RENDERED: December 4, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002765-MR

ROBERT LEWIS SHEMWELL — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE GARLAND W. HOWARD, JUDGE
ACTION NO. 97-CR-000139

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Robert Lewis Shemwell (Shemwell) appeals from a judgment and sentence entered by the Daviess Circuit Court which imposed a ten (10) year sentence pursuant to a jury recommendation after the jury found him guilty of rape in the third degree (KRS 510.060) and of being a persistent felony offender (PFO) in the second degree (KRS 532.080). We affirm.

Shemwell was indicted by a Daviess County Grand Jury of rape in the third degree and of being a PFO in the second degree. The indictment alleged that Shemwell, who was twenty-five years old at the time of the incident, engaged in sexual intercourse with A.R., a female less than sixteen (16) years old. [A.R. was

actually fifteen (15) years old at the time of the rape]. The indictment also alleged that Shemwell met all the criteria to be considered a PFO II. After a two day jury trial, Shemwell was convicted of both offenses and the jury recommended a ten (10) years sentence which the trial court imposed. After the trial court denied appellant's motion for a new trial, this appeal followed.

On appeal Shemwell raises three (3) issues concerning alleged errors in this matter. We will address each assignment of error separately. First, appellant contends it was error for the trial court to refuse to permit him to question A.R.'s father about other people he (the father) may have accused of having sex with his daughter. Shemwell argues that such evidence could have shown "that A.R.'s father was an insanely jealous, religious fanatic, who was possibly molesting his own daughter; and who at the very least was accusing everyone in the project of having sex with his daughter." The trial court refused to permit Shemwell to pursue this line of questioning. Appellant placed the testimony of the victim's father and Detective Osborne, the investigating police officer, concerning the sought after testimony in the record by avowal. As to this issue, A.R.'s father testified that when he confronted his daughter about having sex with Shemwell, he had also heard rumors about her having sex with other people. He also told Detective Osborne of this information. Detective Osborne stated that A.R.'s father told him of rumors A.R. was having sex with other individuals but did not mention any names.

The Commonwealth responds that this type of testimony is properly excluded under KRE 412. KRE 412 replaced KRS 510.145, commonly referred to as the "Rape Shield Statute" in 1992. In pertinent part, KRE 412 states:

> (**a**) **Reputation or opinion.** Notwithstanding any other provision of law, in a criminal prosecution under KRS Chapter 510 or for attempt or conspiracy to commit an offense defined in KRS 510, or KRS 530.020, reputation or opinion evidence related to the sexual behavior of an alleged victim is not admissible.
>
> (**b**) **Particular acts and other evidence.** Notwithstanding any other provision of law, in a criminal prosecution under KRS Chapter 510, or KRS 530.020, or for attempt or conspiracy to commit an offense defined in KRS Chapter 510, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence is admitted in accordance with subdivision (c) and is:
>
> (1) Evidence of past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury;
>
> (2) Evidence of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which an offense is alleged; or
>
> (3) Any other evidence directly pertaining to the offense charged.
>
> (**c**)(**1**) **Motion to offer evidence.** If the person accused of committing an offense described above intends to offer under subsection (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen (15) days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may

> allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.

It should be noted, first, that Shemwell did not comply with the rule [KRE 412(c)(1)] by making the necessary written motion fifteen (15) days before the trial. Be that as it may, KRE 412(b)(1) specifically excludes the testimony appellant attempts to put before the jury. Under the guise of portraying the victim's father as "an insanely jealous, religious fanatic who was possibly molesting his own daughter" of which there was absolutely no evidence, appellant attempts to put into evidence that which KRE 412 specifically excludes. Recent cases have upheld the provisions of KRE 412 and its predecessor KRS 510.145 and their intended purpose of keeping the trial focused on the facts of the specific case and not permitting an unfair attack on the victim. See Hall v. Commonwealth, Ky. App., 956 S.W.2d 224 (1997); Violett v. Commonwealth, Ky., 907 S.W.2d 773 (1995); Commonwealth v. Dunn, Ky., 89 S.W.2d 492 (1995); and Billings v. Commonwealth, Ky., 843 S.W.2d 890 (1992). Under KRE 412 and a long list of case law, the trial court properly excluded the testimony Shemwell attempted to introduce.

The next issue which Shemwell presents is that he was entitled to an instruction on the lesser included offense of third-degree sexual abuse (KRS 510.130). Appellant admits that he did not properly preserve this issue by tendering a written instruction of the requested instruction. However, we will

address the issue in order to thoroughly dispose of all issues presented on appeal. Appellant alleges that based upon the evidence presented the jury could have believed that he and A.R. had not engaged in sexual intercourse. Appellant further contends that the jury, had it been given an instruction of sexual abuse in the third degree, could have convicted him of said lesser offense. However, that is not the standard to be considered by the trial court. The fact that the evidence might support a guilty verdict on an uncharged offense that is less serious in nature or less difficult to prove than the charged offense does not establish that the former is a lesser offense which is necessarily included in the latter. Percy v. Commonwealth, Ky., 839 S.W.2d 268, 272 (1992). Kentucky case law requires that the trial court to instruct on every state of the case deducible from the evidence. See Johnson v. Commonwealth, Ky. App., 875 S.W.2d 105 (1994); Covington v. Commonwealth, Ky. App., 849 S.W.2d 560 (1993). Case law further holds lesser included offense instructions are only required to be given when, considering the totality of the evidence, the jury might reasonably conclude that the defendant was not guilty of the charged offense but was guilty of the lesser offense. See Bills v. Commonwealth, Ky., 851 S.W.2d 466 (1993); Wombles v. Commonwealth, Ky., 831 S.W.2d 172 (1992). The evidence presented to the jury in this matter would only support a conviction of rape in the third degree. It would have been unreasonable for the jury to conclude that Shemwell was guilty of sexual abuse in the third degree.

A.R. testified that she was fifteen (15) years old and that Shemwell knew she was fifteen. She also testified that they had sexual intercourse. Witness Dewayna Barnes testified that she observed A.R. and Shemwell on the couch with their clothes down around their knees and thought that they were engaged in sexual intercourse. Witness Debbie Austin confirmed that Shemwell knew A.R. to be only fifteen and further admitted that A.R. told her that she and appellant had engaged in sexual intercourse. The victim's father testified that his daughter, although she had first denied the allegations, eventfully admitted to him that she and Shemwell did engage in sexual intercourse. Shemwell testified on his own behalf and denied any sexual contact with A.R. He also confirmed that he was twenty-five (25) years old and that he knew A.R. was only fifteen (15) years old. Since there was no evidence from which a jury could conclude that appellant was guilty of sexual abuse in the third degree as opposed to rape in the third degree, he was not entitled to an instruction on sexual abuse.

The final issue raised by Shemwell is that he was unduly prejudiced when Detective Osborne was permitted to state, in effect, that the grand jury had found probable cause since it had returned the indictment against Shemwell. The following exchange occurred between the Commonwealth and Detective Osborne:

> Q (Attorney for Commonwealth): Now, pursuant to your investigation, you also spoke with Dewayna Barnes, is that correct?
>
> A (Det. Osborne): Yes sir, I did.
>
> Q: Again, you did not arrest Robert Shemwell at that time?

A: No sir, I did not.

Q: How did these charges come to before us today?

A: I submitted this before the Grand Jury on April 7.

Q: Of this year, 1997?

A: Yes, sir.

Q: Did the Grand Jury return an indictment?

A: Yes, sir.

Q: Which meant they found probable cause...

[interrupting, defense counsel states, "Judge, I object to that question. Court overrules stating "It's alright." Go ahead and answer the question".]

A: Yes sir they did come back on the 9th.

Shemwell contends that the testimony "amounted to a declaration by the officer that he believed the grand jury's indictment to be evidence of Appellant's guilt." We do not agree.

Appellant cites Braden v. Commonwealth, Ky. App., 600 S.W.2d 466 (1978), to support his argument. Braden addressed this issue as follows:

> Furthermore, we do not believe the statement to be error. This was said during opening statement and the defense, having the last opening statement, could have elaborated on the remark, if they wished.

Braden, 600 S.W.2d at 468. We do not see how the fact that a witness made the same statement is any different and the holding in Braden that such a statement is not error would apply also to this case.

For the foregoing reasons, the judgment and sentence of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Shaw
Richmond, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Vickie L. Wise
Assistant Attorney General
Frankfort, KY