

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000602-MR

SAMUEL R. FIRKINS

APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, JUDGE
ACTION NO. 03-CR-00380

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KELLER, JUDGE: On September 17, 2003, Firkins was indicted on five counts of sodomy, first degree; five counts of sexual abuse, first degree; two counts of incest; and one count of rape, first degree. All of the charges involved allegations made by Firkins's stepdaughter, K.W., who testified that Firkins began abusing her at the age of nine or ten and continued abusing her until she reached age fourteen. Following trial, a jury found

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

Firkins guilty of six counts of sexual abuse, first degree and one count of incest. The jury found Firkins not guilty of the other charges and recommended a total of five years' imprisonment. The trial court entered a judgment to that effect on March 14, 2006. It is from this judgment that Firkins appeals.

In his appeal, Firkins argues that the trial court committed reversible error when it refused to grant his motion for directed verdict. Firkins raises four issues: 1) the various acts with which he was charged were not sufficiently delineated by the proof; 2) because of the failure to delineate the various acts through the proof and the jury instructions, it is impossible to determine if the jury reached a unanimous verdict on any of the individual acts; 3) because of the failure to delineate the various acts through the proof and the jury instructions for each count of sexual abuse or incest, the jurors likely used the same facts for each count, amounting to double jeopardy; and 4) the Commonwealth failed to prove the requisite compulsion. The Commonwealth argues that Firkins failed to properly preserve the above issues at trial; that any error by the trial court did not amount to palpable error; and that this Court is therefore foreclosed from considering the issues raised on appeal. For the reasons set forth below, we affirm.

FACTS

In 1997, Firkins married Lisa Gayle Stilts, who had four children, three girls and one boy, living with her. The middle girl, K.W., testified that Firkins began sexually abusing her when she was nine or ten years old. The abuse began with fondling and escalated to oral sex and alleged rape, ending sometime in the fall of 2002.

In the fall of 2002, a neighbor advised Lisa that K.W. had reported that Firkins was sexually abusing her. Lisa questioned K.W. about these allegations and K.W. denied that any sexual abuse had taken place. After this confrontation, Firkins left the home and essentially did not return. Following Firkins's departure from the home, K.W. began to act out and was ultimately placed in foster care because Lisa could not control her.

In June of 2003, while in foster care, K.W. reported to a social worker that she had been sexually abused by Firkins. The social worker reported the allegations to the Kentucky State Police, who undertook an investigation. During the investigation, K.W. underwent a physical examination that revealed vaginal damage consistent with forcible penetration. The grand jury indicted Firkins on a number of counts of sodomy, sexual abuse, incest, and rape.

At trial, both Firkins and K.W. testified. Because K.W.'s testimony is at the heart of Firkins's appeal, we set it forth in detail below. Testimony from Firkins and other witnesses will be summarized as necessary when we analyze the issues presented.

Commonwealth ("CW"): What did the defendant do to you?

K.W.: He would make me give him head. He would make me touch him. He would touch me.

CW: When did this start?

K.W.: Started when I was about nine or ten.

CW: What would he - I mean initially - what did it start with?

K.W.: Well it started me bothering him.

CW: Would he touch you?

K.W.: Yeah.

CW: At the earliest what did it consist of?

K.W.: Me touchin' him.

CW: Would - where would you touch him?

K.W.: Down there.

CW: On his penis?

K.W.: Yes.

CW: Where would this happen?

K.W.: It would happen in his big truck, he used to drive. It happened in my bed, the couch, in his truck.

CW: Now, this was at your mother's house in Barren County?

K.W.: Yes.

CW: And this would happen in the, I guess when you say couch, would that be the living room?

K.W.: Yes.

CW: When you say bed - his bedroom, your bedroom?

K.W.: It would be his bed and my bed.

CW: Now, where was your mother during this?

K.W.: She would work. He would make my sister, my older sister, babysit my little sister.

CW: And where would they be?

K.W.: They'd be at the house.

CW: So I guess, he would take you for - it happened in his big truck?

K.W.: Yes. When he would like have to go on the road or something, he'd make me go with him and would -

CW: When you say on the road, you don't mean cross-country?

K.W.: No. Just like on a load he had to take somewhere.

CW: Okay. Do you remember any place that he would stop, you know, his truck?

K.W.: One place is where my mom lives at now. It was down the road at this gravel road. He would - the other place would be a barn he'd take me behind it.

CW: Do you remember how old you were when it passed just the touching?

K.W.: It happened for a little while. I can't remember exactly how long but it happened for a little while.

CW: Beyond his touching, you stated oral sex was involved?

K.W.: Yeah.

CW: When did - how old were you when that started?

K.W.: What do you mean?

CW: I mean like when did it start with oral sex? Or would it - I mean - how old - the first time he made you perform oral sex on him or he performed it on you - how old were you at that time?²

² Following this question, a bench conference took place that is not relevant to the issues raised herein.

CW: How old were you when the oral sex began?

K.W.: I think I was about ten or eleven.

CW: Did he ever perform oral sex on you?

K.W.: Yes, he did.

CW: Where would that take place?

K.W.: The same places, the big truck, my bed, his bed, behind the barn, in the field in the truck.

CW: Now all this time that this was going on, what was he telling you?

K.W.: He told me - well he told me that he didn't love my mother. That he loved me and he wanted to marry me. And he told me if I told anybody that he'd kill me, he'd hurt my family.

CW: So, he said that he had no feelings for your mother?

K.W.: Yes.

CW: He had feelings for you. Did you have feelings for him?

K.W.: No, I didn't.

CW: Were you scared of him?

K.W.: Yes, I was.

CW: How tall are you?

K.W.: I think - five something, I think.

CW: Now, why didn't you ever tell anyone?

K.W.: Because . . .

CW: You just said that there was touching and oral sex . . .

K.W.: Yes.

CW: Fondling. At the time you knew that was wrong?

K.W.: Yes.

CW: Well, why didn't you tell anyone?

K.W.: I was scared because he threatened my life. I was scared he'd kill us.

CW: Now - was - was the defendant ever the disciplinarian? Like did he ever - was he ever the one who enforced the rules in your - in your house?

K.W.: He was - yeah - he was - yeah. 'Cause my mama she worked and he was the one that was supposed to be watching us.

CW: Well, was he ever - was he nicer to you?

K.W.: Well, there - before he started doin' all that, yes, he was. But then then three years he - he - got mean. And he'd whup my brother and my sister and if I wouldn't do stuff to him he'd be mad at me and he'd whup me.

CW: Did he ever - did he ever have sex with you?

K.W.: He put it - he put the head in and I bled but he didn't go all the way.

CW: Did he force you to or was this consensual?

K.W.: He was doing things. Messing with me down there and he would make me do that to him and then he got on top of me and I asked him what he was doing and he told me to be quiet and . . .

CW: I'm sorry.

K.W.: And he started to do that and I pushed him off of me. Told him to get off.

CW: Where did this happen?

K.W.: In his big truck.

CW: Do you remember where this truck was parked?

K.W.: Yes, I do.

CW: Where was it?

K.W.: It was down below my mama's road. That gravel - yes.³

CW: When was the last time you remember the defendant and your mother being together?

K.W.: I know that he left a couple of times. I know after he had - all I remember is he had tried to - he'd come and he wanted me to go with him in his big truck and my mama made me get out. I didn't - I got in the truck with him but I didn't want to go.

CW: Do you know why they - your parents - your mother and your stepfather broke up?

K.W.: I guess because they wasn't getting along.

CW: Did she ever ask you about the defendant touching you prior to this?

K.W.: Not until - she asked me in the living room one night and I told her no, that he didn't, because I was scared because he was right there.

³ Following this question, a bench conference took place that is not relevant to the issues raised herein.

On cross-examination, K.W. testified that she did not remember the date of the alleged rape or any other specific dates when these acts occurred.

Firkins testified that he did try to get Lisa's children to "mind [their] mama" and that he had problems with K.W.'s behavior. He denied ever sexually abusing K.W. and stated that he left the house in the fall of 2002 because he was upset that K.W. had told a neighbor that he abused her when he had not.

Although Firkins has listed four issues, the primary issue from which those four flow is that the Commonwealth's proof was not sufficient to support the jury verdict and that the trial court should have granted his motion for directed verdict. However, prior to addressing the issues raised by Firkins, we must determine whether those issues were properly preserved by Firkins at trial.

PRESERVATION OF ISSUES

The Commonwealth argues that Firkins did not properly preserve the issues he has raised on appeal. Firkins admits in his brief that he did not properly preserve the issues on appeal; however, he argues that the alleged errors were palpable and therefore subject to review by this Court. Based on our review of the record, we believe that the issues raised on appeal were preserved. At a pretrial conference on the day of trial, Firkins moved for separate trials on the various counts. In support of his motion, Firkins argued, as he does on appeal, that the cumulative effect of the counts was highly prejudicial. The trial court denied the motion, but did eliminate several of the counts based on the discovery filed by the Commonwealth.

At that pre-trial conference, Firkins also made a motion in limine asking the court to limit testimony to the specific charges listed in the indictment, i.e., one count for each year. In support of his motion, Firkins argued before the trial court, as he does here, that the evidence provided in response to discovery did not set forth specific dates or locations of the alleged acts. He noted that testimony that acts occurred "every other day for two years" would be highly prejudicial and not part of the charges. The trial court granted Firkins's motion in part, limiting testimony to what was contained in discovery and K.W.'s statements.

Firkins moved for a directed verdict at the end of the Commonwealth's case. Although it is nearly impossible to hear the grounds set forth by Firkins for his motion,⁴ it is obvious from the trial court's ruling that Firkins questioned whether the Commonwealth had presented sufficient evidence to prove the elements of sexual abuse and sodomy. Firkins renewed his motion at the end of the trial and the trial court denied both motions.

Based on the above, we hold that Firkins did preserve the issues raised on appeal. Therefore, we need not address the parties' arguments regarding palpable error.

MOTION FOR DIRECTED VERDICT

Firkins's primary issue is whether the evidence was sufficient to support the jury's verdict. As noted above, Firkins properly preserved that issue in his motion for directed verdict at the end of the Commonwealth's case and at the end of the trial. The

⁴ We have listened to this portion of the tape several times. Because Firkins's counsel is speaking in a whisper or is too far from the microphone, his words are essentially inaudible.

trial court denied both motions finding that there was sufficient evidence to submit the case to the jury.

When reviewing a trial court's ruling on a motion for directed verdict, "[T]he test . . . is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt" *Commonwealth v. Benham*, 816 S.W.2d 186 at 187 (Ky. 1991). When reviewing the jury's verdict, we are restricted to determining whether the trial court erred in failing to grant or in granting a directed verdict. In doing so, we must consider all evidence favoring the Commonwealth as true and may not determine the credibility or weight to be given to the evidence. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (Ky. 1990). In other words, we may reverse the jury only when the verdict is so flagrantly against the weight of the evidence as to indicate passion or prejudice. *Bierman v. Klapheke*, 967 S.W.2d 16, 19 (Ky. 1998). Therefore, in order to find for Firkins on the primary issue, we must determine that the jury's findings of guilt on the various charges were clearly unreasonable.

To determine whether the jury's findings of guilt were unreasonable, we must first look at the elements of the crimes for which Firkins was convicted. The jury found Firkins guilty of Sexual Abuse in the First Degree during the years 1998 through 2002 and of Incest for the years 1998 to 2002. We will first address the convictions of sexual abuse. KRS 510.110 states that:

(1) A person is guilty of sexual abuse in the first degree when:

(a) He or she subjects another person to sexual contact by forcible compulsion; or

(b) He or she subjects another person to sexual contact who is incapable of consent because he or she:

1. Is physically helpless;
2. Is less than twelve (12) years old; or
3. Is mentally incapacitated.

(2) Sexual abuse in the first degree is a Class D felony, unless the victim is less than twelve (12) years old, in which case the offense shall be a Class C felony.

KRS 510.010(7) defines sexual contact as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]"

KRS 510.010(2) defines forcible compulsion as:

[P]hysical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition[.]

K.W. testified that, from the time she was age nine or ten until Firkins left the home, Firkins touched her, made her touch him, performed oral sex on her, and made her perform oral sex on him. Therefore, there was sufficient evidence for the jury to determine that Firkins subjected K.W. to sexual contact from 1998 through 2002. During two of those years, 1998 and 1999, K.W. was under the age of twelve, therefore, for those two years, the Commonwealth only had to prove sexual contact, which it did.

However, for the years 2000 through 2002, the Commonwealth had the burden of proving forcible compulsion. K.W. testified that, after Firkins began to

sexually abuse her, Firkins became mean and if she did not "do stuff to him he'd be mad at me and he'd whup me." Furthermore, K.W. testified that Firkins threatened to harm her and her family members if she told what he was doing to her. This testimony is sufficient to support the jury's finding of forcible compulsion necessary for the sexual abuse convictions from 2000 through 2002. *See Gibbs v. Commonwealth*, 208 S.W.3d 848 (Ky. 2006); *Yarnell v. Commonwealth*, 833 S.W.2d 834 (Ky. 1992).

We shall now address the conviction of incest. The jury found Firkins guilty of incest for the years 1998 through 2002. KRS 530.020(1) provides as follows:

A person is guilty of incest when he or she has sexual intercourse or deviate sexual intercourse, as defined in KRS 510.010, with a person whom he or she knows to be an ancestor, descendant, brother, or sister. The relationships referred to herein include blood relationships of either the whole or half blood without regard to legitimacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild.

KRS 510.010(1) defines deviate sexual intercourse as:

any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign object manipulated by another person. "Deviate sexual intercourse" does not include penetration of the anus by a foreign object in the course of the performance of generally recognized health-care practices[.]

Both Firkins and K.W.'s mother testified that they married in 1997, at which point Firkins became K.W.'s stepfather. K.W. testified that Firkins performed oral sex on her and he made her perform oral sex on him beginning when she was ten or eleven, thus establishing deviate sexual intercourse. Firkins and K.W.'s mother testified

that Firkins left the home sometime in the fall of 2002. K.W. testified that all sexual contact ended after Firkins left the home. Therefore, there was sufficient evidence for the jury to find that Firkins committed incest from 1998 through 2002.

Based on the preceding, we hold that there was sufficient evidence to support the jury's finding of guilt on the charges of sexual abuse and incest and that the trial court did not commit error when it denied Firkins's motion for directed verdict.

The remainder of the issues raised by Firkins flow from the sufficiency of evidence issue. Specifically, Firkins contends that the evidence was not specifically delineated as to each count and that the jury instructions did not sufficiently delineate the proof necessary for a conviction on each count. In support of his contention regarding the jury instructions, Firkins relies on *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002). However, *Miller* is clearly distinguishable. In *Miller*, the victim testified that Miller raped and sodomized her on a regular basis from July or August of 1996 through September of 1999. The grand jury charged Miller with 166 counts of rape either with a child under twelve or by force or threat of force after her twelfth birthday and 166 counts of first degree sodomy either with a child under the age of 12 or by force or threat of force after her twelfth birthday.

[T]he trial court selected July 31, 1996, through September 1, 1999, as the maximum inclusive dates of the sexual offenses, which was then rounded to three years; then, mathematically extrapolating [the victim's] testimony as to the frequency of the offenses, instructed the jury that it could find [Miller] guilty of 150 counts of first-degree rape (once per week for 34 weeks and twice per week for eight additional weeks = 50

offenses per year x 3 years), and 75 counts of first-degree sodomy ('every other time' she was raped).

Id. at 572-73. The jury instructions provided that the jury should find Miller guilty of 150 counts of first-degree rape and 75 counts of first-degree sodomy if the jurors believed that Miller performed the requisite sexual act and the victim "*was less than 12 years old OR that [Miller] did so by forcible compulsion.*" *Id.* at 573. (Emphasis in original.)

The Supreme Court of Kentucky held that the preceding "combination" instructions were inappropriate because they "did not describe two alternative theories by which the same offense could be committed but described offenses of two different classes, a Class A felony and a Class B felony." *Id.* at 574. As noted by the Court, rape in the first degree committed by forcible compulsion is a Class B felony (unless the victim receives a serious physical injury) while rape in the first degree with a victim under twelve years of age is a Class A felony. Therefore, when the jury in *Miller* found Miller guilty under those instructions, it was not clear if the conviction was of a Class A or a Class B felony.

The instructions herein do not suffer from the same defect as those in *Miller*. The instructions herein correctly state that, for the years 1998 and 1999, the jury had to find sexual contact and that K.W. was less than the age of twelve. However, for the years 2000 through 2002, the jury was required to find sexual contact and forcible compulsion. Unlike the instructions in *Miller*, the instructions herein did not combine the two standards and therefore did not suffer from the fault the Court found with the *Miller* instructions.

Furthermore, unlike in *Miller*, Firkins was not charged separately for each act. He was charged with, essentially, one act per year. Therefore, the trial court was not required to and did not undertake the faulty mathematical calculations performed by the *Miller* court. Based on the above, we hold that the jury instructions were not deficient.

Firkins also argues that the proof was deficient because the Commonwealth did not delineate with specificity when and where each act of sexual abuse occurred. While K.W. did not give specific times and dates, she did identify the time frame during which the various acts occurred. Furthermore, K.W. specified where the acts occurred - in her bed, in Firkins's bed, in Firkins's big truck, on the couch, and behind the barn. As the Commonwealth noted during trial, more exacting testimony would be preferable; however, we do not find the testimony to be so deficient as to be fatal. As the Supreme Court of Kentucky noted in *Hampton v. Commonwealth*, 666 S.W.2d 737, 740 (Ky. 1984) "the evidence was as specific as is usually found in such cases and ample to separately identify the various offenses charged." Therefore, we cannot identify any deficiency in the Commonwealth's proof.

The issues raised by Firkins regarding double jeopardy and lack of juror unanimity are intertwined with the issues regarding the sufficiency of the evidence. Since we have determined that the evidence was sufficient in quantity and quality, we hold that Firkins's constitutional rights to a unanimous jury and to be free from double jeopardy were not violated.

Finally, we note that the jury rejected all of the sodomy charges, the rape charge, and one of the incest charges. If the jury had not been able to delineate the charges and the evidence, they could not have distinguished among the various charges, finding Firkins guilty of some and not guilty of others.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Barren Circuit Court.

ALL CONCUR.

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