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(FILE NO. 2007-SC-0697-D)**

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002104-MR

LISA ROBINSON — APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 05-CR-00033 and 05-CR-00033-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
AND
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

THOMPSON, JUDGE: The appellant, Lisa Robinson, was convicted of three counts of complicity to commit second-degree rape, three counts of complicity to commit third-degree rape, and was sentenced to eighteen years' imprisonment. On appeal, appellant

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

argues that: (1) her conviction for complicity to commit third-degree rape must be reversed because the principal's convictions on those charges were reversed by the Supreme Court; (2) the jury instructions were erroneous in regard to the complicity to commit second-degree rape because they incorrectly stated the dates on which the sexual contacts occurred; (3) there was insufficient evidence from which the jury could differentiate between each count and degree of rape; (4) the trial court erred when it denied her motion for a mistrial after the Commonwealth introduced her counsel as a public defender; (5) the trial court erred when it denied her motion for a mistrial after S.H. and members of the audience cried during the Commonwealth's closing argument; and (6) the trial court erred when it admitted S.H.'s father's victim impact statement as a part of the pre-sentence investigation report.

Appellant is the natural mother of S.H. who was born on February 15, 1986. When S.H. was approximately eight years old, appellant and S.H. moved in with appellant's boyfriend, Clarence Robinson.[2] In October of 1998, when S.H. was twelve years old, Robinson began having sex with her. On that occasion, he picked up S.H. from a program at her middle school and took her to a country road where he had sexual intercourse with her in his vehicle. In the months that followed, he continued to have sexual intercourse with her three to four times per week. S.H. stated that from the time she was twelve years old, Robinson threatened that if she ever told anyone about their relationship, he would harm her. In 1999, at the age of thirteen, S.H. became pregnant with Robinson's child.

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[2] Appellant and Robinson have the same surname but are not married or biologically related. In this Opinion, Robinson refers to Clarence Robinson and Appellant to Lisa Robinson.

In March 2000, S.H., Robinson, and appellant traveled to Knox County, Tennessee, where S.H. and Robinson were married. At the time, Robinson was thirty-seven years old, and S.H., then six months pregnant, was fourteen years old. The appellant altered S.H.'s birth certificate to make it appear that S.H. was sixteen years old. S.H. testified that she represented that she was sixteen years old on the marriage license application because she feared that if she refused, her mother and Robinson would leave her in Tennessee. S.H. testified that after the birth of her first son, her mother asked her if Robinson could be the father's child. After S.H. responded that it was possible, appellant told her that it was "normal."

After the birth of her first child in June 2000, Robinson continued to have sexual intercourse with S.H. on a nightly basis in her room, in the basement, or in the car. In July 2002, she gave birth to a second child. Thereafter, S.H. testified that Robinson had sexual intercourse with her more than once a night and, at the age of seventeen, in October 2003, she had a third child. Following the birth of the third child, S.H. obtained birth control from the health department.

In January 2005, S.H.'s children were removed from the home and S.H. confided to authorities that she and Robinson had been having sexual intercourse since she was twelve years old. S.H. was also interviewed by KSP Detective Van Wright. S.H. did not tell Detective Wright that she and Robinson were married. However, when Robinson was interviewed by Detective Wright, he stated that he and S.H. were married and produced the marriage certificate. Robinson admitted to having sex with S.H. and consented to a DNA test to determine the paternity of S.H.'s children. At the trial, the

parties stipulated that the DNA testing demonstrated that Robinson was the father of the three children.

Appellant was also interviewed by Detective Wright and told Wright that S.H. and Robinson were married because they loved each other. She admitted, however, that she had sexual intercourse with Robinson after he married S.H.

The Lincoln County grand jury indicted Robinson on seven counts of various degrees of rape and appellant on seven counts of complicity to rape. Following a joint trial, Robinson was found guilty of three counts of second-degree rape, three counts of third-degree rape and one count of first-degree rape. He was sentenced to a total of sixty-one years in prison. Except for the first-degree rape charge which the trial court dismissed pursuant to appellant's motion for a directed verdict, appellant was found guilty of complicity as to all the offenses of which Robinson was convicted.

During the pendency of this appeal, the Kentucky Supreme Court rendered its decision in *Robinson v. Commonwealth*, 212 S.W.3d 100 (Ky. 2006), wherein it reversed Robinson's conviction for the charges of the third-degree rape. In his direct appeal, Robinson argued that the trial court erred when it denied his request for an instruction under KRS 510.035. That statute provides:

> A person who engages in sexual intercourse or deviate sexual intercourse with another person to whom the person is married, or subjects another person to whom the person is married to sexual contact, does not commit an offense under this chapter regardless of the person's age solely because the other person is less than sixteen (16) years old or mentally retarded.

In a 4-3 decision, the Supreme Court held that the marriage was merely voidable and, therefore, that the trial court erred when it refused Robinson's tendered instruction.

Stating that since the legislature did not declare in KRS 402.030 that marriage to a child under the age of sixteen is absolutely void, it found that Robinson and S.H.'s marriage did not violate public policy. Moreover, the court concluded, KRS 510.035 and the marriage as a defense rule included in the statute evidences that there is no public policy against underage marriage.

We are, of course, bound to follow the law as pronounced by our Supreme Court. However, we are compelled to comment on the horrific facts of this case and the Court's declaration that the marriage was valid. As reflected in our statutory law and as has been often expressed by our courts, the protection of our youngest and most innocent citizens is of the utmost importance. Yet, as exemplified by this case, the law shields from punishment a child predator who fraudulently, and through coercion, marries his victim. However, this court has no authority to do otherwise than directed by the Supreme Court and by the legislature. Although we do so with reluctance, we nevertheless must recognize the marriage between Robinson and S.H. as valid and agree with appellant that her convictions for complicity to commit third-degree rape must be reversed.

Unlike Robinson, appellant did not tender a marriage as a defense instruction to the trial court and did not move for a directed verdict on the basis of the marriage. Thus, our review is under the palpable error rule.

A palpable error must involve prejudice more egregious than that occurring in reversible error. *Ernst v Commonwealth,* 160 S.W.3d 744, 758 (Ky. 2005). It must be so serious in nature that left uncorrected, it seriously would affect the fairness of the proceedings. *Id*. An error will not be deemed palpable unless the reviewing court

believes there is a "substantial possibility" that the result in the case would have been different without the error. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). This is one of the rare cases where we find that palpable error occurred.

The Commonwealth is correct when it recites that the conviction of the principal for the same offense is not a condition precedent to a conviction for complicity. *Tharp v. Commonwealth*, 40 S.W.3d 356 (Ky. 2000). The applicable rule is codified in KRS 502.030:

> In any prosecution for an offense in which the criminal liability of the accused is based upon the conduct of another person pursuant to KRS 502.010 and 502.020, it is no defense that:
>
> (1) Such other person has not been prosecuted for or convicted of any offense based on the conduct in question, or has previously been acquitted thereof, or has been convicted of a different offense, or has an immunity to prosecution or conviction for such conduct. . . .

The difficulty in the Commonwealth's reliance on the above statute is that the Supreme Court has reversed the principal's convictions on the basis that no offense was committed. The commission of an underlying offense by another person is clearly an element of complicity. KRS 502.020. Because the Supreme Court has reversed Robinson's conviction for any sexual offenses based on S.H.'s age that occurred after the marriage, appellant's convictions must likewise be reversed. Therefore, we must reverse appellant's convictions for three counts of complicity to commit third-degree rape which occurred after the marriage.

We now address the remaining issues raised in regard to appellant's conviction for complicity to second-degree rape.

The jury instructions regarding the three counts of complicity to rape in the second-degree were as follows:

> You will find the defendant guilty of Complicity to Rape, Second-Degree under this instruction if and only if, you believe from the evidence beyond a reasonable doubt all of the following:
> A. That in this county on or about March 2000 through November 2004 and before the finding of the indictment herein, Clarence V. Robinson engaged in sexual intercourse with S.H.;
> B. At the time of such intercourse, Clarence V. Robinson was 18 years of age or older and S.H. was less than 14 years of age;
> C. The Defendant Lisa Robinson aided and assisted Clarence V. Robinson in doing so by (1) counseling S.H. that "it's or it was" normal, (2) by aiding or assisting in the alteration of S.H.'s birth certificate, or (3) by aiding or assisting in obtaining a fraudulent marriage license and ceremony; AND
> D. That in aiding or assisting Clarence V. Robinson, it was the Defendant's intention that Clarence Robinson engage in sexual intercourse with S.H.

Since S.H.'s date of birth was February 15, 1986, in March 2000, she was fourteen years old. Thus, the instructions erroneously stated that the charged offenses occurred "on or before March 2000 through November 2004." However, we can find no objection which properly preserved the error. RCr 9.54(2). Thus, our review is under the palpable error rule. Although the instructions erroneously stated the specific dates, we do not believe the error to be palpable.

There was ample evidence in the record that Robinson had sexual intercourse with S.H. three to four times per week beginning at age twelve which continued until the birth of S.H.'s first child. The critical question in a second-degree rape case is the age of the victim at the time of the offense and not the specific date of the offense. *Berry v. Commonwealth*, 84 S.W.3d 82, 92 (Ky.App. 2001). Although the dates

stated in the instruction were erroneous, the language was surplusage and, therefore, was not an error so serious as to affect the fairness of the proceedings. *Ernst*, 160 S.W.3d at 758.

Appellant's third assignment of error is that the Commonwealth failed to produce sufficient evidence from which the jury could differentiate between each count and degree of rape. Again, we can find nothing in the record, either in her motion for directed verdict or objections to the jury instructions, which preserved the issue for review. Thus, we again discuss this issue in the context of the palpable error rule.

The precise date on which an offense was committed is not required of a child sexual victim if there is evidence sufficient to identify the various offenses charged. *Hampton v. Commonwealth*, 666 S.W.2d 737, 740 (Ky. 1984). In *Garrett v. Commonwealth*, 48 S.W.3d 6, 10 (Ky. 2001), the court emphasized that it is wholly unreasonable to expect a child to remember specific dates, especially when the abuse continues over a long period of time. Nevertheless, where various degrees of rape are charged based on the victims age, there must be sufficient evidence from which the jury can reasonably distinguish the charges.

In *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002), the court held that the victim's vague reference as to the frequency of the sexual offenses was insufficient to

support the jury instructions on one-hundred and fifty counts of first-degree rape and seventy-five counts of first-degree sodomy.

> Whether the issue is viewed as one of insufficient evidence, or double jeopardy, or denial of a unanimous verdict, when multiple offenses are charged in a single indictment, the Commonwealth must introduce evidence sufficient to prove each offense and to differentiate each count from the others, and the jury must be separately instructed on each charged offense. Mere mathematical extrapolation of a described offense based on such vague testimony as "almost every other weekend," "about ten weeks per year," or "every other time" will not support convictions of separate offenses.

Id. at 576.

S.H. testified to distinct facts which established at least three separate sexual acts by Robinson when she was between the ages of twelve and fourteen. The initial act occurred in October 1998 when Robinson picked S.H. up from her school. S.H. testified that thereafter he took her to country roads and raped her. He also raped her when they went to the store. In addition, her pregnancy with Robinson's child prior to the age of fourteen is undeniable proof that Robinson had sexual intercourse with S.H. when she was less than fourteen years old. There was sufficient evidence presented as to the age of S.H. at the time of each sexual act for the jury to distinguish between the various counts.

At the close of the Commonwealth's proof, appellant moved for a directed verdict of acquittal on the basis that there was insufficient evidence presented that prior to the marriage between Robinson and S.H., that she knew Robinson was having intercourse with her daughter. The court initially agreed to amend the three counts of complicity to second-degree rape to three counts of complicity to third-degree rape but the offer was

refused. Appellant was granted a directed verdict of acquittal as to the charge of complicity to first-degree rape.

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991). A directed verdict is proper only if the Commonwealth produces no more than a "mere scintilla" of evidence. *Id*. at 187-188.

At trial and now on appeal, appellant claims that there was no evidence introduced which established that prior to their marriage, she knew that Robinson was having sexual intercourse with her daughter. To the contrary, we find sufficient evidence from which a jury could reasonably infer not only that she knew of Robinson's crimes, but also that she intended to, and did, aid and assist Robinson in his continued sexual contact with her daughter. Specifically, the following facts were developed at trial:

> S.H. testified that she had a feeling her mother knew Robinson was having sex with her.
>
> When appellant falsified S.H.'s birth record and assisted Robinson in taking S.H. to Tennessee to fraudulently obtain a marriage license, S.H. had turned 14 years old just weeks before and was six months pregnant.
>
> After the birth of her first child, when S.H. informed appellant it was possible the child was Robinson's; appellant told her that it was normal.

Based on the evidence, the jury could reasonably infer that appellant knew of the sexual intercourse between Robinson and S.H. prior to the fraudulent marriage, and promoted and facilitated the commission of second-degree rape. We find no error.

Appellant moved for a mistrial on the basis that during the Commonwealth's summation, S.H. and others in the courtroom were crying. We have

reviewed that portion of the record and agree with the trial court that what was heard was sniffling, as opposed to the stronger emotional outburst of crying. Even if there was crying that could be heard by the jury, it is not the type of emotional outburst that would inflame the jury's passion and thus does not warrant a mistrial or other relief. *Lanham v. Commonwealth*, 171 S.W.3d 14, 32 (Ky. 2005).

Appellant's counsel also objected and moved for a mistrial after the trial court introduced appellant's counsel as a public defender. She alleges that poverty could arouse the passion of the jury regarding appellant's work ethic and appropriation of public funds. The cases cited by appellant, *Morris Commonwealth*, 766 S.W.2d 58 (Ky. 1989) and *Goff v. Commonwealth,* 241 Ky. 428, 44 S.W.2d 306 (1931), are examples of repetitive egregious remarks made by the Commonwealth. In contrast, a mere introduction to the jury of counsel as a public defender while inappropriate is not, under any possible theory of prejudice, sufficient to warrant a mistrial in its limited use in this trial.

Finally, we find no error in the admission of S.H.'s father's victim impact statement. "Although KRS 421.500(1) defines a victim whose statements '*shall* be considered by the court,' KRS 421.520(3) (emphasis added), the trial judge is not precluded from considering statements from other family members or friends of the victim." *Hoskins v. Maricle*, 150 S.W.3d 1, 26 (Ky. 2004)(citation omitted).

Appellant's convictions and sentence for three counts of complicity to commit third-degree rape are reversed and we remand for further proceedings consistent with this opinion and the Supreme Court's opinion in *Robinson*. Her convictions and sentence for complicity to commit second-degree rape are affirmed.

WINE, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, DISSENTING. I respectfully dissent from the portion of the majority opinion reversing the Appellant's conviction for three counts of third-degree rape. I believe that the majority has misconstrued the required effect on this case of the Kentucky Supreme Court's decision in *Robinson v. Commonwealth,* 212 S.W.3d 100 (Ky. 2006), and I disagree with the conclusion of the majority that palpable error occurred.

The majority correctly observed that we are bound to follow the precedents established by our Supreme Court. The Supreme Court couched its decision in *Robinson* in terms of the lack of any stated public policy against underage marriage, mentioning only in passing the trial court's reasoning "that public policy is not furthered by permitting individuals to use marriage as a defense to avoid what would otherwise be criminal sexual contact." *Id.* at 104. If underage marriage is not against Kentucky's public policy, surely fraud perpetrated in furtherance of a sex crime against a minor is. Had the *Robinson* majority taken a different view of the trial court's analysis of KRS 402.040, perhaps the result would have been different. *Id.* at 107, Wintersheimer, J., dissenting. But *Robinson* is what it is, and the question for us is, what effect must that case have on the outcome of this case? I believe that it is important that, rather than simply reversing the conviction

based on Clarence Robinson's overruled motion for a directed verdict, or remanding with directions that the three counts of third-degree rape be dismissed, the Supreme Court instead reversed and remanded "for proceedings consistent with this opinion." In view of the fact that Tennessee law provides that a marriage such as the one involved in this case is "voidable *from the beginning,"* an order of a Tennessee court invalidating the marriage, entered prior to Robinson's retrial, could have precluded his use of the defense. *See Robinson* at 105, *quoting Brown v. Brown,* 29 S.W.3d 491, 495 (Tenn.Ct.App. 2000). The Supreme Court in *Robinson* merely held that, because the marriage was voidable, and no proof was introduced at Clarence Robinson's trial that the marriage had yet been invalidated by a court of competent jurisdiction, Robinson was entitled to the requested instruction if retried upon remand.[3] *See Robinson* at 105-106.

I cannot agree with the majority's conclusion that it must follow from *Robinson* that no offense was committed within the meaning of KRS 502.020 and the cases discussing it. That conclusion is not required by the language of the opinion itself. KRS 502.030 clearly would permit the prosecution of the Appellant even if Clarence Robinson was never prosecuted in the first place. KRS 510.035 says that a spouse "does not commit an offense under this chapter regardless of the person's age solely because the other person is less than sixteen (16) years old or mentally retarded," but I cannot find in

[3] Counsel for the defense indicated at oral argument that upon remand, Clarence Robinson entered a guilty plea to charges including first-degree rape, and that the third-degree rape charges were dismissed pursuant to plea negotiations. To my knowledge these post-remand proceedings from Appellant's co-defendant's case were not made a part of the record of this appeal. The marriage must have been proved at the first trial through the testimony of the Commonwealth's only witnesses, S.M.H. and Detective Van Wright, because Clarence Robinson did not put on any proof. *Robinson,* 212 S.W.3d at 102-103.

the text of the *Robinson* opinion a holding, or even a statement in *dictum*, that no offense was committed under the facts of that case.

I must respectfully disagree that a palpable error occurred here. The Appellant neither tendered an instruction pursuant to KRS 510.035 nor moved for a directed verdict on the basis of the marriage. The trial court had no opportunity to rule on what the Appellant now alleges as error. The jury convicted her. I fail to see an injustice in this, much less a "manifest" one. In my view the trial court committed no error of any kind with regard to the Appellant's third-degree rape convictions, and I would affirm. Except with regard to the third-degree rape counts, I concur with the opinion of the majority.

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