

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001361-MR

DANNY LOONEY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 01-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Danny Looney appeals from his conviction for rape in the first degree and two counts of use of a minor in a sexual performance, for which he was sentenced to a total of ten years' imprisonment. Looney argues on appeal that there was insufficient evidence to support the verdict, that the court erred in rulings concerning the admissibility of certain photographs, and that issues regarding a juror who had a bias

against a potential defense witness were mishandled by the trial court. We affirm.

Looney, who is 59 years old, was accused of the forcible rape of a 16 year-old girl, V.Y., as well as of taking nude Polaroid pictures of the victim on two different occasions, including immediately following the alleged rape. Looney picked up V.Y., and Henry Cleaver, a man believed to be in his late teens or early twenties, at the victim's house on the afternoon of the rape. The three of them went to the site of a torn-down house to salvage materials from the house. Allegedly, the appellant left Cleaver and drove the victim behind a school building in a rural area and coerced her into having intercourse with him. Prior to the rape, the victim testified that she saw the appellant lay a gun on the floorboard of the car. V.Y. testified that after the alleged rape, Looney had her pose in the back seat of the car and took pictures of her.

V.Y. testified that after they returned to the torn-down house to pick up Cleaver, they went to Looney's house, where V.Y. and Cleaver had consensual sex. V.Y. testified that she had been using marijuana that day. She also testified that on a prior occasion, Looney had given her drugs in exchange for her posing nude for pictures on a tanning bed.

The next day, the victim's mother, Felicia Sword, became aware of the photographs and confronted Looney about

them. Sword testified that when she found out about the rape from her daughter, she had her daughter go to the hospital for an examination, but V.Y. testified that she had cleaned herself off in order to protect Cleaver. Prior to trial the parties stipulated that the semen found on the victim was not that of the appellant, and that there was no physical evidence with regard to Looney.

At the trial, appellant sought admission of several photographs which depicted V.Y. and Henry Cleaver engaged in intercourse. The court initially indicated that it would not admit the photographs, as they were irrelevant, and the court instructed counsel not to refer to the photographs during voir dire. The court offered the defense an opportunity to introduce the photographs by avowal, but the defense declined to do so at that time. Later, during the trial, the victim admitted to intercourse with Cleaver shortly after the alleged rape. On the second day of trial, the Commonwealth stated that it had no objection to the photographs if the appellant testified and provided the basis for their admission. The defense then stated that it would not seek the admission of the photographs at that time. Just prior to the appellant testifying, at another bench conference, the Commonwealth withdrew objections to the photographs, but the defense stated that it had decided "not to

go into this" with the appellant, and did not seek to introduce the pictures.

Also during the trial, an irregularity with a juror arose after the lunch break on the first day. A juror saw a potential witness in the hallway and brought it to the court's attention that she had a strong bias against that particular witness. The juror was asked about any feelings she might have toward the witness's wife, and she responded that she had no bias toward her. The court denied the defense motion to excuse the juror for cause and declined to grant a mistrial. The wife of the witness testified while the witness himself did not; the testimony given centered on an alleged attempt to pin the rape on the witness and not Looney. The witness's testimony was not introduced by avowal. The juror was ultimately excused from service by the court since she had been selected as an alternate by the court.

The jury convicted appellant of the charges and sentenced him as described above. This appeal followed.

Looney first argues that the evidence presented was insufficient to support a guilty verdict. He points out the inconsistencies in the victim's testimony and her behavior after the alleged rape, and argues that no reasonable juror could believe that the victim had been coerced into sexual intercourse. The standard for review of a claimed insufficiency

of evidence is found in Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979), adopted in Kentucky in Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). In considering this issue, we must resolve conflicting inferences in favor of the Commonwealth, and decide if a rational jury could have found the appellant guilty beyond a reasonable doubt. We conclude that this standard is not met in this case. The testimony of the witnesses place the parties close together before and after the alleged rape, and Henry Cleaver's testimony that the victim and the appellant went off together in his car just prior to the alleged rape supports the victim's version of events. Likewise, the fact of the photographs being in appellant's possession coupled with the testimony of Felicia Sword and the victim supports the conviction for use of a minor in a sexual performance. Appellant asks us to do something we are not permitted to do, weigh the credibility of the witnesses and substitute our judgment for that of the finder of fact. We decline to do so, and leave the verdict undisturbed.

With respect to the issue of the photographs, we hold that the court's rulings did not compromise the defense's ability to present its case. The photographs would have been mere cumulative evidence, in light of the victim's admission on the stand to a sexual relationship with Henry Cleaver. The defense was able to support its theory that the rape never

occurred and that the victim only had sex with Henry Cleaver that day through cross-examination, and again the admission of the photographs would be mere cumulative evidence. We further note that the court's rulings were not an obstacle to the admission of the photographs, and that the defense had an opportunity to introduce the pictures and declined to do so as a matter of trial strategy. Accordingly, the court's rulings were not erroneous and no prejudice resulted.

Appellant complains that the photographs that were introduced at trial, allegedly taken by Looney of the victim prior to the rape, were not provided to the defense with the date 1/7/2001 written on the back. The defense was instead given a scanned copy on a computer disk, and the originals were available for inspection at the Commonwealth's Attorney's office. The appellant's argument centers on his lack of awareness of the date on the back. We believe that the appellant was not prejudiced by the Commonwealth's failure to inform him of the dates; the photographs were always available in the Commonwealth's office and the indictment did not specify January 7, 2001, as the date the photographs were taken, but a range of dates. The appellant is not entitled to relief based on the omission of the dates in the discovery provided to appellant.

During the deliberations, the jury asked a question about the age of consent, which is not relevant in cases of rape in the first degree. The appellant speculates that the jury misapplied the instructions and even argues that the jury intended to convict him of rape in the third degree. The court responded to the jury's question in writing, stating that "the Court has given you instructions as to the law that applies to this case," indicating that age of consent was not relevant to their deliberations. The record of the in-chambers conference regarding the question is not part of the record on appeal; and under Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990), we must assume that the record supports the court's decision with respect to the jury question. Further, we decline to engage in speculation regarding the possible thought processes of the jury in this matter. Jackson v. Commonwealth, Ky., 20 S.W.3d 906 (2000).

Lastly, with respect to the issue of the juror with an acknowledged bias against a potential defense witness, we conclude that no prejudice to the appellant occurred. Appellant was able to present his theory through the testimony of an alternate witness, and the juror in question ultimately did not participate in deliberations. The court did not abuse its discretion by refusing to grant a mistrial or to excuse the juror for cause when the problem came to light. Caldwell v.

Commonwealth, Ky., 634 S.W.2d 405 (1982), Commonwealth v. Scott,
Ky., 12 S.W.3d 682 (2000).

For the foregoing reasons, the judgment of the Pike
Circuit Court is affirmed.

ALL CONCUR.

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