

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000335-MR

DAVID JETT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
INDICTMENT NO. 06-CR-01055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: David S. Jett appeals his convictions for rape and sodomy. For the reasons herein, we affirm both convictions.

In this case, the complaining witness testified that Jett, a mere a acquaintance or friend of a friend, forcibly raped and sodomized her. In contrast, Jett testified that he and the complainant were lovers and that she fabricated her rape claim

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

because he refused to provide her with cocaine. The jury, which heard and viewed the testimony of both witnesses found Jett guilty as charged.

Jett first contends that his convictions cannot stand on what he characterizes as simply she-said, he-said testimony. But in *Garret v. Commonwealth*, 48 S.W.3d 6, 9-10 (Ky. 2001), the Supreme Court upheld a rape conviction based on the uncorroborated testimony of the victim. *See also Stoker v. Commonwealth*, 828 S.W.2d 619, 624 (Ky. 1992). Thus, the trial court did not err in submitting the question of witness credibility and the competing version of events to the jury. *See Benhman v. Commonwealth*, 186, 187 (Ky. 1991); *see also Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995).

Next, Jett contends that the prosecutor's statement to the effect that Jett had a motive to lie, though objected to below, nevertheless constitutes palpable misconduct requiring reversal under RCr 10.26. We disagree. In *Tamme v. Commonwealth*, 973 S.W.2d 13, 38-39 (Ky. 1998), the Supreme Court held that, when a defendant testifies in his own defense, the prosecutor may attack his credibility and argue to the jury that the defendant has a motive to lie.

Finally, Jett contends that the testimony of a police detective recounting the victim's description of her assailant was inadmissible hearsay. We hold that the second-hand admission of the victim's description of her assailant was at worst harmless error under RCr 9.24 because (1) the victim made an out-of-court identification of Jett's photograph; (2) the victim made an in-court identification of Jett during the trial; and (3) Jett freely acknowledged in his own testimony that he was the person being accused by

the complainant. Indeed, Jett's defense hinged not on misidentification but rather on consent. Therefore, hearsay, touching upon the issues of identity, could not have deprived him of a fair trial.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

DIXON, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky