

RENDERED: APRIL 22, 2010

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000373-MR

**FINAL**

**DATE** 5-13-10 Kelly Klabeck D.C.  
APPELLANT

FRANCIS G. PAYNE

V.  
ON APPEAL FROM HANCOCK CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
NO. 08-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING IN PART AND REVERSING IN PART**

On June 5, 2008, Anna Conner and her husband rented a trailer that Appellant, Francis G. Payne, owned on Highway 144 in Hancock County, Kentucky. The Connors had lived in the trailer for approximately two months, but they were planning on moving out and into a house later that month. That morning, Mrs. Conner saw Appellant working on a deck behind an old grocery store nearby and approached to inform him that she and her husband would be moving out of the trailer in two weeks. According to Mrs. Conner's testimony, as she stepped onto the deck where Appellant was working, he grabbed her and kissed her twice on the mouth. Despite Mrs. Conner's protests, Appellant proceeded to pull her inside the grocery store building, backing her up against a bar in the kitchen area and locking the door.

Once inside the grocery store, Mrs. Conner testified that Appellant shoved his right hand under her shirt and bra and began to squeeze her breast. Again, Mrs. Conner asked Appellant to stop. Moments later, Appellant attempted to undo her shorts, though she was able to pry one of her hands loose and stop him from so doing. Eventually, Appellant was able to work his hand underneath the leg of Mrs. Conner's shorts and insert his finger into her vagina. After a period of approximately twenty minutes, Appellant unlocked the door and told Mrs. Conner that she "was free to go." At this time, Mrs. Conner ran back to her trailer. Approximately ten minutes later, Appellant knocked on her door and asked to come in, stating that he wanted to see her in a bathing suit and wanted to see how she "tasted." Mrs. Conner refused to let Appellant enter the trailer.

After this encounter, Mrs. Conner called her sister-in-law, Tammy McManaway. While on the phone with Mrs. McManaway, Appellant loudly knocked on the door and tried to turn the door knob. Mrs. McManaway could hear these sounds and told Mrs. Conner to stay away from the windows and hide inside the closet. She also informed Mrs. Conner to call law enforcement.

Mrs. McManaway then proceeded to drive to the trailer. As she approached, she saw Appellant pulling out in his truck, passing her as she drove by. Once inside the trailer, Mrs. McManaway saw Mrs. Conner inside, visibly upset. Within a matter of minutes, Hancock Deputy Sheriff Ken Eubanks arrived. Sheriff Eubanks testified that Mrs. Conner appeared "very

distraught” and “very scared.”

Appellant was charged with two counts of first-degree sexual abuse, one count of false imprisonment, and one count of kidnapping. After a jury trial, Appellant was convicted of the two sexual abuse counts and the kidnapping count. The jury sentenced Appellant to 5 years on each of the sexual abuse counts and 15 years on the kidnapping count. The two 5-year sentences were ordered to run concurrent to one another and consecutively to the 15-year sentence for a total of 20 years. He now appeals the final judgment entered as a matter of right, Ky. Const. § 110(2)(b).

Appellant alleges two errors on appeal: (1) that he was entitled to a directed verdict on the kidnapping charge, as prosecution was precluded under the kidnapping exemption statute of KRS 509.050; and (2) that he was entitled to a directed verdict on the sexual abuse charges, as the Commonwealth failed to present sufficient evidence from which a reasonable juror could have found him guilty.

***Directed verdict under kidnapping exemption of KRS 509.050***

Appellant contends that he should have been granted a directed verdict as to the kidnapping charge because of the applicability of the kidnapping exemption statute, KRS 509.050. According to Appellant, the restraint of Mrs. Conner did not go beyond that which occurred incidental to the sexual abuse and, therefore, a conviction for kidnapping cannot stand. We agree.

KRS 509.050 provides, in part:

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.

This Court employs a three-prong test to determine when the kidnapping exemption statute applies. *Griffin v. Commonwealth*, 576 S.W.2d 514 (Ky. 1978). 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. *Id.* at 516. Essentially, “the appellant must jump through three hoops and the failure to jump through any one of the three hoops is a failure to establish his entitlement to the benefit of the exemption statute.” *Id.* Application of the kidnapping exemption statute is determined on a case-by-case basis. *Gilbert v. Commonwealth*, 637 S.W.2d 632, 635 (Ky. 1982).

In conjunction with the kidnapping charge, Appellant was charged with first-degree sexual abuse. First-degree sexual abuse is outside of the statute. See KRS 510.110. Therefore, Appellant satisfies prong one.

To satisfy the second prong, “the interference with victim's liberty must

have been concomitant to the commission of the underlying crime.” *Hatfield v. Commonwealth*, 250 S.W.3d 590, 599 (Ky. 2008). Mrs. Conner testified that, as soon as she approached Appellant and began speaking with him, he grabbed her and kissed her. At this point, the initial act of sexual abuse occurred. However, Appellant then proceeded to drag Mrs. Conner inside the old grocery store building and locked the door, presumably so the second act of sexual abuse could be “perpetrated in a more clandestine manner.” *Id.* at 600. Mrs. Conner was not restrained to achieve any separate objective. In addition, the restraint occurred “immediately with or incidental to” the commission of first-degree sexual abuse. Accordingly, Appellant satisfies the second prong.

Lastly, interference with the victim's liberty must not go beyond that which would normally be incidental to the commission of the underlying crime. This Court has interpreted the third prong to be read in conjunction with the second.

When read together it seems evident that the intent of the latter two prongs is to ensure that the means of restraint effectuated in committing the underlying crime are of such a nature that they are a part of, or incident to, the act of committing the crime itself and, as such, temporally coincide with the commission of the crime. If the deprivation of liberty segues into a more pronounced, prolonged, or excessive detainment, then such restraint should no longer be within the confines of the exemption statute and the accused should be held separately accountable for those actions.

*Id.*

From a review of the evidence, the grocery store building was a short distance—approximately five to ten feet—from the deck where the initial encounter occurred. In addition, Mrs. Conner testified that she was in the grocery store building for a period of about twenty minutes. Thus, it appears that the restraint was both brief in distance and close in time from the commission of the underlying offense. See *Timmons v. Commonwealth*, 555 S.W.2d 234 (Ky. 1977). The movement and restraint of Mrs. Conner occurred in order to commit another act of sexual abuse and did not go beyond the scope of attempting to achieve that objective. Appellant satisfies the third prong of the test and, thus, qualifies for the kidnapping exemption under KRS 509.050.

Because Appellant qualified for the exemption, it was unreasonable for the charge to have been placed before the jury. Thus, we find the trial court abused its discretion when it overruled Appellant's motion for a directed verdict on the charge of kidnapping pursuant to KRS 509.050. Therefore, we reverse that conviction.

***Directed verdict on sexual abuse counts due to insufficient evidence***

Finally, Appellant contends that he was entitled to a directed verdict on the sexual abuse counts, as the Commonwealth failed to present sufficient evidence for a reasonable juror to find him guilty. This Court has long held that “[o]n 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) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4-5 (Ky. 1983)).

The crux of Appellant’s argument is that the time frame for the alleged sexual abuse, approximately from 9:30 a.m. to 10:00 a.m., makes it impossible for the abuse to have occurred. Specifically, Appellant contends that during this time he had left the property to go home and retrieve an extension wrench. Additionally, Appellant states that two extension cords were running from the inside of the building to the outside, meaning the door could not have been locked. Due to this, Appellant contends that he was entitled to a directed verdict. We disagree.

From the evidence introduced at trial, it is clear that it was not unreasonable for the jurors to find Appellant guilty of the crimes charged. Mrs. Conner’s testimony alone constituted adequate evidence upon which a jury could determine Appellant’s guilt beyond a reasonable doubt. “The testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence.” *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002).

In order to sustain a conviction for sexual abuse in the first-degree, the evidence must show that the perpetrator “subjects another person to sexual contact by forcible compulsion.” KRS 510.110(1)(a). In *Combs v.*

*Commonwealth*, 198 S.W.3d 574 (Ky. 2006), this Court stated:

“Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.” KRS 510.010(7). The 1974 Commentary to KRS 510.010(7) explains that “sexual contact” includes “such acts as the manipulation of the genitals, digital penetration of the vagina, and non-consensual fondling of a woman's breast.” Professors Lawson and Fortune assert matter-of-factly that “[d]igital penetration of the vagina . . . is sexual abuse.” Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 11-6(a)(1), at 437 (1998).

*Id.* at 578.

Accordingly, the actions taken by Appellant, to which Mrs. Conner testified, were sufficient to constitute first-degree sexual abuse. Further, her testimony was not so “contradictory, or incredible, or inherently improbable” to defy belief. *Garrett v. Commonwealth*, 48 S.W.3d 6, 10 (Ky. 2001). As such, Appellant was not entitled to a directed verdict.

Based on the foregoing, Appellant’s convictions for the two counts of first-degree sexual abuse are hereby affirmed. However, Appellant's conviction for kidnapping is reversed. Thus, we remand this matter to the Hancock Circuit Court for re-sentencing.

All sitting. All concur.



COUNSEL FOR APPELLANT:

Albert William Barber, III  
225 St. Ann Street  
Owensboro, KY 42303

COUNSEL FOR APPELLEE:

Jack Conway  
Attorney General

Michael Louis Harned  
Assistant Attorney General  
Office of Attorney General  
Criminal Appellate Division  
1024 Capital Center Drive  
Frankfort, KY 40601-8204