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RENDERED: MAY 21, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000733-MR

TROY SCHWEIKERT — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
NO. 06-CR-00322

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Troy Schweikert appeals as a matter of right from a June 25, 2007 Judgment of the Kenton Circuit Court convicting him of first-degree rape, first-degree unlawful imprisonment, and terroristic threatening. The Commonwealth alleged and the jury found that on April 5, 2006, Schweikert raped A.K., an exotic dancer hired by Schweikert to perform at his residence. After forcing A.K. to have sex with him, Schweikert held a knife to A.K.'s throat and kept her captive until the money he had paid for the dance was returned to him. On appeal, Schweikert contends that the trial court erred by (1) failing to grant him a new trial after the transcript from his grand jury proceeding was not provided to him; (2) refusing to dismiss his indictment after the Commonwealth did not show good cause for failing to record the grand jury proceeding; (3) prohibiting him from referring to A.K. as a prostitute or call-girl,

which, Schweikert argues, precluded him from asserting an affirmative defense; (4) failing to grant him a new trial after a jury member fell asleep during trial; (5) refusing to grant him a new trial after the prosecutor implied in his closing argument that the defendant had the burden of proof; and (6) permitting the jury to be instructed as to the crime of unlawful imprisonment. Convinced that Schweikert's claims of error are without merit, we affirm.

RELEVANT FACTS

During the mid-afternoon of April 5, 2006, Schweikert called Naughty Bodies, an adult entertainment company providing exotic dancers to customers, and requested a one-hour, all-nude private dance for the price of $150. Tracey Adkins, an employee of Naughty Bodies, took Schweikert's request, and then at approximately 2:00 p.m., called A.K. to inform her of the job and give her directions to Schweikert's residence. On the way to Schweikert's house, A.K. picked up Mickey Thompson, who was to act as her driver and bodyguard. A.K. and Mickey arrived at Schweikert's house sometime between 3:00 and 4:00 p.m. They both went inside, at which point A.K. collected the $150 from Schweikert and gave it to Mickey. A.K. then told Mickey to drive around the block, return to the house, and wait outside the front door.

A.K. testified at trial that once Mickey left, she followed Schweikert into his bedroom, where she started to perform her dance. According to A.K., once she had removed all her clothing, Schweikert told her he wanted to masturbate, but A.K. replied that he could not. A.K. continued her dance, but

because Schweikert became rude and belligerent, she gathered her clothes and started to leave. A.K. testified that Schweikert jumped in front of the door and prevented her from leaving. The two struggled for a moment as A.K. tried to get out, but Schweikert threw her to the ground, started choking her, and told her he would kill her if she did not stop screaming. Schweikert then made A.K. get onto the bed and forced her to have sex with him. Afterwards, Schweikert made A.K. go into the bathroom, gave her a bar of soap, and ordered her to wash off.[1] After A.K. finished in the bathroom and got dressed, Schweikert took her back into the living room and instructed her to wait there. Schweikert briefly went into the kitchen and retrieved a knife. Holding the knife to her throat, Schweikert led her back into the bathroom and ordered her to call Mickey and get his money back. Schweikert told A.K. that he would slice her throat if she said anything about the rape to Mickey. A.K. then called Mickey and told him to come inside and bring the money Schweikert had given him previously. A.K. testified that Schweikert locked her in the bathroom while he went into the living room and got the money from Mickey. After Mickey had given back the money and gone back outside, Schweikert returned to the bathroom. Eventually, after A.K. promised she would not tell anyone what had happened, Schweikert let her leave. A.K. exited the house, told Mickey to get into the car, and the two drove away.

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[1] A.K. testified that she did not wash her right hand because some of Schweikert's semen had gotten on it and she thought it would be useful forensic evidence.

Believing that Schweikert was following her, A.K. pulled into a bank parking lot located near Schweikert's residence. A.K. and Mickey entered the bank and ran into the office of Assistant Manager Debbie Koch. Mickey asked Koch to call 911, while A.K. knelt in the corner sobbing hysterically. Because A.K. thought Schweikert was still following her, the bank employees took her into the bank's kitchen while Jamie Miller, a bank trainee, called 911. Miller testified that during this time A.K. was shaking, crying, acting very frantic, and gasping for breath. Emergency medical technicians eventually arrived and took A.K. to the hospital, where Mary Morris, a sexual assault nurse examiner, observed that she had a busted lip, bruises on her arms, and a scratch on her neck. The forensic biologist who examined A.K.'s rape kit found semen on her vaginal smear, vaginal swabs, external genital swabs, and dried secretion on her right hand. The DNA profile from A.K.'s vaginal swabs was consistent with a mixture of A.K.'s and Schweikert's, and the dry secretion swab from A.K.'s right hand matched Schweikert's DNA profile.

While A.K. was at the hospital, Police Officer Jim White went to Schweikert's residence to try and locate him, but Schweikert was not home. When Schweikert eventually got home, a neighbor notified Officer White and he returned to the residence. After officers knocked on Schweikert's door and waited outside for nearly two hours, Schweikert finally came outside, explaining that he did not hear the officers because he was in the shower.[2] A

[2] Although Schweikert told officers at the scene that he had been in the shower, he testified at trial that he did not hear them because he was in the hot tub.

search of Schweikert's house revealed marijuana and drug paraphernalia. Police Detective Amy Schworer then took Schweikert to the police station, where he was formally interviewed. Following Schweikert's arrest, a Kenton County Grand Jury indicted him on June 2, 2006, for first-degree rape, first-degree unlawful imprisonment, terroristic threatening, possession of drug paraphernalia, and possession of marijuana.[3]

Schweikert's trial began on April 25, 2007. During trial, Schweikert countered A.K.'s version of what had happened, explaining that they had had sex, but that it was consensual. Schweikert testified that after A.K. arrived at his house, he told her he was not interested in the dance and he only wanted sex. According to Schweikert, A.K. then replied that she would have sex with him, but that her driver could not know about it. According to Schweikert, the two then went into his bedroom and had consensual sex. Schweikert stated that afterwards, she agreed to give him back $100 in exchange for thirty Vicodin ES tablets. However, Schweikert testified that because he gave A.K. thirty Vicodin pills instead of Vicodin ES, she left angry. Schweikert explained that A.K. falsely accused him of rape because he cheated her out of the Vicodin ES pills.

On May 2, 2007, the jury found Schweikert guilty of all three charges and recommended that he serve fifteen years for rape, five years for unlawful

[3] Prior to Schweikert's trial, the Commonwealth agreed to separate his drug charges. Subsequently, after Schweikert's final sentencing on the rape, terroristic threatening, and unlawful imprisonment charges, he pled guilty to the possession charges in exchange for the Commonwealth's recommendation that he be sentenced to twelve months in prison for each charge to run concurrent with each other and with his other sentences.

imprisonment, and twelve months for terroristic threatening. The jury also recommended that the fifteen-year and five-year sentences run consecutively, but that the twelve-month sentence run concurrently. On June 25, 2007, the Kenton Circuit Court entered a judgment consistent with the jury's findings of guilt and sentencing recommendation. This appeal followed.

ANALYSIS

I. There Was No Error in the Handling of the Grand Jury Issues.

On February 2, 2007, Schweikert filed a pre-trial motion to dismiss his indictment because his grand jury proceeding had not been recorded as required by RCr 5.16(1). In its response, the Commonwealth noted that the failure to record the proceeding was due to mechanical difficulties. In demonstrating that there was good cause for this failure, the Commonwealth attached to its response the affidavit of Jackie Dudderar, the employee responsible for recording grand jury proceedings, who stated that "any presentations not recorded were attributable to mechanical failure." After holding a hearing on this motion, the trial court concluded that because RCr 5.16(2) mandates that "[m]echanical failure of the recording device shall constitute good cause," the Commonwealth did not violate RCr 5.16(2) and Schweikert was not entitled to a dismissal of his indictment. Schweikert now argues on appeal both that the trial court erred by not providing him with a copy of the transcript and that the Commonwealth did not show good cause justifying why a recording was not made. We disagree.

RCr 5.16(1) states that "[t]he attorney for the Commonwealth shall cause all of the testimony before a grand jury to be recorded." RCr 5.16(2), however, states that

> [f]ailure to have a record made, if required by paragraph (1) of this Rule 5.16, shall be ground for dismissal of the indictment unless the Commonwealth can show good cause for the failure. Mechanical failure of the recording device shall constitute good cause.

Here, the Commonwealth properly demonstrated that its failure to record the grand jury proceeding was due to a mechanical malfunction, which, according to RCr 5.16(2), "shall constitute good cause." Although Schweikert recognizes in his brief that a mechanical failure is good cause, he simultaneously insists, without explanation, that mechanical failure in this case should not constitute good cause. Furthermore, despite his acknowledgment that whether to dismiss an indictment on this basis is within the sound discretion of the trial court, Jackson v. Commonwealth, 20 S.W.3d 906, 909 (Ky. 2000), Schweikert does not demonstrate how the trial court abused its discretion in this instance. Simply put, the trial court properly acted within its discretion when it denied Schweikert's motion to dismiss his indictment based on a failure to comply with RCr 5.16, no error occurred and Schweikert is not entitled to a new trial on this basis.

II. The Trial Court Did Not Preclude Schweikert From Asserting An Affirmative Defense.

Prior to trial, the Commonwealth filed a motion in limine to preclude Schweikert from referring to A.K. as a prostitute or call girl in front of the jury.

In the hearing held on this issue, the trial judge informed Schweikert that he could not refer to A.K. or any of her co-workers as call girls or prostitutes unless he actually presented evidence supporting that contention. In response to this order, Schweikert's counsel replied that he understood, and he raised no further objection. On appeal, Schweikert argues that his failure to be able to refer to A.K. as a prostitute or call girl denied him the ability to present an affirmative defense. The defense to which Schweikert refers is that he did not rape A.K., but rather, had consensual sex with her in exchange for money and pills.

First and foremost, it is important to note that Schweikert neither objected to the trial court's ruling nor moved for a mistrial. This Court has noted that when a party accepts the trial court's decision without requesting further relief, that party cannot complain about the trial court's action on appeal. Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). Despite Schweikert's failure to properly preserve this claim, no error occurred in this instance because Schweikert had ample opportunity to present his defense that he expected and received consensual sex from A.K.

During his opening statement, Schweikert's counsel informed the jury that evidence would be presented demonstrating that Schweikert thought his request for a "full service" performance included sex and that A.K. had agreed to have sex with him in exchange for money and pills. In his cross-examination of Detective Schworer, Schweikert's counsel was permitted to ask the detective whether she knew that Naughty Bodies was a call-girl service and

whether she investigated Schweikert's claim that he had paid for sex, not just a dance. Furthermore, in his own testimony, Schweikert explained to the jury that when A.K. arrived at his house, he told her he only wanted to have sex, and she agreed. Schweikert also testified that the reason A.K. falsely accused him of rape was because he cheated her out of the 30 Vicodin ES tablets, which he had promised to give her after they had sex. Lastly, in his closing argument, Schweikert's counsel again reinforced his theory that Schweikert expected sex from A.K. because of the type of service he ordered, remarking that "when [Schweikert] engaged the services of Naughty Bodies, he was expecting and did in fact receive sex." Therefore, even if this issue had been properly preserved, the trial court's prohibition on referring to A.K. as a prostitute or call-girl did not hinder Schweikert's ability to present his defense that he expected sex based on the service he ordered and that, in fact, he received it consensually from A.K.

III. The Trial Court Did Not Err When It Denied Schweikert's Motion For A New Trial Based On Juror Misconduct.

During trial, the Commonwealth played a tape recording for the jury of Schweikert's police interview. While the recording of this interview was being played, the court's bailiff noticed that one of the jury members had fallen asleep. The bailiff then got up from his seat, walked to his station, wrote a note informing the judge that a juror was asleep, and delivered the note to the trial judge. Upon receiving this note, the court called for a recess. A total of two minutes and thirty-eight seconds elapsed from the time the bailiff left his

seat to deliver the note and the time the court called a recess.[4] During the recess, the trial court held a bench conference, in which all the parties agreed that a juror had been asleep for approximately three minutes.

Schweikert's counsel then moved for a mistrial because a juror did not hear a portion of the taped statement. In response, the trial court noted that manifest necessity was required before granting a mistrial and suggested that a less severe remedy could correct the error. The court offered that a reasonable remedy would be to replay the three minutes of the taped statement in which the juror was asleep. Schweikert's counsel disagreed and reasserted his motion for a mistrial, arguing that replaying the statement would over-emphasize Schweikert's confession. The trial court, however, overruled Schweikert's motion for a mistrial, finding that because the interview did not include a confession and because the portion missed by the sleeping juror was not any more or less exceptional than Schweikert's other statements, replaying the three minute segment would not be overly prejudicial and would not create a bias among the jury. Once the jury was reconvened, the trial judge informed them that because "it is quiet in here and it is hard to be attentive [all the time] . . . we will just go back and play those three minutes so that everyone can hear the tape."

On appeal, Schweikert argues that this juror misconduct violated his right to a fair trial and that the trial court's failure to grant him a mistrial

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[4] The trial court reviewed the video record of Schweikert's trial in order to ascertain the length of time that the juror was asleep.

constituted reversible error. Because the trial court did not abuse its discretion in fashioning the remedy for the misconduct in this instance and because Schweikert has not shown how he was prejudiced by the juror's misconduct, we find that Schweikert is not entitled to a new trial on this basis.

As Schweikert correctly notes, a new trial may be granted if it is discovered that a jury member has engaged in misconduct, CR 59.01(b), and a juror's inattentiveness does constitute misconduct, Lester v. Commonwealth, 132 S.W.3d 857, 862 (Ky. 2004). However, as this Court has recognized previously, "[t]he trial judge is in the best position to determine the nature of alleged juror misconduct and the appropriate remedies for any demonstrated misconduct." Ratliff v. Commonwealth, 194 S.W.3d 258, 276 (Ky. 2006), *quoting* United States v. Sherrill, 388 F.3d. 535, 537 (6th Cir. 2004). Because this decision is within the sound discretion of the trial court, reversal by this Court is only warranted when the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

Here, the trial court recognized that a mistrial is an extraordinary remedy and that a less severe solution existed that would appropriately address the misconduct. In its order denying Schweikert's motion for a new trial, the trial court reasoned that because the sleeping juror missed tape-recorded evidence which could be replayed, because the interview was not a confession, and because the three-minute portion was "not of a prejudicial or strategic nature" to cause bias among the jury, a reasonable remedy was

simply to replay the three-minute portion. This Court agrees with the Commonwealth that the trial court's action in this instance was not unreasonable or unfair, and thus, the court did not abuse its discretion in refusing to grant Schweikert's motion for a mistrial.

Furthermore, the bare assertion of juror misconduct does not automatically require a mistrial; rather, a court must determine "whether the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." Byrd v. Commonwealth, 825 S.W.2d 272, 275 (Ky. 1992), *overruled on other grounds by* Shadowen v. Commonwealth, 82 S.W.3d 896 (Ky. 2002); Johnson v. Commonwealth, 12 S.W.3d 258, 266 (Ky. 1999). Here, Schweikert states in his brief that the three-minute portion of the tape was critical in his defense and "would unduly influence the jury one way or another since the [trial court] did not seat an alternative juror in this case." However, Schweikert neither explains how the tape was important in his defense nor demonstrates how its replaying was prejudicial. Moreover, the trial court properly found that replaying the tape would not be overly prejudicial to Schweikert because nothing particularly significant or noteworthy occurred during the three-minute portion of the interview. Therefore, Schweikert is not entitled to a new trial on this basis.

IV. Because The Commonwealth Did Not Engage In Prosecutorial Misconduct In Its Closing Argument, The Trial Court Did Not Err In Denying Schweikert's Motion for a Mistrial.

During the Commonwealth's closing argument, the prosecutor made the following statement:

> Let's start from the beginning about the elements of the crime. We all know what that is, you have the jury instructions, they are right there in front of you. You will have them when you deliberate. Has the Defendant countered those elements? Has the Defendant suggested to you. . . .

At this point, Schweikert objected to the prosecutor's statements and requested a mistrial, arguing that the Commonwealth had shifted the burden of proof to the defendant. In response, the trial court stated that it did not believe the prosecutor's use of the word "counter" shifted the burden of proof to the defendant. Nonetheless, the court sustained Schweikert's objection, asked the Commonwealth to be clearer in its choice of language, and provided an admonition to the jury per Schweikert's request. In its admonition, the trial court stated, "ladies and gentlemen, Mr. Kinser [the prosecutor] has informed me that by "counter" he does not mean that . . . the burden of proof has shifted to the defendant." In addition, when the Commonwealth proceeded with its closing argument, the prosecutor explained that "the point I was trying to make is that the Commonwealth is charged with the burden of proving the elements."

On appeal, Schweikert now argues that the Commonwealth engaged in prosecutorial misconduct during its closing argument by making statements that shifted the burden of proof to the defendant, and that the trial court's refusal to grant a mistrial on this basis constitutes reversible error. We disagree. A prosecutor who argues that a defendant has failed to counter the Commonwealth's evidence does not mean that the prosecutor has shifted the burden of proof to the defendant. Tamme v. Commonwealth, 973 S.W.2d 13, 38 (Ky. 1998). Furthermore, this Court has consistently held that "a prosecutor

may comment on tactics, may comment on evidence, and may comment as to the falsity of the defense position." Slaughter v. Commonwealth, 744 S.W.2d 407, 411-412 (Ky. 1987); Bowling v. Commonwealth, 873 S.W.2d 175, 178-179 (Ky. 1993); Haynes v. Commonwealth, 657 S.W.2d 948, 953 (Ky. 1983). In this case, by posing the rhetorical question of whether the defendant had countered the elements of the crime, the prosecutor was simply arguing that Schweikert had failed to rebut the Commonwealth's evidence,[5] which did not shift the burden of proof to Schweikert and is permissible under Kentucky case law. Tamme, 973 S.W.2d at 38. In addition, even if the prosecutor's statement had crossed the line, the trial judge gave a clear admonition to the jury explaining that the defendant did not have the burden of proof, and the prosecutor reiterated that the Commonwealth is responsible for proving the elements of the crime. In sum, the prosecutor's statement in this instance did not amount to prosecutorial misconduct and the trial court did not err in denying Schweikert's motion for a mistrial.

V. The Trial Court Did Not Err In Instructing the Jury On the Crime of Unlawful Imprisonment.

Following the presentation of the evidence, both parties participated in bench conferences regarding the jury instructions. During the first of these conferences, the parties discussed whether the jury should be given an

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[5] However, this Court cautions counsel not to make statements that imply a defendant has an obligation to counter the Commonwealth's case. A defendant has no duty to rebut any element of the Commonwealth's case and may remain silent throughout the trial. Although the statement under these particular circumstances did not amount to prosecutorial misconduct, prosecutors should tread lightly when arguing to the jury what the defendant has or has not done in presenting a defense.

instruction on unlawful imprisonment and how that instruction should read.[6] After the trial court agreed that the evidence supported an instruction on unlawful imprisonment, the prosecutor stated that he "didn't think there needs to be a limited instruction to the bathroom itself, because we heard testimony [that] after she was raped, she was threatened with her life, and she did not feel free to leave." Following this statement, Schweikert's counsel stated that "we would have no objection to that language." The parties then agreed that instruction number six would read, "in this county on or about April 5, 2007, and before the finding of the indictment herein, he [Schweikert] restrained [A.K.] after the commission of the rape by threatening her with [a] gun and knife."

During the second conference dealing with jury instructions, Schweikert's counsel suggested that there be an editorial change in the court's unlawful imprisonment instruction, and the parties began a lengthy discussion on how this instruction should read. Ultimately, the trial court concluded, "so we are clear, when we are talking about unlawful imprisonment, we are really talking about everything up until the time he said 'if you tell anybody,' as she is walking out the door." The trial court then asked defense counsel, "Are you

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[6] No where in the record is there a specific objection to the court giving an unlawful imprisonment instruction. At the beginning of the first bench conference, Schweikert's counsel states that he did not submit a sample instruction on unlawful imprisonment because he did not know how the court was going to rule on that issue, but after the court decided to include such an instruction, Schweikert's counsel accepted the ruling and did not argue that it was unsupported by the evidence.

okay with that?" In response, Schweikert's counsel stated, "I'm okay with that in the defense respect."

On appeal, Schweikert now argues that the trial court erred in giving an unlawful imprisonment instruction because KRS 509.050, the exemption statute, precluded his conviction of that crime. Schweikert erroneously states in his brief that he objected to the giving of this instruction. However, as explained above, although the parties discussed at length how to word the unlawful imprisonment instruction, Schweikert never specifically objected to its inclusion in the jury instructions.[7] RCr 9.54(2) states that

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Here, because Schweikert never argued to the trial court that an unlawful imprisonment instruction was unsupported by the evidence and never specifically objected to its inclusion in the jury instructions, he has not complied with RCr 9.54(2) and this claim of error is not properly preserved for appellate review.

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[7] Schweikert did make a motion for a directed verdict based on KRS 509.050, the exemption statute. In making this oral motion, Schweikert's counsel stated that "we believe that the unlawful imprisonment is part and parcel of the rape and a necessary element, and we believe the exemption statute would therefore erase, or require dismissal of that charge." However, as the Commonwealth notes, a directed verdict motion does not preserve a jury instruction claim of error for appellate review. Miller v. Commonwealth, 77 S.W.3d 566, 577 (Ky. 2002); RCr 9.54(2).

Nonetheless, Schweikert's claim of error is without merit because he cannot satisfy two of the three prongs necessary for KRS 509.050 to apply.[8] In order for KRS 509.050 to exempt a defendant from being convicted of unlawful imprisonment in the first degree, the defendant must establish that he meets a three-prong test:

> 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 the 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), *citing* Griffin v. Commonwealth, 576 S.W.2d 514, 516 (Ky. 1978). Under the facts of this case, Schweikert satisfies neither the second nor the third prong. Regarding these elements, Schweikert continued to interfere with A.K.'s liberty well after the intended crime of rape was completed, and this interference certainly exceeded that which is normally associated with the commission of a rape. A.K. testified that after Schweikert forced her to have sex, Schweikert ordered her to go into the bathroom and wash off; he placed her in the living room while he retrieved a knife from the kitchen; while holding the knife to her throat, Schweikert led her back into the bathroom and forced her to call her driver; and he locked her

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[8] KRS 509.050 states, "A person may not be convicted of unlawful imprisonment in the first degree . . . 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."

in the bathroom while he retrieved the money from the driver. Schweikert's conduct in restraining A.K. in the living room and bathroom after the rape supports an instruction on unlawful imprisonment and makes inapplicable the exemption set forth in KRS 509.050. Thus, the trial court did not err in instructing the jury as to unlawful imprisonment.

CONCLUSION

Despite Schweikert's numerous claims of error, he received a fair and impartial trial and is not entitled to a new trial. Even though Schweikert was not provided with a copy of his grand jury transcript, the Commonwealth demonstrated good cause for this failure, and the trial court did not abuse its discretion in not dismissing Schweikert's indictment on this basis. Schweikert was not precluded from presenting an affirmative defense of consensual sex simply because the trial court prohibited him from referring to A.K. as a prostitute or call-girl. Because the trial court acted reasonably in replaying the three-minute portion of the taped statement that was missed by a sleeping juror and because the prosecutor did not engage in misconduct warranting reversal in his closing argument, the trial court did not err in denying Schweikert's motions for a mistrial. Lastly, due to Schweikert's further restriction of A.K.'s liberty after the rape, KRS 509.050 was not applicable in this case and the trial court properly instructed the jury on unlawful imprisonment. Therefore, the June 25, 2007 Judgment of the Kenton Circuit Court convicting Schweikert of first-degree rape, first-degree unlawful imprisonment, and terroristic threatening is affirmed.

All sitting. All concur.

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