

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002276-MR

MICHAEL CHILTON

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
INDICTMENT NO. 02-CR-00494

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM,¹ DYCHE, AND GUIDUGLI, JUDGES.

DYCHE, JUDGE: Michael Chilton was a deputy sheriff for the Daviess County Sheriff's Department. In that capacity, he also served as a patrolman, the DARE officer, and the school resource officer at Apollo High School in Owensboro, Kentucky. Chilton was removed from the latter position after a complaint was filed against him. He was returned to patrol duty, but later was terminated from the sheriff's office in early 2003.

¹ Judge David C. Buckingham concurred in this opinion prior to his retirement effective May 1, 2006.

While serving as school resource officer, allegations were brought against Chilton by two female juveniles. He was indicted for three counts of sexual abuse in the first degree and one count of sodomy in the first degree. The jury convicted Chilton of three counts of third degree sexual abuse and one count of third degree sodomy. He was sentenced to a total of three years' imprisonment. Chilton appeals, and we affirm.

Chilton's first two arguments concern the jury instructions. He takes issue with the trial court's instructions on the lesser included offenses because they were contrary to both the Commonwealth's and defense's presentations of evidence: Chilton asserts that the Commonwealth's theory was contact by forcible compulsion and the defense's was complete denial, thus the giving of lesser included offense instructions was improper.

We disagree. The trial court is compelled to instruct the jury on the evidence as presented, not the theories of presentation. "Where the evidence is such that the jury could come to any of several conclusions, the trial court is required to submit the instructions on the various alternatives." Sanborn v. Commonwealth, 754 S.W.2d 534, 549 (Ky. 1997).

Nor did the instructions as given "prohibit[] [Chilton] from pursuing a viable trial strategy." The trial

court did not err in instructing the jury on lesser included offenses.

Chilton thirdly argues that the trial court erred in granting the Commonwealth's motion to amend the indictment. The date of occurrence on two counts of the indictment versus Chilton was originally cited as August 2, 2002. Part of Chilton's denial defense was grounded in alibi: He proffered testimony through three witnesses that it was impossible for the events concerning A.H. to have occurred on that date. The Commonwealth made a motion to amend the occurrence date to July 24, 2002, and the trial court granted the motion, giving Chilton a three day continuance in order to regroup on the alibi defense. Chilton accepted the continuance, but when court reconvened the following Monday, he moved for a mistrial.

RCr 6.16 permits the trial court, in its discretion, to amend an indictment "any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted." Here, no additional or different offense was charged, nor was Chilton prejudiced or is he able to demonstrate an abuse of discretion. See Johnson v. Commonwealth, 105 S.W.3d 430 (Ky. 2003). We find no error in the amendment of the indictment.

The fourth allegation of error is in regard to the admission into evidence of emails sent by Chilton to victim D.D. during the summer and fall previous to the alleged incidents. Chilton insists that the prejudicial effect of the emails significantly outweighed any relevance the evidence might have had to the matter being tried. KRE 401 and 403. The trial court disagreed, and we affirm. Again the standard of review is whether the trial court abused its discretion. See Love v. Commonwealth, 55 S.W.3d 816, 822 (Ky. 2001); and English v. Commonwealth, 993 S.W.3d 941, 945 (Ky. 1999). The trial court found the correspondence to be relevant evidence of appellant's and D.D.'s relationship and indicative of Chilton's pattern of seduction. We find no abuse of discretion in the trial court's admitting this evidence.

Chilton lastly alleges that he was entitled to separate trials for separate victims. RCr 9.16. Contrary to Chilton's argument, joinder of the offenses was proper (RCr 6.18), and, absent the requisite demonstration of prejudice or abuse of discretion (see Cannon v. Commonwealth, 777 S.W.2d 591 (Ky. 1989)), we decline to disturb that ruling.

The judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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