

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000103-MR

DESHANE JONES

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 03-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

BUCKINGHAM, JUDGE: Deshane Jones appeals from a judgment of the Montgomery Circuit Court convicting him of third-degree rape and of being a second-degree persistent felony offender (PFO II).

We affirm.

KRS¹ 510.060 provides, in relevant part, that a person who is 21 years old or more who engages in sexual intercourse with another person less than 16 years old is guilty of third-degree rape. The victim, B.M., testified that she was 15 years

¹ Kentucky Revised Statutes.

old on October 30, 2002, when she engaged in sexual intercourse with Jones, who was 22 years old. B.M. had called Jones from a bowling alley and invited him to meet her there. After Jones arrived, he and B.M. left together in a car and went to a parking lot beside the bowling alley. They allegedly engaged in consensual sex at that location.

Jones was charged with the crime weeks later after B.M. became ill at school and it was discovered that she had a sexually transmitted disease. The offense was brought to the attention of the prosecuting authorities after the local health department notified the Department of Social Services, which notified the Kentucky State Police. It is clear from the record that B.M. had no desire to testify against Jones at the trial, but she was compelled to do so by the prosecutor.

The jury found Jones guilty of the offense of third-degree rape and sentenced him to one year in prison. Jones was also charged with PFO II, and the jury enhanced his sentence to five years in prison following that phase of the trial. After the trial court formally sentenced Jones in connection with the jury verdict, this appeal followed.

Jones's first argument is that the trial court erred in not granting a directed verdict in his favor. The applicable rule is as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id.

Jones did not testify at trial, and the only issue was whether Jones and B.M. had engaged in sexual intercourse. Because there were some inconsistencies in the testimony of the prosecution witnesses, Jones argues that B.M.'s testimony was unreliable and unworthy of credibility. He asserts that "forced allegation by itself cannot support a conviction of guilty, and the jury's verdict was clearly unreasonable." In support of this argument, Jones cites Taylor v. Commonwealth, 301 Ky. 109, 113, 190 S.W.2d 1003, 1005 (1945), wherein the court held that the jury's determination of the credibility of witnesses "will not be disturbed unless it is so incredible on its face as to require its rejection as a matter of law."

Having reviewed the record, we conclude that B.M.'s testimony is not "incredible" at all. While it is true that there are inconsistencies between her testimony and the testimony of other witnesses on matters not directly related to the offense, such inconsistencies are not so significant as to eliminate her credibility as a witness. Further, testimony to corroborate B.M.'s testimony was not required. See Commonwealth v. Cox, 837 S.W.2d 898, 900 (Ky. 1992). In short, the trial court correctly denied Jones's directed verdict motion.

Jones's second argument is that the trial court committed reversible error when it failed to instruct the jury on the lesser-included offense of third-degree sexual abuse. In support of his argument, Jones cites Salsman v. Commonwealth, 565 S.W.2d 638, 642 (Ky.App. 1978), wherein this court held that "[t]he crime of sexual abuse is clearly a lesser-included offense of the crime of rape."

Jones's argument is without merit for at least two reasons. First, any error in this regard was not preserved because his attorney did not request such an instruction at the trial. See RCr² 9.54(2). Second, third-degree sexual abuse would not be a lesser-included offense of third-degree rape under the facts of this case. In order for a person to be guilty of third-degree sexual abuse, he must subject another

² Kentucky Rules of Criminal Procedure.

person to sexual contact without the latter's consent. KRS 510.130(1)(a). However, it is a defense to that crime if the other person was at least 14 years old. KRS 510.130(1)(b)2. It is undisputed that B.M. was 15 years old at the time; therefore, Jones had a defense to a charge of third-degree sexual abuse. Thus, Jones could not have been found guilty of third-degree sexual abuse, and the trial court properly refused to instruct the jury on that charge.

Finally, Jones argues that the trial court committed reversible error by not instructing the jury on the offense of sexual misconduct. The crime of sexual misconduct is set forth in KRS 510.140. It applies only in cases where the victim is 14 or 15 years old and the defendant is less than 21 years old, or where the victim is 12-15 and the defendant is less than 18 years old. See Johnson v. Commonwealth, 864 S.W.2d 266, 277 (Ky. 1993). Jones acknowledges that this is the law, but he urges us to re-examine this principle. We are not at liberty to do so because we are bound by the precedent set by the Kentucky Supreme Court in the Johnson case. See Rules of Supreme Court (SCR) 1.030(8)(a).

The judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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