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RENDERED: MAY 20, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000516-MR
2009-SC-000338-MR

JEFFREY CURTIS COTTON — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
NOS. 07-CR-00632; 08-CR-00192

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART,
AND REVERSING AND REMANDING, IN PART

Appellant, Jeffrey Curtis Cotton, was found guilty by a Christian Circuit Court jury of rape in the first degree, sexual abuse in the first degree, robbery in the first degree, burglary in the first degree, tampering with physical evidence in the first degree, fleeing or evading police in the first degree, and escape in the second degree. He was sentenced to fifty years' imprisonment. He now appeals his convictions for first-degree sexual abuse and second-degree escape as a matter of right. Ky. Const. § 110(2)(b).

I. Facts

On July 11, 2007, a man carrying a knife and wearing a ski mask entered F.D.'s rural home while she sat watching television, wrapped his arm

around her neck, and told her to give him her money and jewelry or he would cut her throat. When she informed the intruder that she did not have any money or jewelry, he jerked her arm behind her back and forced her from her chair before tying her arms behind her back and placing a bag over her head. The man then removed F.D.'s clothing and pushed her across the room and onto her back. He penetrated F.D.'s vagina both digitally and with a foreign object for several minutes.

F.D. told the intruder that her granddaughter would be arriving soon, but he informed her that he did not care. However, when a car passed, he got to his feet and washed his hands in her kitchen sink. The man then untied F.D., telling her that if she looked at him he would kill her. F.D. sat where the intruder left her for five minutes, after which time she looked around her home and he was gone. She called 911 and reported that she had been raped.

Officer Mark Reid of the Christian County Sheriff's Department was transporting two civilians involved in an unrelated matter on the day in question. Since he was only a mile away from F.D.'s home, he responded to the call. As Officer Reid approached F.D.'s residence, he saw Appellant driving his vehicle with two tires on the road and two off. When Officer Reid got behind Appellant's car, Appellant hit the accelerator and began weaving. When Officer Reid activated his lights and siren, Appellant threw a shirt and several other items out of his window. Officer Reid pursued Appellant, driving at speeds around eighty miles per hour, and Appellant ran through an

intersection, locked up his brakes, and slid into a cornfield. Due to the civilians in his car, Officer Reid chose not to pursue Appellant, but instead, continued to follow him once he was back on the road until Appellant flipped his car into a ditch. Reid then parked his cruiser, ran to Appellant's car, and told him not to move when he tried to exit the vehicle through the window. He was taken to the hospital, where he was placed under arrest.

When other officers arrived, they recovered a shirt, a ski mask, gloves, a wallet, binoculars, and a large knife from the scene. Appellant testified that he had found these items as he was "scavenging" for copper and other items of value and picked them up and put on the shirt. He also said that the reason he fled from Officer Reid was that he had only recently been released from prison and that the sight of the police officer frightened him, causing him to panic. He claimed that he had never been to F.D.'s home or had any contact with her.

After his arrest, Appellant escaped from a van used to transport inmates from jail to court. He ran across the parking lot before he was stopped and taken back into custody.

Appellant was found guilty of first-degree rape, first-degree sexual abuse, first-degree robbery, first-degree burglary, tampering with physical evidence, first-degree fleeing or evading the police, and second-degree escape. The jury recommended a sentence totaling eighty years for these crimes (all sentences to

be served consecutively), however, pursuant to KRS 532.110(1)(c), his sentence was limited to fifty years.

II. Analysis

A. Jury Instructions

Appellant first argues that the trial court erred when it allowed the jury to convict him of both first-degree rape and first-degree sexual abuse because the sexual abuse instruction was couched in general terms of "sexual contact" and did not differentiate that act from that on which the rape charge was based.[1] Based on this instruction, if the jury convicted Appellant of rape, he clearly subjected F.D. to sexual contact for purposes of first-degree sexual abuse. Thus, if the jury found (as it did) that Appellant raped F.D., they also had to find that he was guilty of first-degree sexual abuse—i.e., he must have also subjected her to sexual contact.

The jury instruction for sexual abuse read:

> You will find the Defendant guilty of First-Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

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[1] Contrary to the Commonwealth's assertions, Appellant's allegation of error is preserved. In the case at bar, Appellant objected not to the form of the jury instructions for rape and sexual abuse, but on the grounds that sexual abuse is a lesser-included offense of rape and that the two should not have been separate charges. Appellant's objection, "although technically insufficient, was nevertheless sufficiently related to the proper ground as to preserve the issue for review," *Claycomb v. Howard*, 493 S.W.2d 714, 717 (Ky. 1973), and it "fairly and adequately presented to the trial judge . . . the party's position." RCr 9.54(2).

A. That in this county on or about July 11, 2007, and before the finding of the Indictment herein, he *subjected [F.D.] to sexual contact*; and

B. That he did so by forcible compulsion.

(emphasis added). The jury instruction for rape read likewise, with the sole exception that the words "subjected [F.D.] to sexual contact" were replaced with "engaged in sexual intercourse with [F.D.]."

In *Johnson v. Commonwealth*, 864 S.W.2d 266, 277 (Ky. 1993), the defendant was charged with both sexual abuse and rape. There, the jury instructions, as in the case at bar, differentiated between the two crimes only by substituting the terms "sexual contact" and "sexual intercourse" for one another. *See id.* But as we explained in *Johnson*:

> [S]exual abuse in the first degree is a lesser-included offense of . . . rape in the first degree . . . while at the same time it was in this case a primary charge of the indictment, relating to a separate instance of sexual contact [digital penetration in the case at bar] . . . . The instruction, couched in general terms of "sexual contact" without differentiating the act from those acts constituting rape . . . 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.

Id. at 277. The jury instructions in the present case, like those in *Johnson*, allowed Appellant to be convicted twice for the same act.

In *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008), Appellant was charged with seven counts of sexual abuse (among other charges). We reversed Appellant's sexual abuse convictions because the jury instructions on the

seven counts were "identical, containing no identifying characteristics that required the jury to differentiate among each of the counts." *Id.* at 816. "We have previously held that '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.'" *Id.* at 817 (*quoting Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002)). Furthermore, we have held that "a trial court errs in a case involving multiple charges if its instructions to the jury fail 'factually [to] differentiate between the separate offenses.'" *Id.* at 817 (*quoting Combs. v. Commonwealth*, 198 S.W.3d 574, 580 (Ky. 2006)). While *Harp* dealt only with the issue of differentiating between different multiple counts of the same offense, when read together with *Johnson*, it is clear that the result must be the same here: we must find that the jury instructions were erroneous.

As we held in *Harp*, "failure to include proper identifying characteristics in jury instructions is reversible error, provided that a timely objection to the error has been made." 266 S.W.3d at 818. Furthermore, while the error may, in some cases, be harmless,

> a party claiming that an erroneous jury instruction, or an erroneous failure to give a necessary jury instruction [is harmless], bears a steep burden because we have held that "[i]n this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial; that an appellee claiming harmless error

> bears the burden of showing affirmatively that no prejudice resulted from the error."

Id. (*quoting McKinney v. Heisel,* 947 S.W.2d 32, 35 (Ky. 1997)). In the present case, the Commonwealth has not overcome this "steep burden."[2]

Appellant claims no error, nor do we find any, with the rape instruction. By convicting Appellant of rape, it is clear that the jury found that he had penetrated F.D. with a foreign object.[3] However, since the sexual abuse instruction was couched in general terms of "sexual contact," it could have allowed Appellant to be convicted twice for the same act (penetration by a foreign object constituting both "sexual intercourse" as required by the rape instruction and "sexual contact" as required by the sexual abuse instruction, rather than finding him guilty of sexual abuse due to the separate and distinct

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[2] The Commonwealth claims to have cured any error in the jury instructions. In its closing argument, the Commonwealth stated that the sexual abuse charge was based upon digital penetration while the rape charge was based upon penetration by a foreign object. However, the jury instructions did not make this differentiation. Our precedent speaks clearly on this matter: "the arguments of counsel are not sufficient to rehabilitate otherwise erroneous or imprecise jury instructions." *Dixon v. Commonwealth,* 263 S.W.3d 583, 593 (Ky. 2008).

[3] KRS 510.010 defines sexual intercourse to include penetration by a foreign object, and then defines a foreign object to include "anything . . . other than the person of the actor." To wit:

> (8) "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. Sexual intercourse occurs upon any penetration, however slight; emission is not required. "Sexual intercourse" does not include penetration of the sex organ by a foreign object in the course of the performance of generally recognized health-care practices; and
>
> (9) "Foreign object" means anything used in commission of a sexual act other than the person of the actor.

Id.

act of digital penetration), we reverse Appellant's first-degree sexual abuse conviction and remand this matter to the trial court—where retrial of the sexual abuse charge will not be barred by double jeopardy. *See generally Blockburger v. United States*, 284 U.S. 299 (1932); *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996), *modified on denial of reh'g*, 947 S.W.2d 805 (Ky.1997) (returning to *Blockburger* for double jeopardy analysis). In the present case, the sexual abuse charge and the rape charge each "requires proof of a fact which the other does not": penetration by a foreign object in the case of rape, and digital penetration in the case of sexual abuse. *Blockburger*, 284 U.S. at 304.

B. Severance

Appellant next argues that his escape charge should have been severed from his other charges, as the two did not arise from a common plan or scheme or arise closely in time to one another. Even if Appellant had preserved this issue, "[w]e will not reverse on appeal for failure to sever 'unless we are clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion.'" *Bratcher v. Commonwealth*, 151 S.W.3d 332, 340 (Ky. 2004) (*quoting Rachel v. Commonwealth*, 523 S.W.2d 395, 400 (Ky. 1975)). However, Appellant not only failed to preserve this issue by making a motion to sever, but he also conceded the escape charge during closing arguments. Now,

Appellant contends that this perceived error merits palpable error review under RCr 10.26, which reads:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

As we noted in *Brewer v. Commonwealth*, "what a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error." 206 S.W.3d 343, 349 (Ky. 2006) (*citing Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003)). Appellant contends that evidence of his escape allowed the jury to speculate about his sense of guilt as it related to his other charges. However, Appellant was also charged with fleeing or evading the police—another charge which he conceded in closing arguments. If the jury did, indeed, draw such an inference, it could have done so from the similar conduct involved in the fleeing and evading charge. Thus, finding no palpable error, we affirm Appellant's conviction for first-degree escape.

III. Conclusion

For the foregoing reasons, we hereby reverse Appellant's first-degree sexual abuse conviction and remand the matter to the trial court for further

proceedings consistent with this opinion. All remaining convictions are affirmed.

All sitting. Minton, C.J.; Abramson, Noble, Schroder, Scott, and Venters, JJ., concur. Cunningham, J., concurs, in part, and dissents, in part, by separate opinion.

CUNNINGHAM, J., CONCURRING IN PART AND DISSENTING IN PART: I concur in the Court's opinion affirming the rape conviction in this case. I respectfully part ways, however, with the Court's reversal of the first-degree sexual abuse conviction.

I agree with the Commonwealth that this error was not properly preserved and, I add, neither was it palpable error. Appellant's specific objection to the instructions is that the first-degree sexual abuse is a lesser-included offense to the rape, and the two should have been one charge. The answer to this objection is simple. Just because one offense in an indictment or conviction may be a lesser-included offense of another offense charged does not mean there cannot be two separate crimes. Here, there was evidence of first-degree sexual abuse with the digital penetration and evidence of the separate offense of rape with the penetration of the foreign object.

Had the Appellant properly objected specifically to the instruction on the ground for which our Court now reverses, the trial court may well have made the correction in the instruction. It would have been a simple step by simply adding "by digital penetration" on the sexual abuse instruction and "by

penetration with a foreign object" on the rape instruction. This specific relief was never requested and, therefore, I do not believe it is fair to the trial judge to say it was properly preserved. Since there was sufficient evidence to support conviction on both crimes, under the instructions given, there was no palpable error. I would affirm the conviction in full.

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