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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001108-MR

DAVID BAILEY — APPELLANT

v.

APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 07-CR-00016

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

NICKELL, JUDGE: David Bailey was convicted of sexual abuse in the first degree[1] in Harrison Circuit Court. He was sentenced to five years in prison and now appeals. He alleges three errors require reversal by this Court. He claims his constitutional rights were violated because the circuit court: (1) refused to instruct the jury on harassment; (2) denied his motion for a judgment notwithstanding the verdict (JNOV); and (3) failed to inform counsel of questions submitted by the jury

[1] Kentucky Revised Statutes (KRS) 510.110, a Class C felony.

during their deliberations. Having reviewed the record and the law, we affirm Bailey's conviction.

Bailey was a frequent visitor in the home of the minor victim, ten-year-old S.S.,[2] and her mother. One evening while he visited and the mother was sleeping, Bailey stayed up with S.S. to watch a movie. While doing so, they both laid on the couch. S.S. had her back to Bailey's front. Bailey pulled down both his pants and her pants and underwear. He proceeded to touch her buttocks with his penis and moved up and down for less than five minutes while he held on to her shoulders. After the incident, S.S. went into the bathroom to find that her panties were damp in the front and back and had "spots" on them.

Several months later, S.S. told her best friend, Chelsea, and a few cousins that she had been raped, but asked all of them to remain silent. Chelsea, however, felt that this was something that should not remain a secret and told her elementary school counselor. Based on Chelsea's statement, an investigation ensued. S.S. was interviewed by Kentucky State Police Trooper Nathan Moore and Emily Cecil of the Child Advocacy Center in Lexington, Kentucky. Although she told both she was unsure what rape meant, she repeated her description of Bailey's actions. As a result, Bailey was indicted on a charge of sexual abuse in the first degree and was tried by a jury.

At trial, S.S. testified as to the events of that evening at her home. Her trial testimony on direct examination was consistent with her prior statements.

[2] It is the policy of the Court to refer to victims of child sexual abuse by initials only.

Upon cross-examination, however, the defense made known to the jury that her testimony conflicted with some of what she told investigators. She had previously stated her panties contained no "mess;" she had not gone to the bathroom at all; Bailey had been "in her;" and he had not restrained her in any way. She repeated none of these statements at trial, even contradicting a few. Also, the defense pointed out S.S. told many children that she had been raped and, despite her previous statements, she knew what rape was from watching mature films.[3] When asked why she gave different details at trial, S.S. stated that she had been scared, but she now had more courage.

After three hours of deliberation, the jury returned a verdict of guilty and set a sentence of five years' imprisonment. After reading the jury's sentence, the trial court addressed a question submitted to him by the jury at some point while they were deliberating. He did not read the exact question into the record, but told the jurors certain evidence was inadmissible and could not have been considered in any case. The judge had not told counsel of the question or what his answer would be. He gave the defense no opportunity to object to his answer before it was given.

Bailey moved for a new trial and JNOV. The motion for a new trial was based largely on the circuit court's refusal to instruct the jury on harassment as a lesser charge of sexual abuse. His request for a JNOV was based on the

[3] Both S.S. and her mother testified S.S. had watched the movie "Monster" on several occasions. The movie is based upon the life of a female serial killer and contains several graphic rape scenes. S.S. stated that she knew these scenes depicted rape, but was not referring to the movie when she told investigators she did not know what rape meant.

insufficiency of the evidence. He argued a guilty verdict was unreasonably based on the testimony elicited by the Commonwealth. The circuit court refused to set aside the jury verdict. This appeal follows.

I. Refusal to Instruct on Alleged Lesser-Included Offense

Bailey first contends that it was error for the circuit court to refuse to instruct the jury on harassment as a lesser included offense of sexual abuse. He preserved this error for appeal by requesting a harassment instruction and objecting when the circuit court refused to include it in its final instructions to the jury. Alleged errors in jury instructions are questions of law that we examine under a *de novo* standard of review. *Reece v. Dixie Warehouse and Cartage Co.,* 188 S.W.3d 440, 449 (Ky. App. 2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth,* 618 S.W.2d 177, 178 (Ky. 1981).

"A lesser included offense is one which includes the same or fewer elements than the primary offense. KRS 505.020(2)(a); *Wombles v. Commonwealth,* 831 S.W.2d 172, 175 (Ky. 1992). This does not require a strict 'statutory elements approach,' so long as the lesser offense is established by proof of the same or less than all of the facts required to establish the commission of the charged offense. *Perry v. Commonwealth,* 839 S.W.2d 268, 272 (Ky. 1992)." *Commonwealth v. Day*, 983 S.W.2d 505 (Ky. 1999).

In pertinent part, KRS 510.110 provides:

> (1) A person is guilty of sexual abuse in the first degree when:
>
> > (a) He or she subjects another person to sexual contact by forcible compulsion; or
> >
> > (b) He or she subjects another person to sexual contact who is incapable of consent because he or she:
> >
> > 1. Is physically helpless;
> >
> > 2. Is less than twelve (12) years old; or
> >
> > 3. Is mentally incapacitated.
>
> . . . .

KRS 525.070(1) provides, in pertinent part:

> A person is guilty of harassment when, with intent to intimidate, harass, annoy, or alarm another person, he or she:
>
> > (a) Strikes, shoves, kicks, or otherwise subjects him to physical contact;
> >
> > (b) Attempts or threatens to strike, shove, kick, or otherwise subject the person to physical contact;
>
> . . . .

Bailey contends harassment is a lesser-included offense of sexual abuse. He argues the jury might have found there to be an unwanted touching without it being sexual in nature; therefore, it was error to not give the instruction for the jury to consider in the alternative of the sexual abuse charge. He also claims this error denied him the right to a defense. *Rogers v. Commonwealth*, 86 S.W.3d 29, 39-40 (Ky. 2002).

We see no evidence supporting an instruction on harassment. S.S. testified to an unwanted touching from Bailey with his penis – a touching that is most certainly sexual in nature. There is no evidence of kicking, striking, offensive language, or any other element detailed in the statute.

Because of the facts, we need not address whether the law supports an instruction on harassment as a lesser-included offense of sexual abuse. For a court to instruct on a lesser-included offense, there must be a possibility the jury could "entertain reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." *Crain v. Commonwealth*, 257 S.W.3d 924, 928 (Ky. 2008). No evidence supports Bailey's conviction of harassment. Neither S.S.'s testimony, nor the facts of this case, suggests harassment would be a viable defense or an offense a jury would find beyond a reasonable doubt. Therefore, we hold the circuit court correctly instructed the jury.

II. Denial of JNOV

Bailey next argues the circuit court should have granted a JNOV. In ruling on a JNOV motion, the circuit court must consider the evidence in a light most favorable to the party opposing the motion and to give that party every reasonable inference that can be drawn from the record. *Taylor v. Kennedy,* 700 S.W.2d 415, 416 (Ky. App. 1985). The motion is not to be granted "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Id*. On appeal, we

consider the evidence in the same light. *Lovins v. Napier,* 814 S.W.2d 921, 922 (Ky. 1991); *Brewer v. Hillard,* 15 S.W.3d 1, 7 (Ky. App. 1999).

When this Court considers the denial of a JNOV following conviction by a jury, we may not overturn "the verdict of a properly instructed jury unless it is flagrantly and palpably against the evidence. The jury are the judges of the credibility of witnesses, and unless a verdict is so flagrantly against the evidence as to shock the conscience and lead unerringly to the conclusion that it was the result, not of deliberation, but of passion and prejudice, it must stand." *Puckett v. Commonwealth*, 235 Ky. 340, 31 S.W.2d 383, 384 (1930).

Upon review of the record in this case, we hold no error was committed by the circuit court. By refusing to grant the JNOV, the court determined sufficient evidence existed so that reasonable minds might differ as to the verdict.

S.S., her mother, and two investigators testified during the Commonwealth's case. Jurors weighed their credibility and found S.S. credible, despite her change in some details of the abuse. The Commonwealth developed sufficient proof from which a reasonable person or a jury could convict Bailey of the sexual abuse. We, like the circuit court, affirm the jury's judgment.

III. Failure to Inform Counsel of Jury Questions

The last issue raised by Bailey is the most compelling. He contends the circuit court violated RCr[4] 9.74 by not revealing to counsel that the jury had

[4] Kentucky Rules of Criminal Procedure.

submitted a question during its deliberations. The Commonwealth argues this issue was not preserved for appeal because no objection was made when the circuit court addressed the issue. While there was no opportunity to object beforehand as only the Judge knew he was going to answer the question and what he intended to say, Bailey should have objected after the court made its comments. Although unpreserved, we shall review this issue for palpable error under RCr 10.26 and reverse only in the face of manifest injustice. *Id.*; *Commonwealth v. Erickson,* 132 S.W.3d 884 (Ky. App. 2004).

At the end of trial, after the jury had returned a guilty verdict and a five year sentence, the judge commented on a question apparently submitted to him during jury deliberations. The record does not indicate when the question was submitted or what was asked; however, it does show when the question was *answered* and that all parties and jury members were present in open court. Still, neither attorney nor Bailey was informed of the question or what the judge would say in response. The following is included in the record:

> **Circuit Court:** I will address the question that you all sent back real briefly, you made a request about character witnesses, typically you won't see character witnesses in trials because only in a very rare set of circumstances is it allowed or admissible, I mean you see cases in your TV shows all the time but that's just not the real world. Same situation on your report, any report an investigator makes does not come into evidence because its (sic) hearsay, just their rendition of what someone else told them, so typically these aren't admissible, do not put it on the attorneys for not bringing those in, they would not have been allowed to if they tried to, so that's why they

were not introduced and they did not get that kind of information . . . .

Juror: The witnesses that we had earlier . . . there's a question among the jury, they said they interviewed her, but they did not really give any definitions to the jury.

Circuit Court: You mean as to what the girl told them?

Juror: To lead one way or the other. As a jury, I think I can say on . . ., we really didn't feel like we had a lot to go on.

After the release of the jury, the court revisited the issue by stating there was no other way to answer the question and had he answered it earlier, it would have invited more questions.

Answering a jury question without first giving notice to counsel is error under RCr 9.74 which requires that information given in response to questions submitted by the jury during deliberation be given "in open court in the presence of the defendant . . . and the entire jury, and in the presence of or after reasonable notice to counsel." Bailey argues a new trial is necessary because the trial court failed to give counsel reasonable notice of the question or allow them to be present when he decided how and when to respond to the question. While there is no dispute among the parties that the information given by the trial court was correct, Bailey argues that because his attorney was not informed of the question or given the opportunity to be heard on the issue before the trial court addressed the jury, reversible error should be found. We agree the procedure followed by the trial court was erroneous, but disagree that it amounts to reversible error.

RCr 9.74 clearly requires the circuit court to give information requested by the jury, after the case has been submitted to them, "in the presence of or after reasonable notice to counsel for the parties." This view is not unique to Kentucky. In *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975), when interpreting Federal Criminal Procedure Rule 43 (similar to RCr 9.74), the Supreme Court held that "the jury's message should have been answered in open court and that petitioner's counsel should have been given an opportunity to be heard before the trial judge responded." Clearly, a judge may not unilaterally decide what communications to and from the jury take place.

While the court did not follow RCr 9.74, we do not believe the error requires reversal. From our review of the record, it does not appear there is a substantial probability the outcome would have been any different had counsel had input or the question bee answered earlier. We deem the error to be non-prejudicial and uphold the circuit court's decision. *Johnson v. Commonwealth*, 231 S.W.3d 800, 806 (Ky. App. 2007). As a result, any error was harmless. RCr 9.24.

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

ALL CONCUR.

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