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# Commonwealth of Kentucky

## Court of Appeals

NO. 2017-CA-000275-MR

JORGE CAMACHO

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT  
HONORABLE ROBERT G. JOHNSON, JUDGE  
ACTION NO. 14-CR-00209

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

JONES, JUDGE: The Appellant, Jorge Camacho, was found guilty of three counts of first degree sexual abuse, victim under twelve years of age, by a Scott County jury. Following the jury's guilty verdict, the Scott Circuit Court sentenced Camacho to eighteen years of imprisonment. On appeal, Camacho asserts that the trial court erred when it denied his motion for a directed verdict. Alternatively,

Camacho argues that he was denied his right to present a defense when the trial court refused to allow him to question one of the victims about her claim that her uncle subjected her to the same type of sexual abuse she accused Camacho of committing against her. After reviewing the record in conjunction with the applicable legal authorities, we affirm.

### **I. Background**

At the time these allegations arose, Camacho was living in a small trailer in Stamping Ground, Kentucky, in Scott County. The other individuals residing in the trailer were: Camacho's girlfriend, Karen Collins; Karen's son, Chuck Collins; Chuck's girlfriend, Patty Burton; Patty's children from a prior relationship, A.R. and M.T. (both fourteen years old at the time of trial); and Chuck's children from a prior relationship, C.C. (twelve years old at the time of trial) and A.M. (ten years old at the time of trial).

On April 15, 2013, the four children informed Chuck and Patty that Camacho, whom they called "Papaw George," had been touching them inappropriately. Patty Burton testified that they told the children if they were lying they would get in trouble and would be sent to juvenile detention. The children did not change their stories.

The following day Patty and Chuck took the children to the police station. Karen and Camacho also went to the police station around the same time. Detective Rodger Persley of the Scott County Sheriff's Office investigated the children's allegations. Kelly Shores with the Cabinet for Health and Family

Services was present and set up a plan to ensure Camacho was not in the home with the children. Detective Persley set up interviews with the children at the Child Advocacy Center for April 24 and 26, 2013. Camacho cooperated with law enforcement throughout the investigation.

Ultimately, Camacho was indicted on four counts of sexual abuse, one for each girl, for abuse occurring over an extended period between 2011 and 2013.<sup>1</sup> Prior to trial, Camacho filed a motion *in limine* to admit statements made by M.T. regarding prior sexual abuse under KRE<sup>2</sup> 412(b)(1)(C). The trial court held a hearing on November 10, 2016, and later issued a ruling denying Camacho's motion.

At trial, A.M., C.C., and M.T. testified as to the inappropriate touching that occurred between 2011 and 2013.<sup>3</sup> Each of them told the jury Camacho "humped" them or would pull their hips back to his pelvic area while in the pool or in the barn playing darts. They also testified that similar incidents would occur while watching movies in Camacho's bedroom and on the porch. On cross-examination of each of the victims, Camacho repeatedly pointed to contradictory statements made during the interviews at the Child Advocacy Center.

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<sup>1</sup> On the first day of the jury trial, the Commonwealth dismissed the count of first-degree sexual abuse involving A.R. because of her inconsistent testimony as compared to the other girls.

<sup>2</sup> Kentucky Rules of Evidence.

<sup>3</sup> Sergeant Larry Wilson, Kelly Shore, Patty Burton, Chuck Collins, Detective Persley, and Doctor Jacqueline Sugarman also testified during the trial. During the trial, the jury also visited the crime scene.

In addition to the above-stated testimony, A.M. testified about an incident where Camacho sat her on a counter in the barn, took off her shirt and pants, and left her in just her bathing suit. She also testified that he told her to keep it a secret when these incidents occurred.

C.C. testified Camacho “humped” her while she was watching television in the living room and he was in a push-up position when this occurred. She testified that she saw Camacho do these things to M.T. more than to her. She also stated that Camacho would give them candy bars and she had found a book in the barn with different sexual positions depicted in it.

M.T. testified that sometimes these incidents would involve skin-on-skin contact, where Camacho would unzip his pants and would pull her pants down. She testified that he kissed her on the mouth, that he grabbed her breasts, and that he touched her vagina. She testified that skin-on-skin contact would only happen at night or when no one else was home because he did not want to get caught. M.T. said Camacho would use this plastic on his penis, which she later said might have been a condom, and a sticky spray (assumed to be some type of lubricant), and she would have to use her mouth, hands, and butt on his penis until “liquid came out.” She stated Camacho would do similar things to C.C. (though C.C. denied that any skin-on-skin contact occurred), and he would give them candy bars and soda. M.T. testified that she too had seen the book with sexual positions depicted in it.

At the close of the Commonwealth's case, Camacho moved for a directed verdict as to all counts. The trial court denied the motion. The defense did not put on any evidence. After deliberating, the jury returned a guilty verdict on all three counts of first-degree sexual abuse. During the sentencing phase, Steve Maynard, Camacho's previous employer, testified as to the good character of Camacho. The jury recommended that Camacho be incarcerated for eight years regarding M.T. and five years each regarding A.M. and C.C., to run consecutively for a total of eighteen years. The trial court sentenced Camacho accordingly. On November 22, 2016, Camacho filed a motion for a new trial pursuant to RCr<sup>4</sup> 10.02 regarding the exclusion of KRE 412 evidence, which the trial court denied. This appeal followed.

On direct appeal, Camacho makes two arguments: (1) the trial court erred in denying his motion for directed verdict; and (2) the trial court erred in excluding testimony under KRE 412.

## **II. Analysis**

Camacho's first argument is that the trial court erred in denying his motion for a directed verdict as to all counts. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187

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<sup>4</sup> Kentucky Rules of Criminal Procedure.

(Ky. 1991). The prosecution must present more than a mere scintilla of evidence.

*Id.* at 188.

[T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

*Id.* at 187.

Camacho contends that the victims' testimony was not credible, and because there was no physical evidence or eyewitnesses other than the victims, the trial court should have granted his motion for directed verdict as to all counts.

Camacho maintains on appeal that the lack of witness credibility, inconsistencies, and contradictions is so palpable on the face of the record that this Court should overturn the entire verdict. The trial record does reveal discrepancies between the victims' testimony, *e.g.* whether there was skin-on-skin contact, how often these incidents occurred, and what they each witnessed regarding Camacho's conduct with the other girls. However, a general lack of witness credibility is not a sufficient basis to justify a disregard of the testimony for purposes of a directed verdict.

The Kentucky Supreme Court recently addressed a similar claim in *Ross v. Commonwealth*, 531 S.W.3d 471 (Ky. 2017). In *Ross*, the Court explained

that in some *exceptional* circumstances “a witness’s testimony may be so improbable and implausible that it must be disregarded as having absolutely no probative value as a matter of law.” *Id.* at 475. However, the touchstone of the analysis is the content of the witness’s statements, not the credibility of the witness making those statements. The *Ross* court explained:

[E]xceptional circumstances do not arise because a particular witness is so lacking in the objective indicators of trustworthiness as to remove from her testimony all vestiges of credibility. The exceptional circumstances, which have authorized the unusual measure advocated by Appellant, arise when the substance of the testimony, detached from the personal credibility of the witness who bears [it], is so laden with doubt and implausibility that it cannot rationally be regarded as a fact capable of supporting a verdict. “It is only where the testimony is so incredible *on its face* as to require its rejection as a matter of law that the jury will not be permitted to consider it.” *Daulton v. Commonwealth*, 310 Ky. 141, 220 S.W.2d 109, 110 (1949) (emphasis added). As the applicable cases illustrate, it is the inherent lack of probative value in the testimony itself, not the witness’s lack of credibility, that allows the court to disregard it.

*Id.*

As stated in *Ross*, the rule is:

[T]estimony admitted into evidence must be disregarded during the directed verdict analysis when the substance of that testimony is so extraordinarily implausible or inherently impossible as to render it manifestly without probative value or patently unworthy of belief. The rule is not, as Appellant posits, that testimony admitted into evidence must be disregarded due to the witness’s extraordinary lack of credibility as demonstrated by the usual manifestations of untrustworthiness.

*Id.* at 476. Following this rule, we are unable to conclude that the trial court erred when it denied Camacho’s motion for a directed verdict.

On its face, the victims’ testimony describing Camacho’s role in abusing them was “not so extraordinarily implausible or inherently impossible that it [was] manifestly without probative value or patently unworthy of belief.” *Id.* at 477. The inconsistencies between the victims’ testimony was an issue for the jury to consider. The jury could have chosen to believe none, all, or some of the victims. However, the conduct described by the victims was sufficient to support the charges of sexual abuse against each victim. Accordingly, the trial court was correct in allowing the case to move forward.

Next, Camacho argues the trial court erred and violated his constitutional right to a fair trial when it excluded evidence under KRE 412. The standard of review on evidentiary issues is whether the trial court has abused its discretion. *Stansbury v. Commonwealth*, 454 S.W.3d 293, 297 (Ky. 2015) (citing *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007)). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

KRE 412 is commonly known as the rape shield rule and prevents certain evidence of a sexual nature from being presented to a jury. *Perry v. Commonwealth*, 390 S.W.3d 122, 128 (Ky. 2012).



Under that rule, in cases involving alleged sexual misconduct, evidence is generally not allowed which is offered to prove that an alleged victim engaged in other sexual behavior or to prove an alleged victim's sexual predisposition. The rule is meant both to shield the victims of sex crimes from painful and embarrassing questions and disclosures about their private sexual activities as well as to preserve the fairness of the proceedings by excluding irrelevant attacks on the victim's character and guarding against distracting the jury with collateral matters.

*Montgomery v. Commonwealth*, 320 S.W.3d 28, 39 (Ky. 2010). The rule, however, is not absolute; there are three exceptions to the rape shield rule. KRE 412(b). Camacho sought to introduce this evidence under the residual exception, which states, evidence of a victim's sexual behavior is admissible if it "directly pertain[s] to the offense charged." KRE 412(b)(1)(C). The drafters of this rule stated that this exception was included as a "safety valve to allow for unanticipated circumstances" and should be used "carefully and sparingly." *Montgomery*, 320 S.W.3d at 40 (citation omitted).

Before the trial began, Camacho moved to admit evidence pursuant to KRE 412. This evidence consisted of statements made during M.T.'s interview at the Child Advocacy Center, wherein she disclosed that her Uncle Bubba inappropriately touched her in the same way as Camacho. At the hearing before the trial court Camacho argued that he wanted to question M.T. about these statements to show the jury an alternative knowledge M.T. had about "sexual things[.]" The trial court ruled the evidence could not be presented to the jury.

In his brief, Camacho claims the exclusion violated his right to present a meaningful defense and his right to a fair trial. The Commonwealth argues that the denial of the use of this evidence did not deny Camacho the opportunity to present an alternative source of knowledge defense because Patty Burton testified the children had been exposed to sexually explicit content in a multitude of ways. The Commonwealth also claims that even if the evidence should not have been excluded, such error was only harmless pursuant to RCr 9.24.

When a defendant contends an evidentiary rule is impeding his ability to present a meaningful defense, courts must use a balancing test to evaluate these challenges. *Montgomery*, 320 S.W.3d at 40-42. “[C]ourts must determine whether the rule relied upon for the exclusion of evidence is arbitrary or disproportionate to the State’s legitimate interests.” *Id.* at 42 (citation and internal quotation marks omitted). Specifically, in the context of KRE 412(b)(1)(C), the Supreme Court of Kentucky has stated:

[E]vidence of a sexual offense victim’s prior sexual behavior pertains directly to the charged offense and thus is admissible . . . if exclusion of the evidence would be arbitrary or disproportionate with respect to KRE 412’s purposes of protecting the victim’s privacy and eliminating unduly prejudicial character evidence from the trial.

*Id.* at 43.

The underlying inference, which is an alternative source of knowledge the defense combats, is that the jury would inevitably presume, given their young age, the children would not have known about the sexual behaviors they described

unless the defendant had in fact abused them. *Basham v. Commonwealth*, 455 S.W.3d 415, 419 (Ky. 2014). The Supreme Court in both *Montgomery* and *Basham* held alternative source of sexual knowledge evidence should only be admitted if the offer of proof demonstrates that the young victim was previously exposed to the same type of sexual behavior. *Montgomery*, 320 S.W.3d at 43; *Basham*, 455 S.W.3d at 419.

In the case *sub judice*, Camacho requested that M.T.'s statements regarding her uncle performing the exact same type of sexual activity be introduced into evidence. The purpose of introducing such evidence was not to show M.T.'s sexual predisposition or to subject her to embarrassing questioning but to demonstrate an alternative source of knowledge. Camacho's offer of proof aligns with what the Kentucky Supreme Court has said would be permissible as part of an alternative source of knowledge defense pursuant to KRE 412(b)(1)(C).

The Commonwealth points out Camacho was able to present this defense because the trial court allowed Patty Burton to testify that the children had watched sexually explicit movies, that the children heard Patty talk about sex, and that the children viewed sexually explicit photographs on Patty's phone. Thus, Camacho was given the opportunity to present his defense to the jury, asserting the children could have come up with these allegations from their exposure to other sexually explicit sources.

For this reason, we hold it was harmless error for the trial court to exclude M.T.'s statements. "[P]reserved evidentiary and other non-constitutional

errors will be deemed harmless . . . if we can say with fair assurance that the judgment was not substantially swayed by the error.” *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010) (citation omitted). For preserved constitutional errors, such as the right to present a meaningful defense, “they must be shown to be harmless beyond a reasonable doubt in order to be deemed harmless.” *Id.* (citations and internal quotations omitted).

Even if this evidence had been presented, there was sufficient evidence presented at trial to support the resulting convictions. The children’s corroborating testimony was direct evidence of the offenses charged. M.T.’s statements would not have been able to explain the sexual knowledge of the two other girls and, thus, would have had little effect on the weight and credibility given to the children’s testimony overall. Additionally, the jury had already been presented evidence that the children could have been exposed to this type of sexual behavior from many other sources.

We are confident beyond all reasonable doubt that exclusion of M.T.’s statement regarding abuse by her uncle, if in error, was harmless. Because the result of the trial would not have been affected had this evidence been introduced and Camacho was able to present his defense of alternative source of knowledge, we hold the trial court’s exclusion of M.T.’s statements was harmless error.

### **III. Conclusion**

For these reasons, we affirm the judgment and sentence of the Scott Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Karen Shuff Maurer  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky