

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001044-MR

ROGER SWANAGAN

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 97-CR-00039

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

KNOPF, JUDGE: The appellant, Roger Swanagan, appeals from a judgment of conviction following a jury trial on three counts of rape in the third degree. We find that the uncorroborated testimony of the prosecuting witness was sufficient to survive a motion for directed verdict. Hence, we affirm.

On February 3, 1997, the Daviess County Grand Jury indicted Swanagan on one count of rape in the first degree (KRS 510.040), and three counts of rape in the third degree (KRS 510.060). The charges arose out of allegations made against Swanagan by K.B., a juvenile. At trial, K.B. alleged that she had sexual intercourse with Swanagan on several occasions while

she was fifteen years old. K.B. also alleged that, after she had turned sixteen, Swanagan forced her to have sexual intercourse with him. Swanagan testified in his own behalf, denying that he ever had sexual intercourse with K.B. Several witnesses also testified that K.B. had told them that she fabricated the charges against Swanagan. At the close of the Commonwealth's case and at the close of his case, Swanagan moved for a directed verdict on the charges, which motions the trial court denied. The jury found Swanagan not guilty on the charge of first degree rape, but found him guilty on three counts of third degree rape. The jury fixed his sentence at one year on each count, to be served consecutively, which the trial court imposed.¹

Swanagan argues that there was no evidence other than K.B.'s testimony that he had sexual intercourse with K.B. while she was less than sixteen years of age. He further contends that K.B.'s testimony was so inconsistent that no reasonable juror could have relied upon it to find him guilty of rape in the third degree. Consequently, Swanagan asserts that the trial court erred in denying his motions for a directed verdict.

¹ The Commonwealth's brief states: "On March 18, 1998, appellant was convicted [of] one count of second degree rape and one count of third degree sexual abuse by a jury who fixed appellant's sentence at ten (10) years in the penitentiary (TR 54, 58, 62). The trial court, on April 18, 1998, entered its final judgment and appellant was sentenced to ten years in the penitentiary (TR 78-79)." Appellee's Brief at 2-3. The Commonwealth's summary of the jury's verdict and sentence is inconsistent with the trial court's record and orders. Hence, we have summarized the findings made in the "Judgment and Sentence on Plea of Not Guilty", entered by the trial court on April 22, 1998.

The Kentucky Supreme Court restated the directed verdict standard in Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), holding as follows:

On a 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.

Benham, 816 S.W.2d at 187.

Clearly, Swanagan raised substantial issues regarding K.B.'s credibility. Nonetheless, issues regarding the weight of evidence and the credibility of the witnesses are functions peculiarly within the province of the jury, and the jury's determination will not be disturbed. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 221 (1996). We find no basis to set aside the jury's determination in this case.

KRS 510.060 sets out the elements of rape in the third degree in pertinent part as follows:

(1) a person is guilty of rape in the third degree when
... (b) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than sixteen (16) years old.

Through K.B.'s testimony, the Commonwealth established that Swanagan had sexual intercourse with K.B., and that K.B. was less than sixteen (16) years old at the time. The Commonwealth established Swanagan's age by other evidence. The Commonwealth

was not required to present evidence corroborating K.B.'s testimony. Commonwealth v. Cox, Ky., 837 S.W.2d 898, 900 (1992). Furthermore, the mere fact that a victim's testimony may appear improbable is not a sufficient basis to grant a directed verdict. It is sufficient if the victim's testimony taken as a whole could induce a reasonable belief by the jury that the crime occurred. Bussey v. Commonwealth, Ky., 797 S.W.2d 483, 484 (1990). Although K.B.'s testimony was inconsistent on a number of points and was subject to attack for its veracity, we cannot conclude that it was so "intrinsically improbable" that no jury would have been justified believing at least part of it. Carrier v. Commonwealth, Ky., 356 S.W.2d 752, 754 (1962). Consequently, we must affirm the conviction.

Accordingly, the judgment of conviction by the Daviess Circuit Court is affirmed.

ALL CONCUR.

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