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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001223-MR

DOUGLAS A. KRUSLEY — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 12-CR-00343

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND STUMBO, JUDGES.

KRAMER, JUDGE: Douglas A. Krusley appeals the Pulaski Circuit Court's judgment convicting him of first-degree rape. After a careful review of the record, we affirm because the circuit court properly chose not to grant a directed verdict to Krusley; the court did not abuse its discretion in denying Krusley's KRE[1] 412 motion; Krusley's substantial rights were not violated by the failure of the

[1] Kentucky Rules of Evidence.

Commonwealth to call the nurse to testify regarding chain of custody; Krusley's right to confrontation was not violated; and a manifest injustice did not result from the Commonwealth's cross-examination of Krusley.

I. FACTUAL AND PROCEDURAL BACKGROUND

Krusley was indicted on one count of first-degree rape. The indictment alleged that he engaged in sexual intercourse with a female victim through the use of forcible compulsion.

Following a jury trial, Krusley was convicted of first-degree rape. Krusley moved for a new trial and for a judgment notwithstanding the verdict. The circuit court denied his motions. The court subsequently entered its judgment against Krusley, sentencing him to fifteen years of imprisonment.

Krusley now appeals, contending that: (a) With no evidence of forcible compulsion, a directed verdict should have been granted, and his due process rights were thereby violated; (b) failure to allow evidence of a possible alternate source of the bruises violated his due process rights; (c) failure to exclude a sexual assault rape kit violated due process absent evidence of a complete chain of custody; (d) refusing to exclude a sexual assault rape kit violated Krusley's federal Sixth Amendment right to confrontation; and (e) the Commonwealth's cross-examination of Krusley was so extreme and combined so many objectionable elements that it violated due process.

II. ANALYSIS

A. FORCIBLE COMPULSION

Krusley first alleges that with no evidence of forcible compulsion, a directed verdict should have been granted, and because it was not granted, his due process rights were violated. The Kentucky Supreme Court explained the trial court's role in evaluating a motion for a directed verdict in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

> 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.

(Internal quotation marks and citations omitted). For appellate purposes, "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 [is] the defendant . . . entitled to a directed verdict of acquittal." *Id*. (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

Krusley was convicted of first-degree rape by forcible compulsion. Pursuant to KRS[2] 510.040(1),

> A person is guilty of rape in the first degree when:
>
> (a) He engages in sexual intercourse with another person by forcible compulsion; or
>
> (b) He engages in sexual intercourse with another person who is incapable of consent because he:

[2] Kentucky Revised Statutes.

1. Is physically helpless; or

2. Is less than twelve (12) years old.

Further, KRS 510.010(2) defines "forcible compulsion" as:

> [P]hysical 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.

Krusley appears to believe that for there to be forcible compulsion, the physical force alone is insufficient – rather, he appears to argue that there must be physical force that places the victim in fear of physical injury. However, the Kentucky Supreme Court has recently held that, pursuant to KRS 510.010(2), "forcible compulsion may be shown in two broad ways: an act of physical force or a threat of physical force." *Yates v. Commonwealth*, 430 S.W.3d 883, 889 (Ky. 2014). In other words, the Commonwealth does not need to show that the victim was in fear of physical injury if it can show the rape occurred by physical force. "Forcible compulsion" also requires "lack of consent by the victim, in the sense of lack of voluntariness or permissiveness." *Yates*, 430 S.W.3d at 890. "[T]he evaluation of physical force is based on a victim's express non-consent, or other involuntariness, to a defendant's act." *Yates*, 430 S.W.3d at 891.

In the present case, the victim was in her mid-twenties at the time of the incident. She has an I.Q. of 56, so she requires a guardian. The victim met

Krusley at a soup kitchen that her guardian assists in running. Krusley lived near the victim and her guardian. On the day in question, the victim and her foster sister went to Krusley's home to play video games with Krusley's son. The victim testified that while there, Krusley told her that he wanted to show her something upstairs. She went upstairs with him, where he showed her one of his wife's necklaces and they began looking for video games to play. The victim attested that Krusley then began kissing her. She stated that she initially wanted to kiss him, and they began having sexual intercourse, which was initially consensual. But at some point while they were having intercourse, it became painful for the victim. She told Krusley to stop, but he did not stop. The victim testified that she continued to tell Krusley to stop because the sexual intercourse was painful, but he continued to have intercourse with her for twenty to thirty minutes after she initially told him to stop. Krusley finally stopped when either his son or the victim's sister came upstairs and tried to open the door to the room where Krusley and the victim were.

Because the victim told Krusley to stop because the sexual intercourse had become painful for her, yet he did not stop, the intercourse became non-consensual once she told Krusley to stop. The fact that Krusley continued, despite the victim repeatedly telling him that he was hurting her, is sufficient evidence that Krusley used physical force to continue having sexual intercourse with her. Based upon this evidence, it was reasonable for the jury to find that Krusley had sexual intercourse with the victim by forcible compulsion. Consequently, the circuit court

properly chose not to grant a directed verdict to Krusley on the charge of first-degree rape.

B. BRUISES

Krusley next asserts that the circuit court's failure to allow evidence of a possible alternate source of the bruises violated his due process rights. Defense counsel informed the court that she learned several weeks before trial that the victim's sister had told Krusley that the victim had sexual relations with her boyfriend at her workplace the day before the incident with Krusley. However, the victim's family refused to talk with Krusley's investigator. Krusley wanted to introduce this alleged evidence of the victim's sexual relations with her boyfriend as a possible explanation for the bruising that the victim had on her thighs.[3]

"The standard of review on evidentiary issues is abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Burchett v. Commonwealth*, 314 S.W.3d 756, 758 (Ky. App. 2010) (internal quotation marks and citations omitted).

Krusley acknowledges that the type of evidence at issue is known as KRE 412 evidence. Kentucky Rule of Evidence 412 is known as Kentucky's "Rape Shield" law, and it provides as follows:

[3] The nurse who initially examined the victim one to two days after the rape testified that the victim had no bruising on her thighs when she examined her. Approximately two weeks after the incident with Krusley, the victim went to the emergency room with nail marks/bruises on her legs and she reported that they were from when Krusley refused to stop having sexual intercourse with her despite her telling him to stop. She speculated that they were the result of him spreading her legs during the incident.

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions:

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) any other evidence directly pertaining to the offense charged.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is

admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Krusley acknowledges that he did not notify either the victim or her guardian that he had filed the motion regarding this alleged evidence, but he contends that he had asked the Commonwealth to notify the victim. Following a hearing on the motion, the circuit court excluded the evidence because Krusley had not shown an attempt to notify the victim or her guardian of the motion, which was required by KRE 412. Nevertheless, the circuit court also held that the alleged evidence at issue nevertheless did not actually qualify as evidence because it was not introduced through an affidavit, testimony, or any other proof that the evidence exists; rather, it merely was "introduced" by defense counsel saying what Krusley had told her that the victim's sister had allegedly told him.

We find that the "evidence" at issue was not actually evidence, but rather a mere allegation by defense counsel, based upon hearsay from the defendant. It did not consist of an affidavit or testimony regarding the alleged sexual encounter between the victim and her boyfriend. Additionally, even if it had constituted evidence and it was admissible, Krusley nevertheless did not notify the victim or her guardian of the filing of his motion, as required by KRE 412(c). Therefore, the circuit court did not abuse its discretion in denying Krusley's KRE 412 motion.

C. CHAIN OF CUSTODY

Krusley next contends that the circuit court failed to exclude a sexual assault rape kit, which violated his due process rights in the absence of proof regarding the complete chain of custody. Specifically, he alleges that in the circuit

court, defense counsel objected to the introduction of the sexual assault rape kit without testimony concerning the chain of custody from the nurse who prepared the kit.[4]

The Kentucky Supreme Court has stated that

> [w]hile the integrity of weapons or similar items of physical evidence, which are clearly identifiable and distinguishable, does not require proof of a chain of custody, . . . a chain of custody is required for blood samples or other specimens taken from a human body for the purpose of analysis. . . .
>
> Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that the reasonable probability is that the evidence has not been altered in any material respect. . . . Gaps in the chain normally go to the weight of the evidence rather than to its admissibility.

Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998) (internal quotation marks omitted).

Even if we were to assume, for the sake of argument, that the circuit court erred in admitting the kit into evidence without first requiring the Commonwealth to put on direct testimony from the nurse concerning the chain of custody, the error is harmless. Pursuant to CR[5] 61.01:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or

[4] Because Krusley only challenges the nurse's part of the chain of custody, we will not review any other parts of the chain of custody on appeal.

[5] Kentucky Rules of Civil Procedure.

> in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Although the nurse who collected the victim's underwear in this case was not called as a direct witness by the Commonwealth, she was called as a witness by the defense. During her testimony, the Commonwealth cross-examined her about the procedure she typically used when receiving such evidence. The nurse attested that in the present case, she would have followed the same procedure, which means she would have taken the underwear from the victim or from the victim's family, put them in a bag, sealed the bag, and only given the bag to law enforcement.

Therefore, because the nurse did ultimately testify concerning the chain of custody, Krusley's substantial rights were not violated when the court did not require the Commonwealth to call the nurse as a direct witness to testify regarding those matters. Consequently, this claim lacks merit.

D. CONFRONTATION

Krusley next asserts that the circuit court's act of refusing to exclude the sexual assault rape kit violated his federal Sixth Amendment right to

confrontation. He specifically alleges that his right to confront witnesses was violated when the trial court admitted the rape kit into evidence without the nurse testifying to establish that she "used correct procedures and did in fact take vaginal swabs from [the victim] and collect underwear and jeans from [the victim] and [that she] gave these to" law enforcement. Krusley acknowledges that this claim is not expressly preserved, but he contends that it is "implicitly preserved by his objection to the absence of the nurse who prepared the sexual assault kit on 'chain of custody' grounds."

Regardless of whether this claim was preserved or not, it lacks merit because the nurse did testify during trial. Defense counsel did have the opportunity to question her. Therefore, Krusley's allegation that he was unable to confront the nurse witness is untrue.

E. CROSS-EXAMINATION OF KRUSLEY

Finally, Krusley alleges that the Commonwealth's cross-examination of him was so extreme and combined so many objectionable elements that it violated due process. Specifically, Krusley asserts that the Commonwealth improperly asked from where he had come and why Krusley's wife did not appear in court to corroborate his defense and also insinuated that Krusley had a criminal history of targeting mentally disabled victims for sexual exploitation. He acknowledges this claim is only partially preserved, so he requests palpable error review under RCr[6] 10.26.

[6] Kentucky Rules of Criminal Procedure.

Kentucky Rule of Criminal Procedure 10.26 provides as follows: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

> [T]he requirement of "manifest injustice" as used in RCr 10.26 . . . mean[s] that the error must have prejudiced the substantial rights of the defendant, . . . *i.e.*, a substantial possibility exists that the result of the trial would have been different. . . .
>
> [The Kentucky Supreme Court has] stated that upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks and citation omitted).

Krusley states the following in his appellate brief:

> During cross-exam[ination Krusley's] denial of being attracted to younger women or to anyone but his wife set the Commonwealth off into a tirade of improper questioning. The Commonwealth quickly responded by asking, "Isn't it true a short time prior to this on November 26 you made an advance on someone younger than your wife?" and "Isn't it true you made an advance on another person with an intellectual disability?" When [Krusley] denied this, the Commonwealth questioned [him] as follows:
>
> > Com.: Isn't that why you go to these volunteer places?
> >
> > Appellant: No.

Com.: Where did you live before?

Appellant: Illinois.

Com.: Before that?

Appellant: Ohio.

Com.: Before that? [Counsel's single-word "objection" overruled at this point without bench conference].

Com.: Why do you move from place to place? Isn't it a fact you move from place to place because this keeps happening to you?

Appellant: No. Gainful employment.

* * * *

Com.: In fact, your wife's through with you, isn't she? She's tired of this stuff, isn't she? Because this isn't your first rodeo, is it?

Appellant: First accusation, yes.

Com.: This isn't the first time you've stepped out on her.

Appellant: I've never stepped out on my wife.

Com.: Never had an affair on your wife?

Appellant: No.

Com.: Then why not have your attorney subpoena her to testify about the condom use?

Krusley alleges that this cross-examination

> urged the jury to distrust [him] because he was "not from around here" and had a criminal history of targeting intellectually disabled victims in other states by frequenting "volunteer places" and raping them. . . . A prior history of raping mentally incompetent victims is implicit in the Commonwealth's demand that [Krusley] admit "this keeps happening to you."

During a bench conference in the midst of the Commonwealth's cross-examination of Krusley, the court, in the absence of an objection by the defense, told the Commonwealth to stop implying that Krusley had prior extramarital affairs because that amounted to character evidence. The Commonwealth obeyed the court's order from that point forward.

Krusley alleges that the Commonwealth's statement that he was not from that area was a way of urging the jury not to trust him. Additionally, Krusley contends that the Commonwealth's statement that "this keeps happening to you" was an implication that he had a criminal history of targeting intellectually disabled victims in other states by frequenting "volunteer places." However, neither statement amounts to a manifest injustice because there is not a substantial possibility that the result of the trial would have been different if these statements had not been made. Although during trial, Krusley maintained that he had not had sexual relations with the victim, the victim's underwear was subsequently tested and Krusley's semen was found in them. Krusley alleged that the victim must have found a used condom while she was at his house and put the semen in her underwear to frame him for rape. However, her guardian attested that, based upon her observations of the victim, she did not think the victim could develop such an

intricate plan, particularly considering the victim's low I.Q. of 56. Furthermore, the victim testified that she initially consented to having sexual relations with Krusley, but that during intercourse, she began to experience pain and she repeatedly told him to stop, which he did not do. Based upon the victim's testimony, her low I.Q., and the fact that Krusley's semen was found in her underwear, there is not a substantial possibility that the result of the trial would have been different if the Commonwealth had not made the statements about which Krusley complains. Therefore, this claim lacks merit.

Accordingly, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

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