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RENDERED: NOVEMBER 23, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000169-MR

JARED FIELDS — APPELLANT

V.

ON APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
NO. 09-CR-00103

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Appellant Jared Fields appeals to this Court as a matter of right from his convictions for kidnapping, first-degree rape,[1] complicity to first-degree rape, first-degree sodomy, complicity to first-degree sodomy, and two counts of complicity to first-degree sexual abuse. We conclude that the kidnapping exemption statute should have been applied to Appellant's kidnapping charge, and therefore reverse that conviction. In all other respects, we affirm.

I. BACKGROUND

D.E., a sixteen-year-old boy and the alleged victim in this case, was a special education student at Hazard High School at the time of the incidents giving rise to the charges. According to witnesses, D.E. was "slow" and sometimes needed extra help in school. In approximately March 2009, D.E.

[1] See Section II A, *infra*.

was playing with his dog in his aunt's yard in Hazard, Kentucky. D.E. was approached by a young man who identified himself as "Robert." Robert also had a dog, and he and D.E. became friends.

In March of 2009, during D.E.'s spring break, Robert called D.E. and asked D.E. to meet him at the library. D.E. met up with Robert, and the two went to a parking structure in town, where they met up with "Eric." Together, the three went to Hall's Malls Apartments in Hazard. They walked into Apartment 6, where two other young men were already present. According to D.E., the two men were drinking and watching a "porn video." Eric undressed, and the two other men were not wearing pants.

D.E. testified that Eric put his hand down D.E.'s pants and touched his penis. D.E. further testified that Eric proceeded to put a finger "up my butt." D.E. testified that, while this was occurring, the two unknown men started "jacking off" and giving each other a "blow job." D.E. also testified that the door was locked and the men had a knife on the counter. After this was over, D.E. was told that he was free to leave, but the men threatened him not to tell anyone and pointed the knife at him.

On a second occasion the same month, Robert called D.E. and picked him up. They again went to the parking structure and then to Hall's Malls Apartments – this time going to Apartment 9. D.E. testified that he "was forced" up the steps, with one man standing on each side of him, "shoving and pushing" him up the steps. There were four men inside Apartment 9, where D.E. was made to take off his clothes. D.E. testified that Robert and Eric

sexually assaulted him – one stuck his penis in D.E.'s mouth, while the other stuck his penis "in [D.E.'s] butt." Eric and Robert then traded positions and continued. One of the other men held a knife close to D.E.'s neck.[2] After they had finished, Eric and Robert told D.E. not to say anything. They told him that if he did, they would stab his aunt.

The allegations came to light during a conversation between D.E., the Hazard High School principal, D.E.'s mother, and Officer Charles Brotherton. Officer Brotherton was a school resource officer assigned to Hazard High School. D.E.'s mother suspected that someone was stealing her son's lunch money. As the conversation progressed, D.E. mentioned someone named "Robert" wanting him to sell drugs. Eventually, D.E. began discussing masturbation and pornography.

Captain James East was called to the school to further interview D.E. Based on the interview, Captain East began to suspect that something had happened to D.E. at Hall's Malls Apartments. D.E. told Captain East that Robert had curly hair and that he had been walking a dog. Captain East remembered that Appellant Jared Fields matched D.E.'s description; further, Captain East had seen Appellant walking a dog around Main Street in Hazard.

Further investigation led police to question Appellant, as well as Brett Combs, Phillip Riddle, and Ora Walker. Police found Walker, Combs, and Appellant in Hall's Malls Apartment 9, where Walker lived. Police retrieved a

[2] At one point, D.E. testified that one of the other two men held the knife to his neck. At another point, D.E. testified that Eric held the knife to his neck.

backpack from the apartment, which Appellant admitted belonged to him. Inside was a distinctive knife with holes in the handle. Appellant admitted that it was his knife, and D.E. identified it at trial as the knife used to threaten him. Police showed D.E. a photo lineup containing pictures of Riddle, Combs, and Appellant. D.E. identified Riddle and Combs, but did not identify Appellant. However, at trial, D.E. identified "Eric" as being Combs, and "Robert" as being Appellant.

The Commonwealth called Combs as a witness at trial. However, he denied all allegations. The Commonwealth impeached his testimony with a video recording of his prior interview with police. In the interview, Combs initially denied all involvement. Eventually, he stated that he, Riddle, Walker, and Appellant had all been involved in an incident with D.E.

Combs stated that it was Appellant's and Riddle's plan, and that Appellant ran toward D.E. on Main Street with a knife. Then, according to Combs, the group took D.E. to Hall's Malls Apartment 6. According to Combs, Appellant and Riddle turned on "porno movies" and began taking off their clothes. They then took off D.E.'s pants and "started playing with themselves." Combs stated that Appellant took off Combs's clothing and ordered him to perform oral sex on D.E. When Combs refused, Appellant put a knife to his throat. At this point, according to Combs, he reluctantly masturbated D.E., while Walker and Appellant masturbated each other. Then, Combs said, Appellant and Riddle "let us all go." Combs denied any knowledge of the incident in Apartment 9.

After the allegations came to light, D.E.'s mother took him to Dr. Donny Spencer for an examination. Dr. Spencer noted that D.E. had an "apprehensive affect" during the examination, but otherwise found no physical evidence of sexual abuse.

Additionally, Appellant testified at trial. He admitted that the knife belonged to him, but stated that it was for protection, because he had been homeless. He denied any involvement in the two incidents involving D.E.

The jury found Appellant guilty of two counts of first-degree sexual abuse by complicity arising out of the incident in Apartment 6, and not guilty of kidnapping arising out of the same incident. The jury also found Appellant guilty of one count of kidnapping, one count of first-degree rape as a principal, one count of first-degree rape by complicity, one count of first-degree sodomy as a principal, and one count of first-degree sodomy by complicity – all arising from the incident in Apartment 9.

During the penalty phase of the trial, Larry Caudill from the Department of Corrections Division of Probation and Parole testified as to penalty ranges and parole eligibility. The jury recommended, and the trial court imposed, sentences of imprisonment for 10 years (kidnapping), 20 years (first-degree rape), 20 years (complicity to first-degree rape), 20 years (first-degree sodomy), 20 years (complicity to first-degree sodomy), 5 years (complicity to first-degree sexual abuse), and 5 years (complicity to first-degree sexual abuse), to be run concurrently in part and consecutively in part for a total sentence of 30 years'

imprisonment. Appellant therefore appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. ANALYSIS

A. Convictions for First-Degree Rape

Before we reach Appellant's arguments on appeal, there is an error that, while not raised at trial or on appeal by either party, is so obvious that we feel we must acknowledge it. Appellant was convicted of two counts of first-degree rape: one count for forcibly performing anal sex on D.E., and one count for complicity when "Eric" forcibly performed anal sex on D.E. However, this conduct clearly falls under the first-degree *sodomy* statute – not first-degree rape.

A person is guilty of first-degree rape when "[h]e engages in sexual intercourse with another person by forcible compulsion . . . ." KRS 510.040(1)(a). A person is guilty of first-degree sodomy when "[h]e engages in deviate sexual intercourse with another person by forcible compulsion . . . ." KRS 510.070(1)(a). Except for the elements of "sexual intercourse" and "deviate sexual intercourse," the crimes are identical.

"'Sexual intercourse' means sexual intercourse in its ordinary sense and includes penetration of the sex organs of one person by a foreign object manipulated by another person. . . ." KRS 510.010(8). By contrast, "deviate sexual intercourse" is defined as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign object manipulated by another person. . . ."

KRS 510.010(1). This definition "include[s] any act of fellatio, cunnilingus *or anal intercourse.*" KRS 510.010 cmt. (emphasis added).[3]

Thus, Appellant's conduct for which he was convicted of first-degree rape, i.e., forcible anal intercourse, clearly falls under the definition of first-degree sodomy. However, under the circumstances of this case, this unpreserved error is not palpable, i.e., there was no manifest injustice. *See Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

As previously stated, other than the elements of sexual intercourse and deviate sexual intercourse, the crimes of first-degree rape and first-degree sodomy are identical. The crimes also carry the same penalty. *See* KRS 510.040(2); KRS 510.070(2) (both crimes are a Class B felony unless the victim is under 12 years old or receives a serious physical injury). Under the jury instructions as written in this case, a reasonable jury could have found Appellant guilty of first-degree rape.[4] Furthermore, the evidence established conduct for which a reasonable jury could have found Appellant guilty of first-degree sodomy, had Appellant been properly charged. Thus, there is no

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[3] Prior to a 2000 amendment, the definition of "sexual intercourse" included the "penetration of the sex organs *or anus* of one person by a foreign object manipulated by another person." (emphasis added). In 2000, the General Assembly removed all references to anal penetration from the definition of "sexual intercourse," and added anal penetration by a foreign object to the definition of "deviate sexual intercourse." *See* 2000 Ky. Acts ch. 401, § 4.

[4] The jury instructions in this case erroneously defined "sexual intercourse" as "sexual intercourse in its ordinary sense and [including] penetration of the sex organ *or anus* of a person. Sexual intercourse occurs upon any penetration, however slight; emission is not required." (emphasis added). In fact, this instruction required a higher level of proof than what would have been necessary for first-degree sodomy, because penetration is not an element of deviate sexual intercourse. *See Bills v. Commonwealth*, 851 S.W.2d 466, 469 (Ky. 1993) (citing *Hulan v. Commonwealth*, 634 S.W.2d 410 (Ky. 1982)).

manifest injustice, and no palpable error. *See also Bennington v. Commonwealth*, ___ S.W.3d ___, No. 2009-SC-000521-MR, 2011 WL 2086637 (Ky. May 19, 2011) (defendant's conviction for first-degree sodomy based on conduct occurring prior to effective date of sodomy statute did not constitute palpable error where defendant's conduct was criminal at the time it ocurred and his punishment was not greater than it would have been under the prior statute).

B. Kidnapping Exemption Statute

Appellant argues that his kidnapping conviction, which was based upon the incident at Apartment 9, should have been barred by KRS 509.050 – the kidnapping exemption statute. We agree.

Under KRS 509.050, an otherwise valid kidnapping charge is made inapplicable to a defendant when certain conditions are met.

> This Court employs a three-prong test to determine when the kidnapping exemption statute applies. First, the underlying criminal purpose must be the commission of a crime defined outside of KRS 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime. All three prongs must be satisfied in order for the exemption to apply. Application of the kidnapping exemption statute is determined on a case-by-case basis. The purpose of the statute is to prevent misuse of the kidnapping statute to secure greater punitive sanctions for rape, robbery and other offenses which have as an essential or incidental element a restriction of another's liberty.

Wood v. Commonwealth, 178 S.W.3d 500, 515 (Ky. 2005) (citing *Gilbert v. Commonwealth*, 637 S.W.2d 632 (Ky. 1982); *Griffin v. Commonwealth*, 576 S.W.2d 514 (Ky. 1978)) (internal quotation marks and citations omitted).

Appellant's underlying criminal purpose at Apartment 9 was the commission of rape and sodomy – offenses defined in KRS Chapter 510. Thus, Appellant has satisfied the first prong.

To satisfy the second prong, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. The interference must be "close in distance and brief in time in order for the exemption to apply." *Timmons v. Commonwealth*, 555 S.W.2d 234, 241 (Ky. 1977). If the victim is transported any "substantial distance," then the exemption will not apply. *Id.* The evidence suggests that the interference with D.E.'s liberty began *immediately prior* to the sexual assault. D.E. was transported a short distance (up the stairs to Apartment 9). The evidence suggests that, prior to D.E. being forced up the stairs at Hall's Malls Apartments, he had gone voluntarily. The restraint did not begin until very shortly prior to the sexual assault. The men then held a knife to D.E.'s throat *during* the sexual assault. Afterwards, the men did not keep D.E. in Apartment 9 for any significant length of time. He was threatened with a knife, but this occurred *immediately after* the assault. D.E. was then permitted to leave. Under these circumstances, Appellant has satisfied the second prong.

Finally, to satisfy the third prong, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime.

> When read together it seems evident that the intent of the latter two prongs is to ensure that the means of restraint effectuated in committing the underlying crime are of such a nature that they are a *part of*, or *incident to*, the act of committing the crime itself and, as such, temporally coincide with the commission of the crime. If the deprivation of liberty segues into a more pronounced, prolonged, or excessive detainment, then such restraint should no longer be within the confines of the exemption statute and the accused should be held separately accountable for those actions.

Hatfield v. Commonwealth, 250 S.W.3d 590, 600 (Ky. 2008) (emphasis in original). Here, the means of restraint was brief, and did not exceed the force necessary to commit the crimes of rape and sodomy upon an unwilling victim. As previously discussed, D.E.'s restraint did not begin until almost immediately prior to the sexual assault in Apartment 9. Nor did it continue afterwards for any appreciable length of time. Under these circumstances, we are satisfied that interference with D.E.'s liberty did not exceed the force necessary to commit the crimes of rape and sodomy. *See also id.* at 599-600 (kidnapping exemption statute applied where victim was dragged to a more secluded location so that the attempt to take her life could continue).

Given that Appellant qualified for the kidnapping exemption, the trial court abused its discretion in submitting the charge to the jury. We must therefore reverse Appellant's conviction on the charge of kidnapping.

C. Jury Instructions

Appellant argues that, because the jury instructions for first-degree sexual abuse were couched in general terms of subjecting D.E. to "sexual contact," the instructions impermissibly allowed Appellant to be convicted of both (1) first-degree sexual abuse and (2) first-degree rape and/or first-degree sodomy for the same conduct.

Appellant is correct that, without differentiating characteristics in the jury instructions, the conduct constituting first-degree rape or first-degree sodomy could also be used to convict a defendant of first-degree sexual abuse, because first-degree sexual abuse under KRS 510.110(1)(a) is defined as "sexual contact" by forcible compulsion. *See Johnson v. Commonwealth*, 864 S.W.2d 266, 277 (Ky. 1993) ("The [first-degree sexual abuse] instruction, couched in general terms of 'sexual contact' without differentiating the act from those acts constituting rape and sodomy, permitted the jury to find Johnson guilty twice for the same act, e.g., intercourse constituting rape and intercourse constituting sexual contact and, therefore, sexual abuse."). *See also Harp v. Commonwealth*, 266 S.W. 3d 813 (Ky. 2008). This is improper because first-degree sexual abuse is a lesser-included offense of both rape and sodomy. *Johnson*, 864 S.W.2d at 277.

However, in this case, the jury instructions clearly distinguished the first-degree sexual abuse counts from the rape and sodomy counts. The first-degree rape and first-degree sodomy counts specified that the conduct occurred in "Apartment No. 9 in Hall's Malls Apartments." By contrast, the first-degree

sexual abuse counts specified that the conduct occurred in "Apartment No. 6 in Hall's Malls Apartment." This differentiation prevented the jury from convicting Appellant of two crimes for the same conduct. Furthermore, D.E.'s testimony and other evidence at trial clearly established that the conduct constituting sexual abuse occurred in Apartment 6, while the conduct constituting rape/sodomy occurred in Apartment 9 on a separate occasion. Therefore, there was no error.

D. Sentencing Phase Testimony Regarding Parole Eligibility

Appellant argues that palpable error occurred when the jury was misinformed as to his parole eligibility during the sentencing phase of the trial. Appellant is correct that incorrect information regarding parole eligibility during the sentencing phase of a trial is palpable error. *See Robinson v. Commonwealth*, 181 S.W.3d 30, 37–38 (Ky. 2005). However, a review of the record reveals that the jury was not presented with incorrect information in this case.

Probation and Parole Officer Larry Caudill testified about parole eligibility during the sentencing phase of Appellant's trial. The prosecutor asked Caudill about a hypothetical Class D felony, and Caudill explained that such a defendant would be eligible for parole after serving 15% of his sentence. The prosecutor then asked Caudill about the Class B felonies for which Appellant was convicted (rape and sodomy). Caudill responded that "with the charges that are indicated here . . . you would have to use the 85% rule." Caudill explained that Appellant would have to serve 85% of his sentence on the Class

B felonies before being eligible for parole. The Commonwealth introduced a certified copy the Kentucky Department of Corrections parole eligibility guidelines as an exhibit.

On cross-examination, Caudill clarified that, because of his Class B felonies, Appellant would be required to serve 85% of his sentence before being eligible for parole. With regard to Appellant's Class D felony convictions, Caudill testified that they would "more than likely be 20%."

While the parole-eligibility testimony was confusing at times, it accurately informed the jury of the applicable law. Persons sentenced to between 2 and 39 years' imprisonment are generally eligible for parole after serving 20% of their sentence. 501 KAR 1:030 § 3(1)(b). A nonviolent offender convicted of a Class D felony with an aggregate sentence of 1 to 5 years' imprisonment is generally eligible for parole after serving 15% of his sentence. KRS 439.340(3)(a). This provision is inapplicable to Appellant, because a person convicted of a sexual offense described in KRS Chapter 510 (including first-degree sexual abuse, a Class D felony) is classified as a "violent offender." KRS 439.3401(1)(d).

Appellant's convictions for first-degree sodomy and first-degree rape also qualify him as a "violent offender." *Id.* Furthermore, a violent offender who has been convicted of a capital, Class A, or Class B felony is ineligible for parole until he has served 85% of the sentence imposed. KRS 439.3401(3). Appellant is therefore ineligible for parole on his Class B felony convictions

(first-degree sodomy and first-degree rape) until he has served 85% of his sentence.

Caudill's testimony accurately reflected the law as it pertains to parole eligibility. The Department of Corrections parole eligibility guidelines submitted to the jury also accurately reflected the law. Therefore, there was no error.

Appellant's kidnapping conviction is reversed and vacated, and the case remanded to the Perry Circuit Court for entry of an amended judgment and sentence. In all other respects, the judgment of the Perry Circuit Court is hereby affirmed.

All sitting. All concur.

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