IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: DECEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2001-SC-0539-MR

DATE 1-8-04 Paula Yount CDC

PHILLIP BEASLEY — APPELLANT

V.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
99-CR-00127 AND 99-CR-00176

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART; REVERSING AND REMANDING IN PART

I. INTRODUCTION

After a jury trial, Appellant was convicted of First-Degree Criminal Abuse, two counts of First-Degree Assault, Third-Degree Criminal Mischief, and two counts of Second-Degree Escape. He was further found to be a Second-Degree Persistent Felony Offender ("PFO"), and he received: (1) an enhanced sentence of ten (10) years on the First-Degree Criminal Abuse conviction; (2) an enhanced sentence of twenty (20) years on each First-Degree Assault conviction; (3) a sentence of ninety (90) days on the Third-Degree Criminal Mischief conviction, and (4) a sentence of one (1) year on each Second-Degree Escape conviction.[1] In accordance with the jury's recommendation, the trial court ordered the sentences to run concurrently with each other for a total sentence

[1] The trial court did not authorize the jury to impose enhanced sentences for the Second-Degree Escape convictions.

of twenty (20) years. Appellant appeals to this Court as a matter of right,[2] and in seeking reversal of his convictions, he identifies six (6) issues for our consideration: (1) "Insufficiency of the evidence of the charge of Criminal Abuse as to D.H."; (2) "Improper instructing of the jury on the charge of First-Degree Assault and failure to instruct on lesser-included [offense] of Second-Degree Assault"; (3) "Refusal to grant a mistrial when the co-defendant stood in front of the jury box and loudly stated that she 'could not stand to be near' [Appellant]"; (4) "Improper joinder of trials of [Appellant and his codefendant]"; (5) "Error to allow A.H., a minor to testify when he was incompetent to do so," and (6) "Error to hold the PFO hearing prior to the jury's fixing of punishment on underlying offenses." We affirm Appellant's convictions for First-Degree Criminal Abuse, Third-Degree Criminal Mischief, and Second-Degree Escape (two counts). We affirm the determination that he is a Second-Degree Persistent Felony Offender. We reverse his First-Degree Assault convictions and remand counts three (3) and four (4) of indictment number 99-CR-00176 for a new trial.

II. FACTUAL BACKGROUND

On September 22, 1999, D.H., age three (3), and A.H., age four (4), were admitted to Twin Lakes Regional Medical Center in Leitchfield, Kentucky. Both children were comatose; after tests revealed their condition was the result of the ingestion of antidepressants, the children were stat-flighted to Kosair Children's Hospital in Louisville, Kentucky. They were accompanied by their mother, Pamela Rose Higdon ("Higdon"). Dr. Sanjay Shah, the attending physician at Twin Lakes Regional Medical Center, testified that their comas were due to the ingestion of high levels of antidepressants and that the level of drugs in their systems was life-threatening.

[2] KY. CONST. § 110(2)(b).

The subsequent clinical forensic examination performed by Dr. Amy Burrows at Kosair revealed the presence of high levels of amitriptyline, nortriptyline, and benzodiazepine in both children. Dr. Burrows testified that these types of drugs were not recommended for and were rarely prescribed to children. She stated that the levels would be considered "supra-therapeutic" in adults, that the high dosage administered to the children was responsible for their comatose state, and that the condition of both children had been very serious.[3] Dr. Burrows also testified that Higdon denied having the type of drugs detected in the children in her home, despite having been to the pharmacy the day before to fill a prescription for amitriptyline (Elavil) and alprazolam (Xanax) for Appellant. Dr. Burrows further testified that Higdon stated that the only medications she kept in her home were Tylenol, cough syrup, and Benadryl.

The physical examination of D.H. revealed bruising and abrasions on the child's extremities, cheeks, ear, forehead, buttocks, rectum, and penis. The physical examination of A.H., however, revealed no "significant cutaneous injuries or evidence of sexual abuse."

Dr. Burrows testified that the bruises on D.H. were of multiple ages and at various stages of healing, that the bruises and scar tissue around the rectum were consistent with something penetrating the anus, and that Higdon's explanation for the injuries was inconsistent with the nature and extent of the injuries. Higdon stated that the injuries to D.H. were likely the result of various falls and mishaps such as falling off of the porch, a reaction to poison oak, hitting his head and cheeks on the wooden bunk bed, and playing with dogs and cats. She also suggested that the rectal tears could be attributed to straining with diarrhea.

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[3] Both children have experienced a full physical recovery.

A.H. and D.H. lived with Higdon and Appellant, their mother's boyfriend. Higdon and Appellant had two daughters, ages 3 months and 14 months, that also lived in the home. Testimony at trial revealed a general timeline of the events on September 22, 1999. Although both children were somewhat ill that day, Higdon took A.H. to school around 10 a.m. She also filled a prescription for Elavil and Xanax for Appellant, stopped at a gas station, and then returned home. Appellant remained at home throughout the day with D.H. and the couple's two young daughters. Higdon again left the home around 3:30 p.m. to pick up A.H. from the bus stop. During this time, D.H. apparently suffered a seizure and Appellant called his sister in law, Belvina Logsdon ("Logsdon") for assistance. When Logsdon arrived, Higdon had already returned home and they decided that Appellant would stay home with the younger children and Logsdon would drive D.H., Higdon, and A.H., to the hospital. En route to the hospital, Logsdon stopped to change a bandage for her father, a task that consumed approximately 30 minutes. According to Logsdon, A.H. "fell asleep" sometime after the stop, and when they arrived at the hospital between an hour to an hour and a half after leaving Higdon's home, both A.H. and D.H. were comatose.[4]

Once the condition of the children was made known to local officials, Don Alvey ("Alvey"), a supervisor with the Cabinet for Families and Children (CFC) in Grayson County, obtained an emergency protective order to place the two younger children into foster care. Deputy Sheriffs Poteet and Clodfelter were dispatched to the Higdon home, along with Alvey, to remove the two children and to take Appellant into custody on two unrelated felony bench warrants. Both Deputy Poteet and Alvey testified that when Appellant was informed of the nature of the physical abuse to D.H., Appellant denied

[4] Sheriff Hudson testified that the trip from the Higdon home to the Twin Lakes Hospital would generally take around 20 minutes.

any knowledge or responsibility for the abuse, he twice attempted to escape, and he begged to be shot. Appellant indicated that he had spoken with Higdon regarding the condition of A.H. and D.H., and that she had informed him that the children had ingested Xanax. He also suggested two possible suspects for the physical abuse of the boys.

Deputy Sheriff Ernie Steff, the lead investigator on the case, testified that during a recorded interview, Higdon was asked the following question: "You knew that your children were being abused and that's why you did not want to take them to the hospital or was reluctant to take them to the hospital because you knew there would be questions asked about the injuries on [D.H.]. It that not true Rosie?" to which she answered, "Yes sir." Also at trial, Sheriff Joe Brad Hudson testified regarding several letters he had received from Appellant, noting that in the letters Appellant stated that he had heard Higdon speak of placing a clamp or clothespin on D.H.'s penis because of his proclivity to wet himself. Sheriff Hudson also testified that Appellant's letters indicated that A.H. and D.H. appeared to require more sleep in the days preceding the incident, and that bruising had appeared on their bodies more frequently.

A.H. testified for the Commonwealth.[5] He remembered his illness, and when questioned as to the reason he became sick, A.H. stated that he got sick because Appellant gave him pills in his mouth, nose, and "butt." A.H. also testified to witnessing Appellant similarly forcing pills into D.H.'s "butt."

Appellant was charged under indictment number 99-CR-00127 with First-Degree Criminal Mischief[6] and two (2) counts of Second-Degree Escape.[7] Under indictment

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[5] The trial court determined that D.H. was not competent to testify.

[6] This charge resulted from damage to the Grayson County Sheriff's vehicle during Appellant's arrest.

number 99-CR-00176, he was additionally charged with First-Degree Criminal Abuse of both D.H. and A.H., First-Degree Assault of both D.H. and A.H., First-Degree Sodomy of D.H., and being a First-Degree Persistent Felony Offender. The PFO charge was amended to Second-Degree Persistent Felony Offender, and during the trial, the charge of First-Degree Criminal Mischief was amended to Third-Degree Criminal Mischief. At the close of the Commonwealth's case, the court directed a verdict on the sodomy charge, and it was dismissed. The jury found Appellant guilty of First-Degree Criminal Abuse as to D.H., First-Degree Assault of both D.H. and A.H., Third-Degree Criminal Mischief, and two (2) counts of Second-Degree Escape. Appellant was found not guilty of First-Degree Criminal Abuse of A.H. The jury then determined that Appellant was a Second-Degree Persistent Felony Offender and sentenced him to an enhanced sentence of twenty (20) years imprisonment on each assault conviction and an enhanced sentence of ten (10) years imprisonment on the criminal abuse conviction. Appellant was also sentenced to one (1) year imprisonment on each of the escape charges and ninety (90) days on the criminal mischief charge. All sentences, in accordance with the jury's recommendation, were ordered to run concurrently for a total sentence of twenty (20) years. As previously mentioned, Appellant appeals to this Court as a matter of right and raises six (6) claims of error.

III. ANALYSIS

A. Denial of Motion for Directed Verdict on the Charge of Criminal Abuse of D.H.

Before addressing his sufficiency of the evidence issue, however, Appellant first argues a subissue. He claims that the trial court erred in "effectively allow[ing] the

[7] These charges resulted from Appellant's attempts to escape after his arrest on unrelated felony bench warrants.

Commonwealth to amend the indictment." This subissue was not preserved, but we nevertheless address it and find that it is without merit.

Appellant argues that "the Commonwealth was proceeding under a theory that the [Appellant's] abuse had 'cause[d] serious physical injury' to the children," and that the trial court amended the indictment when it allowed the Commonwealth to "proceed under the 'torture, cruel confinement, or cruel punishment' prong" of KRS 508.100. We disagree.

As to the criminal abuse count, the indictment charged:

> [T]he defendant, Phillip Wayne Beasley, unlawfully committed the offense of Criminal Abuse in the First Degree, when he, acting alone or in complicity with others, intentionally abused or permitted another person to abuse [D.H.] (a child three years of age of whom he had actual custody) . . . .

Thus, the indictment itself did not specify the consequence of the abuse, and Appellant did not file a bill of particulars[8] seeking information about the particulars of the charge.[9] For these reasons, the Commonwealth was not limited to showing "serious physical injury" but was properly allowed by the trial court to also "proceed under the 'torture, cruel confinement, or cruel punishment' prong" of KRS 508.100, and no amendment of the indictment was necessary for the Commonwealth to do so. If Appellant's trial counsel believed more specificity was necessary to adequately defend against the

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[8] RCr 6.22.

[9] Wolbrecht v. Commonwealth, Ky., 955 S.W.2d 533, 538 (1997) ("The function of the Bill of Particulars in a criminal case is to provide information fairly necessary to enable the accused to understand and prepare his defense against the charges without prejudicial surprise upon trial.").

charge, she could have filed a motion for a bill of particulars,[10] and by failing to do so, she waived this issue.

We will now address Appellant's claim that the evidence was insufficient to support his conviction of First-Degree Criminal Abuse in violation of KRS 508.100, which provides:

> (1) A person is guilty of criminal abuse in the first degree when he intentionally abuses another person or permits another person of whom he has actual custody to be abused and thereby:
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> (a) Causes serious physical injury; or
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> (b) Places him in a situation that may cause him serious physical injury; or
>
> (c) Causes torture, cruel confinement or cruel punishment;
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> to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

Appellant claims that because the evidence was insufficient to support the charge of criminal abuse of D.H., the trial judge erroneously denied his directed verdict motion that he renewed at the close of all of the evidence,[11] and therefore his conviction for First-Degree Criminal Abuse should be reversed. We disagree and hold that the evidence was sufficient to support Appellant's conviction of First-Degree Criminal Abuse of D.H.

Appellant asserts that the evidence was insufficient to convict him because "the Commonwealth never adduced evidence of torture, cruel confinement, or cruel punishment, by [Appellant] or [Higdon]." We review the denial of Appellant's motion for a directed verdict under the standard articulated by this Court in Commonwealth v.

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[10] Id.; Hampton v. Commonwealth, Ky., 666 S.W.2d 737, 740 (1984) ("If the appellant required more specificity to defend, he should have pursued his requirements by pretrial motion.").

[11] Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998) ("A defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence, in order to be preserved for our review.").

Benham.[12] Under the Benham standard, Appellant was entitled to a directed verdict only if, considering the aggregate of the evidence, it would be clearly unreasonable for the jury to find guilt.[13] We review the evidence, including reasonable inferences therefrom, in the light most favorable to the Commonwealth. Applying this standard, we find that the Commonwealth, as it maintains, produced sufficient evidence of torture or cruel punishment by Appellant.

Criminal abuse "has three elements: a culpable state of mind, an act of abuse, and one of the following consequences of that abuse: (i) serious physical injury; (ii) risk of serious physical injury; or (iii) torture, cruel confinement, or cruel punishment."[14] The definition of "abuse" includes "the infliction of physical pain, injury, or mental injury[.]"[15] Appellant does not contest that D.H. was abused but argues that "the Commonwealth failed to ever offer any evidence as to who that abuser was or how the bruising was inflicted much less whether the method of infliction was torture or cruel punishment or cruel confinement." Again, we disagree.

As shown by the exhibits and as detailed in the testimony of Dr. Burrows, D.H. had numerous signs of physical abuse. Dr. Burrows testified:

> [D.H.] had multiple injuries to multiple areas of the body. When we examined the head, he had a scabbed abrasion up near the hairline. He had two big bruises; they were both kind of brown, purple, green on both sides of his cheek. He had abrasions on the inner aspect of the fleshy portion of the cheek. He had a little laceration or tear of the skin right where the left earlobe inserts into the skin of the face. He

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[12] Ky., 816 S.W.2d 186 (1991).

[13] Id. at 187. See also Trowell v. Commonwealth, Ky., 550 S.W.2d 530 (1977); Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 4 (1983); Yarnell v. Commonwealth, Ky., 833 S.W.2d 834 (1992).

[14] Robert G. Lawson and William H. Fortune, Kentucky Criminal Law § 9-6(b) (Lexis 1998).

[15] KRS 508.090(1).

> also had a pink bruise on his chin. The examination of the chest, he had two bruises on the lower aspect of his abdomen on both right and left sides, on his back he had a series of circular contusions on the left shoulder area and a linear yellow bruise in that area as well. He had multiple bruises over the lower aspect of his back and his buttocks. These were more kind of pink and brown. He also had multiple abrasions which are due to like friction of the skin, little scabbed abrasions that were in that area as well. He did have a little rash that was over the back part of his upper right thigh. Examination of his extremities, he had a couple of bruises on his left upper extremity. He had multiple circular bruises around the right elbow and a few other bruises on his right upper extremity. He had some nonspecific scabbed abrasions over the anterior, the front part of his leg and those injuries would be consistent with normal toddler stuff. He had another bruise on the back of his right leg. Examination of the genitalia, disclosed he had a large amount of purple, pink round contusions surrounding the anus where we defecate or where we excrete feces. He had a lot of discoloration around that. It was bruises. He had some bruises in that area of the buttocks as well. He had several small pink bruises on the scrotal sac. He had what looked like a discontinuous circular abrasion around the urethral meatus, the part on the penis where the urine comes out. And circling that was a little abrasion that we describe it as like a clock face. It pretty much encircled the whole thing but there wasn't much abrasion from the 10 to 2 o'clock position. There were multiple pinpoint hemorrhages at the tip of the penis that we call the glans penis. What we call petechial hemorrhages. So he did have multiple contusions in the genital region.

Because neither "torture" nor "cruel punishment" is defined by statute, we assign them their ordinary meanings.[16] "Torture" is defined as "[t]he infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic

[16] KRS 446.080(4) ("All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning."); Cutrer v. Comonwealth, Ky.App., 697 S.W.2d 156 (1985); Heleringer v. Brown, Ky., 104 S.W.3d 397, 401 (2003) (quoting Gateway Const. Co. v. Wallbaum, Ky. 356 S.W.2d 247, 249 (1962)) ("The words of the statute are to be given their usual, ordinary, and everyday meaning.").

pleasure."[17] In Cutrer v. Comonwealth,[18] a case where the meaning of the term "cruel punishment" as used in the criminal abuse statutes was at issue,[19] the Court of Appeals used the dictionary definition of "'cruel' as 'disposed to inflict pain or suffering: devoid of human feeling.'"[20] The Cutrer Court additionally noted that under the Eighth Amendment of the United States Constitution as well as § 17 of the Kentucky Constitution, "[c]ruel punishment is punishment which shocks the general conscience and violates the principles of fundamental fairness[,]"[21] and that "[o]utside the criminal arena, our cases define 'cruel' as 'heartless and unfeeling.'"[22] The Court of Appeals found that the plain language of the abuse statutes was "sufficiently clear to apprise ordinary sensible persons of the type of acts they sanction,"[23] and therefore, it "conclude[d] that those statutes are constitutionally sound."[24] The Court then affirmed criminal abuse convictions that were based on spankings that caused bruises on a child's face, back, and kidney.

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[17] BLACK'S LAW DICTIONARY 1498 (7th ed. 1999).

[18] Ky.App., 697 S.W.2d 156 (1985).

[19] Although Cutrer involved convictions for Second-Degree Criminal Abuse and for Third-Degree Criminal Abuse, the term "cruel punishment" is used in all three (3) degrees of criminal abuse. See KRS 508.100–.120.

[20] Cutrer, supra note 18 at 158 (quoting Webster's Ninth New Collegiate Dictionary 311 (1984)).

[21] Id. (citing Workman v. Commonwealth, Ky., 429 S.W.2d 374, 378 (1968) ("The first approach is to determine whether in view of all of the circumstances the punishment in question is of such character as to shock the general conscience and to violate the principles of fundamental fairness.")).

[22] Id. (citing Connelly v. American Bonding & Trust Co., 113 Ky. 903, 69 S.W. 959 (1902)).

[23] Id.

[24] Id.

The question before this Court in Stoker v. Commonwealth[25] was whether hitting a child with a wire coat hanger qualified as "torture" or "cruel punishment" where the abuse "did not result in medical treatment or leave scars or marks to verify that severe beating had occurred."[26] We concluded that "because the children testified to circumstances proving the nature of the beatings to have been cruel and indiscriminate, and far different in character from normal parental discipline[,] the jury could find that the beatings qualified as torture or cruel punishment."[27]

In Canler v. Commonwealth,[28] this Court cited Cutrer approvingly, incorporated the meanings that Cutrer had assigned to "cruel punishment" and "cruel," and ruled that "[i]t is. . . the jury's function to determine whether the amount of force used during a spanking 'shocks the conscience' or is 'heartless and unfeeling[,]'[29] and to "determine whether the amount of force used during a spanking constitutes cruel punishment."[30] Consequently, this Court upheld the trial court's ruling that a severe spanking that does not result in serious physical injury, or permanent scarring, may nevertheless constitute cruel punishment as statutorily prohibited by KRS 508.100(1)(c). In other words, the Canler Court defined "cruel punishment" as punishment that shocks the conscience or is heartless and unfeeling.

In the present case, D.H. had signs of physical abuse, literally, all over his body. Indeed, the extent of the mistreatment of D.H. not only supports a finding that it "shocks one's conscience" but also supports a finding that it was "heartless and unfeeling."

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[25] Ky., 828 S.W.2d 619 (1992).

[26] Id. at 625.

[27] Id.

[28] Ky., 870 S.W.2d 219 (1994).

[29] Id. at 222.

[30] Id.

Accordingly, based on the testimony of Dr. Burrows and the exhibits, we find that the evidence clearly supported the jury's finding that the abuse resulted in torture or cruel punishment to D.H.

Appellant argues that "no evidence was adduced as to when, how, or who caused the abuse." As to "when," we would point out that Appellant wrote that D.H. "was starting to come up with a bruise ever *[sic]* week or so it seemed like in the last month or so" and that Dr. Burrows testified that the bruises were of multiple ages. We would add that the scope of the abuse would also support an inference that it occurred over a period of time. First-Degree Criminal Abuse is a felony charge and time, itself, is not a material element of the offense. Accordingly, the failure to prove the specific date of the offense is of no consequence.[31] The issue of when an act occurred is often raised in cases where the victim is a young child,[32] and as one would expect, the testimony is often confusing and uncertain. It is important in cases where multiple counts of the same criminal offense are charged that the evidence be sufficient to separately identify the various counts charged.[33] In this case, Appellant was only charged with one (1) count of criminal abuse of D.H.; therefore, there was no need to show the specific days on which the abuse acts were committed on D.H. As shown by the evidence, the abuse of D.H. was a continuing course of conduct, not just one single act of abuse. As to "how" the abuse of D.H. occurred, we would only point out that the means of the infliction of the abuse was not a necessary element of the offense that the Commonwealth was required to prove in this case. As to "who," the evidence showed

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[31] 1 Cooper, Kentucky Instructions to Juries (Criminal), § 1.11 (4th ed. Anderson 1993).

[32] Id.

[33] Id.

that D.H. was in the care of both Appellant and Higdon during the time that he was abused, and Deputy Steff testified that Higdon admitted to him that she knew that the children were being abused and did not want to take them to the hospital for that reason. A reasonable inference from this evidence was that Higdon was referring to Appellant as the person who had abused the children. Accordingly we find that the evidence was sufficient to support a finding by the jury that Appellant was the perpetrator of the abuse on D.H.

Finally, we would note that the direct evidence that Appellant introduced the drugs into D.H.'s system was by itself sufficient to support a finding of First-Degree Criminal Abuse by Appellant. The evidence clearly supports a finding of the three elements of First-Degree Criminal Abuse set forth supra: first, the introduction of the drugs was intentional; second, the introduction constituted an act of abuse in that it caused "physical injury" to D.H., and third, the consequence of the introduction was "serious physical injury" to D.H. since it caused him to become comatose and was life threatening. This evidence would also support a finding of "torture" or "cruel punishment" because the introduction of drugs at a life-threatening level into the system of a three (3) year old child qualifies as an act that both shocks the conscience and is heartless and unfeeling.

Appellant argues, however, that the introduction of the drugs into D.H.'s system was the basis of the assault charge and "could not logically serve as the basis for the criminal abuse charge as well." Appellant does not cite any authority in support of this argument, and we find none. In fact, "[w]hen 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."[34] Appellant does not raise double jeopardy as an issue; regardless, it would not bar his convictions in this case because each charge – First-Degree Criminal Abuse and First-Degree Assault – requires proof of at least one fact which the other one does not.[35] For First-Degree Criminal Abuse, the Commonwealth was required to prove that D.H. was twelve (12) years of age or less, which is not an element of First-Degree Assault, and for First-Degree Assault, the Commonwealth was required to show that Appellant's conduct created a grave risk of death, which is not a requirement for First-Degree Criminal Abuse. Accordingly, the evidence that Appellant introduced drugs into D.H.'s system was also sufficient to thwart Appellant's motion for a directed verdict on the abuse charge.

B. First-Degree Assault Instructions.

A person commits First-Degree Assault when: "(a) [h]e intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or (b) [u]nder circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person."[36] In the present case, the trial court attempted to fashion a combination instruction[37] and instructed the jury under both methods of committing First-Degree Assault:

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[34] KRS 505.020.

[35] Commonwealth v. Burge, Ky., 947 S.W.2d 805, 809 (996) ("Double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" (quoting from Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)).

[36] KRS 508.010.

[37] On retrial, we suggest that the instruction for First-Degree Assault follow the specimen instruction set forth in 1 Cooper, Kentucky Instructions to Juries (Criminal) § 3.36 (4th ed. Anderson 1993).

> You will find the Defendant guilty of First-Degree Assault under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following:
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> A. That in this county on or about September 22, 1999, and before the finding of the Indictment herein, he, acting alone or in complicity with another, intentionally caused a serious physical injury to [D.H./A.H.] by introducing into his body Tricyclic anti-depressant and/or benzodiazepine;
>
> OR
>
> B. The Defendant wantonly engaged in conduct, which created a grave risk of death to another and thereby caused serious physical injury [to] [D.H./A.H.] under circumstances manifesting extreme indifference to the value of human life.[38]

Appellant first complains that the evidence did not support the intentional assault theory, and therefore, the requirement of unanimity was violated because the jury's verdict did not indicate under which theory it convicted Appellant.[39] However, we find that the evidence supported a finding of intentional assault, and thus unanimity is not an issue.

"A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct."[40] Evidence of actual intent, however, is not required; the jury may infer intent from the circumstances of the act.[41] A.H.'s testimony as to the manner in which Appellant administered the drugs and the serious consequences associated

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[38] The First-Degree Assault instructions read exactly the same for both counts except for the names of the victims.

[39] On retrial, if a combination instruction is used, we would suggest that a verdict form be utilized that requires the jury to state under what theory they find guilt. See specimen instructions 2.08D and 2.09D of 1 Cooper, Kentucky Instructions to Juries (Criminal) (4th ed. Anderson 1993) and Commonwealth v. Hager, Ky., 41 S.W.3d 828 (2001) (both majority and concurring opinions set forth specimen verdict forms).

[40] KRS 501.020(1).

[41] Dishman v. Commonwealth, Ky., 906 S.W.2d 335, 341 (1995) ("A jury has latitude to infer intent from the surrounding facts and circumstances.").

with the drugs was sufficient to support a reasonable inference that Appellant intended to harm D.H. and A.H. through the administration of high dosages of medication.

Next, Appellant argues that the instructions were erroneous because the instructions "assume[d] as a matter of law that the drugs were dangerous instruments," and that was a question for the jury. Without addressing the merits of this argument, we would simply note that this issue was not preserved for appeal. Appellant did not offer an instruction or otherwise make known his objection to the intentional First-Degree Assault instruction.[42] His submission of a Second-Degree Assault instruction defining "dangerous instrument" and allowing the jury to make a determination under that instruction whether the drugs were dangerous instruments was not sufficient to fairly and adequately present to the trial court the objection to the First-Degree Assault instruction that he now asserts. Therefore, Appellant did not preserve his claim of error regarding the First-Degree Assault instruction. Consequently, he is precluded from assigning as error the trial court's failure to define "dangerous instrument" and allowing the jury to make that determination under the First-Degree Assault instruction.

C. Failure to Instruct on Second-Degree Assault.

Finally, as to the instructions, Appellant argues that the trial court erred in failing to give a wanton Second-Degree Assault instruction as a lesser-included offense of First-Degree Assault. We agree.

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[42] RCr 9.54(2) ("No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.").

"All instructions must be supported by the testimony and evidence presented at trial."[43] Thus, "[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."[44]

The Second-Degree Assault statute, KRS 508.020, reads in relevant part as follows:

> (1) A person is guilty of assault in the second degree when:
>
> . . . .
>
> (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

Thus, "[n]ormally, a [wanton First-Degree Assault] instruction is accompanied by an instruction on [wanton] Second-Degree Assault as a lesser included offense, if (1) a dangerous instrument was used; and either (2) there is a reasonable doubt whether the degree of the defendant's wantonness reached the level described in [the wanton First-Degree Assault] instruction, or only that contained in the definition of 'wantonly' . . . ."[45] Here, under the evidence presented, the jury clearly could have entertained a doubt as to whether Appellant's wantonness reached the level necessary for a conviction of

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[43] Parker v. Commonwealth, Ky., 952 S.W.2d 209, 211 (1997); 1 Cooper, Kentucky Instructions to Juries (Criminal) § 1.05B (4th ed. Anderson 1993) ("[T]he jury must be instructed on all lesser included offenses which are supported by the evidence." Id.).

[44] Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 298 (1993); Clifford v. Commonwealth, Ky., 7 S.W.3d 371 (1999) ("Regardless, an instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury could have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." Id. at 376-377) (emphasis added).

[45] 1 Cooper, Kentucky Instructions to Juries (Criminal) § 3.34, comment (4th ed. Anderson 1993).

wanton First-Degree Assault but believed beyond a reasonable doubt that he was guilty of wanton Second-Degree Assault.

The Commonwealth counters that Appellant failed to preserve this claim of error. We disagree. Appellant tendered to the trial court a Second-Degree Assault instruction,[46] and at the instruction conference, the trial court acknowledged any objection by Appellant to its instructions "as to any differences that may exist."

Accordingly, we reverse Appellant's First-Degree Assault convictions and remand the charges to the trial court for a new trial.

D. Outburst of Codefendant.

As the court was reconvening after a recess, Higdon, who was standing in front of the jury box and referring to Appellant, loudly stated, "I can't stand to be near him." The trial court overruled Appellant's motion for a mistrial. Appellant argues that he was prejudiced because Higdon was in effect able to get a statement in front of the jury when she had elected not to testify and that he was, therefore, unable to cross-examine her about it. The trial court overruled the motion, finding no manifest necessity. We agree. This was a brief isolated remark and did not contain any factual information. Appellant declined the trial court's offer of a curative admonition or a separate instruction regarding Higdon's remark. Accordingly, we agree with the trial court that Higdon's remark, albeit clearly improper, did not create manifest necessity for a mistrial.[47]

E. Joinder of trials.

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[46] On the face of Appellant's tendered instructions, it is hand-written "tendered 5-23-01 ed rejected."

[47] Caudill v. Commonwealth, Ky., __ S.W.3d ___ (2003); Bray v. Commonwealth, Ky., 68 S.W.3d 375 (2002).

Appellant maintains that he was prejudiced by his joint trial with Higdon. He bases this claim on several arguments. First, he argues that he and Higdon had antagonistic defenses because they were casting blame on each other for the abuse and drugging of the children. Although this is a factor that the trial court may properly consider in determining whether to order separate or joint trials of defendants otherwise properly joined, this fact, by itself, does not mandate separate trials. In fact, antagonistic defenses might be a reason for joint trials.[48] Accordingly, we find no undue prejudice to Appellant from his joint trial with Higdon solely because of their antagonistic defenses.

Next, Appellant asserts that after Higdon's outburst, the trial court should have stopped the joint trial and, at that point, severed his trial from the trial of Higdon. Again, we disagree. As we have previously noted, Higdon's outburst was brief in duration, a mere seven (7) words, contained no factual information, and in essence, was without any significant effect in Appellant's trial. For that reason, we hold that Higdon's outburst did not require a severance of Appellant's trial at that point.

Lastly, Appellant claims that the trial court's refusal to order separate trials allowed Higdon's lawyer to act as a "separate prosecutor" and that a separate trial would have avoided this prejudicial situation. As an example of prejudice, Appellant complains that Higdon's lawyer questioned Deputy Sheriff Poteet in detail about Appellant's arrest and subsequent escapes when those matters were irrelevant to the charges against Higdon. He claims that the sole purpose was to make him look bad to the jury. We would point out that if the details of Appellant's arrest and escapes were irrelevant to Higdon's defense, or if they were cumulative of details previously elicited by

[48] Ware v. Commonwealth, Ky., 537 S.W.2d 174 (1976).

the Commonwealth, Appellant should have timely objected to such evidence.[49] Having failed to object, he waived any objection to the relevancy or redundancy of the evidence elicited by Higdon.[50] We would note, however, that evidence of escape is generally probative of guilt,[51] and in this case, Higdon was attempting to establish Appellant's guilt as her defense. She had this right, and it necessarily included the right to introduce relevant evidence of Appellant's guilt of the abuse and assault of the children.[52] For these reasons, we find that the so-called "second prosecution" by Higdon did not justify the granting of a severance.

F. Competency of A.H.

Appellant claims that A.H. was not competent to testify. The Commonwealth, however, argues that this claimed error was not preserved for appeal. We agree. Although it is correct that Appellant asked the trial court to determine whether A.H. was competent to testify, no objection was made to A.H. testifying after the trial court held a hearing and found A.H. competent to testify. Appellant's motion was not a motion to preclude A.H. from testifying because of a lack of competency, but rather, it was, as previously stated, a motion solely for the trial court to make a determination as to A.H.'s competency to testify. If Appellant was dissatisfied with the trial court's ruling, then the burden was upon Appellant to voice an objection to the trial court's finding or A.H.'s testimony. Appellant's failure to do so forfeited his right to predicate error upon the

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[49] KRE 402; KRE 403.

[50] KRE 103(a)(1); Bush v. Commonwealth, Ky., 839 S.W.2d 550, 558 (1992) ("The defendant cannot fail to object at trial and then raise the issue on appeal.").

[51] Bunton v. Commonwealth, Ky., 464 S.W.2d 810 (1971); Napier v. Commonwealth, Ky., 306 Ky. 75, 80, 206 S.W.2d 53, 55 (1947) ("Flight and escape after being charged with a crime is evidence of the defendant's guilt.").

[52] Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 705 (1994).

ruling of the trial court allowing A.H. to testify. Nevertheless, we will briefly address the merits of this argument.

KRE 601 governs the competency of a witness to testify, and it provides:

> (a) General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.
> (b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:
> (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
> (2) Lacks the capacity to recollect facts;
> (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
> (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

"The trial court is in the unique position to observe witnesses and to determine their competency[ ]";[53] therefore, "[t]he trial court has the sound discretion to determine whether a witness is competent to testify."[54] There is no minimum age for testimonial capacity, and accordingly, "[a]ge is not determinative of competency[.]"[55] Here, A.H. was six (6) years of age at the time of trial and four (4) years of age when the alleged crimes occurred. The trial court conducted an evidentiary hearing, examining A.H., and although the trial court indicated A.H.'s testimonial competency was marginal, the trial court found that A.H. met the minimal standard to testify. From a review of the record, we find that the record supports the trial court's findings and that the trial court did not abuse its discretion in finding A.H. competent to testify.

G. PFO hearing.

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[53] Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 525 (2002).

[54] Id.

[55] Id.

Appellant complains that the trial court committed error when it allowed the jury to determine his PFO status prior to sentencing him on the underlying offenses. Appellant is right but this procedural error did not prejudice him.

We set forth in Commonwealth v. Reneer[56] a suggested procedure for trial courts to follow in a combined PFO/Truth-in-Sentencing hearing:

> If the accused is also charged as a persistent felony offender, the penalty phase and a persistent felony offender phase can be combined because the same evidence that is pertinent toward fixing the penalty is also pertinent for consideration in the enhancement of sentence, and the jury in the combined bifurcated hearing could be instructed to (1) fix a penalty on the basic charge in the indictment; (2) determine then whether the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a persistent felony offender.[57]

Obviously, the trial court deviated from the suggested procedure; however, Appellant was not prejudiced by this error.[58] Accordingly, we hold that the error was harmless, and Appellant is not entitled to a new sentencing hearing as a result thereof.[59]

IV. CONCLUSION

We affirm Appellant's convictions for First-Degree Criminal Abuse, Third-Degree Criminal Mischief, and two counts of Second-Degree Escape. We also affirm the finding that he was a Second-Degree Persistent Felony Offender. We reverse and remand for retrial his convictions for the two (2) counts of First-Degree Assault.

Cooper, Graves, Johnstone, Keller and Stumbo, JJ., concur. Lambert, C.J. and Wintersheimer, J., dissent without separate opinion.

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[56] Ky., 734 S.W.2d 794 (1987).

[57] Id. at 798.

[58] Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 721 (1991) ("It is as likely that the failure of the jury to set a sentence on the underlying offense had a mitigating effect, as that it had a punitive effect.").

[59] Id.; RCr 9.24.

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