

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002143-MR

BRIAN MOFFITT

APPELLANT

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 01-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE. Appellant Brian Moffitt was convicted in Livingston Circuit Court of kidnapping an eleven-year-old girl, B.C., and sentenced to fifteen years' imprisonment. He appeals as a matter of right on the grounds that the trial court erred in denying his motion for a directed verdict, in excluding evidence of a "911" call made by B.C.'s mother, in refusing to strike a juror for cause, and for denying a motion to allow the

jury to visit the scene of the kidnapping. We disagree with each argument and hence, affirm.

On July 14, 2001, B.C. went across the street from her home in Paducah, Kentucky, to the house of Nancy Ali and Kevin Croft. B.C. decided to spend the night at the Ali-Croft house because Nancy's young cousin Kayla was staying there and the two girls were friends. The appellant, Moffitt, was a friend of Kevin Croft's, and was also at the house. He and Croft had been drinking heavily. Croft eventually passed out in the bedroom. Moffitt watched TV in the living room with Nancy Ali, B.C., Kayla, and Nancy's son, Clayton. At around midnight, Nancy Ali went to bed. Moffitt slept on the living room couch; Clayton slept on the living room floor; and Kayla and B.C. slept on the living room love seat.

B.C. testified that she was sleeping upright on the love seat when she felt Moffitt's hand on her mouth. He told her that if she didn't shut up, she would get hurt. They went outside and got into Moffitt's car. B.C. crouched down because he told her to do so and because his hand was on her head. Once they had driven past her house, she testified that she was permitted to sit up. As they were leaving, they were observed by a child, Maco Vogt, who alerted B.C.'s uncle, Michael Ledbetter. Vogt and Ledbetter were both spending the night at B.C.'s parents' house. Ledbetter unsuccessfully chased the car

on foot. Moffitt shouted and made an obscene gesture at the onlookers as he drove away. B.C. stated that she and Moffitt drove around downtown Paducah and then to a gravel road in Livingston County where she claimed Moffitt raped and sodomized her. He then dropped her off at Owen's Cleaners, which has an alley that leads to the back of the Ali-Croft house. B.C. also testified that although Moffitt did not threaten her, he did warn her not to tell anyone what had happened. She then ran to her home, where her family, friends and neighbors were outside looking for her.

Moffitt was charged with first-degree rape, first-degree sodomy, and kidnapping. Following a jury trial, Moffitt was found not guilty of rape or sodomy, but guilty of kidnapping.

The jury was instructed that intent to commit a felony was an element of kidnapping. The jury instruction regarding the kidnapping charge stated in relevant part:

You will find the Defendant guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this County on or about July 15, 2001, and before the finding of the indictment herein, the Defendant, Brian Mason Moffitt, restrained [B.C.] by forcibly removing her from her home and taking her to and keeping her in Livingston County by force and intimidation;

B. That the restraint was without [B.C.]'s consent;

AND

C. That in so restraining [B.C.] it was the Defendant's intention to accomplish or advance the commission of Rape, First Degree, and/or Sodomy, First Degree.

Because the jury did not find him guilty of rape or sodomy, Moffitt argues that the verdict of guilty on the kidnapping charge was inconsistent and that the trial court consequently erred in denying his motion for a directed verdict.

The jury instruction clearly stated, however, that the required element was **intent** to commit a felony, not the actual commission of a felony. The instruction tracked the kidnapping statute, which states in part: "A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is . . . [t]o accomplish or to advance the commission of a felony" KRS 509.040(1)(b).

In a case involving an appellant who challenged his conviction for kidnapping, rape, and murder as a violation of double jeopardy, our Supreme Court stated:

The offense of kidnapping was complete when [the appellant] restrained the victim against her will with the intent to commit a felony. KRS 509.040(1)(b). The question is not whether he actually committed a felony but whether he intended to do so at the time he unlawfully restrained the victim. . . . Rape was unnecessary to complete the kidnapping. . . . Clearly rape and

kidnapping are two separate criminal offenses.

Bedell v. Commonwealth, Ky., 870 S.W.2d 779, 782 (1993), as modified on denial of reh'g (1994).

The same reasoning is applicable to the case at hand, and it was not therefore inconsistent of the jury to find Moffitt not guilty of rape or sodomy, but guilty of kidnapping.

Moffitt further argues, however, that since the jury found insufficient evidence to convict him of rape or sodomy, it could not possibly have found sufficient evidence of intent to commit either offense. He raises the following evidence as proof that there was no intent to commit rape or sodomy: no one heard Moffitt force B.C. to leave the house; B.C. changed from her nightclothes into her regular clothes before they left; Maco Vogt testified that he saw B.C. walking ahead of Moffitt to his car and that she remained in the car and did not try to escape when Moffitt returned to the house to get his car keys; rather than trying to leave surreptitiously, Moffitt shouted and gestured at Michael Ledbetter as he drove away; and finally, when B.C. was returned to Owen's Cleaners, it initially appeared that she was making her way back to the Ali-Croft house. When she saw a crowd at her parents' house, she went there instead.

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

In viewing the evidence as whole, it was not unreasonable for the jury to find that Moffitt intended to commit a felony. He approached B.C., a young child, very late at night as she was sleeping on the sofa at a friend's house, he put his hand over her mouth and told her not to say anything, he pushed her head down in the car, and he drove her through the town and then to a remote area where he stopped the car. Moffitt seems to suggest that because there is evidence that he did not try to leave surreptitiously with B.C., and B.C. did not openly and strenuously resist him, he could not have intended to commit or advance the commission of a felony against her. We do not agree that the jury was unreasonable in rejecting such an interpretation, particularly in light of B.C.'s age and the evidence that Moffitt had been drinking heavily.

Moffitt's second argument concerns the trial court's denial of a motion by defense counsel to play the "911" tape of B.C.'s mother telephoning the police. Moffitt maintains that the tape shows that the victim's mother was "very calm and collected" when she called the police, and that the tape was therefore relevant evidence showing no one at the time of the

incident felt that a kidnapping had occurred. B.C.'s mother did not testify at trial.

"It is well settled that the admission of tape recordings at trial rests within the sound discretion of the trial court.'" Johnson v. Commonwealth, Ky., 90 S.W.3d 39, 45 (2002), (quoting United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983)). The trial court excluded the "911" tape recording on the grounds that it was being introduced as an opinion as to whether the crime had occurred.

"[A] witness generally cannot testify to conclusions of law." Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 32 (1998), cert. denied, 525 U.S. 1153, 119 S. Ct. 1056, 143 L. Ed. 2d 61 (1999). "The issue of guilt or innocence is one for the jury to determine, and an opinion of a witness which intrudes on this function is not admissible, even through a route which is, at best, 'back door' in nature." Nugent v. Commonwealth, Ky., 639 S.W.2d 761, 764 (1982). See also Meredith v. Commonwealth, Ky., 959 S.W.2d 87, 92 (1997) (reversible error to introduce contents of non-testifying person's letter containing opinion about defendant's guilt.)

Although the tape recording may have been technically admissible under one of the hearsay exceptions, we see no abuse of discretion on the trial court's part in excluding it because it was being offered for the improper purpose of demonstrating

the opinion of B.C.'s mother as to whether a crime had taken place.

Moffitt's third argument concerns the trial court's refusal to strike a prospective juror for cause. During voir dire, defense counsel informed the potential jurors that the evidence would show that Moffitt had been drinking and that he subsequently drove around with an eleven-year-old in his car. He then asked whether any juror felt so strongly about drinking and driving that he or she would automatically convict Moffitt on that basis alone. One juror admitted that she felt strongly about drinking and driving and that this knowledge would affect her judgment of Moffitt. Although her responses in the record are almost inaudible, she appears to have agreed with defense counsel's statement that her knowledge of the DUI would affect Moffitt's credibility and she might be less likely to believe what he had to say. The trial court cautioned the jurors that uncharged misconduct could not be used to convict Moffitt. The court stressed that it was important that the jury not be diverted by other things, such as the DUI, for which Moffitt was not being tried. The court then asked the potential juror whether the fact that Moffitt had consumed a lot of alcohol and drove with a child in the car would cause her, in and of itself, divorced of any other evidence, to find him guilty of the

charges. Although her response is not audible, the court appeared satisfied by it.

In a subsequent bench conference, defense counsel said he was concerned with the juror's assessment of Moffitt's credibility because, in his view, the trial would be fundamentally a swearing contest between Moffitt and the victim. The court told defense counsel that he was attempting to introduce evidence into the process of jury selection, and that Moffitt's drinking was evidence that could permissibly affect the jury's assessment of Moffitt's judgment. The trial court ultimately refused to strike the juror for cause.

We find that the trial court did not err in refusing to strike the juror. "The questions of credibility and weight of the evidence are jury matters." Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997). "[W]hen [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses--rules that serve the truth-seeking function of the trial--are generally applicable to him as well." Portuondo v. Agard, 529 U.S. 61, 69, 120 S. Ct. 1119, 1125, 146 L. Ed. 2d 47 (2000) (quoting Perry v. Leeke, 488 U.S. 272, 282, 109 S. Ct. 594, 600-01, 102 L. Ed. 2d 624 (1989)). A defendant's "credibility may be impeached and his testimony assailed like that of any other witness.'" Id. (quoting Brown v. United States, 356 U.S. 148, 154, 78 S. Ct. 622, 626, 2 L. Ed. 2d 589

(1958)). Although ultimately Moffitt testified only during the penalty phase of the trial, the fact that he had been drinking heavily and chose to drive on the night in question was certainly evidence the jury could have considered in evaluating his credibility.

Moffitt's final argument concerns the trial court's denial of his motion to have the jury visit the scene of the crime. The jury did see numerous photographs and a videotape of the area. No explanation is given as to how an actual visit by the jury to the site would have affected the outcome of the case. On reviewing the record, we find that the trial court did not abuse its discretion in denying the motion.

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

ALL CONCUR.

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