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OPINION OF APRIL 15, 2011, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001357-MR

TANYA BAYNUM — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 08-CR-00376

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

CAPERTON, JUDGE: Tanya Baynum appeals from her conviction in the Kenton Circuit Court on one count of third-degree rape, one count of custodial interference, and two counts of first-degree unlawful transaction with a minor, for which she was sentenced to ten years of imprisonment. After a thorough review of

the parties' arguments, the record, and the applicable law, we agree with Baynum that the jury instructions given by the trial court were reversible error. Therefore, we reverse and remand to the trial court for a new trial on the charges of unlawful transaction with a minor consistent with this opinion. We also reverse and remand the portion of Baynum's sentence that exceeded the trial court's authority in light of *Smith, infra.* We affirm Baynum's remaining convictions.

The facts of this case were testified to at a multiple-day jury trial. The Commonwealth presented evidence that Baynum had a sexual relationship with T.R. when Baynum was 28 and T.R. was 15. T.R. moved into Baynum's home in January of 2008.[1] T.R. stayed with Baynum for almost a month.[2] During that time he often interacted with Baynum's three children, helping with their homework and playing with them. At first another minor, C.C., also lived at Baynum's residence. C.C. was in love with Baynum but left when he saw a relationship developing between Baynum and T.R. After C.C. left, T.R. began sleeping in the same bed as Baynum. Shortly thereafter, a sexual relationship began. The two professed their love for each other and discussed getting married and having children together.[3]

T.R. testified that he smoked marijuana and methamphetamine with Baynum. T.R. testified that the first time he smoked methamphetamine with

[1] T.R. had been living with his grandfather after his mother had a crack cocaine relapse in February 2007.

[2] While T.R. stayed with Baynum, he never told his mother or grandfather where he was staying.

[3] This was corroborated by a letter written by Baynum to T.R.

Baynum was the night the two met and that he thought the methamphetamine was hers. T.R. testified that on a second occasion he smoked methamphetamine with Baynum after two individuals came to her trailer and provided her with the drug.

During this time, T.R.'s mother (Millburn) tried to locate him. Eventually, C.C. informed Millburn that T.R. was staying in a trailer with somebody named Tanya, and C.C. told Millburn the name of the street on which she would find the trailer. Millburn drove to the trailer and knocked on the door.[4] When Baynum answered, Millburn told her that she was looking for T.R. Baynum acknowledged that she knew who T.R. was but told Millburn that he was not there. Baynum later told Millburn that T.R. had stayed with her for a few days but left with someone from Ohio. Millburn called the police, and Officer Robert Linton arrived at the scene. Linton requested to search Baynum's trailer and she consented. Linton left after finding no evidence linking T.R. to the trailer and instructed Baynum to call the police if she saw T.R. Millburn proceeded to post fliers with T.R.'s photograph.

On February 22, 2008, Millburn received a tip from C.C.'s younger brother, S.C., that he was getting ready to meet T.R. at a White Castle. Officer Ki Ransdall went to the White Castle with a warrant to take T.R. into custody. Officer Ransdall met S.C. prior to T.R.'s arrival and parked his cruiser behind White Castle. When S.C. sighted T.R. at a gas station across the street, Officer Ransdall

[4] During this encounter, T.R. left through the trailer's back door and hid under the porch. When he saw his mother looking in another direction, T.R. ran to a creek behind the trailer and hid for approximately 45 minutes.

then arrested T.R. Officer Ransdall had to remove T.R. from the backseat of a car in which Baynum was a passenger. Thereafter, T.R. stayed at various locations, including Millburn's residence, his father's residence, a mental health facility, and a rehabilitation facility. During this time, T.R. asked Millburn for permission to marry Baynum when he turned 16.

Millburn arranged for a meeting with Baynum and T.R. Millburn recorded the meeting, and the Commonwealth played the tape at trial. On the recording Baynum admitted that T.R. had stayed with her for a month, that the two had a sexual relationship, and that she possessed methamphetamine that she intended to sell to raise cash to buy birthday presents for her child. Millburn took the tape to the police. Thereafter, Baynum was interviewed by the police and admitted that she knew that T.R. was 15. Baynum claimed that T.R. had told her to lie to Millburn so that he could go live with his father. After hearing this evidence, the jury convicted Baynum of one count of third-degree rape, one count of custodial interference, and two counts of first-degree unlawful transaction with a minor. It is from this conviction that Baynum now appeals.

On appeal, Baynum presents three arguments. First, the trial court erred to Baynum's substantial prejudice when defense counsel was barred from recalling a Commonwealth witness and presenting a defense. Second, that the jury instructions on each count of first-degree unlawful transaction with a minor were identical and thus did not protect Baynum against nonunanimous verdicts or

double jeopardy. Third, the trial court sentenced Baynum to numerous penalties not authorized by any Kentucky statute.

In response, the Commonwealth presents three arguments that we do not find dispositive. Accordingly, we shall briefly address each in turn. First, the Commonwealth argues that the trial court properly refused to permit the defense to recall T.R., whom the defense had already cross-examined. In support thereof, the Commonwealth states that the issue regarding whether T.R. should be recalled as a witness is moot because: (a) defense counsel announced that she was not going to recall T.R., and (b) the avowal testimony of Remy (an individual whose identity is unknown to this Court) did not provide any evidence that should have been admitted at trial. Upon our review of this argument, we find it unpersuasive and decline to address it further.

Second, the Commonwealth argues that Kentucky law places defense counsel in an ethical dilemma when the jury instructions do not delineate between crimes: either counsel objects and calls the court's attention to the incorrect jury instructions, or, counsel is silent, knowing that his client will benefit from an automatic reversible error. In support thereof, the Commonwealth asserts that Kentucky Rules of Criminal Procedure (RCr) 10.26 is not a substitute for the contemporaneous objection rule contained in RCr 9.54, in reliance on *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002)("The palpable error rule set forth in RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. RCr 9.22. The general

rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived."). The Commonwealth urges this Court to recommend to the Kentucky Supreme Court that it reconsider the state of our current caselaw. Additionally, the Commonwealth argues that any error was harmless because the evidence at trial clearly showed that on two different occasions Baynum shared crystal methamphetamine with the fifteen-year-old victim. We decline to address this argument because this assumes that defense counsel understood the instruction to be in error and made a conscious decision not to object. The record does not disclose that defense counsel made this decision.

Third, the Commonwealth argues that the judgment did not conform to the recent case of *Smith v. Commonwealth*, 2010 WL 1005907 (Ky. 2010)(2008-SC-000786-MR), wherein the same trial court imposed requirements almost identical to those imposed *sub judice* on a sex offender during his conditional discharge. Said requirements were held to be beyond statutory authorization by the Kentucky Supreme Court in an unpublished decision. The Commonwealth further argues that, given the trial court could not have been aware of the *Smith* holding prior to issuing the order in this case, this Court should only vacate the portions of the sentence that are beyond the trial court's statutory authority and leave the remainder of the sentence intact. After our review of the Commonwealth's argument, we do not find the argument to be dispositive; while *Smith* is not a published opinion, by virtue of Kentucky Rules of Civil Procedure (CR) 76.28(4)(c) we have considered the merits of *Smith* and agree with the Kentucky

Supreme Court's learned reasoning. In light of *Smith*, we must agree with Baynum that the requirements placed upon her in her sentence exceeded the trial court's authority and, thus, are in error. Accordingly, we reverse and remand this portion of her sentence.

With these arguments in mind, we now turn to the dispositive issue on appeal, that the jury instructions on each count of first-degree unlawful transaction with a minor were identical and thus did not protect Baynum against nonunanimous verdicts or double jeopardy.

At the outset, we note that Baynum has conceded that this issue concerning jury instructions was not properly preserved for our review and requests a palpable error review pursuant to RCr 10.26. Accordingly,

we shall conduct a palpable error review. RCr 10.26 states:

> 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.

Manifest injustice requires showing 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). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding…to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Martin* at 4.

Further refining the parameters of RCr 10.26, the Kentucky Supreme Court in *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006), undertook an analysis of what constitutes a palpable error:

> For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. A palpable error must involve prejudice more egregious than that occurring in reversible error. A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, 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. If not, the error cannot be palpable.

Id. at 349. At trial, the court issued Instruction Number 8 to the jury which stated:

> You will find the Defendant, Tanya Baynum, guilty of First Degree Unlawful Transaction with a Minor under this Instruction and under Count III of the indictment, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:
> A. That in Kenton County between January 23, 2008, through February 22, 2008, and before the finding of the Indictment herein, she knowingly induced, assisted or caused [T.R.] to engage in the use of methamphetamine;
> AND
> B. That [T.R.] was less than 16 years of age;
> AND
> C. That the Defendant knew [T.R.] was less than 16 years of age.

The trial court also issued Instruction Number 11 which stated the exact same language as Instruction Number 8 except Instruction Number 11 referenced Count IV of the indictment. In contrast, Instruction Number 8 made no reference to any count of the indictment. The jury found Baynum guilty under both counts.

The Kentucky Supreme Court recently addressed a similar situation in *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009). In *Miller,* palpable error review was likewise sought for an unpreserved objection to jury instructions on the same grounds now argued by Baynum. The Court in *Miller* ultimately held that such an unpreserved error may rise to the level of palpable error. In so holding, the *Miller* Court undertook a learned discussion on the applicable law in Kentucky, which we have set forth herein:

> In this regard, "[i]t is [ ] elementary that the burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude." *Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002). Plainly, a defendant cannot be convicted of a criminal offense except by a unanimous verdict. Ky. Const. § 7; *Cannon v. Commonwealth*, 291 Ky. 50, 163 S.W.2d 15 (1942); RCr 9.82(1). Therefore, we have held that:
>
> > [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 at 695, citing *Miller v. Commonwealth* 77 S.W.3d at 576. The Court in *Miller* further noted:

> Prior to our recent decision in *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008), it was

possible for an instructional error such as this to be "cured" by the Commonwealth's introduction and explanation of the identifying characteristics from which the jury could determine the existence of facts proving each of the offenses, rendering any error in the instructions harmless. *See Bell v. Commonwealth*, 245 S.W.3d 738, 744 (Ky. 2008). Then, in *Dixon v. Commonwealth*, 263 S.W.3d 583, 593 (Ky. 2008), we recognized that "the arguments of counsel are not [now] sufficient to rehabilitate otherwise erroneous or imprecise jury instructions" because the arguments of counsel are not evidence. *Harp* further corrected dictum in *Bell* which supported the proposition that counsel could "cure" defects in identical instructions in closing argument, reaffirming the proposition that:

> a party claiming that an erroneous jury instruction, or an erroneous failure to give a necessary jury instruction [is harmless error], 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; [thus,] an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error."

Harp, 266 S.W.3d at 818.

Thus, it is now settled that a trial court errs in a case involving multiple charges if its instructions to the jury fail to factually differentiate between the separate offenses according to the evidence. *Combs,* 198 S.W.3d at 580. Here, because the trial court used identical jury instructions on multiple counts of third-degree rape and sodomy, none of which could be distinguished from the others as to what factually distinct crime each applied to, Appellant was presumptively prejudiced. Nor has the Commonwealth met its burden to show affirmatively that "no prejudice resulted from the error." *Harp*, 266 S.W.3d at 818. Therefore, the identical jury instructions, here, can not be considered harmless.

> [I]t must be evident and clear from the instructions and verdict form that the jury agreed, not only that [Appellant] committed one count of sodomy, but also exactly which incident they all believed occurred [and voted for]. Otherwise, [Appellant] is not only denied a unanimous verdict, but is also stripped of any realistic basis for appellate review of his conviction for sodomy. In other words, without knowing which instance of sodomy is the basis of his conviction, [Appellant] cannot rationally challenge the sufficiency of the evidence on appeal.

Bell, 245 S.W.3d at 744.

Being error, we now hold such instructional error as this to be palpable error, *Id.* "[T]he instructional error explained above ... constituted palpable, reversible error." *Id*.; *cf. Commonwealth v. Davidson*, 277 S.W.3d 232, 233, 235-36 (Ky.2009). Yet, that is not to say that every error in jury instructions rises to the level of palpable error.

As this Court noted in *Nichols v. Commonwealth*, 142 S.W.3d 683, 691 (Ky.2004), an alleged error is not reviewable under RCr 10.26 unless (1) it is "[a] palpable error," and (2) "a determination is made that manifest injustice [has] resulted from the error." By definition, the word "palpable" means "[e]asily perceived; obvious." *Id.* (quoting American Heritage Dictionary of the English Language 946 (4th ed.2000)). Thus, a "palpable error" is an error that is easily perceived or obvious. *Id.* In *Brock v. Commonwealth,* 947 S.W.2d 24, 28 (Ky.1997), this Court "interpreted the requirement of 'manifest injustice' as used in RCr 10.26 ... to mean that the error must have prejudiced the substantial rights of the defendant, i.e., a substantial possibility exists that the result of the trial would have been different." (internal citation omitted)

> Here, it is obvious that the identical jury instructions used in this case patently failed to adequately differentiate the alleged instances of multiple third-degree rape and sodomy. Therefore, the error was palpable. Further, as the trial court's error "prejudiced the substantial rights of the defendant," the use of identical jury instructions resulted in manifest injustice, potentially depriving Appellant of his right to a unanimous verdict and to challenge the sufficiency of the evidence on appeal. *Id.*

Miller at 695-696 (internal footnotes omitted).

In this case, Baynum's identical jury instructions on multiple counts of first-degree unlawful transaction with a minor failed to factually differentiate the alleged instances of the crime. We do note that one jury instruction references a particular count in the indictment and that the other instruction does not reference the indictment whatsoever, but we do not see this as the differentiation between instructions that is required by *Miller*, *Bell* and *Harp*. Further, we believe this instructional error to be a palpable error affecting Baynum's constitutional rights. *See Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002), and *Miller v. Commonwealth*, 283 S.W.3d 690, 695-696 (Ky. 2009).

We disagree with the argument asserted by the Commonwealth that Baynum was only convicted of two counts of unlawful transaction with a minor and, thus, she cannot realistically argue how she was actually prejudiced. We remind the Commonwealth that the "burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the

failure to do so is an error of constitutional magnitude." *Miller v. Commonwealth*, 77 S.W.3d 566 at 576.

Second, the burden is not Baynum's to bear. We direct the Commonwealth's attention to *Bell*, wherein the court stated "Nor has the Commonwealth met its burden to show affirmatively that 'no prejudice resulted from the error.'" *Bell* at 744, quoting *Harp*, 266 S.W.3d at 818. Clearly, the Commonwealth's violation of Baynum's constitutional rights in this case resulted in actual prejudice.[5] Thus, under *Miller, supra,* we must conclude that the issued jury instructions were reversible error necessitating remand to the trial court for a new trial. Accordingly, we decline to address Baynum's remaining two arguments because they are rendered moot by the remand for a new trial.

In light of the foregoing, we reverse Baynum's conviction for unlawful transaction with a minor and that portion of her sentence which exceed the trial court's authority in light of *Smith,* and remand to the trial court for a new trial and sentencing. We affirm Baynum's remaining convictions *sub judice.*

MOORE, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

[5] The Commonwealth argues that the evidence at trial showed that on two different occasions Baynum shared methamphetamine with the fifteen-year-old victim. However, the Commonwealth then states "T.R. testified that he and Baynum smoked crystal methamphetamine on three different occasions." Clearly, Baynum was prejudiced because without knowing which instance of unlawful transaction with a minor served as the basis for each conviction, Baynum cannot rationally challenge the sufficiency of the evidence on appeal. *See Bell v. Commonwealth,* 245 S.W.3d 738, 744 (Ky. 2008).

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