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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000107-MR

BILLY JOE WALDEN — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 02-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Billy Joe Walden ("Walden") appeals from a judgment of the Monroe Circuit Court reflecting a jury verdict of guilty on two counts of first-degree unlawful transaction with a minor. We affirm.

In November, 2001, B.J. Walden ("B.J."), son of appellant Walden, began dating a fourteen-year-old girl named "M.S." B.J. was 20 years old at the time. M.S. had a fifteen-year-old female friend referred to in the record as "A.H."

On several occasions in late November, 2001, Walden, age 43, B.J., and the two minor girls allegedly engaged in the illegal use of prescription drugs and alcohol. It would later be alleged that on November 24, 2001, the four individuals consumed alcohol and rented a hotel room in Tompkinsville, Kentucky, where B.J. and M.S. had sexual intercourse on one of the hotel beds while Walden and A.H. were on the other bed.

The uncle of M.S. apparently became suspicious of M.S.'s involvement with B.J. and reported the matter to the Kentucky State Police. An investigation ensued which resulted in the indictment of B.J. and Walden on six counts each of first-degree unlawful transaction with a minor. B.J. pled guilty, and the charges against Walden came to trial in Monroe Circuit Court on December 10, 2002.

Evidence was adduced at trial that Walden had provided prescription drugs and alcohol to the minor girls on several occasions. Particular attention was given to the November 24, 2001 encounter, during which Walden allegedly provided the girls with alcohol and pills, drove them to Tennessee, then returned to Tompkinsville where the hotel room was rented. M.S., A.H., and B.J. each testified that Walden had provided the girls with alcohol and pills. Walden maintained that B.J. was fabricating a story in order to secure a favorable plea agreement in his

criminal proceeding, and that the girls were supporting his story in order to help B.J.

At the close of the Commonwealth's case, Walden maintained that insufficient evidence was presented to instruct the jury on any offense. The trial judge agreed in part, ruling that the only direct evidence of Walden's alleged wrongdoing related to the November 24, 2001 incident and a subsequent incident occurring on Big Sulfur Road. The trial continued only as to the two counts of the indictment relating to those two incidents. Walden denied any wrongdoing, maintaining that he had never given the girls alcohol or pills, and in fact had lectured them on the evils of drug use after smelling marijuana on them.

At the close of all the evidence the jury was instructed on two counts of first-degree unlawful transaction with a minor relating to the November 24, 2001 incident; the lesser included offense of third-degree unlawful transaction with a minor; and, one additional count of first-degree unlawful transaction with a minor for the alleged sexual contact occurring with A.H. at Big Sulfur Road. Upon considering the proof, the jury returned a verdict of guilty on two counts of third-degree unlawful transaction with a minor (for the November 24, 2001 incident), and not guilty on the third count. Walden

was sentenced to 12 months in jail on each charge, to be served concurrently. This appeal followed.

Walden first argues that the trial court erred in denying his motion for a directed verdict of acquittal. He maintains that the evidence was not sufficient to prove that he was guilty of third-degree unlawful transaction with a minor, arguing that the evidence in support of these charges was conflicting and contradictory. He claims that no reasonable person could rely on this conflicting testimony to find that he was guilty of the charged crimes, and that as such the trial court erred in failing to grant his motion for a directed verdict. He seeks to have his conviction reversed and the matter remanded for entry of a directed verdict of acquittal.

As the parties are aware, Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), sets forth the standard for reviewing motions for a directed verdict. It states that,

> [O]n 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.

> 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.

Benham, 816 S.W.2d at 187.

M.S. testified that Walden purchased alcohol in Tennessee, and that the four individuals consumed the alcohol in Walden's vehicle while driving back to Tompkinsville, Kentucky. Other evidence was introduced that the girls were 14 and 15 years old at the time of the incident. When the trial court drew all fair and reasonable inferences from this testimony as Benham requires, and when it assumed that the evidence was true for purposes of Walden's motion, it properly concluded that the evidence was sufficient for the jury to render a guilty verdict. As to the test on appellate review, we cannot conclude that under the evidence as a whole it was clearly unreasonable for the jury to find guilt. Id. The important inquiry is not whether the evidence was conflicting, nor whether evidence was produced which support Walden's claim of innocence, for each of those questions would be answered in the affirmative. Rather, the question which disposes of Walden's claim of error is whether evidence existed upon which the jury could have reasonably concluded that Walden was guilty of the charged

offenses. Such evidence is found in the record, and accordingly, we find no error on this issue.

Walden next argues that the trial court erred in allowing the jury to twice find him guilty of the same count of the indictment. He notes that Count 1 of the indictment alleges that he engaged in illegal conduct as against two minors on November 24, 2001. He maintains that the trial court treated this one count as two separate and distinct charges, and improperly instructed the jury that it could find him guilty of two offenses (one offense against each girl). Stated differently, since Walden was only indicted on one count of wrongful conduct occurring on November 24, 2001, he claims that he cannot be found guilty twice. He notes that this issue is not preserved for appellate review, but claims that it represents palpable error.

We have closely studied this issue and find no error. An indictment may be amended at any time to conform to the proof. RCr 6.16; Wolbrecht v. Commonwealth, Ky., 955 S.W.2d 533 (1997). It cannot be amended so as to make additional charges which the defendant is not prepared to meet. Maum v. Commonwealth, Ky., 490 S.W.2d 748 (1973).

In the matter at bar, Count 1 of the indictment clearly alleged wrongful conduct as against two minors. Nothing requires the indictment to set forth separate counts as against

each alleged victim. See generally, Maddox v. Commonwealth, Ky., 349 S.W.2d 686 (1961), which stands for the proposition that the indictment and jury instructions need not be perfectly matched so long as they describe the same offense. See also, Johnson v. Commonwealth, Ky., 105 S.W.3d 430 (2003). The indictment put Walden on notice that the Commonwealth sought to prove criminal behavior as against two minors, and evidence was adduced at trial in support of the indictment. As such, it cannot reasonably be argued either that Walden was unaware of the charges against him or that the jury instructions came as a surprise. Walden did not object to the instructions, and we find no palpable error. Accordingly, this issue does not provide a basis for tampering with the judgment on appeal.

Walden's third and final argument is that the trial court abused its discretion by giving him the maximum sentence of 12 months, and by denying his motion for probation. We find no abuse of discretion. The sentence was within the statutory guidelines for third-degree unlawful transaction with a minor (KRS 530.070), and the record contains nothing showing that Walden was entitled under the law to a shorter sentence. Similarly, there is no right to receive a probated sentence, White v. Commonwealth, Ky. App., 611 S.W.2d 529 (1980), and Walden is not entitled to any relief under this argument.

For the foregoing reasons, we affirm the judgment of the Monroe Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
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