

RENDERED: JULY 30, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2003-CA-001433-MR

GREGORY ALLEN VALENTINE

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN O'MALLEY SHAKE, JUDGE  
ACTION NO. 02-CR-001052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, Chief Judge; DYCHE, Judge; and EMBERTON, Senior Judge.<sup>1</sup>

COMBS, JUDGE. Gregory Valentine has appealed from a final judgment and sentence of the Jefferson Circuit Court entered on June 9, 2003. The judgment followed Valentine's conviction of two counts of first-degree sexual abuse and one count of fourth-

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<sup>1</sup> Senior Judge Thomas Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

degree assault. We conclude that the trial court did not err either by submitting the second count of sexual abuse to the jury or by limiting the evidence presented with respect to a threat that Valentine made against the victim. Therefore, we affirm the judgment.

On the evening of March 6 and into the early hours of March 7, 2002, Valentine intimidated, humiliated, and finally assaulted his live-in girlfriend. The victim reported the crimes, and Valentine was indicted on May 7, 2002. He was charged with one count of first-degree rape, one count of fourth-degree assault, two counts of first-degree sexual abuse, one count of unlawful imprisonment, and one count of terroristic threatening. Valentine pleaded not guilty.

A jury trial was held on February 4-7, 2003. Following presentation of the evidence, the court instructed the jury, in part, to find Valentine guilty of first-degree sexual abuse if it believed -- beyond a reasonable doubt -- that Valentine had subjected the victim to sexual contact by forcing her to masturbate in front of him. The jury acquitted Valentine of rape, unlawful imprisonment, and terroristic threatening. It convicted him of one count of first-degree sexual abuse and fourth-degree assault. This appeal followed.

Valentine argues that the trial court erred by instructing the jury with respect to the count of sexual abuse

pertaining to the forced masturbation. While he concedes in his brief that this claim of error has not been properly preserved for appellate review, Valentine nonetheless urges this Court to review this issue of first impression pursuant to the palpable error standard of RCr<sup>2</sup> 10.26, which provides as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

After our review, we have concluded that the jury was properly instructed on this matter and that Valentine's conduct -- as found by the jury -- did indeed amount to criminal sexual abuse.

The provisions of KRS 510.110(1)(a) define criminal sexual abuse as the act of subjecting another person to sexual contact by forcible compulsion. The term "sexual contact" is defined at KRS<sup>3</sup> 510.010(7) as "**any touching** of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." (Emphasis added.) Read together, these provisions criminalize an act whereby one person forcibly subjects another to any touching of

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2 Kentucky Rules of Criminal Procedure.

3 Kentucky Revised Statutes.

the intimate parts of either of them for the purpose of gratifying the sexual desire of either of them.

Pursuant to these provisions, Valentine contends that a defendant cannot be found guilty of sexual abuse where he simply compels another to touch her own intimate parts in order to gratify the defendant's sexual desire. Valentine argues that the provisions require one of the parties to touch the other and that the act of forcing someone else to engage in an activity of auto-manipulation has not been criminalized by these provisions.

The court's instruction to the jury provided that the jury was to find Valentine guilty of first-degree sexual abuse if the jury was persuaded beyond a reasonable doubt that he "subjected the victim to sexual contact by forcing her to masterbate (*sic*) in front of him. . . ." Valentine concedes that the Commonwealth produced evidence sufficient to support the jury's finding that he had coerced the victim into masturbating through a threat of further violence against her. However, he denies that he touched her or that she touched him.

We begin our analysis by examining the statutory provisions. The statute prohibits a person from subjecting another to sexual contact by forcible compulsion. It does not prescribe particulars: *e.g.*, that one person must touch the other. On its face, the legislation is broad enough to encompass the defendant's actions in this case. By operation of

KRS 510.110, the defendant is made criminally liable if he "subjects another person to sexual contact." The statute is not ambiguous. The statute does not limit the scope of the crime by defining who touches whom. Instead, it encompasses a prohibition against all **forced** sexual contact. Valentine admits that he forcibly subjected the victim to unwanted, involuntary sexual contact in order to gratify his own sexual desire. Based on the evidence presented and the language of the statutes at issue, the trial court did not err by submitting this matter to the jury.

Valentine also contends that the court erred by prohibiting him from introducing specific evidence of a threat he made against the victim during the evening of March 6-7. He had threatened to disclose personal information about the victim to her parents (*i.e.*, that she had had an abortion). He argues that evidence of the specific contents of that threat is relevant to show that the victim had a motive to fabricate her allegations against him and that its exclusion deprived him of a complete defense. We disagree.

In a pre-trial motion, the Commonwealth sought to prevent Valentine from mentioning the abortion, limiting his testimony to his threat to "reveal" an "intimate secret." According to Valentine, this evidence was admissible to show that the victim had a motive to fabricate the charges.

Valentine argued that his threat to reveal this information to the victim's parents precipitated her false allegations against him. Without this evidence, Valentine claimed that he would be deprived of a fair trial.

The trial court indicated its inclination to exclude evidence relating to the specific terms of the threat because they were not particularly probative of any issue and were unfairly prejudicial to the Commonwealth's case. However, the court did permit Valentine to indicate in his testimony that he had threatened to reveal an "intimate secret" to the victim's parents. Valentine was not permitted to elaborate further on the particular contents of the threat.

KRE<sup>4</sup> 401 and 403 set forth the guidelines under which the admissibility of evidence is evaluated. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). KRE 401 defines relevant evidence as:

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

KRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of undue prejudice. . . ." Absent an abuse of discretion, an

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4 Kentucky Rules of Evidence.

appellate court will not disturb the decision of a trial court as to the admissibility of evidence. Id.

Valentine intended to demonstrate to the jury that this contested evidence was the very factor that motivated the victim to fabricate claims against him. The trial court concluded that while the evidence was relevant, the exact details of the personal information had little -- if any -- probative value.

The trial court did not abuse its discretion by excluding evidence of the specific terms of Valentine's threat against the victim. He was allowed to present evidence suggesting that the victim had pressed charges against him in retaliation for his threat to reveal "an intimate secret" about her. He was able to create a clear impression to the jury that the victim might have fabricated the charges. We cannot agree that he was deprived of a fair trial on this issue.

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

EMBERTON, SENIOR JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT.

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