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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001120-MR

DAVEON L. JACKSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL , JUDGE
ACTION NO. 08-CR-00904

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Daveon L Jackson appeals from a final judgment of the Fayette Circuit Court convicting him of third-degree rape and of being a second-degree persistent felony offender (PFO) and sentencing him to ten

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

years in prison. We affirm the convictions but reverse and remand for a new sentencing hearing.

On June 3, 2008, Jackson went to the home of a female friend after having a fight with his girlfriend. His friend's 15-year-old daughter, J.M., and son, D.J., were also at the home. In addition, D.J. had a friend who was at the home. Later in the evening, Jackson's friend and J.M. went to bed. After Jackson's friend rejected Jackson's romantic advances, Jackson went to J.M.'s bedroom and made sexual advances toward her. When J.M. resisted Jackson's advances and fled from her bedroom, Jackson told her not to tell her brother and her mother. He then left the house.

J.M. awakened her brother and told him what had happened. He then told his mother. The police were called, and J.M. was taken to the hospital and examined. J.M. claimed that Jackson had forcibly raped her. She stated that he had put his penis into her vagina and had thrusted three times but had not ejaculated. The examining nurse noted redness and abrasions in the labia minora and redness above the urethra. J.M. also claimed that Jackson had slapped her and had bitten her ear, but no bruising, swelling, or bite marks were noted.

Police Detective Tim Ball later questioned Jackson in a taped interview that was played as evidence in the jury trial in this case. In the interview, Jackson at first denied having even been around J.M. and denied having talked to her. He also denied having sex with her. After further questioning by the detective, Jackson admitted that "I did put it in a little bit and pulled it out and left

‘cause I felt her brother and his friend were up in their room [and] her mom wasn’t all the way asleep.” Jackson also said, “You can say sex ‘cause of intercourse, but I didn’t go all the way, but it’s sex.” Jackson also stated that he thought J.M. was 16 or 17 years old.

Jackson was indicted by a grand jury on charges of first-degree rape and for being a second-degree PFO. Following a jury trial, he was convicted of the lesser-included offense of third-degree rape, based on his age being 21 or older and J.M.’s age being under 16, and of PFO. Jackson’s sentence was set at five years on the rape charge, enhanced to ten years due to his PFO status. This appeal by Jackson followed.

Jackson raises several issues on appeal, some of which address the guilt/innocence phase of the trial and some of which address the sentencing phase. He also appeals from the portion of the judgment that requires him to pay court costs. We conclude that any error in the guilt/innocence phase was harmless but that there was palpable error in the sentencing phase that requires us to reverse the sentence and remand for a new sentencing hearing. We also reverse the portion of the final judgment that requires Jackson to pay court costs.

Jackson’s first argument is that the trial court erred in admitting the portions of the taped interview wherein the detective stated to Jackson that he was lying. During the interrogation the detective made several statements, including “obviously you’re being deceitful with me,” “You sitting in that chair trying to bs me is not going to work today[,]” “What I don’t understand is somebody sitting in

that chair telling me they didn't do something when I know they did[,]" "So don't lie to me and say that you don't know [J.M.] and don't lie to me and say you were not messing around with [J.M.'s] mom[,]" and "See how you were at first, you denied, lied. . ."

In *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), the Kentucky Supreme Court faced this very issue. In a 4-3 decision, the Court held that

> We agree that such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect's story shifts and changes. We also agree that retaining such comments in the version of the interrogation recording played for the jury is necessary to provide a context for the answers given by the suspect.

Id. at 27. Based on *Lanham*, the statements were admissible, and the trial court did not err in allowing those portions of the taped interview to be played to the jury.

Because *Lanham* was a 4-3 decision, Jackson urges us to revisit the issue and overrule the case. Even if we were inclined to do so, we are prohibited from such action because we are bound by the precedents of the Kentucky Supreme Court. Rule of Supreme Court (SCR) 1.030(8)(a).

Jackson also asserts that even if the statements were properly admitted into evidence, the trial court nevertheless erred in not giving the jury a limited admonition that the statements were not to be considered by the jury as evidence of guilt but were only admissible to provide context for Jackson's relevant responses. Jackson cites the portion of the *Lanham* case where the Court said that "the better

remedy to any possible adverse inference by the jury is a limiting admonition given by the court before the playing of the recording." *Id*. at 28. The court in *Lanham* further stated as follows:

> The admonition should be phrased so as to inform the jury that the officer's comments or statements are "offered solely to provide context to the defendant's relevant responses." This means, however, that a trial court's failure to give such an admonition when requested by a defendant is error, though such an error is still subject to harmless error analysis.

Id. (footnote and citation omitted).

As admitted by the Commonwealth in its brief, the court erred in not giving the limited admonition. The remaining issue in this regard is whether the error was harmless.

The test for harmless error is "whether there is any substantial possibility that the outcome of the case would have been different without the presence of that error." *Thacker v. Commonwealth*, 194 S.W.3d 287, 291 (Ky. 2006). Because Jackson's story changed and because he admitted having penetrated J.M.'s vagina, we conclude that any error in failing to give the limited admonition was harmless.

In a related argument, Jackson contends that the court erred in allowing an additional portion of the taped interview to be played. In that portion the detective states that J.M. "has no reason to lie because she's embarrassed about it." Jackson asserts that this portion of the tape served to improperly bolster J.M.'s

credibility. He further argues that this type of evidence is not admissible because it does not fall within the holding of the *Lanham* case.

While Jackson's attorney at trial objected to the admissibility of the portion of the taped interview regarding Jackson's credibility, he did not object to the portion of the taped interview regarding J.M.'s credibility. Because Jackson did not preserve any error in this regard, we will examine the issue to determine whether any error occurred and, if so, whether the error was a palpable one. *See Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

The first question is whether any error occurred. In resolving this issue, we begin by looking at the *Lanham* case. While the Court in the *Lanham* case addressed circumstances where the questioning officer made statements relating to the defendant's credibility and held that such statements were admissible, it did not address circumstances where the questioning officer made statements relating to the victim's credibility. In fact, the Court stated that

> We further note that our holding in this case, and the rule it establishes, is limited to the types of comments in this case, i.e., accusations by an officer that a defendant is not telling the truth. The rule does not address the types of comments that some other courts have dealt with and were not present in this case.

Lanham at 29.

"Generally, a witness may not vouch for the truthfulness of another witness." *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997). *See also Lanham,* 171 S.W.3d at 23. Since our Supreme Court has not extended the holding

of the *Lanham* case to this circumstance and has even specifically limited its holding to the circumstances present in that case, we decline to extend the rule as well. Thus, we conclude that it was error for the court to allow that portion of the taped interview as evidence. Because Jackson's attorney did not object and thus did not preserve error, the issue now is whether such error was a palpable one.

Kentucky Rules of Criminal Procedure (RCr) 10.26 provides in relevant part that

> A palpable error which affects the substantial rights of a party may be considered . . . 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.

Id.

In *Graves v. Commonwealth*, 17 S.W.3d 858 (Ky. 2000), our Supreme Court held as follows concerning the palpable error rule:

> Under this rule, an error is reversible only if a manifest injustice has resulted from the error. That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial.

Id. at 864 (citing *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky. App. 1986)).

In the *Stringer* case, a certified psychological counselor and cognitive therapist testified that he was initially concerned that the 10-year-old child victim of a sex offense might have been coached. He further testified that he subsequently found that the child's responses to questions were "consistent" and

supported by "internal logic." The witness concluded his testimony by stating that his initial concerns were alleviated and that "I felt that I trusted [the victim] – or the veracity of the statements and so forth."

Our Supreme Court in *Stringer* noted that the issue had not been preserved for appellate review and that the Court did not believe that the evidence constituted "manifest injustice" or rose to the level of palpable error. *Id*. at 888.

Likewise, in this case we conclude that the error does not rise to the level of palpable error. First, the detective did not state that J.M. was telling the truth. He stated only that he believed that the victim had no reason to lie. Second, the evidence was admitted as part of the taped interview whereby Jackson was being interrogated. The jury heard the evidence in that context, as opposed to a context where the detective was testifying as to his beliefs concerning J.M.'s credibility. We cannot conclude that the admission of this evidence created a "manifest injustice" requiring reversal of the conviction. We conclude that, considering the whole case, there is not a substantial possibility that the result would have been any different had that portion of the taped interview not been admitted.

Jackson's second argument on appeal is that the trial court erred by not giving the jury a lesser-included offense instruction of sexual misconduct under Kentucky Revised Statutes (KRS) 510.140. Jackson concedes that he was not entitled to such an instruction under the current state of Kentucky law. *See*

Johnson v. Commonwealth, 864 S.W.2d 266, 277 (Ky. 1993). He urges us to overturn this "long-standing rule."

As we noted earlier herein, we are bound by the precedents of the Kentucky Supreme Court. SCR 1.030(8)(a). Therefore, we decline to overturn the precedent of the *Johnson* case.

Jackson's third argument is that in the sentencing phase of the trial, the jury was given inaccurate information. Jackson states that the prosecutor erroneously told the jury that he would be eligible for parole consideration after serving 15% of his sentence. The Commonwealth agrees that the information given to the jury was not accurate and that Jackson is not eligible for parole until after he serves 20% of his sentence. Jackson made no objection to the evidence or incorrect information, but he again asserts that the error was a palpable one requiring reversal. The Commonwealth contends that the error was harmless.

In *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005), our Supreme Court stated that "[t]he use of incorrect, or false, testimony by the prosecutor is a violation of due process when the testimony is material." Further, "[w]hen the prosecutor knows or should have known that the testimony is false, the test of materiality is whether 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id*. (quoting from *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)).

The Commonwealth contends that the error in this regard is not a palpable one because "we can be very confident here that the alleged 5% misstatement as to parole eligibility had no impact on the jury's sentencing recommendation." The Commonwealth states that the 5% difference means that Jackson will have to serve 24 months rather than 18 months before being eligibility for parole consideration. It asserts that the "misstatement only results in a six-months difference in the amount of time the Appellant will have to serve before he is eligible for parole."

Further, the Commonwealth contends that "[i]n light of the fact that the jury gave Appellant the maximum sentence on both charges [rape and PFO], there's little or no likelihood that the alleged 5% misstatement would [have] resulted in the jury imposing a lesser sentence."

To address the Commonwealth's first assertion, we note that while the six-month difference in parole eligibility may seem insignificant to the Commonwealth, it is surely significant to Jackson or anyone else who might have an additional six months to serve in prison before being eligible for release.

Second, we disagree with the Commonwealth's argument that the fact Jackson received the maximum sentence supports a conclusion that the error was likely not material in influencing the jury to render a sentence greater than it otherwise might have rendered in the absence of the incorrect information. Had the jury known that Jackson's parole eligibility was 20% rather than 15%, it might have sentenced him to only eight years in prison rather than ten years. Eight years

at 20% eligibility and ten years at 15% eligibility result in approximately the same parole eligibility.

In the *Robinson* case, our Supreme Court vacated the sentence due to incorrect information regarding "good time credits" being given to the jury in the sentencing hearing and remanded the case to the trial court for a new sentencing hearing. *Id*. at 38. The Court stated

> The question remains whether the testimony influenced the jury to render a sentence greater than what it might otherwise have given absent the incorrect testimony. We believe it did and, for sure, can't say it didn't. . . . The jury was given information to consider that was obviously confusing to the very people who deal with it on a daily basis. There is a reasonable likelihood that the jury was influenced by the incorrect testimony.

Id. Like our Supreme Court in the *Robinson* case, we conclude that there is a reasonable likelihood that the incorrect information could have influenced the jury and "for sure, can't say it didn't." We vacate the ten-year sentence and remand for a new sentencing hearing.

Jackson's fourth argument is that the trial court erred because it gave an erroneous jury instruction on the PFO charge and that the erroneous instruction invited a non-unanimous verdict. KRS 532.080(2)(c)(2) allows prosecution for second-degree PFO if at least one of several forms of release from custody existed when the new offense was committed. In Jackson's trial, the Commonwealth introduced evidence that Jackson was on probation when the rape occurred. There was no evidence presented that any of the other circumstances of release required

for PFO prosecution existed. Nevertheless, the trial court instructed the jury that it could find Jackson guilty of PFO if it believed, among other things, that any of the other circumstances allowed by the PFO statute were present. Jackson argues that this was error and violated the requirement that the verdict be unanimous.

"When a jury is presented, in a single instruction, alternate theories of guilt for the same offense, 'each juror's verdict [must] be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt.'" *Robinson*, 181 S.W.3d at 37 (quoting from *Burnett v. Commonwealth*, 31 S.W.3d 878 (Ky. 2000)). "The denial of a unanimous verdict – where the error is properly preserved – is not subject to a harmless error analysis." *Burnett*, 31 S.W.3d at 883.

Here, however, Jackson did not object to the instruction as given by the trial court. Thus, the alleged error was not preserved. The Commonwealth argues that Jackson's failure to object renders the alleged error non-reviewable. *See* RCr 9.54(2). Jackson, however, cites *Howell v. Commonwealth*, 296 S.W.3d 430, 433-35 (Ky. App. 2009), and *Brown v. Commonwealth*, 297 S.W.3d 557, 561 (Ky. 2009), as instances where Kentucky's appellate courts have reviewed jury instructions under the palpable error rule because the defendant had not objected to the instructions at trial.

Assuming that we may review this issue for palpable error under RCr 10.26, we conclude that any error in this regard was not palpable because no

manifest injustice has resulted. We do, however, caution the trial court on remand to instruct the jury concerning PFO based only on the evidence.

Finally, Jackson argues that the trial court erred by improperly imposing $155 in court costs on him. Jackson states that he was determined by the trial court to be indigent and was represented by a public defender attorney. He argues that it was error to impose court costs on him due to his indigency. Having not preserved error in this regard, Jackson again alleges that the error was a palpable one. The Commonwealth has not challenged Jackson on this issue.

KRS 23A.205(2) requires a trial court to impose court costs on convicted persons "unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." We find palpable error and reverse the portion of the judgment requiring Jackson to pay the court costs.

Therefore, we affirm the portion of the final judgment convicting Jackson of third-degree rape and second-degree PFO. We reverse the ten-year sentence and remand for a new sentencing hearing. We reverse the imposition of court costs.

MOORE, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Kathleen K. Schmidt
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky