

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000412-MR

JAMES JOHNSON

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
ACTION NO. 12-CR-00295

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, COMBS, AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: James Johnson appeals his convictions for sexual abuse in the first degree entered by the Christian Circuit Court following a jury trial.

Johnson contends that the trial court failed to correct two errors during the trial proceedings which violated his due process right to a fair trial: the

Commonwealth's failure to provide specific dates on which the offenses occurred;

and the Commonwealth's line of questioning during Johnson's trial testimony related to his disappearance following the indictment. Having examined the record and finding no error, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL HISTORY

Johnson was a member of the United States Army's 101st Airborne Division, stationed at Fort Campbell. He met and married his now ex-wife shortly before his third overseas deployment. His former wife had two daughters, "Mary" and "Jane," from a previous relationship.¹ Mary and Jane were the victims in this case.

Johnson returned home from Afghanistan on August 20, 2011, to find a host of legal and personal difficulties confronting him. He discovered that his marriage was in trouble, and that Mary and Jane's father had initiated legal proceedings seeking full custody.²

Both girls testified at Johnson's trial. Jane, who was eight years old in 2011 and eleven at the time of trial, testified that she did not get along with Johnson, but clarified that he was never mean to her. She testified that on several occasions between August of 2011 and June of 2012, Johnson had placed his hands on her clothes over her genital area and placed her hand on his own genital area. She testified that she had confided in Mary about these incidents, even writing a

¹ These children were referred to by pseudonym in the parties' briefs. This Court will use the same pseudonyms.

² The Appellant's brief asserts that the father's petition for change in custody was dismissed shortly after the only hearing Johnson was able to attend.

note in Mary's coloring book that "He rubbed me in the wrong places and I'm scared to tell."

Mary was eleven years old in 2011 and fourteen at the time of trial. She testified that she had a good relationship with Johnson, but there were also incidents of sexually abusive behavior of the same sort and during the same time as those complained of by Jane. She testified that when Jane told her of her own experiences, she advised Jane to keep it a secret, fearing that they would end up homeless if they told anyone (due to their mother's financial circumstances). Mary eventually showed the coloring book to their father, and explained to him what Jane had told her in addition to recounting her own experiences.

The girls' father took them to the Children's Advocacy Center, and from there, personnel referred the matter to law enforcement. Though neither girl could identify a specific date on which any of these events occurred, the investigation continued. A grand jury eventually indicted Johnson on 120 counts of sexual abuse in the first degree, all ranging in date from August 2011 to June 2012. Leading up to trial, the indictment was amended to include only thirteen counts, and the jury was ultimately instructed on only ten of those thirteen counts.

Johnson maintained his innocence, insisting that if he could be provided with specific dates, he could cross-reference them with his duty records and could provide an alibi for himself. He moved on-base following his indictment, but due to the pending charges, he could not deploy with the rest of his unit.

After his indictment, Johnson disappeared, failing to appear in court and failing to report for duty. He was apprehended after approximately a year and a half absence. During trial, the Commonwealth asked on cross-examination, and Johnson confirmed, that he had been accused of desertion, but that charge had been amended down to unauthorized absence because one must be deployed to sustain the charge of desertion. He also confirmed that he had been named the Army's number three most-wanted fugitive during his absence. Johnson offered testimony that he did not flee because he felt he was guilty, but rather it was a combination of personal medical issues, the stress placed on him by these charges, and the grief upon learning his best friend had been killed in action, that led to his disappearance. When asked why he did not turn himself in, he responded that he did not want to involve others in his personal problems.

Following Johnson's capture in 2014, the matter proceeded to trial in August of 2015. The jury convicted him on nine of the ten charges for which they had received instructions. They recommended sentences of five years on each, with the sentences on all to run concurrently. At sentencing, the trial court ordered that the sentences relating to Jane run concurrently to each other, and the sentences for the convictions related to Mary run concurrently to each other. The trial court ordered, however, as required under KRS 532.110(1)(d), that the sentences related to Mary run consecutively to the sentences related to Jane, for a total sentence of ten years to serve.

Johnson argues that the trial court erred in allowing the Commonwealth to proceed on “vague” information relating to the dates of the offenses, and committed palpable error in allowing the Commonwealth to ask about his disappearance.

II. ANALYSIS

A. THE LACK OF SPECIFIC DATES DID NOT VIOLATE JOHNSON’S DUE PROCESS RIGHTS

Johnson argues that the lack of specific dates in the indictment prevented him from being able to defend himself against the charges, and thereby deprived him of a fair trial. He specifically contends that he wanted to mount a date-specific defense using his duty records to alibi himself, rather than rely on a general denial of all the allegations, and the inability to do so deprived him of any ability to defend himself, in violation of *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Mary testified about the following instances of abuse.

1. In November, Mary was sitting on the couch watching TV, and he put his hand on her crotch area. Neither person said anything, and it lasted about 15 seconds.
2. The next time was a couple of weeks after that. She was in a chair playing Xbox, and he was sitting on the floor next to her when he put his hand on her crotch. It lasted about the same time or maybe a little longer. Mary said she thought it happened on a weekday because they go to their fathers’ house on the weekends.

3. Mary said the next time was maybe towards December. While she was watching TV, he put her hand on his crotch. Mary was not sure for how long.
4. A couple of weeks after that, he put his hand on her crotch while she was playing Xbox. Mary thought this was still in December. The next time maybe occurred in January. He put her hand on his crotch. She might have been watching TV. She did not say anything. She moved her hand when he let go.
5. The last time Mary testified about was in May close to end of school. She was sitting in a chair playing Xbox, and he was on the floor next to her. She said he touched her crotch, and she did not say anything.

Jane testified about the following events.

1. Jane was watching TV one morning before the school bus came. She said Johnson sat down next to her on the couch and put his hand on her pants and kept it there for a couple of seconds.
2. Jane recounted another time near the end of the school year where he touched her private area over her clothes. He put her hand on his crotch area on top of his jeans. The jury could not reach a decision on this count.
3. Jane said she came home from a neighbor's house after petting the neighbor's horses and laid down on the couch because she was tired. She said Johnson came over, said "poor thing", and put his hand on her private area.
4. The last allegation from Jane was that she was playing a game on Johnson's laptop computer but it was not working so she asked for help. She said she sat on his lap, and he put his hand on her private area.

Johnson's argument is flawed as he was able to present a defense. Moreover, his argument is far from unique. Kentucky appellate courts have repeatedly held that child victims of sexual offenses need not "testify to specific dates and times when the acts of sexual abuse occurred." *Stringer v. Commonwealth*, 956 S.W.2d 883, 886 (Ky. 1997). "In a felony case, the failure to prove the specific date of the offense is of no consequence unless time is a material ingredient of the offense." *Stringer* at 886-87. "[I]n prosecutions for child sex abuse, a child victim's vagueness about dates and times of incidents does not create a due process violation." *Dunn v. Commonwealth*, 360 S.W.3d 751, 761 (Ky. 2012). "This Court has long held that in sexual abuse cases, especially those involving children, if 'time is not an essential element of the offense..., all that is necessary in the indictment in this respect is that it should appear from its averments that the offense was consummated before the finding of the indictment.'" *Applegate v. Commonwealth*, 299 S.W.3d 266, 270-71 (Ky. 2009) (quoting *Salyers v. Commonwealth*, 255 S.W.2d 605, 606 (Ky. 1953)). "In fact, '[i]t would be wholly unreasonable to expect a child of such tender years to remember specific dates, especially given the long time period over which the abuse occurred.'" *Applegate* at 270 (quoting *Farler v. Commonwealth*, 880 S.W.2d 882, 886 (Ky. App. 1994)). The Supreme Court even upheld a conviction where a child witness offered testimony that two of the alleged acts of abuse occurred on the same day, despite earlier claims—during the very same testimony

—that they occurred on separate days. *Hampton v. Commonwealth*, 666 S.W.2d 737, 740 (Ky. 1984).

The Supreme Court clarified in a footnote in *Dunn* that time is only an element of the offense “if the offense is dependent on the victim being a particular age.” *Dunn* at 761 fn. 3. The Supreme Court cited the example of KRS 510.070(1)(b), which deals with prosecutions where victims are incapable of consenting to sexual contact due to being under the age of 12.

Here, while the date of the offenses may have been relevant to the defense Johnson wanted to mount, the overwhelming weight of the authorities counters his position regarding the necessity of specific dates and times. *Dunn* states, in no uncertain terms, that the precise issue Johnson claims as a violation of his right to due process is *not* a due process violation.

When confronted with the sheer volume of binding authority on the subject, we can arrive at no other conclusion than the trial court neither erred nor acted to deprive Johnson of due process.

B. THE TRIAL COURT DID NOT COMMIT PALPABLE ERROR IN PERMITTING THE COMMONWEALTH TO CROSS-EXAMINE JOHNSON REGARDING HIS DISAPPEARANCE

Johnson concedes that this allegation of error was unpreserved before the trial court, and asks us to search the record for palpable error pursuant to CR 10.26. Prior courts have defined such error as “easily perceptible, plain, obvious, and readily noticeable.” *Biedeman v. Commonwealth*, 434 S.W.3d 40, 45 (Ky.

2014). To justify relief, the error must present a defect which rises to the level of “shocking or jurisprudentially intolerable” (*Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)), to the point that it spawns reasonable concerns about the justice of the outcome.

Johnson questions the relevance of the line of questioning relating to his disappearance. He contends that it was not intended to show flight to elude capture or prevent discovery, or consciousness of guilt. He instead contends that his flight lacked spatial or temporal proximity to the crime for which he was charged (*Rodriguez v. Commonwealth*, 107 S.W.3d 215 (Ky. 2003)), and the evidence of his flight cannot be used to show his consciousness of guilt because of the lack of a close temporal relationship to the charges (*Jackson v. Commonwealth*, 199 S.W.3d 763, 765 (Ky. App. 2006)).

Johnson’s position is refuted by the very authorities he cites to make it. The Court in *Rodriguez* opined that “evidence of flight is admissible because it has a tendency to make the existence of the defendant’s guilty more probable[.]” *Rodriguez* at 219. “Immediacy is generally only relevant, however, where ‘the defendant does not know, or his knowledge is doubtful, about the charges and accusations made against him’ at the time of his flight[.]” *Jackson* at 765 (quoting *U.S. v. Oliver*, 397 F.3d 369, 376-77 (6th Cir. 2005)). Much like the defendant in *Oliver*, “it is clear the defendant [was] aware of the charges against him, the immediacy factor is not required to show consciousness of guilt.” *Oliver* at 376-

77. The questioning was thus designed at eliciting relevant testimony from Johnson, which he was free to (and did) rebut.

The testimony was also not as prejudicial as Johnson claims. His testimony on this issue presented the story of a wounded veteran who was overwhelmed with grief, and distressed by the possibility of losing his “only shot at having a family” after being “blown up in Iraq” had rendered him unable to father children. We agree with the Commonwealth that this testimony likely made him more sympathetic to the jury than he would have appeared absent such testimony.

We cannot conclude that the trial court, in allowing the Commonwealth to question Johnson regarding his disappearance, committed an error affecting his substantial rights and which had a greater effect on the judgment than ordinary error. *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009).

III. CONCLUSION

After careful review of the record, this Court concludes that the issues raised herein present neither a due process violation nor palpable error by the trial court. The judgment of the trial court is accordingly affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen K. Schmidt
Samuel N. Potter
Kentucky Department of Public
Advocacy
Frankfort, Kentucky

ORAL ARGUMENT FOR
APPELLANT:

Samuel N. Potter
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

David B. Abner
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR
APPELLEE:

Joseph A. Beckett
Frankfort, Kentucky