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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 15, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 7-6-06 ELM GREENUP, DC.

2004-SC-0112-MR

DAVID BASHAM — APPELLANT

V.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
01-CR-72

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Greenup Circuit Court jury convicted Appellant, David Basham, of kidnapping, a Class B felony, KRS 509.040(2), for which he was sentenced to twenty years in prison. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting three claims of error: (1) the instructions to the jury failed to define the word "restrain;" (2) the prosecutor improperly questioned Appellant about a prior arrest while cross-examining him during the penalty phase of the trial; and (3) the record on appeal does not reflect that the court advised him or his counsel of the contents of the presentence investigation ("PSI") report or afforded them an opportunity to controvert its contents. Finding no error, we affirm.

On the morning of May 3, 2001, Appellant drove his truck to a lumberyard to meet his seventeen-year-old former stepson, P.A. They left the yard together in Appellant's vehicle and drove to a remote area. After stopping the vehicle, Appellant

asked P.A. to help him murder Appellant's former girlfriend who had recently terminated their relationship. When P.A. refused, Appellant produced a handgun, told P.A. to get out of the truck, and threatened to shoot him if he ran away. Appellant then bound P.A.'s hands and feet with wire ties and tied him to a tree. According to P.A., Appellant then orally sodomized him and ordered him to reciprocate. When P.A. refused, Appellant untied him from the tree, threw him to the ground, and anally sodomized him. At this point, P.A.'s hands and feet were still tied with wire ties. P.A. ultimately managed to release his feet from the ties and ran away with his arms still bound behind his back. He stated that Appellant shot at him once or twice as he ran and said, "If you don't come back, I'll kill you."

Appellant left the scene and later telephoned emergency services ("911"). He was connected to authorities in Ohio. He was crying uncontrollably on the telephone and stated that he had done something terrible in Greenup County and that he wanted to kill his girlfriend. Ohio state police troopers B. J. Hobson and R. J. Greenwood were on duty at that time, and Greenwood began speaking with Appellant. He asked Appellant not to kill his girlfriend and told Appellant that he would come out and talk to him if he would go to another location. After they were disconnected, the dispatcher was able to trace the call and determine Appellant's cellular telephone number. Greenwood telephoned Appellant to get his location, and Hobson and Greenwood soon apprehended Appellant in a field in Ohio.

Appellant was indicted on May 24, 2001, by a Greenup County grand jury for kidnapping, sodomy in the first degree, and criminal attempt to commit murder. He was convicted of the kidnapping of P.A. but acquitted of the sodomy and attempted murder charges.

I. JURY INSTRUCTIONS.

Appellant first asserts his conviction must be reversed because the jury instruction on kidnapping did not include the legal definition of the word "restrain." He concedes the issue was not preserved for appeal under the requirements of RCr 9.54(2) and requests review for palpable error. A palpable error must affect a defendant's substantial rights and result in manifest injustice. RCr 10.26. "A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, and the error must have resulted in 'manifest injustice.'" Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005) (citation omitted).

The kidnapping instruction provided:

> You will find the Defendant guilty of Count I of the Indictment of the offense of Kidnapping 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 on or about May 3, 2001, and before the finding of the Indictment herein, he restrained P.A. by binding his hands and feet;
>
> B. That the restraint was without P.A.'s consent;
>
> AND
>
> C. Than in so restraining P.A., it was the Defendant's intention to accomplish or advance the commission of the felony crime of Sodomy or Murder or to inflict bodily injury or to terrorize P.A. or another person.

The instructions did not include the legal definition of "restrain," which is defined, inter alia, as follows:

> "Restrain" means to restrict another person's movements in such a manner as to cause a substantial interference with his liberty by moving him from one place to another or by confining him either in the place where the restriction commences or in a place to which he has been moved without consent. A person is moved or confined "without consent" when the movement or confinement is accomplished by physical force, intimidation, or deception . . . .

KRS 509.010(2)

In a criminal case, it is the duty of the trial court "to prepare and give instructions on the whole law of the case." RCr 9.54(1); Holland v. Commonwealth, 114 S.W.3d 792, 802 (Ky. 2003); Lawson v. Commonwealth, 309 Ky. 458, 218 S.W.2d 41, 42 (1949). The trial court must include, "when necessary or proper, definitions of technical terms used." Lawson, 218 S.W.2d at 42; see also Caretenders, Inc. v. Commonwealth, 821 S.W.2d 83, 87 (Ky. 1991); Herring v. Lunderman, 302 Ky. 271, 194 S.W.2d 506, 508 (1946). However, the failure to define terms commonly understood by the average juror is not reversible error. Caretenders, 821 S.W.2d at 87; Lawson, 218 S.W.2d at 42; Commonwealth v. Hager, 35 S.W.3d 377, 379 (Ky. App. 2000); Raines v. Commonwealth, 731 S.W.2d 3, 5 (Ky. App. 1987).

Since the General Assembly has provided a legal definition of the term "restrain" in the penal code chapter pertaining to kidnapping and related offenses, the definition should have been included in the instructions as a part of the whole law of the case. Commonwealth v. Hager, 41 S.W.3d 828, 833-35 (Ky. 2001). However, the meaning of the term "restrain" is not beyond the comprehension of the average juror, and the jury expressed no confusion about the term. See Caretenders, 821 S.W.2d at 87; Hager, 35 S.W.3d at 379. Furthermore, there was ample evidence at trial that the victim was actually restrained with wire ties and tied to a tree. During closing argument Appellant's counsel conceded that Appellant restrained P.A. when he asked the jury to convict Appellant of second-degree unlawful imprisonment instead of kidnapping, viz:

> But, when you turn to Instruction Number 4, you know, there's really not a reasonable doubt about that. There's no question that in this county, on or about May 3, 2001, and before the finding of this indictment herein, my client restrained [P.A.] by binding his hands and feet and the he did so knowingly without [P.A.]'s consent. Certainly, you would be warranted finding that that happened.

Thus, the failure to define the word "restrain" in the jury instructions did not affect a substantial right of Appellant or result in manifest injustice. RCr 10.26. In fact, even if the error had been preserved, we would have deemed it harmless. RCr 9.24.

II. ALLEGED PROSECUTORIAL MISCONDUCT.

Appellant claims that the prosecutor improperly cross-examined him during the penalty phase of the trial about a prior arrest that did not result in a conviction, in violation of KRS 532.055. Again, he concedes the error is unpreserved and requests review for palpable error.

Kentucky's "truth-in-sentencing" statute, KRS 532.055, was enacted for the purpose of providing the jury with information about prior felony and misdemeanor convictions in order to aid it in arriving at the appropriate sentence. Williams v. Commonwealth, 810 S.W.2d 511, 513 (Ky. 1991). The statute provides in pertinent part:

> (2) Upon return of a verdict of guilty . . . the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. . . .
>
> (a) Evidence may be offered by the Commonwealth relevant to sentencing including:
>
> 1. Minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor;
>
> 2. The nature of prior offenses for which he was convicted . . . .

(Emphasis added.) Evidence of an alleged incident that resulted in dismissed charges is not admissible under the statute. Cook v. Commonwealth, 129 S.W.3d 351, 365 (Ky. 2004); Robinson v. Commonwealth, 926 S.W.2d 853, 854 (Ky. 1996).

During the sentencing phase of the trial, Appellant testified that, other than possibly a traffic ticket, he had "[n]ever been convicted of any crime that would

constitute a misdemeanor or a felony other than what the jury found [him] guilty of here today." On cross-examination the prosecutor questioned Appellant extensively about a possible prior conviction.

Prosecutor:	Well, how about the time that you were charged with, was it Wanton Endangerment, involving [P.A.'s] mother?
Appellant:	That was dismissed.
Prosecutor:	It was?
Appellant:	Yes.
Prosecutor:	Did you serve forty-five days in jail for that?
Appellant:	The charges was dismissed, but there was like a tail of like seven days, you know, extension onto it. But I mean, the charges was dismissed. I don't know how they done that.
Prosecutor:	Did you have a trial?
Appellant:	No.
Prosecutor:	What were you charged with, running her off the road?
Appellant:	That's what the allegations was.
Prosecutor:	Out on the interstate, wasn't it?
Appellant:	It was Paris Pike.
Prosecutor:	In Lexington?
. . . .	
Appellant:	Yes.
Prosecutor:	I want to ask you, have you ever been convicted of any other offense? You're under oath.
Appellant:	Actually convicted?
Prosecutor:	Yes.
Appellant:	No.

Prosecutor:	Did you plea[d] guilty to any other offense?
Appellant:	No.
Prosecutor:	Ok. That's the same as being convicted. If a jury convicts you or you plea[d] guilty, then the Judge enters a Judgment.
Appellant:	Yeah.
Prosecutor:	So, there's no other criminal offense that you have been convicted of?
Appellant:	No.

(Emphasis added.)

This questioning would have been improper if, as Appellant claimed, the wanton endangerment charge had been dismissed. However, the clerk's record contains Appellant's "rap sheet" which reflects an indictment on October 23, 1996 in Bourbon County, No. 96-F-00135, for two counts of wanton endangerment in the first degree resulting in two convictions of amended charges of wanton endangerment in the second degree. The record also reflects "40 dys, jail, 40 dys susp, 80 days total on 2 charges 73 probated for 2 yrs. Serve 7 days to have no other offenses. Jail time can be served in Ohio." (Emphasis added.) We assume the quoted entry reflects a plea agreement, indicating that the convictions were pursuant to a guilty plea. A guilty plea is a "conviction" for purposes of KRS 532.055(2)(a). Cook, 129 S.W.3d at 364-65. Despite Appellant's mistaken belief that the incident occurred in Lexington, not Bourbon County (Paris Pike runs from Lexington to Paris, the county seat of Bourbon County), these convictions obviously pertain to the same incident discussed by Appellant and the prosecutor during the prosecutor's cross-examination. Apparently, the prosecutor was not in possession of an admissible copy of the judgment of convictions and was

attempting (unsuccessfully) to elicit an admission from Appellant that he had, in fact, been previously convicted of a criminal offense. We find no prosecutorial misconduct in this fact-based inquiry, much less palpable error.

III. PSI REPORT.

Appellant requests that his sentence be reversed and his case remanded to the Greenup Circuit Court for resentencing because the record does not reflect that the trial court complied with KRS 532.050, which provides inter alia:

> (1) No court shall impose sentence for conviction of a felony, other than a capital offense, without first ordering a presentence investigation after conviction and giving due consideration to a written report of the investigation. The presentence investigation report shall not be waived . . . .
>
> . . . .
>
> (6) Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. The court shall provide the defendant's counsel a copy of the presentence investigation report.

Appellant suggests (but does not specifically assert) that the trial court sentenced him without allowing him or his counsel to review and controvert the contents of his PSI report. His sole support for this claim is the fact that the trial judge did not check one of the blanks on the pre-printed part of the final judgment that provides "Defendant [ ] agreed with the factual contents of the PSI **OR** [ ] was granted a hearing to controvert factual contents of the PSI," and the fact that the transcript of the sentencing hearing contains no reference to the PSI report.

Compliance with KRS 532.050(6) is a mandatory prerequisite before a final judgment may be entered. Brown v. Commonwealth, 639 S.W.2d 758, 761 (Ky. 1982); Eversole v. Commonwealth, 575 S.W.2d 457, 461 (Ky. 1978). Should the trial court fail

to comply with the statute, the proper remedy is to remand the case for a new sentencing phase in compliance with the statute. Arnold v. Commonwealth, 573 S.W.2d 344, 346 (Ky. 1978). The Commonwealth contends that since the error is unpreserved, Appellant must show palpable error. However, a failure of the trial court to comply with KRS 532.050 per se requires remand for re-sentencing. Id. (holding that compliance with KRS 532.050 is "absolutely necessary"); Brown, 639 S.W.2d at 761; Eversole, 575 S.W.2d at 461.

Nevertheless, the record does not prove that the trial court sentenced Appellant without allowing him to review and controvert the PSI report if he so desired. The trial transcript reflects that after receiving the sentencing verdict from the jury, the trial court stated:

> I will order that Probation and Parole prepare a pre-sentence investigation report. We will now set sentencing on March the 20th. I will order that the Defendant be remanded to custody in the Greenup County Jail pending final sentencing.

The transcript of the proceedings on March 20, 2003, reflects that Appellant's retained counsel was unable to appear and that stand-in counsel appeared with Appellant and requested a continuance to which the Commonwealth agreed. The transcript then reflects the following:

> JUDGE: Okay. Let's have the Bailiff approach. Give that to Mr. Basham. Send a copy to his attorney.

The transcript does not reflect what "that" was; but it was obviously a document if a "copy" could be sent to Appellant's attorney. It could have been a copy of the order rescheduling the sentencing hearing for March 27, 2003 (though it does not appear that the trial court handed the defendant a copy of the order originally scheduling the

sentencing hearing for March 20, 2003); or it could have been Appellant's PSI report (or both).

Final sentencing was actually held on April 3, 2003. Appellant is correct that no mention is made at that hearing of the PSI report. Of course, there would have been no need to mention it if Appellant and his counsel had already received and reviewed it and did not wish to controvert it. The hearing was not entirely perfunctory. The Commonwealth presented some victim-impact testimony before final sentencing. The trial court inquired: "Is there any legal reason that sentencing should not be imposed at this time?" Defense counsel responded: "No, Your Honor, and he is not eligible for probation. So, we don't have anything that we wish to say at this time." Counsel never claimed that he had not received and reviewed a copy of the PSI report.

Appellant asserts that the Commonwealth's claim that the document given to him and ordered to be sent to his attorney on March 20, 2003, was the PSI report is mere speculation. However, Appellant knows what the trial court handed to him and has not seen fit to tell us. Though we would have preferred that some specific reference to this PSI report had been made at one of the hearings, we will not presume that Appellant and his counsel were <u>not</u> allowed to review and controvert the PSI report from the trial court's mere failure to check a box on a four-page printed form, especially where Appellant has not specifically claimed that neither he nor his attorney ever received the PSI report and there is good reason to believe that they did.

Accordingly, the judgment of conviction and the sentence imposed by the Greenup Circuit Court are affirmed.

All concur.

COUNSEL FOR APPELLANT:

Donna L. Boyce
Appellate Branch Manager
Department of Public Advocacy
Suite 302
100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General
State Capitol
Frankfort, KY 40601

Jeffrey A. Cross
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601