

RENDERED: June 26, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-000170-MR

KENNETH MARTY LITTLETON

APPELLANT

V. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
INDICTMENT NO. 95-CR-000038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and HUDDLESTON, Judges.

HUDDLESTON, JUDGE. A.M., the fifteen-year-old stepdaughter of Kenneth Littleton, testified that when she was in kindergarten, Littleton began touching her in a sexual manner, and when she was in fifth grade began engaging in sexual intercourse with her. The abuse continued until June 1995, when A.M. (then age 14) went with Littleton to wash his truck in a creek. There he asked her to have sex, and when she refused he pushed her in the creek. A.M. told her sister, Wanda, about the abuse and moved to Wanda's house. A.M.'s mother, the wife of Littleton, testified that after A.M. left, Littleton would look at pictures of A.M. and cry several times every night. Dr. Mary Jane Humpkey examined A.M. and

testified that her hymen was intact; however, Dr. Humpkey also explained that sexual intercourse does not necessarily destroy the hymen due to its elasticity. Dr. Humpkey also stated that the injuries observed were consistent with blunt force penetrating trauma.

A jury convicted Littleton of incest and first-degree sexual abuse, and he was sentenced to fifteen years in prison. Littleton appeals the judgment of conviction on the grounds that the trial court should have: (1) granted a mistrial due to prosecutorial misconduct; (2) granted a directed verdict of acquittal; and (3) allowed his brother, William Richard Littleton, to testify.

When faced with a motion for mistrial, the question is whether the impropriety, in this case, alleged prosecutorial misconduct, would likely influence the jury. Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 547 (1993). "[T]he trial court has broad discretion to determine whether a violation of proper courtroom conduct requires a mistrial." Id. A motion for mistrial should be granted only where the record shows a manifest, urgent or real necessity for the mistrial. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985).

When reviewing a motion for mistrial due to prosecutorial misconduct, this Court must consider "the overall fairness of the entire trial." Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). "In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial

fundamentally unfair." Id. It must be so serious as to be apparent that the appellant was denied a fair and impartial trial and the prejudicial effect can be removed in no other way. Gould v. Charlton Co., Ky., 929 S.W.2d 734, 738 (1996).

Littleton's counsel was given Detective Matt Sparks's case report on April 9, 1996. The report detailed a description of Littleton's confession. The trial did not occur until December 16, 1996, eight months later. Defense counsel did not move to suppress the confession. Then, in opening statement, the Commonwealth stated that it would present a confession from Littleton. Again, defense counsel did not object. The Commonwealth acted on a reasonable belief that there was no objection by defense counsel to admitting the evidence. "When trial counsel is aware of an issue and fails to request appropriate relief on a timely basis, the matter will not be considered plain error for reversal on appeal." Tucker v. Commonwealth, Ky., 916 S.W.2d 181, 183 (1996). Littleton's counsel failed to object during opening statement, thereby waiving any objection to the comments of the prosecution regarding testimony the defense knew about eight months before trial.

The Commonwealth's attorney also made other comments in opening statement regarding evidence that clearly could not be produced. The prosecutor stated that testimony would be presented to prove (1) that the touching occurred by "threats to her (A.M.);" (2) that Dr. Humpkey found "that her(A.M.'s) hymen was gone;" and (3) that the letters A.M. wrote Littleton were "very graphic about

love and sex." While these assertions were not proven by the testimony, the statements were careless error and were not significant enough to warrant a mistrial.

Littleton contends that the trial court should have granted his motion for a directed verdict. A trial court, when confronted with a motion for a directed verdict

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.

Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). On the other hand, "[w]here the facts are in dispute, and the evidence in relation to them is that from which fair-minded [persons] may draw different conclusions, the case should go to the jury." Hartman v. Commonwealth, Ky., 282 S.W.2d 48, 51 (1955). "[I]f under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." Yarnell v. Commonwealth, Ky., 833 S.W.2d 834, 836 (1992); Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983). Given the testimony of A.M., her mother and Dr. Humpkey, it was reasonable for the jury to find the defendant guilty.

The final issue is whether the trial court committed prejudicial error by refusing to allow a witness to testify. The rule is that "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." Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969). First of all, prior to the swearing in of the first witness, the prosecution stated "if there are any witnesses in here, for either party, then, I am going to ask that you step outside." The defense did not object and was presumably aware that Ky. R. Civ. Proc. (CR) 43.09, providing for the separation of trial witnesses, had been invoked. However, Richard Littleton, brother of Kenneth Littleton, failed to leave the courtroom. At a recess Richard Littleton told defense counsel that he had relevant information. When Richard Littleton was called to testify, the Commonwealth objected and the trial court sustained the objection. The invocation of the rule requiring witness separation was made clear to all in the courtroom, and Littleton clearly violated the rule. Secondly, Richard Littleton's testimony was insignificant and would not have changed the outcome of the case. Considering the case as a whole, there is no possibility that the result would have differed if the testimony of Richard Littleton had been admitted.

The judgment is affirmed.

ALL CONCUR.

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