

RENDERED: June 4, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2003-CA-000722-MR

CHRIS WOOD

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 02-CR-00009

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: JOHNSON, MINTON, AND TACKETT, JUDGES.

TACKETT, JUDGE: Chris Wood appeals from a judgment of the Garrard Circuit Court finding him guilty of first-degree rape and sentencing him to ten years' imprisonment. The sole issue on appeal is the trial court's failure to grant Wood's motion for a directed verdict. After careful review, we conclude that the Commonwealth presented sufficient evidence supporting each element of the offense to allow the case to be submitted to the jury. Therefore, the judgment of the trial court is affirmed.

The victim, M.A., was a college student who normally resided in a university dormitory. On the night she was assaulted, M.A. had been staying at her family's home over the Christmas holiday. On December 31, 2001, only the victim's brother, Kevin Austin, was at home with some friends and they were drinking and celebrating New Year's Eve. After midnight, Austin departed with most of the guests to continue their celebrations at a restaurant in Lexington. Only Wood, David Padgett and Derrick Johnson remained at the Austin home drinking beer and mixed shots. M.A. returned home between 12:30 and 12:45 a.m. already intoxicated. She then drank four or five shots with Wood before passing out on the living room couch.

Wood remained in the living room on the couch with M.A. while Johnson and Padgett went to Austin's bedroom and used his entertainment system. At one point they returned to the living room where they observed Wood kissing an unresponsive M.A. and fondling her breasts. Wood briefly left M.A. to go to the bathroom to vomit before returning to the couch. When Johnson came back to the living room a while later, he saw M.A. lying on her side with her back against the couch and her knees bent towards her stomach. Her pants were pulled down around her ankles and she was motionless and silent. Wood was standing with one foot on the floor and one knee on the couch having sexual intercourse with M.A. from behind. Johnson returned to

Austin's room and tried unsuccessfully to telephone him. He told Padgett they needed to go into the living room and stop Wood from having sex with M.A.

Padgett went into the living room and also watched Wood having sex with M.A. Testimony differed as to what happened next. Johnson stated that he returned to find that Padgett was now having sex with M.A. Padgett denied this and claimed that he masturbated, ejaculated and inserted his fingers into M.A.'s vagina. At this point, Johnson left the house in tears and while still only a few houses down the street encountered Austin and his friends driving back to the house. Johnson refused to tell Austin exactly what had happened, but told him to get home quickly.

When Austin arrived home, he found his sister lying on the couch, still partially undressed and very wet around her private parts. She was so unresponsive that Austin feared she was dead. He rolled her onto the floor and finally found her pulse and heard her breathing. Padgett and Wood were in Austin's bedroom and feigned ignorance as to what had gone on in the living room. Padgett was talking on a cell phone and Wood was pretending that he had just awoken in Austin's bed. Austin told them he would find out what happened and set out in pursuit of Johnson. At first, Padgett and Wood followed him, but as Austin caught up to Johnson and began to speak with him, the

other two turned and fled back to the house. Padgett and Wood got into Padgett's car and drove away quickly, causing the tires to squeal.

Austin returned home and finally was able to wake M.A. He told her what had happened and she began crying saying that she neither knew of nor consented to sexual acts being performed upon her by Wood and Padgett. Austin took his sister to the police department and then to the hospital where a rape examination was performed and samples collected from her. Prior to the examination, M.A. had used the bathroom. Both Padgett and Wood submitted to rape kit examinations and gave statements. Padgett only admitted to fondling the victim while Wood denied any sexual contact with M.A. The state crime lab was able to test semen from the vaginal smear, external genital swabs and the victim's clothing. Padgett's DNA matched the samples retrieved from the victim.

Both Padgett and Wood were indicted for first-degree rape. Prior to trial, Padgett entered a guilty plea to first-degree sexual abuse in exchange for a five-year sentence and his agreement to testify against Wood. At trial, Johnson testified that he saw both Padgett and Wood raping an unconscious M.A. Padgett's testimony confirmed the details of Wood's assault on M.A., as recounted by Johnson, but he differed from Johnson's testimony in regard to his own actions toward M.A. Wood chose

not to testify in his defense. The trial court instructed the jury on the offense of first-degree rape as well as on the lesser included offense of first-degree sexual abuse over Wood's objection. The jury convicted Wood of first-degree rape and this appeal follows.

Wood's sole argument on appeal is that the trial court erred in denying his motion for a directed verdict since there was insufficient evidence introduced to support an element of the offense. Specifically, Wood contends that the Commonwealth failed to introduce evidence of penetration which is required to prove first-degree rape. M.A. was unable to testify to the assaults against her since she was unconscious when they occurred. The medical reports showed no injuries to her genital area. Thus, the only evidence of penetration came in the form of witness testimony from Johnson and Padgett. Padgett specifically testified that he saw Wood penetrate M.A. and that he had no doubt that what he saw was sexual intercourse. In addition, he stated that when Wood was finished raping M.A., he turned to Padgett and said, "here you go" which Padgett took to mean that it was his turn to have sex with the victim.

In his argument for a directed verdict, Wood stated that the Commonwealth failed to introduce scientific or medical evidence of penetration. However, Kentucky law does not require that proof of penetration be supported by medical evidence.

Stoker V. Commonwealth, Ky., 828 S.W.2d 619 (1992). When ruling on a motion for a directed verdict, the trial court is required to consider all of the evidence in the light most favorable to the opposing party and to draw all fair and reasonable inferences in favor of that party. Dishman v. Commonwealth, Ky. 906 S.W.2d 335 (1995); Lawson v. Commonwealth, Ky., 53 S.W.3d 534 (2001). On review, we must determine whether it was clearly unreasonable for the jury to have found Wood guilty. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). However, it is not our place to substitute our judgment regarding the credibility of witnesses for that of the trial court and jury. Commonwealth v. Jones, Ky., 880 S.W.2d 544 (1994). The jury heard evidence that Padgett witnessed Wood having sexual intercourse with M.A. and that, from his vantage point, he was able to observe Wood penetrating her while she was unconscious. Clearly, the jury believed the accounts of Wood's activities given by Johnson and Padgett. In fact, the trial court went so far as to instruct the jury that they could find Wood guilty of the lesser included offense of first-degree sexual abuse if they believed that his sexual contact with M.A. did not include penetration. Consequently, we are unable to say that it was unreasonable for the jury to find Wood guilty of first-degree rape based on the evidence offered by the Commonwealth.

For the foregoing reason, the judgment of the Garrard Circuit Court is affirmed.

ALL CONCUR.

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