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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002208-MR

JOSHUA LYNN COZART

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 11-CR-00449

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

VANMETER, JUDGE: Joshua Lynn Cozart appeals from the McCracken Circuit Court's final judgment imposing the jury's recommended sentence of fifteen years' imprisonment for his convictions of first-degree unlawful imprisonment, second-degree assault, and violation of a Kentucky Domestic Violence Order (DVO). For the following reasons, we affirm.

Cozart was indicted on charges of kidnapping with serious physical injury, first-degree rape, first-degree sodomy, second-degree assault, and violation of a DVO based on allegations that he unlawfully entered the home of his ex-girlfriend, Deborah Croft, assaulted, raped, and sodomized her, and held her against her will for over twenty hours. Following trial, the jury returned a verdict finding Cozart guilty of first-degree unlawful imprisonment, second-degree assault, and violation of a DVO, and recommended a sentence of one year for violation of a DVO, five years for unlawful imprisonment in the first degree, and ten years for assault in the second degree. The trial court imposed a sentence in accordance with the jury's recommendation for a total of fifteen years. Cozart now appeals.

On appeal, Cozart presents three claims of error: (1) the trial court improperly denied his motion for a directed verdict on the assault charge because the Commonwealth failed to prove Croft suffered a serious physical injury; (2) the trial court improperly denied his motion for a directed verdict on the unlawful imprisonment charge because that charge should have merged with the assault charge; and (3) the trial court abused its discretion by denying his motion to redact portions of the Presentence Investigation Report (PSI) report.

With respect to Cozart's first two claims of error, upon consideration of a motion for a directed verdict,

the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe . . . that the defendant is guilty, a directed verdict should not be given. For the

purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted); accord *Banks v. Commonwealth*, 313 S.W.3d 567, 570 (Ky. 2010).

In this case, the jury was instructed to find Cozart guilty of second-degree assault if it believed he “intentionally caused a serious physical injury to Deborah Croft by striking her in the head, face, and body with his fists or feet.” The instructions defined “serious physical injury” as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.” This definition mirrors that of KRS¹ 500.080(15). The jury was also given the option to convict Cozart of fourth-degree assault if it believed he “caused physical injury” to Croft instead of “intentionally caused a serious physical injury.” Cozart asked the trial court to direct a verdict of acquittal on the second-degree assault charge, arguing the Commonwealth failed to prove he caused a serious physical injury. The court declined to do so.

Whether the evidence is sufficient to prove the existence of a serious physical injury turns on the unique circumstances of an individual case. *Cooper v.*

¹ Kentucky Revised Statutes.

Commonwealth, 569 S.W.2d 668, 671 (Ky. 1978). Proof that a victim lost consciousness or “blacked out” has been held sufficient to constitute serious physical injury. *Id.* In this case, Dr. Brantley, who treated Croft upon her arrival to the emergency room after the assault, testified that Croft suffered a concussion, five rib fractures, a fracture of her left cheek bone, and was the most severely injured assault patient he had ever seen. Dr. Brantley stated that Croft’s concussion involved a loss of consciousness and, generally speaking, a concussion involves severe trauma to the brain that can create a substantial risk of death. Dr. Brantley further testified that Croft’s rib fractures were caused by trauma severe enough to create a substantial risk of death.

Cozart asserts the Commonwealth merely offered the possibility that a complication could have arisen which could have caused death, which he claims is insufficient to prove serious physical injury. But the fact that a victim does not die cannot negate the reality of a substantial risk of death. *Cooper*, 569 S.W.2d at 671. Based on the evidence presented, it would not have been unreasonable for a jury to find Cozart caused a serious physical injury that created a substantial risk of death.

Moreover, a jury could have reasonably determined that Cozart caused a serious physical injury that created prolonged impairment of health. Croft testified that she suffers every day from constant pain in her ribs. She wakes up every day and her ribs hurt. She still experiences pain in her left cheek from the fracture and scars remain on her face, which she displayed to the jury. Her experience of prolonged pain in her ribs and left cheek bone is an impairment of health that

constitutes a serious physical injury under Kentucky law. *See Parson v. Commonwealth*, 144 S.W.3d 775, 787 (Ky. 2004) (prolonged pain constitutes a serious physical injury). *See also Commonwealth v. Hocker*, 865 S.W.2d 323, 325 (Ky. 1993) (expert medical testimony is not required to establish serious physical injury; a victim is competent to testify about his own injuries). Considering the totality of the evidence, it would not have been unreasonable for a jury to find Cozart caused serious physical injury by creating a substantial risk of death or by causing prolonged impairment of health, or both, for purposes of second-degree assault. Accordingly, the trial court properly denied Cozart's motion for a directed verdict on this charge.

Likewise, the trial court properly denied Cozart's motion for a directed verdict on the charge of unlawful imprisonment. Cozart maintains that a verdict of acquittal should have been directed because the unlawful imprisonment charge should have merged with the assault charge pursuant to KRS 509.050, commonly referred to as the kidnapping exemption statute. Cozart did not preserve this issue below, therefore we will address it for palpable error only pursuant to RCr² 10.26, which 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.

² Kentucky Rules of Criminal Procedure.

In other words, palpable error relief is not available unless the error was (1) clear or plain under existing law, (2) more likely than ordinary error to have affected the judgment, and (3) so seriously affected the fairness, integrity or public reputation of the proceeding to have been jurisprudentially intolerable.

Commonwealth v. Jones, 283 S.W.3d 665, 668 (Ky. 2009).

In some circumstances, KRS 509.050 precludes a kidnapping or unlawful imprisonment conviction when the defendant has committed another crime that involves interference with the victim's liberty. KRS 509.050 states:

A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose. The exemption provided by this section is not applicable to a charge of kidnapping that arises from an interference with another's liberty that occurs incidental to the commission of a criminal escape.

In other words, KRS 509.050 requires a three-prong test to determine if the kidnapping exemption applies:

First, the underlying criminal purpose must be the commission of a crime defined outside of KRS [Chapter] 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime.

Stinnett v. Commonwealth, 364 S.W.3d 70,76 -77 (Ky. 2011). Each prong must be met in order for the charges to merge. *Id.* at 77.

In the present case, the facts do not support Cozart's claim that the unlawful imprisonment charge merges with the assault charge. Croft testified that Cozart restrained her in her home for twenty hours, during the first four hours of which he assaulted her. On two separate occasions she attempted to flee her home after the initial assault, only to have Cozart catch her in the front yard and drag her back into the house by her hair. After the initial assault, Cozart slept with his arms clutched around Croft's body so that he would feel her if she tried to leave during the night. He ultimately released her on her promise not to report the incident to the police. These facts clearly provide a basis for an unlawful imprisonment conviction. *See* KRS 509.020(1) (“[a] person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully restrains another person under circumstances which expose that person to a risk of serious injury[.]”).

The evidence demonstrates that Cozart's restraint of Croft for a period of twenty hours was neither immediate nor incidental to the assault he committed during the first four hours. A restraint of liberty that lasts for over twenty hours is beyond that necessary to carry out an assault. *See Stinnett*, 364 S.W.3d at 78 (period of captivity exceeding an hour was beyond that necessary to commit the offense of murder, even one committed by an extended beating); *Murphy v. Commonwealth*, 50 S.W.3d 173, 180 (Ky. 2001) (a restraint exceeding ten hours was beyond that necessary to commit a theft). Based on the evidence presented, a

jury could reasonably find beyond a reasonable doubt that Cozart intended to unlawfully imprison Croft beyond any intention to also commit an assault. Accordingly, no palpable error occurred and Cozart's conviction for unlawful imprisonment stands.

Lastly, Cozart contends the trial court abused its discretion by not redacting the allegations of rape and sodomy, of which he was acquitted, from the "nature of the offense" section of the PSI report. He argues their inclusion in the PSI report violates his due process rights and could potentially negatively affect him when he becomes eligible for parole.

General standards of due process during the sentencing phase require that sentences not be imposed on the basis of material misinformation. *Fields v. Commonwealth*, 123 S.W.3d 914, 917 (Ky. App. 2003) (citation omitted). KRS 532.050 outlines the presentence procedure for felony convictions and requires that prior to imposing a sentence for a felony conviction, the trial court must order a PSI and corresponding report to be prepared by the Department of Corrections. KRS 532.050(1)-(2). Once the PSI is provided to the trial court, the court must advise the defendant or his or her counsel of the factual contents and conclusions of the report and afford the defendant a fair opportunity and reasonable time to controvert them, if the defendant so requests. KRS 532.050(6). The trial court has the discretion to determine what constitutes a meaningful opportunity to controvert. *Fields*, 123 S.W.3d at 917.

KRS 532.050 requires a meaningful opportunity to controvert the contents of the report; it does not provide a right to have disputed facts redacted from the PSI report. Upon Cozart's request for redaction, the trial court agreed to note on the PSI report that the nature of the offense was based solely on information contained in the Commonwealth's file and not on information proven at trial, and that Cozart disputed the factual allegations. The court assured Cozart that it would only sentence him for crimes for which he had been convicted.

Cozart does not argue that his sentence was based on misinformation. Instead, he claims the PSI report could potentially negatively affect him when he becomes eligible to meet the parole board. However, such an injury is speculative and not ripe for review. "[T]he ripeness doctrine requires the judiciary to refrain from giving advisory opinions on hypothetical issues." *Associated Indus. of Kentucky v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) (citation omitted). *See also Smith v. Commonwealth*, No. 2004-SC-0259-MR, 2006 WL 734008 (Ky. March 23, 2006) (defendant's claim that error in the PSI report could potentially negatively affect him when he becomes eligible to meet the parole board is speculative and not ripe for review). As it stands, Cozart was afforded a meaningful opportunity to controvert the allegations contained in the PSI report, the trial court duly noted his objections in the file, and no evidence suggests he has been injured by the PSI report. This claim of error fails as well.

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

ALL CONCUR.

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