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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000814-MR

CHRISTOPHER ESTRADA — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 06-CR-00360

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; HENRY, SENIOR JUDGE.

WINE, JUDGE: Christopher Estrada ("Estrada") appeals to this court from his conviction in the Hardin Circuit Court for one count of distribution of matter portraying the sexual performance of a minor. On appeal he argues that he was deprived a unanimous jury verdict; that he was improperly denied a strike for

cause; and that a directed verdict of acquittal should have been granted. We disagree.

Background

In September of 2004, Estrada was hired by Nichols Used Cars and Parts in Elizabethtown, Kentucky. His job was to remove parts from old cars for resale. After working there for a period of time, it came to the attention of John Nichols ("Nichols"), the owner of Nichols Used Cars and Parts, that Estrada was computer savvy. Nichols commissioned Estrada to create a website for the business and gave him a desk behind the parts counter at which to work.

Estrada brought his own computer from home to work on the website. Internet access was made available at the desk he was provided. Although it was a full-sized desktop computer with a "tower" (rather than a laptop), Estrada brought the entire computer into work each morning and took it home each night.

On January 4, 2005, Nichols's wife, Donna, sat down at the parts desk while Estrada was at lunch. She noticed a "pop-up" window on the computer screen which appeared to be pornographic. Her curiosity piqued, she testified that she opened the internet history, and observed that several pornographic sites had been accessed. Donna showed the browser history to her husband, who became upset that Estrada was wasting time at work. When Estrada returned from lunch, Nichols sent him home so he could determine whether he should terminate his employment.

After Nichols sent Estrada home, he contacted local police to come look at the computer to see if he had a legitimate reason to terminate Estrada's employment. Officer Mark Bollin ("Bollin") of the Elizabethtown Police Department agreed to come to the business and examine the computer. When Bollin clicked on an icon on the desktop, a photograph appeared depicting a naked boy and girl who looked to be between the ages of four and seven years old. Police detectives were called to the scene and a search warrant was obtained for the computer. Officers executed the warrant, seizing the tower, monitor, keyboard, mouse, splitter, and hard drive.

On the evening of January 4, 2005, Estrada was interviewed at the Elizabethtown Police Department by Detective Kelly Sloan ("Sloan"). A videotape of the interview was played for the jury at trial. During the interview, Estrada admitted to Sloan that he regularly downloaded pornography to his computer. He claimed that he "tried not to download child pornography," but that he was a member of several internet "news groups" and that anything posted to the groups would automatically be downloaded on his computer. He explained that he knew the downloaded materials sometimes included child pornography and that he had attempted to delete any child pornography. Estrada explained that he had over 20,000 pornographic images on his computer and estimated that perhaps a couple thousand were child pornography. He explained that he was downloading so much pornography because he wanted to start his own adult website.

Estrada was arrested on May 3, 2006. He was indicted by the grand jury for one count of distribution of matter portraying sexual performance by a minor and two counts of possession of matter portraying a sexual performance by a minor. At trial, Nichols testified that Estrada worked between the hours of 8:00 a.m. and 5:00 p.m. each day and that other employees had access to Estrada's computer, but that he did not think any other employees had ever used the computer. Donna testified that she had no knowledge of any other employee ever using the computer.

A police detective specializing in computers, Sam Durham ("Durham"), testified at trial that over 1,000 images of child sexual exploitation were found on Estrada's computer. Durham further testified that he had the capability to find images that had been deleted, including images which had been deleted from the "recycle bin." He testified that he found *no* deleted images of child pornography.[1] Durham also testified that he was able to access the "spool file," which lists files that have been printed from the computer. Several of the files in the "spool file" were images of child pornography. This indicated to Durham that those images had been printed. The jury was shown a sampling of these images at trial. After examining the computer, Durham was of the opinion that Estrada had been actively looking for child pornography.

[1] Contrary to Estrada's statement that he had been trying to delete child pornography from his computer.

The jury convicted Estrada of one count of distribution of matter portraying a sexual performance by a minor.[2] He was sentenced to five years' imprisonment. Estrada now appeals, arguing that he was denied a unanimous jury verdict, that the trial court erred by failing to grant one of his strikes for cause, and that a directed verdict of acquittal should have been granted.

Analysis

A. Unanimity of the Jury Verdict

Estrada first argues that the trial court's jury instructions were in error because they failed to distinguish whether Estrada had "exhibit[ed] for profit or gain," had "inten[ded] to distribute" or had "offer[ed] to distribute" the child pornography. Thus, Estrada claims, he was denied a unanimous jury verdict.

This issue was not preserved for review.[3] However, as Estrada has briefed and requested palpable error review under Kentucky Rules of Criminal Procedure ("RCr") 10.26, we will review for palpable error. An error is not palpable unless it results in a manifest injustice, meaning that there is a "probability of a different result" or the error is "so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

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[2] At the close of the case, the Commonwealth agreed to dismiss the two counts of possession of a matter portraying a sexual performance by a minor because they were misdemeanors charged more than one year after the indictment and therefore barred by the applicable statute of limitations.

[3] Although Estrada objected to the inclusion of several of the grounds in Kentucky Revised Statute ("KRS") 531.340(1)(c), he did not object on the ground that the instructions failed to differentiate between them which would violate his right to a unanimous verdict.

Estrada was convicted under KRS 531.340 for the distribution of matter portraying a sexual performance by a minor. KRS 531.340 provides, in pertinent part, that:

> (1) A person is guilty of distribution of matter portraying a sexual performance by a minor when, having knowledge of its content and character, he or she:
> (a) Sends or causes to be sent into this state for sale or distribution; or
> (b) Brings or causes to be brought into this state for sale or distribution; or
> (c) In this state, he or she:
> (1) ***Exhibits for profit or gain***; or
> (2) ***Distributes***; or
> (3) ***Offers to distribute;*** or,
> (4) Has in his or her possession with intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor.
>
> (2) Any person who has in his or her possession more than (1) unit of material coming within the provision of KRS 531.300(2) ***shall be rebuttably presumed to have such material in his or her possession with the intent to distribute*** it.

(Emphasis added). Estrada points out that he was indicted under subsection (c) of the statute which requires that one possess the material with an intent to distribute it (or to offer to distribute it) or exhibit it for profit or gain. He argues that he was not indicted for "exhibiting for profit or gain" or for "offering to distribute" the material, but only for possession with intent to distribute. He further argues that the jury instructions failed to differentiate under what part of subsection (c) they were finding him guilty, and thus, deprived him of a unanimous jury verdict as he could not be found guilty under an uncharged prong of the statute.

While it is true that a unanimous verdict is required in a criminal case, Estrada fails to show that the rule has been violated here. Unanimity becomes an issue in a case "when the jury is instructed that it can find the defendant guilty under either of two theories, since some jurors might find guilt under one theory, while others might find guilt under another." *Davis v. Commonwealth*, 967 S.W.2d 574, 582 (Ky. 1998). However, "[i]f the evidence would support conviction under both theories, the requirement of unanimity is satisfied." *Id*. Indeed, our Supreme Court has held that a "'combination' instruction permitting a conviction of the same offense under either of two alternative theories does not deprive a defendant of his right to a unanimous verdict if there is evidence to support a conviction under either theory." *Miller v. Commonwealth*, 77 S.W.3d 566, 574 (Ky. 2002). It is when "the evidence would support a conviction under only one of alternative theories [that] the requirement of unanimity is violated." *Davis,* at 582.

Here, a conviction could be supported under any of the theories in KRS 531.340(1)(c). Count (1) One of Estrada's indictment, read as follows:

> That on or about the 4th day of January 2005, in Hardin County, Kentucky, the above named Defendant committed the offense of Distribution of Matter Portraying a Sexual Performance by a Minor when, having knowledge of its content and character, he ***possessed with the intent to distribute or exhibit*** more than one (1) unit of material portraying a sexual performance by a minor.

(Emphasis added). Thus, Estrada was indicted for possession with intent to distribute *or* intent to exhibit. Although the indictment did not specifically include "offer to distribute," such ground may fairly be included in the category of "intent to distribute." Further, KRS 531.340(2) states that any person possessing more than one unit of child pornography is *presumed* to possess it with the intent to distribute. Estrada fails to address this presumption. He clearly admitted to possessing more than one unit of such material (although he may not have realized the legal import of such admission at the time), and thus he is presumed to have possessed it with the intent to distribute. If the presumption lies that he intended to distribute it, it is certainly within the same scope to presume that he intended to "offer" to distribute it. Estrada further argues that no evidence was presented that he intended to exhibit the images for profit or gain. We disagree. Estrada stated in his interview with police that he intended to open an adult website. Specifically, he stated: "I wanted to get out of the junk yard - working at the junk yard. So, I wanted to . . . you know, start my . . . own adult website." This statement alone might indicate that Estrada intended to exhibit the images for profit or gain. Although he did not specifically admit that he wanted to put images involving children on the website, the jury certainly could have inferred that he intended to do so and the credibility of witnesses is a matter for jury determination. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-65 (1941).

Further, Detective Durham found evidence that Estrada had printed out images portraying sexual performances by minors. Thus, a jury might

reasonably infer that Estrada showed the images he printed out to others or that he intended to show those images to others. Accordingly, we find that the evidence in the case was sufficient to support a finding by the jury under any of the prongs of KRS 531.340(1)(c). As such, we affirm the trial court on this ground.

B. Failure to Grant Strike for Cause

Estrada's second allegation of error is that the trial court impermissibly refused to grant a strike for cause as to venire member No. 360 ("No. 360"). This issue is preserved for review. We review the trial judge's decision not to strike No. 360 for abuse of discretion. *Adkins v. Commonwealth*, 96 S.W.3d 779, 795 (Ky. 2003).

During *voir dire* on the second day of jury selection, No. 360 asked to approach the bench. She explained to the trial judge that Estrada's son was a third-grader at the school where she taught. She stated that, although the boy was not in her class, she knew who the child was. Venire member No. 360 also admitted that she had driven to the elementary school that morning to look at the boy's school records to see if Estrada was, indeed, the father (reportedly because she thought the court would want to know if she taught at the same school the defendant's son attended). She confirmed that Estrada was the boy's father. She stated that she did not know Estrada and that she had never seen Estrada at the school. When asked if this would influence her decision in the case, she stated: "I don't believe so because I don't know him." No. 360 also revealed to the judge that her son was a deputy sheriff in Hardin County, and that he had been employed in that position for

ten years. No. 360 stated that she would not give the testimony of police officers more credibility than other witnesses.

Defense counsel moved to strike No. 360 on both of the above grounds, noting that her son was an officer in the county and that it was disturbing that No. 360 had gone to Estrada's child's school to look at his records. The trial court overruled the motion. Estrada was forced to use a peremptory challenge on No. 360 and exhausted his peremptory challenges.

Our Supreme Court has recognized that a criminal defendant "is entitled to a reversal in those cases where a defendant is forced to exhaust his peremptory challenges against prospective jurors who should have been excused for cause." *Shane v. Commonwealth*, 243 S.W.3d 336, 339 (Ky. 2008). Indeed, when a defendant is forced to use a peremptory challenge on a juror that should have been stricken for cause, he is shortchanged in that the Commonwealth is effectively given more peremptory challenges than the defendant. *Id*. As such, the error may never be harmless. *Id* at 341. The question in this case, however, becomes whether there was a "reasonable ground to believe that . . . [No. 360 could not] render a fair and impartial verdict on the evidence . . ." RCr 9.36(1).

Here, although No. 360 knew who Estrada's child was, she had no personal relationship with the child or the family. Further, she told the trial court that she thought she could be impartial and that she didn't think the knowledge that Estrada's son attended her school would influence her. Indeed she had never seen Estrada before she saw him in the courtroom during jury selection. While we are

concerned by the fact that No. 360 went to look at the school records upon her own initiative, we do not think it was an abuse of discretion for the trial court to deny the strike for cause. Mere knowledge of someone's family members or loose association with someone does not require a strike for cause. Indeed, in other cases, our courts have held that it was not error for a trial judge to deny a motion to strike where prospective jurors have indicated an ability to be fair and impartial in the following situations: where a prospective juror had a daughter who was friends when she was younger with a codefendant in the case, *Ratliff v. Commonwealth*, 194 S.W.3d 258, 266 (Ky. 2006); where a prospective juror was married to a police officer and claimed to be "pro-police," *Penman v. Commonwealth*, 194 S.W.3d 237, 251 (Ky. 2006); where a prospective juror was acquainted with a witness in a case, *Sholler v. Commonwealth*, 969 S.W.2d 706, 708 (Ky. 1998); and where prospective jurors were an ex-brother-in-law and a distant cousin of the defendant in a case, *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985). While it would be error for a judge to allow a juror to sit who had a "close relationship" with a defendant or witness, there was no such "close relationship" in this case. *Ward, supra.* Rather, prospective juror No. 360 merely had knowledge of who Estrada's son was and did not personally know Estrada or his son. Further, the mere fact that No. 360's son was a deputy sheriff does not compel a finding of bias. *Penman, supra.* As such, we cannot say that the trial judge abused her discretion by refusing to strike No. 360.

C. Denial of Directed Verdict Motion

Finally, Estrada argues that the trial judge erred by failing to grant a directed verdict of acquittal. Namely, Estrada contends that the Commonwealth failed to prove he was the only one with access to the computer.

However, we may summarily dispose of this issue as Estrada admitted that he downloaded pornography to his computer from "news groups" on the internet and admitted that such downloads often included child pornography. Indeed, this seems to negate any arguments by Estrada that others might have had access to the computer as he admitted that he downloaded child pornography (albeit allegedly inadvertently). It is of no consequence that Estrada claimed he would "try to delete" these images when they were downloaded. As the images were on Estrada's computer and in his possession, he is presumed by law to have intended to distribute same.[4] Thus, he was not entitled to a directed verdict of acquittal.

Conclusion

In light of the foregoing, the judgment and sentence of the Hardin Circuit Court is hereby affirmed.

ALL CONCUR.

[4] Despite Estrada's counsel's apparent confusion over this concept at trial, we note that the rebuttable presumption acted to shift the burden of production to the defense to bring forward evidence to rebut Estrada's presumed intent to distribute. The Commonwealth did not have to prove intent to distribute as it has already supplied sufficient evidence to show possession. *See, e.g., Osborne v. Commonwealth*, 839 S.W.2d 281, 284 (Ky. 1992); *ACSR, Inc. v. Cabinet for Health Services*, 32 S.W.3d 96 (Ky. App. 2000); *Lanier v. Wal-Mart Stores, Inc*., 99 S.W.3d 431 (Ky. 2003).

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