

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001930-MR

FELIX MOSES

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 04-CR-00156

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

THOMPSON, JUDGE: Felix Moses appeals his conviction in the McCreary Circuit Court for rape in the third degree. For the reasons set forth herein, we affirm.

On October 30, 2004, a judgment of paternity was entered adjudging Moses, an adult, the father of a child born to D.F., a minor. On November 22, 2004, a McCreary County grand jury indicted Moses for third-degree rape for having engaged in sexual intercourse with a person who was less than sixteen years old.

After two mistrials, Moses' trial began on June 22, 2006. The Commonwealth primarily relied on the testimony of D.F., the victim. She testified that

she met Moses when she was twelve years old, and the two developed an intimate relationship which culminated in sexual intercourse when she was fourteen.

She further testified that she informed Moses of her age prior to engaging in sexual intercourse with him and that she never misled Moses about her age. Specifically, she denied ever telling Moses that she was seventeen. Further, the Commonwealth introduced several photographs of D.F. which depicted her physical appearance at various times between meeting Moses and the birth of their child.

Moses testified that he believed D.F. was over the age of fourteen when they had sexual intercourse. Moses' father, Felix Moses Sr., testified that the victim informed him she was seventeen and aggressively pursued his son. Moses' mother, Margie Moses, gave similar testimony.

At the conclusion of the trial, the jury found Moses guilty of third-degree rape. In accordance with the jury's recommendation, the trial court sentenced Moses to one year's imprisonment. This appeal follows.

Moses contends that the trial court erred when it denied his motion for a directed verdict of acquittal. He argues that there was insufficient evidence for a jury to find that he believed D.F. was less than sixteen years old when they had sexual intercourse. Thus, pursuant to KRS 510.030, he contends that the trial court should have granted his motion for a directed verdict of acquittal.

On appellate review of a motion for a directed verdict of acquittal, our analysis is to determine "whether, under the evidence viewed as a whole, it was clearly unreasonable for the jury to have found the defendant guilty." *Bray v. Commonwealth*, 177 S.W.3d 741, 746 (Ky. 2005). We further recognize that the Commonwealth bears

the burden of proof in establishing each element of a charged crime otherwise a defendant's motion for a directed verdict should be granted. *Williams v.*

Commonwealth, 721 S.W.2d 710, 712 (Ky. 1986).

KRS 510.060(1)(b) provides that "[a] person is guilty of rape in the third degree when being twenty-one (21) years old or more, he or she engages in sexual intercourse with another person less than sixteen (16) years old." However, as a defense, KRS 510.030 provides the following:

In any prosecution under this chapter in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old, mentally retarded, mentally incapacitated or physically helpless, the defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent.

Thus, the mistaken belief as to the age of the victim (inability to consent) can exculpate a defendant from criminal liability. *Wilson v. Commonwealth*, 290 Ky. 223, 160 S.W.2d 649 (1942).

Moses contends there was insufficient evidence to prove that he had knowledge that D.F. was under sixteen when they engaged in sexual intercourse. Specifically, he contends that D.F. and her mother led him to believe that D.F. was sixteen or seventeen years old at the time of their sexual intercourse. Additionally, although D.F. testified that she informed Moses of her age before intercourse, Moses points out that D.F. did not specifically testify as to what age she told him prior to the illegal conduct.

He further contends that his introduction of evidence regarding his memory loss, major depression, nervous disorder, and low I.Q. of 80 should have been

accepted as bolstering his testimony that he was unaware that D.F. was under sixteen. He argues that his parents' testimony, that D.F. had told them that she was seventeen, was improperly disregarded by the jury.

Despite Moses' recitation of the trial testimony, his contention is unconvincing because there was sufficient evidence, viewed as a whole, to permit the jury to reasonably find Moses guilty of third-degree rape. The Commonwealth introduced D.F.'s testimony that she never misled Moses regarding her age and never informed him that she was seventeen.

The Commonwealth also introduced several photographs of D.F. depicting her at the age of 12, when she first met Moses, to the age of 14, when they engaged in sexual intercourse. While Moses now contends that the photograph depicting D.F. at age twelve was inaccurate, the photograph was apparently admitted without objection and constituted competent evidence for the jury to consider.

Accordingly, based on the evidence before the jury, there was sufficient evidence to find Moses guilty of rape in the third degree. D.F. testified that she never misled him regarding her age. Additionally, a photograph of D.F. taken when she was twelve, at the time when Moses first met her, was introduced as evidence. Thus, in addition to testimony, the jury could reasonably infer that Moses knew D.F. had not reached sixteen years of age at the time of intercourse.

While Moses cites the comments to KRS 510.030 for the proposition that his mistaken belief did not have to be reasonable, the jury is entrusted with the sacred duty of observing and weighing the credibility of witnesses and evidence. In fulfilling its obligation, the jury did not believe Moses' testimony that he believed D.F. was sixteen

years old or more. Therefore, when considering all of the evidence, we cannot conclude that the jury's finding was unreasonable.

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

ALL CONCUR.

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