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NOT TO BE PUBLISHED OPINION

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RENDERED: SEPTEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0138-TG DATE 10-12-06 E.W.A. Graham, D.C.

BOBBY LAMONT FAIRLEY APPELLANT

APPEAL FROM HART CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, JUDGE
V. 04-CR-00018

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A Hart Circuit Court jury convicted Appellant, Bobby Lamont Fairley, of first-degree sexual abuse and of being a first-degree persistent felony offender. For these crimes, Appellant was sentenced to twenty years' imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

The victim herein, E.T., met Appellant on her twentieth birthday. While E.T. was getting ready to celebrate her birthday at the home of a friend, Appellant came to E.T.'s apartment to visit her roommate. Appellant later arrived at the home where E.T. was visiting. Appellant reportedly drank whiskey in a back room with others while E.T.

watched television with her friend in another room. After a couple of hours, E.T. returned to her apartment.

Because she could not get telephone service inside her apartment, E.T. decided to sit outside to make some calls on her cellular telephone. During this time, Appellant and a friend, Harold Bethel, drove by E.T.'s apartment and asked her if she had seen a mutual acquaintance. E.T. answered that she had not, and the pair drove away. A few minutes later, they drove by again, Appellant got out of the vehicle, and Bethel drove away. When E.T. asked Appellant what he was doing at her apartment, Appellant replied that his friend would be back shortly.

After some time, E.T. requested that Appellant call his friend for a ride home as she was ready to retire for the evening. When Appellant's calls went unanswered, Appellant asked E.T. if she would drive him to another friend's house and offered to give E.T. some gas money for her trouble. E.T. briefly checked with her roommate and then agreed to give Appellant the ride.

Appellant directed E.T. to take several country roads which seemed disconnected and unfamiliar to her. Eventually, E.T. began to get nervous because Appellant appeared to be taking her on a wild goose chase. After much wandering, E.T. was directed down a gravel driveway surrounded by trees. When they reached the end of the driveway, Appellant told E.T. to turn off her headlights. Appellant then unbuckled his seat belt and appeared to be exiting the vehicle. Instead of exiting the vehicle, however, Appellant began to attack E.T.

Appellant grabbed E.T.'s arm and crotch and attempted to pull her over to his side of the car. Fortunately, Appellant was unable to do so because E.T. was still wearing her seatbelt. E.T. reached for her cellular telephone and attempted to make a

call. Appellant grabbed the telephone and threw it out the window. Thereafter, Appellant pulled down his pants, and E.T. tried to get Appellant to stop his attack by telling him that she was on her period. Appellant responded by ordering E.T. to perform oral sex on him. E.T. immediately tried to start her vehicle, but Appellant grabbed the keys away from her and threw them out the window. E.T. became hysterical, but then stopped when she realized that her key had broken off in the ignition. She calmed down, telling Appellant that he could do anything he wanted to her if he retrieved her keys and telephone from outside the vehicle.

When Appellant exited the vehicle, E.T. quickly closed the passenger side door and locked it. She then "floored it," hitting Appellant with her mirror as she fled. Appellant was subsequently charged with kidnapping, attempted rape, unlawful imprisonment, and being a persistent felony offender.

During trial, the trial court granted a directed verdict motion as to the kidnapping and unlawful imprisonment charges pursuant to KRS 509.050. Appellant presented no evidence, and the jury ultimately convicted Appellant of first-degree sexual abuse and of being a persistent felony offender. An enhanced sentence of twenty years' imprisonment was recommended by the jury and imposed by the trial court.

Appellant now appeals to this Court alleging several errors which entitle him to relief. For the reasons set forth herein, we affirm Appellant's convictions and sentence.

Appellant first argues that the trial court erred by admitting Appellant's own statement. The statement was admitted through a detective who testified regarding Appellant's explanation of the incident. Appellant alleged that the entire incident resulted from a misunderstanding regarding whether E.T. had agreed to perform oral sex for money. When asked why E.T. would make these allegations against him,

Appellant responded that E.T. was using information she knew about similar allegations to set him up. Specifically, the detective stated, "[Appellant] felt like that he was being falsely accused because she was setting him up, copying off of another situation where he had been accused of the same thing."

The trial judge admitted the statement, in part, because it was made by Appellant. KRE 801A(b)(1); Rabovsky v. Commonwealth, 973 S.W.2d 6, 10 (Ky. 1998) ("any statement made by a party is admissible against that party as an admission"). However, as Appellant correctly points out, admissibility pursuant to KRE 801A does not forgo the need to satisfy the requirements of KRE 404(b).

KRE 801A addresses the competency of certain types of statements that may otherwise be excluded as hearsay. In contrast, KRE 404(b) is much broader in scope and addresses the actual relevancy of certain types of evidence. It is thus possible for certain statements to be admissible as hearsay exceptions pursuant to KRE 801A, but nonetheless be inadmissible due to irrelevancy pursuant to KRE 404(b). See Salinas v. Commonwealth, 84 S.W.3d 913, 919 (Ky. 2002); Moseley v. Commonwealth, 960 S.W.2d 460, 461 (Ky. 1997)("[T]o be admissible, the statements must satisfy not only Article IV (Relevancy), but also Article VIII (Hearsay) of the Kentucky Rules of Evidence.").

KRE 404(b) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Id. Such evidence may, however, be admissible "[i]f offered for some other purpose . . . ." KRE 404(b)(1). In this case, Appellant claims that his statement regarding why he believed E.T. was apparently trying to set him up was admitted for no purpose other than to show criminal propensity. We disagree.

Appellant's explanation was relevant, and thus admissible, for the purpose of showing motive, intent, and state of mind. See, e.g., Soto v. Commonwealth, 139 S.W.3d 827, 858 (Ky. 2004)(" Evidence of prior misconduct that shows a motive to commit the subsequent offense is admissible under KRE 404(b)(1)."). Appellant's explanation was also relevant for rebuttal purposes. Specifically, the Commonwealth had a right to rebut Appellant's allegation that E.T. was lying. See Ernst v. Commonwealth, 160 S.W.3d 744, 762 (Ky. 2005)("Evidence of collateral criminal conduct is admissible for the purpose of rebutting a material contention of the defendant."). Accordingly, we find no error in the trial court's ruling that the statement was admissible.

Appellant argues, however, that even if the evidence was relevant pursuant to KRE 404(b), he is entitled to a new trial because he was prejudiced by the Commonwealth's failure to give him "reasonable pretrial notice" of its intent to offer the evidence against him at trial. KRE 404(c). Appellant's argument is without merit, as he raised his objections to this exact issue (1) by filing and arguing a *motion in limine* prior to trial; and (2) when the evidence was offered at trial. Soto, supra, at Id. ("KRE 404(c) is satisfied if the accused is provided 'with an opportunity to challenge the admissibility of this evidence through a *motion in limine* and to deal with reliability and prejudice problems at trial.'") (citation omitted); see also Tamme v. Commonwealth, 973 S.W.2d 13, 31-32 (Ky. 1998).

Appellant next argues that the trial court erred when it (1) instructed the jury on sexual abuse in the first degree; and (2) failed to instruct the jury on the lesser-included offense of sexual abuse in the third degree. Both of these arguments are unpreserved because Appellant failed to present his position to the trial court (1) by offered

instruction or by motion; or (2) by an objection made before the court instructed the jury. RCr 9.54(2). In the alternative, Appellant argues both claims as palpable error. RCr 10.26. Because neither of his claims rise to the level of manifest injustice, Appellant is not entitled to relief. Id.

KRS 510.110(1)(a) defines first degree sexual abuse, in pertinent part, as follows: "A person is guilty of sexual abuse in the first degree when . . . [h]e subjects another person to sexual contact by forcible compulsion." Id. Appellant claims there was insufficient evidence to support a finding of forcible compulsion. Evidence will be found insufficient if "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . ." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

"The essential element under subsection (1)(a) is the use of force." KRS 510.110 (Commentary); see also KRS 510.010(2) ("'Forcible compulsion' means physical force . . . ."). Appellant submits that the touching in this case was merely "unwanted" and not accomplished by any actual physical force. We find such a contention to be without merit.

E.T. testified that Appellant unexpectedly grabbed her arm and crotch so hard that she would have been thrust from her seat if it weren't for the seatbelt she was wearing. Moreover, Appellant attacked E.T. while she was sitting in a confined space with no place to retreat. Upon being attacked, E.T. claimed that she resisted and tried to scratch Appellant. These facts alone support a reasonable inference that Appellant accomplished the sexual contact in this case by forcible compulsion.

Appellant further contends that he was entitled to a jury instruction on sexual abuse in the third degree. "A person is guilty of sexual abuse in the third degree when . . . [h]e subjects another person to sexual contact without the latter's consent." KRS

510.130(1)(a). The Commentary to KRS 510.110 states that all degrees of sexual abuse involve "lack of consent." Id. However, first and second degree sexual abuse involves additional elements, such as "forcible compulsion" and "incapacity to consent." Id.

Only one version of events was submitted to the jury in this case. These events were disputed only to the extent of questioning whether E.T. actually consented to the forcible grabbing of her arm and crotch. As such, there was simply no evidentiary foundation to support a theory involving a lack of force. See Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998)("Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence, that duty does not require an instruction on a theory with no evidentiary foundation.")(citations omitted). Accordingly, Appellant suffered no manifest injustice when the trial court did not submit an instruction for sexual abuse in the third degree.

Appellant next argues that he was prejudiced by the trial court's refusal to inform the jury that he had been granted directed verdicts on the charges of kidnapping and unlawful imprisonment pursuant to KRS 509.050. Because the jury was aware of these charges at the start of trial, Appellant claims that their absence during deliberations might have led the jury to believe (1) that Appellant pled guilty to the charges; or (2) that the charges should be considered as aggravating factors during the penalty phase.

We find Appellant's argument to be completely without merit. Appellant cites to no authority whatsoever which places a duty on the trial court to inform juries regarding the granting of directed verdicts. In Hanson v. American National Bank & Trust Co., this Court specifically found no such duty, but stated that it was merely within the trial court's

discretion to determine whether such information should be conveyed to a jury. 865 S.W.2d 302, 307 (Ky. 1993), *overruled on other grounds by*, Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483 (Ky. 2002). In this instance, we find no abuse of discretion by the trial court.

In his final assignment of error, Appellant argues that he was unduly prejudiced by inadmissible evidence submitted during the penalty phase of his trial. During the penalty phase, the prosecutor called Tom LaFollette, an employee of the Department of Corrections, Division of Probation and Parole, to testify as a witness regarding Appellant's prior felony convictions. The prosecutor intended to question Mr. LaFollette regarding charges in prior indictments that resulted in convictions. Pursuant to Appellant's request, the trial court ruled and the prosecutor agreed not to ask or reference charges in the indictments that did not result in convictions.

The prosecutor proceeded to ask Mr. LaFollette about Appellant's prior felony convictions and the offense date for those convictions. In responding to the date of offense, Mr. LaFollette replied with a date for each count in the indictments, instead of just stating a date for the counts with which Appellant had been convicted. In all, Mr. LaFollette referenced dates for thirteen (13) counts, but only reported convictions and sentences for six (6) offenses. Appellant claims this error entitles him to a new penalty phase trial.

We find it significant that Appellant made no contemporaneous objections whatsoever to Mr. LaFollette's erroneous testimony even though he had received a favorable ruling on the issue from the trial court. Appellant retorts that he "should not have to draw attention to prejudicial evidence after having secured a ruling excluding the evidence only minutes before the prosecution introduces it." We disagree, since a

contemporaneous objection could have (1) significantly mitigated the error; and (2) allowed the trial judge to issue an admonition to the jury. As it was, Appellant waived his chance to mitigate or cure the error by failing to enter a contemporaneous objection. See West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989)("The defendant's counsel cannot deliberately forego making an objection to a curable trial defect when he is aware of the basis for an objection"); see also, Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002) ("The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived.").

Moreover, only the fact that extraneous counts existed was revealed to the jury. The nature of the prior accusations that resulted in dismissal was never discussed or disclosed. We also note that Appellant's receipt of the maximum possible sentence in this case is easily explained by the heinous nature of the crime itself coupled with Appellant's six (6) prior felony convictions. When these circumstances are viewed in their totality, we find that the error is harmless, at best, and does not rise to the level of creating any manifest injustice. RCr 10.26. We further find no deliberate prosecutorial misconduct and reject Appellant's allegations to the contrary.

For the reasons set forth herein, the judgment and sentence of the Hart Circuit Court are affirmed.

All concur.

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