

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001641-MR

JO HYOUNG KIM

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 04-CR-00127

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, TAYLOR, AND WINE, JUDGES.

TAYLOR, JUDGE: Jo Hyoung Kim brings this appeal from an October 4, 2004, judgment of the Hardin Circuit Court upon a jury verdict of guilty of first-degree sexual abuse and fourth-degree assault. We affirm.

Appellant and the victim, C.S.P., were involved in a romantic relationship.¹ The duration of this relationship is controverted. In any event, on January 8, 2004, C.S.P. was returning from Rough River in the early morning hours when appellant spotted C.S.P.'s vehicle. Appellant followed C.S.P., and C.S.P. eventually stopped her vehicle.

¹ The record reflects that the victim was married and had two children.

Appellant then accused C.S.P. of cheating on him, and C.S.P. drove away. Appellant again followed C.S.P. and used his car to block the entrance to her subdivision. C.S.P. eventually pulled the vehicle over and attempted to take refuge in a nearby restaurant. However, appellant grabbed C.S.P. by the hair and forced her into his car. Appellant then locked the doors and began hitting C.S.P. with his elbow in the chest, back, and head. Appellant instructed C.S.P. to lift her top, but she refused. He lifted her shirt and bra, “twisted” her nipple, and “checked” her breast. Appellant then instructed C.S.P. to take off her undergarments, but she refused to do so. Appellant did so. He inserted his finger into C.S.P.'s vagina and smelled it several times. At some point, C.S.P. used her cell phone to call 911.

Appellant was subsequently indicted upon first-degree sexual abuse, first-degree unlawful imprisonment, second-degree stalking, and fourth-degree assault. A jury trial ensued, and appellant was found guilty of first-degree sexual abuse and fourth-degree assault. He was sentenced to three-years' imprisonment. This appeal follows.²

Appellant initially contends the circuit court committed error by denying his motion for a directed verdict of acquittal upon the offense of first-degree sexual abuse. The Commonwealth strenuously argues that appellant failed to preserve this issue for our review. Upon review of the videotape record, appellant clearly made a motion for directed verdict at the close of the Commonwealth's case-in-chief and at the conclusion of

² By order entered August 14, 2006, this Court granted appellant's motion to file a belated appeal.

defendant's case; however, the record is, likewise, clear that appellant failed to renew the motion for directed verdict after the Commonwealth presented its rebuttal evidence.

The law is clear. To preserve the issue for appellate review, a defendant must make a motion for directed verdict after the close of the Commonwealth's case-in-chief and must renew the motion for a directed verdict both at the close of defendant's case and at the close of the Commonwealth's rebuttal evidence:

[A]t the conclusion of the Commonwealth's evidence in chief, the defendant may make a motion for the court to direct a verdict of acquittal. In the event the motion is granted, then the charges will be dismissed. On the other hand, if the motion is denied, then, and in that event, the defendant must either stand on his motion and refuse to put on any proof or he may present his evidence to support his defense. At the conclusion of the defendant's case, he must renew his motion for a directed verdict of acquittal. In the event the motion is granted, the charges will be dismissed. On the other hand, if the motion is denied, **then the Commonwealth must proceed to put on its rebuttal evidence, if any, and at its conclusion the defendant must again renew his motion for a directed verdict of acquittal.** In each such instance the trial judge would have been afforded an opportunity to pass on the propriety of the motion. This is essential, not only essential but mandated by RCr 9.54.

Scruggs v. Com., 566 S.W.2d 405, 412 (Ky. 1978)(emphasis added); *see also*

Schoenbachler v. Com., 95 S.W.3d 830 (Ky. 2003). As appellant failed to renew his motion for a directed verdict at the close of the Commonwealth's rebuttal evidence, we are compelled to conclude that this issue was not preserved for our review.³

³ Appellant did not request this Court review to the issue under Ky. R. Crim. P. 10.26.

Appellant also argues the circuit court erroneously failed to grant a mistrial when one of the Commonwealth's witnesses, Detective Kelly Sloan, improperly testified to prior bad acts in contravention of Ky. R. Evid. 404(b).

It is well-recognized the decision to grant a mistrial is within the sound discretion of the trial court, and such decision will not be disturbed on appeal absent an abuse of discretion. *Neal v. Com.*, 95 S.W.3d 843 (Ky. 2003). A mistrial is regarded as an extreme remedy and will only be granted in light of manifest necessity. *Woodard v. Com.*, 147 S.W.3d 63 (Ky. 2004). To be entitled to a mistrial, the error must be of a magnitude to effectively deprive defendant of a fair and impartial trial. *Bray v. Com.*, 177 S.W.3d 741 (Ky. 2005). In this case, appellant alleges that a mistrial was warranted by Detective Sloan's particular testimony that appellant's motor vehicle license was suspended and by Detective Sloan's testimony that appellant discussed with the Detective other "instances" occurring with C.S.P. We shall address each particular allegation *seriatim*.

At trial, Detective Sloan was asked by appellant's counsel on cross-examination whether appellant was born in the United States. In response, the Detective stated that she was unsure but that appellant's mother owned a grocery store and that appellant possessed a motor vehicle operator's license, which was suspended. Appellant objected and moved for a mistrial. The court refused to grant a mistrial but admonished the jury not to consider the Detective's statement concerning appellant's suspended license.

Upon the whole, we are simply unable to conclude that the Detective's reference to appellant's suspended operator's license created a manifest necessity for mistrial or otherwise deprived appellant of a fair and impartial trial. Moreover, we view the circuit court's admonition to the jury as curing any error. *See Boone v. Com.*, 155 S.W.3d 727 (Ky.App. 2004).

We shall now address Detective Sloan's statement concerning his discussion with appellant about other “instances” with C.S.P. Again on cross-examination, Detective Sloan was asked specifically whether she interviewed C.S.P. prior to interviewing appellant. Detective Sloan answered in the affirmative. Detective Sloan was then asked whether appellant was specifically questioned as to the veracity of C.S.P.'s statements concerning the incident. At this point, Detective Sloan responded that “some of the time, there was a lot more interview that was not shown here where he had explained to me several instances, where we, that we had talked about.” Appellant objected and moved for a mistrial. The circuit court denied the motion.

Appellant maintains that Detective “Sloan was inferring that . . . [appellant] had followed and/or confronted her [C.S.P.] on other occasions.” Appellant's Brief at 13. Appellant believes Detective Sloan's testimony was highly prejudicial and amounted to the jury being informed that appellant “had confessed to other bad acts.” Appellant's Brief at 14. We disagree.

Detective Sloan's statement was ambiguous; however, the statement cannot reasonably be interpreted as amounting to a confession by appellant to other instances of

“bad acts.” More importantly, we do not view Detective Sloan's testimony as constituting an error of such magnitude to deny appellant a fair trial. Simply stated, there existed no manifest necessity requiring a mistrial.

In sum, we conclude the circuit court did not err by denying appellant's motions for mistrial.

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

ALL CONCUR.

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