

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001799-MR

TED JOSEPH DAVIDSON

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 94-CR-00139

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, JOHNSON, and KNOX, Judges.

BUCKINGHAM, JUDGE. Ted Joseph Davidson (Davidson) appeals from a judgment of the Pike Circuit Court wherein he was convicted and sentenced to nineteen years of imprisonment after a jury trial for the offenses of third-degree rape and being a first-degree persistent felony offender. We affirm.

On April 21, 1994, Davidson drove M.N., a fourteen-year-old girl from Bulan, Kentucky, to Virginia, where he attempted to marry her but was unable to obtain a marriage license due to her young age. Davidson and M.N. then returned to Kentucky and rented a motel room in Pikeville, where they engaged in sexual intercourse. Following telephone contact with M.N.'s

angry father, Davidson and M.N. went to Tennessee where they stayed for several days before they were located by authorities.

Davidson was arrested in May 1994 and indicted in Pike County in June 1994 for two counts of unlawful transaction with a minor and one count of being a first-degree persistent felony offender.¹ Following his pretrial release, Davidson was arraigned in August 1994 and ordered to appear at trial on February 14, 1995. Although a condition of his release was that he have no contact with M.N., Davidson concedes that he violated this condition by taking M.N. to Oklahoma in October 1994. After the sureties on Davidson's bond located him in Oklahoma, he was extradited back to Kentucky.

The trial court revoked Davidson's bond after he failed to appear at his bond revocation hearing and issued an arrest warrant charging Davidson with bail jumping. In January 1995, Davidson was indicted in Perry County for custodial interference as a result of his taking M.N. to Oklahoma. Furthermore, a Perry County Grand Jury later indicted Davidson for promoting contraband in the local jail in an August 1995 incident. Davidson pled guilty to the Perry County charges in December 1995 and was sentenced to two concurrent one-year terms of imprisonment.

In October 1996, Davidson filed a pro se motion for a speedy trial on the rape charges. In March 1997, his counsel requested a competency hearing and a stay of the proceedings

¹ The unlawful transaction charges were later amended to charges of third-degree rape.

until the competency evaluation was complete. Davidson filed a pro se motion to dismiss his indictment for lack of a speedy trial in April 1997, which was denied by the trial court. After the trial court received the competency evaluation and determined Davidson to be competent, his trial was rescheduled for May 27, 1997. Following the trial, the jury found Davidson guilty of the charged offenses, and he was sentenced to nineteen years in prison. His appeal followed.

Davidson's first argument is that he was deprived of his Sixth Amendment right to a speedy trial due to the almost three-year lapse of time between his June 1994 indictment and his May 1997 trial. In determining whether Davidson was deprived of his right to a speedy trial, we must consider (1) the length of the delay, (2) the reasons for the delay, (3) Davidson's assertion, or lack thereof, of the right to a speedy trial, and (4) the prejudice, if any, suffered by Davidson. McDonald v. Commonwealth, Ky., 569 S.W.2d 134, 136 (1978), citing Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). We will assume that the almost three-year delay between indictment and trial "gives rise to a need for further scrutiny." Preston v. Commonwealth, Ky. App., 898 S.W.2d 504, 506 (1995) (holding that a three-and-one-half-year delay between indictment and trial merited further scrutiny).

Where the delay is caused in large part by the defendant's own actions, however, the defendant's speedy trial rights are not violated thereby. Tabor v. Commonwealth, Ky. App., 948 S.W.2d 569, 570 (1997). Having examined the record in

this case, we conclude that most of the delay in the instant case arose from the actions of Davidson or his counsel, including his absconding to Oklahoma with M.N., his criminal activity and proceedings in Perry County, his counsel's request for a competency evaluation, and his numerous pro se motions. Furthermore, Davidson has failed to identify any actual prejudice resulting from the delay, but only speculates that M.N. might have testified more favorably toward him if the trial had taken place earlier.

In addition to the almost three-year delay between indictment and trial, Davidson also draws attention to the seven-month lapse of time between his demand for a speedy trial and his trial and contends that this was a violation of KRS 500.110. KRS 500.110 provides that upon a demand for a speedy trial upon an untried indictment by a person in custody, the trial court must try that person within 180 days. However, KRS 500.110 also provides that "for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

In the case sub judice, the trial court granted counsel for Davidson's request for a stay of proceeding pending an evaluation of his competency. Thus, the fact that the trial occurred approximately seven months after Davidson's demand for a speedy trial rather than within 180 days does not constitute a violation of his rights under KRS 500.110. See also Wells v. Commonwealth, Ky., 892 S.W.2d 299, 303 (1995) (holding that as the defendant had requested continuance to obtain new counsel, he

could not then assert that his right to a speedy trial had been violated). In short, we conclude that the trial court did not err in refusing to dismiss Davidson's indictment for lack of a speedy trial.

Davidson's next argument is that the trial court erred in denying his motion for a directed verdict on the ground of insufficient evidence that M.N. was under the age of 16 when the incident at issue occurred and because "the evidence is uncontradicted" that he believed M.N. to be at least sixteen years of age "at all relevant times." Although the trial court did not allow M.N.'s birth certificate to be introduced into evidence by the Commonwealth, M.N. and both of her parents testified that she was born on December 6, 1979, and was only fourteen years old in April 1994. The testimony of these three witnesses was sufficient evidence to support the conviction, especially since the jury had an opportunity to view M.N. and judge her age for itself. See Chaney v. Commonwealth, 149 Ky. 464, 149 S.W.2d 923, 924 (1912) (evidence was sufficient to support a statutory rape conviction despite the fact that the victim's testimony as to age was uncorroborated); 65 Am. Jur. 2d Rape § 58, at 794 (1972).

Concerning Davidson's argument that there was insufficient evidence to support his conviction due to uncontradicted evidence of his belief that M.N. was at least sixteen years old, we note that Kentucky does recognize mistake as to the victim's age as a defense to a charge of statutory rape. See KRS 510.030. However, a mistake of fact must be

reasonable to relieve the defendant of liability when the elements of the crime are otherwise met. Cheser v. Commonwealth, Ky. App., 904 S.W.2d 239, 242 (1994). Viewing the evidence as a whole, we conclude that the jury could reasonably have determined that Davidson did not, in fact, believe M.N. to be sixteen at the time or that any mistaken belief as to her age was not reasonable. M.N. testified that she told Davidson she was only fourteen years old, and Davidson himself testified that M.N. showed him her birth certificate which indicated that she was born on December 6, 1979. Under the standard for directed verdicts set forth in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), we hold that the trial court did not err and that there was sufficient evidence to support Davidson's convictions.

Davidson's next argument is that the trial court erred by failing to grant a mistrial at four different times during the trial. A mistrial should be granted only where there is a "manifest necessity for such action." Turpin v. Commonwealth, Ky., 780 S.W.2d 619, 621 (1989). The issue to be resolved in deciding whether to grant a mistrial is "whether the impropriety would likely influence the jury." Sharp v. Commonwealth, Ky., 849 S.W.2d 525, 547 (1993). Whether to declare a mistrial is within the trial court's sound discretion; however, that discretion is not unlimited. Id.

Davidson contends that a mistrial should have been granted due to M.N.'s testimony on direct examination that she did not scream or run away from Davidson because he had

threatened her family and said he would kill her parents. Davidson had requested discovery of any alleged statements made by him, but this statement was not provided. According to the prosecutor's statements at a bench conference, however, this testimony came as a surprise to the Commonwealth as well as to the defendant. The trial court denied Davidson's request for a mistrial when the statement was introduced, but sustained Davidson's objection and admonished the jury to disregard the statement. "It is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition." Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993). We conclude that the admonition was sufficient.

Davidson's second argument concerning his request for a mistrial is that the trial court erred due to an argument between the bailiff and a deputy sheriff concerning who would guard Davidson during the trial which he alleges the jury could have overheard. The trial court conducted a hearing during which the attorney who witnessed the dispute, the deputy jailer, and the bailiff testified. The attorney testified that he overheard the dispute while he was in the courtroom and that the dispute occurred just outside an open door to the courtroom next to the jury box. Neither party requested that the jurors be interviewed, and the trial court denied the motion for a mistrial finding that Davidson failed to show that the jurors overheard the dispute. As Davidson fails to cite any evidence to indicate that the trial court's finding was incorrect, we find no error.

Davidson next asserts that a mistrial should have been granted due to the prosecutor's attempted introduction of M.N.'s birth certificate into evidence after the trial court had previously granted Davidson's motion in limine to exclude it. While Davidson claims prosecutorial misconduct, a review of the videotape of the hearing on the motion in limine reveals that the prosecutor could have misunderstood the court's ruling regarding the admission of this evidence, as the court said it would "sustain" the motion but that it would "let it in." At any rate, the prosecutor was not allowed to admit the birth certificate into evidence at trial, and no further mention was made of it. Also, Davidson's statement that the prosecutor was "waving around" the birth certificate in front of the jury is a mischaracterization, as the videotape shows the prosecutor merely holding the certificate in his hand. Even if the birth certificate had been admitted into evidence, its effect would have been minimal as M.N. and her parents had already testified to her birth date.

Davidson's final argument concerning his request for a mistrial is that the trial court erred in denying his request although the prosecutor made misstatements of fact or law in the closing argument. Davidson contends that he was prejudiced by the prosecutor's telling the jurors that they only had to believe that Davidson and M.N. engaged in sexual intercourse "at some point" during the twelve- or thirteen-day period from April 21, 1994, until they were located in Tennessee, and the prosecutor's argument that because Davidson must have known that M.N. was

under age sixteen in October 1994 when he took her to Oklahoma, he had to have believed she was under age sixteen on April 21, 1994.

The trial court clearly instructed the jury that it would have to find that Davidson and M.N. engaged in sexual intercourse in Pike County on or about April 21, 1994, to convict him of third-degree rape. Therefore, we find no error in connection with Davidson's first argument concerning the prosecution's closing statement.

The trial court further instructed the jury that it should find Davidson not guilty if it found that he did not know that M.N. was under sixteen years of age. Although this mistake of fact instruction did not specifically state that the relevant time frame as to his belief would also be on or about April 21, 1994, this appears evident, and Davidson does not argue on appeal that he objected to the wording of this instruction. We conclude that the prosecutor's misstatements did not prejudice Davidson and that the trial court did not err in refusing to grant a mistrial for that reason.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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