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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001957-MR

DARRELL FORD

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
2014-SC-000502-DG

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 11-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: KRAMER, JONES, AND MAZE, JUDGES.

JONES, JUDGE: This case arose out of Appellant's convictions for incest and sexual abuse. On direct appeal before this Court, we affirmed Appellant's convictions. Thereafter, the Kentucky Supreme Court granted Appellant's Motion for Discretionary Review and remanded this matter to this Court for further

consideration, in light of its recent decision in *Martin v. Commonwealth*, 456 S.W.3d 1, 6 (Ky. 2015).¹ After careful review, in light of *Martin*, we affirm Appellant’s incest conviction, reverse Appellant’s sexual abuse conviction, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Appellant, Darrell Ford, is the biological father of “Sue,” born September 25, 1995.² Sue was conceived during a brief sexual relationship between Sue’s mother, Christina, and Appellant. When Sue reached sixth grade, she asked Christina if she could meet Appellant. Christina reached out to Appellant’s relatives and Appellant agreed to meet Sue. Appellant and Sue began seeing each other approximately once or twice per month. Eventually, Sue spent several nights at Appellant’s apartment without incident.

On Saturday, August 22, 2009, Sue stayed at Appellant’s apartment. Sometime during the early morning hours of August 23, 2009, Appellant came home from work and went into the back bedroom. During a later recorded interview at the Children’s Advocacy Center, Sue stated that she woke in the night without her clothes on and found that Appellant was “molesting” her. Sue explained that Appellant was “fingering her” and licking her “private parts.” Sue also stated that Appellant tried to have sex with her but she stopped him by rolling

¹ Discretionary Review was granted here in light of *Martin v. Commonwealth*. Appellant’s claims regarding directed verdict and double jeopardy, which this court previously rejected, are unaffected by *Martin*.

² The Court adopts the Commonwealth’s proposed pseudonym in order to protect the privacy of the young victim.

away. The following week at school, Sue told a friend that Appellant had done “some stuff” to her. An investigation was then initiated.³

Appellant was indicted by the Monroe County Grand Jury for sodomy, incest with a person under 18 years of age, and first-degree sexual abuse. A trial was held on July 23-24, 2012. After testimony from several other witnesses, including Sue and Appellant, the jury found Appellant guilty of incest with a person under 18 years of age and first-degree sexual abuse.⁴ The jury found Appellant not guilty of sodomy. The jury recommended a sentence of ten years’ imprisonment on the incest conviction and one year on the sexual abuse conviction with the sentences being run concurrently for a total sentence of ten years’ imprisonment. Appellant was sentenced in accordance with the jury’s recommendation on October 11, 2012. Appellant then filed a direct appeal.

On direct appeal before this Court, Appellant claimed, for the first time, that the jury instructions on incest and sexual abuse were improper in that they permitted a non-unanimous verdict. We rejected Appellant’s claims and found that both theories were supported by the evidence, and that any error did not amount to palpable error. Thereafter, Appellant moved for discretionary review in the Kentucky Supreme Court, raising the same arguments brought before this court. The Kentucky Supreme Court granted Appellant’s Motion for Discretionary

³ It was during this investigation that Sue was interviewed at the Children’s Advocacy Center.

⁴ Sue’s prior recorded interview at the Children’s Advocacy Center was also played for the jury.

Review, and remanded this matter to this Court for further consideration in light of its decision in *Martin v. Commonwealth*.

In *Martin*, the Supreme Court of Kentucky discussed two archetypal unanimous-verdict violations. The first type of unanimous-verdict violation occurs when multiple counts of the same offense are adjudicated in a single trial. The second, which is applicable here, is where a jury instruction may be satisfied by multiple criminal acts by the defendant. The Supreme Court explained the “multiple acts” unanimity violation as follows:

More recently, we clarified a second type of unanimous-verdict violation. In *Johnson v. Commonwealth*, 405 S.W.3d 439, 449 (Ky. 2013), we held that the requirement of a unanimous verdict is violated when “a general jury verdict [is] based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof.” This type of unanimous-verdict violation occurs when a jury instruction may be satisfied by multiple criminal acts by the defendant. When that is the case, and the instruction does not specify which specific act it is meant to cover, we cannot be sure that the jurors were unanimous in concluding the defendant committed a single act satisfying the instruction. Instead, the jury's verdict only reflects their unanimous view that the defendant committed the crime, without necessarily resulting in a unanimous conclusion that the defendant committed a single criminal act beyond a reasonable doubt. Therefore, in those circumstances, the jury fails to reach a unanimous verdict.

Martin v. Commonwealth, 456 S.W.3d at 6-7 (Ky. 2015). Further, the Supreme Court held that a unanimity violation always gives rise to palpable error. *Id.* at 9-10.

II. ANALYSIS

A. Incest Instruction

First, Appellant argues that the incest instruction deprived him of a unanimous verdict because it is impossible to determine which criminal act served as the basis for the jury's decision. The Commonwealth argues that under the definition of "deviate sexual intercourse" employed by the trial court, only one of the acts testified to by the victim would have been sufficient to satisfy the jury instruction on incest. The Commonwealth argues that because the jury instruction on incest could not have been satisfied by multiple acts, there is no unanimity violation as to the incest instruction under *Martin*. We agree.

The jury instruction given by the trial court as to incest reads as follows:

**INSTRUCTION NO. 4
CHARGE NO. 2
INCEST**

You will find the Defendant guilty of Incest under this Instruction if, and, only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county on or about the 22nd day of August, 2009, and before the finding of the Indictment herein, he engaged in deviate sexual intercourse with [Sue];
- B. That [Sue] was his biological daughter;
- C. That he knew [Sue] was his biological daughter;

AND

D. That at the time of such deviate sexual intercourse [Sue] was less than 18 years of age.

If you find the Defendant guilty under this Instruction, you will state in your Verdict that you find him guilty under No. 4.

The Commonwealth points out that the jury instruction does not permit the jury to conclude that incest occurred on “sexual contact.” Rather, the supporting act must have constituted “deviate sexual intercourse.” The jury instructions defined deviate sexual intercourse as:

Deviate Sexual Intercourse – Means 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.⁵

Under this definition, Appellant’s touching of the victim’s vagina with his fingers cannot constitute deviate sexual intercourse. The only act to which the victim testified that could have met that definition was the act of licking her “private parts.” In Appellant’s own principal brief, he specifically acknowledged that: “the victim testified to only one act which would constitute deviate sexual intercourse. The testimony of the alleged victim was only that the Defendant licked me.”

The jury instruction could not have been satisfied by multiple acts. As argued by the Commonwealth, and admitted by the Appellant, only Appellant’s act of “licking” Sue’s “private parts” could qualify as deviate sexual intercourse.

⁵ KRS 510.010(1).

Therefore, it follows that only one act could make him guilty of incest. Therefore, there is no unanimity violation as to the incest instruction under the Supreme Court's holding in *Martin*. Accordingly we affirm the trial court's judgment as to the incest conviction.

B. First Degree Sexual Abuse Instruction

While the Commonwealth argues there was no violation under the Incest Instruction, it concedes that there was a potential unanimity violation with regard to the First Degree Sexual Abuse Instruction. The jury instruction stated:

**INSTRUCTION NO. 5
CHARGE NO. 3
SEXUAL ABUSE 1st DEGREE**

You will find [Appellant] guilty of Sexual abuse, 1st Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county on or about the 22nd day of August, 2009, and before the finding of the Indictment herein he subjected [Sue] to sexual contact;
- B. At the time of such occurrence, [Sue] was less than 16 year of age;

AND

- C. That at the time of the occurrence, [Appellant] was 21 years of age or older.

The instructions defined "sexual contact" as:

Sexual Contact – Means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.

Under the definition of “sexual contact” employed by the trial court, it is possible to conclude that sexual contact occurred either when Appellant licked the victim’s vagina or when he touched the victim’s vagina with his fingers. As such, we find that the First Degree Sexual Abuse Instruction constitutes the second type of unanimous-verdict violation addressed in *Martin*, which arises when evidence adduced at trial presents the jury with multiple acts by the defendant that may satisfy a single general-verdict instruction.

Having found the First Degree Sexual Abuse jury instruction violated Appellant’s unanimous-verdict right, we must now decide if the violation rises to the level of palpable error. In *Martin*, the Kentucky Supreme Court contemplated this very issue and concluded that all unanimous-verdict violations constitute palpable error resulting in manifest injustice. 456 S.W.3d at 9-10. We must find, as the Court found in *Martin*, that palpable error occurred here.

As noted in our original opinion, we do not believe that this error can be said to have affected the outcome of this case. However, the Supreme Court was clear in *Martin* that an error of this type is a palpable error *per se* mandating reversal and remand. We are bound by Supreme Court precedent. Therefore, we have no choice but to reverse Appellant's sexual abuse conviction.

However, we do feel compelled to point out that the defect in this instruction certainly did not work to deprive Appellant of a fundamentally fair trial or a unanimous verdict. It is clear to us from examining the entire record that the jury must have unanimously agreed on all the elements necessary to convict

Appellant of sexual abuse. We know this because only two acts could have resulted in the jury finding Appellant guilty of sexual abuse--Appellant's act of touching Sue's vagina with his finger or his act of licking her "private parts." The jury found Appellant guilty of incest. As explained above, only Appellant's act of licking Sue's private parts met the definition of deviate sexual intercourse. Deviate sexual intercourse was a necessary element of incest. Therefore, the jury must have unanimously agreed that Appellant licked Sue's private parts because they found him guilty of incest. Thus, we can be sure *in this case* that the jury did unanimously agree on at least one act necessary to support the sexual abuse conviction even though the acts are not specifically delineated.

Under this situation, we believe that the error of not delineating the acts in the sexual abuse instruction certainly did not impact the outcome of Appellant's trial. We believe this is precisely the type of case Justice Keller described in her dissent in *Martin* wherein she pointed out the dangers of watering down palpable error review. Nevertheless, based on our current understanding of *Martin* we are required to reverse and remand despite our fervent belief that Appellant has not suffered **any** injustice, manifest or otherwise.⁶

III. CONCLUSION

For the reasons set forth of above, we affirm the incest conviction, reverse the sexual abuse conviction, and remand for further proceedings consistent with this Opinion and the *Martin* decision.

⁶ We urge the Supreme Court to re-examine or clarify *Martin's* holding that "all unanimous-verdict violations constitute palpable error resulting in manifest injustice."

ALL CONCUR.

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