IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JUNE 16, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0059-MR

DARRYL A. DOWNING — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS McDONALD, JUDGE
2002-CR-0189

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Darryl A. Downing, was convicted in the Jefferson Circuit Court of attempted rape, kidnapping, and first-degree sexual abuse. He was sentenced to a total of forty years' imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

The evidence at trial established that on the morning of Monday, January 14, 2002, eleven-year-old V.J. was walking to school after having missed the bus when a man in a brown car stopped to talk to her. The man, later identified as Appellant, had a little boy with him and asked V.J. where she was going. Appellant told V.J. that if she walked to school the next day he would pick her up and take her to buy some candy.

The following morning, V.J. again missed the bus and was walking to school when she observed Appellant's car. Appellant approached and asked V.J. if she remembered him and whether she still wanted to go buy candy. V.J. got into Appellant's car and he drove to a Kroger grocery store. V.J. selected candy and drinks,

which Appellant paid for with a food stamp card. When V.J. told Appellant that she would get into trouble if she took the items to school, he suggested that they drive to his house to get a gym bag to put them in.

Upon arriving at Appellant's house, V.J. followed Appellant into the basement where V.J. observed a bed, dresser, and television. Appellant told V.J. to sit on the bed while he looked for the gym bag. Appellant then approached V.J. and said, "Since I gave you something, you have to give me something back." V.J. testified that Appellant told her to take her pants off and that she complied because she was afraid he would hurt her if she didn't. Appellant removed his pants and V.J. noticed that he was not wearing underwear. V.J. stated that Appellant repeatedly tried to penetrate her with his penis but that it would not go in. Appellant apparently became frustrated and angry, and told V.J. to get dressed.

When Appellant dropped V.J. off at her school, she immediately reported the incident to the school counselor. However, V.J. initially claimed that Appellant had forced her into his car. She later admitted that she had lied because she did not want others to think she was stupid for getting into a stranger's car.

The Kroger store's surveillance camera recorded Appellant and V.J.'s purchase on the day in question. Police traced the food stamp card to Appellant's wife, who positively identified him from the store video. Following Appellant's arrest, he was interviewed by police during which he made numerous denials and gave various versions of events. Finally, Appellant gave a taped statement and admitted penetrating V.J. with his finger while the two were in the basement of his house. Although Appellant stated that he became aroused, he denied ever taking his penis out of his pants or trying to penetrate V.J. with it.

Appellant was subsequently indicted by a Jefferson County grand jury on charges of rape, kidnapping, and sexual abuse. Following a trial in March 2003, the jury found Appellant not guilty of rape, but guilty of attempted rape, kidnapping, and sexual abuse. The jury recommended an aggregate sentence of forty years' imprisonment and the trial court entered judgment accordingly. Additional facts are set forth as necessary.

I.

Appellant's first allegation of error concerns the introduction of testimony pertaining to V.J.'s financial status and to Appellant's sexual relationship with his wife. Appellant claims that the evidence on both subjects was irrelevant and inflammatory. We disagree.

During direct examination by the Commonwealth, Detective Carolyn Nunn of the Louisville Crimes Against Children Unit was asked how she would describe V.J.'s family's financial situation. Defense counsel objected to the relevancy of the testimony and the Commonwealth responded that the evidence was relevant to show why V.J. would get into the car of a stranger who offered her candy and also why she asked for the candy back even after it was seized as evidence by the police. The trial court overruled the objection. Detective Nunn thereafter responded, "poor, not a lot of money."

Appellant argues that the sole purpose of the evidence was to create the inference that V.J. was even more of a victim because of her poverty in order to elicit sympathy from the jury. Further, Appellant claims that the introduction of V.J.'s financial status allowed the Commonwealth during closing argument to further expound on V.J.'s home life. The Commonwealth did, in fact, comment during closing that V.J.'s family

was poor, that mother would not take her to school when she missed the bus, and even that her mother was not present at the trial.

The determination of relevance and admissibility under KRE 401 and KRE 403 is within the sound discretion of the trial court, Rake v. Commonwealth, 450 S.W.2d 527 (Ky. 1970), and will not be disturbed in the absence of an abuse of that discretion. Commonwealth v. English, 993 S.W.2d 941 (Ky. 1999); see also Love v. Commonwealth, 55 S.W.3d 816 (Ky. 2001). We agree with the Commonwealth that V.J.'s financial situation was relevant not only to provide a background and history of the eleven-year-old, but also to explain why V.J. acted the way she did, especially with respect to her initial claim that Appellant forced her into his car. V.J. testified that she lied because she did want anyone to think she was stupid for voluntarily getting into the car. But the fact of the matter is she did so simply because she was offered something she could not buy on her own. Even after V.J. realized the gravity of the situation and was driving around with the police, she asked the officers if she could still have the candy and drinks that were seized as evidence.

Even assuming arguendo that V.J.'s poverty was not relevant, we do not agree with Appellant that the singular statement by Detective Nunn was so prejudicial and inflammatory as to deny him the right to a fair trial. RCr 9.24. The Commonwealth would have still had the latitude to comment on V.J.'s background during closing argument. See Tamme v. Commonwealth, 973 S.W.2d 13 (Ky. 1998), cert. denied, 525 U.S. 1153, 119 S. Ct. 1056, 143 L. Ed. 2d 61 (1999). No error, harmless or otherwise, occurred.

The second part of Appellant's argument concerns Detective Nunn's testimony regarding comments Appellant made about his marital relationship during his interview.

Detective Nunn stated that Appellant initially told police that his wife did not sexually arouse him anymore and that they slept in separate bedrooms. Later during the interview, however, Appellant claimed he and his wife had engaged in sexual intercourse the day before the incident in question. The Commonwealth argued that the evidence was relevant to show Appellant's repeated inconsistencies in his statement. The trial court agreed and overruled defense counsel's objection.

Credibility is always an issue and "the trial court may not exclude evidence that impeaches credibility even though such testimony would be inadmissible to prove a substantive issue in the case." Sanborn v. Commonwealth, 754 S.W.2d 534, 545 (Ky. 1988). The Commonwealth was within the bounds of the law to point out that Appellant initially stated he was no longer sexually interested in his wife, but changed his story after being confronted with the allegations made by V.J. and claimed that he and his wife had just previously had sex.

Further, we find Appellant's reliance on Chumbler v. Commonwealth, 905 S.W.2d 488 (Ky. 1995) misplaced. In Chumbler, this Court held that evidence of a homosexual relationship between two defendants was relevant to the crimes charged, but evidence pertaining to pedophilia and "sex toys" found at the men's residence was highly prejudicial and irrelevant. Id. at 492-93. Not only were Appellant's comments relevant to the overall credibility of his statement, but they were in no manner similar in extent or form of those found reversible in Chumbler.

The trial court acted well within its discretion in permitting Detective Nunn to testify about the comments made during Appellant's statement. No error occurred.

II.

Appellant next argues that the trial court erred in denying his motion for a

directed verdict on the kidnapping charge. At trial, Appellant argued that the Commonwealth had failed to prove that he intended to accomplish or advance a felony at the time he restrained V.J. However, on appeal, Appellant now contends that the kidnapping exemption statute, KRS 509.050, precludes convictions for both kidnapping and attempted rape. He concedes that application of KRS 509.050 was not raised in the trial court.

KRS 509.040(1)(b) provides that a person is guilty of kidnapping when he unlawfully restrains another person with the intent to accomplish or advance the commission of a felony. Here, the kidnapping was a Class B felony because V.J. was released at a safe place, alive and without serious physical injury. KRS 509.040(2). The kidnapping exemption statute, KRS 509.050, provides as follows:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose. The exemption provided by this section is not applicable to a charge of kidnapping that arises from an interference with another's liberty that occurs incidental to the commission of a criminal escape.

This Court has held that application of the exemption statute is determined on a case-by-case basis. Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993), overruled on other grounds in St. Clair v. Roark, 10 S.W.3d 482 (1999). If the restraint goes beyond that which occurs immediately with or incidental to the commission of the underlying offense, the exemption statute is not available. Gilbert v. Commonwealth, 637 S.W.2d

632 (Ky. 1982), cert. denied, 459 U.S. 1149, 103 S. Ct. 794, 74 L. Ed. 2d 998 (1983). Furthermore, "if the victim of a crime is going to be restrained of his liberty in order to facilitate its commission, the restraint will have to be close in distance and brief in time for the exemption to apply." Murphy v. Commonwealth, 50 S.W.3d 173, 180 (Ky. 2001) (quoting Timmons v. Commonwealth, 555 S.W.2d 234 (Ky. 1977)).

Appellant initially concedes that because of V.J.'s age, she was "restrained" at the point she got into his vehicle. See KRS 509.010(2).[1] Nonetheless, he argues that V.J.'s own testimony established that she did not believe she was restrained until Appellant told her that she had to give him something in return for the candy. As such, Appellant contends that the restraint did not actually occur until they were in his basement and thus, was immediate and incidental to the commission of the underlying offenses. Furthermore, he points out that V.J. was never tied up or held down, and any restraint did not exceed that which ordinarily accompanies an attempted rape or sexual abuse.

Regardless of what V.J. believed, she was restrained at the moment she was induced into Appellant's car by the promise of candy. More than one and a half hours passed from the time V.J. got into Appellant's vehicle until the time he finally dropped her off at school. Furthermore, V.J. was picked up en route to the school, taken to the Kroger store, to Appellant's house, and then back to school. Thus, it cannot reasonably

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[1] KRS 509.010(2) defines "restrain" for the purposes of the kidnapping statute as follows, in relevant part:

> A person is moved or confined "without consent" when the movement or confinement is accomplished by physical force, intimidation, or deception, or by any means, including acquiescence of a victim, if he is under the age of sixteen (16) years, or is substantially incapable of appraising or controlling his own behavior. (Emphasis added).

be argued that the restraint was immediate and incidental to the commission of the sexual offenses. Accordingly, Appellant's argument that he is entitled to application of the exemption statute is not only unpreserved, but unpersuasive on the merits.

Notwithstanding the exemption statute, there was more than sufficient evidence for the jury to find that Appellant restrained V.J. with the intent to commit a felony. The jury heard evidence that Appellant approached V.J. the previous day and told her he would take her to buy candy if she walked to school the next day. A reasonable juror could have concluded that Appellant planned the encounter and used the promise of candy to lure V.J. into his car. He thereafter demanded something in return for the candy. "[T]he intentions of an accused may be ascertained from the surrounding facts and the jury is allowed a reasonably wide range in which to infer intent from the circumstances." Rayburn v. Commonwealth, 476 S.W.2d 187, 189 (Ky. 1972); see also Beaty v Commonwealth, 125 S.W.3d 196 (Ky. 2003). Without question, the Commonwealth produced sufficient evidence to withstand a directed verdict on the kidnapping charge. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

III.

Appellant next argues that he was entitled to an instruction on unlawful imprisonment as a lesser-included offense of kidnapping. While defense counsel did request that the jury be instructed on unlawful imprisonment, he did not specify which degree. Nevertheless, the trial court denied any instruction on the grounds that there had to be some evidence to support the instruction and that it found none in this case. We agree.

The essential difference between kidnapping and unlawful imprisonment is that kidnapping requires that the restraint of the individual be accompanied by the intent to:

(1) hold the victim for ransom, or (2) accomplish or advance the commission of a felony, or (3) inflict bodily injury on the victim or terrorize the victim, or (4) interfere with the performance of a governmental or political function, or (5) use the victim as a shield or hostage. KRS 509.040(1)(a), (b), (c), (d) and (e). Cannon v. Commonwealth, 777 S.W.2d 591 (Ky. 1989). Under KRS 509.020, a person is guilty of unlawful imprisonment in the first degree when he or she knowingly restrains another person under circumstances which expose that person to a risk of serious physical injury. Unlawful imprisonment in the second degree requires only the element of restraint. KRS 509.030.

It is axiomatic that a trial court must instruct the jury on all lesser-included offenses which are justified by the evidence. McClellan v. Commonwealth, 715 S.W.2d 464 (Ky. 1986), cert. denied, 479 U.S. 1057, 107 S. Ct. 935, 93 L. Ed. 2d 986 (1987); Martin v. Commonwealth, 571 S.W.2d 613 (Ky. 1978). However, there must be some evidence that pertains to the lesser-included offense. "A defendant is not entitled to an instruction on a lesser-included offense unless the evidence is 'such as to create a reasonable doubt as to whether the defendant is guilty of the higher or lower degree.'" Rowe v. Commonwealth, 50 S.W.3d 216, 218-19 (Ky. App. 2001).

Here, there was no evidence presented which would justify an instruction on either degree of unlawful imprisonment. Appellant's actions on the day before the incident and on the day in question clearly indicated his intent to commit a sexual felony when he picked up V.J. Appellant presented no evidence at trial, and merely maintained the defense that he only penetrated V.J. with his finger, not his penis.

Based on the evidence and testimony, the jury could not have reasonably maintained doubt concerning the kidnapping offense, but found guilt beyond a

reasonable doubt of unlawful imprisonment. Parker v. Commonwealth, 952 S.W.2d 209 (Ky. 1997); see also Bills v. Commonwealth, 851 S.W.2d 466 (Ky. 1993). Thus, the trial court did not err in refusing to instruct the jury on unlawful imprisonment in either degree.

IV.

Finally, Appellant contends that the trial court erred in denying his motion for a directed verdict on the attempted rape charge on the grounds that there was insufficient evidence that he attempted to penetrate V.J. with his penis. He also argues that he could not have been found guilty under the facts presented of both attempted rape and sexual abuse. This second argument was never presented to the trial court and is wholly unpreserved for review.

Notwithstanding, we conclude there was more than sufficient evidence of Appellant's guilt on both charges. V.J. clearly and specifically testified, "He tried to stick his thing in me. . . . He kept trying, but it wouldn't go in." V.J. testified that she saw Appellant's penis, felt it touching her, and that "it felt scary." She further stated that "nothing came out of it." After several attempts, Appellant told V.J. it was not going to work, and V.J. said she could tell from his expression that Appellant was mad. V.J.'s testimony alone, taken in the light most favorable to the Commonwealth, was sufficient to submit the attempted rape charge to the jury. Benham, supra.

Moreover, Appellant himself admitted to fondling V.J.'s breasts and penetrating her with his finger. Although V.J.'s testimony differs from Appellant's version of events, the evidence presented was sufficient to support a conviction for sexual abuse.

The judgment and sentence of the Jefferson Circuit Court are affirmed.

Lambert, C.J.; Cooper, Graves, Johnstone, Scott, and Wintersheimer, JJ., sitting. All concur.

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