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RENDERED: NOVEMBER 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000316-MR

EDDIE JOE COBB — APPELLANT

V.

ON APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
NO. 05-CR-000063-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

This case is on appeal from the Clay Circuit Court where Appellant, Eddie Joe Cobb, Brian Collins, and Grant Hatfield, were convicted of attempted murder, kidnapping and intimidation of a witness. Appellant raises two claims of error: (1) that he should have been granted a directed verdict as there was not sufficient evidence to support any of the charges; and (2) that it was improper for a critical witness to be permitted to remain in the courtroom and sit at the prosecutor's table throughout the trial. Finding that the kidnapping exemption applied to Appellant, we affirm in part and reverse in part.

I. Background

On the morning of April 7, 2005, Natisha Saylor was found behind the Horse Creek Baptist Church storage building. She had been severely beaten and was near

death. Though her wounds were not fatal, they were serious, consisting of four deep lacerations to her throat, six broken ribs, a collapsed lung, a long and deep slash across her forehead, and several facial fractures.

On the evening of the attack, Saylor accepted a ride from Corky Price while walking home from a local convenience store. Saylor testified that Price first took her home, and then they went riding around. Delmas Dale and Vernan Jarvis were in the car during the course of the evening, though there was conflicting testimony at trial as to whether they were already in the car when Saylor was picked up and as to when they were dropped off.

While Saylor and the others drove around, they stopped to obtain cocaine. According to Saylor, she took Xanax, possibly some cocaine, and an unknown quantity of painkillers. Price testified that while driving he noticed he was being followed by a black Monte Carlo. He pulled over, got out of his car, and spoke with the people in the black Monte Carlo, whom he identified as Appellant and Brian Collins. Hatfield and Collins were the Appellant's co-defendants at trial. Price gave conflicting testimony regarding the conversation with the persons in the black Monte Carlo. At one point during the trial, he denied having been given $1000 to drop Saylor off at the church. After a short break, he testified that he was given $1000, stating that he did not remember his pre-break testimony.

Saylor eventually found herself in the parking lot of the Horse Creek Baptist Church. Price testified that he and Jarvis dropped Saylor off at her subdivision and never entered the church parking lot. This directly contradicted Price's statement at his guilty plea that he dropped Saylor off in the church parking lot. Saylor testified that Price drove her to the church parking lot and, at first, she and Price were the only ones

there. After about five minutes, a dark car pulled in with the Appellant, Collins, and a woman named Chris Bottner in it. Appellant and Collins got out of the car, and another vehicle, a small white van, pulled into the lot. Hatfield got out of the van. Roy Jarvis, who lived near the church, testified that he saw a dark car, a small pickup truck, and a small white van pull into the church parking lot that evening.

Saylor testified that she was first attacked in the church parking lot by Appellant, Hatfield, and Collins soon after they arrived. The three men beat her with their fists and then dragged her between the buildings. She first saw Collins with a knife, which he used to cut her. She further testified that all three of her attackers cut her with the knife, and that she lost consciousness after her throat was slashed. Although Saylor identified the Appellant and co-defendants at trial, she gave several conflicting statements regarding the identity of her attackers prior to trial. While being transported to UK Hospital after the attack, Saylor named Travis Jarvis as her attacker. Jarvis, however, had been detained at the Clay County Detention Center during the time of the attack. Saylor next named Corky Price, along with Collins, Hatfield, and Appellant, as her attackers. Saylor later told Detective John Yates that only "Bubba and Eddie Joe" were her attackers. Though Saylor did not mention who "Bubba" was, the Commonwealth's brief indicates that "Bubba" is Brian Collins's nickname. Saylor later told Detective Yates that Appellant, Collins, and Hatfield were her attackers.

Ultimately, Appellant, Collins and Hatfield were charged with attacking Saylor. They were indicted for first-degree assault, criminal attempt to commit murder, intimidating a witness in a legal process, and kidnapping. The intimidating a witness charge came from the fact that Saylor was, at the time of the attack, a witness to a murder that was allegedly committed by the three men's uncle in 2004.

At trial, Appellant and his co-defendants were found guilty of all charges, except first-degree assault, which the jury was instructed to treat as a lesser-included offense of attempted murder. They were then sentenced to serve 20 years in prison.

II. Analysis

Appellant raises multiple issues on appeal. The attempted murder and intimidating a witness convictions will be addressed together, the kidnapping conviction and the failure to sequester a witness, separately.

A. Intimidating a Witness and Attempted Murder Convictions

Appellant argues that the trial court abused its discretion by not granting a directed verdict on both the intimidating a witness and criminal attempt to commit murder charges. The pertinent evidence connecting Appellant to the crime was the testimony of Saylor and Corky Price. Appellant claims that Saylor's testimony was inconsistent, and Price's testimony was not credible, and as a result of this, a directed verdict should have been granted.

In ruling on a motion for a directed verdict, "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky.1991); see also Brewer v. Commonwealth, 206 S.W.3d 313, 318 (Ky. 2006). "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 is the defendant entitled to a directed verdict." Benham, 816 S.W.2d at 187. In addition, if the evidence is sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, a directed verdict cannot be granted. Benham, 816 S.W.2d at 187; see also Rice v. Commonwealth, 199 S.W.3d 732, 735 (Ky. 2006).

The evidence presented at trial was the testimony of the victim, Natisha Saylor. Saylor stated that all of the defendants, including Appellant, violently attacked her and left her for dead. The credibility and weight of Saylor's testimony is for the jury to determine. Benham, 816 S.W.2d 186 at 187. The jury found Saylor's testimony credible and this is evidenced by the guilty verdict rendered at trial. That testimony is sufficient to allow a jury determination on the attempted murder charge because it is not "clearly unreasonable for the jury to find guilt." Id. (emphasis added). The trial court did not abuse its discretion by denying the directed verdict.

Appellant also argues that Saylor's testimony regarding the intimidating a witness charge was not sufficient to warrant a reasonable inference of guilt, and thus a directed verdict was appropriate. Saylor stated that she had witnessed a murder prior to her attack, and that one of the alleged murderers was the uncle of all of the defendants at trial, including Appellant. To determine the sufficiency of the evidence, the trial court must, "from the totality of the evidence...conclude that reasonable minds might fairly find guilt beyond a reasonable doubt...." Commonwealth v. Sawhill, 660 S.W.2d 3 at 4 (quoting Hodges v. Commonwealth, 473 S.W.2d 811, 814 (Ky. 1971)). If this is found, then "the evidence is sufficient to allow the case to go to the jury even though it is circumstantial." Sawhill, 660 S.W.2d at 4; see also Brewer v. Commonwealth, 206 S.W.3d 313, 318 (Ky. 2006). This analysis applies to both direct and circumstantial evidence. Brewer, 206 S.W.3d 313 at 318. Based on Saylor's testimony, it was not unreasonable for a jury to infer that Appellant believed Saylor to be a witness, and that the attack was an attempt to induce Saylor not to testify in violation of KRS 524.040. Saylor's testimony was sufficient to allow a finding of guilt. Thus, the trial court did not

abuse its discretion by denying a directed verdict as to the intimidating a witness charge.

B. Kidnapping Conviction

Appellant argues that he was entitled to a directed verdict as to the kidnapping charge because of the kidnapping exemption statute, KRS 509.050. The question here is whether the restraint on Saylor, which included dragging her body to another area of the church grounds, was a separate crime from the assault/attempted murder.

"A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is...to accomplish or to advance the commission of a felony; or to inflict bodily injury or to terrorize the victim or another...." KRS 509.040(1)(b)(c). The kidnapping exemption, KRS 509.050, establishes that:

> 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. KRS 509.050.

Three prongs must be met for the exemption statute to apply:

> "First, the underlying criminal purpose must be the commission of a crime defined outside of KRS 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to commission of the underlying intended crime. Third, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime."

Wood v. Commonwealth, 178 S.W.3d 500, 515 (Ky. 2005). (internal citations omitted).

First, in order for the exemption to apply, Appellant must have purposefully committed an offense outside the statute. Here, Appellant was charged with and convicted of criminal attempt to commit murder, a violation of KRS 506.010 and KRS 507.020, which is outside of Chapter 509.

Next, the interference with the victim's liberty must have occurred "immediately with and incidental to the commission of the offense," which in this case is attempted murder. KRS 509.050; see also Wood, 178 S.W.3d at 515. The victim was first attacked near the parking lot of the church. During the attack, Saylor was dragged to another area of the church, where Appellant and his co-defendants cut her several times and left her for dead. There is no evidence that the attack was delayed at any point, other than to drag the victim. This satisfies the "immediately with" element of this statute.

Additionally, the act of restraining the victim in this case was "incidental to" the attempted murder. One can infer that during the process of an attempted murder, the attackers must restrain the victim in order to commit the crime. Saylor was restricted of her liberty; however, limiting her freedom must accompany the attack in order to complete the crime. If Saylor was free to leave, it is fair to infer that she would have. Because the attempted murder was immediate and incidental to the restraint of Saylor's liberty, the second prong is satisfied.

The final prong is whether the restriction of Saylor's liberty exceeded that which is normally incident to the underlying crime of attempted murder. The requirement in the statute that the commission of the crime be "immediate with and incidental to" another offense, while simultaneously exceeding "that which is ordinarily incident" to the

commission of that same offense is ambiguous. Timmons v. Commonwealth, 555 S.W.2d 234, 241 (Ky. 1977). "[T]he consensus view of the court is to resolve the ambiguity in favor of the 'immediately with and incidental to' phraseology, which means that the statute will be construed strictly and restrictively unless and until it be amended to the contrary." Id. In addition, for the exemption to apply, "the restraint will have to be close in distance and brief in time." Id. Under this analysis, the victim would have to be transported a "substantial distance" in order for the kidnapping exemption not to apply. Saylor was transported only from the church parking lot to the nearby church storage building which sat on the same premises. Saylor was not dragged a substantial distance nor did the restraint last for long.

Because all of these prongs were met, the kidnapping exemption applied to Appellant. This analysis is reinforced by the fact that the trial court treated the assault and attempted murder as arising out of the same sequence of events. This is evidenced by the jury instructions treating the assault as a lesser-included offense of the attempted murder. The events constituting a kidnapping are a result of the same actions by the Appellant. The kidnapping charge should have been analyzed in the same way as the assault and attempted murder. Therefore, the kidnapping exemption applies to the kidnapping charge the same way the lesser-included offense rule applied to the assault and attempted murder charges.

C. Separation of Witnesses

Just before opening statements, the Commonwealth invoked the rule requiring the exclusion of witnesses from the courtroom. However, it also moved the court to allow Charles Marcum, Natisha Saylor's grandfather, to stay in the courtroom and sit at the prosecutor's table during the trial. It was acknowledged that Marcum would be a

witness for the Commonwealth. Defense counsel objected, but the trial court permitted Marcum to stay in the courtroom. Marcum sat at the prosecutor's table and was the last witness for the Commonwealth.

KRE 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
> (1) A party who is a natural person;
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

However, the rule does not authorize exclusion of a person whose presence is shown by a party to be essential to the presentation of the party's cause. KRE 615(3). In criminal cases, this person is usually a police officer. See Dillingham v. Commonwealth, 995 S.W.2d 377 (Ky. 1999). However, there is nothing in the language of KRE 615(3) that requires that the representative be an officer. All that is required to meet the exception is a showing that the person is "essential to the presentation of the case." The trial court deemed that requirement met, finding no basis for the objection. While Charles Marcum may have met this criterion, there was never any showing as required by KRE 615(3). Consequently, the trial court erred in allowing Marcum to remain in the courtroom throughout the trial.

This Court has recognized, however, that failure to separate witnesses may be harmless error under the particular circumstances of the case. See Justice v. Commonwealth, 987 S.W.2d 306, 315 (Ky. 1999) (rule designed to prevent witnesses from altering their testimony in light of evidence adduced at trial was not violated where there was no valid argument that particular witness had altered his testimony). Cf. Mills v. Commonwealth, 95 S.W.3d 838, 840-41 (Ky. 2003) (prejudicial error where robbery

victim remained in the courtroom and heard extensive testimony from other witnesses regarding the details of the specific events to which he subsequently testified). Given Marcum's role as primarily a witness to the course of Saylor's recovery from the assault and the fact that Appellant visited Harold Wayne Collins while Collins was in jail, the potential for Marcum to alter his testimony in light of other witnesses' testimony was practically non-existent. He had no involvement in the events on trial except to establish Appellant's jail visit, a fact to which no other witness testified. As for Appellant's contention that Marcum was there to support his granddaughter's veracity, Appellant offers no basis for concluding that Marcum altered his own testimony as a result of having heard the trial testimony of other witnesses. Stated differently, there is no suggestion that Marcum's answers regarding Saylor's statements to Detective Yates or Saylor's recovery were affected by what he heard in the course of the trial. Thus, the error of failing to make an appropriate finding that Marcum's presence was essential to presenting the Commonwealth's case is harmless.

While failure to require the showing mandated by KRE 615(3) produced no harm in this trial, it is incumbent upon all parties and the trial court to recognize that the rule does not grant an unfettered right to exempt one witness from the longstanding rule of separation of witnesses. When KRE 615(3) is invoked and the party is required to make the necessary showing, the trial court will have an adequate opportunity to consider whether allowing the person to remain in the courtroom would produce a situation similar to that found unacceptable in Mills.

III. Conclusion

For the foregoing reasons, Appellant's kidnapping conviction is reversed and his other convictions are affirmed. The judgment of the circuit court is vacated and this matter is remanded for entry of a judgment in conformity with this Opinion.

All sitting. All concur.

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