

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001324-MR

JOSHUA R. ABNEE

APPELLANT

v. APPEAL FROM NICHOLAS CIRCUIT COURT  
HONORABLE ROBERT W. MCGINNIS, JUDGE  
ACTION NO. 06-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Joshua R. Abnee appeals from a judgment of conviction by the Nicholas Circuit Court. We find that the trial court properly instructed the jury on second-degree sodomy as a lesser-included offense of first-degree sodomy. Hence, we affirm.

On May 1, 2006, a Nicholas County grand jury indicted Abnee on two counts of first-degree sodomy (Kentucky Revised Statute (“KRS”) 510.070), one count each of first-degree unlawful imprisonment (KRS 509.020), and being a persistent felony offender in the first degree (“PFO I”) (KRS 532.080(3)). The unlawful imprisonment and PFO I counts were dismissed prior to the first trial. The first trial ended in a mistrial due to a discovery violation by the Commonwealth.

The case proceeded to a second trial in April of 2008. Abnee moved for a directed verdict at the close of the Commonwealth’s case and at the close of proof. The trial court granted the latter motion, finding that the Commonwealth failed to present sufficient evidence of forcible compulsion.<sup>1</sup> However, the court instructed the jury on second-degree sodomy over Abnee’s objection. The jury returned a verdict of guilty on one count of second-degree sodomy and not guilty on the other count. Thereafter, the jury fixed Abnee’s sentence at five years’ imprisonment, which the trial court imposed.

On appeal, Abnee challenges the trial court’s amendment of the charges on three related but separate grounds. First, he argues that the trial court’s instruction on second-degree sodomy after granting a directed verdict on the first-

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<sup>1</sup> In its brief, the Commonwealth asks this Court to review the trial court’s decision granting a directed verdict of acquittal on the charge of first-degree sodomy. However, the Commonwealth cannot directly appeal that issue, and it did not request a certification of the law under Kentucky Rule of Civil Procedure (“CR”) 76.37(10) and *Ky. Const.* § 115. *See also Murphy v. Commonwealth*, 50 S.W.3d 173, 186 (Ky. 2001). Therefore, the issue is not properly presented on appeal.

degree sodomy violated his rights against double jeopardy. Second, he argues that the Kentucky Constitution prohibits a conviction of a crime which is not charged in the indictment. And third, he argues that the amendment of the charge is prohibited because second-degree sodomy is not a lesser-included offense of first-degree sodomy.

As an initial matter, we agree with the Commonwealth that Abnee did not preserve these particular issues for appeal. Kentucky Rule of Criminal Procedure (“RCr”) 9.54(2) provides that “[n]o 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.” “[T]o preserve any error relating to the failure to give an instruction, there must be an objection in the record stating specifically the matter to which the party objects and the ground therefore.” *Greene v. Commonwealth*, 244 S.W.3d 128, 137 (Ky. App. 2008).

At trial, Abnee’s counsel objected to the instruction for second-degree sodomy, noting that he had moved for a directed verdict “on the case as a whole.” However, he did not present any argument objecting to the propriety of the instruction of second-degree sodomy on particular grounds. Since the trial court was not given the opportunity to consider the objection to the instruction on this ground, we must conclude that the issue is not properly preserved for review.

Abnee asks this Court to review the issue under the palpable error standard of RCr 10.26. However, the Kentucky Supreme Court recently stated that palpable error review of an unpreserved error concerning instructions is discretionary in light of the more specific language of RCr 9.54(2). *Chestnut v. Commonwealth*, 250 S.W.3d 288, 305 (Ky. 2008). *See also Johnson v. Commonwealth*, 105 S.W.3d 430, 435 (Ky. 2003); *Chumbler v. Commonwealth*, 905 S.W.2d 488, 499 (Ky. 1995); and *Commonwealth v. Thurman*, 691 S.W.2d 213, 216 (Ky. 1985). Moreover, the error must “seriously affect the ‘fairness, integrity, or public reputation’ of a judicial proceeding in order to be considered palpable under RCr 10.26.” *Page v. Commonwealth*, 149 S.W.3d 416, 422 (Ky. 2004) (*quoting U.S. v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). Under the circumstances of this case, we decline to address the merits of these issues.

Accordingly, the judgment of the Nicholas Circuit Court is affirmed.

ALL CONCUR.

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