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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001198-MR

PHILLIP EDMONDSON — APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE C. RENE WILLIAMS, JUDGE
ACTION NO. 14-CR-00032

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: Phillip Edmondson stands convicted of first-degree sexual abuse[1] for which he was sentenced to a term of six years by the Union Circuit Court. Edmondson appeals from that judgment, as well as the related trial order

[1] Kentucky Revised Statutes (KRS) 510.110, a Class C felony when the victim is less than twelve years old.

and jury verdict, and denial of a combined motion for a new trial and judgment notwithstanding the verdict (JNOV). Having reviewed the record, the briefs and the law, we affirm.

FACTS

Around 7:00 p.m. on January 11, 2014, eleven-year-old J.R.[2] went to the Sturgis (Kentucky) Youth Center with her younger brother and her mother—a volunteer assigned to run the concession stand that evening. Once they arrived at the center, J.R.'s mother was focused on her assignment and did not see her daughter until the center closed shortly after 10:00 p.m.

While J.R. played soccer with a girl named Delaney, the ball was inadvertently kicked to Edmondson. As J.R. went to retrieve the ball, Edmondson —a stranger to J.R.—engaged her in conversation. He learned she was eleven and in the fifth grade. Upon hearing J.R.'s name, he commented it was "unusual," prompting J.R. to explain she has a boy's name because her mother thought she was having a son. Edmondson told her she did not look like a boy, and established the names of her father and grandfather—both of whom he knew. J.R. resumed playing soccer, but noticed Edmondson "staring" at her as the night progressed.

According to J.R., when she and Delaney switched from playing soccer to air hockey, Edmondson approached the girls and "started bribing us." He stood behind J.R. demonstrating air hockey techniques and then announced the next child to score a goal would win a dollar. J.R. made a goal, prompting

[2] Pursuant to Court policy, the juvenile victim will be identified by initials only.

Edmondson to give her a dollar, and, according to J.R., he "touched my butt;" he "squeezed it." J.R. testified this same sequence occurred not once, but at least three and perhaps four times[3] because she had no money when she arrived at the center, but left with $4.00. The scenario ended only when Edmondson said he had run out of money, winked and smiled at J.R., and exchanged a "high-five" hand slap with her. J.R. said she returned the "high-five" "so as not to make a scene and returned to the air hockey table with Delaney. When Edmondson asked J.R. for a hug, she tried to ignore him, but relented because "it was just a hug, so I did and then he squeezed my butt again." Shocked by the encounter with Edmondson, J.R. testified she did nothing because she could not speak and did not know what to do.

J.R. did not immediately discuss the incident with her mother, but she did type a "note" on her phone which she shared with Delaney. She testified the touching was "upsetting" to her. When recalled to the stand, she testified the squeezing of her butt, which she considers an intimate, personal part of her body, was not an accidental brush.

When the center closed that evening, Delaney told her mother, Dawn Hedgepath, who was overseeing the center that night, about the note J.R. had typed on J.R.'s cell phone and showed it to her. Hedgepath then apprised J.R.'s mother, Brandee, of the note, gave Brandee J.R.'s phone, and contacted the Union County Sheriff's Department.

[3] On cross-examination, J.R. acknowledged Delaney may have given her a dollar bill that night.

On cross-examination, J.R. stated she did not tell Edmondson to leave her alone the first time he touched her butt. She also confirmed she did not verbally tell Delaney or her mother she had been touched inappropriately. On redirect, J.R. acknowledged people had congratulated her for athletic triumphs in the past, but no one had squeezed her butt while praising her softball prowess.

Deputy Kyle Dane responded to the center and collected video from the center's security camera, including a six-minute segment[4] verifying Edmondson's touching of J.R. at the air hockey table. Hedgepath testified she briefly saw Edmondson and J.R. at the air hockey table, and heard Edmondson casually remark, "he was just gonna show the new school how old school could show 'em how to play."

That night, in the company of her mother, J.R. was interviewed briefly at the center by Deputy Dane. Because it was noisy, Deputy Dane, J.R. and Brandee traveled about five minutes to the Union County Sheriff's Department. While there, J.R. gave a written statement. J.R.'s cell phone was not collected as evidence. After leaving the center, J.R. erased the note from her phone.

[4] This segment was played in its entirety for jurors five times at trial. Once when Deputy Dane testified for the Commonwealth, a second time during defense closing argument, a third time during the Commonwealth's summation with running commentary by the prosecutor, and twice more in the courtroom during jury deliberations. At no time was the video ever visible to this Court during its review of the trial.

The Commonwealth also introduced several still photos taken from the video. Those photos, as well as an enlargement of one of the photos provided by the defense, are in the record, but they are grainy and their value to this Court—without access to the video from which they were copied—is severely limited.

As a result of the touchings, Edmondson was indicted on a single count of first-degree sexual abuse. After a lengthy one-day jury trial, he was convicted and filed this appeal in which he raises four allegations of trial error. He claims: he should have been granted a new trial because the jury foreman was the brother-in-law of the prosecutor's assistant and concealed this fact during *voir dire*; during the Commonwealth's summation, the trial court should have admonished the jury when the prosecutor referenced Catholic priest cases and tried to bolster J.R.'s testimony by saying the video shows her typing the note that was ultimately viewed by Delaney, Hedgepath and Brandee but was erased before it could be collected as evidence and was never seen by the defense; the trial court should have granted Edmondson's request for a directed verdict because there was no proof of sexual gratification; and, trial was marred by cumulative error. Discerning no error, we affirm.

ANALYSIS

We begin with Edmondson's claim that he was tried and convicted by an unfair and biased jury because the brother-in-law of an assistant prosecutor sat on the jury and served as foreman. We disagree.

This case was originally to be prosecuted by Hon. Mike Williamson, a part-time Assistant Commonwealth Attorney. However, Williamson had previously represented Edmondson. Due to that conflict of interest, Williamson did *not* prosecute the case, but he did sit in on jury selection at the request of Commonwealth Attorney J. Zachary Greenwell because Williamson, being a

Union County native, would be more familiar with the populace. Greenwell, who tried the case, is a native of Crittenden County, but the case was being tried in Union County—one of four counties in the circuit.

Voir dire was conducted by the trial court, Greenwell and, on behalf of Edmondson, Hon. Dax Womack. The court began questioning the *venire* by introducing the case, the parties and the attorneys. After identifying Greenwell, asking whether anyone had a relationship with him that would make them unable to try the case fairly, and excusing one juror, she told the *venire*:

> Mr. Williamson, Mike Williamson, is seated behind Mr. Greenwell. He is the Assistant Commonwealth Attorney, so he'll be assisting. Is anyone represented by Mr. Williamson or have a relationship that we've not been made aware of that might impair their ability to be fair and impartial in this case? If you'll come forward please, if you feel that your relationship would prohibit you from being fair and impartial.

The video camera in the courtroom was focused on the bench during this time, but no one approached the bench and no one was questioned. *Voir dire* continued for some time. No further inquiry was made of whether anyone on the *venire* might be biased toward or against Williamson. Ultimately, trial proceeded with Mark Danhauer serving as jury foreman.

Between conviction and sentencing, defense counsel learned Danhauer is Williamson's brother-in-law, a fact neither disputed by the Commonwealth, nor revealed during *voir dire.* Believing Danhauer should have been stricken for cause, as were other prospective jurors familiar with or related to

the accused, the Commonwealth or the victim, Edmondson moved for a new trial and a JNOV. The motion was based in part on several cases in which convictions were reversed due to jurors giving false answers or concealing vital information. *E.g., Olympic Realty Co. v. Kamer,* 283 Ky. 432, 141 S.W.2d 293 (1940).

Danhauer was subpoenaed to testify by the defense when the motion was heard on July 13, 2015. Danhauer stated he was en route to the bench in response to the judge's question about having a relationship with Williamson, but did an about face, returned to his seat and sat down when she rephrased the question to direct potential jurors to come forward *if* their relationship caused them to be biased. Because Danhauer did not believe his familial relationship with Williamson would influence his decision or his ability to fairly hear the case, he sat down "to expedite the day."

After both Womack and Greenwell questioned Danhauer during the hearing, the court questioned Danhauer and established he had not spoken with his sister or Williamson before trial, and had forgotten he was to report for jury duty that morning. Already dressed for work, Danhauer testified he arrived at the courthouse before the judge took the bench to begin jury selection, but only because the sheriff had called him and reminded him he was to report.

When Danhauer completed his testimony he was excused. Womack then argued he did not recall knowing at the time of trial that any potential juror was related to Williamson. He argued Danhauer should have been excused for cause because of his family ties, and if he had not been stricken for cause, the

defense would have used a peremptory to remove him from the panel. But, Womack also noted the defense team had kept the prosecutor's former girlfriend on the *venire* because all defense peremptory strikes had been exhausted. At that point, the court stated a number of people had raised their hand indicating a relationship with Williamson, but none of them ultimately came to the bench and none was questioned further—something the judge said she expected the parties to do. The trial court found Danhauer had not given any false answers during *voir dire*, and so the cases Edmondson had cited in support of reversal and a new trial were not controlling.

We agree with the trial court's resolution of this claim. During *voir dire*, Danhauer tried to disclose his relationship with Williamson. Neither party explored his reason for initially raising his hand and beginning to approach the bench. Furthermore, Danhauer was not the only potential juror to acknowledge having a relationship with Williamson; *none* of those relationships was explored. The failure to do so rests squarely with the parties, not with the prospective juror and not with the trial court.

This is not a scenario in which the trial court was asked to excuse a prospective juror and denied the request. Neither is it a scenario in which the known brother-in-law of a prosecutor was deliberately left on the jury. *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985). Had the defense explored Danhauer's relationship to Williamson, revealed he was related, and asked that he be excused for cause, the trial court may well have granted the request—it had

already excused from the *venire* many others with familial and social ties. Ultimately, counsel bears the burden of representing the client and that includes vigilance during jury selection. We simply cannot say Edmondson's failure to learn of Danhauer's relationship to Williamson means Edmondson was tried and convicted by an improperly constituted jury.

Edmondson's second complaint is the trial court should have admonished the jury, as he requested, when the prosecutor stated in closing argument,

> [w]hy didn't she jump up and down and scream at the top of her lungs immediately after these things happened. I wish I had an answer for these questions, but you know, with the priest case in the Catholic Church, it took years for the children to report, yet they went to mass every Sunday.

As soon as the words were uttered, defense counsel objected, approached the bench, and moved for an admonition, characterizing the statement as inflammatory and improper. The prosecutor argued he was merely drawing an analogy in response to the defense argument—without any supporting studies or proof—that a truthful child would have reported an improper touching immediately; since J.R. did not report immediately, she must not have been credible. The court noted the objection and directed the prosecutor to move on, but did not give the requested admonition. When the new trial motion was heard the following month, the court stated—in her experience—giving an admonition often draws more attention to the challenged comment and ultimately denied the motion.

Citing *Coates v. Commonwealth,* 469 S.W.2d 346, 348-49 (Ky. 1971) (prosecutor not to inject false issue into case), Edmondson argues reference to Catholic priest cases—a matter outside the record in this case—requires reversal. In the context of this case, we disagree. Without establishing child sexual abuse victims immediately report, throughout trial the defense repeatedly emphasized J.R. did not immediately report the inappropriate touching, specifically noting she "did not act like a victim" of sexual abuse on the video and even high-fived and hugged Edmondson as he left the center.

Curiously, the defense claims the trial court erred in not admonishing the jury when all the prosecutor did was respond to an argument first made by the defense. If it were fair for the defense to argue throughout trial that absence of an immediate report probably meant nothing happened, it was equally fair for the prosecutor to argue lack of an immediate report did not automatically mean a touching did not occur. Here, neither party submitted proof one way or the other—thus, there was no support for either party to argue truthful children do or do not immediately report sexual abuse. When the defense opens the door, the Commonwealth must not be denied the opportunity to respond. *See Arnold v. Commonwealth*, 192 S.W.3d 420, 426 (Ky. 2006).

As an appellate court, we must determine whether the challenged comment constituted "manifest injustice" which necessarily requires consideration of multiple factors. *Young v. Commonwealth*, 25 S.W.3d 66, 74-75 (Ky. 2000). This also requires us to determine whether Edmondson ultimately received a fair

trial. *Noakes v. Commonwealth*, 354 S.W.3d 116, 121-22 (Ky. 2011). In our review, we are guided by the principle that, "[a] prosecutor may comment on tactics, may comment on evidence, and may comment on the falsity of a defense position." *Id.* at 122 (internal citations omitted). We will "reverse for prosecutorial misconduct in a closing argument only if the misconduct is 'flagrant' *or* if each of the following three conditions is satisfied: (1) Proof of defendant's guilt is not overwhelming; (2) Defense counsel objected; and (3) The trial court failed to cure the error with a sufficient admonishment to the jury." *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002). Defense counsel having objected and requested an admonition which was denied, we look for flagrant conduct by the prosecutor.

The statement about the Catholic priest cases lasted mere seconds in a day-long trial. Edmondson did not receive the maximum punishment—he received a term of just six years—one more than the statutory minimum, KRS 532.060(2)(c), a penalty jurors recommended after learning Edmondson had previously been convicted in Illinois of attempt to commit indecent solicitation of a child and attempt to commit delivery of controlled substance, for which he received a probated sentence of 30 months after serving just 120 days, and was required to register as a sex offender in Illinois.

While the eleven-year-old victim was the only "witness" to the sexual contact in this case, her testimony was strong and convincing, especially her

explanation that she was shocked by the touching and did nothing because she did not want to cause a scene and she did not know what to do. The prosecutor's fleeting comment appeared to rebut the defense theme of the case—that J.R. was untruthful because she did not tell Edmondson to stop touching her and she did not immediately report the unwanted touching even though there were other people at the center—mostly children—that night.

Taking both summations "as a whole," as we must, *Young,* 25 S.W.3d at 75, and keeping in mind that both parties enjoy "wide latitude" during closing argument, we see no need for reversal. *Id.* The prosecutor's conduct was not flagrant and, overall, Edmondson received a fair trial.

An additional complaint included under this heading is the prosecutor attempted to bolster J.R.'s credibility by arguing she typed the events of the evening on her cell phone but that note was deleted before it could be collected into evidence and therefore was outside the record. Edmondson challenged the veracity of the note because it was supposedly typed in the bathroom, but the surveillance video never showed J.R. in the bathroom that night. While this Court has not seen the video, during a bench conference, the trial court stated the video clearly showed J.R. typing on a cell phone from which jurors could infer she was typing the pivotal note about which she testified even though it could not be provided to the defense.

Defense counsel emphasized inconsistencies in the proof, giving jurors his view of the testimony and allowing jurors to assess the proof from his

perspective. J.R. testified she typed a note on her phone rather than speaking about the touching because she was shocked and could not speak. She said she showed the note to Delaney who showed it to Hedgepath who showed the phone to Brandee and contacted law enforcement. Similarly, Brandee testified J.R. gave the phone with the typed note to Delaney who gave it to Hedgepath, who gave it to Brandee. After seeing the note herself, Brandee went to the bathroom where she saw J.R. crying. Delaney, who did not testify, was with Brandee and J.R. in the bathroom. Finally, Hedgepath testified Delaney asked her to come to the bathroom and both Delaney and J.R. were there. According to Hedgepath, J.R. had typed a note rather than saying out loud what had happened.

This is one more example of the wide latitude allowed in closing argument. J.R., Brandee and Hedgepath all gave consistent testimony. We deem the complaint of alleged bolstering to be without merit.

Edmondson's third complaint is the guilty verdict was against the weight of the evidence because there was no proof of "sexual contact" as required by KRS 510.110(1)(b). "Sexual contact" is defined in KRS 510.010(7) 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[.]" Because J.R. did not say she derived sexual gratification from the touching, and Edmondson did not testify at all, Edmondson maintains the trial court erred in not granting a directed verdict.

As was argued by the Commonwealth at trial, and noted by the trial court in its order overruling the motion for a new trial/JNOV, if direct, explicit

proof of sexual gratification is required, it is unlikely the Commonwealth will ever secure a sexual abuse conviction—a scenario inconsistent with the General Assembly's enactment of the legislation. As explained in *Tungate v. Commonwealth*, 901 S.W.2d 41, 42 (Ky. 1995) (internal citations omitted), while sexual contact to achieve sexual gratification is an element of sexual abuse in the first degree, "[i]ntent can be inferred from the actions of an accused and the surrounding circumstances. The jury has wide latitude in inferring intent from the evidence."

Here, the Commonwealth introduced sufficient proof from which jurors inferred Edmondson's actions were for the purpose of his sexual gratification. A directed verdict was not warranted and the jury was not clearly unreasonable in convicting Edmondson of sexual abuse in the first degree. *Mullins v. Commonwealth*, 350 S.W.3d 434, 442 (Ky. 2011) (citing *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)).

Edmondson's final complaint is that even if each individual allegation of error does not justify reversal, surely the cumulative effect of all the errors requires reversal. We disagree. We will reverse a conviction only when "individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth,* 313 S.W.3d 577, 631 (Ky. 2010). When there are no errors, as is true in this case, the combination of no error simply cannot amount to reversible error.

THEREFORE, discerning no error, reversible or otherwise, we affirm the judgment of the Union Circuit Court.

ALL CONCUR.

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