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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001041-MR

ROBERT L. ROLAND — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 99-CR-00608

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: DYCHE, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Robert L. Roland has appealed from a judgment of conviction and sentence of seven years' imprisonment entered by the Kenton Circuit Court on April 13, 2000, which convicted him of rape in the second degree.[1] Having concluded that none of the issues raised by Roland on appeal constitutes harmful error, if any error, we affirm.

On December 10, 1999, a Kenton County grand jury returned an indictment against Roland for the offense of rape in the second degree. On February 29 and March 1, 2000, a jury trial was held and Roland was convicted as charged. On April 13,

[1]Kentucky Revised Statutes 510.050.

2000, he was sentenced to seven years' imprisonment. This appeal followed.

In September 1998, the victim, W.E.[2], whose date of birth is June 17, 1986, was living with her mother, K.E., her younger brother, and an older sister, C.E., who was 18. At the time of the alleged eight instances of sexual intercourse, the family was living in Covington, Kentucky. During the time W.E. was having sexual intercourse with Roland, she spent a significant amount of time with her 19-year-old cousin, B.E. W.E. testified that she stayed with her cousin on many weekends and at one point was basically living with her.

W.E. testified that she met Roland on May 2, 1998, when she was standing outside her home with her sister, C.E. Roland, whose date of birth is June 19, 1972, approached the girls and began to have a conversation with them. At some point after C.E. walked off, Roland asked W.E. her age. W.E. testified that she told Roland that she was 17 years old although she was actually only 11 years old and that he told her he was 20 years old although he was actually 25 years old.

W.E. next saw Roland approximately a week later on the street near her home. W.E. testified that this was the time she acquired Roland's pager number and that after that encounter she began to page him. W.E. testified that she subsequently met

[2]While the Commonwealth has referred to the minor victim by her full name, in an effort to protect her privacy we will refer to her and her family members by their initials.

Roland outside Joe's Bar and Club 55 in Newport, but that they did not show any affection toward each other because they were in public.

W.E. testified that she first had sexual intercourse with Roland sometime during the middle of September 1998. At that time, W.E. was 12 years old and Roland was 26 years old. W.E. had skipped school and was at the home of a friend, when she paged Roland. Roland went to W.E.'s friend's house; and after the friend left the house, W.E. and Roland had sexual intercourse with each other for the first time. W.E. testified that when they had sexual intercourse, she took off her pants and panties and Roland only pulled down his pants. She testified that she kept her shirt on during the sexual intercourse and that he did not touch her breasts or say anything sexual to her.

The second time W.E and Roland had sexual intercourse occurred two or three months later at her cousin's house. W.E. paged Roland, he came over, and they had sexual intercourse upstairs in the cousin's son's bedroom. The third time they had sexual intercourse was approximately one month later in a car parked on Greenup Street after W.E. had paged Roland. Roland climbed on top of W.E. while she sat in the reclined passenger seat. The fourth time they had sexual intercourse was approximately one or two months later. This time W.E. was at her aunt's residence and paged Roland. Roland picked her up and took her to a secluded location behind Lookout Bowl in a different

vehicle, and once again he got on top of her in the passenger seat and had sexual intercourse with her.

Approximately two months later, W.E. paged Roland from her cousin's house, he came over, picked her up, and took her to the Lookout Motel. They checked into room 23, where they had sexual intercourse in bed. After they had sex, Roland went to a nearby Hardee's restaurant and picked up some food. W.E. testified that Roland ate but that she did not. She further testified that they smoked a marijuana joint together and then had sexual intercourse again. She testified that they watched some television and then had sexual intercourse for the third time that day. W.E. testified that the first time that they had sex in the motel room was the only time during any of their encounters that Roland took off all of his clothing. She testified that she kept her shirt on during each of the encounters. The eighth and final time that they had sexual intercourse took place approximately two months later in Roland's car which was parked in a secluded spot at Lookout Bowl.

W.E. testified that she did not use any birth control during any of the eight times that they had sexual intercourse because Roland had told her that he had taken action to prevent him from producing children. After W.E. began to feel sick to her stomach, her mother took her to the hospital. W.E. was diagnosed with having the sexually transmitted diseases of chlamydia and gonorrhea. At first W.E. would not tell her mother who she had had sex with, but after she was told by a worker from

Child Protective Services that her mother would go to jail if she refused to provide the name of her sex partner, W.E. relented and told them about Roland.

W.E.'s cousin testified and corroborated a portion of W.E.'s testimony. The cousin testified that W.E. often stayed with her during the relevant time period and that she had seen Roland drop W.E. off at her home. She also said that she had answered the telephone when Roland had called for W.E. and that W.E. referred to him as her "dude." The cousin also testified that W.E. had told her that she and Roland had had sex in a car and in a motel room. The cousin further testified that W.E. told her about having sexual intercourse with Roland before the police began investigating the case.

Detective Ray Haley worked for the Covington City Police Department's domestic abuse response team during this time period. His job involved working with juvenile crime victims. After being assigned to this case, Det. Haley videotaped an interview between W.E. and a professional forensic interviewer. Det. Haley testified that he videotaped the interview from a separate room and that the purpose of the interview was to identify the perpetrator of the alleged abuse without using leading questions. Det. Haley testified that W.E.'s story was consistent in the two interviews she gave prior to trial and in her trial testimony. Moreover, he stated that W.E.'s story was given validity when he took W.E. to the locations where the acts of sexual intercourse allegedly occurred. W.E. was able to

identify the motel and show the detective the room where she and Roland had allegedly had sex. She had originally told Det. Haley that they had had sex in room 22, but after arriving at the motel she said that she was positive it was room 23 because of the way the door opened. Det. Haley had already discovered, but had not informed W.E., that the motel's records showed that Roland had checked into room 23 during the relevant time period.

Roland's primary defense at trial was that W.E. had a serious crush on him and that he had no interest in a little girl. He testified that she was always trying to talk to him but that he had no interest in her. He also testified that he had no sexually transmitted diseases and thus that he could not have been the person who had infected W.E. Furthermore, since W.E. had failed to mention Roland's distinguishing physical characteristic of severe scarring during her testimony, Roland showed the jury his back and upper buttocks which revealed several keloidal scars. Roland admitted that he had checked into room 23 at the Lookout Motel, but he claimed to have done so with a woman he had met at a gas station. However, this other women did not testify and Roland did not introduce any other evidence to establish her existence.

The case sub judice turned to a large extent on the credibility of Roland and the victim. Roland's testimony primarily consisted of a strong denial that he had had sexual intercourse with W.E. In addition to W.E.'s testimony, the Commonwealth's proof included testimony from some of W.E.'s

relatives which was consistent with W.E.'s testimony. But perhaps the most important evidence was the testimony from Det. Haley which raised the question of how W.E. could have known which motel room Roland had checked into, if she had not been with him; and the hard to explain fact that W.E. had acquired Roland's pager number. Apparently, Roland was not able to sufficiently answer some of these questions to the satisfaction of the jury.

As we turn to the arguments made by Roland in his brief, we agree with the Commonwealth that many of his arguments are difficult to understand. Roland attempts to raise several issues concerning voir dire. He first claims that he was denied his constitutional right to a fair trial and an impartial jury because there were no African-Americans serving on the jury panel. However, he has failed to indicate in his brief where any issue concerning voir dire was preserved for appeal; and from our review of the record, we conclude that none of them was properly preserved for our review.[3] In fact, not only was this issue not objected to at trial, but Roland's counsel stated during voir dire that he felt that Roland could get a fair trial from an "all white jury." The questions asked by Roland's counsel during voir dire either resolved any concern that he may have had related to there being no African-Americans on the jury, or it was counsel's trial strategy to try to gain favor with the jury by expressing

[3]Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v).

confidence in their ability to give Roland a fair trial. In any event, he accepted the jury.

Roland next claims that he was denied his right to a fair trial because several members of his jury had sat on another jury during the same term of court.[4] The case that some of the jurors apparently served on had the same prosecutor and also involved a sex crime. Once again, this issue was not preserved for appellate review and apparently did not cause defense counsel any concern. Nonetheless, we will briefly address the issue, by quoting from our Supreme Court's opinion in Spanski v. Commonwealth:[5]

> As his second argument on appeal, appellant claims that several prospective jurors who had sat on several cases in the same term were disqualified because of this previous service. He cites KRS 29A.080(2)(g): "(2) A prospective juror is disqualified to serve on a jury if he: . . . (g) Has served on a jury within the past twelve (12) months." There is no merit to this argument. KRS 29A.080 is part of a statutory scheme to provide grand and petit jurors for a term of court. KRS 29A.010 et seq. The disqualification statute relates to the prospective jurors' ability to be on a jury panel. To hold otherwise would mean that a juror could only serve on one case per term and obviously this was not the intent of the legislation.

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[4]Although Roland makes this claim, he is unable to state with any specificity who the jurors were and how many had previously served on another case.

[5]Ky., 610 S.W.2d 290, 292 (1980).

Roland next claims that the Commonwealth's Attorney attempted to prejudice the jury against him by using his familiarity with the jury panel. In his brief, Roland states:

> The [C]ommonwealth's [A]ttorney established a prejudicial familiarity with this jury based on his prior trial, being both of sexual issues and concluded to him (sic). He initially asked during "voir dire" who knew him and who had served on a jury with him [citation to the record omitted].
>
> The defendant-appellant's position is without objection, the trial court has a duty to this defendant-appellant to protect the Constitutional Right of the defendant to a fair and impartial jury.
>
> This jury has a clear predisposition to the acceptance of [the] Commonwealth's Attorney and his subsequent arguments, presumably if they rendered a guilty verdict; in the prior jury trial meeting and acquientancship (sic). If the prior contact was adverse to either party, that aspect was not demonstrated, by the conduct of the jurors, who were excused of cause [citation to the record omitted].

This argument is simply without merit. Although the citations to the record are clearly incorrect, we have reviewed the entire voir dire. At the beginning of voir dire, the Commonwealth's Attorney noted that he saw some familiar faces and he apologized in advanced if his questions seemed repetitive to those who had previously heard them. We find nothing objectionable in his conduct.

Roland also claims that it was error for a juror who had a "passing acquaintance with Det. Ray Haley" to have been seated. Once again, this claim was not preserved for appellate

review, and additionally, the citation to the record where the error allegedly occured was incorrect. We have reviewed the record and could not find where a juror stated that he had a "passing acquaintance" with Det. Haley. In any event, unless it was established that the relationship would prevent the juror from deciding the case fairly because of his inability to give equal weight to Det. Haley's testimony, the juror would not have been dismissed for cause. Thus, we find no error.

Next, Roland relies on Commonwealth v. Callahan,[6] for his claim that he was prejudiced by the Commonwealth's Attorney's explanation of the law to the jury panel during voir dire. Yet again, this error was not preserved for appellate review; and additionally, Callahan is clearly not on point. In Callahan, the defense attorney attempted to define reasonable doubt. The Supreme Court of Kentucky held that a trial court must prohibit counsel from making any attempt to define reasonable doubt at any point during the trial. Once again, Roland sends us on a "wild goose chase" with citations to the record that have nothing to do with his argument. However, as we have stated previously, we have reviewed the entire voir dire, and we did not see any conduct which violated Callahan.

Next, Roland claims that the trial court erred by allowing the Commonwealth's Attorney to make improper racial remarks during his opening statement and during his examination

[6]Ky., 675 S.W.2d 391 (1984).

of witnesses. This alleged error was also not preserved on appellate review. Generally, with little or unhelpful citations to the record, Roland has argued that the Commonwealth's Attorney made a point to make race an issue at trial for the improper purpose of stirring the emotions of the juror.

We have reviewed the record and disagree with Roland's characterizations of the Commonwealth's use of race. It is true that the Commonwealth's Attorney asked W.E.'s older sister, C.E., if her boyfriend was a black man, and she answered in the affirmative. While this question was limited and not expanded upon, the obvious implication was that W.E. was perhaps trying to emulate her older sister by dating Roland.

Roland also argues that the prosecutor used racially-motivated tactics during his cross-examination by asking him if the woman he claimed to have had sexual intercourse with in room 23 of the Lookout Motel was a white woman. However, this question was asked in conjunction with several other questions concerning the identity and whereabouts of this woman, who the Commonwealth has referred to as the "mystery woman." It is clear from our review of the record that the Commonwealth was merely attacking Roland's credibility on this issue. In its closing argument, the Commonwealth did not place any emphasis on the fact that Roland was black and the alleged woman from the gas station was white. Rather, the prosecutor argued that the woman was not present to testify at trial, and that Roland's explanation was not believable. Thus, we reject Roland's argument that the

Commonwealth attempted to inappropriately comment on race throughout the trial in an attempt to prejudice the jury. We hold that when the fact of race was raised at trial that it was properly raised because it was relevant to the Commonwealth's case.

The final issue raised on appeal is whether the trial court erred by denying Roland's motion for a directed verdict of acquittal. When a trial court considers a motion for a directed verdict of acquittal, it must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.[7] "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."[8] In reviewing the trial court's decision, an appellate court should not disturb the trial court's denial of a motion for a directed verdict of acquittal unless it would be clearly unreasonable for a jury to find guilt.[9] With this standard in mind, we will review the evidence presented in support of the charge of rape in the second degree.

Roland argues that the evidence at trial was insufficient for any reasonable juror to find that he had had sexual intercourse with W.E. At trial and in his brief, Roland points to what he claims to be three critical facts in his favor.

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[7]Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

[8]Id.

[9]Id.; Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983).

First, he argues that no witness could corroborate W.E.'s testimony. Although no witness actually saw the two of them having sex, W.E.'s story was supported by her sister and her cousin since both testified that they knew Roland and they had seen him with W.E. W.E.'s cousin further testified that W.E. often talked about her relationship with Roland, that she had answered the telephone when Roland had called for W.E., and that she had seen Roland drop W.E. off at her house.

The second fact that Roland emphasizes is W.E.'s failure to mention that Roland's back and buttocks are covered with extensive surgical scars. We conclude that a reasonable juror could have found that W.E. had a limited opportunity to view the scars. The testimony at trial was that Roland was fully nude in the presence of W.E. only one time and it was for only a very brief period of time. Also, on all eight occasions that W.E. claimed to have had sexual intercourse with Roland, she stated that he was on top of her.

Finally, Roland argues that no reasonable juror could have found that he had had sexual intercourse with W.E. because she had contracted two sexually transmitted diseases and that he did not have either disease. Although Roland testified that he did not have a venereal disease, the jury was left to make a judgment as to his credibility versus W.E.'s credibilty. We cannot say that it would have been unreasonable for the jury to believe W.E.'s claim that she had acquired the sexually transmitted diseases from Roland and that Roland was not being truthful about

having the diseases. As we discussed previously, there were two unexplained factual matters which clearly supported W.E.'s version of the events: she knew Roland's pager number and she also knew that he had checked into room 23 in the Lookout Motel during the relevant time period.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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