IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: JUNE 15, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-000886-MR

CHRISTOPHER NUCKOLS — APPELLANT

V.

APPEAL FROM BARREN CIRCUIT COURT
HON. PHILLIP R. PATTON, JUDGE
NO. 03-CR-000482

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

Appellant, Christopher Nuckols, was convicted in the Barren Circuit Court for first-degree rape, first-degree sexual abuse, first-degree burglary, first-degree kidnapping, attempted first-degree sodomy, fourth-degree assault, third-degree terroristic threatening, and theft by unlawful taking under $300. After a jury trial, Appellant was sentenced to twenty years in prison for the rape and to varying terms of imprisonment on the remaining charges, all to run concurrently. He now asks that we reverse his convictions on three of the underlying charges—first-degree kidnapping, fourth-degree assault, and third-degree terroristic threatening—but does not challenge any of the remaining convictions or ask that we grant him a new trial. Specifically, he claims that his conviction for kidnapping should have been dismissed pursuant to KRS 509.050, the kidnapping exemption statute, and that his convictions for assault and terroristic threatening should have been dismissed because they amount to double

jeopardy as prohibited in both the United States and Kentucky Constitutions and by KRS 505.020.

I. Background

The underlying facts in this case are largely undisputed by the parties. On September 6, 2003, the victim returned home from work between 10:00 and 10:30 p.m. She was 6 ½ months pregnant. After a short visit from friends, the woman heard someone enter her home and shortly thereafter was confronted by a large African-American man with a stocking covering his face, later identified as Appellant. He appeared to be carrying a small paddle in the back of his shorts.

Immediately, Appellant grabbed the victim's cell phone and shut and locked the door to her home. He threatened the woman, grabbed her breast, and instructed her to perform oral sex on him. When she refused, Appellant threw her over the side of a recliner, pulled her pants off, ripping her underwear, and attempted to have anal intercourse with her. At some point, Appellant struck the victim in the face. Next, Appellant threw the victim to the floor and, after repeated failed attempts at anal intercourse, forced her to engage in vaginal intercourse. After ejaculating, Appellant left the victim's home. During the course of the attack, Appellant repeatedly told the victim to "shut up," threatened to harm her baby, and referred to her by name. The victim testified that she recognized Appellant as a neighbor, but did not know his name. She stated that she remembered having spoken with him briefly on the day she moved into her house.

After waiting a short time, the victim, whose cell phone had been stolen by Appellant, left her home and went to a local convenience store to call the police. A Glasgow police dispatcher received her telephone call early in the morning of

September 7, 2003. The dispatcher testified at trial that the victim was distraught and claimed to have been raped. Officers responded to the call, and the woman gave a description of her assailant before being taken to a local emergency room for examination and treatment of minor injuries. While at the hospital, the victim was questioned by officers and identified Appellant in a photo lineup. At least one officer also went to the victim's residence, the site of the incident, where he observed signs of a struggle and a plastic lawn chair placed under one of the windows of the victim's house.

After Appellant was identified, officers went to his house, which was located just down the street from that of the victim. Appellant was apprehended at the rear of the residence and officers obtained consent from his mother to search the home. During the search, police found: a fan blade that had been removed from a ceiling fan, used condoms, and wadded panty hose. Officers also observed two plastic lawn chairs, which were similar to the one found under the window at the victim's residence. Appellant and his mother were transported to the police station for questioning. Appellant initially denied any involvement with the attack. As the questioning progressed, Appellant made admissions indicating his involvement in the attack. Appellant then confessed to police that he had taken the victim's cell phone and had thrown it out in a park after the assault. Later that night, Appellant led police to the phone.

Because he was 17 at the time of the incident, Appellant was initially charged in juvenile court. Shortly thereafter, the Commonwealth moved to transfer the case to circuit court and to proceed against Appellant as a youthful offender in accordance with KRS 640.010. The district court granted that motion on September 25, 2003. Trial

began on July 1, 2004 and lasted just two days. After trial, but before sentencing, Appellant filed a pro se motion asking for post-trial DNA testing. The court granted the motion. Testing was completed prior to final sentencing and showed that DNA samples from bodily fluids recovered from the victim's body matched samples provided by Appellant. The report concluded that "[t]he estimated frequency of this profile is one person in six quadrillion based on the United States African American or Caucasian populations." On September 27, 2004, Appellant was sentenced to twenty years in prison as recommended by the jury. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

As noted above, Appellant claims that his convictions for first-degree kidnapping, third-degree terroristic threatening, and fourth-degree assault were improper. He argues that he should not have been prosecuted for kidnapping pursuant to the kidnapping exemption statute, KRS 509.050. He also argues that the remaining two convictions were improper because they subjected him to double jeopardy as prohibited by the Federal and Kentucky Constitutions and by KRS 505.020. At the outset, we must address the Commonwealth's contention that the errors asserted by Appellant were not preserved at trial.

Appellant's first claim of error—that prosecution for kidnapping was precluded by the exemption statute—was preserved by his timely motion for a directed verdict. That motion was offered at the close of the Commonwealth's proof on the afternoon of July 1, 2004, and was renewed after his own evidence was submitted on the morning of July 2, 2004. In his initial directed verdict motion, Appellant specifically objected to the kidnapping charge, stating that he did not believe there was any proof of conduct in

excess of what is ordinary to commit the other charged offenses. This claim was consistent with the presentation of the kidnapping charge in the original indictment and tracked the language of the kidnapping exemption statute. The Commonwealth and trial court responded to Appellant's contention, stating that the kidnapping charge in the indictment had been amended to read, "The Grand Jury charges that on or about September 6 or 7, 2003, in Barren County, Kentucky, the defendant committed the crime of KIDNAPPING when he unlawfully restrained [the victim] with intent to accomplish or advance the commission of a felony." It must be noted, however, that the motion to amend, as well as the order amending the indictment were not filed in the record until July 2, 2004, the second day of trial. Furthermore, it is apparent from the record that when Appellant's counsel moved for a directed verdict on July 1, 2004, he was unaware that the indictment had been amended.

In addition, while reviewing the proposed jury instructions in the judge's chambers, Appellant's counsel specifically objected to the instruction on the kidnapping charge, arguing that there was insufficient evidence to allow conviction. Although Appellant's counsel never explicitly raised the applicability of the kidnapping exemption statute, he had alluded to it in his initial directed verdict motion, arguing that there had not been any proof of conduct in excess of that normally necessary to complete the charged offenses. Given these circumstances—Appellant's apparent lack of notice regarding the amendment of the indictment, his timely motions for directed verdict, and his consistent objections to the kidnapping charge—we believe Appellant did enough to preserve the issue for our review.

Appellant acknowledges that he did not specifically preserve his double jeopardy claims. However, we have typically allowed review of such claims even if not properly

preserved for review. See Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977). Although we questioned the wisdom of this approach in a later case, we nevertheless continued to follow the rule set forth in Sherley. See Baker v. Commonwealth, 922 S.W.2d 371, 374 (Ky. 1996). As such, we will review Appellant's double jeopardy claims despite the fact that they are unpreserved.

A. Applicability of the Kidnapping Exemption Statute

The first issue we must address is the applicability of the kidnapping exemption statute, KRS 509.050, which provides:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose. The exemption provided by this section is not applicable to a charge of kidnapping that arises from an interference with another's liberty that occurs incidental to the commission of a criminal escape.

As we stated in Gilbert v. Commonwealth, 637 S.W.2d 632 (Ky. 1982), "[t]he purpose of the statute is to prevent misuse of the kidnapping statute to secure greater punitive sanction for rape, robbery and other offenses which have as an essential or incidental element a restriction of another's liberty." Id. at 635.

We have held that the applicability of the kidnapping exemption statute is a question of law that is to be decided by the trial court. Calloway v. Commonwealth, 550 S.W.2d 501, 502-03 (Ky. 1977) ("[T]he application of KRS 509.050 is to be determined by the trial court and not by a jury in the absence of standards by which a jury could make such a determination."). In a recent case we set forth the requirements that must be met before the kidnapping exemption will apply:

> Application of the exemption is determined on a case-by-case basis. A three-part test must be satisfied before the exemption is applicable. First, the criminal purpose must be the commission of an offense defined outside Chapter 509; second, the interference with the victim's liberty must occur immediately with and incidental to the commission of the underlying offense; and finally, the interference with the victim's liberty must not exceed that which is normally incidental to the commission of the underlying offense.

Murphy v. Commonwealth, 50 S.W.3d 173, 180 (Ky. 2001) (internal citations omitted).

The Commonwealth concedes that the first two prongs of the three-part test—namely, that the purpose of the kidnapping was the commission of a crime defined outside Chapter 509 and that the interference with the victim's liberty must occur immediately with and incidental to the commission of the underlying offense—were satisfied in this case. As to the third prong, however, the Commonwealth argues that Appellant's actions interfered with the victim's liberty to a greater extent than would normally be associated with crimes of this type. The factual basis of this claim was the undisputed testimony that upon entering the victim's home, Appellant seized her cell phone and then shut and locked the door. Appellant contends that the kidnapping exemption statute would be meaningless if it can be avoided by proof of such peripheral facts. We agree.

The proof at trial was uncontroverted that Appellant assaulted the victim immediately after entering her home and securing the door. Likewise, the proof demonstrated that Appellant departed immediately after completing the attack. There was no proof that Appellant restrained the victim in any way either before or after the attack. This is precisely the sort of case in which the kidnapping exemption statute is designed to apply. In Timmons v. Commonwealth, 555 S.W.2d 234 (Ky. 1977), we discussed KRS 509.050, noting:

> In retrospect, we think it might have been well for the drafters simply to omit the "unless" clause, because it is hard to see how a restraint could be "immediately with and incidental to" the commission of another offense and at the same time exceed "that which is ordinarily incident" to the commission of such other offense. The consensus view of the court is to resolve the ambiguity in favor of the "immediately with and incidental to" phraseology, which means that the statute will be construed strictly and restrictively unless and until it be amended to the contrary. Therefore, if the victim of a crime is going to be restrained of his liberty in order to facilitate its commission, the restraint will have to be close in distance and brief in time in order for the exemption to apply. If the victim is restrained and transported any substantial distance to or from the place at which the crime is committed or to be committed, the offender will be guilty of an unlawful imprisonment offense as well.

Id. at 240-41. In this case there can be no question that the restraint on the victim's liberty was "immediately with and incidental to" the commission of the underlying crimes. Likewise there was no evidence, apart from Appellant locking the door, which might indicate restraint which "exceed[ed] that which is ordinarily incident to commission" of such an offense. As we wrote in Timmons, it is difficult to imagine a factual scenario in which the "unless" clause would operate to prevent application of the exemption statute. Suffice to say, this is not such a case. In light of the foregoing, the trial court erred in allowing Appellant's conviction for kidnapping in the first degree and that conviction is reversed.

B. Double Jeopardy

Next, we must determine whether Appellant's convictions for third-degree terroristic threatening and fourth-degree assault should be reversed as violations of statutory and constitutional protections against double jeopardy. Both the Federal Constitution, via the Fifth and Fourteenth Amendments, and the Kentucky Constitution, in Section Thirteen, prohibit multiple prosecutions for the same criminal offense. In addition to the constitutional protections, Kentucky has also enacted a statute, KRS

505.020, which outlines the principles to be applied in determining whether a single course of conduct will give rise to multiple criminal convictions.

In Commonwealth v. Burge, 947 S.W.2d 805 (Ky. 1997), we "declare[d] that double jeopardy issues arising out of multiple prosecutions henceforth will be analyzed in accordance with the principles set forth in Blockburger v. United States, supra, and KRS 505.020." Id. at 811. Specifically, we held that "[d]ouble 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.'" Id. at 809 (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)). As noted in Burge, KRS 505.020(1)(a) and (2)(a) codify the Blockburger test. 947 S.W.2d at 809.

Appellant contends that he may not be convicted of fourth-degree assault and third-degree terroristic threatening because the facts used to prove those charges were also used to prove the forcible compulsion element of his convictions for first-degree rape and first-degree sexual abuse. But this misconstrues the applicable test as set forth in Burge. In Matthews v. Commonwealth, 44 S.W.3d 361 (Ky. 2001), the Court applied the Blockburger test, as set forth in Burge, and concluded that a drunken driver who collided with and caused injury to another party could be convicted of both fourth-degree assault and first-degree wanton endangerment. The Court reasoned:

> These offenses each require proof of an element which the other does not. See Commonwealth v. Burge, Ky., 947 S.W.2d 805, 811 (1996). Assault in the fourth degree requires a finding of physical injury, whereas wanton endangerment does not. Wanton endangerment requires conduct which creates a substantial danger of death or serious physical injury to another, whereas fourth-degree assault does not. Thus, Appellant's argument is without merit.

Matthews, 44 S.W.3d at 365. Similarly, in McKinney v. Commonwealth, 60 S.W.3d 499 (Ky. 2001), the Court upheld convictions for second-degree arson, three counts of abuse of a corpse, and tampering with physical evidence for a defendant who had attempted to conceal evidence of a triple-murder by burning a building containing the bodies. Although the charges all stemmed from the single act of setting fire to the building, the Court held "[i]t is clear that each charge requires proof of at least one fact which the other two do not." Id. at 510.

Turning to the facts of this case, we must consider whether Appellant's convictions for assault and terroristic threatening are appropriate in light of his convictions for rape and sexual abuse. As in Matthews, we must consider whether "[t]hese offenses each require proof of an element which the other does not." 44 S.W.3d at 365. An individual is guilty of fourth-degree assault under KRS 508.030(1)(a) if "[h]e intentionally or wantonly causes physical injury to another person." In this case, the evidence showed that Appellant injured the victim by striking her in the face. An individual is guilty of third-degree terroristic threatening under KRS 508.080(1)(a) if "[h]e threatens to commit any crime likely to result in death or serious physical injury to another person or likely to result in substantial property damage to another person." In this case, the evidence showed that Appellant had threatened to kill the victim and her unborn child. First-degree rape requires proof that an individual "engages in sexual intercourse with another person by forcible compulsion," KRS 510.040(1)(a), and first-degree sexual abuse requires proof that an individual "subjects another person to sexual contact by forcible compulsion." KRS 510.110(1)(a). For the purposes of both statutes, the definition of "forcible compulsion" is set forth in KRS 510.010(2):

> "Forcible compulsion" means physical force or threat of physical force, express or implied, which places a person in fear of immediate death,

> physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition.

Applying the Blockburger test, it is clear that both first-degree rape and first-degree sexual abuse require proof of elements—proof of sexual intercourse and proof of sexual contact, respectively—that are not required for conviction of either fourth-degree assault or third-degree terroristic threatening. The question remains whether the fourth-degree assault and third-degree terroristic threatening charges contain an element that is different from the elements of the rape and sexual abuse charges.

Both first-degree rape and first-degree sexual abuse require proof of forcible compulsion which, as defined in KRS 510.010(2), need not include any proof of physical injury. Fourth-degree assault requires proof of "physical injury to another person." Because fourth-degree assault requires proof of physical injury, which is not a required element of either first-degree rape or first-degree sexual abuse, Appellant's contention that his conviction for fourth-degree assault and the two sex crimes amounted to a violation of double jeopardy principles is without merit.

Similarly, third-degree terroristic threatening requires proof of a threat "to commit any crime likely to result in death or serious physical injury to another person." On the other hand, forcible compulsion, the relevant element of first-degree rape and first-degree sexual assault, only requires a "threat of physical force, express or implied." The key distinction is in the nature and severity of the threatened behavior. The threat to commit a crime, the key element of third-degree terroristic threatening, is simply different than a threat of physical force as contemplated in the statutory definition of forcible compulsion Although, this is a somewhat more subtle distinction than the requirement of physical injury, it is nonetheless dispositive of the issue. While the facts

of a case might often give rise to charges under both statutes, one can imagine a scenario where a threat of physical force sufficient to establish forcible compulsion would be insufficiently specific to justify a conviction for third-degree terroristic threatening. Thus, Appellant's contention that his conviction for third-degree terroristic threatening was in violation of the prohibition against double jeopardy is also without merit.

III. Conclusion

Appellant has challenged convictions that were scheduled to run concurrently with more serious offenses. In these cases, we have acknowledged that our decision to reverse will not result in any change in the term of Appellant's sentence. Beaty v. Commonwealth, 125 S.W.3d 196, 214 (Ky. 2003). Nevertheless, we have noted that "[t]he separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 1673, 84 L.Ed.2d 740 (1985) (quoted with approval in Beaty).

As we have noted, Appellant has not appealed his convictions for first-degree rape, first-degree sexual abuse, first-degree burglary, attempted first-degree sodomy and theft by unlawful taking under $300. However, for the reasons set forth above, Appellant's conviction for first-degree kidnapping is reversed and the judgment of the court as to that charge is vacated. Appellant's convictions for fourth-degree assault and third-degree terroristic threatening are affirmed.

Lambert, C.J.; Johnstone, Roach and Scott, JJ., concur. Wintersheimer, J., concurs in result only.

Cooper, J., dissents in part and would also vacate the conviction of terroristic threatening because it merged into the forcible compulsion element of the offense of rape in the first degree.

Graves, J., dissents and would not reverse Appellant's kidnapping conviction.

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