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RENDERED: FEBRUARY 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000568-MR

DATE 3-13-08 E.A.Grant D.C.

TROY DANIEL HUNT — APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
NO. 05-CR-000159

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Troy Hunt, was convicted of multiple counts each of first-degree sodomy, incest, and first-degree sexual abuse of his daughter. On appeal, he claims that he was entitled to a directed verdict on several of the counts because the Commonwealth failed to prove an element of the offenses and that his right to a speedy trial was violated. Finding no error, Appellant's convictions are affirmed.

I. Background

In March 2005, Appellant's daughter, J.H., told some of her friends that her father had been doing sexual things to her. One of her friends reported this to a school counselor, which led to the police being contacted. The next day, police officers went to J.H.'s school and took her and one of her school's counselors to the police station to be interviewed. J.H. told the police that her father had been touching her breasts and vagina since she was in the sixth grade (J.H. was fourteen and in the eighth grade at the time of the interview). Based on this investigation, the police arrested Appellant and

charged him with sexual abuse. In May 2005, Appellant was indicted on five counts of first-degree sexual abuse, two counts of first-degree sodomy, and two counts of incest.

At trial, J.H. testified as to several instances of sexual contact with her father. According to her testimony, the first incident she could remember occurred at the beginning of her sixth grade year and consisted of her father fondling and kissing her breasts. J.H., who was born on December 28, 1990, was 11 years old at the time of the incident.

The next incident she could remember occurred in the summer of 2003 and consisted of her sitting on Appellant's lap, facing him and straddling his legs, while he touched her chest with his hands over her clothes. While testifying about this incident, she was asked whether she felt threatened in any way by her father. She responded, "My father is a very scary man, sir."

The third incident she remembered in greater detail, though she could did not recall exactly when it occurred other than that it was after August 2003. J.H. testified that Appellant had been showering and had called for her to come to the bathroom. When she arrived, he was naked and told her to get on her knees. She told him that she did not want to do it, but that he told her to do it anyway. She stated at trial that "it" had been going on for a while at that point and that he "was going to make [her] anyways," so she did as he told her and got on her knees. She testified that he told her to perform oral sex on him but that she did not want to do so and that when she hesitated, Appellant put his hand on the back of her head, pushed her head forward and put his penis in her mouth. She testified that it only lasted a few seconds because she gagged and left the room.

J.H. could not recall when the next incident occurred, though she stated that it occurred between January and October 2003 and she believed she was 13 years old at the time (she was actually 12 years old during that time period). She testified that Appellant came into her room during the night, pulled her underwear down, and put his mouth on her vagina. She stated that she was scared and did not know what to do, so she just waited for it to be over. Appellant returned to her room ten to fifteen minutes after the incident, apologized, and told her that he would stop doing "it" if it made her uncomfortable. She testified that she told him she was and that he did stop but only for "some time," after which things went back to the way they were.

She also testified about an incident that occurred in Appellant's bedroom. She claimed that Appellant had been in his bedroom watching television and asked her to come watch it with him. She did so and fell asleep on his bed, and later woke to him touching her breasts with his hands. She testified that she pretended to still be asleep because she was "scared of what he would do if [she] woke up."

She testified generally that Appellant regularly touched her breasts, letting his hands linger on her, while tucking her into bed and that one of these incidents occurred just a few weeks before she spoke with the police. When asked whether she tried to get Appellant to stop touching her, she replied that when it first began, she would tell him to stop and try to push him away, but he would ignore her response. She also testified that several times he apologized and stopped touching her for a short time (as described above) but that he always started back again within a few months.

The jury convicted Appellant of two counts of first-degree sodomy, two counts of incest, and four counts of first-degree sexual abuse (one count of sexual abuse had been dismissed on the prosecutor's motion). Appellant was sentenced to a total of

twenty years in prison. His appeal to this Court, therefore, is a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. Sufficiency of the Evidence of Forcible Compulsion

Appellant's first claim of error is that he was entitled to a directed verdict on the first-degree sodomy and sexual abuse charges because there was insufficient evidence of forcible compulsion. Appellant properly preserved his claim of error by moving for a directed verdict, and he is correct that forcible compulsion is an element of first-degree sodomy and sexual abuse, at least when the victim is not incapable of consent for reason of age or otherwise. See KRS 510.070(1)(a); KRS 510.110(1)(a). The question then is whether the evidence at trial was sufficient to sustain Appellant's conviction in light of the directed verdict standard.[1]

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). "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." Id. 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. Id.

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[1] It must be noted that the "forcible compulsion" element was potentially unnecessary for one of the counts of first-degree sexual abuse because J.H. was less than twelve years old (the charge in question related to the first incident described above). That the victim is unable to consent because she is less than twelve years old is an alternative element of first-degree sexual abuse under KRS 510.110(1)(b) to the forcible compulsion element listed in KRS 510.110(1)(a). However, the trial court did not instruct under that alternative, nor did the prosecutor seek such an instruction. Thus, because the jury was instructed with the forcible compulsion element, Appellant's directed verdict challenge is still applicable to that count.

Appellant claims that J.H. testified that he would stop when asked to do so and not touch her for several months, and that there was no allegation of force in the evidence. In support of his position, Appellant cites Miller v. Commonwealth, 77 S.W.3d 566 (Ky. 2002), which held that forcible compulsion was not proven where the victim testified that the defendant would stop an act of rape or sodomy when asked to do so by the defendant. However, Miller differs significantly from this case in that the defendant there would stop during the act itself. The testimony in this case established that at most Appellant would temporarily stop the practice of touching J.H. when asked to do so after the completion of a sexual act, not that he would stop during the specific act. Several other items of testimony—namely an instance of Appellant physically forcing J.H. to perform oral sex on him when she resisted, J.H.'s claim that he "was going to make [her] anyways," and his ignoring her request that he stop during one incident—undercut Appellant's contention in this regard. In short, none of the testimony on which Appellant relies in his brief indicates that he would stop in flagrante delicto when asked, which is necessary for Miller to be applicable.

Moreover, Appellant's general claim that there was no evidence of forcible compulsion is simply incorrect. Forcible compulsion is defined as "physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter." KRS 510.010(1). Physical resistance by the victim is not necessary to show forcible compulsion. Id. In response to whether she was threatened, J.H. responded affirmatively, albeit in an indirect way, by describing her father as a "very scary man." She also described an incident in which she resisted but Appellant physically forced her to perform oral sex on him and stated

that her father would "make" her do what he wanted, regardless of her wishes. She also testified to feigning sleep out of fear that Appellant would do more sexual acts beyond touching her breasts (which constitutes fear of another offense under KRS Chapter 510). Though J.H. did not testify directly that she was physically overcome or that she was threatened with physical injury in every instance, her testimony was such that it was not unreasonable for the jury to believe that she feared physical force or another crime or that Appellant employed sufficient force to overcome what resistance she was capable of as a young girl. This allowed the jury to find that Appellant subjected her to forcible compulsion. This satisfies Benham and the trial court's denial of a directed verdict was not erroneous.

B. Speedy Trial Right

Appellant also claims that the thirteen-month delay between his initial arrest and trial violated his right to a speedy trial. Appellant was arrested and charged in March 2005 and was indicted in May 2005. He was arraigned on June 16, 2005, at which time his trial was set for January 18, 2006, and Appellant's attorney said the trial date "was fine." On August 3, 2005, Appellant filed a motion for a speedy trial asking for a date sooner than January 18, 2006. The trial court declined to move up the trial date because of scheduling conflicts, but encouraged Appellant to communicate with the prosecutor about possible dates opening due to the settlement of other cases. The January trial ultimately had to be rescheduled to April 24, 2006 because of inclement weather (a snow storm), and trial finally started on that day.

Speedy trial claims are evaluated under a balancing test with four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33

L.Ed.2d 101 (1972); see also McDonald v. Commonwealth, 569 S.W.2d 134, 136 (Ky. 1978) (applying the Barker test).

As to the first factor, the Supreme Court has noted, "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530, 92 S.Ct at 2192. A thirteen-month delay falls very near the cutoff for presumptive prejudice, and thus it favors the defendant's claim. Compare Brown v. Commonwealth, 934 S.W.2d 242, 248-49 (Ky.1996) (holding a ten month delay not to be presumptively prejudicial), with Dunaway v. Comonwealth, 60 S.W.3d 563, 569 (Ky. 2001) (holding a thirteen and one-half month delay to be presumptively prejudicial). This "presumptive prejudice," however, is not alone dispositive and must be balanced against the other factors. See Doggett v. United States, 505 U.S. 647, 652 n.1, 112 S.Ct. 2686, 2691, 120 L.Ed.2d 520 (1992) ("'[P]resumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry.").

Turning to the other factors, Appellant expressly invoked his speedy trial right in August 2005. However, he did not do so as a way to complain about an already lengthy delay, as he raised the issue within a mere two months of his initial arraignment. Cf. Barker, 407 U.S. at 532, 92 S.Ct. at 2193 (noting that assertion of the right is entitled to strong evidentiary weight, but only insofar as complaints are more likely to arise when the deprivation is more serious). Weighing against the single invocation of the right is the fact that Appellant's counsel had stated less than two months before that the January trial date "was fine." While this does not constitute a waiver of the right, it does

show that Appellant's soon-thereafter invocation of the right was not so much a complaint about detrimental delay as it was a strategy. As such, Appellant's invocation of the right is at best neutral and does not weigh substantially in his favor.

The delay in this case was caused primarily by the trial court's crowded docket, though weather also caused some of the delay. The delay was not "a deliberate attempt to delay the trial in order to hamper the defense" by the prosecution. Id. at 531, 92 S.Ct. at 2192. Rather, the primary reason for the delay was neutral, though that still weighs somewhat in favor of Appellant because that responsibility ultimately lies with the Commonwealth. Id.

Finally, the Court must consider actual prejudice to Appellant, which "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect : . . ." Id. at 532, 92 S.Ct at 2193. Those interests include "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Id. (footnote omitted). Appellant was incarcerated during the entire thirteen-month delay, meaning the first factor weighs in his favor. However, he does not point to any specific anxiety and concern he suffered, and he even admits the record does not indicate that he expressed anxiety or concern.

More importantly, Appellant has not shown that the delay impaired his defense, which is the "most serious" interest here. Id. He points to the addition of several charges by the grand jury in the indictment (which came two months after the initial arrest), the fact that the Commonwealth withdrew its plea-offer after his speedy trial motion, and J.H.'s inability to recall every detail of the incidents as evidence of impairment.

However, the grand jury believed there was evidence to support more charges than Appellant was originally arrested for, and this does not show impairment by the thirteen-month delay; if anything, it shows that the delay helped his defense in that it gave him more time to prepare for what he characterizes as essentially surprise charges.

He also claims that he was punished for seeking a speedy trial by the Commonwealth's withdrawal of an offer of a plea bargain. The portion of the record that Appellant cites (just prior to voir dire) includes his attorney claiming that the offer was withdrawn because of the speedy trial motion and the prosecutor stating that the withdrawal was because Appellant had indicated he was not interested in the offer. Thus, it is not clear that Appellant's present characterization of what happened is correct. Even if it is, it is further not clear how this demonstrates that the delay impaired his defense. More importantly, just after the exchange, the attorneys indicated that they were willing to negotiate and took a break to do so (though the negotiations ultimately failed to resolve the case).

Finally, Appellant notes J.H.'s inability to recall all the details of what happened to her as proof that the delay was detrimental to him. It must first be said that after reviewing J.H.'s testimony, describing her memory as failing requires quite a stretch of the meaning of the word. Though she was unable to remember every detail, she described the incidents for which Appellant was convicted with many details as to the activity, the setting, and time period. Moreover, Appellant's contention does not make a lot of sense since J.H. was the victim of the crime and main witness for the prosecution. Again, if anything, her inability to recall details weighs in Appellant's favor in this case since it gave him grounds to attack her testimony. Appellant cites United States v.

Graham, 128 F.2d 372 (6th Cir. 1997), for the proposition that a failing memory by a prosecution witness can impair the right to cross-examination, but unlike the defendant in that case, he does not describe how J.H.'s supposed memory problems impaired his cross-examination.

Though the reasons for the delay weigh slightly in Appellant's favor in this case, his invocation of his speedy trial right and actual prejudice (primarily in the form of impairment of his defense) do not. Appellant simply has not demonstrated any real prejudice to him by the delay between his arrest and trial, and all the delay was actually from neutral causes. Thus, this Court concludes that his speedy trial right was not violated.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

All sitting. All concur.

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