodomy and nine counts of second-degree sodomy. The charges of second-degree sodomy were dismissed prior to trial; three of the counts of third-degree sodomy were dismissed by the court on Posey's motion for a directed verdict. Despite his motion for a directed verdict on the remaining five counts, he was convicted on those counts after a jury trial and was sentenced to serve five concurrent three-year terms in prison.

On appeal, Posey argues that the evidence is insufficient to support his convictions for third-degree sodomy. His argument concentrates on the credibility of J.R.B.'s testimony that they had engaged in oral sex prior to her sixteenth birthday, citing alleged inconsistencies in her trial testimony and in statements that she gave to police. He contends that "the jury was left with the ever-changing, contradictory, inconsistent, and erratic story of [J.R.B.]" and that the evidence "was so incredible and contradictory as to prevent any reasonable finding of guilt." (Appellant's brief at pp. 9 and 10.)

The standards governing a trial court in considering a motion for a directed verdict and guiding our review of the court's ruling on the motion are well established:

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. (Emphasis added.)

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991), citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983), and Trowel v. Commonwealth, 550 S.W.2d 530 (Ky. 1977).

In order to establish the elements of third-degree sodomy, the Commonwealth was required to prove that Posey was more than twenty-one years of age, that he engaged in "deviate sexual intercourse" with J.R.B., and that she was less than sixteen years of age at the time. KRS³ 510.090(b). "Deviate sexual intercourse" is defined in KRS 510.010(1) to include "any

³ Kentucky Revised Statutes.

act of sexual gratification involving the sex organs of one person and the mouth or anus of another[.]”

Consistent with her statements to investigators, J.R.B. testified at trial that she and Posey did not engage in sexual intercourse (which she defined as vaginal penetration) until after her sixteenth birthday. However, she revealed that Posey performed oral sex on her and that he digitally penetrated her vagina prior to her sixteenth birthday. Because in her opinion those acts did not constitute sexual intercourse, she did not tell police about the oral sex in her original interview. This omission laid the groundwork for Posey’s claim that her story was “ever changing.”

Posey’s only defense to the sodomy charges was that the acts of oral sex did not occur until after J.R.B. became sixteen years of age on August 17, 2001. Nonetheless, J.R.B. told the jury that she had **no doubt** that Posey performed oral sex on her a few weeks prior to her sixteenth birthday. She testified that they had engaged in oral sex before the beginning of school in August 2001 -- an event which **preceded** her birthday by a few days. During cross-examination by Posey’s attorney at trial, J.R.B. set forth her certainty as to the timing of the charged conduct as follows:

Q. When did you first have oral sex with the defendant?

A. Prior to sixteen.

Q. Do you remember your sixteenth birthday - is that a pretty vivid memory to you?

A. Yes, sir.

Q. . . . You clearly remember your sixteenth birthday?

A. Yes, sir.

Q. Had school started before or after that?

A. Before, yes, sir.

Q. Tell this jury, to the best of your recollection, **referencing school and your birthday**, when you first had oral sex with the defendant?

A. Okay. It was before school started, I remember this because, as school kids often do when it gets within a month or a few weeks of the time to go back to school, you get sad and depressed because the summer's over and you have to get back in your school routine. And, I was kind of down one day because I was dreading that and he [Posey] asked me what's wrong and stuff like that. I said I was going to miss this summer and he was just telling me that maybe next summer would be even better than this one and he also said that maybe we should do something to make that summer more memorable.

Upon furthering questioning by Posey's attorney, J.R.B. acknowledged that she did not perform oral sex on Posey until October 2001 -- after her sixteenth birthday. However, she remained emphatic that Posey had performed oral sex on her before she was sixteen.

The trial court did not err in refusing to grant Posey's motion for a directed verdict of acquittal -- regardless

of any alleged inconsistencies in J.R.B.'s trial testimony or any conflicts between that testimony and her statement to police. "Credibility and weight of the evidence are matters within the exclusive purview of the jury." Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999). The issue of witness credibility is removed from a jury only in extremely rare situations -- as the court recognized in Coney Island Co., Inc. v. Brown, 290 Ky. 750, 162 S.W.2d 785 (1942), a case cited by Posey in his brief. Testimony is incredible as a matter of law when it "is opposed to the laws of nature or is clearly in conflict with the scientific principles" or is "so incredible and improbable and contrary to common observation and experience as to be manifestly without probative value." Id., at 787-788. We have carefully reviewed J.R.B.'s entire testimony, and we are not persuaded that her story was so unbelievable as to require a directed verdict for Posey.

The judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Astrida L. Lemkins
Frankfort, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael L. Harned
Assistant Attorney General
Frankfort, KY