RENDERED: JULY 3, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000052-MR

MARCUS SHANTEZ FRIAR APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 01-CR-00010

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the McCracken Circuit Court after a jury found appellant guilty of first degree rape and resisting arrest. Appellant contends that the court erred (1) by failing to find that it lacked subject matter jurisdiction, (2) by permitting certain statements to be introduced into evidence, (3) by permitting the victim to testify concerning psychological trauma, and (4) when

instructing the jury. For the reasons stated hereafter, we affirm.

The commonwealth adduced evidence to show that appellant, a fifteen-year-old, entered the victim’s car without permission and while holding his hand under his shirt as if he had a gun. Appellant directed the victim to drive to another location, where he forced her to leave the car and to proceed down an alley before he raped her. According to the victim, appellant threatened several times to shoot and kill her if she did not cooperate or if she told anyone of the assault. After appellant left the scene, the victim obtained assistance at a nearby house.

Appellant eventually was apprehended and charged with first degree rape, first degree sodomy, and resisting arrest. After a hearing the charges were transferred from the juvenile division of district court to the circuit court for a jury trial. Appellant’s defense at trial was that the victim concocted the rape story only after he refused to pay her for consensual sex. Nevertheless, the jury convicted him of first degree rape and resisting arrest, and he was sentenced to fifteen years’ imprisonment. This appeal followed.

First, appellant contends that the circuit court erred by failing to find that it lacked subject matter jurisdiction to hear the case against him. We disagree.

KRS 635.020(4) requires that a juvenile who is charged with using a handgun in the commission of a felony "shall be transferred to the Circuit Court for trial as an adult if, following a preliminary hearing, the District Court finds probable cause to believe" that the juvenile was over fourteen, that he or she committed a felony, and that a "firearm was used" in the felony's commission. (Emphasis added.) Establishing probable cause requires more than a showing of bare suspicion, but less evidence than that needed to support a conviction. 8 Leslie Abramson, Kentucky Practice, CR 18.20 (3d ed. 1997). See, e.g., Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984).

Here, it is undisputed that the victim indicated to the investigating officer that appellant held his hand under his shirt as if he had a gun, that he threatened to shoot her if she did not cooperate, and that he threatened to "pull Glocks" on her if she reported the offense. Although the evidence ultimately failed to show that a gun was used in the commission of the offense, we cannot say that the district court erred by preliminarily determining that there was probable cause to believe that a firearm was used and by transferring appellant to the circuit court for trial as an adult. KRS 635.020(4). It follows that the circuit court did not err by failing to find that it lacked subject matter jurisdiction herein.

Next, appellant contends that the circuit court erred by permitting the commonwealth to introduce certain statements into evidence as excited utterance exceptions to the hearsay rule. We disagree.

KRE 803(2) provides an exception to the hearsay rule for a statement made as an excited utterance, which is defined as one which relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." As stated in Souder v. Commonwealth, Ky., 719 S.W.2d 730, 733 (1986),

> The general rule as to when an out-of-court statement should be admitted under the spontaneous statement exception to the hearsay rule is well set out in Lawson, Kentucky Evidence Law Handbook, 8.60(B) (2d ed. 1984). Lawson states:
>
> > "A 'spontaneous' statement is one uttered under the stress of nervous excitement and not after reflection or deliberation. Whether or not a given statement is 'spontaneous' depends upon an evaluation of the particular circumstances under which it was made, with the following circumstances most significant: (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving."

> Whether or not a particular statement qualifies as "spontaneous" must "depend upon the particular circumstances in each case." Consolidated Coach Corp. v. Earl's Adm'r, 263 Ky. 814, 94 S.W.2d 6, 8 (1936). Thus, to a certain extent, because the circumstances in each case are different, no case is exactly in point as precedent. Deciding whether the circumstances in which a particular statement was made qualify as (sufficiently) "spontaneous" to admit the evidence, is sometimes an arguable point, and when this is so the trial court's decision to admit or exclude the evidence is entitled to deference.

See also Lawson, Kentucky Evidence Law Handbook, 8.60(III) (3d ed. 1993). In Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 470 (1998), the supreme court reaffirmed the use of these criteria, noting both that they operate as "a guideline for consideration" rather than as "a true-false test for admissibility," and that the offering party must show that when the hearsay statement was made, "'the declarant was under the stress of excitement caused by the event or condition.'" In Cook v. Commonwealth, Ky. App., 351 S.W.2d 187, 189 (1961), a rape victim's statement was found to be an admissible excited utterance, even though it was made one hour after the crime occurred, where

> [t]he prosecutrix lived in a remote section and made complaint to her husband immediately upon his arrival home. She was at that time visibly nervous and excited, and made complaint at the first opportunity following the alleged offense. Under the circumstances the passage of one hour's time would not be sufficient to exclude her statement from the exception afforded by the res gestae doctrine. On the other hand, her

> statement made to the police officer six hours later is clearly not a part of the res gestae, and under the authority stated above is inadmissible.

See also Robey v. Commonwealth, Ky., 943 S.W.2d 616, 619 (1997).

Here, despite appellant's contention that there was insufficient independent evidence of a rape rather than consensual conduct, the record shows that the victim sought assistance at a nearby house immediately after the rape. The house's occupant testified that the victim appeared to be scared, and that she was shaking and crying uncontrollably when she described what had happened. Like the witness in Cook, the witness was the first person who spoke with the victim after the attack, and the victim showed visible signs of still being "under the stress of excitement caused by the event or condition." KRE 803(2). Under these circumstances, the trial court did not abuse its discretion by permitting the witness to testify regarding the victim's statements pursuant to the excitable utterance exception. In any event the evidence was admissible to rebut appellant's contention that the victim fabricated the charges against him only after he refused to pay her for consensual sexual activity.

Next, appellant contends that the trial court erred by permitting the victim to testify concerning the psychological trauma which she suffered as a result of the rape. Although

appellant argues on appeal that the testimony was inadmissible for the same reasons that expert testimony regarding the child sexual abuse accommodation syndrome is inadmissible, the videotape record shows that this ground was not raised below. Instead, appellant contemporaneously objected only on the grounds that the testimony was prejudicial and irrelevant. Hence, this matter was not preserved for review and it will not be further considered on appeal.

Finally, appellant contends that the trial court erred by refusing to provide the jury with his tendered instruction regarding the presumption of innocence. We disagree.

The court instructed the jury as follows:

> The law presumes a Defendant to be innocent of a crime and the Indictment shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

This instruction is essentially identical both to the instruction which is set out in RCr 9.56(1) for use in every criminal jury trial, and to the model instruction set out in 1 Cooper, Kentucky Instructions to Juries (Criminal), Sec. 2.02 (1999). Our courts have repeatedly upheld this instruction as being in compliance with constitutional requirements concerning the presumption of innocence in criminal cases. See, e.g.,

Mills v. Commonwealth, Ky., 996 S.W.2d 473, 491 (1999); Grimes v. McAnulty, Ky., 957 S.W.2d 223, 231 (1997) (dissenting opinion).

Although appellant asserts that Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), compels the model instruction to be modified to require a more explicit jury determination of each and every element of a charged crime, we are not persuaded that Apprendi establishes a new standard for instructing juries regarding the presumption of innocence. Instead, our review of the case shows that it merely reaffirms the standards set out in cases such as In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978), which serve as the underlying basis for our existing model instruction. See Grimes, 957 S.W.2d at 231. In any event, because the record shows that the elements of each charged offense were adequately set out in the other instructions, we conclude that there is no merit to appellant's argument and that the court did not err by failing to give his tendered instruction to the jury.

The court's judgment is affirmed.

ALL CONCUR.

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