

RENDERED: NOVEMBER 5, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-000707-MR

JOHN RAY WILLIAMS

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CR-00228

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, McANULTY, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: John Williams appeals from a jury verdict convicting him of three counts of third-degree rape. Williams contends the trial court erred by failing to give an instruction on the lesser included offense of attempted third-degree rape; that palpable error resulted from misleading parole eligibility information presented to the jury in the sentencing phase of the trial; and that palpable error occurred as a result of several

comments made by the prosecutor during the sentencing phase of the trial. We affirm.

On November 25, 2002, Williams was indicted on one count of first-degree sodomy and three counts of attempted third-degree rape. On November 25, 2002, the Commonwealth resubmitted the case to the grand jury, which returned a superceding indictment charging Williams with one count of first-degree sodomy and three counts of third-degree rape.

The superceding indictment resulted from the allegation that on or about April 12, 2001, Williams engaged in deviate sexual intercourse with a minor victim (S.S.) through the use of forcible compulsion, and on three occasions in April and/or May 2001 had engaged in sexual intercourse with S.S., who was less than 16 years of age at the time. Williams was 39 years old at the time of the alleged incidents.

Following a jury trial, Williams was found not guilty of the first-degree sodomy charge, but was found guilty of the three charges of third-degree rape. The jury recommended a sentence of five years on each conviction, to be served consecutively. On March 20, 2003, the trial court entered final judgment and Williams was sentenced pursuant to the jury's recommendation. This appeal follows.

First, Williams contends the trial court erred by failing to instruct the jury on the lesser included offense of

attempted third-degree rape. A lesser included offense is defined as, among other things, an attempt to commit the offense charged. Kentucky Revised Statutes (KRS) 505.020(2)(b). The offense of attempted third-degree rape is, accordingly, a lesser included offense of third-degree rape.

Kentucky law is well established that "it is the duty of the trial judge to prepare and give instructions on the whole law of the case . . . [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony." Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 360 (1999). However, the trial court should instruct on lesser-included offenses "only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 72 (2000) (quoting Houston v. Commonwealth, Ky., 975 S.W.2d 925, 929 (1998)).

Deputy Dennis McDaniel of the Calloway County Sheriff's Office, the investigating officer in the case, testified that he originally charged Williams with attempted rape because the victim originally stated that Williams had attempted to, but had not, penetrated her. McDaniel testified that when S.S. subsequently changed her story to allege

penetration, a superceding indictment was brought charging Williams with rape, rather than attempted rape.¹

In her testimony, S.S. admitted that she had originally alleged there had been no actual intercourse. In conjunction with S.S.'s testimony, an affidavit she executed on August 6, 2001, was identified as an exhibit and referred to for the purpose of refreshing S.S.'s memory. While the affidavit was not entered into evidence, its contents were referred to in direct testimony, including that part relevant to the present issue as follows:

Also since school was over at [sic] May 25th 2001 John Williams attempted to place his penis in my vagina. I wouldn't let him and stopped him by pushing him away. This happened three separate times. One occurred at a field across from my house near a tree he carved our initials in. One time occurred at a cemetery at the corner of Forrest Rd. and Engell Rd., and one other time across the street from our house again. I managed to push him away from me with my legs, at the cemetery the other times I fended him off with my hands.

In his opening statement, counsel presented the defense's theory that the incidents alleged by S.S. did not occur. The defense denied the allegations and placed into issue the credibility of S.S. The emphasis placed by the defense upon

¹ The victim testified at trial that her initial statement to Deputy McDaniel was false. She further testified that after discussing the matter with her mother, a social worker and a counselor, she decided to tell the truth about her sexual relationship with the defendant. Medical testimony at trial revealed that she had a non-intact hymen ring showing evidence of repeated vaginal penetration.

the evolving stories told by S.S. was that this was proof the allegations were fabricated. Williams's defense was outright denial. Williams did not assert an alternative theory (i.e., that the victim's original allegations were true, that he had attempted, but had failed to penetrate S.S.)

During cross-examination of Captain McDaniel and S.S., defense counsel sought to exploit S.S.'s changing statements. However, it is clear from the cross-examination that defense counsel's objective was to discredit S.S.'s truthfulness and to entirely discredit her evolving series of allegations. Further, in his case in chief, Williams presented no witnesses in support of the theory that he had attempted to rape S.S. but had been successfully fought off.

More importantly, the testimony elicited through the affidavit does not warrant an attempted rape in the third degree instruction. Rape in the third degree looks to consensual sexual intercourse by an adult with a person less than sixteen (16) years old. KRS 510.060(1)(b). The affidavit allegations look to attempted sexual intercourse by forcible compulsion or rape in the first degree. KRS 510.040. Attempted rape in the first degree is not a lesser included offense of rape in the third degree.

For the reasons discussed, we conclude the instruction was not warranted nor do we believe that had the attempted rape

instruction been given, there is a reasonable possibility the jury's verdict would have been different. See Gabow 34 S.W.3d 63.

Second, Williams contends the prosecutor committed "four substantial and prejudicial errors" during the sentencing phase of the trial. The errors alleged are that (i) the prosecutor presented incorrect and misleading evidence regarding parole eligibility; (ii) the jury was misadvised by the Commonwealth as to the legal effect of its verdict by a comment made by the Commonwealth during his closing argument regarding the governor releasing people from prison; (iii) the Commonwealth gave an improper "opinion" to the jury regarding Williams' chances for obtaining parole; and (iv) the Commonwealth's comments during closing argument regarding Williams's wife's failure to attend the sentencing phase.

Williams concedes that these issues were not preserved at trial; however, he requests that they be reviewed pursuant to RCr 10.26 for palpable error.

"A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error." Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). To be palpable, the error must be "easily perceptible, plain, obvious and readily noticeable." Burns v.

Level, Ky., 957 S.W.2d 218, 222 (1998). Relief will only be granted from a palpable error if a substantial possibility exists that the result at the trial court would have been different but for the error. Butcher v. Commonwealth, Ky., 96 S.W.3d 3 (2002).

We have reviewed each of the four allegations of error in detail as concerning the conduct of the Commonwealth attorney during the sentencing phase of the trial. We do not believe the conduct of the prosecutor rises to the level of palpable error, nor has manifest injustice resulted therefrom. The alleged errors are somewhat overstated as to the actual events that occurred during the sentencing phase. Even if these four alleged errors are viewed together as a "cumulative error" as suggested by Williams, we do not believe their omission would have changed the result of the sentence recommended by the jury.

Additionally, appellant failed to make any objection to the alleged improper statements made by the Commonwealth. Objections made to improper statements must be contemporaneous so that the court is given the opportunity to consider whether an admonition would cure the error. Weaver v. Commonwealth, Ky., 955 S.W.2d 722 (1997). Again, reviewing these statements in the context of the entire sentencing proceeding, we cannot say that a manifest injustice has occurred such as to constitute palpable error.

When prosecutorial misconduct is asserted, the relevant inquiry by the appellate court should always look to the overall fairness of the trial and not the culpability of the prosecutor. Young v. Commonwealth, Ky., 129 S.W.3d 343 (2004). In this case, the record clearly reflects the appellant received a fair trial.

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

GUIDUGLI, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING BY SEPARATE OPINION:

Respectfully, I dissent from that portion of the majority opinion which fails to find error in the trial court's failure to instruct on the lesser included offense of attempted rape in the third degree. I do not believe that the failure of defense counsel to offer proof that the victim fabricated the allegations insulates the trial court's limited instructions from error.

As written in Cooper's Kentucky Instructions to Juries, (Criminal) § 1.05 (3rd ed. 1993):

An instruction on a lesser included offense may be authorized even if inconsistent with the defendant's theory of the case, e.g. if it is supported by the Commonwealth's evidence.

(*quoted in Garland v. Commonwealth, Ky., 127 S.W.3d 529, 536 n.5).*

The "whole case" included the victim's prior statement which establishes an issue for the jury as to whether intercourse occurred on three occasions, was attempted, or did not occur.

It matters not, in my opinion, if Appellant successfully forcibly engaged in intercourse or he consensually engaged in intercourse with a person less than sixteen (16) years old. In either case, he would be guilty of rape, albeit a different degree.

The issue is whether he engaged in intercourse or attempted to engage in intercourse. In the event the jury believed her statement that intercourse did not occur, but only an attempt, no instruction was given which would allow that determination. I would, therefore, vacate the conviction and remand for a new trial.

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