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RENDERED: JUNE 21, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000059-MR

ROBERT ALLEN EDMONDS — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
NO. 09-CR-002040

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Jefferson Circuit Court jury found Appellant, Robert Allen Edmonds, guilty of two counts of first-degree rape, two counts of first-degree sodomy, and being a persistent felony offender in the second degree. For these crimes, he received consecutive sentences totaling sixty years' imprisonment. He now appeals as a matter of right, Ky. Const. § 110(2)(b), and asserts that the trial court erred by: (1) denying his motion for a directed verdict; (2) excluding evidence concerning the alleged victims' sexual histories, including his allegation that they were prostitutes; (3) allowing him to represent himself; (4) amending his indictment to correct a victim's name; and (5) excusing a juror for cause and declaring a mistrial. Finding no error, we affirm.

I. BACKGROUND

The facts surrounding the crimes in the case at bar are largely irrelevant to our analysis. In short, Appellant was convicted of raping and sodomizing two women[1]—EV in 2005, and HN in 2007. At trial, Appellant indicated it was his wish to represent himself, and he was allowed to do so. He claimed that, while he did engage in the sexual acts with his alleged victims, the acts were consensual. Further facts will be developed as required for our analysis.

II. ANALYSIS

A. Directed Verdict

At trial, Appellant made a motion for directed verdict, insisting that the Commonwealth failed to prove one of the elements (forcible compulsion) for each charged count of rape and sodomy. The trial court denied Appellant's motion, which Appellant alleges violated his due process rights. He argues that the trial court should have granted a directed verdict with respect to all rape and sodomy charges against him.

This Court outlined the standard by which a trial court should evaluate a motion for a directed verdict in *Commonwealth v. Benham*:

> [T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth

[1] He was also indicted for the 1999 rape of a third woman; however, this count was dismissed without prejudice.

> is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

816 S.W.2d 186, 187 (Ky. 1991).

For our purposes, "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, . . . then the defendant is entitled to a directed verdict of acquittal." *Id.* (*citing Commonwealth v. Sawhill,* 660 S.W.2d 3 (Ky. 1983)); *see also Beaumont v. Commonwealth,* 295 S.W.3d 60, 67 (Ky. 2009). Thus, "there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Benham,* 816 S.W.2d at 187-88. However, we reemphasize that an evaluation of the sufficiency of evidence depends on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Beaumont*, 295 S.W.3d at 68 (*citing Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

KRS 510.040 reads, in pertinent part: "(1) A person is guilty of rape in the first degree when: (a) He engages in sexual intercourse with another person *by forcible compulsion* . . . ." (Emphasis added.) Likewise, KRS 510.070 reads, in pertinent part: "(1) A person is guilty of sodomy in the first degree when: (a) He engages in deviate sexual intercourse with another person *by forcible*

compulsion . . . ." (Emphasis added.) Forcible compulsion is defined by KRS 510.010(2) as:

> [P]hysical 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. Physical resistance on the part of the victim shall not be necessary to meet this definition.

Appellant attempts to paint his victims as prostitutes whose objections were "not to the fact that they had sex with [him], but to the fact that they were not paid for that sex." He insists that because neither EV nor HN had torn clothes or physical injuries, his acts were clearly not committed through the use of forcible compulsion. The Commonwealth, however, presented sufficient evidence in both cases that Appellant engaged in rape and sodomy through forcible compulsion.

As to EV, she testified that Appellant jumped across the seat toward her, placed a hard object to her head, and told her if she screamed he would hurt her before "ramming" his penis inside her vagina. She further testified that she thought Appellant had a weapon, and did not attempt to fight back because of fear about what he held to her head. After raping her, Appellant pulled EV's head down, sodomized her, and ejaculated inside her mouth. EV told Appellant "no" numerous times to no avail.

Appellant claims that EV's testimony was not believable. He claims that the fact that she remained in the car and accepted a ride from him is inconsistent with her story that she feared Appellant may harm her. However, in spite of Appellant's contentions, witness credibility and the weight to give

testimony are matters for the jury; and the jury believed that Appellant raped and sodomized EV through forcible compulsion. The Commonwealth produced more than a mere scintilla of "evidence of substance" and it was not clearly unreasonable for a jury to find Appellant guilty of raping and sodomizing EV.

As to HN, she testified that Appellant ordered her to disrobe, grabbed her hand, and held her. When she did not take off her clothes, Appellant "snatched her panties" from under her skirt, leaned over her, told her to perform oral sex on him, and placed his penis in her mouth. After ejaculating inside her mouth, he shoved his penis inside her vagina and ejaculated again. HN testified that she did not, at any point, consent to having sex with Appellant.

Appellant insists that this testimony did not rise to the level of forcible compulsion. We disagree. HN testified that Appellant grabbed her hand and held her. When she did not comply with his demand to remove her clothes, he forcefully removed her underwear. The jury was free to judge HN's credibility for itself. They apparently believed her testimony that Appellant raped and sodomized her through the use of forcible compulsion.

A review of the evidence presented in this case clearly indicates that the trial court correctly determined that a reasonable juror could fairly find guilt beyond a reasonable doubt. The Commonwealth produced more than a mere scintilla of "evidence of substance" that Appellant raped and sodomized EV and HN through the use of forcible compulsion. *Benham,* 816 S.W.2d at 187-88.

Thus, the trial court did not err in denying Appellant's motion for a directed verdict.

B. Exclusion of Evidence

Appellant next argues that the trial court erred by excluding evidence that the acts of sexual intercourse and sodomy were consensual. However, Appellant fails to direct us to any evidence of consent he attempted to offer at trial; rather, he merely points out that the trial court would not allow him to refer to EV and HN as prostitutes.

Following the Commonwealth's objection, the trial court instructed Appellant that, pursuant to KRE 412[2] (also known as the "rape shield"), he

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[2] KRE 412 reads, in pertinent part:

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions:

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) any other evidence directly pertaining to the offense charged. . . .

would not be allowed to introduce any evidence pertaining to the victims' past sexual histories, including his allegations that they were prostitutes. Appellant now contends that his theory of the case was that HN and EV were prostitutes with whom he engaged in consensual sex, but refused to pay. He, however, provided no evidence of this alleged consent.

While the rape shield does provide exceptions in which the prior sexual conduct of an alleged victim is admissible, none of these apply in the case at bar.[3] For instance, Appellant does not seek to introduce evidence of a specific instance of sexual behavior that would explain semen or injuries. KRE 421(b)(1)(A). DNA testing showed his semen present in the cases of both women, and neither of the women claimed to have sustained any physical injuries. Further, he was not attempting to introduce specific instances in which he and his victims had engaged in prior consensual sexual activities in

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[3] Specifically, KRE 412 provides, in pertinent part:

(b) Exceptions:

> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
>
> > (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> >
> > (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
> >
> > (C) any other evidence directly pertaining to the offense charged.

an attempt to show that the acts were consensual on the dates for which he was charged with rape and sodomy. KRE 412(b)(1)(B). Nor did any of the evidence he sought to introduce directly pertain to the charged offenses. KRE 412(b)(1)(C).

Besides general references to the women as prostitutes, Appellant also specifically sought to introduce evidence that, *in addition to his DNA*, the semen sample from EV's panties contained the DNA of three other men. The trial court properly excluded this evidence, as the presence of other men's semen had no bearing on whether EV consented to engage in sexual intercourse and sodomy with Appellant. The evidence Appellant sought to introduce failed to fit into any of KRE 412's exceptions and therefore was properly excluded.

Appellant also claims that the trial court foreclosed his right to present a defense in violation of his due process rights by excluding this evidence. We disagree. While we follow the United States Supreme Court's pronouncement that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotations omitted),[4] we also note that "state and federal rulemakers have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials" because a "defendant's right to present relevant evidence is not unlimited." *U.S. v. Scheffer*, 523 U.S. 303, 309 (1998) (emphasis added). When an accused's right to present a defense "is

[4] *See also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.").

abridged by evidence rules that infring[e] upon a weighty interest of the accused and are *arbitrary or disproportionate* to the purposes they are designed to serve," this "broad latitude" is impermissibly exceeded. *Holmes*, 547 U.S. at 324 (internal quotation marks omitted) (emphasis added).

Appellant argues that his theory of the case was that EV and HN were prostitutes with whom he had consensual sex, but did not pay. He wanted to use this theory to make otherwise inadmissible evidence regarding the victims' past sexual encounters admissible. However, he fails to argue that our rape shield rule is either "arbitrary or disproportionate to the purposes [it is] designed to serve" as required by *Holmes*.[5] Furthermore, as we noted in *Mills v. Commonwealth,* 996 S.W.2d 473, 489 (Ky. 1999), "*Chambers* [*v. Mississippi,* 410 U.S. 284 (1973)] . . . does not hold that evidentiary rules cannot be applied so as to properly channel the avenues available for presenting a defense."[6] As a result, we cannot say that the trial court's ruling violated Appellant's right to present a defense.

C. Self-representation

Appellant next argues that the trial court erred when it allowed him to proceed pro se during his trial. In *Faretta v. California,* 422 U.S. 806,

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[5] *See also Fresh v. Commonwealth*, 2009-SC-000797-MR, 2011 WL 1642275 (Ky. April 21, 2011); *Gatewood v. Commonwealth*, 2009-SC-000644-MR, 2011 WL 2112566 (Ky. May 19, 2011); *Rapone v. Commonwealth*, 2010-SC-000172-MR, 2011 WL 5880911 (Ky. Nov. 23, 2011); *White v. Commonwealth*, 2010-SC-000626-MR, 2011 WL 6826230 (Ky. Dec. 22, 2011).

[6] *See also Fields v. Commonwealth*, 2009-SC-000435-MR, 2011 WL 3793149, at *12 (Ky. Aug. 25, 2011) ("[T]he 'right to present a defense' does not supersede the rules of evidence. Implicit in the accused's right to present a defense is that he do so within the bounds of the established evidentiary law.").

807(1975), the United States Supreme Court held that, subject to exceptional limitations, a State may not constitutionally "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." To force counsel upon an unwilling defendant "is contrary to his basic right to defend himself if he truly wants to do so." *Id.* at 817. However, in order for a waiver of the right to representation to be valid, a trial court must hold a *Faretta* hearing and ensure that the waiver is made knowingly, intelligently, and voluntarily. *See Iowa v. Tovar*, 541 U.S. 77 (2004); *McKaskie v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); *Faretta*, 422 U.S. 806; *Grady v. Commonwealth*, 325 S.W.3d 333, 341 (Ky. 2010); *Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009); *Commonwealth v. Terry*, 295 S.W.3d 819 (Ky. 2009). In *Terry*, while "reiterate[ing] that no script for the trial court is required . . . [when] a defendant seeks to waive the right to counsel," 295 S.W.3d at 825, we "note[d], with approval, the model *Faretta* hearing questions used in federal courts." *Id.* at 824.

In the case at bar, Appellant admits that the trial court held a *Faretta* hearing on his request to represent himself and "asked a number of questions, following this Court's opinion in *Terry* . . . ." At the conclusion of the thorough *Faretta* hearing, and after several warnings that the trial court thought Appellant was making a "grave mistake" by doing so, the trial court found that he was knowingly, intelligently, and voluntarily waving his right to counsel and choosing to represent himself. Even though Appellant stated that he wanted to "go solo," the trial court appointed standby counsel to assist him in the event

he changed his mind. *Faretta*, 422 U.S. at 834 n.4 ("Of course, a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.").

However, in spite of his acknowledgement that the trial court conducted his *Faretta* hearing in compliance with *Terry*, Appellant now argues that it erred in finding that he knowingly, intelligently, and voluntarily waived his right to counsel. We disagree, as the record shows that the trial court went above and beyond the threshold requirements of the law to ensure that Appellant made his decision to waive counsel and represent himself knowingly, intelligently, and voluntarily.

During the *Faretta* hearing, the trial court asked Appellant if he had ever studied law or represented himself. He responded that he had not. When the trial court inquired as to his knowledge of the Kentucky Rules of Evidence and the Kentucky Rules of Criminal Procedure, he displayed a lack of familiarity with both. Appellant informed the trial court that he had only completed the tenth grade, but insisted that he still had the right to represent himself, stating "I don't have to be no college graduate." The trial court warned Appellant that in spite of his lack of knowledge concerning the law and its rules and procedures, he would still be bound to follow them. The trial court also ensured that Appellant understood the sentences he could receive for each crime and the likelihood that he would be convicted of being a persistent felony

offender and how his sentence, even if convicted of only one of the charged crimes, could be life in prison. Appellant told the trial court that he believed he would receive such a sentence if represented by counsel, but that he would be cleared of all charges if he conducted his own defense. In spite of the trial court's numerous warnings that Appellant was making a "grave mistake" and a "terrible decision"—one that could result in him spending life in prison—Appellant insisted on "taking his chances" and exercising his right to self-representation.

Appellant's contention that he did not make a knowing, intelligent decision based on the fact that he was not familiar with the Kentucky Rules of Evidence and the Kentucky Rules of Criminal Procedure is misplaced. As noted by the United States Supreme Court in *Faretta*, Appellant's "technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." 422 U.S. at 836.

Appellant's claim, purporting to rely on footnote 46 in *Faretta*, that he should have been disqualified from self-representation based upon the fact that he was "unable to comply with relevant rules of procedural and substantive law" is also without merit. *Faretta* does not require a trial court to deny a defendant his right to self-representation based on a lack of knowledge of the law or its procedural rules. Even if Appellant's reliance on *Faretta* was sound, nothing in the record indicates that Appellant exhibited an inability to comply with the law or rules of procedure at any point during his trial.

Appellant's final contention is that his right to self-representation should have been denied because his decision was irrational, and he was therefore not competent to represent himself. The trial court ensured that Appellant proceeded with "eyes open" to the dangers inherent in self-representation, as required by *Faretta* and its progeny. To have forced counsel upon Appellant, even if the trial court determined it was for his own good, would have been in violation of his Sixth Amendment rights. *Id.* at 834 ("And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351 (Brennan, J., concurring))).

The trial court did everything within its power to ensure that Appellant's decision was knowing, intelligent, and voluntary. In spite of its many warnings, Appellant insisted upon exercising his right to represent himself. The trial court did not err in allowing him to do so.

D. Amended Indictment

Appellant next argues that the trial court erred by allowing an amendment to his indictment. The indictment initially charged Appellant with raping and sodomizing HN on June 19, 2007, and with raping EV on November 22, 2005, and sodomizing HN on this same date. The day before the trial began, the Commonwealth filed a motion to amend the indictment to correct the name of the alleged victim of the 2005 sodomy to EV. The trial court granted this motion and entered an order amending the indictment. When asked by the trial court, Appellant had no input as to the amendment.

Therefore, the indictment was amended to charge Appellant with sodomizing EV on November 22, 2005 rather than HN. Appellant claims that the trial court erred in amending his indictment and requests that this Court vacate his twenty-year sentence for sodomizing EV.

Appellant insists that this issue did not need to be preserved and could be raised at any time, citing to RCr 8.18,[7] which states, in pertinent part, "[l]ack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the proceedings." However, this reliance is misplaced in the current case. The indictment did not fail to charge Appellant with the offense of sodomy on November 22, 2005; rather, it charged him, but merely included the wrong victim's name. Nor did the trial court lack jurisdiction.

In the alternative, Appellant requests review for palpable error pursuant to RCr 10.26.[8] In order for an error in an indictment to rise to the level of

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[7] RCr 8.18 reads in full:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. *Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the proceedings.*

(Emphasis added.)

[8] RCr 10.26 reads:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and

palpable error, "there must be a 'manifest injustice resulting from the error' so substantial that absent the error there would be a 'probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Clark v. Commonwealth*, 267 S.W.3d 668, 679 (Ky. 2008) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 2 (Ky. 2006)). Furthermore:

> [E]rrors in an indictment are not strictly reviewed for technical violations, but are looked at to make sure that the defendant had fair notice and a fair trial. Indeed, RCr 6.10(3) references the idea that error or omission in an indictment shall not be grounds for reversal of a conviction if the error did not mislead a defendant to his prejudice.

Clark, 267 S.W.3d at 679.

In *Clark*, we dealt with a similar issue and found that the amendment to the indictment did not constitute palpable error. In that case, the indictment was amended to correct the name of the victim in one of the defendant's charges after the jury instructions were rendered. That defendant argued on appeal that this "amounted to being charged with wholly different offenses than those indicted," just as Appellant now argues. *Id.* However, we disagreed, holding that "the error was little more than clerical in nature, and such inadvertent mistake did not affect Appellant's substantial rights, nor was he prejudiced by such mistake." *Id.* at 680.

In the case at bar, the amendment had even less an effect on Appellant's substantial rights, as it occurred the day before trial even began (as opposed to

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appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

after jury instructions had been rendered, as in *Clark*). Just as was the case in *Clark*, Appellant's defense was not affected. In the present case, Appellant's defense was not that the acts did not occur, but that each of the alleged victims consented. In no way did amending the indictment to correct a clerical error involving the name of one of the victims cause Appellant to be "surprised, misled or otherwise unfairly prejudiced by the variance." *Id.* For these reasons, we hold that the court did not commit palpable error by ordering the amendment to the indictment.

E. For-cause Strike/Mistrial

Appellant's final argument is that the trial court erred in excusing a juror for cause and declaring a mistrial after the selection of the jury. After voir dire was completed and the jury selected, but not sworn, one of the thirteen selected jurors approached the bench. He informed the trial court that he had been accused of rape forty-six years earlier, but that the charges were dismissed. On initial questioning by the trial court, the juror responded that he did not think his prior experience would affect him, as the facts in his case were not similar in any manner to Appellant's case. When the Commonwealth asked the juror to "give some detail into the situation," the juror went on to say that, in his case, the allegations arose from sex acts that were consensual. The trial judge then, stating that he did not know what the defense in this case would be, asked the juror "[i]f the defense is that it was all consensual, will you be able to separate yourself from your own situation such that you can make a

fair and impartial determination in this case?" The juror answered, "I'm not sure, judge. I can't, I really can't say yes or no on that."

The Commonwealth made alternative motions for the trial court to either strike the juror for cause, or to strike the entire panel, as only thirteen jurors had been selected and striking one juror would leave no alternate. Appellant's standby counsel asked Appellant if he was objecting to the Commonwealth's motion to strike the panel and he responded "no, I agree with [the Commonwealth]." The trial court stated that it would prefer just to strike the one juror and proceed with the twelve remaining on the panel. Appellant, however, responded that he wanted to "start all over," as striking the juror would leave only one African American on the jury. The trial court asked Appellant to further clarify his position, and Appellant stated that if the trial court was going to strike the juror, he wanted to start over the next day with another panel.

Appellant objected to striking the juror for cause when his standby counsel asked him if he wanted the individual juror struck. The court, however, never ruled on this objection and Appellant did not pursue a ruling. Standby counsel then stated that he believed Appellant objected "to going forward with twelve today." The trial court agreed that they would "start over tomorrow." Appellant's standby counsel and the Commonwealth agreed that the panel would have to be selected from an entirely new group of jurors.

While Appellant did object to the trial court striking the juror for cause, the trial court did not rule on his objection. "[I]f an objection is made, the

party making the objection must insist that the trial court rule on the objection, or else it is waived." *Bell v. Commonwealth*, 473 S.W.2d 820, 821 (Ky. 1971). Therefore, Appellant waived his objection and failed to preserve this issue for our review. As for the trial court excusing the original jury panel, Appellant not only failed to object to this at trial, but actually *requested* it. Therefore, we find Appellant's allegations in this regard to be without merit.

III. CONCLUSION

For the foregoing reasons, we affirm Appellant's convictions and sentences.

All sitting. All concur.

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