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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: DECEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL DATE 1-12-06

2004-SC-0996-MR

CHARLES RAY ROGERS — APPELLANT

V.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
04-CR-00045

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Charles Ray Rogers, was convicted by a McCracken Circuit Court jury of first-degree rape. The jury recommended a twenty year sentence, and the trial court entered judgment accordingly. Appellant appeals to this Court as a matter of right. Ky. Const § 110 (2)(b). For the reasons stated herein, we affirm.

FACTUAL BACKGROUND

On the evening of November 6, 2003, Appellant and the victim, M.J., were drinking alcohol. They had dated, but there was no intimate relationship at the time of this incident. Appellant handcuffed M.J. and choked her until she was unconscious. Appellant struck M.J. in the face and chest, and then moved her to the bed where he forcibly engaged in intercourse. M.J. testified that she was unconscious part of the time, but awoke as Appellant was having intercourse with her. Appellant ran from the house after hearing M.J.'s son arrive at the front door.

The police took M.J. to the hospital for a rape evaluation. The treating physician testified that the pelvic exam was normal with no sign of injury, although she was badly bruised over the rest of her body. The doctor stated that a normal exam does not rule out a rape. The rape kit was negative for Appellant's semen; however, the lab technicians testified that such a finding was not conclusive of absence of sexual intercourse. The Commonwealth presented additional evidence which included Appellant's boxer shorts that tested positive for M.J.'s blood.

Appellant moved for a directed verdict at the close of the Commonwealth's case. The trial court denied the motion, and Appellant failed to renew his motion at the close of all evidence. Appellant also tendered jury instructions to the trial court on "lesser included" offenses of kidnapping, first-degree unlawful imprisonment and second-degree unlawful imprisonment. The Commonwealth opposed, and the trial court denied, the instructions.

ANALYSIS

A. Jury Instructions

Appellant first argues the trial court erred by denying Appellant's tendered jury instructions on kidnapping and unlawful imprisonment as lesser-included offenses. Alternatively, Appellant claims he was improperly denied instructions on his theory of the case. We disagree.

We address first Appellant's claim that he was entitled to jury instructions on kidnapping and unlawful imprisonment as lesser-included offenses of first-degree rape. While this issue is preserved for our review under RCr 9.54, denial of the instructions was appropriate because kidnapping and unlawful imprisonment are not lesser-included offenses of first-degree rape. This Court has previously held "[c]learly rape and

kidnapping are two separate criminal offenses." Bedell v. Commonwealth, 870 S.W.2d 779, 782 (Ky. 1993). In Bedell, we reasoned that kidnapping was not a necessary element of rape, and conversely, rape is not an element of kidnapping. Id.

Appellant opines that unlawful imprisonment is a lesser-included offense of rape because both require the element of restraint. Appellant relies on KRS 505.020 which states that a lesser-included offense can be proven by "the same or less than all the facts required to establish the commission of the offense charged." KRS 505.020 (2)(a). We disagree with Appellant's claim that rape and unlawful imprisonment require the same proof of facts. First-degree rape requires "sexual intercourse with another person by forcible compulsion." KRS 510.040 (1)(a). Whereas first-degree unlawful imprisonment requires knowing and unlawful restraint of "another person under circumstances which expose that person to a risk of serious physical injury."[1] KRS 509.020. Appellant attempts to equate the forcible compulsion element of rape with the restraint requirement of unlawful imprisonment. We find the two are distinctly different. Unlawful imprisonment is incapable of being factually reconciled as a lesser-included offense of rape. Consequently, Appellant's claims fail to meet the requirements of a lesser-included offense as described by KRS 505.020.

Appellant contends that there is a great weight of evidence supporting his argument. We find the most accurate assessment of Appellant's claim is that kidnapping and unlawful imprisonment are merely uncharged offenses in this case. "The fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser included offense. . . ." Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998).

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[1] Appellant also requested an instruction on second-degree unlawful imprisonment which requires only knowing and unlawful restraint. KRS 509.030.

Appellant's alternative argument is that the trial court erred by denying jury instructions on Appellant's theory of the case. At trial, Appellant's defense was that he did not rape M.J. Appellant claims this theory entitles him to jury instructions on kidnapping and unlawful imprisonment because he admittedly restrained her liberty, but had no forcible intercourse. Appellant relies on Sanborn v. Commonwealth, 754 S.W.2d 534, 549 (Ky. 1988), for the proposition that a defendant is entitled to instructions on his theory of the case where the jury could reach multiple conclusions based on the evidence. Appellant overlooks, however, that defendant Sanborn actually requested that the trial court permit an instruction on his theory. Id. In this case, Appellant only requested instructions on kidnapping and unlawful imprisonment as "lesser included offenses," never mentioning the possibility of an alternative theory of the case. Accordingly, Appellant failed to properly preserve his claim for appellate review. We will not allow Appellant to make the same argument twice, by merely couching his claims within an "alternative theory of the case" on appeal.

A recent Court of Appeals case, Meadows v. Commonwealth, __ S.W.3d __ (2003-CA-002482-MR, Opinion rendered June 3, 2005, final December 19, 2005) (Ky. App. 2005), addressed this issue. Meadows claimed Sanborn entitled him to an instruction on fourth degree assault as his theory of the case in a rape prosecution. The court held,

> [a]t trial, he requested the fourth-degree assault instruction solely on the basis that it was a lesser included offense of the rape charge. Having given a specific reason for his objection to the trial court's failure to instruct on the fourth-degree assault charge, he may not now raise a different ground.
> Id.

Consequently, we find that Appellant's claims are without merit, and the trial court did not err in denying jury instructions on kidnapping and unlawful imprisonment.

B. Directed Verdict

Appellant also claims the trial court erred by denying Appellant's motion for a directed verdict of acquittal. We find that this issue is not properly preserved for our review. Appellant moved for a directed verdict at the close of the Commonwealth's case; however, he failed to renew the motion at the close of all the evidence. Appellant opines that the renewal was "implied" after the defense rested because the trial court noted counsel's objection to the jury instructions. We disagree.

It is well settled in Kentucky that "[a] motion for a directed verdict made at the close of the plaintiff's (here the Commonwealth's) case is not sufficient to preserve error unless renewed at the close of all the evidence. . . ." Kimbrough v. Commonwealth, 550 S.W.2d 525, 529 (Ky. 1977); *See also*, Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998). Even if the issue were preserved, Appellant does not have a viable claim. "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." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The evidence presented by the Commonwealth was sufficient to give this case to the jury. The jury heard compelling testimony from the victim as well as testimony regarding the scientific and physical evidence. As a result, the trial court properly denied Appellant's motion for directed verdict of acquittal.

CONCLUSION

For the reasons stated herein, we affirm the judgment and sentence of the McCracken Circuit Court.

All concur.

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