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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000971-MR

LACY BEDINGFIELD — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 95-CR-00866

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI[1] AND JOHNSON,[2] JUDGES.

JOHNSON, JUDGE: Lacy Bedingfield has appealed from an order entered by the Fayette Circuit Court on April 6, 2005, which denied his motion to vacate judgment and to grant him a new trial. Having concluded that the trial court did not abuse its discretion in refusing to grant Bedingfield a new trial based upon newly discovered evidence, we affirm.

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[1] Judge Daniel T. Guidugli concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

On October 2, 1995, Bedingfield was indicted by a Fayette County grand jury for two counts of rape in the first degree,[3] and three counts of sodomy in the first degree.[4] A separate indictment was issued charging Bedingfield with being a persistent felony offender in the first degree (PFO I).[5] The two indictments were consolidated and a jury trial was held on April 1 and 2, 1996.

Evidence at trial showed that on the night of June 2, 1995, two Lexington Police officers were approached by a young girl[6] wearing only a t-shirt, who told them she had just been raped by a man at a certain residence and she was afraid that her friend[7] was also being raped. The police followed the girl to the residence, and the girl identified Bedingfield as the person who had raped her. Bedingfield was apprehended as he was leaving the residence and arrested. Bedingfield, who was 39 years old, was the victim's friend's former step-father, but he still lived with his ex-wife and her daughter, the victim's friend, at the suspect residence.

Physical samples were taken from the girl and pursuant to a court order samples were also taken from Bedingfield. The

[3] Kentucky Revised Statutes (KRS) 510.040.

[4] KRS 510.070.

[5] KRS 532.080(3).

[6] The victim was 13 years old.

[7] Her friend was 11 years old.

victim's blood type is B and Bedingfield's blood is type O. Edward Taylor, a forensic serologist from the Kentucky State Police crime laboratory, testified that he found traces of semen on the t-shirt the girl had been wearing, on some pants she had been given to put on, as well as on a vaginal swab. However, he stated that it was not possible to perform DNA testing on those small samples.

However, Taylor did testify that he was able to determine through blood-type secretions in the bodily fluids that there were group B factors present in the semen samples, and that he could not rule out type O factors. He stated that about 80% of people are secretors, i.e., a person who secretes their blood type in other bodily fluids. The victim was determined to be a type B secretor and Bedingfield was determined to be a type O secretor. Taylor also testified that if a bodily fluid contains a mixture of the bodily fluids of two people, with one of the two being a type O secretor and the other person having type A, B, or AB factors, the type O factors would be masked by either the A, B, or AB factors. Thus, Bedingfield's type O factors could have been present in the bodily fluids which were tested because if the victim's type B factors were mixed with Bedingfield's type O factors, the type B factors would have masked the type O factors. Further, since the victim was a type B secretor, Taylor stated that he could

not be certain that the victim had not had sexual intercourse with a type B secretor, although the victim testified that she had not had consensual intercourse with anyone else on that day.[8]

The jury found Bedingfield guilty of one count of rape in the first degree, and being a PFO I, and recommended a prison sentence of 25 years, which the trial court ordered. Bedingfield directly appealed his convictions to the Supreme Court of Kentucky,[9] which affirmed the convictions in a non-published Opinion rendered on September 4, 1997.

During the time his appeal was pending, Bedingfield filed a motion pursuant to RCr[10] 11.42, claiming various elements of ineffective assistance of trial counsel. The trial court denied the motion on June 16, 1997. This Court affirmed the denial on July 17, 1998.[11]

On July 6, 2004, Bedingfield filed a motion for release of evidence consisting of the victim's rape kit. He sought forensic testing of the semen which was not available at the time of trial in 1996. The Commonwealth did not oppose the release of the evidence for testing. The trial court granted the motion on September 7, 2004, and the forensic evidence was

[8] The victim was not asked if she had had sexual intercourse with anyone else previously that week. Bedingfield asserts in his brief that an assumption was made during trial that a 13-year-old female is not sexually active.
[9] 1996-SC-0508-MR.

[10] Kentucky Rules of Criminal Procedure.

[11] Case No. 1997-CA-1597-MR, not-to-be-published.

sent for testing to Reliagene Technologies in New Orleans, Louisiana.

On January 26, 2005, Bedingfield filed a motion to vacate judgment and to grant new trial pursuant to CR[12] 60.02 (e) and (f), RCr 10.02 and RCr 10.06. Bedingfield claimed that the results of the DNA testing performed by Reliagene excluded him as the source of the semen recovered from the victim and requested a new trial based upon the newly discovered evidence. The Commonwealth responded that Bedingfield was not entitled to a new trial because "there was a wealth of evidence pointing to [Bedingfield's] guilt at trial aside from the presence of unknown semen on the vaginal smear."

The trial court entered its opinion and order on April 6, 2005, denying the motion, and stated as follows:

> The central inquiry, as stated above, is would the exclusion of [Bedingfield] as the source of the semen be significant enough to change the outcome of the trial within a reasonable certainty. This Court is of the opinion that the DNA evidence in this case was limited from the beginning and recognizes the possible confusion surrounding the testimony dealing with said evidence.
>
> Given the entirety of the proof, the Court is not convinced the newly discovered evidence would change the outcome of the jury's decision. The testimony from those finding the two girls after the incident in question supports the determination that a

[12] Kentucky Rules of Civil Procedure.

> rape occurred. The condition of the home where the events occurred as well as the torn bathing suit affords credence to the conclusion of guilt. The statement made by [Bedingfield] at the hospital in addition to the clump of hair found in the home further support the jury's conclusion. The testimony of the minor witness and the victim designate [Bedingfield] as the attacker. The account of events as given by the two girls was relatively consistent. Both were subjected to zealous cross-examination by the competent trial counsel and upon review of the trial tape, flaws in the testimonies were exposed.
>
> The exclusion of [Bedingfield] as the source of semen does not negate any of the forgoing evidence nor does it tend to prove, considering the entire case, that [Bedingfield] did not commit rape. The evidence of the exclusion, in this Court's opinion, is not of such significance that the verdict would change or be likely to change.

This appeal followed.

"Whether to grant a new trial on the basis of newly discovered evidence is largely within the discretion of the trial court, and the standard of review is whether there has been an abuse of that discretion" [citations omitted].[13] "[N]ewly discovered evidence that merely impeaches the credibility of a witness or is cumulative is generally disfavored as grounds for granting a new trial."[14] The evidence "'must be of such decisive value or force that it would, with

[13] Foley v. Commonwealth, 55 S.W.3d 809, 814 (Ky. 2000).

[14] Id.

reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.'"[15]

Bedingfield summarizes the significance of the DNA tests performed in 2004 in his reply brief as follows:

> The Commonwealth first downplays the importance that the blood-type secretion evidence played in the Commonwealth's case. They further argue the jury convicted the Appellant "despite the discrepancy between his blood type and the type found in the secretions from the pants [the victim] had put on." The [b]lood-type secretion testimony did not create a discrepancy between the Appellant's blood type and the type found on the secretion from the pants as the Commonwealth now claims. In fact, the secretion testimony fully supported the Commonwealth's theory that the semen belonged to the Appellant. Specifically, semen and Group B factors were found on the pants that [the victim] was wearing. The Appellant is a Group O blood type secretor and [the victim] is a Group B blood type secretor. Group B blood type secretions mask Group O blood type secretions. Consequently, in the instant case the semen either came from a Group B or a Group O secretor, which included the Appellant. Given the testimony that [the victim] did not have sex with anyone else that day, that she had been in and out of the pool all day, and in consideration of her age of 13, the jury had no option except to attribute the semen to the Appellant, a Group O blood type secretor [citations to record omitted].
>
> The Commonwealth next argues that the newly discovered evidence "merely indicated that someone else had engaged in sexual intercourse with [the victim] sometime prior to the rape." This evidence, however, does

[15] Collins v. Commonwealth, 951 S.W.2d 569, 576 (Ky. 1997) (quoting Coots v. Commonwealth, 418 S.W.2d 752, 754 (Ky. 1967)).

> much more. As previously mentioned, given the evidence at trial, there was no other explanation for the semen other than attributing it to the Appellant. As such, it supported the allegation that a rape had occurred despite the problems with the other testimony at trial [citations to record omitted].

While the DNA evidence certainly constitutes impeaching evidence, we cannot conclude that this evidence with reasonable certainty would change the result at a new trial. Thus, the trial court did not abuse its discretion in denying Bedingfield's motion for a new trial.

More specifically, while the DNA evidence excluded Bedingfield as a source of the semen, the testimony at trial was that Bedingfield may or may not have been the source of the semen because of the difference in the typing of blood secretions in the semen. The fact that further DNA testing proved that Bedingfield was not the source of the semen found on the victim's vaginal swab does not mean that he did not rape the victim. It merely established that she had had sex with another man in the recent past.

At trial, the jury was made aware of the discrepancies in the witnesses' testimonies. In its brief the Commonwealth summarizes the other evidence in support of Bedingfield's guilt as follows:

> 1. Physical evidence corroborated [the victim's] and [her friend's] testimony

that Appellant assaulted [the victim] by striking her with his fists. Nurse LeAnn Wright and Dr. Joseph Stapczynski described contusions and swelling to [the victim's] face and a scrape on her arm [citation to record omitted].

2. [The victim] and [her friend] both testified that Appellant grabbed [the victim] by the hair and threw her onto [her friend's] bed. A clump of hair was photographed and collected from the bed [citations to record omitted].

3. Both [the victim] and [her friend] testified that Appellant ripped [the victim's] bathing suit off of her. The torn bathing suit was collected by police from the floor beside [her friend's] bed and introduced at trial [citations to record omitted].

4. [The victim] testified that Appellant was wearing blue shorts when they were in the den watching television. [The victim] testified that while they were there Appellant took her black shorts off of her. Police found the black shorts in the family room floor in front of the television. Both [the victim] and [her friend] testified that they went to [the friend's] room and locked the door. They further stated that Appellant forced his way through the door and was completely naked. Appellant's blue shorts and boxer shorts were also found in the den [citations to record omitted].

5. [The victim] testified that when Appellant's penis touched her anus, it felt slimy. [The friend] testified that Appellant brought a bottle of hair conditioner in the room and [rubbed] it on his penis before raping [the victim]. Police located and collected a bottle of hair conditioner from the

dresser in [the friend's] bedroom [citations to record omitted].

6. [The victim] testified when Appellant was finished raping her, he told her to "[g]et up and get out." She fled the room, but then Appellant changed his mind and told her, "I'm not through. I want it again." He dragged her into another bedroom and raped her again. [Her friend] testified that at this opportunity, she jumped out the window and ran to a friend's house. Caroline Hufstedler testified that [the friend] ran to her house, upset and crying that "[h]e raped my friend and tried to rape me[ ]" [citations to record omitted].

7. [The victim] testified that after Appellant raped her again in the second bedroom he went to get something and she fled with nothing but her t-shirt on her. She further stated that Appellant chased her through the house, knocking over a lamp along the way. Police located and photographed a turned-over lamp [citation to record omitted].

8. Lexington police officers were on foot patrol when they encountered [the victim] semi-hysterical, crying that she had been raped, clothed in only a t-shirt [citation to record omitted].

9. Police took [the victim] back to the house where she was raped and the officers saw Appellant coming out of the kitchen door wearing only blue jeans and shoes, and "perspiring profusely [citation to record omitted].

10. The girls testified that Appellant was drinking MD 20/20 before raping [the victim], and Officer Phil Taylor, who participated in Appellant's arrest, confirmed that Appellant smelled of

alcoholic beverages [citations to record omitted].

11. While Appellant was at the hospital to submit physical samples for forensic purposes, Nurse Brian Howard cleaned and bandaged a laceration on Appellant's left big toe. Appellant told Howard several different stories about how he had cut it. At trial Appellant claimed that he had cut it earlier that day while replacing the blade of a meat-cutting band saw at the restaurant where he was employed. However, he could not produce the shoes that the blade had purportedly cut through [citations to record omitted].

12. Finally, Appellant confessed at the hospital on the night of the crime. He said that he had sex with the girl but didn't know she was underage. Appellant recanted this confession at trial, claming that he only admitted to the serious crime because he didn't want his penis swabbed.

Given the magnitude of the evidence against Appellant, it is not possible to find that if the jury had learned the victim had sex with someone other than Appellant at some time prior to the rape, there is a reasonably certainty that the verdict would have been different.

We agree with the Commonwealth that the trial court did not abuse its discretion in denying Bedingfield a new trial. As stated in Foley: "While [this] result may at first blush seem harsh, [it] is based on the principle that a defendant is entitled to one fair trial and not to a series of trials based on newly discovered evidence unless that evidence is

sufficiently compelling as to create a reasonable certainty that the verdict would have been different had the evidence been available at the former trial[.]" We cannot conclude that there is a reasonable certainty that the newly discovered evidence would bring about a different result at a new trial.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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