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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002154-MR

ROBERT EARL BRATCHER, SR. APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 02-CR-00131

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Robert Earl Bratcher, Sr. has appealed from a judgment of the Butler Circuit Court entered on October 4, 2004, following a jury verdict finding Bratcher guilty of five counts of rape in the first degree by forcible compulsion,[1] ten counts of sodomy in the first degree by forcible compulsion,[2] and four counts of sexual abuse in the first degree by forcible

[1] Kentucky Revised Statutes (KRS) 510.040.

[2] KRS 510.070.

compulsion.[3] Having concluded that the evidence supports the convictions, that the jury was properly instructed, and that the trial court properly allowed certain evidence, we affirm.

Bratcher was indicted by a Butler County grand jury on October 9, 2002, and was charged with 20 counts of rape in the first degree by forcible compulsion, ten counts of sodomy in the first degree by forcible compulsion, and 20 counts of sexual abuse in the first degree by forcible compulsion. The indictment charged that all of the offenses occurred between the summer of 2001 and August 2002, and involved Bratcher's then 14-year-old step-daughter, E.R. Bratcher argues on appeal that he was entitled to a directed verdict of acquittal because the Commonwealth failed to present sufficient evidence of forcible compulsion. Further, he argues that the trial court erred by denying his request that the jury be instructed on lesser-included offenses and that he was prejudiced when evidence of prior bad acts was introduced with no prior notice by the Commonwealth.

At trial, E.R. testified that during the late summer of 2001, Bratcher began to kiss her on the lips and soon thereafter began to touch her inappropriately. E.R. described the first inappropriate incident as Bratcher rubbing her inner thighs. E.R. testified that Bratcher wanted her to rub his legs

[3] KRS 510.110.

and that he would show her where he wanted to be rubbed by rubbing her inner thighs. She testified that this made her uncomfortable and that she would shut her legs when he tried to rub her thighs, but Bratcher would spread her legs back apart to rub her thighs and make her do the same to him.

E.R. also testified that shortly thereafter Bratcher began to inappropriately touch her breasts by rubbing cocoa butter onto them after he would pull off her bra. E.R. testified that after she had been to a doctor visit, Bratcher pulled down her pants and checked her vaginal area to see if her hymen was intact and became upset when Bratcher told her it was not. E.R. then testified that Bratcher's advances continued to the point of sexual intercourse.

E.R. stated that the first incident of sexual intercourse occurred in her bedroom late at night. She testified that Bratcher entered her room while she was in bed and that he got on top of her, pulling at her clothes. E.R. stated that she was scared and that she tried to push Bratcher off of her, but that he was too strong. She said that Bratcher told her not to tell anyone or that he would have to leave and they would both get in trouble. E.R. testified that when she refused to do what Bratcher wanted, she would get punished by having to do chores. She also testified that he would "grab my

hand and he'll be like just do it and like if I told him no and stuff and had to do it anyway."

E.R. testified that Bratcher continued to sexually abuse her until August 2002 when authorities were notified that she had bruising on her back caused by Bratcher. The Cabinet for Health and Family Services began an investigation which quickly revealed the sexual abuse. Bratcher testified in his own defense at trial and maintained that E.R. was lying and no abuse had occurred.

Bratcher was found guilty and sentenced on October 4, 2004, to 15 years' imprisonment on each of the five convictions for rape in the first degree, 15 years' imprisonment on each of the ten convictions for sodomy in the first degree, and five years' imprisonment on each of the four convictions for sexual abuse in the first degree. All sentences were ordered to run concurrently for a total of 15 years' imprisonment. This appeal followed.

Bratcher's first argument on appeal is that the Commonwealth presented insufficient evidence that the alleged sexual abuse of E.R. was committed by "forcible compulsion" and that he was entitled to a directed verdict[4] of acquittal on all the charges. The Commonwealth contends that the evidence was sufficient to support Bratcher's convictions, and that Bratcher

[4] Kentucky Rules of Civil Procedure (CR) 50.01.

did not properly preserve this alleged error for appellate review.

At the close of the Commonwealth's case in chief, Bratcher moved for a directed verdict of acquittal on the basis that "the Commonwealth has failed to sustain its burden of proof." This motion was renewed by Bratcher at the close of the defense's case as well as at the close of the Commonwealth's rebuttal evidence. However, Bratcher concedes on appeal that his defense counsel believed that the Commonwealth's proof had failed in regard to the dates of the alleged occurrences, not as to "forcible compulsion" to compel E.R. to engage in sexual activity with him.

The Supreme Court of Kentucky has held that CR 50.01 requires a defendant to state specific legal and factual grounds in support of a motion for a directed verdict of acquittal,[5] and that the failure to do so leaves the issue unpreserved for review.[6] The directed verdict motions made in this case are very similar to those made in Pate and Potts v. Commonwealth,[7] which the Supreme Court held to be insufficient to preserve the issue for appeal. Rather than stating specific legal and factual grounds for the motion, Bratcher's counsel simply moved for a

[5] Pate v. Commonwealth, 134 S.W.3d 593, 597 (Ky. 2004); Daniel v. Commonwealth, 905 S.W.2d 76, 79 (Ky. 1995).

[6] Id.

[7] 172 S.W.3d 345, 347-48 (Ky. 2005).

directed verdict of acquittal on the basis that the Commonwealth failed to meet its burden of proof. This motion was insufficient pursuant to CR 50.01 to preserve for appellate review Bratcher's argument that the Commonwealth specifically failed to prove the element of "forcible compulsion" beyond a reasonable doubt. As such, we will review this issue only for palpable error that affected Bratcher's substantial rights and resulted in manifest injustice,[8] and "'if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.'"[9]

It is elementary that the Commonwealth bears the burden "in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude."[10] However, the failure of the Commonwealth to present evidence sufficient to support a criminal conviction is not always palpable error.[11] As our Supreme Court stated in Potts, such "would essentially eliminate the well-established requirement that a party properly preserve

[8] Kentucky Rules of Criminal Procedure (RCr) 10.26.

[9] Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (quoting Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969) overruled on other grounds, Blake v. Commonwealth, 646 S.W.2d 718 (Ky. 1983)).

[10] Miller v. Commonwealth, 77 S.W.3d 566, 576 (Ky. 2002); Schoenbachler, 95 S.W.3d at 836.

[11] Potts, 172 S.W.3d at 348.

a claim for insufficiency of evidence by informing the trial court of the relief requested and the reasons therefor."[12]

Our standard of review of the denial of a motion for a directed verdict of acquittal is well-settled.

> On motion for directed verdict, the 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.[13]

The Supreme Court further stated that "[o]n 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."[14]

Bratcher asserts that the Commonwealth failed to offer sufficient proof that he compelled E.R. to engage in sexual activity by means of "forcible compulsion." KRS 510.010(2) defines "forcible compulsion" as follows:

> (2) "Forcible compulsion" means physical force or threat of physical force, express or implied, which places a

[12] Potts, 172 S.W.3d at 348.

[13] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

[14] Id. (citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)).

> person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition[.]

Bratcher relies upon Miller to support his argument that the Commonwealth failed to present sufficient evidence to support the element of "forcible compulsion."[15] In Miller, there was no evidence that the defendant ever used physical force against the victim or threatened to harm her or another if she refused his advances. Nor was there any evidence that the victim submitted to the defendant's advances out of fear of harm to herself or another. The only evidence of any threat made to the victim was that she and the defendant would get in trouble if the victim told anyone about the sexual activity. Further, the Commonwealth conceded during an instruction conference that the only evidence of forcible compulsion was that the victim did not give the defendant consent to have sexual relations.[16] The Supreme Court held that such evidence was insufficient to support a finding that the defendant forcibly compelled the victim to engage in sexual activities with him.[17]

[15] Miller, 77 S.W.3d at 566.

[16] Id. at 575.

[17] Id. at 575-76.

We conclude that the evidence in the present case is more substantial than the evidence in Miller, and it is more similar to the evidence presented in Salsman v. Commonwealth.[18] In Salsman, the victim testified that the defendant came to her house to deliver milk and bread and that after placing those items in the refrigerator asked the victim to have sexual relations with him. The victim refused and the defendant opened his pants and sought to have the victim perform oral sex on him which she refused by covering her mouth. The victim testified that the defendant grabbed her hand and pulled her out of a chair and removed her pants and undergarments and sought to have intercourse with her. The victim resisted by saying "no, no" and testified that she did not otherwise resist or try to run away because she feared the defendant would hurt her.[19] The Court of Appeals held that this evidence in Salsman presented a jury question as to whether the defendant used "forcible compulsion" to compel the victim to engage in sexual activities with him.[20]

In the case before us, E.R. testified on numerous occasions that she feared Bratcher and that he caused her to perform sexual acts. Additionally, she testified that Bratcher physically got on top of her while she was in bed and that she tried to resist, but Bratcher was too strong and she was scared.

[18] 565 S.W.2d 638 (Ky.App. 1978).

[19] Id. at 639-40.

[20] Id. at 642.

E.R. also testified that if she refused Bratcher's requests for sexual activity he would get upset and punish her with "chores" or would grab her hand and she "had to do it anyway." Regarding a specific instance, E.R. testified that "I remember him waking me up, this is the first time it happened in my room, him waking me up and he'd like get on top of me and if I said no he was like 'Shh' you know and then I couldn't push him away so I did what he said." Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth as we are required to do, we cannot conclude based upon the evidence as a whole that it was clearly unreasonable for the jury to find Bratcher guilty. Thus, a jury question arose regarding the element of "forcible compulsion" and the trial court correctly denied Bratcher's motion for a directed verdict of acquittal.

Bratcher next claims the trial court erred in declining to instruct the jury on sexual abuse in the third degree and rape in the third degree. Bratcher tendered instructions on both offenses as lesser-included offenses of all the charges against him. "It is well settled that the trial court should instruct the jury on every theory of the case supported by the evidence, including lesser offenses."[21] Instructions on lesser-included offenses are "'appropriate only when the state of the evidence is

[21] Swain v. Commonwealth, 887 S.W.2d 346, 348 (Ky. 1994) (citing Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988)).

such that a juror might entertain reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.'"[22]

We agree with the Commonwealth that based upon the evidence presented at trial, the jury could only reach one of two results. If they believed the testimony of E.R. and the Commonwealth's other evidence, Bratcher was guilty of rape in the first degree, sodomy in the first degree and sexual abuse in the first degree. Bratcher's defense was that no sexual activity with E.R. or sexual abuse of E.R. occurred. He did not challenge the Commonwealth's proof of forcible compulsion, but rather completely denied that any sexual activity had occurred between him and E.R. If the jury were to accept Bratcher's testimony, it would have to return a verdict of not guilty on all charges. There was simply no basis from the evidence presented for the jury to find that Bratcher engaged in sexual activity with E.R. without forcible compulsion. Accordingly, the trial court did not err by refusing to instruct the jury as to the lesser-included offenses of rape in the third degree and sexual assault in the third degree.

Bratcher also contends that he was entitled to an instruction on rape in the second degree and sexual abuse in the

[22] Jacobs v. Commonwealth, 58 S.W.3d 435, 446 (Ky. 2001) (quoting Billings v. Commonwealth, 843 S.W.2d 890, 894 (Ky. 1992)).

first degree as lesser-included offenses, but concedes that such instructions were not requested at trial. This error is unpreserved for appellate review since "[n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion."[23] As discussed above, we conclude that the evidence only supported convictions for rape in the first degree or an acquittal. Thus, there was no evidence to support these lesser-included offenses.

Bratcher's final claim is that the trial court erred when it allowed evidence of alleged prior bad acts to be introduced without notice.[24] Bratcher concedes that this issue was not properly preserved for appellate review so we can only consider it if it rises to palpable error.[25] Bratcher contends that he was prejudiced by the Commonwealth's introduction of evidence concerning an instance when alleged child pornography was found on the Bratcher's home computer. Prior to Dr. Jeffery Blackerby of the Child Advocacy Center testifying on behalf of the Commonwealth, Bratcher's trial counsel made a motion in limine to preclude Dr. Blackerby from mentioning the alleged pornography that he had previously mentioned in a written report. Bratcher's trial counsel objected on grounds that the testimony

[23] RCr 9.54(2)

[24] Kentucky Rules of Evidence (KRE) 404.

[25] RCr 10.26.

was irrelevant. The trial court denied the motion, but there was no mention of the incident during Dr. Blackerby's testimony.

However, during the defense's case-in-chief the Commonwealth's Attorney cross-examined Bonnie Bratcher, Bratcher's wife, about a picture of a young girl on the computer. Also, Paul Bratcher, E.R.'s half brother, was cross-examined by the Commonwealth's Attorney about whether he remembered his mother and father fighting about Internet pornography. Paul was also asked "[d]id you ever hear of them talking about him [Bratcher] sending a note about having sex with a twelve year old girl?" Defense counsel objected to the question because there was no evidence offered about the actual note. The trial court ordered the Commonwealth's Attorney to rephrase the question. Finally, Juanita Rutherford testified that Bonnie Bratcher told her that Bratcher had discussed having sex with young girls on the Internet with the mother of a twelve-year-old girl. Defense counsel objected based on relevance and the trial court overruled the objection.

On appeal, Bratcher argues that the testimony of the alleged prior bad acts elicited by the Commonwealth on cross-examination should have been excluded by the trial court based upon KRE 404(c) because the Commonwealth did not provide notice of its intent to use this evidence. KRE 404(c), however, is not

applicable to testimony the Commonwealth elicits on cross-examination. It states in pertinent part as follows:

> Notice Requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence [emphasis added].

Because the testimony Bratcher complains of was not introduced during the Commonwealth's case-in-chief, his reliance upon KRE 404(c) is misplaced.

Finally, Bratcher asserts that the admission of evidence concerning Internet pornography unfairly prejudiced him and caused him to be denied a fair trial. However, he fails to show how he was unduly prejudiced by the testimony, and we reject this contention. Rather, we conclude this evidence was properly admissible under KRE 404(b) as evidence of a common scheme or plan, and affirm the trial court's decision overruling Bratcher's objection on the basis of relevancy.

Based upon the foregoing, the judgment of the Butler Circuit Court is affirmed.

ALL CONCUR.

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