

RENDERED: MARCH 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000218-MR

PAUL H. WILLIAMS, JR.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 16-CR-00495

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, K. THOMPSON, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Paul Williams, Jr. (“Appellant”) appeals from a judgment of the Kenton Circuit Court reflecting a jury verdict finding him guilty of three counts of rape in the third degree and one count of sexual abuse in the first degree. Appellant argues that the circuit court erred in failing to order a mistrial,

and in failing to grant his motion for a directed verdict. For the reasons addressed below, we find no error and AFFIRM the judgment on appeal.

In 2016, the Kenton Grand Jury indicted Appellant on three counts of rape in the first degree and one count of sexual abuse in the first degree. The indictment was based on testimony that Appellant, while living with his girlfriend C.B., had sexual contact with C.B.'s daughter who was under the age of 16. The matter proceeded to a jury trial on November 28, 2017, in Kenton Circuit Court. At the close of the evidence, Appellant moved for a directed verdict on the charges of rape in the first degree, arguing that the evidence was not sufficient to prove the element of forcible compulsion. The court granted the motion, and ordered that three counts of rape in the third degree and one count of sexual abuse in the first degree would go to the jury.

On the first day of deliberations, the electricity in the Kenton County courthouse failed and caused the proceedings to be continued to the following day. On the second day of deliberations, the court was informed that one of the jurors was ill and could not attend the proceedings. The court offered one of three courses of action in regard to the sick juror: 1) deliberations could continue if Appellant waived the requirement of a unanimous verdict of twelve jurors; 2) the Court could declare a mistrial; or, 3) the court could continue the deliberations to the following day. Neither party sought a mistrial, and Appellant did not waive the

requirement of a unanimous verdict of twelve jurors. As such, the court contacted the sick juror who indicated that he was violently ill and could not return for several days. The decision was made to continue the proceedings for about five days to December 5, 2017.

The ill juror returned on December 5, 2017, and deliberations resumed. The jury returned a guilty verdict on each count of rape in the third degree, and Appellant was sentenced to five years per count to be served concurrently. He was also convicted on one count of sexual abuse in the first degree, and was sentenced to a term of one year in prison to be served concurrently for a total sentence of five years in prison. This appeal followed.

Appellant first argues that the Kenton Circuit Court erred in failing to order a mistrial *sua sponte* in response to the power outage on the first day of deliberations, and the juror's illness beginning on the second day of deliberations. Appellant asserts that the evidence presented at trial was very graphic in nature and emotionally charged. The focus of his argument on this issue is that the delay between the presentation of the evidence and the jury's deliberation would have led the jury to forget a substantial portion of the details. According to the Appellant, those details would have led the jury to change its verdict and return a verdict of not guilty.

We must first note that this argument was not raised below and is not preserved for appellate review.¹ Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v) requires Appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of Appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985). Even if this matter were preserved, we would find no error as it is uncontroverted that Appellant, through counsel, argued against a mistrial below and assented to a continuance. An appellant is estopped from asserting an invited error on appeal. *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011). Further, a mistrial is warranted only when there is a manifest necessity for such remedy. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985). A delay in deliberations due to a power outage and a sick juror does not necessitate a mistrial, especially in light of the fact that the parties were offered three remedies by the court and agreed to a continuance. We find no error.

Appellant goes on to argue that the Kenton Circuit Court erred in denying his motion for a directed verdict of acquittal at the close of the

¹ Appellant does not argue the presence of palpable error, nor do the facts support such an argument. Kentucky Rules of Criminal Procedure (RCr) 10.26.

proceedings. In support of this argument, Appellant asserts that the evidence was not sufficient to support a guilty verdict. He notes that there was no physical evidence of rape or sexual abuse, and no rape kit was utilized. Rather, Appellant states that the Commonwealth relied only on the testimony of the alleged victim and several other witnesses who based their testimony on information presented to them by the victim. Appellant maintains that this evidence was not sufficient to support a guilty verdict, and that the Kenton Circuit Court erred in failing to so rule.

The standard of review on a motion for a directed verdict was set forth in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), in which the Kentucky Supreme Court stated:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

The prosecution must produce more than a “mere scintilla of evidence” regarding the defendant’s guilt. *Id.* at 188. However, “[t]he testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence.” *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002) (citation omitted).

Under the evidence as a whole, it was not clearly unreasonable for the jury to return a guilty verdict. The victim’s testimony, taken alone, was sufficient to prove the elements of the offenses and to support a finding of guilt, and was more than a mere scintilla of evidence as required by *Benham, supra*. The Kenton Circuit Court properly so ruled, and we find no error.

For the foregoing reasons, we AFFIRM the judgment of the Kenton Circuit Court.

ACREE, JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Darrell A. Cox
Covington, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Joseph A. Newberg, II
Assistant Attorney General
Frankfort, Kentucky