

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000530-MR

LESLIE CHESTER

APPELLANT

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 05-CR-00331

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,¹ SENIOR JUDGE.

WINE, JUDGE: On May 27, 2005, a Christian County grand jury returned an indictment charging Leslie Chester with second-degree robbery, kidnapping, first-degree attempted sodomy, and alcohol intoxication. The matter proceeded to a jury trial on October 31, 2005. The trial court granted Chester a directed verdict on the charges of attempted sodomy and alcohol intoxication. The jury acquitted Chester of the kidnapping

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.

charge, but found him guilty of second-degree robbery.

Following the penalty phase, the jury fixed Chester's sentence at ten years' imprisonment, which the trial court imposed. On appeal, Chester contends that he was entitled to a directed verdict on the robbery charge, and he raises an unpreserved issue regarding the admissibility of a witness's identification of him in a show-up procedure. Finding no error, we affirm.

The charges arose from an incident that occurred on March 19, 2005, involving Chester and Derrick Stratton, the victim. Stratton testified that Chester approached him in a store and asked to speak with him privately. After both men left the store, Chester grabbed Stratton by both hands and dragged him into an abandoned house. Once inside the house, Chester asked Stratton to perform oral sex on him. Stratton refused. At this point, Chester noticed a bag of foreign coins in Stratton's pocket. Chester released Stratton's hands and took the bag from Stratton's pocket. Stratton then fled the house, ran back to the store, and called the police.

Stratton later gave the police a general description of the individual and identified Chester by name. The police located an individual matching the description and brought Stratton over to identify him. However, Stratton told the police that the individual was not the person who had robbed him.

Shortly thereafter, the police received information about another man who matched the description given by Stratton and who was running away from the crime scene. Based on this information, the police followed this person to Chester's mother's house, where Chester resided. The officers detained Chester and took him to Stratton's location. Stratton identified Chester as the person who robbed him. Later, Chester's mother gave consent for the police to search her house. The officers recovered the stolen coins in a drawer near the back entrance.

Chester first argues that he was entitled to a directed verdict on the robbery charge because there was no evidence either that he used force against the victim or that he did so with the intent to accomplish the robbery. The Commonwealth responds that a general motion for a directed verdict is not the proper means to challenge the sufficiency of the evidence on a particular issue. Anastasi v. Commonwealth, 754 S.W.2d 860, 862 (Ky. 1988). The Commonwealth correctly notes that when the evidence is insufficient to sustain the burden of proof on one or more, but less than all, of the issues presented by the case, the correct procedure is to object to the giving of instructions on those particular issues. Kimbrough v. Commonwealth, 550 S.W.2d 525, 529 (Ky. 1977).

However, this rule only applies when there are two or more charges and the evidence is sufficient to support one or more, but not all of the charges. Miller v. Commonwealth, 77 S.W.3d 566, 577 (Ky. 2002). Chester specifically moved for a directed verdict on the robbery charge, asserting that there was no evidence that he used or threatened to use force to accomplish the theft. On the other hand, use or threat of force is not an element of the kidnapping charge. KRS 509.040. We conclude that Chester's motion for a directed verdict based on insufficiency of the evidence adequately preserved the issue for appeal.

Nevertheless, we do not agree that Chester was entitled to a directed verdict on the robbery charge.

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

On appellate 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 the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991),
citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky.
1983).

While Stratton's testimony was not entirely consistent in certain details, it was sufficient to establish that Chester used or threatened the use of force to accomplish the theft of the coins from Stratton. KRS 515.030. Stratton testified that Chester grabbed his hands and dragged him to the abandoned house. He also testified that Chester choked him at some point while they were in the house, but he did not testify as to exactly when the choking occurred. Stratton also testified that Chester was still restraining his hands when he noticed the bag of coins missing.

The jury has wide latitude in inferring intent from the evidence. Intent can be inferred from the actions of an accused and from the surrounding circumstances. Anastasi, 754 S.W.2d at 862. Moreover, credibility determinations must be left to the jury. Benham, 816 S.W.2d at 187. In this case, the jury could reasonably conclude from the evidence that Chester used force against Stratton with the intent to accomplish the theft.

Chester next argues that the trial court erred in failing to suppress Stratton's show-up identification of him

following the arrest. Chester concedes that this issue is not preserved, but he argues that we should review this issue as palpable error pursuant to RCr 10.26. But given the totality of the circumstances, we cannot find that the show-up identification was so unreliable as to demonstrate the manifest injustice required under the palpable error rule.

In determining the admissibility of eyewitness identifications, Kentucky courts have consistently followed the United States Supreme Court's decision in Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). See Wilson v. Commonwealth, 695 S.W.2d 854, 857 (Ky. 1985). The Court in Neil set out a two-prong test under which the court must first determine whether the confrontation procedures employed by the police were suggestive. First, the court must determine whether the confrontation procedures employed by the police were unduly suggestive. If not, the analysis ends and the identification testimony is allowed. King v. Commonwealth, 142 S.W.3d 645, 649 (Ky. 2004).

But even if Stratton's show-up identification of Chester was suggestive, Neil holds that unnecessary suggestiveness alone does not require exclusion of the identification. Neil, 409 U.S. at 198-99, 93 S. Ct. at 381-82. Instead, the inquiry is "whether under the 'totality of the circumstances' the identification was reliable even though the

confrontation procedure was suggestive." Id. at 199, 93 S. Ct. at 382. Neil identifies five factors to be considered in evaluating the likelihood of misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of identification; and (5) the length of time between the crime and the confrontation. Id. at 199-200, 93 S. Ct. at 382.

Stratton testified that he had an extended period of time to observe the perpetrator. Furthermore, he was able to identify Chester by name even prior to the show-up identification as he knew Chester through his mother. Although the description Stratton initially gave to police was not very specific, Stratton was able to quickly exclude another individual whom the police asked him to identify. Finally, Stratton was able to definitely identify Chester as the perpetrator no more than forty minutes after the crime occurred. Based on the totality of the circumstances, Stratton's identification of Chester was reasonably reliable despite any possible suggestiveness of the show-up procedure.

Accordingly, the judgment of conviction by the Christian Circuit Court is affirmed.

ALL CONCUR.

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