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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: FEBRUARY 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0641-MR

DATE 03-16-2006 Ella Grauth D.C.

MICHAEL ALLEN TANNER APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN GRISE, JUDGE
2002-CR-0588

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING AND VACATING IN PART

This appeal is from a judgment based on a jury verdict that convicted Tanner of first-degree rape, first-degree sodomy, first-degree burglary, first-degree robbery, theft by unlawful taking and being a second-degree persistent felony offender. He was sentenced to life in prison.

Tanner presents the following two questions for review: 1) whether he was twice placed in jeopardy for the same offense when he was convicted and sentenced for first-degree robbery and theft; and 2) whether the prosecutor impermissibly defined reasonable doubt.

The victim testified that someone crashed through her door one evening, forcibly subdued her and covered her head. She was then beaten, raped, sodomized and robbed. The victim heard two different voices, but was unable to identify the individuals because the one who had first subdued her had covered his face as well as her own.

She was able to confirm that the burglars had taken a .22 caliber rifle, a shotgun, a $20-bill and a collection of commemorative state quarters.

Tanner and Phelps were eventually arrested for the crimes. As it turns out, both individuals had previously done some yard work at the home of the victim. Phelps testified against Tanner at his trial. According to him, Tanner was the one who suggested burglarizing the home of the victim. Phelps admitted that he kicked in the door and forcibly subdued the victim. He also stated that both he and Tanner kicked the woman in the side. Phelps denied committing any of the sexual assaults. He did indicate that he carried out of the house the stolen items collected by Tanner.

The jury convicted Tanner of rape, sodomy, burglary and robbery, all in the first degree, as well as theft by unlawful taking and being a second-degree persistent felony offender. He was sentenced to an enhanced term of life in prison on all of the charges except the theft, for which he received an enhanced term of ten years in prison. This appeal followed.

I. Double Jeopardy.

Tanner argues that he was twice placed in jeopardy for the same offense when he was convicted and sentenced for first-degree robbery and theft. He admits that this issue was not properly preserved, but seeks review pursuant to RCr 10.26. The Commonwealth concedes error.

Although this argument is not preserved, this Court continues to adhere to the rule that double jeopardy questions may be reviewed on appeal despite the failure to preserve the issue in the trial court. Beaty v. Commonwealth, 125 S.W.3d 196 (Ky. 2003); Baker v. Commonwealth, 922 S.W.2d 371, 374 (Ky. 1996); Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977).

The test in Kentucky for determining whether multiple prosecutions are impermissible for the same course of conduct parallels the federal rule announced in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). See Beaty, 125 S.W.3d at 210; Commonwealth v. Burge, 947 S.W.2d 805 (Ky. 1996). In Blockburger, the Supreme Court determined that:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger, 284 U.S. at 304, 52 S.Ct. at 182. This test was expressly adopted in Burge, and was codified in KRS 505.020.

On the morning of trial, the theft count was amended to eliminate the language "valued over $300." The reason being, two of the alleged items stolen were a shotgun and a rifle and the stealing of a firearm is a class D felony regardless of its value. Both the instruction on first-degree robbery and theft by unlawful taking were premised on Tanner stealing firearms, cash and coins, although the latter charge specified the firearms were a shotgun and a rifle.

Under the facts presented here, because all of the elements of theft as set forth in KRS 514.030 are incorporated into the robbery statute (KRS Chapter 515), Tanner was impermissibly subjected to double jeopardy. United States Constitution Amendment V; Kentucky Constitution, Section 13; Jordan v. Commonwealth, 703 S.W.2d 870 (Ky. 1985); McKee v. Commonwealth, 720 S.W.2d 343 (Ky.App. 1986); KRS 515.020 commentary (1974). Consequently, we must reverse and vacate that part of the judgment that convicted Tanner of theft by unlawful taking and sentenced him to an enhanced term of ten years in prison.

II. Defining Reasonable Doubt

Tanner contends that his conviction should be reversed because the prosecutor allegedly sought to define reasonable doubt during voir dire. He concedes that this issue is not preserved, but asks this Court to review it under our palpable error rule. RCr 10.26 and KRE 103(e).

The comments by the prosecutor were to the effect that "beyond a shadow of a doubt" is not the same as "beyond a reasonable doubt." Notably, he stated that neither he, nor defense counsel, nor the trial judge could define reasonable doubt because such a definition was up to the jury to determine. The prosecutor here made virtually the same statements in Johnson v. Commonwealth, ___ S.W.3d ___ (Ky. 2005), and we determined that at worst, the error was harmless in that case. Accordingly, there can be no palpable error here.

The judgment of conviction is affirmed, except that part which convicts Tanner of theft by unlawful taking and sentences him to an enhanced term of ten years in prison is reversed and vacated.

All concur.

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