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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000262-MR

DERRICK KRYSTYNAK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 02-CR-001529

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Derrick Krystynak brings this appeal from a jury verdict and judgment entered January 20, 2004, by the Jefferson Circuit Court, convicting him of various crimes. We affirm.

On July 15, 2002, appellant was indicted on one count each of criminal attempt to commit rape (first degree), sexual abuse (first degree), wanton endangerment (first degree) and assault (fourth degree). Prior to trial, appellant filed a motion in limine seeking to exclude a taped statement he made to Detective Brian Sherrard. Appellant asserted the taped

conversation contained improper bolstering of the victim identifying him as her attacker. The circuit court denied the motion.

On November 12, 2003, a jury trial was commenced. At the close of the Commonwealth's case-in-chief, appellant moved for a directed verdict of acquittal. The circuit court denied the motion. At the conclusion of all the evidence, appellant renewed his motion for a directed verdict, which was also denied. Appellant was convicted on all counts.

Appellant subsequently filed a motion for judgment of acquittal, or in the alternative, a motion for new trial. The circuit court granted appellant's motion for judgment of acquittal upon the count of first-degree sexual abuse and, thus, dismissed this count. The motion was denied upon all remaining counts. The motion for a new trial was also denied. On January 20, 2004, the circuit court sentenced appellant to a total concurrent sentence of five years' imprisonment. This appeal follows.

Appellant initially contends the circuit court erred by denying his motion for a directed verdict of acquittal. See Ky. R. Civ. P. (CR) 50.01. Specifically, appellant asserts the victim's identification of him as the attacker was insufficient to support the jury's finding of guilt. In support of this contention, appellant enumerates what he perceived as

inconsistencies in the victim's testimony. Appellant asserts that these inconsistencies, combined with the lack of corroborating evidence, demonstrate that the evidence was insufficient to support his conviction. Thus, appellant contends the lack of a reliable identification entitled him to a directed verdict upon all charges.

The case of Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) sets forth the applicable standard of review where a motion for directed verdict was denied by the circuit court:

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. . . .

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.

It is well established that questions of weight and credibility of evidence are questions reserved solely for the jury and such determinations will not be disturbed on appeal. Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996). A review of the record reveals that the inconsistencies complained of by appellant were merely questions of weight and credibility of

evidence. For example, appellant complains that the victim characterized her attacker's eyes as being "dark-colored." At trial, appellant presented evidence that his eyes are blue and that he had never worn colored contacts lenses. Obviously, the jury had ample opportunity to evaluate the weight and credibility of the evidence. When disputed evidence is presented at trial, the jury is entitled to believe or disbelieve any or all of the evidence presented by either party. Morton v. Commonwealth, 817 S.W.2d 218 (Ky. 1991). Hence, we reject appellant's contention that the circuit court erred by denying his motion for directed verdict.

Alternatively, appellant asserts that he was entitled to a directed verdict of acquittal on the charge of first-degree criminal attempt to commit rape. Appellant asserts the evidence presented was insufficient to establish the elements of the crime. Specifically, appellant asserts that the attacker's actions did not constitute a substantial step toward the commission of rape.

At trial, the victim testified that appellant asked her for directions and then waited on the opposite side of the street while she went into a convenience store to inquire about employment. She testified that as she left the store, he followed her and then ran behind her on a stretch of sidewalk that was isolated by bushes and a fence. The victim stated that

appellant grabbed her from behind and held a knife to her throat while telling her to "shut up." She further testified that appellant pushed her into a fence and threw her to the ground. Once she was on the ground, he got on top of her and stuck his hands in the front of her pants, touching her skin. The victim was then able to repel appellant, and he fled.

Rape in the first degree is codified in Kentucky Revised Statutes (KRS) 510.040, and states in part:

- 1) A person is guilty of rape in the first degree when:
 - (a) He engages in sexual intercourse with another person by forcible compulsion

Criminal attempt is codified in KRS 506.010 and reads in pertinent part:

- (1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

. . . .

- (b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

- (2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.

In this case, we think the evidence clearly presented a reasonable basis for the jury's finding of guilt upon the attempted rape charge. Simply stated, the jury could have concluded beyond a reasonable doubt that appellant intended to forcibly engage in sexual intercourse with the victim and that his conduct constituted a "substantial step" toward doing so. Indeed, appellant threatened the victim with deadly force, pushed her to the ground and placed his hand inside of her pants before she was able to escape. Accordingly, we conclude the circuit court properly denied appellant's motion for directed verdict.

Appellant lastly argues the circuit court erred by admitting portions of appellant's taped statement given to Detective Sherrard. Appellant specifically complains of the following portion of his taped statement:

Sherrard: I showed you the composite
that this, that was done uh,
several months ago. Is that
correct?

Krystynak: Yes, sir.

Sherrard: I think that looks like you.
Do you?

Krystynak: Sorta. Probably. The eyes
look different and the face
structure is a little
different, but only with a
glance (inaudible) know.

Sherrard: Um-hmm. But for somebody had only seen you one time, that looks pretty close. Wouldn't you say?

Krystynak: It looks pretty close, but I've never been that big. Really. And his hair looks like it's been dyed.

Sherrard: Um-hmm.

Krystynak: That's what that color hair would. It don't look like a regular blond.

Sherrard: Um-hmm.

Krystynak: It looks like a lighter type blond.

Sherrard: Um-hmm. Well, it's hard to make blond on the composite. You just try to show that the hair's light (Tape 1, 11/13/03, 11:12:30; TR I, 58-59).

Appellant argues the taped statement "improperly bolstered the victim's identification" of appellant as the attacker. Even if the above taped statement were improperly admitted, we view any error as harmless. Ky. R. Evid. 103; CR 61.02. Simply put, we cannot say that absent its admission there existed a reasonable possibility the jury's verdict would have been different. See Crane v. Commonwealth, 726 S.W.2d 302 (Ky. 1987).

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

ALL CONCUR.

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