RENDERED: DECEMBER 13, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000742-MR

BILL JOE ROOF — APPELLANT

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 14-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Bill Joe Roof brings this appeal from a February 23, 2018, Breckinridge Circuit Court Judgment and Sentence on Plea of Not Guilty upon a jury verdict finding Roof guilty of two counts of first-degree sexual abuse, two counts of third-degree sodomy, and sentencing him to a total of fourteen-years' imprisonment. We reverse and remand.

On January 9, 2014, Roof was indicted by a Breckinridge County Grand Jury upon the following four counts:

> COUNT I: That on, about or between August 2010 and August 15, 2012[,] in Breckinridge County, Kentucky, the Defendant, Bill Roof, committed the offense of Sexual Abuse in the First Degree, when being over 21 years of age, he subjected K.R. (DOB: 08/16/1996), a person less than sixteen (16) years of age, to sexual contact;
>
> COUNT II: That on, about or between August 16, 2010[,] and August 2013 in Breckinridge County, Kentucky, the Defendant, Bill Roof, committed the offense of Sexual Abuse in the First Degree, when being in a position of authority or special trust he subjected K.R. (DOB: 08/16/1996), a person less than eighteen (18) years of age, to sexual contact;
>
> COUNT III: That on, about or between August 2010 and August 15, 2012[,] in Breckinridge County, Kentucky, the Defendant, Bill Roof, committed the offense of Sodomy in the Third Degree, when being over 21 years of age or more, subjected K.R. (DOB: 08/16/1996), a person less than sixteen (16) years of age, to deviate sexual intercourse; [and]
>
> COUNT IV: That on, about or between August 16, 2012, and August 13, in Breckinridge County, Kentucky, the Defendant, Bill Roof, committed the offense of Sodomy in the Third Degree, when he, being a person in a position of authority or special trust, subjected K.R. (DOB: 08/16/1996), a person less than eighteen (18) years of age, to deviate sexual intercourse[.]

Indictment at 1. Roof was accused of committing the above sexual offenses against his step-daughter, K.R., while she was in high school and principally residing with Roof and her mother.

A jury trial ensued, and Roof was found guilty of all of the indicted offenses. Pursuant to the jury's verdict, the circuit court ordered the sentences of imprisonment for the four offenses to run consecutively for a total of fourteen-years' imprisonment. This appeal follows.

Roof's first argument on appeal is that the circuit court erred by failing to suppress admissions he made during an interview with Sheriff Todd Pate and Jennifer Hayes, a social worker employed by the Kentucky Cabinet for Health and Family Services. Roof asserts that the interview constituted a custodial interrogation and that it was undisputed that Sheriff Pate did not inform Roof of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) at any point during the interview. As a result, Roof maintains that his admissions during the "custodial interrogation" should have been suppressed:

> [Roof] submits that it was clear that he was under custodial interrogation. The ominous summoning of [Roof] by the Sheriff to his office, left [Roof] with a 'come or else' understanding of his situation. While the Sheriff did not draw a gun or impound [Roof's] truck, the summoning was not one of free will, but one of coercion. Any other similarly situated person who plies their trade on the highways would understand that a failure to comply with the Sheriff's summons could result in a legal summons that would leave [Roof's] truck

> impounded. This is equally true of the interrogation conducted at the Sheriff's office.
>
> While Sheriff Pate and Jennifer Haynes have different recollections on whether or not [Roof] was told that he could terminate the interview and leave, the Sheriff, who actually conducted the interview stated that he did not recall telling [Roof] he could leave. Equally, [Roof] was unequivocal in his assertion that he was not told that he was free to leave. [Roof] specifically remembers the Sheriff telling him that he could be arrested and that his truck, with the military load on it, could be detained. [Roof], or any reasonable person in his position, would understand that his failure to continue the interview and to provide the desired information would result in either arrest or the detention of his truck. Either action could have catastrophic effects on [Roof's] career as an independent trucker and his livelihood. While [Roof] was not physically constrained, the constraint on Mr. Roof's livelihood was as strong as any physical bond. The entire circumstances was one created to compel [Roof] to provide a statement.

Roof's Brief at 10-11 (citations and footnotes omitted). So, Roof argues that the circuit court erred by concluding that he was not subject to custodial interrogation, and thus, Sheriff Pate was not required to inform Roof of his *Miranda* rights. *See Miranda*, 384 U.S. 436. For the following reasons, we disagree.

It is well-established that the constitutionally mandated *Miranda* warnings are only implicated if a suspect is in custody. *Smith v. Commonwealth*, 312 S.W.3d 353, 357-58 (Ky. 2010) (quoting *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006)); *see also United States v. Washington*, 431 U.S. 181, 188-89 (1977); *Thompson v. Keohane*, 516 U.S. 99, 102 (1995). And, a custodial

interrogation "has been defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." *Lucas*, 195 S.W.3d at 405. To constitute custody, law enforcement must either by a show of authority or physical force restrain the liberty of a suspect. *Smith*, 312 S.W.3d at 358. The ultimate test "is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave." *Id.* To answer this question, the following factors should be considered:

> [T]he threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled. . . . [T]he purpose of the questioning[,] . . . whether the place of the questioning was hostile or coercive[,] . . . the length of the questioning[,] and . . . other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions.

Smith, 312 S.W.3d at 358-59 (citing *United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Salvo*, 133 F.3d 943, 950 (6th Cir. 1998).

In this case, the circuit court conducted an evidentiary hearing. Thereafter, the court rendered Findings of Fact, Conclusions of Law and Judgment and denied Roof's motion to suppress. In particular, the circuit court determined:

FINDINGS OF FACT

> (3) The Defendant is a truck driver and was in Crane, Indiana when contacted by the Sheriff. The Defendant testified that the Sheriff stated that he wanted to talk to him that day and that this matter should not wait until the next day. The Defendant was on a tight contractual schedule regarding his trucking business but did make arrangements to drive back to Breckinridge County the day the Sheriff contacted him.
>
> (4) The Defendant met the Sheriff at the Sheriff's Office and submitted to an interview with the Sheriff in the presence of the social worker. The interview occurred in the Sheriff's office. His office is used for a variety of things, including questioning people. It is not a dedicated interrogation room. The door to the office was closed for privacy reasons.
>
> (5) The Sheriff testified that he did not have any intention of arresting the Defendant either during or after the interview. The purpose of the interview was to compare the Defendant's statements with the victim's statements. The Sheriff testified that the Defendant was a suspect even before he met with the Sheriff. The Sheriff testified that he wanted to lay out the facts and allow the Defendant to comment on them. The Sheriff testified that if the Defendant had refused to talk to him that he was going to submit the matter directly to the Grand Jury, but did not tell the Defendant this.

(6) The interview lasted about thirty (30) minutes. At no point until the end of the interview did the Defendant ask to leave or ask to call someone and he did not request an attorney. The Defendant made incriminating admissions during the interview, however, the Sheriff did not arrest the Defendant after the interview.

(7) The Sheriff does not recall advising the Defendant that he was free to leave. The Sheriff testified that he felt fairly confident that he told the Defendant he could leave when he wanted to and that he was not going to be arrested, but he could not say with enough certainty to state that under oath. The social worker testified that the Sheriff did tell the Defendant that he did not have to speak with him during this interview and that no one was trying to coerce him into saying anything. The social worker further testified that she was sure the Sheriff told the Defendant he was free to leave several times during the interview.

(8) The social worker testified that the Sheriff did not bully the Defendant or raise his voice to the Defendant and that the Defendant's demeanor was polite and cooperative. He never asked to leave the room. The Sheriff testified that he did not tell the Defendant that if he did not tell him what he wanted that he would not let him deliver his load that was on the truck or put him in jail. The interview ended when the Sheriff asked the Defendant to give a recorded statement and the Defendant stated that he should speak to an attorney.

(9) The Defendant testified that the Sheriff never told him he was free to leave until the end of the interview. He further testified that the Sheriff told him he did not believe him and that he could put him in jail if he did not tell the truth. He also testified that the Sheriff said he did not care about the Defendant's load on the truck. The Defendant testified that he believed that if he did not give the Sheriff the information that the Sheriff

wanted that he would go to jail. The Defendant testified that he never asked the Sheriff if he could leave during the interview, although he testified that the Sheriff never told him he was free to leave. The Defendant says the testimony of the social worker that the Sheriff told him that he could leave at anytime [sic] is not correct.

CONCLUSIONS OF LAW

(3) "Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*.

(4) The determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansburg v. California*, 511 U.S. 318 (1994). Custodial interrogation for purposes of *Miranda* is determined by objective analysis. *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioning person is one whom the police suspect." *California v. Beheler*, 463 U.S. 1121 (1983). The only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420 (1984).

(5) A court in determining whether the questioning is custodial must look at the totality of the circumstances surrounding the interrogation. *U.S. v. Carter*, 884 F.2d 368 (8th Cir. 1989). An objective review of the indicia of custody in this case indicates that the interrogation was not custodial. The Defendant was asked to come in to speak with the Sheriff, not ordered. The Defendant was told that he was free to leave and was not under arrest. The Defendant possessed unrestrained freedom of movement during the questioning. No strong arm tactics or deceptive stratagems were employed

during the questioning. The Defendant was not placed under arrest at the termination of the questioning. Indications of custody that are present in this case are that the Defendant was initially contacted by the Sheriff and that the questioning was in the Sheriff's office. It has been held that an interrogation which occurs at the police station or jailhouse may be non-custodial. *Oregon v. Mathison*, 429 U.S. 492 (1977). Another factor that indicates non-custodial is the brief amount of time (30 minutes) that the interview took.

(6) This Court concludes that a reasonable person in the Defendant's position would not have understood that he was in custody based on the extent of the physical and psychological restraints placed on the Defendant during the interrogation. *Berkemer*.

(7) Although the Sheriff testified that the Defendant was a suspect before and during the interview, Kentucky subscribes to the rule that custodial interrogation occurs when a suspect is "in custody" and not whether he is the "focus of the investigation". *Little v. Commonwealth*, 991 S.W.2d 141 (Ky. App. 1999) and *Callihan v. Commonwealth*, 142 S.W.3d 123 (Ky. App. 2004).

(8) The facts of this case are similar to the facts in *Oregon*, where the United States Supreme Court held that a criminal suspect interviewed by a police officer at a police station behind closed doors was not in custody where the suspect was not taken by force to the police station. The police told the suspect that he was not under arrest and that he was able to leave after the interview.

(9) The Defendant was not in custody when he made incriminating statements to the Sheriff and, therefore, he was not entitled to be given *Miranda* warnings.

July 25, 2014, findings of fact at 2-6.

Considering the factors set forth above to determine whether a suspect is in custody, we believe that Roof was not in custody during the interview with Sheriff Pate. Roof had not been arrested and was not arrested at the conclusion of the interview. There were no other police officers present for the interview, and Roof's freedom of movement was not impaired during the interview. Roof was questioned in the sheriff's office with the door closed for privacy. The length of the interview was only around thirty minutes. Considering the surrounding circumstances, we conclude that a reasonable person would have believed that he was free to leave during the interview. Hence, we are of the opinion that the circuit court properly denied Roof's motion to suppress admissions he made during the interview.

Roof's next argument is that "the Commonwealth's failure to introduce sufficient evidence to distinguish the four charged counts separately constitutes reversible error." Roof's Brief at 12. Consequently, Roof argues that he was denied a unanimous verdict and that the burden of proof was improperly shifted to him. For the same reasons, Roof also maintains that he was entitled to a directed verdict of acquittal upon the four counts of sexual abuse and sodomy. Roof points to the testimony of K.R. that Roof sexually abused and sodomized her over fifty times starting her freshman year in high school when she was thirteen

years old and ending her senior year in high school when she was seventeen years old:

> [Roof] was charged with two separate counts of two separate crimes: Sexual Abuse in the First Degree and Sodomy in the Third Degree. The indictment was structured such that a count of Sexual Abuse and a count of Sodomy were alleged to have occurred between August 10, 2010[,] and August 15, 2012[,] and separate counts of Sexual Abuse and Sodomy were alleged to have occurred between August 16, 2012[,] and August 2013. There were no specific dates or instances alleged in the Commonwealth's indictment.
>
> During testimony, the Commonwealth elicited testimony from the victim pertaining to instances of described Sexual Abuse and Sodomy but failed to tie any of the events to any specific instances, or especially to link each charged count to a specific event. The events were all described as essentially identical and were described as being numerous – "50 plus times." When asked when the sexual events stopped, K.R. stated that "they stopped when I got moved out of my mom's house." K.R. describes the event that led her to tell her friends was an offer of money for sexual favors but not actually a sex act. The victim described the events being approximately 3 or 4 times a week when [Roof] was home but stated that [Roof's] schedule as a trucker caused these time periods to be non-uniform. The victim described these events as involving oral sodomy and digital penetration every time.

Roof's Brief at 14-15 (citations omitted). Even though K.R. testified to the sexual abuse and sodomy occurring over fifty times during a four-year period, the jury was only instructed upon two separate instances of sexual abuse and two separate instances of sodomy occurring between August 2010 and August 15, 2012, and

also between August 16, 2012, and August 2013. Roof argues that K.R. testified to an unspecific and undifferentiated course of conduct concerning sexual abuse and sodomy rather than to the two specific instances of sexual abuse and sodomy as charged in the jury instructions.

The Kentucky Supreme Court has recognized that "Section 7 of the Kentucky Constitution requires a unanimous verdict." *Ruiz v. Commonwealth*, 471 S.W.3d 675, 678 (Ky. 2015) (quoting *Wells v. Commonwealth*, 561 S.W.2d 85, 87 (Ky. 1978)). The constitutional requirement of a unanimous verdict "means that jurors must agree upon the specific instance of criminal behavior committed by the defendant." *King v. Commonwealth*, 554 S.W.3d 343, 352 (Ky. 2018). A violation of the constitutional unanimity requirement occurs:

> [W]hen a jury instruction may be satisfied by multiple criminal acts by the defendant. When that is the case, and the instruction does not specify which specific act it is meant to cover, we cannot be sure that the jurors were unanimous in concluding the defendant committed a single act satisfying the instruction. Instead, the jury's verdict only reflects their unanimous view that the defendant committed the crime, without necessarily resulting in a unanimous conclusion that the defendant committed a single criminal act beyond a reasonable doubt.

Martin v. Commonwealth, 456 S.W.3d 1, 7 (Ky. 2015) (footnote omitted). Such an erroneous jury instruction is often referred to as a duplicitous instruction. *King*, 554 S.W.3d at 351. A duplicitous jury instruction error requires reversal even if

the error was unpreserved, as it constitutes a palpable error resulting in manifest injustice. *Martin*, 456 S.W.3d at 8-9; *Ruiz*, 471 S.W.3d at 679.

The issue of a duplicitous jury instruction was recently discussed by the Kentucky Supreme Court in its opinion in *King*, 554 S.W.3d 343.[1] In *King*, appellant was convicted of first-degree sodomy and two counts of first-degree sexual abuse. He was sentenced to life imprisonment. Although unpreserved, appellant contended that the jury instructions upon the two counts of first-degree sexual abuse were duplicative and resulted in nonunanimous verdicts. The Supreme Court set forth the two jury instructions. Jury Instruction No. 5 read:

> You will find the Defendant, Ronald King, guilty of Sexual Abuse in the First Degree under this Instruction and under Count One of the Indictment, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Kenton County on or between May 2010 and March 2013 and before the finding of the Indictment herein, he subjected A.S. to sexual contact at 414 Garvey Avenue;
>
> AND,
>
> B. That at the time of such contact, A.S. was less than twelve years of age.

And, Jury Instruction No. 7 stated:

> You will find the Defendant, Ronald King, guilty of Sexual Abuse in the First Degree under this Instruction

[1] *King v. Commonwealth*, 554 S.W.3d 343 (Ky. 2018) was rendered on August 16, 2018.

> and under Count Three of the Indictment and under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Kenton County on or between May 2010 and March 2013 and before the finding of the Indictment herein, he subjected A.S. to sexual contact at 119 Sioux Trail (the brown trailer);
>
> AND,
>
> B. That at the time of such contact, A.S. was less than twelve years of age.

King, 554 S.W.3d at 350 (footnote omitted).

The *King* Court observed that the victim testified that appellant committed two separate instances of first-degree sexual abuse within the time period as set forth in Jury Instruction No. 5 and two separate instances of first-degree sexual abuse within the time period as set forth in Jury Instruction No. 7. *Id.* at 350-51. The Supreme Court held that "a general jury verdict based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based upon the proof – violates the requirement of a unanimous verdict." *Id.* at 350 (quoting *Johnson v. Commonwealth*, 405 S.W.3d 439, 449 (Ky. 2013). The *King* Court explained that such duplicitous jury instructions violated the constitutional unanimity requirement as:

> [E]ach charge of sexual abuse contained in the jury instructions was based upon multiple, separate acts of

> sexual abuse mentioned in the evidence, and so it cannot be determined that all twelve jurors agreed upon the criminal acts for which King was convicted. Moreover, no specific jury instruction existed telling the jury that it could not convict King unless it unanimously agreed on the particular act he committed.

King, 554 S.W.3d at 352. The Supreme Court reversed appellant's convictions upon the two counts of sexual abuse.

Likewise, in this case, the jury instructions upon the two counts of sexual abuse and sodomy were duplicitous. The jury instructions read:

> INSTRUCTION NO. 2
> SEXUAL ABUSE IN THE FIRST DEGREE,
> VICTIM UNDER 16
>
> You will find the Defendant guilty of Sexual Abuse in the First 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 between August 2010 and August 15, 2012[,] and before the finding of this indictment herein, he subjected [K.R.] to sexual contact;
>
> AND
>
> B. That at the time of such occurrence, [K.R.] was less than 16 years of age.
>
> AND
>
> C. That at the time of such occurrence, Bill Roof was 21 years of age or older.
>
> INSTRUCTION NO. 3
> SEXUAL ABUSE IN THE FIRST DEGREE,

VICTIM UNDER 18

You will find the Defendant guilty of Sexual Abuse in the First 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 between August 16, 2012[,] and August 2013 and before the finding of this indictment herein, he subjected [K.R.] to sexual contact;

AND

B. That at the time of such conduct, [K.R.] was less than 18 years of age.

AND

C. That at the time of such occurrence, Bill Roof was in a position of authority;

AND

D. That the defendant came in contact with [K.R.] as a result of his position of authority.

INSTRUCTION NO. 4
SODOMY IN THE THIRD DEGREE,
VICTIM UNDER 16

You will find the Defendant guilty of Sodomy in the Third 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 between August 2010 and August 15, 2012[,] and before the finding of this indictment herein, he engaged in deviate sexual intercourse with [K.R.];

AND

B. That at the time of such intercourse, the Defendant was 21 years of age or older and [K.R.] was less than 16 years of age.

INSTRUCTION NO. 5
SODOMY IN THE THIRD DEGREE,
VICTIM UNDER 18

You will find the Defendant guilty of Sodomy in the Third 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 between August 16, 2012[,] and August 2013 and before the finding of this indictment herein, he engaged in deviate sexual intercourse with [K.R.];

AND

B. That at the time of such intercourse, [K.R.] was less than 18 years of age.

AND

C. That at the time of such intercourse, Bill Roof was a person in a position of authority;

AND

D. That the defendant came in contact with [K.R.] as a result of his position of authority.

December 19, 2017, Instructions to the Jury 1-3.

At trial, K.R. testified to multiple instances of sexual abuse and sodomy perpetrated by Roof during an approximate four-year period. When

juxtaposing the victim's testimony and the above jury instructions, it is evident that there was evidence introduced of multiple acts of sexual abuse or sodomy that occurred within the time frame set forth in each jury instruction.

Consequently, it is impossible to know if the jury unanimously agreed that Roof committed the same act of sexual abuse or sodomy. As in *King*, the jury was presented evidence of multiple instances of sexual abuse and sodomy even though Roof was only charged with two counts of each. *See King*, 554 S.W.3d at 350. Therefore, we are compelled to conclude that the jury instructions upon sodomy and upon sexual abuse violated the constitutional unanimity requirement and resulted in "reversible palpable error." *See Martin*, 456 S.W.3d at 9.[2]

The evidence before the jury of Roof's guilt was substantial and included his confession to the charged criminal offenses. It is clear that the Commonwealth presented more than sufficient evidence to withstand Roof's motion for a directed verdict upon the counts of first-degree sexual abuse and

[2] The Kentucky Supreme Court noted that the legislature has not "criminalize[d] serial acts of sex abuse or sodomy as a 'course of conduct' crime." *Ruiz v. Commonwealth*, 471 S.W.3d 675, 679 (Ky. 2015). In a separate concurrence, Justice Abramson "share[d] the dissent's grave concerns about this type of continuing sexual abuse case and reiterate[d] that the General Assembly can address the problem, as have the legislatures in sister states, by adopting a 'course of conduct' statute for multiple sex crimes against a minor." *Id.* at 684 (Abramson, J., concurring). We join in Justice Abramson's expression of grave concern and, likewise, echo the need for a legislative remedy.

sodomy.[3] However, the Supreme Court views this type of unanimity error as fundamentally threatening "a defendant's entitlement to due process of law." *Id.* at 8 (citation omitted). Even in the face of overwhelming evidence of guilt, a duplicitous jury instruction that violates the constitutional unanimity requirement results in palpable and reversible error:

> Here, the evidence of Martin's multiple pretrial admissions and confessions renders him incapable of showing a probability of a different outcome. But that circumstance does not dispose of the palpable nature of the unanimous-verdict violation because it contemplates only one of the two bases under which palpable error may be found and ignores the basis upon which *Johnson* [405 S.W.3d 439 (Ky. 2013)] and *Kingrey* [396 S.W.3d 824 (Ky. 2013)] rely.
>
> . . . .
>
> The binding nature of the *Johnson–Kingrey* precedent is evident on review of our recent unanimous-verdict jurisprudence. Since rendition of *Johnson* and *Kingrey*, this Court has cited one or both of those cases as the basis for finding palpable error in every instance where we have found a unanimous-verdict violation. This Court has even stated that unanimity errors are "deemed palpable." We have also held unanimity errors to be palpable in light of overwhelming evidence of guilt, specifically confessions to law enforcement.

Martin, 456 S.W.3d at 9. (Citations and footnotes omitted.)

[3] A directed verdict is proper only when reasonable jurors could only conclude that the moving party was entitled to judgment. Kentucky Rules of Civil Procedure 50.01; *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963). Also, the evidence and reasonable inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Id.*

We view any remaining contentions of error as moot or without merit.

Accordingly, we reluctantly reverse Roof's convictions upon two counts of sodomy and of sexual abuse as the jury instructions upon those offenses violated the constitutional unanimity requirement. Upon remand and retrial, the circuit court may avoid a duplicitous instruction error by:

> (1) the jury instruction can simply identify which of the particular criminal acts included in the evidence the jury is asked to consider; (2) the verdict form can identify the particular act upon which the jury determined guilt; or (3) a special instruction, as held by some courts, informing the jury that, in order to convict, all twelve jurors must agree that the defendant committed the same act.

King, 554 S.W.3d at 353.

For the foregoing reasons, the judgment and sentence of the Breckinridge Circuit Court is reversed and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

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