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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000843-MR

ANGELINA BRUMLEY — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE ROBERT E. GILLUM, JUDGE
INDICTMENT NO. 03-CR-00084-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING IN PART – REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Angelina Brumley appeals from a judgment and jury verdict of the Pulaski Circuit Court finding her guilty of complicity to first-degree sexual abuse and sentencing her to five years' imprisonment. Upon review, we affirm in part, reverse in part and remand.

[1] Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In 1999, Brumley was living with her two children, B.P., a girl, and A.H., a boy, at the Cumberland Manor Apartments in Pulaski County, Kentucky. Brumley met Elijah Burns, also a resident at Cumberland Manor, when he was waiting for the bus to school; at the time, she was 26 and he was 18. The two began a relationship and, in November 1999, Brumley sought permission from the housing office to add Burns to her lease. Burns moved in with Brumley and her two children in January 2000.

After he moved in, Burns allegedly began to sexually abuse Brumley's daughter B.P., who was seven years old at the time.[2] According to testimony given by B.P. at trial, Burns first touched her in a sexual manner by putting his hand down her pants and touching her genital area while she was sitting on his lap. B.P. further testified that later that day she went into the kitchen to tell Brumley what had happened, and was told "he was probably just trying to tickle me and he touched you." B.P. indicated that she never told Brumley about anything else that Burns allegedly did to her of a sexual nature after that because she did not know what Brumley would say and because Burns told her to keep it a secret.

[2] Burns also allegedly abused two female friends of B.P. who were six and eleven years old at the time. These children would also ultimately testify at trial.

Information concerning Burns' sexual activities (he was also indicted for sexually abusing other young girls) eventually came to the attention of the local social service agency and the Kentucky State Police. Brumley was subsequently indicted on March 26, 2003, for two counts of complicity to Burns' first-degree sexual abuse of B.P. She was tried jointly with Burns, who had been indicted on multiple counts of first-degree sexual abuse, first-degree sodomy, and first-degree rape.

At trial, Brumley testified in her own behalf. She denied that B.P. had made any mention to her of the initial touching episode noted above and actually testified that she had asked B.P. if Burns had done anything to her, which she said B.P. had denied. However, she admitted on cross-examination that when questioned by the police earlier she had admitted that B.P. had told her about this incident, but that B.P. had told her that Burns had only touched the inner side of her legs. Brumley further testified that B.P. had not told her about anything else that Burns had allegedly done to her.

Carolyn Ping, Brumley's mother and B.P.'s grandmother, also testified at trial. She indicated that she saw Burns kiss B.P. on the lips in an "adult-like" manner, but that she never told Brumley about this. She further indicated that she told Brumley that she saw Burns tickle B.P. while the two were playing, but that Brumley said nothing about it.

Brumley was ultimately found guilty of one count of complicity to first-degree sexual abuse, with the jury recommending a sentence of five years' imprisonment. She was sentenced accordingly by the Pulaski Circuit Court in a judgment entered on April 5, 2004. Burns was also found guilty of all charges against him and was sentenced to seventy years' imprisonment. Brumley now appeals as a matter of right.

Brumley raises three contentions on appeal: (1) the jury was incorrectly instructed as to the necessary mental state needed for a complicity conviction; (2) her motion for a directed verdict should have been sustained; and (3) the trial court erred in refusing to disqualify the Assistant Commonwealth's Attorney from prosecuting her case and in refusing to allow her to call him as a witness.

We focus our analysis on Brumley's argument that the jury was incorrectly instructed as to the necessary mental state required for a complicity conviction pursuant to KRS[3] 502.020. The jury instruction in question reads as follows:

> **COMPLICITY TO SEXUAL ABUSE, FIRST-DEGREE**
>
> You will find the Defendant guilty of Complicity to Sexual Abuse, First-Degree under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

[3] Kentucky Revised Statutes.

> A. That in this county on or about January 2000 to January 2001, Elijah Burns sexually abused B.P. by having sexual contact with said child, being less than 12 years of age;
>
> B. That in so doing, Elijah Burns' acts of sexual contact were intentional;[4]
>
> C. That the Defendant was the mother of B.P.;
>
> AND
>
> D. That at the time of the sexual contact by Elijah Burns, the Defendant was acting wantonly[5] or recklessly[6] with respect to the risk that Elijah Burns would inflict sexual abuse upon B.P. and failed to make an effort reasonable under the circumstances to protect B.P. from such harm.

Brumley specifically contends that, because Burns was charged with sexual abuse, a crime that she submits is completed upon its act, KRS 502.020(1), the "complicity as to the act" subsection of that statute, is implicated. Consequently, the Commonwealth should have been required to prove that she knew

[4] "Intentionally" was defined in the jury instructions as follows: "A person acts intentionally with respect to a result or to a conduct when her conscious objective is to cause that result or to engage in that conduct."

[5] "Wantonly" was defined in the jury instructions as follows: "A person acts wantonly with respect to a result or to a circumstance when she is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

[6] "Recklessly" was defined in the jury instructions as follows: "A person acts recklessly with respect to a result or to a circumstance when she fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

that Burns intended to sexually abuse her daughter and that she then intentionally failed to prevent that abuse in order to procure a complicity conviction. The Commonwealth counters that the instruction was proper pursuant to Lane v. Commonwealth, 956 S.W.2d 874 (Ky. 1997), and that according to KRS 502.020(2), the "complicity as to the result" subsection, is applicable; therefore, the argument goes, only wantonness or recklessness must be proven.

KRS 502.020, entitled "Liability for conduct of another; complicity," reads in its entirety as follows:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.
>
> (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

> (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
>
> (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
>
> (c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

As the Official Commentary to this statute reads, "[t]o be guilty under subsection (1) for a crime committed by another, a defendant must have specifically intended to promote or facilitate the commission of that offense. This means that the statute is not applicable to a person acting with a culpable mental state other than 'intentionally.'" (1974 Official Commentary). The Commentary includes as falling under subsection (1) the offense of "failure to perform duty: the failure to prevent the commission of an offense by one having a duty to do so accompanied by the requisite mental state constitutes guilt under this subsection." Id. As for subsection (2), the Commentary states that "[t]he purpose of subsection (2) is to make special provisions for complicity in an offense which has a prohibited result as an essential element. The offenses most likely to be affected by this provision are homicide, with death of another as the prohibited result,[7] and assault, with

[7] See KRS Chapter 507.

bodily injury of another as the prohibited result.[8] Unlike subsection (1), this provision does not require for liability that a defendant intended to promote or facilitate the commission of an offense. It is required only that a defendant act with the kind of culpability sufficient for commission of the offense charged." Id. Other commentators have particularly noted that KRS 502.020(2) has "limited applicability," and that KRS 502.020(1) governs "the vast majority of cases involving accomplice liability." Robert G. Lawson & William H. Fortune, Kentucky Criminal Law, § 3-3(b)(1) (LEXIS 1998).

In line with the Official Commentary, our Supreme Court has recognized that KRS 502.020 "describes two separate and distinct theories under which a person can be found guilty by complicity, i.e., 'complicity to the act' under subsection (1) of the statute, which applies when the principal actor's conduct constitutes the criminal offense, and 'complicity to the result' under subsection (2) of the statute, which applies when the result of the principal's conduct constitutes the criminal offense." Tharp v. Commonwealth, 40 S.W.3d 356, 360 (Ky. 2000). The Supreme Court has further reinforced the fact that KRS 502.020(1) requires proof that it was the defendant's intention to promote or facilitate the principal conduct constituting the charged offense, while a conviction under KRS 502.020(2) can be

[8] See KRS Chapter 508.

achieved with a showing of intent, recklessness, wantonness, or aggravated wantonness with respect to the result that is sufficient for commission of the principal offense. Id.; see also Harper v. Commonwealth, 43 S.W.3d 261, 263-64 (Ky. 2001). Accordingly, the mental state of the defendant is very much at issue in complicity cases.

The jury instructions given at trial here were clearly predicated on an understanding that complicity to first-degree sexual abuse falls under KRS 502.020(2), the "complicity to the result" subsection, as they asked the jury to find Brumley guilty if it found that she acted "wantonly or recklessly." As noted above, Brumley argues that KRS 502.020(1), the "complicity to the act" subsection, is applicable instead; therefore, the trial court erred in refusing to instruct the jury that it must find that she acted intentionally. Accordingly, we believe that the appropriateness of these instructions must turn on whether first-degree sexual abuse is an "act" or "result" offense. This specific issue appears to be one of first impression.

The statute that sets forth the offense of first-degree sexual abuse is KRS 510.110, which reads as follows:

> (1) A person is guilty of sexual abuse in the first degree when:
>
> (a) He subjects another person to sexual contact by forcible compulsion; or

> (b) He subjects another person to sexual contact who is incapable of consent because he:
>
> 1. Is physically helpless;
>
> 2. Is less than twelve (12) years old; or
>
> 3. Is mentally incapacitated.
>
> (2) Sexual abuse in the first degree is a Class D felony.

"Sexual contact" is defined in KRS 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."

The Official Commentary to KRS 510.110 sets forth that the "three degrees of sexual abuse contained in KRS 510.110, 510.120, and 510.130 roughly parallel the structure for rape and sodomy." (1974 Official Commentary). In particular, we note that the statutory language used in KRS 510.110 (first-degree sexual abuse), KRS 510.040 (first-degree rape), and KRS 510.070 (first-degree sodomy) substantively differs only in the type of act required for each offense, with sexual abuse requiring "sexual contact," rape requiring "sexual intercourse," and sodomy requiring "deviate sexual intercourse." The Commentary further notes that the proscribed behavior of sexual abuse, when performed on an adult, was formerly prosecuted under an assault provision. (1974 Official Commentary). However, as the Commentary further provides, "under the Code an actual physical

injury must be inflicted to constitute an assault. Since the conduct dealt with in the offense of sexual abuse seldom results in physical injury a gap would exist if this conduct were not proscribed. Thus, these three sections constitute a special prohibition against sexual assault." Id.

Consequently, it is clear that our General Assembly considers sexual abuse as somewhat comparable to assault, but a distinct enough offense to require its own classification, given the finding that sexual abuse rarely results in physical injury. This refutes the Commonwealth's argument that the sexual abuse allegedly committed against B.P. is "akin to the prohibited result of bodily injury that occurs in connection with assault offenses." Indeed, as other commentators have noted: "'Sexual contact' generally does not physically injure the victim. Thus, there is no grading based on injury. If the victim sustains injury as a result of a sexual touching the defendant should be charged with assault, rather than sexual abuse." Lawson & Fortune, supra, § 11-6(b).

We similarly believe that this distinction is an important one and note that KRS 510.110, the sexual abuse statute at issue here, makes no reference to any sort of "result," instead indicating that the crime is complete upon sexual contact by forcible compulsion or sexual contact upon a person incapable of consent. This would indicate that sexual

abuse should fall within the "complicity to the act" category given the emphasis on the "act" itself and the lack of any mention of any sort as to "result."

Moreover, as noted above, "sexual contact" is defined in KRS 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." While this definition requires proof that the contact be made for the purpose of sexual gratification, it does not require that the offense actually result in sexual gratification. Accordingly, we do not believe that KRS 510.010(7) supports the argument that sexual abuse is a "result" offense.

We further note that our Supreme Court has identified complicity of a mother to the rape of her child as falling within KRS 502.020(1), the "complicity to the act" subsection of the statute. Tharp, 30 S.W.3d at 361, 363. We also note that first-degree sexual abuse is considered a lesser-included offense of both first-degree rape and first-degree sodomy, Johnson v. Commonwealth, 864 S.W.2d 266, 277 (Ky. 1993), which is logical given how closely the statutory language for each offense corresponds. Given this correlation, we cannot reasonably say that sexual abuse should be categorized differently than rape for the purposes of the necessary mental state for complicity.

Consequently, we find that sexual abuse is an "act" offense for purposes of KRS 502.020. Therefore, in order for an accused to be convicted of complicity to first-degree sexual abuse, a finding must be made by the jury that the accused intended to promote or facilitate the conduct constituting the charged offense of sexual abuse. The instructions given to the jury in this case did not require such a finding to be made. Accordingly, we find that said instructions were in error, and that the case must be reversed and remanded for a new trial consistent with this opinion. See Carpenter v. Commonwealth, 771 S.W.2d 822, 825 (Ky. 1989), citing Watkins v. Commonwealth, 298 S.W.2d 306 (Ky. 1957).

Although we are reversing and remanding this case based upon erroneous jury instructions, we shall address the two remaining issues raised by Brumley.

The second issued raised by Brumley is that she was entitled to a directed verdict. While Brumley may not have preserved this issue by failing to move for a directed verdict at the close of the Commonwealth's case and by simply stating "we're again renewing the motion for directed verdict" at the close of the trial without stating specific grounds for the motion, we believe that under Schoenbacher v. Commonwealth, 95 S.W.3d 830 (Ky. 2003), this issue can be reviewed under RCr

10.26, the palpable error rule. As the Schoenbacher Court stated:

> We recognize not only that "burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude," but also that the nature of the error alleged here is such that, if the trial court did, in fact, err by failing to direct a verdict of acquittal, that failure would undoubtedly have affected Appellant's substantial rights. And, we likewise observe that the trial result necessarily would have been different if the trial court had directed a verdict in Appellant's favor. Accordingly, we examine the merits of Appellant's allegation.

Id. at 836-837 citing Miller v. Commonwealth, 77 S.W.3d 566, 576 (Ky. 2002) and Perkins v. Commonwealth, 694 S.W.2d 721, 722 (Ky.App. 1985). (Footnotes omitted).

We review a motion for directed verdict under the standard articulated in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1994). 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

reserve to the jury questions as to the credibility and weight to be given to such testimony.

On appellant 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 is the defendant entitled to a directed verdict of acquittal. Id. at 187.

While the case before us is somewhat confusing as to the charges against Brumley, we believe the Commonwealth presented sufficient evidence to overcome its burden of proof so as to avoid a directed verdict. We say the charges against Brumley are confusing in that Burns was charged with five (5) counts of sexual abuse relating to B.P. He was also charged with numerous counts of rape and sodomy against B.P. Yet, Brumley was indicted on only two counts of complicity to sexual abuse, first degree, and the jury instructions contained only one charge encompassing a time span from January 2000 to January 2001. As to why Brumley was not charged with the more serious counts of complicity to rape and/or sodomy is not clear. But it would appear that if she had a duty to protect her daughter from Burns as to any sexual abuse she would also have the same duty to protect her from being raped and sodomized. However, that issue is not before us at this time. As to the directed verdict, we believe B.P.'s testimony as to the events of the

alleged first incident of sexual abuse and her informing Brumley as to that event, combined with Brumley's own testimony as to her concerns relating to how Burns had touched B.P.(as well as testimony that B.P. may have alleged abuse in the past by other partners of Brumley) was sufficient to allow the matter to go to a jury. We also note that Brumley did not argue sufficiently of the evidence in closing arguments but rather B.P.'s credibility.

Brumley's final argument relates to disqualifying the Assistant Commonwealth's attorney from prosecuting the case and in refusing to allow her to call him as a witness. We address this issue because it could again be raised at a re-trial in this matter. Following Burns's arrest, Brumley was picked up for questioning by State Trooper Doug Byrd. This questioning took place in the Commonwealth Attorney's office and Assistant Commonwealth Attorney Gregory Ousley and two other police officers were present. Prior to trial, Brumley moved the court to disqualify Ousley and to suppress any statement made during the interview. In response, the Commonwealth indicated that it did not intend to use any statements made by Brumley except possibly for impeachment purposes. The court denied Brumley's motions. At trial, Brumley did testify and the Commonwealth used statements made during the initial interview to impeach her. During cross-examination of Brumley, the following exchange took place:

Q. So she [B.P.] never told you anything. You asked her because you saw something that concerned you?

A. Yes.

Q. Okay. Any why did you tell the trooper…When you were in my office why did you tell the trooper you acknowledged that she told you Eli had touched her?

A. She didn't come to me and tell me that he had touched her.

Q. What I'm saying is why did you acknowledge it when you were in the commonwealth attorney's (sic) office. You told the trooper, "Yes, [B.P] told me that she was touched and I told her it was an accident." Why did you say that?

A. She didn't no [sic].

Q. Are you saying you didn't say that?

A. She did not say that he had touched her.

Q. What I'm asking you, ma'am is that when you were in the commonwealth attorney's (sic) office you told that trooper. You acknowledged that your daughter, B.P., had told you that Elijah Burns had touched her. Are you denying that?

A. I never said that in...

Q. Are you denying it? Yes or no.

A. No, I'm not denying it.

On appeal, Brumley contends that she was unduly prejudiced by the court's order permitting Assistant

Commonwealth Attorney Ousley to prosecute the case and not permitting her to call him as a witness. Her argument is based upon KRS 15.733(2)(d) which states that a prosecuting attorney shall disqualify himself if to his knowledge he is likely to be a material witness in the proceeding. Brumley contends that since Ousley was present at her initial interview she wished to question him about what transpired at that time. However, we believe the circuit court's ruling in this matter to be proper. We see nothing in Brumley's allegations that would make any testimony offered by Ousley to be relevant or material to Brumley's defense. The fact that Ousley was present during the interview was made known to the jury, as well as, Brumley's concerns that the interview was "unfair" since there were three police officers and Ousley present and she was not afforded the right to counsel. Nothing in the interview was brought out during direct testimony but used only to impeach Brumley when she made a conflicting statement. On appeal, Brumley does not argue that any statement should have been suppressed but only that Ousley should have been disqualified. After a thorough review of Brumley's arguments, we cannot find anything in the record that would substantiate Brumley's contention that Ousley needed to be disqualified. She has not presented any argument that Ousley could have provided any relevant or material testimony. Without presenting such, Brumley's argument that

Ousley had to be disqualified pursuant to KRS 15.733(2)(d) must fail. The mere fact that a prosecuting attorney was present during the investigation of a crime or observed police interview or interrogate a suspect is not a valid reason to demand disqualification of that prosecutor.

For the foregoing reasons, the final judgment entered by the Pulaski Circuit Court is affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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