

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002175-MR

WILLIAM WELLS

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 02-CR-00046

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND KNOPF, JUDGES; AND EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE. William Wells ("Wells") appeals from a judgment of conviction of the Casey Circuit Court reflecting a jury verdict of guilty on one count of third-degree rape and one count of incest. For the reasons stated herein, we must affirm.

On May 13, 2002, Wells was indicted by the Casey County grand jury on one count each of third-degree rape and

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

incest. The charges arose from an allegation that Wells had sexual intercourse with his fifteen-year-old step-daughter, "D.M.", and that D.M. became pregnant. D.M. lived alone with Wells after D.M.'s mother and Well's wife, Bernadette, had moved out of the house. Trial on the charges was conducted in August, 2002, whereupon the jury returned a verdict of guilty on both charges. The trial court sentenced Wells in accordance with the jury's recommendation to ten years in prison on the incest charge and five years in prison on the rape charge, to be served consecutively for a total sentence of fifteen years. This appeal followed.

Wells first argues through counsel that the trial court improperly denied his motion to strike a juror for cause. He notes that prospective juror Cheryl Payne ("Payne") stated during voir dire that she had "heard rumors" regarding a possible relationship between Wells and D.M. Specifically, Payne stated during a bench conference that she had seen Wells and D.M. in a public place, and asked a friend what was going on between Wells and D.M. because the "appellant was too damn old to be living with a little girl." Payne stated, however, that she had not formed an opinion as to the criminal charges against Wells. Wells, through counsel, asked the court to strike Payne for cause. The court questioned Payne further as to whether she had formed an opinion on the case, and it denied the motion to

strike for cause after Payne again stated that she had not formed an opinion and would have to hear the evidence before reaching a conclusion. Wells now argues that the court erred in failing to strike Payne for cause because it was obligated to resolve any doubts in his favor.

We have closely examined this issue and find no error. RCr 9.36 provides that "[W]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Trial courts possess considerable discretion as to whether prospective juror should be excused for cause. Moss v. Commonwealth, Ky., 949 S.W.2d 579 (1997).

In the matter at bar, though Payne evidenced some knowledge of the case, she repeatedly stated to the court that she had not formed an opinion as to Wells's guilt or innocence. There is no requirement that a prospective juror be dismissed for cause based on knowledge of the case, as long as the juror is impartial. Hodge v. Commonwealth, Ky., 17 S.W.3d 824 (2000). Payne stated that she would have to hear the evidence before forming an opinion as to guilt or innocence; that she did not know if what she heard about Wells was true; and, that she could decide the case based solely on what she heard in court. These statements form a reasonable basis for the trial court's

decision not to excuse Payne for cause, and accordingly, we find no error on this issue.

Wells next argues that the trial court abused its discretion and violated his constitutional rights when it admitted into evidence the results of a DNA test without accompanying live testimony. The DNA test results allegedly showed with a very high degree of probability that Wells was the biological father of D.M.'s baby. Though objected to by Wells, the test was admitted as an exception to the hearsay rule as a properly authenticated business record pursuant to KRS 902. Wells argues that the admission of this evidence was improper, and he seeks an order reversing the judgment of conviction.

Wells argument on this issue centers on the alleged failing of the Commonwealth to establish a proper chain of custody. This argument is compelling in that no witnesses testified as to chain of custody, and the documents accompanying the DNA results do not resolve the chain of custody issue.

There are two reasons, however, that we do not find this issue to form a basis for tampering with the judgment on appeal. First, Wells never contended that he did not have sexual intercourse with D.M. His defense was based on his contention that she was at least 16 years old when the intercourse occurred, and/or that no incest occurred because he is not D.M.'s biological father. Thus, while the DNA results

may serve as proof that intercourse occurred, Wells never denied that it happened.

Second, paternity was not at issue. As the Commonwealth properly notes, no proof of paternity was required to find Wells guilty of third-degree rape or incest. The jury's verdict was based on other evidence which, according to the jury, showed that the elements of those crimes were met. Since paternity was not at issue, and as Wells did not deny having intercourse with D.M., any error in the admission of the DNA evidence was harmless. "No error . . . in any ruling or order or in anything done or omitted by the court . . . is ground[s] for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." CR 61.01. It cannot reasonably be argued that the circuit court's refusal to exclude the DNA evidence had any effect on the outcome of the trial, since paternity was not at issue and since Wells did not deny having intercourse with D.M. As such, the trial court's refusal to exclude the evidence was not inconsistent with substantial justice, and accordingly we find no error on this issue.

Wells's third argument is that the trial court abused its discretion when it permitted D.M. to testify as to Wells's date of birth. He contends that the Commonwealth failed to lay

a sufficient foundation for the introduction of this testimony, and that as such it was inadmissible.

We are not persuaded by this argument. The jury was availed of the opportunity to draw its own conclusion as to whether Wells was twenty-one years old or older (an element of the charge of rape in the third degree) by way of its direct observation of Wells. Furthermore, Wells never claimed to be under the age of 21 when the intercourse occurred. Additional evidence was adduced that Wells had married D.M.'s mother, Bernadette, in 1991, and that D.M. have lived with Wells for 12 years. Since Wells did not argue at trial that he was under the age of 21 when the intercourse occurred, and as other evidence could be relied upon to establish Wells's age at the time the crimes were committed, we find no error on this issue.

Wells next argues that the trial court permitted prosecutorial misconduct at the close of the penalty phase. He argues that the prosecutor improperly expressed his opinion that the maximum penalty for the crimes charged was insufficient, and improperly denigrated opposing counsel by characterizing her argument as merely an expression of pity for Wells. Wells contends that because the jury's imposition of the maximum penalty for each of the two counts of the indictment may be attributable to the prosecutor's misconduct in closing argument, the sentence must be vacated.

This argument is not compelling, and Wells admits that it is not preserved for appellate review. Wells contends that this Court should review the issue pursuant to RCr 10.26, the palpable error rule. It cannot be reasonably argued that the alleged misconduct rises to the level of palpable error, and accordingly, we find no error on this issue.

Lastly, Wells maintains that the trial court improperly punished him for exercising his fifth amendment right to remain silent at trial and sentencing. Wells points out that the trial judge stated that he had hoped to hear a statement from Wells that would have enabled the court to impose a sentence of less than 15 years. When Wells made no statement, the court imposed the sentence of five and ten years on the two counts, to be served consecutively for a total sentence of fifteen years. Wells argues that because it cannot be determined from the record that the trial judge did not use Wells's silence against him, he is entitled to have the matter remanded for resentencing.

We have closely studied the record and the written arguments, and find no error. Wells was given the opportunity at sentencing to make a statement for the purpose of explaining his conduct, showing remorse, and seeking a lenient sentence. When he declined the opportunity to be heard, the trial judge imposed the recommended sentence. We find nothing in the record

to support Wells's assertion that the trial judge acted improperly. Wells exercised his constitutional right not to be heard, and sentencing was conducted in accordance with KRS 532.110 and the jury's recommendation. Accordingly, we find no error.

For the foregoing reasons, we affirm the judgment of conviction and sentence of the Casey Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher N. Lasch
Louisville, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Janine Coy Bowden
Assistant Attorney General
Frankfort, KY