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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000132-MR

NICHOLAS RECKLEY — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 15-CR-00796

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND GOODWINE, JUDGES.

GOODWINE, JUDGE: Nicholas Reckley appeals his conviction on two counts of first-degree sexual abuse, menacing, indecent exposure, and being a second-degree persistent felony offender, for which he was sentenced to a total of ten years' imprisonment. After reviewing the record in conjunction with applicable legal authority, we affirm the judgment of the Campbell Circuit Court.

BACKGROUND

The incidents giving rise to Reckley's convictions occurred on August 5, 2015. The victim, who had commenced her morning jog around 5:50 a.m., became alarmed when she heard footsteps keeping pace behind her. Suddenly hit from behind, she was engulfed in a bear-type hug picking her up off the ground. The victim was able to stay upright, get her arms out of his grasp, and began fighting the assailant. At this point, the assailant began grasping, squeezing, and roughly attacking the victim's breasts.

After the assailant managed to work his way around to being in front of the victim, he began grabbing, jabbing, and punching at the victim's vaginal area outside her running shorts, while holding on to her shoulder and trying to pull her down. The assailant kept shoving his fingers between her legs, ramming his fingers into her vaginal area multiple times.

Still attempting to fend off the attack, the victim began screaming, which caused the assailant to stop and run away. The victim then fell to the ground and a fellow jogger came to her assistance. The victim reported the assault to the police, and a neighbor who heard her screams also called 911.

Later that morning the police went to the victim's home to question her about the incident. The victim described the attacker's clothing and haircut

and also stated that his mouth was distinctive. At a later police photo line-up, the victim identified Reckley as the assailant without hesitation.

Shortly after the sexual attack ended and the assailant fled, one of the victim's neighbors looked out the window and saw a man standing in her back yard. Although he was clothed, he was exposing himself and masturbating. The neighbor quickly called her landlord who saw the man and later identified him as Reckley. Based on the landlord's identification of Reckley, whom she knew, and the victim's identification, police officers placed him under arrest.

On September 24, 2015, Reckley was indicted by the Campbell County Grand Jury on two charges of sexual abuse in the first degree, menacing, and for being a persistent felony offender in the second degree. On November 5, 2015, Reckley was indicted on a charge of indecent exposure in the second degree stemming from the incident in the neighbor's yard. The Commonwealth contended that the last charge of indecent exposure, which occurred a short time after the first attack, was a continuation of Reckley's course of conduct in attempting to satisfy his need for sexual gratification.

After a jury trial in September 2016, Reckley was convicted on all four counts.

STANDARD OF REVIEW

Kentucky Rule of Criminal Procedure ("RCr") 10.26 permits unpreserved error to be reviewed if it affects "substantial rights" of a party and results in "manifest injustice." "A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily dependent upon the facts of each case." *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005) (citing *United States v. Young*, 470 U.S. 1, 16, 105 S.Ct. 1038, 1046-47, 84 L.Ed.2d 1 (1985)).

ANALYSIS

Reckley advances three issues in this appeal, two of which were not preserved in the lower court. In his first allegation of error, Reckley asserts that the circuit court lacked subject matter jurisdiction to try the misdemeanor charge of indecent exposure. Reckley maintains that because the district court has exclusive jurisdiction over misdemeanor offenses, the circuit court erred in allowing the September 2015 felony indictment on the sexual assault charges to be tried with the later November 2015 indictment on the misdemeanor indecent exposure charge. We disagree.

Under RCr 6.18, two or more offenses, whether they are felonies or misdemeanors, may be joined "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or *constituting parts of a common scheme or plan*." (Emphasis added.) It is well-settled that a

trial judge is vested with wide discretion in applying the rule permitting the joinder of related offenses in an indictment and the consolidation of cases for trial. In *Brown v. Commonwealth*, the former Court of Appeals offered the following explanation of the rule and the latitude afforded trial courts in applying it:

> Our view, as well as that of the federal courts in construing substantially similar procedural rules, is that the trial judge is vested with wide discretion in applying the rule.
>
> In this case the trial judge found at the outset of the trial that the offenses either were of the same or similar character **or were based on transactions connected together.** When that result is viewed in the light of what subsequently occurred after the consolidated trials went forward, we cannot say that an abuse of discretion occurred or that appellant was 'embarrassed or confounded' in making his defense. The evidence of each crime was simple and distinct, the dates of the several offenses were closely connected in time, and even though such evidence of distinct crimes might not have been admissible in separate trials, the promotion of economy and efficiency in judicial administration by the avoidance of needless multiplicity of trials was not outweighed by any demonstrably unreasonable prejudice to the defendant as a result of the consolidations. We reject appellant's contention concerning the alleged errors of misjoinder of offenses and joint trial.

458 S.W.2d 444, 447 (Ky. 1970) (emphasis added) (internal citations omitted). As previously noted, the indecent exposure charge was closely related in time and proximity to the sexual assault charges stemming from the interrupted assault on the jogger.

Further, RCr 9.12 permits a trial court to order two or more indictments to be tried together if the offenses could have been joined in a single indictment. In arguing that the two offenses could have been joined in a single indictment, the Commonwealth submits that Reckley's second indictment for indecent exposure was part of a single plan for sexual gratification and was thus sufficiently related to the interrupted sexual assault to be tried together.

In resolving a similar issue concerning consolidation of indictments for trial, the Supreme Court in *Elam v. Commonwealth* explained the proper application of RCr 9.12:

> The standard for joining different criminal acts into a single indictment is established by RCr 6.18. Different criminal acts may be joined as separate counts in the same indictment if the offenses are "of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." **Consequently, crimes charged in different indictments may be consolidated for trial if they are "of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan."**

500 S.W.3d 818, 823 (Ky. 2016) (emphasis added).

Viewed in the light of palpable error analysis, Reckley has failed to demonstrate infringement of any substantial right or the existence of manifest injustice by the joinder of the indecent exposure misdemeanor with the felony charges. Reckley received a sentence of five years' imprisonment for each of the

felony charges, enhanced to ten years by virtue of his conviction as a second-degree persistent felon. He received a sentence of 90 days for the misdemeanor indecent exposure charge. All sentences were ordered to run concurrently for a total of ten years' imprisonment. Thus, even had the misdemeanor indecent exposure charge been severed from the felony charges, Reckley's sentence would nevertheless total ten years' imprisonment. There was no reversible error in trying the misdemeanor and felony charges together.

Next, Reckley asserts that he was subjected to a double jeopardy violation when the trial court submitted to the jury the two separate counts of sexual abuse in the first degree. Again, because this error was not preserved in the trial court, our review is for palpable error.

The Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution are "identical in the import of their prohibition against double jeopardy." *Jordan v. Commonwealth*, 703 S.W.2d 870, 872 (Ky.1985). The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V; *see also* KY. CONST. § 13. Reckley insists that because the attack on the victim was one single, brief, continuous act, his conduct falls under the prohibition against double jeopardy and therefore he cannot be

convicted of two separate offenses. Because both statutory and caselaw are to the contrary, Reckley cannot demonstrate manifest injustice.

Concerning prosecution for multiple offenses, the Kentucky Legislature has provided guidance in determining what constitutes a single course of conduct. Kentucky Revised Statute ("KRS") 505.020 provides in pertinent part:

> (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:
>
> (a) one offense is included in the other, as defined in subsection (2); or
>
> (b) Inconsistent findings of fact are required to establish the commission of the offenses; or
>
> (c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

In *Kiper v. Commonwealth*, the Supreme Court examined KRS 505.020 and the application of its dictates to the concept of distinct acts within a single course of conduct:

> We have previously acknowledged that KRS 505.020 does not bar the prosecution or conviction upon multiple offenses arising out of a single course of conduct when the facts establish that two or more separate and distinct attacks occurred during the episode of criminal behavior. *Welborn v. Commonwealth*, 157

> S.W.3d 608, 611-12 (Ky. 2005). **However, for multiple convictions to be proper there must have been a cognizable lapse in his course of conduct during which the defendant could have reflected upon his conduct, if only momentarily, and formed the intent to commit additional acts.** *Id*. at 612; *see also Terry v. Commonwealth*, 253 S.W.3d 466, 474 (Ky. 2008).

399 S.W.3d 736, 745 (Ky. 2012), *as modified on denial of reh'g* (Apr. 25, 2013) (emphasis added).

In support of its contention that Reckley committed two separate acts prohibited under Kentucky law, the Commonwealth argues that the first act of sexual abuse occurred when Reckley attacked the victim from behind grabbing her breasts. As the victim struggled to fend off the attack, Reckley managed to move around to a position in front of her in order to attack her vaginal area. The Commonwealth argues that this constituted a sufficient momentary lapse in Reckley's course of conduct to support a second charge of sexual abuse. Again, both the statute and caselaw support the Commonwealth's contention.

Returning to KRS 505.020(1)(c), we must examine whether the charges against Reckley constitute an offense designed to prohibit specific acts or a continuing course of conduct. In discussing this provision, the Supreme Court observed in *Welborn v. Commonwealth*:

> The real question is whether it was the individual acts which are prohibited, or the course of action they constitute. If it is the individual acts, then each act is

> punishable separately, but if it is a single course of conduct, there is only one punishment.

157 S.W.3d 608, 612 (Ky. 2005). Like the assault charge at issue in *Welborn*, sexual assault is a "result offense" meaning that "[o]nce all three elements are met, the crime is complete." *Id.* The crime of first-degree sexual assault is complete when a defendant "subjects another person to sexual contact by forcible compulsion[.]" KRS 510.110(1)(a). Therefore, because each crime was complete when the individual act was accomplished, we perceive no manifest injustice in Reckley's conviction on two counts of sexual assault. One count of sexual assault was complete when Reckley subjected the victim to sexual contact by grabbing her breasts by forcible compulsion, and a second count was complete when he subjected her to sexual contact by poking her vaginal area by forcible compulsion.

Further, after grabbing her breasts, Reckley had to work his way around to being in front of the fighting victim to accomplish the attack on her vaginal area. There was thus the requisite lapse in Reckley's course of conduct during which he "could have reflected upon his conduct, if only momentarily, and formed the intent to commit additional acts." *Kiper*, 399 S.W.3d at 745. We thus perceive no palpable error in Reckley's conviction on two counts of sexual assault.

Finally, Reckley argues that he was prejudiced when the jury saw him in the custody of a deputy. Reckley contends that if the jury saw him coming out of the holding room escorted by a deputy, they would assume his guilt. In

rejecting Reckley's contention, the trial court questioned whether the circumstances were as described by Reckley. Finding that the deputy was pushed back and that Reckley didn't come out of the room in a manner that would allow the jurors to see either Reckley or the deputy, the trial court concluded that Reckley had not established prejudice. We find no basis for disturbing the trial court's conclusion or the factual findings underpinning it.

CONCLUSION

Based upon the foregoing, we affirm the judgment of the Campbell Circuit Court.

ALL CONCUR.

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