

RENDERED: OCTOBER 13, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000312-MR

JAMES M. LAYNE

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 12-CR-00199

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * ** ** *

BEFORE: KRAMER, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

NICKELL, JUDGE: James M. Layne has appealed from the judgment and sentence of the Carter Circuit Court following a jury trial finding him guilty of multiple sexual offenses perpetrated against two of his foster children. Layne contends the Commonwealth's use of a duplicitous indictment and the manner it

introduced proof at trial deprived him of a unanimous verdict. Following a careful review, we affirm.

Layne was indicted on ten counts of sodomy in the first degree¹ and two counts of rape in the first degree² stemming from acts allegedly occurring in the period of June 1 and October 16, 2012, between himself and two minor girls living in his home as foster children. The case proceeded to trial on September 15, 2015 and continued for seven days. Prior to submitting the case to the jury, the trial court directed a verdict in favor of Layne on four counts of sodomy. Further, upon finding the Commonwealth had failed to present any evidence of force in relation to the first count of first-degree rape, the trial court refused to submit that charge to the jury, instead submitting the lesser-included offenses of rape in the third degree³ and sexual abuse in the first degree.⁴ For the same reason, the trial court submitted only the lesser-included offense of rape in the third degree on the second count of rape, and on two of the sodomy charges, the trial court submitted the lesser included offense of sodomy in the third degree.⁵ For the remaining

¹ Kentucky Revised Statutes (KRS) 510.070, a Class B felony.

² KRS 510.040, a Class B felony.

³ KRS 510.060, a Class D felony.

⁴ KRS 510.110, a Class D felony.

⁵ KRS 510.090, a Class D felony.

charges, the trial court submitted all applicable lesser-included offenses supported by the evidence adduced during the trial. While neither Layne nor the Commonwealth tendered proposed jury instructions, a lengthy discussion was had regarding the instructions prepared by the trial court. Ultimately, both sides agreed with the trial court's draft instructions as being appropriate.

Late on the evening of September 23, 2015, after deliberating for approximately seven hours, the jury found Layne guilty on one count each of sexual abuse in the first degree, rape in the third degree and sodomy in the second degree.⁶ The jury recommended sentences of incarceration for three years, five years and nine years, respectively, to be served consecutively for a total of seventeen years' imprisonment. On March 2, 2016, the trial court entered its order sentencing Layne in conformity with the jury's verdict. This appeal followed. Additional facts will be discussed only to the extent necessary for our analysis.

Before this Court, Layne contends he was denied a unanimous verdict. He argues it is not evident from the instructions and verdict form that the jury agreed on exactly which offenses they all believed occurred as the instructions were not tailored to reflect the evidence sufficiently to identify specific factual scenarios upon which the convictions could be based. Layne posits the evidence adduced at trial presented the jury with multiple illicit sexual acts with each of the

⁶ KRS 510.080, a Class C felony.

two victims within the time period set out in each instruction. He asserts a unanimity issue exists because of the uncertainty concerning which of these many sexual occurrences between Layne and the victims provided the basis for his convictions. He believes the Commonwealth's presentation of non-specific, vague and redundant testimony caused confusion within the jury and ultimately led to the unanimity violation. This issue is unpreserved so we review for palpable error.⁷ Discerning none, we affirm.

“[E]rroneous jury instructions are presumed to be prejudicial.” *Mason v. Commonwealth*, 331 S.W.3d 610, 623 (Ky. 2011) (citation omitted). “Section 7 of the Kentucky Constitution requires a unanimous verdict.” *Wells v. Commonwealth*, 561 S.W.2d 85, 87 (Ky. 1978). The right to a unanimous verdict is a substantial, constitutional right, the violation of which requires reversal. *Miller v. Commonwealth*, 283 S.W.3d 690, 696 (Ky. 2009). Uncertainty about exactly which instance of sexual misconduct the jurors believed occurred could give rise to manifest injustice and require reversal. However, no such uncertainty exists in the instant case.

⁷ This allegation of unpreserved instructional error is not barred from judicial review by the recent holding of the Supreme Court of Kentucky in *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013), because Layne challenges the adequacy of the content of an instruction that was given to the jury, not the propriety of the instruction being given. *Id.* (“In summary, assignments of error in ‘the giving or failure to give’ an instruction are subject to [Kentucky Rules of Criminal Procedure (RCr) 9.54(2)’s] bar on appellate review, but unpreserved allegations of defects in the instructions that were given may be accorded palpable error review under RCr 10.26.”).

The Commonwealth urges us to conclude Layne waived any challenge to the jury instructions based on his initial failure to object to the proposed instructions and subsequent affirmative acquiescence and agreement with the wording of the instructions actually given to the jury. The Commonwealth argues Layne invited the error and cannot now be heard to complain, citing *Graves v. Commonwealth*, 384 S.W.3d 144, 152 (Ky. 2012). While we agree with the Commonwealth's statement of the law, we disagree regarding its applicability to the instant matter. As previously noted, unanimity errors rise to constitutional levels and are jurisprudentially intolerable. *Ruiz v. Commonwealth*, 471 S.W.3d 675, 679 (Ky. 2015) (quoting *Johnson v. Commonwealth*, 405 S.W.3d 439, 457 (Ky. 2013)). Thus, we reject the Commonwealth's invitation to find a waiver and turn to Layne's claim of error.

We have reviewed the pertinent portions of the written and videotaped portions of the record and discern no error. The trial court, in keeping with precedents regarding the need to insure unanimous verdicts, *see Kingrey v. Commonwealth*, 396 S.W.3d 824 (Ky. 2013) and *Johnson*, closely tailored the jury instructions to the specific acts that could be supported by testimony from the victims. The instructions included explicit references to specific acts, locations and/or dates and omitted any acts about which the evidence was not clear. That is exactly what trial courts have been instructed to do.

The indictment in this case charged the events in question as to each child, which are clearly delineated as to the offense, happened over a period of time rather than on a specific date. The charges were appropriately addressed as single crimes in the indictment and the jury instructions were tied to specific testimony at trial, so there is no unanimity problem.

All of the jury instructions at issue here required the jury to find guilt only if the crime alleged occurred in Carter County, “between June 25, 2012, and October 16, 2012, and before the finding of the Indictment herein[.]” The evidence demonstrated the victims lived in Layne’s home during this period. Layne argues in part that, because the Commonwealth presented vague and redundant testimony which indicated that Layne perpetrated various sexual crimes against the victims during this timeframe, it is impossible to know with certainty which crimes the jury believed occurred.

In *Kingrey*, the jury instruction provided for conviction if the jury determined that the defendant “committed the crime between January 1, 2007, and May 31, 2008.” *Id.*, 396 S.W.3d at 830. In that case evidence was presented at trial that, during this time period, the defendant committed multiple acts constituting the one offense for which he was convicted. *Id.* at 831. The Supreme Court of Kentucky reversed because it was unclear “which instance of the crime is the basis of his conviction” *Id.* at 832.

Unlike *Kingrey*, the evidence in the present case established singular instances from which the jury could find guilt for each crime charged. Compare *Johnson*, 405 S.W.3d at 449 (finding palpable error where the jury instruction “did not require the jury to differentiate which of the two instances was the basis of the conviction.”). To clarify, while the victims in this case recounted multiple events, each presented specific identifying detail relating to only one event corresponding with each crime charged. Therefore, this case is most similar to *Bennington v.*

Commonwealth, where our Supreme Court held:

[w]hile the instructions do not detail the specifics of each particular instance of sodomy, rape, and incest, such as the setting or the exact conduct engaged in, such detail is not required. There is no uncertainty as to which crime the jury convicted of on each count and thus, no deprivation of a unanimous verdict.

348 S.W.3d 613, 623 (Ky. 2011). The instructions given in the instant case were sufficiently specific to eliminate any uncertainty about which crimes the jury believed Layne had been proven guilty. We are likewise unpersuaded by Layne’s suggestion the jury was confused by the Commonwealth’s method of presenting evidence of his guilt.

On the strength of the foregoing analysis, we cannot say Layne’s convictions are infirm. There was no error entitling Layne to relief. His convictions and sentence must, therefore, be affirmed.

Finally, Layne has moved to supplement the record with a transcript of the proceedings which he had prepared based on an alleged inability to access the video record. This Court had no such issues with the recordings provided by the Carter Circuit Court Clerk. Therefore, there being no discernable need for supplementation, the motion is DENIED.

ENTERED: 10-13-2017

/s/ C. Shea Nickell
JUDGE, KENTUCKY COURT OF APPEALS

ALL CONCUR.

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