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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001831-MR

GREGORY D. CASSIDY

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 13-CR-00146

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Gregory D. Cassidy appeals from a judgment of the Montgomery Circuit Court convicting him of one count of second-degree sodomy and one count of first-degree sexual abuse and sentencing him to twelve-years' imprisonment. He alleges a violation of the double jeopardy clauses to the United States Constitution and Kentucky Constitution and that he was entitled to a first-

degree sexual abuse instruction as a lesser included offense of second-degree sodomy. We disagree with both arguments and affirm.

On February 13, 2013, Cassidy's daughter, T.C., and two female friends, S.H. and T.S., spent the night at Cassidy's home. The girls slept in Cassidy's bedroom while Cassidy and his son slept on the couch.

T.S. testified that the girls fell asleep around 3:00 a.m. She woke at approximately 7:00 a.m. when she felt Cassidy touching her vagina with his fingers and tongue. T.S. started to sit up but Cassidy slowly put her back down and told her "I'm not going to hurt you. Everything's okay." She kicked T.C. off the bed. T.C. woke, punched Cassidy and told him to leave.

T.S. used her cell phone to call her uncle to pick her up from Cassidy's home. She did not immediately tell him about Cassidy's sexual contact with her.

S.H. testified that she and T.S. were asleep side by side on the bed while T.C. slept across the bottom of the bed. She woke and saw Cassidy enter the bedroom and touch T.S. with his finger and tongue in the vaginal area.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" U.S. Const. amend. V; *see also* Ky. Const. § 13 ("No person shall, for the same offense, be twice put in jeopardy."). In making a double jeopardy determination, Kentucky follows the test established in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 176 L.Ed. 306 (1932). *Fagan v. Commonwealth*, 374 S.W.3d 274, 277 (Ky. 2012). "[W]here the same act or

transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182. “An overlap of proof does not necessarily establish a double jeopardy violation. The correct test is whether the separately charged crimes are factually a single offense.” *Smith v. Commonwealth*, 905 S.W.2d 865, 867 (Ky. 1995) (citation omitted). Kentucky has codified the *Blockburger* principles in KRS 505.020(1)(a) and (2)(a).

As explained in *Turner v. Commonwealth*, 345 S.W.3d 844, 847 (Ky. 2011): “A defendant is put in double jeopardy when he is convicted of two crimes with identical elements, or where one is simply a lesser-included offense of the other. In such a case, the defendant has only actually committed one crime and can only endure one conviction.” However, while double jeopardy precludes convictions for a greater and a lesser-included offense, it does not prohibit convictions for the greater and lesser offense if the defendant committed two separate criminal acts. *Simpson v. Commonwealth*, 159 S.W.3d 824, 827 (Ky.App. 2005). With the principles of double jeopardy stated, we address Cassidy’s argument.

“First-degree sexual abuse is properly classified as a lesser included offense of first-degree sodomy.” *Mash v. Commonwealth*, 376 S.W.3d 548, 559 (Ky. 2012). As observed in *Mash*:

The distinction between the two offenses is the body part touched for purposes of sexual gratification. Sexual abuse requires sexual contact, KRS 510.110, which means touching of the sexual or other intimate parts of a person, KRS 510.010(7). Sodomy, on the other hand, requires deviate sexual intercourse, KRS 510.070, which means any act of sexual gratification involving the sex organs of one (1) person and the mouth or anus of another, KRS 510.010(1). The additional element in a sodomy offense is the specific sexual or intimate parts involved, namely, the mouth or anus.

Id. Kentucky Supreme Court precedent instructs that whether Cassidy's convictions for sodomy and sexual abuse violate double jeopardy depends on whether the sexual abuse was incidental to the sodomy or a separate criminal act.

In *Hampton v. Commonwealth*, 666 S.W.2d 737, 739 (Ky. 1984), "the first-degree sodomy and first-degree sexual abuse were both charged from a single sexual transaction[.]" As described by the Court, the evidence "was that the appellant performed fellatio on the victim and caused the child to perform the same act on him either simultaneously or continuously." *Id.* In that instance, there were two separate acts of sexual gratification and not "incidental" contact and, therefore, the single criminal act violated two statutes. "[T]he fact that the two sexual acts occurred either simultaneously or nearly so [was] irrelevant." *Id.*

In *Benet v. Com.*, 253 S.W.3d 528 (Ky. 2008), the Court again considered whether a sodomy conviction and first-degree sexual abuse conviction violated double jeopardy. As did the appellant in *Hampton*, Benet argued that a person cannot commit sodomy without also committing the offense of sexual abuse. *Id.* at 536. Rejecting that argument, the Court held that "touching of the

victim's genitals through the victim's clothing was an entirely separate act and offense from orally sodomizing the victim.” *Id.*

The Court again addressed and rejected a double jeopardy argument in *Banks v. Commonwealth*, 313 S.W.3d 567, 575 (Ky. 2010). The Court held that the preliminary rubbing and touching was not part of a single continuous act culminating in the act of sodomy. The Court stated: “[I]n the present case two unrelated acts occurred: the acts of rubbing and touching, which comprise the first-degree sexual abuse convictions, and the separate and unrelated acts of sodomy, which comprise the first-degree sodomy convictions. *Id.* at 576.

Under the precedent cited, we must conclude that there were two separate criminal acts committed by Cassidy. The touching of T.S.’s vagina with Cassidy’s finger constituting sexual abuse was not incidental contact to the touching of her vagina with his tongue constituting the separate crime of sodomy. Each act was unrelated to the other and each done for the purpose of sexual gratification. Whether they occurred close in time or even simultaneously, is irrelevant. *Hampton*, 666 S.W.2d at 739. There was no double jeopardy violation.

As noted, sexual abuse is a lesser-included offense of sodomy. *Mash*, 376 S.W.3d at 559. However, it does not necessarily follow as Cassidy argues that he was entitled to a sexual abuse instruction as a lesser-included offense of sodomy. “Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser-included offenses which are supported by the evidence, that duty does not require an instruction on a theory with no

evidentiary foundation.” *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998) (internal citation omitted). As stated in *Skinner v. Commonwealth*, 864 S.W.2d 290, 298 (Ky. 1993): “[a]n instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant’s guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.”

In *Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993), the Court held the trial court erred when it did not instruct on sexual abuse as a lesser-included offense to a sodomy charge. However, the Court emphasized the fact warranting the instruction was “that the only witness to this incident testified that he had not observed actual oral-genital contact.” *Id.* at 277. The Court considered this fact determinative because “[u]nder these circumstances, the jury clearly could have entertained a reasonable doubt as to whether Johnson had touched the victim's sexual parts, but could have believed beyond reasonable doubt that he had touched ‘other intimate parts’ of her body (e.g., her thighs), thus committing sexual abuse rather than sodomy.” *Id.*

Unlike in *Johnson*, T.S. and the witness to the crime, S.H., testified that Cassidy touched T.S.’s vagina with his tongue. As to the sodomy charge, the only possible conclusion from the testimony is that Cassidy touched T.S.’s vagina with his tongue. The jury could either believe the testimony and find Cassidy guilty of sodomy or disbelieve the testimony and find him not guilty of sodomy. There was

no evidence upon which a jury could entertain a reasonable doubt of his guilt on the sodomy charge but believe he was guilty of sexual abuse.

Based on the foregoing, the judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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