

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002094-MR

WILLIE HARRISON

APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 05-CR-00085

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Willie Harrison appeals from a judgment of the Meade

Circuit Court that sentenced him to twelve-years' imprisonment after being convicted by a

jury of kidnapping and assault in the fourth degree. For the reasons stated below, we

affirm.

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

Harrison was indicted by the Meade County Grand Jury on September 12, 2005, on charges of kidnapping, rape in the first degree, attempted sodomy in the first degree, and assault in the second degree. The indictment stems from allegations that on July 10, 2005, Harrison assaulted and kidnapped his estranged wife, Tina Harrison, by taking her from her home in Louisville and then driving her to a deserted area of Meade County where he forced her to have sexual intercourse. Harrison also attempted to force Tina to perform oral sex on him. After the attack, Tina walked to a nearby residence in Meade County and police were called.

After a three-day jury trial beginning on August 28, 2006, Harrison was found guilty of kidnapping and assault in the fourth degree. The jury found Harrison not guilty of rape in the first degree and attempted sodomy in the first degree. On September 21, 2006, Harrison was sentenced to twelve-years' imprisonment for the kidnapping conviction and twelve months for the assault conviction, with the sentences to run concurrently. This appeal followed.

Harrison raises several issues on appeal: 1) that the jury instruction given at trial regarding the kidnapping charge was improper; 2) that the trial court erred for failure to instruct the jury on the lesser included offense of unlawful imprisonment; 3) that the trial court erred for failure to apply Kentucky's kidnapping exemption statute; 4) that the form of the indictment was deficient; 5) and that the evidence against him was insufficient to support a conviction and that the circuit court erred by failing to grant a directed verdict or judgment notwithstanding the verdict (JNOV). None of these alleged

errors was properly preserved for appeal. Thus, they are subject to review only as palpable errors. Pursuant to RCr 10.26, an error is reversible only if a manifest injustice has resulted from the error. “That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial.” *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000), *citing Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky. App. 1986).

Harrison first argues that the wording in the kidnapping instruction given to the jury was “patently improper and prejudicial.” Kentucky RCr 9.54(2) states:

No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Since this issue is not properly preserved for appeal because no objection was made to the tendered instruction, it will be reviewed under the palpable error analysis of RCr 10.26.

Supra. Harrison argues that the wording in the kidnapping instructions given to the jury presented four alternative theories that were not supported by the evidence at trial.

The jury instruction at issue attempts to mirror the wording of KRS 509.040, Kentucky's kidnapping statute. The instruction specifically states in section C, “[t]hat in so restraining Tina Harrison, it was Defendant's intention to accomplish or advance the commission of a rape or sodomy or to inflict bodily injury or to terrorize Tina

Harrison.” Harrison argues that this wording presents four alternative theories, which are not all supported by the evidence. The Kentucky Supreme Court has held that:

Any instruction which permits a conviction on the basis of alternative theories that are not supported by the evidence runs afoul of the due process requirement that each juror's verdict be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt.

Commonwealth v. Whitmore, 92 S.W.3d 76, 81 (Ky. 2002). However, evidence was produced at Harrison's trial, as the record reflects, alleging that the victim was raped and beaten, which supports an instruction like the one given. Therefore, we conclude that no palpable error was committed by the trial court in its kidnapping instruction to the jury.

Next, Harrison argues that he was entitled to an instruction on unlawful imprisonment, and the trial court committed palpable error for not giving one. Again, since this issue is not properly preserved on appeal because no objection was made pursuant to RCr 9.54, our standard of review is of manifest injustice. RCr 10.26. Harrison is correct in stating that unlawful imprisonment is a lesser included offense of kidnapping. *See Thomas v. Commonwealth*, 567 S.W.2d 299, 301 (Ky. 1978). “It is axiomatic that a trial court must instruct the jury on all lesser included offenses which are justified by the evidence.” *Cannon v. Commonwealth*, 777 S.W.2d 591, 596 (Ky. 1989) (citing *Martin v. Commonwealth*, 571 S.W.2d 613 (Ky. 1978)).

However, Harrison did not request an instruction on the lesser included offenses of unlawful imprisonment in the first degree and in the second degree. “It is

always the duty of a trial court to instruct a jury on lesser included offenses when it is so requested and it is justified by the evidence.” *Martin, supra*, at 615. We conclude that the trial court did not err because no request was made by Harrison for such instructions.

The third issue Harrison raises is that the trial court erred for failure to apply Kentucky's kidnapping exemption statute, KRS 509.050, which states:

A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

The record clearly shows that Harrison did not request that the exemption statute apply nor made any objection to the trial court's failure to apply it. “The kidnapping exemption statute is to be strictly construed and the burden is upon a defendant to show that it should apply.” *Murphy v. Commonwealth*, 50 S.W.3d 173, 180 (Ky. 2001) (citing *Timmons v. Commonwealth*, 555 S.W.2d 234, 241 (Ky. 1977)). The burden was on Harrison to present the evidence to support the application of the kidnapping exemption statute at trial, and he failed to meet the burden. Therefore, we conclude that no error was made by the trial court on this issue.

Next, Harrison argues that the kidnapping count of his indictment was fatally deficient because it failed to mention his intent to commit the crime. RCr 6.10(2) outlines the requisites of an indictment by saying:

The indictment or information shall contain, and shall be sufficient if it contains, a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged.

In Kentucky, an indictment falls under the notice pleading requirement of the Rules of Criminal Procedure and is sufficient if “it fairly informs the accused of the nature of the charged crime, without detailing the formerly 'essential' factual elements” and “if it informs the accused of the specific offense with which he is charged and does not mislead him.” *Thomas v. Commonwealth*, 931 S.W.2d 446, 449 (Ky. 1996) (citations omitted).

In *Thomas*, the Kentucky Supreme Court held that the failure of the indictment to mention that the defendant “used or threatened to use physical force” against the victim was “the type of defect that can be easily cured at the trial level and must be raised by motion before trial in accordance with RCr 8.18.” Since Harrison did not make any pretrial motion to clarify his indictment or ask for a bill of particulars, our review is, again, one of manifest prejudice. RCr 10.26. In this case, the indictment was adequate in putting Harrison on notice of the charges against him. The kidnapping count of the indictment mentioned the date and the place of the alleged kidnapping as well as the victim's name. Therefore, we conclude that Harrison had proper notice of the charges against him and was not prejudiced by the indictment's failure to mention the intent required for kidnapping under KRS 509.040.

Lastly, Harrison argues that the trial court erred by failing to grant a directed verdict or JNOV, even though no motion was made for either, because the

evidence presented by the Commonwealth was insufficient to support a conviction for kidnapping. Harrison argues that his conviction was an inconsistent verdict because he was found guilty of kidnapping but not rape. Normally, our standard of review as to the denial of a motion for directed verdict is to examine the evidence as a whole to determine if the jury's finding of guilt was clearly unreasonable. *See Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). Motions for JNOV are reviewed under the same standard as those for directed verdicts. *See Commonwealth v. Nourse*, 177 S.W.3d 691 (Ky. 2005).

Since Harrison has not properly preserved this issue for appeal, we must review for palpable error under RCr 10.26 as well. The record clearly refutes this claim. Evidence was presented at trial to support a reasonable finding and conviction of kidnapping. Tina testified that Harrison forced her into his car against her will. In addition to Tina's testimony, numerous police officers and medical personnel testified to evidence of a forcible rape. Therefore, Harrison's argument of inconsistent verdicts has no merit. A jury was free to convict him of all or none or a combination of the charges. It has no bearing on the circuit court's judgment that Harrison was convicted of kidnapping but not rape. They are both crimes that required force, but one is not needed to prove the other. Harrison claims that the evidence was "tenuous and speculative," yet the record shows that a reasonable jury could have convicted Harrison based on the overwhelming amount of evidence presented of his guilt.

Therefore, the judgment of the Meade Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Frank P. Campisano
Frank P. Campisano & Associates
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky