

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000219-MR

JAMES G. BIXLER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
ACTION NO. 96-CR-01073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE. James G. Bixler (hereinafter appellant) was convicted in the Fayette Circuit Court following a jury trial. He received a fifteen year sentence and now appeals to this court as a matter of right. On appeal, he argues that the Fayette Circuit Court was not the correct venue for this prosecution. In addition, he argues that there was insufficient evidence to establish forcible compulsion in this case, and that the prosecution made improper references to his failure to test

the forensic evidence. We have reviewed the claims of error in light of the record in this case, and we affirm appellant's conviction.

The Commonwealth's evidence in this case was that in the evening of May 29, 1993, the victim, Melissa Brown, went to Lexington with a friend. Ms. Brown went to a club and tried to page a male friend who was supposed to be inside the club; she was underage and could not go in herself. She was unsuccessful and returned to her car to find that her friend had left in her car. Appellant and another man called her over to their car. She told them that she had been left there by her friend, Dina, and appellant claimed to know Dina. They told her that they would drive her around the area to look for her friend. Ms. Brown willingly got into the backseat of the car with them.

They drove around for a time, and then the man with appellant said he wanted to go. They went to an auto body shop and appellant dropped him off there. Ms. Brown got in the front seat and she and appellant drove around some more. Appellant suggested that they go to the club in Frankfort where he said he had met Dina because he knew she went there sometimes. They left the Lexington city limits.

As they drove, Ms. Brown fell asleep. When she awoke, her seat had been reclined and the car was stopped. She found that the car was parked in a field off of a dirt road and

surrounded by a lot of trees. Appellant was climbing onto Ms. Brown's side of the vehicle. Appellant told Ms. Brown to take off her shorts; she would not. Ms. Brown started to cry and tried to push appellant off. He grabbed her hands and held them over her head with one of his hands. Appellant said to her that if she stopped crying it would only take a few minutes and if she did not it would take all night. While appellant held her hands over her head, appellant took off Ms. Brown's shorts and underwear. Appellant had intercourse with her. Ms. Brown testified at trial that if appellant had not forced her, she would not have had sexual intercourse with him. Afterward, she asked him to take her back to the club, but he drove her back to the body shop in Lexington. Once there, Ms. Brown ran off and called the police from a pay phone. She returned to the body shop with police, who arrested appellant.

Appellant's first argument is his allegation of improper venue. The general rule is that the venue of criminal prosecutions is in the county or city in which the offense was committed. Kentucky Revised Statutes (KRS) 452.510. Moreover, slight evidence is sufficient to sustain the venue, and slight circumstances from which the jury might infer the place where the crime was committed are considered sufficient. Commonwealth v. Duvall, 220 Ky. 771, 776, 295 S.W. 1047 (1927). Ms. Brown testified at trial that she did not know where the rape took

place. From her testimony, it is possible that the rape took place in a neighboring county rather than Fayette. Appellant argues that the Commonwealth failed to establish the proper venue because the evidence did not show that a rape occurred in Fayette County.

The Commonwealth points to two other venue statutes as authority for the prosecution in Fayette County. First, KRS 452.550 provides that, "Where an offense is committed partly in one and partly in another county, or if acts and their effects constituting an offense occur in different counties, the prosecution may be in either county in which any of such acts occurs." Appellant disagrees that KRS 452.550 is applicable because he says the Commonwealth did not establish that any offense was committed in Fayette County.

The second part of the statute authorizes venue if "acts and their effects constituting an offense occur" in the counties. It does not require that the offense itself have been committed in both counties, or that an identifiable or chargeable offense is committed in each county. In Moore v. Commonwealth, Ky., 523 S.W.2d 635 (1975), the defendant alleged that venue was not proper in Jefferson County when a rape was alleged to have occurred in Oldham County. The evidence was that one of the victims said the defendants abducted her in Jefferson County and took her to Oldham County where they forced

her to have sexual intercourse with them. The Court held that the "initial abduction was a sequential part of carrying out the purpose of having carnal knowledge of their victim," and so the prosecution could have been in Jefferson or Oldham County. Id.

In this case, the Commonwealth contends that appellant's act of luring the victim into his car by claiming to know her friend and offering help was a sequential part of carrying out the crime in this case. We agree. To conclude the luring of Ms. Brown into the vehicle and gaining her trust was a sequential part of the offense, it does not have to be shown that appellant could have been charged with a crime at that point.

We also disagree with appellant that this case is distinguishable from Moore simply because there was no "abduction" in the case at bar. While there was no violence involved, appellant took the victim away with him by false assurances. The act of picking up and driving the victim in Fayette County was a sequential part of the offense in this case, and venue was properly in Fayette County.

We also agree with the Commonwealth that the second venue statute, KRS 452.620, applies to make venue proper in Fayette County. KRS 452.620 states that, "When there is a reasonable doubt as to whether the offense was committed in the county in which an indictment has been returned or in some other

county, the venue of the prosecution is in the county in which the indictment was returned." The presumption is that a trial was held in the appropriate county. Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1993). Under this statute, we agree that venue was certainly established in this case. There was no error.

Appellant's next claim of error is that there was insufficient evidence of rape in the first degree because the Commonwealth did not establish the element of "forcible compulsion." According to KRS 510.010(2), "forcible compulsion"

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

Appellant asserts that the Commonwealth never established that Ms. Brown was placed in fear of appellant. The Commonwealth responds that it was enough to show that the intercourse was physically forced on her, which was proved in this case.

If the victim was subjected to intercourse by physical force, the prosecution does not also have to show that the victim was in fear of death, physical injury, kidnap or another offense. Under the statute, the Commonwealth may prove forcible compulsion one of two ways: 1) by physical force or 2) threat of

physical force, express or implied, which places a person in fear of death, etc. Thus, we do not agree with appellant's assertion that in each case charging rape in the first degree the victim's fear must be shown.

In Hayes v. Commonwealth, Ky., 58 S.W.3d 879 (2001), the Kentucky Supreme Court found that there was sufficient evidence of forcible compulsion to support a conviction for rape in the first degree. The Court recounted the evidence presented by the victim to show forcible compulsion, in which there was no mention of the victim being placed in fear. The evidence showed that the defendant "attacked her and continued to attack her after she requested that he stop" and "slammed her head against the steering wheel and told her to shut up." Id. at 883. The court stated that "obviously" there was sufficient evidence of forcible compulsion. Id. Physically forcing the victim to submit establishes forcible compulsion.

We are aware that in Salsman v. Commonwealth, Ky., 565 S.W.2d 638 (1978), the Court stated, "Forcible compulsion places the victim in fear of death or physical injury." However, it is apparent from the context of the opinion that the court was speaking of the second means of proving forcible compulsion -- that of the victim being placed in fear. The court also noted in Salsman that at common law the offense of rape constituted sexual intercourse with a woman by force against her will.

Thus, we have no hesitation in stating that the element of "forcible compulsion" is satisfied by proof that the victim was physically forced to have sexual intercourse against her will, regardless of whether she was placed in fear thereby.

Thus, it was sufficient if the Commonwealth established that the rape was committed by physical force in this case, with no requirement of fear of death or physical injury. We conclude that the Commonwealth's evidence of forcible compulsion was sufficient. Ms. Brown testified that appellant held her hands over her head with one of his. On cross-examination, she testified that appellant kept her hands over her head while he pulled her shorts off. She said he was lying on top of her. We find sufficient evidence that she was compelled by force from her testimony. Therefore, we affirm appellant's conviction for rape in the first degree.

Finally, appellant argues that the Commonwealth was improperly allowed to make an adverse inference from the fact that the defense did not ask to independently test any of the materials containing DNA. He acknowledges that the claim of error is unpreserved by objection in the trial court, but he asks that we review the issue as one of substantial error pursuant to RCr 10.26. He argues that the Commonwealth's statements along these lines impinged on his right to require the Commonwealth to prove its case.

We decline to review this issue as one of palpable error. We do not agree that appellant has shown that it was error for the Commonwealth to elicit such evidence. In opening statement, counsel for appellant asserted that "when the defense requested an opportunity to have an independent lab test it, they were told, well, there's nothing left for you to test, you're going to have to trust us." The defense asked the jury to consider that during the trial. In response, the Commonwealth asked its expert whether there was material available for defense testing and asked the defense expert if he had done any testing. We believe that the defense opened up this can of worms and should not be heard to complain because the Commonwealth provided an explanation. Therefore, we do not consider the arguments appellant makes about whether improper inferences were raised.

For the foregoing reasons, we affirm appellant's conviction for rape in the first degree in the Fayette Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

John Palombi  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

BRIEF AND ORAL ARGUMENT FOR  
APPELLEE:

Wm. Robert Long, Jr.  
Assistant Attorney General  
Frankfort, Kentucky