RENDERED: FEBRUARY 6, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001678-MR

JIMMY GALLOWAY, JR. APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 05-CR-00009

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: A jury found Jimmy Galloway, Jr., guilty of first-degree sodomy and second-degree assault. He was sentenced to serve ten years for the sodomy charge and five years for the assault charge with the sentences running concurrently for a total sentence of ten years. He brings four issues to our

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

attention. He first argues that the trial court improperly failed to suppress statements he gave to the police prior to receiving *Miranda*[2] warnings. He then suggests that the jury verdict was not unanimous. His third reason seeking reversal stems from remarks made by the prosecutor, which Galloway claims were improper. Finally, he presents the situation that, given all of the errors, the cumulative effect of these errors requires a new trial. We disagree and affirm the judgment, conviction, and sentence of the Casey Circuit Court.

Galloway and the victim had been friends for many years. Galloway and the mother of his child lived in another state, but both knew the victim. Over a period of time, the mother of Galloway's child discovered that a romantic relationship had developed between Galloway and the victim, and she left with her child. Galloway and the victim then moved in together. Eventually Galloway and the victim also returned to Kentucky and moved into a dwelling with Galloway's cousin. The building had no electricity or running water, and neither Galloway nor his cousin was regularly employed.

On the evening of January 31, 2005, Galloway and the victim returned from visiting friends where Galloway had been drinking. The victim also acknowledged that she had been drinking. Galloway's version of the rest of the evening was that the two discussed Galloway's thoughts about returning to the mother of his child and even marrying her in order for him to maintain a more normal relationship with his daughter. According to Galloway, the victim became

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

upset, but they soon got past that and the victim initiated sexual contact. Galloway further testified that he neither on that occasion nor any other previous time forced her to engage in anal sex and that in fact the first time the couple engaged in that activity, it had been the victim's idea.

Galloway further testified that a friend came to the house that evening to talk to him about working. Galloway left with that friend and stayed several days with him. Eventually, he started living in a trailer supplied by another person for whom he was doing work. Several months later, the victim moved in with him at that location.

The victim's version of the events of January 31st differs from Galloway's version. The victim testified that when they returned from visiting the friends, they got into an argument and Galloway grabbed her and beat her for hours. He then made her disrobe and sit out on the porch in the cold. When he allowed her to come inside, he took a hot metal poker from the fire and threatened her with it and burned her leg. The scar from the burn was shown to the jury. Galloway then forced her to submit to anal sex before he passed out. The victim then ran to a neighbor's house. She was taken to the hospital where a test was done that showed she had recently engaged in anal sex, and she was treated for the injuries sustained during the beating. She then went to a shelter where she stayed for several weeks. Several months later, the two reconciled and began living together again. Both knew the police were looking for Galloway because of the

reported attack. One evening, Galloway again threatened her. She called the police and he was arrested.

During the trial, a deputy began to testify that he had transported Galloway and that during the drive they had a conversation. Counsel immediately objected and the trial court conducted a hearing to determine if Galloway's statements should be suppressed. The trial court determined that there was no *Miranda* violation and allowed the deputy to continue to testify.

The standard of review applicable in an appeal from a circuit court's decision on a motion to suppress is set forth in *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000): "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law." After our review of the record, we agree that there was substantial evidence to support the findings of the trial court and hold that there was no error.

The deputy acknowledged that he never provided Galloway with any *Miranda* warnings. He further testified that during the drive he did engage in idle conversation with Galloway. He told Galloway that the police had been looking for him for awhile, to which Galloway responded that they must not have looked too hard. According to the deputy, Galloway then said that a police officer was within a few feet of him shining a light but missed him in the weeds. Galloway's version of the conversation was that the deputy told him that the police had been looking for him for awhile, and Galloway responded that he was not difficult to

find. Galloway then testified that the deputy told him that he heard he was within several feet of him the night of the incident, and Galloway responded that if he had been there he would have been found. The deputy then concluded the conversation by saying it was very foggy that night.

Miranda warnings are required when a suspect is in custody and subject to "interrogation." *Watkins v. Commonwealth*, 105 S.W.3d 449, 551 (Ky. 2003). While it is true that Galloway was in custody during this conversation, we cannot hold that the conversation met the level of interrogation so as to require suppression. The conversation did not relate to the sodomy or assault charges and appeared to relate more to Galloway's credibility. Even if we were to hold that the conversation met the level of an interrogation and accordingly should have been suppressed, we would nevertheless consider such error to be harmless as Galloway's substantial rights were not affected. *See* Kentucky Rules of Criminal Procedure (RCr) 9.24. As we shall discuss below, the Commonwealth presented sufficient other evidence to support Galloway's conviction.

Galloway next argues that the jury verdict was not unanimous and that he was entitled to a directed verdict of acquittal. We disagree. His argument is that the jury's decision to return the minimum sentence under the law for both offenses indicates "at least some doubt." There is no dispute that at some point in time after the events in question, the victim reconciled with Galloway. The record is filled with her attempts to support Galloway and dissuade officials from bringing him to trial. Her version of the events of that evening changed several times. Still,

there was enough evidence for the jury to find, beyond a reasonable doubt, that Galloway was guilty. Uncorroborated testimony of an alleged rape victim is sufficient to sustain a conviction in Kentucky. *Commonwealth v. Cox*, 837 S.W.2d 898 (Ky. 1992). In addition to her testimony, however, there were photographs of her injuries and scars along with other physical evidence. There is no credence to the theory that because the jury selected a minimum sentence, it had any doubt as to guilt. The trial court had ample evidence to deny the requested motions for a directed verdict. There was no error.

Next, Galloway urges us to hold that certain comments made during the prosecutor's closing argument were an improper appeal to community responsibility and a request for the jury to send a message that such crimes would not be tolerated. This alleged error was not preserved for review, but we will review it nonetheless pursuant to the palpable error standard of RCr 10.26. To show palpable error, Galloway must show "the probability of a different result or error so fundamental as to threaten his entitlement to due process of law." *Brooks v. Commonwealth*, 217 S.W.3d 219, 225 (Ky. 2007). He has not done so.

In closing argument, the prosecutor told the jury "when it comes down to whether a case sees justice, you twelve people in Casey County, Kentucky are the voice of justice. By your verdict you will speak justice to whether those actions of Jimmy Galloway are held accountable." This was the portion of the closing argument that Galloway now claims was improper. "[W]e must always consider these closing arguments 'as a whole' and keep in mind the wide latitude

we allow parties during closing arguments." *Young v. Commonwealth*, 25 S.W.3d 66, 74-75 (Ky. 2000)(citations omitted).

The statements did not suggest that the jury should send a message in any manner. They were a fair and accurate description of the role of jurors in this case. There was no attempt to coerce the jurors to bring a verdict that was not based on the evidence of what Galloway had done. Galloway has not shown how these two statements in any manner impeded his right to a fair trial. There was sufficient evidence for the jury to find him guilty, and we are not convinced that absent these two statements, the verdict would have been different. There was no error.

Finally, Galloway relies on the long established principle that an accumulation of harmless errors sufficiently taints the rights of the defendant to require a new trial. *See Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1993). Here, however, since there was no substantial error, there could be no cumulative effect.

The judgment of the Casey Circuit Court is affirmed.

ALL CONCUR.

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