

RENDERED: FEBRUARY 5, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000985-MR

FRANK TORIAN

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 07-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

VANMETER, JUDGE: Frank Torian Jr. appeals from the final judgment entered
by the Lyon Circuit Court. He was convicted of one count of sexual abuse in the
first degree and sentenced to five years' imprisonment. For the reasons stated

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

herein, we reverse and remand the case to the trial court with directions to enter an order of dismissal.

Torian was an inmate of Western Kentucky Correctional Complex (WKCC) when the crime allegedly occurred. At trial, a WKCC employee L.D. testified that she was sitting in a dorm guard station when Torian came to the door and said he needed a job. L.D. and Torian proceeded to a nearby bulletin board where job openings were posted. While discussing the jobs, L.D. felt something touch her crotch. She looked down and saw Torian touching and rubbing her crotch with the back of his hand. She knocked Torian's hand away, told him not to put his hands on her, and called for assistance.

When Torian attempted to follow L.D. into the guard station, L.D. ordered him to stand against the wall and not move. An officer then arrived and escorted Torian from the room. According to the testimony, Torian denied touching L.D. but said that if he did touch her, he did so accidentally.

Torian's fellow inmate testified that he saw Torian and L.D. standing beside the bulletin board discussing something and that, in his opinion, the situation looked unusual because of their close physical proximity. The inmate said he observed L.D. suddenly get mad and tell Torian "not to F-ing move." However, although he saw Torian's hands move as he talked, he did not see Torian's hand on L.D.'s crotch.

Torian testified that he and L.D. conversed at the bulletin board, but that he kept his left hand in his pocket the entire time, as he had a hole in his

pocket and didn't want to lose his locker keys. He stated that he used his right hand as he pointed to the bulletin board and conversed with L.D., but denied touching L.D.'s crotch. He followed L.D. into the guard station because he did not know what was happening and wanted to ask what was going on. Torian denied telling the officers that he may have touched L.D. accidentally.

On appeal, Torian first argues that the court erred by failing to grant a directed verdict in his favor because the Commonwealth failed to prove the element of forcible compulsion, which is necessary to a charge of sexual abuse in the first degree. Despite the Commonwealth's assertion to the contrary, this claim was preserved for our review by Torian's motion for a directed verdict at the close of the Commonwealth's case-in-chief, followed by his renewal motion at the close of all the evidence, citing this ground.

“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 (Ky. 1991). To determine whether the jury's finding of guilt was unreasonable, we look first to the elements of the crime of sexual abuse in the first degree.

Pursuant to KRS 510.110(1)(a), first-degree sexual abuse occurs when a person “subjects another person to sexual contact by forcible compulsion[.]” KRS 510.010(2) defines forcible compulsion as:

physical force or threat of physical force, express

or implied, which places a 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[.]

The Kentucky Supreme Court addressed the issue of forcible compulsion in *Miller v. Commonwealth*, 77 S.W.3d 566, 575 (Ky. 2002). The defendant in that case was convicted of raping and sodomizing his daughter 225 times. However, the victim never testified that the defendant used physical force or threats of harm if she refused his sexual advances, or that she submitted to the defendant's advances out of fear of harm to herself or others. Indeed, the victim testified that the defendant would cease sexual contact if requested, and "[t]he only threat she described was that, on one unspecified occasion, [the defendant] told her they would both get in trouble if she told anyone what they were doing." *Id.* The court found that "[w]hile that might explain delayed reporting, it does not prove that [the victim] was compelled by force or threat to submit to sexual intercourse or oral sodomy." *Id.* at 575-76. The court therefore held that no evidence was produced to show that any of the sexual offenses were committed by forcible compulsion. *Id.* at 576.

By contrast, the Kentucky Supreme Court found evidence of forcible compulsion existed to support the defendant's conviction of first-degree sexual abuse in *Gibbs v. Commonwealth*, 208 S.W.3d 848, 856-57 (Ky. 2006). The court addressed the question of whether the defendant's act of placing the victim's hand

on his clothed crotch constituted sufficient physical force to satisfy the element of forcible compulsion. The court distinguished *Miller* on the ground that rape and sodomy charges require some form of penetration, in addition to the forcible compulsion element required in first-degree sexual abuse. Sexual abuse requires only contact by force which:

cannot be implied. Since sexual contact does not have an implied forcible compulsion element, there must be a close examination of whether physical force or threats of physical force caused the sexual contact, and an offender's intention must be taken into consideration. Here, Appellant's act of taking [victim's] hand and placing it on his penis is required physical force and his intent was to cause the sexual contact between the two. Unlike the victim in *Miller*, [victim here] testified that Appellant *forced* her to touch his penis. [Victim] did not consent or contribute to the act of touching Appellant's penis; it was the sole act of Appellant that caused [victim's] hand to be placed on Appellant's penis. Although there was no duress or resistance on [victim's] part, forcible compulsion has no such requirement. It simply requires physical force *or* threat of physical force. The evidence was sufficient to permit a jury to believe beyond a reasonable doubt that the defendant was guilty. The trial court did not err in denying Appellant's motion for directed verdict.

Gibbs, 208 S.W.3d at 856-57 (citations omitted).

Both *Miller* and *Gibbs* demonstrate that forcible compulsion exists only if sexual contact is caused by physical force, or threats thereof. In Torian's case, the Commonwealth presented evidence that the unwanted touching happened suddenly, and that afterwards L.D. was frightened because she inadvertently

cornered herself in the guard station, with no exit except past Torian. Yet the parties do not dispute that no force was used to accomplish the abrupt touching, and that after the touching, Torian and L.D. had no further physical contact. Since the Commonwealth failed to present any evidence that Torian physically forced, or threatened to physically force, L.D. to submit to sexual contact, or that L.D. failed to resist sexual contact out of fear of Torian, no evidence of forcible compulsion was presented. Thus, under the evidence as a whole, first-degree sexual abuse was not proven and the jury's finding of guilt was unreasonable. The trial court therefore erred by denying Torian's motion for a directed verdict on the charge of sexual abuse in the first degree.

Torian also contends that the trial court erred by denying his request to include sexual abuse in the third degree as a lesser included offense in the jury instructions. Under KRS 510.130(1), this offense requires subjecting "another person to sexual contact without the latter's consent." While the facts of this case may very well have fit under this statute, our ruling on the directed verdict renders this claim moot. We therefore decline to address the merits of this claim.

The judgment of the Lyon Circuit Court is reversed and this case is hereby remanded with directions for the trial court to enter an order of dismissal.

ALL CONCUR.

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