

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001528-MR

DORMUS DALTON, JR.

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 01-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: Following a jury trial, Dormus Dalton, Jr., (hereinafter appellant) was convicted in the Pulaski Circuit Court of one count of rape in the first degree. J.B., appellant's niece by marriage, accused appellant of having sex with her against her will when she was 15 years old. Appellant was charged in the indictment with rape in the first degree by forcible compulsion.

Appellant argues on appeal that he should have been granted a directed verdict on the charge of rape in the first

degree because there was insufficient evidence of forcible compulsion. In addition, he believes the court erred in denying his request for an instruction on the lesser included offense of sexual misconduct. Finally, appellant alleges that the jury selection was not done properly as there were a large number of unexplained absences among members of the jury pool.

On appellate review, the standard for review of a directed verdict is if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983). The Commonwealth had the burden of proving the element of forcible compulsion, as it had of proving every element of the offense, beyond a reasonable doubt. KRS 500.070.

Rape in the first degree may be proved by evidence that the defendant engaged in sexual intercourse with another person by forcible compulsion. KRS 510.040(1)(a). "Forcible compulsion" is defined in KRS 510.010(2) as

physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition[.]

Thus, actual physical force is not required to prove forcible compulsion for first-degree rape, since it may also be established by a threat. In determining whether a victim submitted because of an implied threat which placed her in fear, a subjective rather than an objective standard must be applied. Yarnell v. Commonwealth, Ky., 833 S.W.2d 834 (1992).

J.B. testified as follows at trial:

On the night in question, J.B. had been visiting her boyfriend. She returned home and went to her Aunt Theresa's trailer which was next door to the trailer where J.B. lived with her mother. J.B.'s uncle, appellant, was present. J.B. testified her uncle was drunk and had been fighting with his girlfriend. J.B. became concerned that his girlfriend would call the police and appellant might go to jail. Appellant walked out the door of her aunt's trailer and headed down the road, and J.B. followed him out.

J.B. asked him if he wanted to come to her house and lie on the couch. He took J.B. up on the offer. They were standing in front of J.B.'S trailer, and appellant asked her if she "wanted something." J.B. said that because he was drunk she answered, "Sure." He told her it was a "Xanax bar," and gave her a pill. He then asked her if she had taken it. J.B. replied, "Yeah." Appellant then kissed her and put his tongue in her mouth to make sure she had taken it. J.B. testified that

she had not wanted to kiss him, but she swallowed the pill.

J.B. said after that she got scared and did not know what to do.

They went into the trailer. J.B. said she told him he could sleep on the couch until he sobered up.

J.B. testified during direct examination as to what appellant did next:

Q. 56 Did you leave him in the living room?

A. Yes, sir.

Q. 57 And where did you head to?

A. I went and used the bathroom and then I went to bed. I went to go lay down in my room. I didn't have a bed then. I just had . . . I used blankets and stuff as a bed then because we hadn't been there but probably two months and I didn't have my bed put up yet.

Q.58 What happened then?

A. I went in there and I laid down. When I laid down Dormus Dalton come in there and he started kissing me and stuff and . . .

Q. 59 What happened next?

A. (Witness has started to cry) He started . . . (witness crying). And he started kissing me and stuff and I said, "Bubby," I said, . . . I was talking about Dormus, but he also goes by Bubby. I said, "Bubby, you can't do this," and he was messed up and I thought that he would quit soon because, you

know, he was messed up and he didn't know what he was doing and I'm his niece - I **was** his niece - and he was starting to take my clothes off and I said, "Bubby," I said, "Please don't do this." I said, "You're my uncle and you're not supposed to do this," and he ended up raping me.

Q. 60 Now when you say he took your clothes off, what was he doing?

A. I don't understand. I'm sorry.

Q. 61 You testified he started to undress you, taking your clothes off. What was he specifically doing?

A. He was taking my pants and my panties off.

Q. 62 Did he get them off?

A. Yes, sir.

Q. 63 Now, when you say he raped you, what did he physically do? Exactly.

A. He put his penis inside of me.

Q. 64 Your vagina.

A. Yes, sir.

Q. 65 Did he penetrate you? Did he get his penis inside of you?

A. Yes, sir.

Q. 66 Did you want him to do that?

A. No, sir.

Q. 67 Did you tell him you didn't want to do that?

A. Yes, sir, I did. I told him. I said, "Bubby, you can't do this. You're my uncle." I said, "You can't do this."

Q. 68 How long did it go on?

A. I don't know exactly. Melinda Dalton ended up beating on my door and that's when he quit.

We conclude that J.B.'s testimony provided no evidence of forcible compulsion. The victim never testified that her uncle used physical force on her. In addition, she never indicated that she was placed in fear of physical force by anything he did or said. The testimony that the victim protested does not establish forcible compulsion. Miller v. Commonwealth, Ky., 77 S.W.3d 566 (2002). Neither does evidence that the perpetrator disrobed the victim. Id.

The Commonwealth below cited the incident wherein appellant gave the victim a Xanax pill as proof of forcible compulsion. The Commonwealth argues that appellant "forcibly kissed her and put his tongue in her mouth to make sure that she had swallowed the pill." We do not agree this incident established forcible compulsion. First, it did not take place at the time of the sexual act. Second, the victim did not state that force was used during the unwanted kiss. Third, the victim furthermore did not testify that she submitted to her uncle because this occurrence placed her in fear of him. We also do not believe that J.B.'s vague statement that she "got scared"

after her uncle kissed her is equivalent to testimony that she was in fear of physical harm from him. Moreover, the statement referred to the time of the kiss, not of the sexual act.

The Commonwealth adds that the size difference between appellant and the victim showed forcible compulsion. We strongly disagree. This fact proves nothing since there just as likely could be a size discrepancy in a consensual sexual relationship. Finally, while it is easily inferred that appellant gave her a tablet of Xanax to make it easier to seduce her, there was no evidence that the pill had any physical effect on her in the short time between when he gave it to her and when he had sex with her. And again the victim did not equate this with any kind of physical force or threat.

Miller establishes that there must be evidence that the perpetrator used physical force against the victim or threatened to harm her or another if she refused sexual advances, or the victim submitted to sexual advances out of fear of harm to herself or another. Id. at 575. Since none of that was established, we conclude that it was clearly unreasonable for the jury to find that appellant committed rape by forcible compulsion in this case. We vacate appellant's conviction for rape in the first degree.

Since the Commonwealth did not present sufficient evidence to support the charge, appellant may not be retried on rape in the first degree. McGinnis v. Wine, Ky., 959 S.W.2d 437 (1998). However, the Commonwealth may choose to retry appellant on a lesser offense. Under the circumstances of this case, a more appropriate charge due to the age of the victim would be rape in the third degree. Because of the possibility of retrial, we consider appellant's argument that the jury should have been given a lesser offense instruction on the charge of sexual misconduct.

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. Holland v. Commonwealth, Ky., 114 S.W.3d 792, 892 (2003). Although a defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions, the trial court should instruct as to 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."
Id.

Sexual misconduct is a class A misdemeanor, which is charged when a person engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent. KRS 510.140. Appellant would be entitled on retrial to an instruction on this lesser offense only if the jury may have a reasonable doubt of appellant's guilt of the greater offense charged by the Commonwealth. Appellant's defense was that the offense did not occur and J.B. made up the story. Sexual misconduct would not be properly charged, therefore, as a lesser included offense of rape in the third degree because once the ages are established the jury could not have a reasonable doubt that appellant committed rape in the third degree and still believe that appellant committed sexual misconduct.

We will not address the question of the jury selection, as we have been presented no reason to believe the same situation will recur in the event of a retrial.

We vacate appellant's conviction for rape in the first degree and remand for proceedings consistent with this opinion.

GUIDUGLI, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS AND FILES SEPARATE OPINION:

DYCHE, JUDGE, DISSENTING: I must respectfully dissent. The testimony of the victim concerning her resistance to the sexual assault was sufficient to present a jury question on the issue of forcible compulsion. The fact that a child in

such a circumstance might be rather inarticulate is understandable. The jury heard the testimony and decided the facts. We should not second guess them.

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