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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-001101-MR

JOHN BROUGHTON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 99-CR-00042

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: The appellant, John Broughton (Broughton), appeals from the judgment of the Kenton Circuit Court, convicting him of rape in the first degree and sentencing him to ten-years' imprisonment. He argues that the court erred in failing to instruct the jury on a lesser-include offense and in excluding a portion of the testimony of a defense witness. After our review of the record, we affirm the judgment of the circuit court.

On January 29, 1999, the Kenton County Grand Jury indicted Broughton on the count of Rape in the First Degree (Kentucky Revised Statute (KRS) 510.040). The indictment charged that on Thanksgiving Day, November 26, 1998, Broughton forcibly

compelled M.T. to submit to sexual intercourse with him. Broughton had invited M.T. and her boyfriend, Patrick, to his mother's house for Thanksgiving dinner. M.T. and Patrick accepted the invitation and spent Thanksgiving Day with the Broughton family watching television, drinking alcohol, and eating dinner.

Later that evening, M.T. and Broughton left the house to walk to a nearby convenience store to buy some ice. Broughton led M.T. through a ballfield, claiming it was a short-cut to the store. As they were walking across the ballfield, Broughton grabbed M.T. and made lewd sexual comments to her. She tried to resist his advances and to get away from him. However, Broughton tackled her to the ground and positioned himself on top of her. M.T. alleged that Broughton pulled open her shirt and pushed her pants and underwear down to her knees, exposing her breasts and genitalia. She screamed for help and struggled unsuccessfully to get away from him. Before the police arrived on the scene, Broughton penetrated her vagina with his fingers and his penis.

At approximately 8:00 p.m. on the night in question, Ray Johnson went outside to quiet his barking dog in the backyard. While he was outside, he heard a "commotion" on the ballfield behind his house. As he listened, Johnson heard a female voice screaming for help. He went inside his house and immediately called "911" for help. After placing the call, Johnson went outside. He could hear the female screaming, and her screams seemed to be getting louder. He called "911" again, and the police soon arrived at his house. Johnson accompanied

the police officers to the ballfield, where they discovered Broughton on top of M.T. The police officers forcibly removed Broughton from M.T., and she was taken to the hospital. Broughton was arrested and charged with rape in the first degree. The case proceeded to trial, and the jury found Broughton guilty as charged. Subsequently, on April 21, 1999, the court entered final judgment, sentencing Broughton to ten years' imprisonment. This appeal followed.

Broughton first argues on appeal that the court erred in failing to instruct the jury on the offense of sexual abuse, a lesser-included offense of rape in the first degree. He contends that there was substantial evidence presented at trial that although he had attempted to have intercourse with M.T., he failed as he was unable to attain an erection. Broughton maintains that there was evidence that M.T. made contradictory statements as to whether he had penetrated her with his penis and that the police officers who responded to the "911" call could not recall whether Broughton had an erection when he was pulled off M.T. Based upon this contention, Broughton maintains that the jury might have reasonably believed that his attempt resulted only in sexual contact since there was equivocal evidence as to the element of penetration required for rape. We disagree.

It is well established in this jurisdiction that a defendant has a right to have the jury instructed on the whole law of the case. Taylor v. Commonwealth , Ky., 995 S.W.2d 355 (1999). The trial court must instruct the jury on every theory of the case supported by the evidence -- including any lesser-

included offenses. Swain v. Commonwealth, Ky, 887 S.W.2d 346 (1994). However,

> [a]n instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt as to the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.

Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 298 (1993).

A person is guilty of rape in the first degree when he engages in sexual intercourse with another person by forcible compulsion. KRS 510.040(1). As used in KRS Chapter 510, "'Sexual intercourse' means sexual intercourse in its ordinary sense . . . . Sexual intercourse occurs upon any penetration, however slight; emission is not required." (Emphasis added). KRS 510.010(8).

A person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact by forcible compulsion. KRS 510.110(1). "Sexual contact" is defined as "touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." KRS 510.010(7). Sexual abuse has been recognized as a lesser-included offense of rape. Johnson v. Commonwealth, Ky., 864 S.W.2d 266 (1993). This court articulated the standard governing jury instruction as to these related offenses in Salsman v. Commonwealth, Ky. App., 565 S.W.2d 638 (1978):

> When all of the evidence indicates that there was sexual intercourse and there is no evidence that there was only sexual contact, a defendant is not entitled to an instruction on the lesser included offense of sexual abuse in the first degree.

Id. at 642.

At trial, M.T. testified that Broughton forced her to engage in sexual intercourse. She stated that he penetrated her with both his fingers and his penis. On the night of the incident and the days following, M.T. had told the police that Broughton penetrated her vagina with his fingers and his penis. Ray Johnson testified that he accompanied the police officers to the ballfield where they found Broughton "on top" of M.T. He stated that the lower extremities of both Broughton and M.T. were unclothed and that Broughton was moving on top of M.T. in a sexual manner. Johnson further testified that M.T. was screaming "get off of me," "stop," and "you are hurting me."

The police officers who responded to the "911" call corroborated Johnson's testimony. They testified that they found Broughton on top of M.T. in a sexual position and that Broughton and M.T. were partially nude. They also stated that M.T. told them that Broughton had penetrated her vagina with his fingers and his penis. However, both officers admitted on cross-examination that they could not recall whether Broughton had an erection when he was pulled off M.T. The doctor who examined M.T. on the night of November 26, 1998, testified that he did not find any seminal fluid. However, he also testified that the absence of seminal fluid was not conclusive evidence that Broughton had not penetrated M.T. with his penis.

We find that based upon the totality of the evidence at trial, Broughton was not entitled to an instruction for sexual abuse. M.T. consistently stated that Broughton had penetrated

her with his penis, and Johnson and the police officers on the scene testified that Broughton and M.T. appeared to be engaged in sexual intercourse. Contrary to Broughton's assertion, we cannot agree that there was sufficient evidence for a juror to doubt that Broughton was guilty of rape but to conclude that he was guilty of sexual abuse. We find no error.

Broughton next asserts that the court erred in excluding evidence that M.T. had offered to drop the charges against Broughton in exchange for money. Prior to trial, the Commonwealth filed a motion *in limine* to exclude evidence that M.T. had offered to drop the charges against Broughton in exchange for money. The Commonwealth countered by stating that M.T. had been harassed and bribed by Broughton's family to drop the charges against him. The court granted the motion to the exclude the evidence.

At trial, Morris was called as a witness for the defense. She stated that she had known Broughton and his family for several years and that she was acquainted with M.T. Morris testified that M.T. had admitted to her that Broughton did not rape her. After the case was submitted to the jury, Morris testified by avowal that M.T. had offered to drop the charges against Broughton in exchange for money and that M.T. demanded to be paid at least half the money before she went to the police.

On cross-examination, the Commonwealth questioned Morris as to whether she knew that M.T. was assisting the police with a "sting" investigation into the attempted bribery of a witness. The Commonwealth then explained to the court that M.T.

complained that she had been harassed and that she was offered money to drop her charges against Broughton. She agreed to assist the police in an investigation into the harassment and bribery allegations by participating in a "sting" operation.

The court affirmed its exclusion of evidence regarding this matter, stating that its inclusion would have effectively created the scenario of a "trial within a trial."

KRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of issues, or misleading to the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. [Emphasis added].

The court must balance the probative value of the proffered evidence against its possible prejudicial effect. Hall v. Transit Authority of Lexington Fayette Urban County Government, Ky. App., 883 S.W.2d 884 (1994). The decision to admit or exclude evidence is a matter committed to the sound discretion of the trial court, and a trial court's ruling on such matters will not be disturbed upon appellate review absent an abuse of discretion. Transit Authority of River City v. Vinson, Ky. App., 703 S.W.2d 482 (1985); Danner v. Commonwealth, Ky., 963 S.W.2d 632 (1998).

In this case, the court excluded the evidence concerning M.T.'s alleged offer to drop the charges against Broughton in exchange for money in order to prevent confusion of issues or to avoid misleading the jury. The court found that the introduction of this evidence would have resulted in a "trial

within a trial" of the bribery allegations against Broughton's family and would have had a prejudicial effect on the trial. Broughton had the opportunity to impeach M.T.'s testimony and credibility through Morris's limited testimony without the necessity of introducing evidence as to M.T.'s alleged bribery. We do not agree that the court abused its discretion.

Based upon the foregoing reasons, we affirm the judgment of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
Covington, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, KY