

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002273-MR

JEFFREY L. HALE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 09-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Jeffrey L. Hale appeals from a Christian Circuit Court judgment sentencing him to serve ten years in prison after a jury found him guilty of first-degree unlawful transaction with a minor. Hale contends that his

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

conviction rests on a misinterpretation of the unlawful transaction statute and that he was entitled to a directed verdict of acquittal. He further contends that comments made by the Commonwealth attorney constituted palpable error warranting reversal of his conviction. In our view, Hale's argument regarding the interpretation of the statute is well-founded, but we are constrained by the precedent of our Supreme Court from reversing his conviction and, therefore, we affirm.

Hale confessed to committing one act of sexual intercourse with a family friend, C.P. She was fourteen years of age at the time the act occurred. KRS 530.064(1)(a) provides in relevant part that “[a] person is guilty of unlawful transaction with a minor in the first degree when he or she knowingly induces, assists, or causes a minor to engage in . . . [i]llegal sexual activity[.]” Unlawful transaction with a minor in the first degree is a Class B felony “if the minor so used is less than sixteen (16) years old at the time the minor engages in the prohibited activity[.]” KRS 530.064(2)(b).

Hale contends that the plain meaning of the statute requires the Commonwealth to prove that the minor engaged in activity that is illegal for *the minor* to perform. Because C.P. was the victim of a crime committed against her by Hale, he contends that the proper charge in the case should have been rape under KRS 510.060(1)(b), which provides that a person is guilty of rape in the third degree when “[b]eing twenty-one (21) years old or more, he or she engages in

sexual intercourse with another person less than sixteen (16) years old[.]” Rape in the third degree is a Class D felony. KRS 510.060(2).

As additional support for his argument, Hale emphasizes that other sections of the unlawful transaction statutes require a finding of illegal conduct on the part of the minor, such as illegal controlled substances activity, illegal gambling activity, and any other criminal activity constituting a felony. *See* KRS 530.064(1)(b) and KRS 530.065(1). Furthermore, KRS 530.064(2) provides that the classification of the felony is dependent on the age of the minor at the time “the minor engages in the prohibited activity[.]” which further reinforces the view that the activity must be prohibited for the minor.

Hale further contends that the interplay between the unlawful transaction statute, if it is interpreted to include conduct which is not illegal on the part of the minor, and the rape statutes, leads to absurd results and violates the rule of lenity, which provides that when

[i]t is not possible to determine which meaning [of a statute] the General Assembly intended ... the movant is entitled to the benefit of the ambiguity. . . . Doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishments totally disproportionate to the gravity of the offense [.]

White v. Commonwealth, 178 S.W.3d 470, 483-484 (Ky. 2005) (internal citations and quotation marks omitted).

Hale has provided numerous examples of the anomalous results which could result from the interplay of the statutes. For instance, under KRS 510.040(2), if an adult defendant has sexual intercourse with an eleven-year-old child, the offense qualifies as rape in the first degree, a Class A felony. If, however, an adult defendant has sexual intercourse with a child of the same age, and the Commonwealth can also prove that the defendant induced, assisted or caused the child to participate willingly, the offense qualifies as unlawful transaction with a minor in the first degree, which is only a Class B felony.

Although Hale's arguments are compelling, our Supreme Court has already addressed whether KRS 530.064 should apply "to a circumstance in which the defendant induced, assisted or caused a minor to engage in illegal sexual activity with the defendant, himself[,]" or whether such a circumstance should instead "be governed by the offenses described in KRS Chapter 510." *Young v. Commonwealth*, 968 S.W.2d 670, 673 (Ky.1998) (overruled on other grounds by *Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky. 2005) (internal citations omitted). The Supreme Court acknowledged that the argument had some appeal, but ultimately concluded that

our function is not to legislate, but to ascertain the legislative intent. This statute, which was originally compiled within KRS 530.070(1)(b), was enacted contemporaneously with KRS Chapter 510. 1974 Ky.Acts, ch. 406, §§ 81-95 and § 263. If the legislature had intended to limit the scope of this offense, it would have been a simple matter to have written the statute with that limitation, e.g., "to engage in illegal sexual activity with another." Nor does the 1974 Commentary indicate

any intent to so limit the scope of this statute. . . . Any possible overlap of this statute with the offenses described in KRS Chapter 510 is but another circumstance where the same act may constitute either of two offenses, permitting the grand jury to elect to indict on either offense.

Id.

“The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.” Rules of the Supreme Court (SCR) 1.030(8)(a). Although we are hopeful that our highest court will reconsider its ruling in this matter, we are powerless to act because we simply “cannot overrule the established precedent set by the Supreme Court[.]” *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky.App. 2000).

In a related argument, Hale also contends that he was entitled to a directed verdict because the Commonwealth failed to present evidence that he had induced, assisted or caused C.P. to engage in illegal activity. He argues that an overly expansive interpretation of these terms leads to the result that any act of consensual sex with a minor qualifies as an unlawful transaction with a minor and thereby invalidates statutory rape laws. Upon appellate review, the test for a directed verdict is whether, “under the evidence as a whole it would not be clearly unreasonable for a jury to find guilt.” *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). Hale points to C.P.’s statement that the intercourse “just happened” and to the fact that she wrote a letter to Hale afterwards saying she felt as though she had taken their relationship to a new level and that she hoped it would happen

again soon. Hale contends that he could not have “induced” C.P. to do something that she already wanted to do and that there was no evidence that C.P.’s willingness to engage in sexual activity was induced by Hale’s actions. Even if there was no evidence of inducement, however, C.P. could not have committed the illegal activity, even if she initiated the idea, without Hale’s assistance. C.P. testified that Hale became a “father figure” to her after her own father passed away. Before she engaged in sexual intercourse with Hale, he told her that he loved her and asked her if she was a virgin. She also testified that he took her by the hand into his bedroom, helped her to undress and that the two then engaged in sexual intercourse. This constituted sufficient evidence that Hale assisted her or caused her to engage in the illegal activity.

Finally, Hale asks us to review various remarks of the prosecutor under the palpable error standard. A palpable error is one that “affects the substantial rights of a party” and will result in “manifest injustice” if not considered by the court. Kentucky Rules of Criminal Procedure (RCr 10.26). The law is clear that RCr 10.26

is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. ... In determining whether an error is palpable, an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.

Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky.2002) (internal citations and quotation marks omitted). Hale contends that the prosecutor improperly stressed

the victim's innocence and virginity, factors which were irrelevant to the jury's determination of guilt and appealed to the jury's emotions and prejudices, rather than stressing that the case should be decided on the evidence. Specifically, the prosecutor made repeated references to C.P.'s virginity; read aloud a prop "story book" written for toddlers that was not entered into evidence, stated that the story was about innocence and made references to the rabbits mentioned in the book; remarked to the jury that they should be offended or that "it's offensive" in regard to Hale and his attorney; remarked that Hale had failed to accept responsibility for his actions or to show remorse; exhorted the jury to "think with your mind and your heart;" and told the jury that the trial was not about fairness but about a 44-year-old man who slept with a 14-year-old girl. We agree with Hale that these remarks were highly inappropriate and prejudicial. Nonetheless, Hale has failed to make the required showing of a "probability of a different result or error so fundamental as to threaten . . . [his] entitlement to due process of law. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

The judgment of the Christian Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

William G. Deatherage, Jr.
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Michael John Marsch
Assistant Attorney General
Frankfort, Kentucky