

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

2004-SC-000198-MR DATE 7-7-05 ELLA GRAWITT, D.C.

WILLIAM J. DAUGHERTY

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
INDICTMENT NO. 02-CR-001190

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On May 13, 2002, police officers responded to a "911" call reporting trouble in an alley in downtown Louisville. When the officers arrived, they found two men, both with their pants down, standing over the battered and bruised female victim. The two men, William J. Daugherty and William Brooks, were jointly indicted for two counts of rape, acting alone or in complicity, and two counts of sodomy, acting alone or in complicity. It is undisputed that Daugherty had sexual intercourse with the victim and that Brooks put his penis in her mouth. However, there was conflicting evidence concerning whether Brooks had sexual intercourse with the victim. Ultimately, Brooks pled guilty to all four counts and Daugherty proceeded to trial. He contended that the victim consented to all of the sexual acts that occurred. A jury found Daugherty guilty of rape in the first degree as a principal, rape in the first degree by complicity and sodomy

in the first degree by complicity. He was sentenced to ten years on each count to run consecutively, for a total of thirty years.

Daugherty appeals to this court as a matter of right and asserts that there was insufficient evidence to convict him of complicity to rape. He also attacks the jury instructions on several grounds.

Under Kentucky's complicity statute a person is guilty of an offense committed by another if he acts with the intention of promoting or facilitating the other person's commission of the offense.¹ In addition to Daugherty's conviction of rape in the first degree for his conduct as a principal actor, he was also convicted of a second count of rape in the first degree as an accomplice to Brooks. He urges that the evidence was insufficient to prove that Brooks committed the act of rape in the first degree and, consequently, insufficient to prove his own complicity in the alleged act. Daugherty is correct that he cannot be guilty of complicity without proof that Brooks committed the offense and, on that basis,² Daugherty moved for a directed verdict based on insufficient evidence, thereby properly preserving the issue for our review.

Sexual intercourse by forcible compulsion constitutes rape in the first degree.³ Daugherty argues that there was insufficient evidence of sexual intercourse between Brooks and the victim. The victim testified that Brooks' penis never penetrated her vagina. Likewise, Brooks told the police that he was unable to maintain an erection because he had been smoking crack cocaine. The Commonwealth points out, however, that after the incident the victim told the police that both men had penetrated her. The Commonwealth further highlights Brooks' own statement that his penis "kept

¹KRS 502.020(1).

²Harper v. Commonwealth, 43 S.W.3d 261 (Ky. 2001).

³KRS 510.040(1)(a).

slidin' out," arguing the logical inference of such a statement, that at some point it had been "in." Given that "[s]exual intercourse occurs upon any penetration, however slight,"⁴ we agree with the trial court that the evidence supported an instruction on rape in the first degree as well as attempted rape. Daugherty's motion for directed verdict was properly overruled.

Daugherty challenges the trial court's instructions for each of the offenses that concerned his conduct as Brooks' accomplice. In addition to Daugherty's conviction of complicity to rape in the first degree, he was convicted of sodomy in the first degree for his conduct as Brooks' accomplice. Even though the instructions were directed at Daugherty's acts as an accomplice, the literal wording of these two instructions permitted the jury to find Daugherty guilty if, either "acting alone or in complicity with" Brooks, he committed the offenses. Daugherty argues that these instructions deprived him of a unanimous verdict on the complicity charges. Specifically, he asserts that the jury was permitted to convict him as a principal or as an accomplice notwithstanding the complete lack of evidence that he committed sodomy as a principal. Similarly, the complicity instructions permitted the jury to convict him of rape as a principal or as an accomplice even though rape as a principal was covered in a separate instruction. In other words, he views the instructions as allowing two principal rape convictions.

Section 7 of the Kentucky Constitution mandates that a jury of twelve persons reach a unanimous verdict to convict a person of a crime.⁵ An instruction presenting alternate theories of guilt may violate a defendant's right to a unanimous

⁴KRS 510.010(8).

⁵Wells v. Commonwealth, 561 S.W.2d 85 (Ky. 1978).

verdict if one of those theories is totally unsupported by the evidence.⁶ Furthermore, we have held that the error, if preserved, is not subject to a harmless error analysis.⁷ However, Daugherty neither objected to these instructions, nor did he tender his own. Therefore, this issue is not properly preserved.⁸ Accordingly, we must decide whether the instructions constitute palpable error.⁹

To constitute palpable error, a review of the entire record must reveal a substantial possibility that the result would have been different but for the error.¹⁰ Our review of this record gives rise to no such revelation. Kentucky employs a “bare bones” approach to jury instructions, allowing counsel to flesh them out in closing arguments.¹¹ In the case at bar, counsel for the Commonwealth clearly explained to the jury that the first instruction referred to Daugherty’s actions as a principal, while the latter addressed his actions as Brooks’ accomplice, leaving no room for juror confusion. We cannot say that Daugherty was substantially prejudiced by the instructions or that they contributed to any manifest injustice.

For a complicity conviction of first-degree rape or first-degree sodomy, the jury must find that the defendant *intended* to promote or facilitate the commission of each offense.¹² Daugherty complains that the instructions involving complicity failed to require the jury to find this essential *mens rea* element. Again, Daugherty failed to preserve the issue and we do not discover any error, much less palpable error. While the element of intent was not explicitly included in each instruction, it was included in

⁶Burnett v. Commonwealth, 31 S.W.3d 878 (Ky. 2000).

⁷Id.

⁸Wolford v. Commonwealth, 4 S.W.3d 534 (Ky. 1999).

⁹Id.

¹⁰Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

¹¹Cox v. Cooper, 510 S.W.2d 530, 535 (Ky. 1974).

¹²KRS 502.020(1) (emphasis added).

the definitional instruction. Consequently, Daugherty's reliance on Harper v. Commonwealth¹³ is misplaced. In Harper, we stated that "the failure to instruct *at all* on her [the alleged accomplice's] mental state was reversible error."¹⁴ There, the trial court failed to include the element of intent anywhere in the instructions. However, we acknowledged in Crawley v. Commonwealth¹⁵ that "[o]ften, this element of intent is satisfied by giving a separate instruction defining complicity." The trial court utilized this method in the instant case and correctly instructed the jury on the definition of complicity, including the necessary element of intent. Moreover, counsel for the Commonwealth referred to this definition in connection with each instruction during closing argument.

Finally, Daugherty argues that he was prejudiced by the trial court's failure to instruct on complicity to first-degree sexual abuse as a lesser-included offense of first-degree rape. If a juror could reasonably doubt a defendant's guilt on one charge but believe beyond a reasonable doubt that he is guilty of a lesser- included offense, then an instruction on the lesser-included offense is appropriate.¹⁶ This issue was not preserved and we cannot say that the Defendant suffered any prejudice from the omission of the instruction.

Sexual abuse in the first degree requires that a person subject another to sexual contact by forcible compulsion,¹⁷ while attempted rape requires a defendant to intentionally do something which is a substantial step in a course of conduct planned to

¹³43 S.W.3d 261.

¹⁴*Id.* at 265 (emphasis added).

¹⁵107 S.W.3d 197, 200 (Ky. 2003).

¹⁶Osborne v. Commonwealth, 43 S.W.3d 234 (Ky. 2001).

¹⁷KRS 510.110(1)(a).

culminate in raping the victim.¹⁸ Although the jury was not instructed on first-degree sexual abuse, it was instructed on attempted rape. The undisputed facts reveal that Brooks' penis touched the victim's vagina. The evidence was in dispute as to whether penetration occurred. The jury believed that Brooks penetrated the victim and it rejected the alternative attempted rape instruction. Thus, the jury found Daugherty guilty of the greater offense of complicity to rape in the first degree. Therefore, Daugherty failed to show that he was prejudiced by the absence of an instruction on sexual abuse.

For the foregoing reasons, we affirm Daugherty's convictions and sentence.

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

¹⁸KRS 506.010.

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