

RENDERED: MAY 27, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000167-MR

ISROM JOHNSON

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 12-CR-003763

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: DIXON, NICKELL AND VANMETER, JUDGES.

DIXON, JUDGE: Isrom Johnson (Johnson) brings this direct appeal from the judgment of conviction issued by the Jefferson Circuit Court. Johnson argues the content of the jury instructions given by the circuit court qualified as palpable error. The Commonwealth agrees. Having reviewed the record and applicable law, we vacate the judgment of the Jefferson Circuit Court and remand this matter for a new trial.

In October 2014, Johnson was convicted by a jury of three counts of Sodomy in the Third Degree. The jury recommended a maximum sentence of five years' imprisonment for each count to run consecutively. The trial court followed the jury's recommendation and sentenced Johnson to a total of fifteen years to serve. In seeking an appeal of his verdict, Johnson contends the jury instructions on each count of Sodomy III were identical and equaled a denial of due process, a denial of a unanimous verdict or the imposition of double jeopardy. This issue was not preserved at trial and Johnson seeks review pursuant to the palpable error standard. The Commonwealth concedes that the allegation of error is palpable, but asks this Court to consider revisiting the established case law that requires reversal of the conviction due to the substantial evidence of Johnson's guilt that was presented at trial and the likely harm to the victim in having to go through trial proceedings again.

Under Kentucky Rules of Criminal Procedure 10.26, a palpable error which affects the substantial rights of a party may be considered by an appellate court on appeal, even if not preserved for review. *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009). Palpable error only exists if there is a substantial possibility that the defendant's case would have been different absent the error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." *Id.* (citations omitted). A palpable error must be so grave in nature that if it were

uncorrected, it would seriously affect the fairness of the proceedings. *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005).

The only issue before this Court is whether instructions for each count were distinguishable enough to permit the jury to relate each verdict to a specific crime shown by the evidence. *See Banks v. Commonwealth*, 313 S.W.3d 567, 573 (Ky. 2010). The instruction for each count must enable “the jury to identify the instruction with a specific crime established by the evidence and avoids the likelihood of confusion with other offenses presented against defendant in the same trial ...” *Id.* On the issue of jury instructions, in *Miller*, the Kentucky Supreme Court, in referencing a previous holding, explicitly noted,

“[w]hether the issue is viewed as one of insufficient evidence, or double jeopardy, or denial of a unanimous verdict, when multiple offenses are charged in a single indictment, the Commonwealth must introduce evidence sufficient to prove each offense and to differentiate each count from the others, and the jury must be separately instructed on each charged offense.”

Miller, 283 S.W.3d at 576-77 (citation omitted).

At the Johnson trial, the circuit court issued Instruction Number 1:

INSTRUCTION NO. 1 – SODOMY IN THE THIRD DEGREE

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

(a) That in Jefferson County, Kentucky, on or about the 14th day of March 2009, through on or about the 13th day of March 2011, Defendant engaged in deviate sexual intercourse with [Z.K.];

AND

- (b) That at the time of such intercourse, Defendant was 21 years or (*sic*) age or older, and [Z.K.] was less than 16 years of age.

If you find Defendant, Isrom Johnson, guilty under this Instruction, you will say so by your verdict and no more. There will be a further proceeding at which you will fix his punishment.

The trial court also issued Instruction Numbers 2 and 3 which stated the same language as Instruction Number 1. The jury found Johnson guilty under all three counts.

We find the instructions in the Johnson trial were not specific as to factually enumerate the differences between the separate offenses, according to the evidence. These instructions fail under an analysis of both the *Miller* and *Banks* standards, as noted above. We find the Jefferson Circuit Court erred by issuing instructions to the jury that failed to factually differentiate between the separate counts of Sodomy III and, as a result, the fairness of the trial proceedings were affected. None of the instructions pertaining to the charges could be distinguished from the others on the distinctiveness of each crime. The Jefferson Circuit Court's error is "easily perceptible, plain, obvious and readily noticeable." *Brewer*, 206 S.W.3d at 349. The written jury instructions, as well as the video record showing the court's verbal recitation of the instructions to the jury, demonstrate to us that the instructions were identical. We find that, under current case law, Johnson was prejudiced in the issuance of the instructions. Although agreeing that the error is

palpable, to avoid reversal, the Commonwealth implores this Court to essentially ignore and overrule the precedent set forth in cases such as *Miller*, as to the standard for the sufficiency of jury instructions. As precedent on this direct issue has been set by the Kentucky Supreme Court, we do not have the authority to do so. We are mindful of the impact a reversal will have on all participants to this case. We especially do not take lightly the decision to remand a case of child sexual abuse and compelling the victim and the family to endure the pretrial and trial processes again. However, we also do not take lightly the circuit court's failure to ensure the full integrity of the jury trial proceeding, notably the issuance of the jury instructions, in not following due process mandates and the requirements of Kentucky case law. We have no option but to send this matter back to the Jefferson Circuit Court.

CONCLUSION

In light of the aforementioned, we VACATE the judgment of conviction and REMAND this matter for a new trial.

ALL CONCUR.

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