

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001651-MR

JEFFERY HILLEBRANDT

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 10-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Jeffery Hillebrandt appeals from a Judgment of the Clay Circuit Court reflecting his conviction on one count of rape in the third degree. Hillebrandt argues that he was entitled to a directed verdict because the victim, though suffering from a mental disability, understood the meaning of sexual intercourse and therefore was capable of consenting to it. For the reasons stated below, we find no error, and affirm the Judgment on appeal.

The facts are not at issue. The victim, "A.M.," is a female who was born in 1988. The record demonstrates that A.M. has an IQ of 48 which places her in the one percentile. Hillebrandt does not contest this fact.

It is also uncontested that Hillebrandt engaged in sexual intercourse with A.M. on one occasion. As a result of the intercourse, Hillebrandt was indicted by the Clay County grand jury on one count of rape in the first degree. A.M. would later testify that she understood what sexual intercourse was, that she did not want to have sexual intercourse and was made to do so by Hillebrandt. A.M. additionally stated that she had a three-year-old child but did not know how babies were made.

The matter proceeded to trial, whereupon Hillebrandt moved for a directed verdict. In support of the motion, Hillebrandt argued that *Salsman v. Commonwealth*, 565 S.W.2d 638 (Ky. App. 1978), stood for the proposition that a criminal defendant could not be guilty of third-degree rape when the purported victim, although mentally disabled, understood that the defendant was seeking to perform sex acts upon her. Because A.M. testified that she knew what sexual intercourse was, Hillebrandt argued that the Commonwealth could not prove an essential element of rape in the third degree, to wit, incapacity to consent. Accordingly, he argued that he was entitled to a directed verdict.

Hillebrandt's motion was overruled, and the jury later returned a guilty verdict. Hillebrandt was sentenced to five years in prison, and this appeal followed.

Hillebrandt now argues that the Clay Circuit Court erred in denying his motion for a directed verdict. He again avers that *Salsman* stands for the proposition that a defendant cannot be found guilty of rape in the third degree when the purported victim is mentally challenged yet nevertheless understands what sexual intercourse is. Hillebrandt does not contest A.M.'s mental condition, nor whether he had sexual intercourse with her. Rather, his sole claim of error centers on the application of *Salsman*, and whether A.M.'s understanding of sexual intercourse operates to shield him from criminal liability. In other words, in Hillebrandt's view, since A.M. knew what sexual intercourse is, she had the capacity to consent to it, thus removing an essential element of rape in the third degree.

We must first note that Hillebrandt has not complied with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv), which requires his appellate brief to contain a

“STATEMENT OF THE CASE” consisting of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal, with ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings, or date and time in the case of all other untranscribed electronic recordings, supporting each of the statements narrated in the summary.

We have discretion to dismiss an appeal for noncompliance with CR 76.12, to strike the brief in its entirety or to consider the issues raised therein only for manifest injustice. *Vander Boegh v. Bank of Oklahoma, N.A.*, 394 S.W.3d 917

(Ky. App. 2013). Nevertheless, we have given Hillebrandt's appellate brief thorough consideration as if it complied with CR 76.12.

Kentucky Revised Statutes (KRS) 510.060(1) states in relevant part that, "[a] person is guilty of rape in the third degree when: (a) He or she engages in sexual intercourse with another person who is incapable of consent because he or she is an individual with an intellectual disability[.]" Additionally, KRS 510.020(3) provides that, "[a] person is deemed incapable of consent [under KRS Chapter 510] when he or she is . . . (b) An individual with an intellectual disability or an individual that suffers from a mental illness[.]" As it is uncontroverted that Hillebrandt had sexual intercourse with A.M. and that she is an individual with an intellectual disability, the question for our consideration is whether *Salsman* operates to relieve Hillebrandt of criminal liability on the charge of rape in the third degree.

In *Salsman*, the Defendant was a route salesman for a dairy who visited the home of the victim to deliver milk and bread. The victim was a 24-year-old female who had an IQ in the 50's or 60's and was classified as mentally retarded. She was also deaf. The Defendant asked to have sexual relations with the victim, who refused. Against her protestations of "no, no," the Defendant proceeded to remove her clothing and have sexual intercourse with her. The victim later testified that she wanted to flee, but was afraid that the Defendant

would harm her if she did. The Defendant testified that he used no physical force upon the victim.

The Defendant was subsequently charged with rape in the first degree. At issue was whether the evidence supported the charge of rape in the first degree, or the lesser included offenses of sexual abuse in the second degree or rape in the third degree. Hillebrandt directs our attention to the following quote, which he claims is found in the *Salsman* opinion: “In a rape case, the Defendant could not be guilty of . . . third-degree rape . . . on theory [sic] that prosecutrix, although retarded, did understand that Defendant was seeking to perform sexual acts upon her.” Hillebrandt relies on this quotation for the proposition that he cannot be found guilty of rape in the third degree under the facts before us since A.M. understood that he was seeking to perform sexual acts upon her and therefore was not incapable of consenting.

This quotation does not appear in the *Salsman* opinion. Rather, the quotation which Hillebrandt attributes to *Salsman* is part of a “Headnote” created by the Westlaw publishing company and appended to the opinion to aid in legal research.¹ The Headnote quoted by Hillebrandt directs the reader to the following paragraph which *is* contained in the opinion:

A man is guilty of rape in the third degree if he engages in sexual intercourse with a woman who is incapable of consent because she is mentally defective. KRS 510.060. A man is guilty of sexual abuse in the second degree if he subjects a woman to sexual contact who is incapable of consent because she is mentally

¹ See <http://lawschool.westlaw.com/knumbers/glossary.asp?mainpage=16&subpage=4>.

defective. KRS 510.120. A woman is “mentally defective” if she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct. KRS 510.010(4). Under this definition, it is immaterial whether the person does not possess the power to resist because of a mental disease or defect. In determining whether a woman is incapable of granting consent because she is mentally defective, the sole question is whether she is capable of appraising the nature of the sexual act being performed. In this case, the record established that the prosecutrix did understand that Salsman was seeking to perform sexual acts upon her. *The trial court correctly concluded that Salsman could not be guilty of either rape in the third degree or sexual abuse in the second degree on the theory that the prosecutrix was incapable of giving consent.* (Emphasis added).

Salsman, 565 S.W.2d at 640.

The panel of this Court went on to consider the definition of “forcible compulsion” and its applicability to the facts of the case. Ultimately, the Court determined that the Defendant’s substantial rights were not prejudiced when the trial court gave an instruction on sexual abuse in the first degree, and it affirmed the Defendant’s conviction on one count of first-degree rape.

Salsman stands for the proposition that a charge of rape in the third degree cannot be proven under circumstances where the purported victim, though she has an intellectual disability, nevertheless is capable of consenting to sexual intercourse. We cannot conclude that *Salsman* is applicable herein, however, and we find no error in the Clay Circuit Court’s denial of Hillebrandt’s motion for two reasons.

First, and as the Commonwealth properly notes, on a motion for a directed verdict “the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Applying *Benham* herein, and for the limited purpose of adjudicating Hillebrandt’s motion, the trial court was required to conclude from the evidence that A.M. was not capable of consenting due to her mental disability.

Second, the evidence did not demonstrate that A.M. was capable of consenting to sexual intercourse. Rather, A.M. stated that she *understood* the meaning of “sexual intercourse.” We cannot go so far as to conclude that A.M.’s understanding of the meaning of sexual intercourse necessarily demonstrated that she was capable of consenting to it. This is especially true on a motion for a directed verdict, when all fair and reasonable inferences are drawn in favor of the Commonwealth. *Id.* Additionally, the record does not demonstrate that A.M. knew the meaning of sexual intercourse prior to the time that Hillebrandt had sexual intercourse with her.

On appellate review, the test of a directed verdict is whether under the evidence as a whole it would be clearly unreasonable for a jury to find guilt. *Id.* The Defendant is entitled to a directed verdict only if that question is answered in the affirmative. *Id.* In the matter at bar, when all of the testimony relating to A.M.’s mental disability and her understanding of sexual intercourse is considered,

it would not be clearly unreasonable for a jury to find guilt. Accordingly, we find no error.

For the foregoing reasons, we affirm the Judgment of the Clay Circuit Court.

ALL CONCUR.

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