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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-000913-MR

MICHAEL MARKSBERRY APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 16-CR-00193

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Michael Marksberry appeals from the judgment and sentence entered by the Boone Circuit Court following a jury trial finding him guilty of first-degree sodomy[1] and first-degree sexual abuse.[2] Following a careful review, we affirm.

Marksberry was indicted for one count of first-degree sodomy and one

[1] Kentucky Revised Statutes (KRS) 510.070, a Class B felony.

[2] KRS 510.110, a Class D felony.

count of first-degree sexual abuse stemming from events occurring in the early hours of February 26, 2016. The prior evening Marksberry and his wife, Laura, were socializing with Alexis Moore and Brady Alford, a couple with whom the Marksberrys had previously resided. All four individuals, in addition to the law enforcement officers involved in the investigation, testified at trial.

On February 25, 2016, Moore, Alford, and their infant child were visiting the Marksberrys' home. The group then decided to relocate to Moore and Alford's home, where they played cards and consumed alcoholic beverages. Moore stated she did not drink much before retiring to her bedroom to help her child get back to sleep. Moore herself fell asleep, and the other three individuals continued with their activities in the living room. After some coaxing by Alford, Marksberry, Laura, and Alford decided to engage in group-sex activity in another bedroom. In that bedroom, Laura performed oral sex on both Marksberry and Alford. Laura became upset with the situation and began crying. The three reconvened in the living room, at which time either Alford told Marksberry to go wake Moore up to join them or Marksberry decided to do so on his own accord.

According to his testimony at trial, Marksberry entered the bedroom where Moore was sleeping and touched her shoulder. He then kissed her cheek, neck, shoulder, and legs. At this point, he pulled down her shorts and began performing oral sex on Moore. In a recorded phone call with Detective Tracy

Watson, he admitted there was some "petting" involved and his mouth was on her vagina. At trial, he claimed Moore was a light sleeper, which he knew from living with her. He testified she was awake after he touched her shoulder, which he knew because he heard her moaning throughout these acts.

According to Moore, she was sleeping next to her child and she partially awoke to someone touching her genital area. She assumed it was Alford. Seconds later, she stated Alford entered the room and began yelling at Marksberry and her child began crying. She stated Marksberry's pants were pulled down; she could see his buttocks. She also noticed her shorts were pulled down. She said she was still confused and Alford had to tell her what had occurred. Moore stated she was not intoxicated but was often exhausted from taking care of her child, who did not always sleep through the night.

According to Alford, Marksberry had been absent from the living room about fifteen minutes when he decided to look for him. Alford found him with his pants partially down and his face in Moore's genital area. Alford then started yelling at Marksberry and pushed him out of the bedroom.

Subsequently, Marksberry left the home. Eventually, Moore called 9-1-1 to report the incident to law enforcement. At this point, it was now the morning of February 26, 2016. Deputy James Thomas met them at their home and spoke with both parties, along with Marksberry via telephone. Detective Watson

also spoke with both parties and conducted a recorded telephone interview with Marksberry.

At the close of the Commonwealth's case, Marksberry moved for a directed verdict on both counts arguing the Commonwealth had not proven Moore was "physically helpless" at the time of this incident. Additionally, Marksberry moved for a directed verdict regarding the sexual abuse count, claiming the Commonwealth had not proven any other sexual contact occurred other than that which formed the basis for the sodomy count. The court denied the motion.

At the close of all evidence, the trial court and the parties discussed the jury instructions. Marksberry requested a sexual misconduct instruction as a lesser-included offense of both counts of the indictment. The court denied this request. No other objections to the jury instructions were made, and the instructions were submitted to the jury. The jury ultimately found Marksberry guilty of first-degree sodomy and first-degree sexual abuse, recommending sentences of fifteen years' imprisonment and five years' imprisonment, respectively, to be served concurrently. At final sentencing, the court reduced the sentence for first-degree sodomy to ten years' imprisonment, for a total sentence of ten years. This appeal follows.

Marksberry raises three claims of error: (1) the convictions violated double jeopardy principles; (2) the trial court erred in denying his motion for

directed verdict on both counts of the indictment; and (3) the trial court erred in denying his request for the lesser-included instruction of sexual misconduct.

KRS 510.070 and KRS 510.110 set out the requisite elements of first-degree sodomy and first-degree sexual abuse, respectively, in pertinent part, as follows:

> (1) A person is guilty of sodomy in the first degree when:
>
> . . .
>
> (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:
>
> 1. Is physically helpless[.]

KRS 510.070.

> (1) A person is guilty of sexual abuse in the first degree when:
>
> . . .
>
> (b) He or she subjects another person to sexual contact who is incapable of consent because he or she:
>
> 1. Is physically helpless[.]

KRS 510.110.

We first consider Marksberry's argument his convictions for sodomy and sexual abuse constituted double jeopardy in violation of the Fifth Amendment

of the United States Constitution and Section 13 of the Kentucky Constitution because the convictions were based on the same conduct. Marksberry admits this issue is unpreserved, but points out "double jeopardy violations are treated as an exception to the general rules of preservation." *Brooks v. Commonwealth*, 217 S.W.3d 219, 221 (Ky. 2007).

Constitutional double jeopardy claims are analyzed under the test delineated in the landmark case of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, 284 U.S. at 304, 52 S.Ct. at 182. A conviction for sexual abuse requires proof of "sexual contact."[3] A conviction for sodomy requires proof of "deviate sexual intercourse."[4] Different facts are necessary to prove these distinct elements. Thus, the *Blockburger* test is satisfied, and no double jeopardy violation occurred.

Further, Marksberry himself admitted kissing various parts of Moore's body and engaging in "petting" before performing oral sex on her. These

[3] "'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[.]" KRS 510.010(7).

[4] "'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 any body part or a foreign object manipulated by another person." KRS 510.010(1).

additional acts constitute separate instances and not a "single continuing offense." *Id.*, 284 U.S. at 302, 52 S.Ct. at 181. Whether kissing and petting in this scenario constituted "sexual contact" and whether the victim was "physically helpless" are factual determinations for the jury, but there are two separate instances of conduct for the jury to assess in accordance with the charged offenses. Accordingly, Marksberry's double jeopardy claim is meritless.

Second, Marksberry claims the trial court failed to direct a verdict of acquittal on both counts. Specifically, he contends the trial court should have found the Commonwealth failed to prove Moore was "physically helpless," as required by the statutes for both first-degree sodomy and first-degree sexual abuse.

The Commonwealth points out in its brief Marksberry failed to renew his motion for a directed verdict at the close of all evidence.[5] To properly preserve an argument of insufficient evidence for appellate review, "[a] defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence[.]" *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998); *see also Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836-37 (Ky. 2003). Without such renewal, this issue is unpreserved.

[5] Although Marksberry's brief cites to the record in stating the motion for a directed verdict was renewed, our review shows no such renewed motion.

However, in his reply brief, Marksberry requests palpable error review under RCr[6] 10.26. "CR[7] 76.12(1) and 76.12(4)(e) permit the appellant to file a reply brief 'confined to points raised in the briefs to which they are addressed.'" *Commonwealth v. Jones*, 283 S.W.3d 665, 670 (Ky. 2009). Because Marksberry has specifically requested palpable error review of his argument the Commonwealth failed to present sufficient evidence of Moore being "physically helpless" to survive a directed verdict motion, we will now address the merits of that claim.

A palpable error is one "which affects the substantial rights of a party[,]" and appropriate relief therefrom "may be granted upon a determination that manifest injustice has resulted from the error." RCr 10.26. To prevail, an appellant must show there is a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

On review, appellate courts should "reverse a trial court's refusal to grant a directed verdict only if it would be clearly unreasonable for a jury to find a defendant guilty based upon the evidence as a whole." *Hubbard v. Commonwealth*, 932 S.W.2d 381, 383 (Ky. App. 1996) (citing *Commonwealth v.*

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[6] Kentucky Rules of Criminal Procedure.

[7] Kentucky Rules of Civil Procedure.

*Benham*, 816 S.W.2d 186, 187 (Ky. 1991)). Further, the trial court is required to "draw all fair and reasonable inferences from the evidence in favor of the Commonwealth[,]" but must avoid usurping the jury's role in determining the credibility and weight given to testimony. *Benham*, 816 S.W.2d at 187. After our review of the evidence and applicable case law, we conclude the trial court correctly denied Marksberry's motion for a directed verdict.

Marksberry alleges the trial court should have concluded it would be clearly unreasonable for a jury to find him guilty of first-degree sodomy and first-degree sexual abuse because the Commonwealth failed to demonstrate Moore was "physically helpless" as the statutes require. "Physically helpless" is defined at KRS 510.010(6) as:

> a person [who] is unconscious or for any other reason is physically unable to communicate unwillingness to an act. "Physically helpless" also includes a person who has been rendered unconscious or for any other reason is physically unable to communicate an unwillingness to an act as a result of the influence of a controlled substance or legend drug[.]

The commentary to this subsection notes "physically helpless" also includes "the situation where a person is in a deep sleep as a result of barbiturates, unconscious because of excessive alcohol consumption, or a total paralytic."

*Boone v. Commonwealth*, 155 S.W.3d 727 (Ky. App. 2004), guides our interpretation and application of "physically helpless" to this case. The facts of

*Boone* are similar to those involved here, in that Boone was convicted of several sexual offenses, including first-degree sexual abuse, based on the victim's testimony he was sleeping and awoke when the sexual contact occurred. After a survey of other states' interpretations of "physically helpless," this Court held, "being in the state of sleep renders one unable of making a conscious choice." *Boone*, 155 S.W.3d at 731 (quoting *People v. Copp*, 648 N.Y.S.2d 492, 493 (N.Y. City Ct. 1996)). Ultimately, this Court determined a jury could reasonably find Boone's victim was unable to consent because he was sleeping at the time sexual contact began.

It is Marksberry's position Moore awoke after he touched her shoulder. If that is the juncture at which she awoke, Moore could not be considered "physically helpless," even if she was only "partially awake" as she repeatedly stated in her testimony. However, Moore testified when she partially awoke she felt something touching her vagina. Taking the Commonwealth's evidence and the inferences therefrom as true, it would not be clearly unreasonable for a jury to find Moore was sleeping as Marksberry was kissing or petting her and when he initiated oral sex upon her. Thus, the trial court correctly denied Marksberry's motion for directed verdict, and we discern no palpable error.

Finally, Marksberry argues the trial court should have instructed the jury on sexual misconduct as a lesser-included offense of first-degree sodomy and

first-degree sexual abuse because the jury could have believed Moore was not physically helpless but still did not consent. The offense of sexual misconduct is defined as "[a] person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent." KRS 510.140(1).[8]

Our standard of review for a trial court's ruling regarding jury instructions is abuse of discretion. *Cecil v. Commonwealth*, 297 S.W.3d 12, 18 (Ky. 2009). It is the trial judge's duty to instruct the jury on the whole law of the case. *Taylor v. Commonwealth*, 995 S.W.2d 355 (Ky. 1999). A lesser-included instruction is required, "only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998).

However, the evidence in this case failed to support a sexual misconduct instruction. In *Cooper v. Commonwealth*, 550 S.W.2d 478 (Ky. 1977), our Supreme Court construed KRS 510.140 as applicable only where non-consent was based on the age of the perpetrator and the victim, specifically under eighteen years old if the victim was under sixteen years of age but not under the age of twelve, or under twenty-one years of age if the victim was fourteen or fifteen years

[8] A Class A misdemeanor. KRS 510.140(2).

of age. *Id*. at 479. Kentucky caselaw has repeatedly reaffirmed its adherence to this interpretation of KRS 510.140. *Murphy v. Commonwealth*, 509 S.W.3d 34, 48-49 (Ky. 2017); *Jenkins v. Commonwealth*, 496 S.W.3d 435, 452 (Ky. 2016). It is undisputed that Moore was of majority age when these acts occurred.[9] Accordingly, due to the principle of *stare decisis*, we are constrained to follow *Cooper* and its progeny and hold the trial court did not abuse its discretion in denying Marksberry's request for a sexual misconduct instruction because KRS 510.140 is inapplicable here.

For the foregoing reasons, the judgment and sentence of the Boone Circuit Court is affirmed.

ALL CONCUR.

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[9] She testified at trial her birthdate was February 25, 1998.