

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000774-MR

JAMES KIRCHNER

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 05-CR-001880

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

STUMBO, JUDGE: James Kirchner (Appellant) appeals his conviction of two counts of second-degree rape, four counts of incest, two counts of second-degree sodomy, and three counts of second-degree sexual abuse. He claims that there was insufficient evidence produced at trial to separately identify the various offenses and that the verdict was not unanimous. At issue is the minor victim's inability to recall the specifics surrounding the sexual abuse. She could not recall specifically when the abuse began, how long it lasted, or its frequency. The

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

Commonwealth argues that these issues were not preserved for appellate review, and in the alternative that a minor is not required to recall specific dates of sexual abuse when there is "ample evidence to separately identify the various offenses charged." *Hampton v. Commonwealth*, 666 S.W.2d 737, 740 (Ky. 1984). We agree with the Commonwealth that the issues Appellant raises on appeal were not preserved and affirm the conviction.

Appellant was charged with 22 counts of differing sexual offenses against his step-daughter on June 16, 2005. The crimes took place between August 26, 2002, and March 18, 2005. It is unknown how often the offenses occurred and when they began, most likely due to the victim's young age (she was between 11 and 13 years old when it began). During trial, Appellant's counsel moved for a directed verdict two times. Each time, he claimed the Commonwealth failed to prove that any alleged incidents occurred when the victim was less than 12 years old. The relevance of this is that sexual crimes against children under 12 years old are first-degree crimes, while those perpetrated against children 12 and older are second-degree crimes. This age issue was the only one brought to the court's attention during the motions for directed verdict.

Now, Appellant claims that these motions preserved the current issues on appeal. We disagree. The motions for directed verdict only dealt with the issue of the victim's age. Appellant failed to otherwise object to the sufficiency of

evidence or unanimity of the jury's verdict and as such, failed to preserve the issue for appellate review.

An objection made in the trial court will not be treated in the appellate court as raising any question for review which is not within the scope of the objection as made, both as to the matter objected to and as to the grounds of the objection, so that the question may be fairly held to have been brought to the attention of the trial court.

Richardson v. Commonwealth, 483 S.W.2d 105, 106 (Ky. 1972).

Because Appellant only raised the issue of the victim's age during his motion for directed verdict, his arguments about sufficiency of evidence and a unanimous verdict are not preserved for review.

Though not necessary to the resolution of this appeal, we will briefly discuss the other arguments presented. Both the sufficiency of evidence and unanimous verdict issues are grounded in the standard set forth in *Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002). *Miller* states:

Nor can multiple similar offenses be proven by mere mathematical extrapolation. We held in *Hampton v. Commonwealth*, Ky., 666 S.W.2d 737 (1984), that proof of the precise dates on which the offenses were committed is not required of a child sexual abuse victim where the evidence is "ample to separately identify the various offenses charged." *Id.* at 740; see also *Garrett v. Commonwealth*, Ky., 48 S.W.3d 6, 10 (2001); *Stringer v. Commonwealth*, *supra*, at 886. In each of those cases, the victims described a distinct factual basis for each separate charge so that the jury could determine in each instance whether a separate criminal offense had been committed. See also *State v. Rudd*, 759 S.W.2d 625, 630 Mo.Ct.App.1988)

("[I]f multiple offenses are submitted against a single defendant, the different offenses submitted should be distinguished. As much is inherent in the well established rule that the giving of distinctive instructions is the proper method of submitting multiple offenses."); *State v. Wood*, 311 N.C. 739, 319 S.E.2d 247, 249 (1984) ("Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense *where there is sufficient evidence that defendant committed each essential act of the offense.*" (Emphasis added.))

Whether the issue is viewed as one of insufficient evidence, or double jeopardy, or denial of a unanimous verdict, when multiple offenses are charged in a single indictment, the Commonwealth must introduce evidence sufficient to prove each offense and to differentiate each count from the others, and the jury must be separately instructed on each charged offense. Mere mathematical extrapolation of a described offense based on such vague testimony as "almost every other weekend," "about ten weeks per year," or "every other time" will not support convictions of separate offenses.

As in *Miller*, there were multiple offenses charged. However, we find that even though the victim's testimony was not clear as to some issues, we believe that was merely a product of her young age. While she may have used vague terminology like "three or four times a week" or "two or three weeks a month," there was sufficient testimony from other witnesses to support the multiple charges and to differentiate between the offenses. Witnesses, including the victim, spoke of different acts, dates, and locations where the abuse took place. This was not an

example of mere mathematical extrapolation as spoke of in *Miller v. Commonwealth*.

As to the denial of a unanimous verdict, Appellant argues that since the Commonwealth was unable to sufficiently differentiate between the multiple criminal acts, it cannot be guaranteed that one juror did not consider a particular instruction satisfied by one portion of the victim's testimony and another juror believe that same instruction was satisfied by another portion of her testimony. We believe that the victim's testimony, along with the testimony of other witnesses, was sufficient to guarantee a unanimous verdict on all counts. Additionally, the jury instructions included specific acts of sexual abuse and different dates when they occurred. The fact that Appellant was not found guilty of all 22 counts also demonstrates that the jury could differentiate between the criminal acts.

Since we believe that the motions for directed verdict did not preserve the above issues for appeal, we affirm Appellant's conviction.

ALL CONCUR.

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