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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002162-MR

JOHNNY RAMEY

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
INDICTMENT NO. 00-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: In 1995, John Ramey was charged in an indictment with rape in the first degree and sexual abuse in the first degree. It was alleged that in August 1993 Ramey both raped and sexually assaulted his six-year-old daughter, E.R. On May 5, 1995, the Commonwealth moved to dismiss the indictment

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

without prejudice because, although E.R. was undergoing counseling at that time, it was unable to elicit testimony from the child. The motion was granted and the indictment was dismissed "without prejudice," meaning that the Commonwealth could seek a new indictment at some future time.

On May 31, 2000, Ramey was again charged in an indictment with rape and sexual abuse. On November 5, 2001, he moved to dismiss the 2000 indictment, arguing that inasmuch as the Commonwealth could not elicit testimony from E.R. in 1995, it would not be able to do so in 2000. He also argued that the Commonwealth should not have been allowed to dismiss the 1995 indictment in order to gain a tactical advantage. The motion was denied.

The case against Ramey proceeded to a jury trial that lasted from July 30, 2002, to August 7, 2002. At trial, E.R. testified that during August 1993, while she and her siblings were staying with Ramey, she awoke to find Ramey on top of her and that he had covered her mouth. She related that her clothes had been removed and that she felt pain in her genital area. E.R. went on to testify that Ramey threatened to "do it again" if she told anyone.

Ramey also testified. He claimed that he never touched E.R. in a sexual manner, nor did he have sex with her.

Before submitting the case to the jury, the trial court directed a verdict on the separate count of sexual abuse since E.R. had only testified to one incident, the rape. The court submitted proposed jury instructions to the parties that included an instruction listing sexual abuse as a lesser-included offense of rape. Although Ramey objected, the trial court overruled the objection and instructed the jury as it had informed the parties it would. After deliberating, the jury acquitted Ramey of rape but convicted him of sexual abuse. In accord with the jury's recommendation, the court sentenced Ramey to five years' imprisonment. This appeal followed.

On appeal, Ramey argues that the trial court erred when it instructed the jury on sexual abuse as a lesser-included offense of rape. Ramey cites Skinner v. Commonwealth² and points out that a lesser-included offense instruction is only appropriate where, given the evidence, the jury could reasonably doubt that the defendant is guilty of the greater offense but still believe, beyond a reasonable doubt, that he is guilty of the lesser offense. Ramey argues that the evidence could only support an acquittal or a conviction for rape since E.R. testified that he had penetrated her while he testified that he never touched her.

² 864 S.W.2d 290 (Ky. 1993).

In general, sexual abuse is a lesser-included offense of rape.³ A trial court may only instruct a jury regarding a lesser included offense where, given the evidence, a reasonable juror could doubt that the defendant is guilty of the crime charged yet conclude that he is guilty of some lesser offense.⁴ As will be seen, in this case, the trial court correctly instructed the jury on the lesser-included offense of sexual abuse.

While Ramey believes that E.R.'s testimony that she was penetrated and his testimony that he never touched E.R. precluded the jury from convicting him of sexual abuse, this is not the case. The jury has the sole responsibility to weigh the evidence and judge the credibility of all witnesses. It is not bound to accept the testimony any witness, including the accused, as true.⁵ Ramey also labors under the incorrect impression that the jury had to either accept all of E.R.'s testimony or to reject all of it in favor of his testimony. To the contrary, it was the jury's duty to weigh the probative value of the evidence and to choose which testimony was the most convincing.⁶ A jury may believe all or any part of a witness' testimony or disbelieve all of it.⁷

³ Johnson v. Commonwealth, 864 S.W.2d 266, 277 (Ky. 1993).

⁴ Luttrell v. Commonwealth, 554 S.W.2d 75, 78 (Ky. 1977).

⁵ Dunn v. Commonwealth, 151 S.W.2d 763, 764-765 (Ky. 1941).

⁶ Commonwealth, Dep't of Highways v. Dehart, 465 S.W.2d 720, 722 (Ky. 1971).

⁷ Gillispie v. Commonwealth, 279 S.W. 671, 672 (Ky. 1926).

As the fact-finder, the jury could have rejected all of Ramey's testimony. And the jury could have believed the vast majority of E.R.'s testimony, as it obviously did, yet still have chosen to disbelieve that part of her testimony regarding penetration. Having done so, the jury could have found that Ramey had sexual contact with E.R. since she testified that while he was on top of her she experienced pain in her genital area. Given the evidence, the jury could have harbored a reasonable doubt that Ramey had committed rape, yet have been convinced beyond a reasonable doubt that he was guilty of sexual abuse. Thus, the trial court did not err when it instructed the jury on sexual abuse as a lesser-included offense of rape.

Ramey cites Sanabria v. United States⁸ in support of his argument that the double jeopardy provisions of both the United States and the Kentucky constitutions precluded the trial court from instructing the jury on the crime of sexual abuse. According to Ramey, when the court directed a verdict on the original sexual abuse charge, jeopardy attached thus precluding an instruction on sexual abuse as a lesser-included offense of rape.

Double jeopardy applies only if the rape charge and the original sexual abuse charge were based on the same incident. However, a bill of particulars that may have shed

⁸ 437 U.S. 54, 64, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978).

light on this issue, was not, if filed, included in the record on appeal. We have not been directed to anything else in the record to suggest that the rape charge and the original sexual abuse charge arose out of the same incident. Where the record is incomplete or silent regarding an issue, we assume that the omitted portion of the record supports the trial court's decision.⁹ Thus, we assume that when the court directed a verdict on the original sexual abuse charge, it did so because that charge did not arise from the same incident as the rape charge, the only event described by E.R. in her testimony. Thus, double jeopardy did not bar Ramey's conviction of sexual abuse as a lesser-included offense of rape.

Ramey also insists that the trial court erred when it denied his motion to dismiss. Ramey observes, as noted above, that he was originally indicted in 1995, but the Commonwealth moved to dismiss the indictment. The Commonwealth waited until 2000 to re-indict Ramey and until 2002 to try him allowing E.R. to attain the ability to testify against him. This, Ramey asserts, gave the Commonwealth an unjustified tactical advantage.

Ramey contends that he was prejudiced by the delay and because E.R. received counseling after she was allegedly assaulted. This is so, he says, because at trial E.R. could not

⁹ Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985).

remember making statements to social workers in which she denied being sexually assaulted and because E.R. could not remember certain details after the assault, such as whether there was blood on the couch or in her underwear.

In Kentucky, there is no statute of limitations that fixes a deadline for the prosecution of felony offenses.¹⁰ Moreover, the constitutional right to a speedy trial is not implicated until an indictment has been returned. Even so, where pre-indictment delay is unjustified and prejudicial, a violation of a defendant's due process rights may occur requiring dismissal of the charges. But dismissal is only required where there has been both an intentional delay to gain a tactical advantage and substantial prejudice.¹¹

In 1995, when the Commonwealth moved to dismiss the first indictment without prejudice, it was because it could not elicit testimony from E.R. It did not seek re-indictment until E.R. could testify effectively against Ramey. Obviously, the Commonwealth dismissed the 1995 indictment and delayed re-indictment in order to gain a tactical advantage over Ramey.

On the other hand, Ramey has failed to show that he suffered substantial prejudice as a consequence of the Commonwealth's delay in bring renewed charges against him. He

¹⁰ Kirk v. Commonwealth, 6 S.W.3d 823, 826 (Ky. 1999). See also Reed v. Commonwealth, 738 S.W.2d 818 (Ky. 1987).

¹¹ Id. at 826.

points to no witnesses who were available in 1995, but not available when he was ultimately tried. Nor was any evidence lost destroyed in the interim. Since there was no substantial prejudice, the trial court did not err when it denied Ramey's motion to dismiss.

The judgment is affirmed.

ALL CONCUR.

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