RENDERED: JULY 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001957-MR

DARRELL FORD — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE STEVE D. HURT, SPECIAL JUDGE
ACTION NO. 11-CR-00015

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND MOORE, JUDGES.

JONES, JUDGE: This case arises out of Appellant's convictions for incest and sexual abuse. On appeal, Appellant raises three unpreserved assignments of error. As discussed below, we find no palpable error. Therefore, we affirm Appellant's convictions.

I. BACKGROUND

Appellant, Darrell Ford, is the biological father of "Sue," born September 25, 1995.[1] Sue was conceived during a brief sexual relationship between Sue's mother, Christina, and Appellant. Christina did not inform Appellant of her pregnancy. Appellant did not learn about Sue until she was three years old when a DNA test was performed to confirm that Appellant was Sue's biological father. Appellant did not have any contact with Sue after learning that he was her father. Sue was eventually adopted by her stepfather with Appellant's consent.

When Sue reached sixth grade, she asked Christina if she could meet Appellant. Christina reached out to Appellant's relatives and Appellant agreed to meet Sue. Appellant and Sue met a few weeks later and continued communicating through phone calls and e-mails. Appellant and Sue began seeing each other approximately once or twice per month. Eventually, Sue spent several nights at Appellant's apartment without incident. Appellant's daughter, Andrea, along with her husband and two children, were always present during these overnight visits.

On Saturday, August 22, 2009, Sue stayed at Appellant's apartment along with Andrea and her family. Sue, Andrea, and the rest of the family turned in for bed before Appellant returned home from work. Sue went to bed in the back bedroom of the apartment. Andrea and her family went to sleep in the other

[1] The Court adopts the Commonwealth's proposed pseudonym in order to protect the privacy of the young victim.

bedroom and in the living room.[2] Sometime during the early morning hours of August 23, 2009, Appellant came home from work and went into the back bedroom. During a later recorded interview at the Children's Advocacy Center and during her trial testimony, Sue stated that she woke in the night without her clothes on and found that Appellant was "molesting" her. Sue explained that Appellant was "fingering her" and licking her. Sue also stated that Appellant tried to have sex with her but she stopped him by rolling away. Appellant eventually stopped and left the room.

After this incident, Sue left the bedroom to find Andrea and her phone. However, Andrea had already left for work and Sue could not find her phone. As a result, she returned to the bedroom and fell back asleep. The next morning, Appellant dropped Sue off at her maternal grandparents' home. The following week at school, Sue told a friend that Appellant had done "some stuff" to her. An investigation was then initiated and Sue was interviewed by the Children's Advocacy Center where Sue explained the incident during a recorded interview.

Appellant was indicted by the Monroe County Grand Jury for sodomy, incest with a person under eighteen years of age, and first-degree sexual abuse. A trial was held on July 23-24, 2012. During the trial, the Commonwealth introduced three expert witnesses concerning DNA analysis performed on the underwear worn by Sue on the night in question. The first expert testified that a substance inside the underwear was tested and presumed to be saliva. The second

[2] Andrea testified that one of her children was sleeping in the bed with Sue.

expert testified that a traditional DNA analysis performed on a cutting of the underwear revealed only Sue's DNA. A third expert testified that she conducted "YSTR" testing on the cutting and found that there was male DNA present and that someone from Appellant's male lineage could not be excluded as the source of that DNA.[3]

After testimony from several other witnesses, including Sue and Appellant, the jury found Appellant guilty of incest with a person under eighteen years of age and first-degree sexual abuse. The jury found Appellant not guilty of sodomy. The jury recommended a sentence of ten years' imprisonment on the incest conviction and one year on the sexual abuse conviction with the sentences being run concurrently for a total sentence of ten years' imprisonment. Appellant was sentenced in accordance with the jury's recommendation on October 11, 2012. Appellant now brings this direct appeal.

[3] "YSTR" testing excludes all female DNA and looks only to the "Y" chromosome. However, the testing cannot be used to single out an individual as all males of a given familial lineage share the exact same "Y" chromosome.

II. Analysis

A. Sufficiency of Evidence Regarding First-Degree Incest

Appellant argues that the evidence regarding incest, first degree, was insufficient to sustain his conviction as there was no proof of deviate sexual intercourse, as required under the jury instructions. Kentucky Revised Statutes (KRS) 530.020 states:

> A person is guilty of incest when he or she has sexual intercourse or deviate sexual intercourse, as defined in KRS 510.010, with a person whom he or she knows to be an ancestor, descendant, uncle, aunt, brother, or sister. The relationships referred to herein include blood relationships of either the whole or half blood without regard to legitimacy, relationship of parent and child by adoption, relationship of stepparent and stepchild, and relationship of step-grandparent and step-grandchild.[4]

Deviate sexual intercourse is defined as "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 a foreign object manipulated by another person." KRS 510.010(1).

Appellant argues that there was no evidence introduced at the trial that there was an act of sexual gratification involving Sue's sexual organs and his mouth or anus, or vice versa. Specifically, Appellant points out that during Sue's trial testimony, she only stated that Appellant "licked" her without specifying a

---

[4] KRS 530.020(2)(b) Incest is a Class B felony if committed:
1. By forcible compulsion as defined in KRS 510.010(2); or
2. On a victim who is:
   a. Less than eighteen (18) years of age; or
   b. Incapable of consent because he or she is physically helpless or mentally incapacitated.

specific body part. Therefore, Appellant argues that the trial court erred by not including instructions as to the lesser included offense of sexual abuse, first degree.[5]

Conceding that he did not preserve this issue for appeal by raising it at the trial court level, Appellant requests that we review it for palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26.[6] The Kentucky Supreme Court recently summarized the palpable error standard:

> For error to be palpable, "it must be easily perceptible, plain, obvious and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky.2006). The rule's requirement of 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). Or, as stated differently, a palpable error is where "the defect in the proceeding was shocking or jurisprudentially intolerable." *Id.* at 4. Ultimately, "[m]anifest injustice is found if the error seriously affected the fairness, integrity, or public reputation of the proceeding." *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky.2013) (quoting *McGuire v. Commonwealth*, 368 S.W.3d 100, 112 (Ky.2012)).

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014).

However, we do not review claims for failure to instruct on a lesser included offense under the palpable error standard if the defendant did not request

[5] Appellant was also indicted and convicted for sexual abuse, first degree. However, we view Appellant's argument as stating that the trial court should have included an instruction on the lesser offense of sexual abuse just in relation to the "licking."

[6] The Rule provides: "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."

such an instruction during his trial. *Bartley v. Commonwealth*, 400 S.W.3d 714, 731 (Ky. 2013). To permit a review where no instruction was offered would encourage "gamesmanship" and undermine our procedural rules. *Id.* As our Supreme Court explained:

> [The defendant] could remain silent about a lesser included offense instruction at trial in hopes that the jury would opt for acquittal or for a minimal offense, but if the verdict disappointed her she could claim on appeal that the lesser included offense instruction was mandated. Our rule requiring that lesser included offense instructions be specifically requested discourages such gamesmanship[.]

Id. Because Appellant did not offer an alternative lesser include offense instruction as related to the first-degree incest, we cannot review the trial court's failure to give such an instruction.

Additionally, having reviewed the entire record, we believe that ample evidence existed to support Appellant's first-degree incest conviction. First, examining the totality of Sue's trial testimony it is clear to us to that Sue indicated that Appellant placed his mouth on her genital area, even though she did not use those exact words. Additionally, the videotaped interview Sue gave to the Child Advocacy Center was introduced without objection. In that interview, Sue states that she awoke to Appellant "licking me in my private parts." Evidence was also introduced regarding the presence of male DNA and saliva on Sue's underwear.

B. Jury Instructions as to Sexual Abuse, First Degree

Appellant's second assignment of error is that the jury instructions wholly lacked factual specificity as to what sexual contact/conduct occurred, depriving him of his due process rights. The jury instructions stated:

> You will find [Appellant] guilty of Sexual abuse, 1st Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following: A. That in this county on or about the 22nd day of August, 2009, and before the finding of the Indictment herein he subjected [Sue] to sexual contact; B. At the time of such occurrence, [Sue] was less than 16 year of age; AND C. That at the time of the occurrence, [Appellant] was 21 years of age or older.

Appellant argues that there was no identifying information with regard to the specific sexual contact allegedly committed within the jury instructions.

Appellant again concedes that this issue was not properly preserved for review and asks us to review it for palpable error. In this instance, we are permitted to review the claim because Appellant is complaining about the adequacy of the instruction that the court gave; he is not seeking a separate instruction that was never offered before the trial court. *See Wise v. Commonwealth*, 422 S.W.3d 262, 276-77 (Ky. 2013) ("In other words, a defendant cannot rely on the palpable-error rule to complain about the *absence* of an instruction that was never requested (and thus was not given) or that was not objected to (and was given), but that rule is still available when the defendant belatedly complains about the content of an instruction that was given.").

Appellant argues that the jury instructions did not require the jury to explicitly find in which instance he touched "the sexual or other intimate parts of

[Sue] for the purpose of gratifying the sexual desire of either party." Sue testified to two acts sufficient to meet the definition, Appellant licking her genitals and Appellant touching her genitals with his fingers.[7] Appellant argues that there is no way to deduce from the instruction that the jury concurred unanimously on the specific act used to convict him.

First, "[a] verdict cannot be attacked as being non-unanimous where both theories are supported by sufficient evidence." *Halvorsen v. Commonealth*, 730 S.W.2d 921, 925 (Ky. 1986)(citing *Wells v. Commonwealth*, 561 S.W.2d 85 (1978)). Additionally, there is simply nothing in the record to support Appellant's claim that there is even a slight probability that there would be a different outcome in this case should we consider and reverse the conviction on this issue.

C. Instructions as to Sodomy and Incest

Appellant's final assignment of error is that the trial court's instructions to the jury on sodomy and incest did not factually differentiate both charges' common element of "deviate sexual intercourse," violating his due process rights and his double jeopardy rights when the jury found him not guilty of sodomy, but guilty of incest based on the same alleged "deviate sexual intercourse." Appellant's primary argument in regards to this error is that the jury instructions were obviously flawed because the jury could not have convicted him of incest while finding him not guilty of sodomy based on the same alleged deviate

[7] Sue also stated that Appellant "rubbed her body" but did not indicate that the rubbing involved her sexual or other intimate parts.

sexual intercourse, namely the "licking." Again, our review is limited to palpable error as Appellant concedes that he did not preserve this issue at trial.

First, we find no due process violation. Sodomy requires the additional element of forcible compulsion, which is not required for incest. While there may have only been one incident of deviate sexual intercourse, there was no error in Appellant being charged and the jury being instructed on both sodomy and incest. As explained in *Clark v. Commonwealth*, 267 S.W.3d 668, 675 (Ky. 2008), we must determine whether a single course of conduct has resulted in a violation of two distinct statutes and, if so, whether each statute requires proof of an additional fact which the other does not. If each statute requires proof of an additional fact which the other does not, then conviction under the two statutes in question does not violate double jeopardy. If, however, the exact same facts could prove the commission of two separate offenses, then the double jeopardy clause mandates that while a defendant may be prosecuted under both offenses, he may be convicted under only one of the statutes.

Defendant was not convicted under both statutes. He was convicted only of incest, not sodomy. Furthermore, since sodomy requires evidence of forcible compulsion while incest does not, there is no violation of double jeopardy. We consequently conclude that there was no palpable error in the court instructing the jury on both sodomy and incest.

III. Conclusion

For the reasons set forth above, we affirm Appellant's convictions for incest and sexual abuse, first degree.

ALL CONCUR

BRIEF FOR APPELLANT:

Ken Garrett
Glasgow, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky