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**NOT TO BE PUBLISHED OPINION**

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RENDERED: SEPTEMBER 18, 2008

NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2006-SC-000437-MR

DATE 10-9-08 Eric Gramm, P.C.  
APPELLANT

BRYCE BONNER

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH McDONALD-BURKMAN, JUDGE  
NO. 04-CR-001298

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING IN PART AND  
REVERSING AND REMANDING IN PART**

Bryce R. Bonner appeals as a matter of right<sup>1</sup> from a circuit court judgment convicting him of two counts of first-degree rape, two counts of first-degree robbery, two counts of kidnapping, two counts of first-degree burglary and two counts of unlawful imprisonment; and sentencing him to seventy years' imprisonment. These charges arose out of three separate incidents perpetrated within relatively close proximity in time and place against three different women and a child of one of these women. Bonner contends that the trial court committed reversible error in: 1) admitting evidence of his possession of various weapons, clothing, and badges used in bail bond enforcement work; 2) failing to order separate trials for the three incidents; and 3) instructing the jury on

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<sup>1</sup> Ky. Const. § 110 (2) (b).

kidnapping charges in violation of the kidnapping exemption statute, Kentucky Revised Statutes (KRS) 509.050.<sup>2</sup>

We conclude that the trial court committed no reversible error in its admission of weapons and bail bond enforcement items in Bonner's possession and in its refusal to order separate trials. But one of the two kidnapping convictions—both of which Bonner contends to be improper under KRS 509.050—must be reversed, although the other kidnapping conviction (as to victim M.D) is valid. We thus reverse the kidnapping conviction as to victim L.H with directions to dismiss this charge, affirm all other convictions reflected in the trial court's judgment, and remand the case to the trial court for re-sentencing.<sup>3</sup>

#### I. FACTS.

The grand jury returned an indictment against Bonner, charging him with several violent crimes allegedly committed in three separate incidents that occurred within several months of each other. Specifically, the indictment charged Bonner with 1) burglary, rape, robbery, and kidnapping of L.H. in May

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<sup>2</sup> KRS 509.050 provides that:

“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.”

<sup>3</sup> While we express no opinion concerning the proper sentence to be imposed by the trial court on re-sentencing, we note that the statutory maximum for the remaining convictions remains seventy years' imprisonment under KRS 532.110, despite the dismissal of one kidnapping charge.

2003, 2) rape, robbery, and kidnapping of M.D. in January 2004, and 3) one count of burglary and two counts of kidnapping in regard to M.H. and her minor child, H.H., in February 2004. Bonner was ultimately acquitted of kidnapping M.H. and H.H., but convicted of the lesser-included offense of unlawful imprisonment of M.H. and H.H.

Bonner repeatedly moved the trial court to conduct separate trials for each of the three separate incidents, but the trial court consistently denied these motions. In its last order denying severance, the trial court indicated that the three incidents were similar enough and close enough in time to justify a joint trial:

All three events involve a forced entry, followed by a robbery and/or rape and kidnapping; the same witnesses were involved in the investigation of each event; a weapon was displayed or threatened in each event; the method of rape was similar.

The passage of eight months between the first and second event, and one month between the second and third does not preclude joinder. Instead, the Court needs to focus on the character of the events.

As in any criminal case, the defense may feel prejudice. Is undue prejudice likely in this case if the events are not severed? As the Court finds these offense are of the same or similar character, the answer is no.

At trial, the trial court admitted into evidence several items including weapons and bail bond enforcement apparel and paraphernalia recovered by police in executing a search warrant on Bonner's car and residence over Bonner's objections. Bonner objected to the admission of this evidence, arguing that the probative value of such evidence was greatly outweighed by the potential for undue prejudice. A number of witnesses testified at trial about the facts of the

three incidents. These witnesses included the investigating law enforcement officers, the victims (except for the child), and Bonner himself.

A. First Incident—May 2003.

L.H. testified to having been planting flowers one morning in her yard when a man she did not know approached asking to use her phone. She fetched a cell phone from her house and let him try to use it. Apparently no one answered the call. L.H.'s husband soon returned home briefly and saw the man talking to his wife. L.H. said that the man was looking for a certain street, and her husband got a map out of his car but was unable to find that street on the map. The man left, and L.H.'s husband left home again.

While her husband was gone, the same man came up behind L.H., startling her and asking to use the phone again. Again, she brought a cell phone out of the house for him. He was again unable to reach the desired person, and he indicated that he must have the wrong number. She then allowed him inside the house to use her phone. While he was supposedly looking up a phone number, she looked around for her dog and found it in the living room. Meanwhile, the man had followed L.H. into the living room without her noticing. He placed one arm behind his back and the other on his chin, and asked her to show him her bedroom. She replied that she could not, and he told her she would have to. She then perceived that she was in danger, because the front door was dead-bolted and he stood between her and the side door. She started screaming.

The man then tackled her, forcing her to the floor, face-to-face with him on top of her. He then told her to get up, placing his hand over her mouth and bending her neck to the side. He then used his other hand on her arm to pull her up. She struggled with him, but let up on her resistance when he took her into the kitchen and started looking around. At trial, she speculated that he might have been looking for a knife.

After she nodded in the direction of her bedroom upstairs in response to his asking again about its location, he took her upstairs with one hand over her mouth and the other hand holding her hair on the back of her head. He put her on her bed face-down, and holding her down with his knees on her head and lower back area, cut her shirt and bra down the back with a knife. He then told her to put her hands behind her back, and he bound them with duct tape. After turning her over to face him, he then cut off her pants and underwear. He then turned her face-down again, and after a few seconds, started forcing his penis into her vagina from behind. L.H. stated that this assault did not last long, because the man was apparently finished relatively quickly after having to re-insert his penis a few times. During this sexual assault, the man stated he bet her husband did not do this to her, repeatedly asked her when was the last time she had sex, and speculated that she was enjoying their encounter.

The man then told L.H. "you know I cannot let you go," and L.H. feared for her life. In response to L.H. begging him not to kill her, he then asked her if there was any money in the house. She responded that she might have about \$100 in her purse in the kitchen. The man lifted her off the bed (L.H.'s hands were still

bound), and held her from behind as they went down the stairs, directing her not to get too far ahead. They went into the kitchen, where the man searched her purse until he found cash, a credit card, and an ATM card for which L.H. provided the PIN number as he demanded.

The man then announced that they had to return upstairs to the bedroom. L.H. begged him to leave. She later described him as “stone-faced” as he told her they had to go back upstairs. He took her back to the bedroom, and she saw on the bed a roll of duct tape, which she later thought he must have originally intended to use to tie her to the bed. She again begged him to leave, stating she would not go anywhere, offering to count to fifty. He responded “make it a hundred,” and he abruptly left, leaving her hands bound but not tying her up to the bed or otherwise restraining her.

After waiting a few minutes to make sure the man left, L.H. called 911. She was transported to a hospital for a rape examination. Medical personnel noted genital injuries typically associated with forceful sexual intercourse and wrist injuries. During the initial investigation, investigators found a used condom near L.H.’s house, and the semen in it was later identified as Bonner’s through DNA analysis.

Shortly after the attack, L.H.’s ATM card was successfully used once at a nearby bank. Video surveillance showed that the user put his hand over the camera before using the card. A customer using the ATM around the same time reported seeing an oddly parked Monte Carlo in the parking lot and seeing a man who walked up to the drive-thru ATM make the transaction. Someone attempted

to use the same card again later, but the machine took it because the card had been reported stolen.

L.H. described her attacker to police as a young, well-groomed African-American man, about six feet tall with a stocky, athletic build and odd-colored eyes. She identified Bonner as her attacker at trial. Apparently, she had been unable to identify with certainty her attacker from the various photo packs presented to her. But she testified that she had focused on a photo of a man that closely resembled her attacker. The photo turned out to be of Bonner. An investigating officer testified that L.H. positively identified Bonner from a photo pack, stating her doubts were silly and that she "knew in her heart it was him" before a warrant for his arrest was issued. Looking at the photo pack picture at trial, L.H. stated that it showed a man with brown eyes but she had described her attacker as having odd-colored eyes. Later, when shown an individual photo of Bonner with a different eye color (apparently from contact lenses), she was sure that was her attacker.

In a taped police confession, which was played at trial, Bonner admitted to having forcible intercourse with a woman he did not know in the May 2003 incident. At trial, he admitted having sex with L.H. in May 2003, but he stated that it was consensual with bondage at L.H.'s request. He claimed that they had been having an affair for several months at that point. He claimed that L.H. falsely accused him of rape after ending the relationship. He also called to the stand a witness who testified to seeing L.H. with Bonner at a movie theater, to which Bonner wore a "Bond Enforcement" T-shirt.



B. Second Incident—January 2004.

M.D. testified that after getting off work at a grocery store she picked up some groceries for her family and was loading the groceries in her car in the front parking lot around 7:30 p.m. when she saw an African-American man wearing dark gloves approach her. She tried to get in the car quickly and shut the door, but the man stuck his hand in the door and pointed a gun at her. He entered the car, threatened to kill her if she tried to run and ignored her offers to give him her car and her purse with credit cards if he would just let her live. He then instructed her to drive to a nearby ATM, directing her there and repeatedly telling her to slow down. She then withdrew \$400 with her ATM card and gave him the ATM card upon his demand.

The man then directed M.D. to make a number of different turns—so many turns that it took M.D. a few minutes just to describe all the various turns at trial. But despite the multiple turns, the man ultimately ordered her to stop the car behind the same grocery store they had left. He kept the gun at her side the whole time.

The man ordered M.D. to turn off the car as she continued to beg for her life, telling him she had children waiting for her. He asked about the children's ages and her marital status. After M.D. responded that she had remarried a short while ago after having the children several years before in an earlier marriage, he remarked that "you are one of those women." He then ordered her to join him in the backseat. As she was climbing over the seat, her head hit the

dome light, and she stared directly into his face when the light came on. He told her to turn off the light and not to look at his face.

The man then ordered M.D. to face away from him toward the side window. As she continued to plead for her life, he began asking her questions about her sexual relations with her husband such as about what particular positions her husband liked. While pointing the gun at her, he demanded that she remove her clothes—first her shirt and bra, then her pants and underwear. He then ordered her to put her whole body in the seat, with her legs bent underneath her and her head face-down as far down as it would go. She heard him unzip his pants and heard paper noises, which she believed to come from a condom being unwrapped. He directed her to move closer with her back end up higher and moved closer to her to make several attempts to penetrate her vagina from behind. After several attempts, he was able to do so. After three or four strokes, he spoke in an aggravated manner which M.D. believed was because he had ejaculated.

After M.D. heard the man pull his pants up, he told her to sit up and started asking why she did not say no. She replied because she wanted to live. After sitting in the back a short time, he then ordered her to get back in the front seat and made her put her hands on the steering wheel. He then used some plastic ties to bind her hands to the steering wheel. He told her to put her head down and he put the keys in her lap, and then a minute or so later he got out of the car and fled.

M.D. managed to get her hands free and to use her cell phone to call 911 while driving around the building. After covering herself with a jacket, she called out to some co-workers standing outside the grocery store. Law enforcement and EMS arrived, and she was taken to the hospital for a rape examination. The rape examination revealed no semen from the assailant; however, red marks had been left on her wrists from the ties.

At trial, M.D. identified Bonner as her attacker. However, like L.H., she had not been able to identify her attacker with certainty from a photo pack, although she remembered focusing on one photograph in particular as strongly resembling her attacker. She recalled telling police there was something very distinctive or odd about his eyes, and she recounted feeling relieved when she saw Bonner's picture on television following his arrest because she felt sure then they had arrested the right man.

Bonner later confessed to police that he had forced a woman to have sex behind the grocery store. He stated he done so at knifepoint and used a condom. However, at trial, he contended that his confession was involuntary and untrue and that he had been mistakenly identified as M.D.'s assailant.

#### C. Third Incident—February 2004.

M.H. testified that after walking her older children to school, she noticed a black Monte Carlo with dark-tinted windows passing her slowly a couple of times during her three-block walk home. After she returned home and her husband left a few minutes later, a man suddenly burst through her front door. The man flashed a badge which he wore clipped to his belt, pointed a silver gun at M.H.

and ordered her to get on the ground. After M.H. initially failed to follow his order, the man told her to “get on the ground or it is going to get worse”. She lay down on the ground face-up and he ordered her to roll over to lie face-down. He then handcuffed her arms behind her back as her youngest child came in the room. He told her to make the child go into another room. After M.H. unsuccessfully tried twice to have the child leave the room with assurances that she would be O.K., she told the man that the child was too scared to leave.

The man then demanded to see M.H.’s identification, which she said was in her car. He then said they would go in the car, and he removed her handcuffs and told her to take the child. L.H. offered the man money or her vehicle if he would leave her and the child alone, but he ignored these offers. They then went out in the driveway, where L.H. slowly buckled the child in a car seat, hoping neighbors would notice the situation. The man then ordered her to drive around. As she drove, he emptied out her purse and looked at her identification, checkbook, ATM card, and other items. He had her drive for about half an hour, taking various turns for no apparent reason. Ultimately, he had her stop very near to where they had started—on a road about two blocks from her house. After she parked the car, the man commanded that M.H. go to the third row of her vehicle and remove all her clothes, including shoes and socks. After M.H. unsuccessfully negotiated to leave on her sports bra, the man collected all of her clothes with the exception of a T-shirt she accidentally left in the back. He put her clothes in the front seat. M.H. continued to plead with the man to leave her alone.

A short while later, the man suddenly stated “when I am out of sight, you can leave” without further explanation. He exited the car, taking nothing with him. L.H. then put back on her T-shirt and drove to her driveway. She put on her pants and then went to a neighbor’s home to call for help. She described the man to police as African-American, about six feet tall, with a medium muscular build and either having blue eyes or wearing blue contacts. She indicated he had worn a black earband and black gloves along with blue jeans and a sweatshirt.

In his confession to police, Bonner admitted that he was the man who had entered a woman’s home in that area and forced her to drive around aimlessly and then remove her clothes. He stated that he was performing bond enforcement work and accidentally entered the home after being given the wrong address. He claimed that he had M.H. drive around to try to flush the person he was looking for out of the house. He also said that he made her remove her clothes to allow him to get away without her following him. At trial, Bonner contended his confession was untrue and involuntary and that M.H. had misidentified him, since he had been transporting his ex-wife to work and shopping at the time this incident occurred.

Several weeks after the last incident, the police arrested Bonner while he was stopped for a traffic offense in a black Monte Carlo. Two police departments had been working together to investigate these three possibly related incidents. Apparently, Bonner closely resembled the descriptions of the attacker given by all three victims. A search warrant was executed, and a number of items such as weapons and a black earband were found in his home and car. He was

wearing blue contact lenses at time of arrest and other blue contact lenses were found in his home.

## II. ANALYSIS.

### A. No Reversible Error in Admission of Weapons and "Bond Enforcement" Gear in Bonner's Possession.

Contrary to Bonner's arguments, we find no reversible error in the trial court's admission of weapons (with accessories and ammunition), items used in law enforcement (such as handcuffs and flex ties) and bail bond enforcement apparel and accessories (such as badges) found in Bonner's possession.<sup>4</sup>

Bonner contends that he was legitimately engaged in the bail bond enforcement business in another state. This business necessitated his possession of the weapons and other items. He argues that the admission of these items into evidence led to an unfair suggestion that he was involved in other criminal activity. We note that he does not argue that the trial court denied him the opportunity to explain his need for these items in his alleged line of work. He also generally states that the number of weapons and bond enforcement gear admitted into evidence amounted to "overkill".

We agree with the Commonwealth that Bonner only preserved the issue of admissibility of these items on general relevancy grounds. Although he argues in his brief that the items should have been excluded under Kentucky Rule of

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<sup>4</sup> Bonner states in his brief that many items found in his possession related to his work as a bond enforcement agent and lists these items as including clothing, "several black shirts depicting 'Bond Enforcement' as well as a badge sewn on the front", several metal badges, two guns, holsters, gun cases, ammunition and "numerous knives". He complains "many" of these items were irrelevant and that most of the possibly relevant items were unduly prejudicial.

Evidence (KRE) 404(b), which relates to prior bad acts, he fails to cite to the record to show where he argued that the items should be excluded as evidence of prior bad acts. So we will review the admission of these items on general relevancy grounds only, and we will not analyze whether they should have been excluded as evidence of prior bad acts.

Bonner's possession of most of these items was directly relevant<sup>5</sup> to proving his identity as the perpetrator of the three incidents. We note that all three victims reported that the perpetrator had a weapon in his possession during their ordeals. L.H. testified that her attacker used a knife to cut away her clothes; M.D. testified that her attacker pointed a gun at her; and M.H. testified that the intruder pointed a silver, automatic gun at her. Also, M.H. recalled the intruder flashing a badge and both M.H. and M.D. recalled that the perpetrator wore dark gloves. Also, M.H. remembered the perpetrator as wearing a black earband, and a black earband was one of the items found in Bonner's car. So it appears that most of these items were relevant to proving identity, which Bonner put in issue by claiming misidentification by M.D. and M.H. Because he appears to be complaining about the admission of a large number of items admitted into evidence, we recognize the possibility that some specific items may not have been specifically described in a victim's testimony. For instance, none of the victims specifically mentioned Bonner wearing clothing marked "Bond Enforcement," although a defense witness testified to seeing Bonner wearing a "Bond Enforcement" shirt while accompanying L.H. to the movies. But the

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<sup>5</sup> KRE 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

weapons and law or bail bond enforcement gear found were generally relevant in light of the victims' descriptions of the items used by the person accosting them.

Bonner fails to identify any undue prejudice from the admission of these items. While he speculates that the jury might have inferred illegal activity from his possession of these items, he does not claim that he was denied the opportunity to explain why he needed those items to engage in his bail bond enforcement business. Admittedly, the weapons and law enforcement gear (such as handcuffs and flex ties) would be most likely to have a prejudicial effect, however, we conclude that this prejudicial effect was clearly outweighed by their strong probative value considering the victims' description of such items being used in the crimes. Conversely, the clothing marked "bond enforcement" was of lesser probative value but we cannot discern that this had any substantial prejudicial effect<sup>6</sup> especially in light of all the other evidence. Because the evidence was relevant and we discern no undue prejudice,<sup>7</sup> we find no abuse of discretion in the trial court's admission of these items.

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<sup>6</sup> While it is illegal to engage in a private bail bond enforcement business in Kentucky, we are unaware of any authority making it illegal to wear clothing marked "bond enforcement". Furthermore, clothing (even if marked with silly or offensive material) would simply not generally appear to have the same prejudicial effect as inherently more dangerous items such as weapons or law enforcement gear (such as handcuffs or flex ties). As for any "bond enforcement" badges, such were clearly relevant because M.H. recalled the perpetrator flashing a badge at her when he burst into her home.

<sup>7</sup> KRE 403 states that otherwise-relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice" or for other reasons including "needless presentation of cumulative evidence." We note that Bonner argued undue prejudice at trial, but we have found no indication that he argued "needless presentation of cumulative evidence" to the trial court to prevent the alleged overkill.



In any event, even had there been any error in the admission of these items into evidence, such error was undoubtedly harmless<sup>8</sup> in light of the overwhelming evidence of guilt, which included the three adult victims' eyewitness testimony, DNA evidence concerning the rape of L.H., and Bonner's confessions. And Bonner has not attacked on appeal the voluntariness of his confessions.

B. No Error in Joint Trials.

We reject Bonner's contention that the trial court's refusal to order three separate trials was reversible error. We note that offenses stemming from the three separate incidents were charged in the same indictment, which is proper under Kentucky Rule of Criminal Procedure (RCr) 6.18 so long as the "offenses are of the same or similar character." Although Bonner does not specifically take issue with the joint indictment, we note that it does not appear improper in this case because of the striking similarities among the three incidents, which occurred within a year and all in eastern Jefferson County, Kentucky.

As mentioned previously, the trial court declined to order separate trials, noting that all three cases included forced entry and display of a weapon and were investigated by the same witnesses and that the two rape cases involved similar methods of rape. We discern no error in the trial court's denying

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<sup>8</sup> Kentucky Rule of Criminal Procedure (RCr) 9.24 (stating that no error in the admission of evidence is grounds for reversing a judgment unless "denial of such relief would be inconsistent with substantial justice" and that courts "must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties"); KRE 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected".).

severance, especially as the testimony given at trial shows even more striking similarities than those mentioned by the trial court in its pretrial order.

Even though none of the incidents was identical to any of the others, there were nonetheless striking factual similarities among the three incidents. As the trial court noted, the method of rape in the two rape cases was very similar (vaginal penetration from behind with both victims noting that the sexual assault was very brief and that the attacker asked questions about their marital sexual relations and with some indication of condom use in both incidents). All three incidents were stranger encounters with weapons displayed and forced entry, although in L.H.'s case, perhaps the initial entry into the home was authorized but he overstepped the terms of permission by leaving the kitchen to follow her into another room. Further, both M.D. and M.H. were asked to drive around seemingly aimlessly, taking several turns before ending up in almost the same place where they started. Also, the perpetrator initially tackled both L.H. and M.H. and went through the items in their purses. So each of the incidents bears some striking similarities to each of the other incidents. Evidence of each offense would likely be admissible in separate trials of other offenses as the striking similarities suggests that they were committed by the same perpetrator and thus would be relevant to proving lack of consent as to L.H. and identity of perpetrator of acts against M.D. and M.H.<sup>9</sup>, both of which were at issue.

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<sup>9</sup> See Clark v. Commonwealth, 223 S.W.3d 90, 96-97 (Ky. 2007) (explaining that prior bad acts may be admitted under KRE 404 under modus operandi exception where striking factual similarities make it very likely that the acts were committed by the same perpetrator or with the same mental state).

RCr 9.16 states that separate trials or other appropriate relief must be ordered if a party will be prejudiced by joinder of offenses in the indictment or trials. Bonner contends that he was improperly prejudiced by the joint trial, which he contends caused jury confusion. He also argues that the Commonwealth was allowed to reap the benefits of allegedly stronger evidence in one case (presumably DNA evidence as to assault on L.H.) to strengthen its case as to other incidents. However, we agree with the trial court that any prejudice was minimal. For instance, Bonner admits that counsel was given an opportunity to clarify with more questions when a juror's question concerning DNA evidence suggested that the juror had the two rape victims confused. Furthermore, defense counsel was free to draw attention to any weaknesses in the evidence as to any individual case (such as the lack of DNA evidence supporting the rape of M.D. and the fact that no condom was found in the M.D. rape investigation) in closing argument and all three cases were well supported by evidence. So we conclude that the trial court did not abuse its discretion in denying his request for three separate trials.<sup>10</sup>

C. Trial Court Erred in Not Applying Kidnapping Exemption to L.H. Events, but Properly Did Not Apply Exemption to M.D. Events.

Bonner contends that his convictions for kidnapping L.H. and M.D. must both be reversed because the kidnapping in each case was incidental to the rape

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<sup>10</sup> Rearick v. Commonwealth, 858 S.W.2d 185, 187 (Ky. 1993) (“a trial court has broad discretion with respect to joinder, and will not be overturned absent a showing of prejudice and clear abuse of discretion.”).

and robbery and, therefore, he should not have been charged with or convicted of these kidnapping offenses under KRS 509.050, which provides as follows:

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 incidental 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.

Applying this statute, we have employed a three-prong test to determine whether the kidnapping exemption applies: 1) is the underlying purpose of the perpetrator to commit an offense outside KRS Chapter 509 (kidnapping and unlawful imprisonment)? 2) did the interference with the victim's liberty occur immediately with or incidental to this underlying crime? and 3) did this interference with the victim's liberty exceed that which is ordinarily incidental to the offense's commission?<sup>11</sup>

We reject Bonner's contention that the kidnapping exemption should have been applied to preclude a conviction for kidnapping M.D. Bonner had forced his way into her car at gunpoint, made her drive to an ATM to withdraw money, and then had her drive around seemingly aimlessly, taking a number of turns before having her stop behind the same grocery store where he raped her and then left her tied to the steering wheel. Obviously, his criminal purpose included crimes outside KRS Chapter 509—notably, robbery and rape—and much of his interference with the M.D.'s liberty occurred immediately with or incidental to the

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<sup>11</sup> See e.g. Hatfield v. Commonwealth, 250 S.W.3d 590, 599-600 (Ky. 2008).

robbery and rape. But we do not accept his argument that the restraint on M.D. did not exceed that which was necessary to accomplish the robbery and rape. Even assuming for argument's sake that the initial carjacking was necessary to accomplish the robbery (although he could have simply demanded the ATM card and PIN number without forcing her to remain in the car), he forced her to remain in the car for a substantial time beyond the commission of the robbery and rape as he demanded that she drive around aimlessly, making many turns in between the robbery and rape. Furthermore, after the robbery and rape were complete, he imposed yet another interference with her liberty and restraint—tying her arms to the steering wheel, and according to M.D., stating that she would be there a long time.<sup>12</sup> Because he restrained and transported her at least several blocks before returning to the same place where the incident began and for a substantial period beyond the underlying robbery and rape offenses, we find no error in the trial court's instructing the jury on kidnapping charges as to M.D.<sup>13</sup> In essence, much

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<sup>12</sup> See Murphy v. Commonwealth, 50 S.W.3d 173, 180 (Ky. 2001) (kidnapping exemption held inapplicable where victim was left tied up following burglary and not set free until discovered by neighbors ten hours later). See also Miller v. Commonwealth, 925 S.W.2d 449, 454 (Ky. 1996) (kidnapping exemption held inapplicable where victim dragged from playground to defendant's apartment and tied to chair as these restraints not immediate with or incident to sexual abuse offense), *overruled on other grounds by* Garrett v. Commonwealth, 48 S.W.3d 6, 14 (Ky. 2001).

<sup>13</sup> Timmons v. Commonwealth, 555 S.W.2d 234, 241 (Ky. 1977). (in holding that kidnapping exemption did not apply where victim was transported to a distant location before murder occurred, stating "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.")

of the interference with M.D.'s liberty was not specifically directed toward accomplishing the robbery and rape.<sup>14</sup>

While we affirm the trial court on the conviction for kidnapping M.D., we must reverse the conviction for kidnapping L.H. Essentially, she was forced to go upstairs to her bedroom where the rape occurred, to go downstairs to the kitchen where the robbery was completed, and then to go back upstairs where Bonner abruptly decided to leave with her hands remaining tied during this whole ordeal. But unlike M.D., she was not left tied to another object or transported anywhere other than to other rooms in her home. The Commonwealth argues that it was not necessary to move her to various rooms in the house to accomplish the rape and robbery and that a kidnapping conviction is appropriate for Bonner "parading" L.H. through her home. However, we note that the initial transportation of L.H. to the bedroom was incidental to the rape. And the transportation down to the kitchen was incidental to accomplishing the robbery because that was where her money and credit and debit cards were located. Although she was again transported (with hands tied) back up to the bedroom after the robbery (which occurred after the rape), we note that she was not really

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<sup>14</sup> Hatfield, 250 S.W.3d at 600 (holding kidnapping exemption applicable as movement of victim from one part of parking lot to another occurred for the purpose of attempting to kill her: "The evidence indicates that Saylor was restrained incident to the attempt to take her life and as the assault was committed on her. Saylor was first attacked at the front of the church and was then dragged behind the church where the attack continued. While it is difficult from a moral perspective to quantify such behavior as being appropriate in terms of restraint and interference with liberty, the law demands that justice separate raw emotion from reason. The movement and restraint of Natisha Saylor occurred in order to attempt to take her life, and did not go beyond the scope of attempting to achieve that objective. Appellant satisfies prong three of the test and thus qualifies for the kidnapping exemption under KRS 509.050.") (emphasis omitted).

subjected to additional restraint during this time since her hands had been tied throughout her terrifying ordeal and that the trip up the stairs to the bedroom hardly seems like transportation over a substantial distance.<sup>15</sup> Although this course of conduct was clearly despicable and outside the bounds of human decency, we think it a stretch to say that it included kidnapping as well as rape, robbery and burglary. Thus, we must reverse Bonner's conviction for kidnapping L.H.

### III. CONCLUSION.

For the foregoing reasons, we reverse Bryce Bonner's conviction for kidnapping of L.H. with directions to dismiss this charge, affirm all other convictions entered by the trial court in this case, and remand for re-sentencing.

Minton, C.J.; Abramson, Cunningham, Schroder, and Venters, JJ., concur. Noble, J., dissents by separate opinion in which Scott, J., joins.

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<sup>15</sup> See Timmons, 555 S.W.2d at 241 (stating that the kidnapping exemption does not apply where victim is transported a substantial distance). See also 1974 Kentucky Crime Commission/LRC Commentary to KRS 509.050 (stating that "[t]he provision seeks to express a policy against the use of kidnapping to impose sanctions upon conduct which involves a movement or confinement (of another person) that has no criminological significance to the evil toward which kidnapping is directed" and explaining purpose of statute to avoid "misuse [of] the kidnapping statute to secure greater punitive sanctions for rape, robbery and other offenses than are otherwise available." )

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# Supreme Court of Kentucky

2006-SC-000437-MR

BRYCE BONNER

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE  
NO. 04-CR-001298

COMMONWEALTH OF KENTUCKY

APPELLEE

## OPINION BY JUSTICE NOBLE

### CONCURRING IN PART AND DISSENTING IN PART

Respectfully, I dissent in part. I concur with the majority opinion on all issues except as to whether the kidnapping exemption applies in the case of the victim, L.H. Because I believe that the trial court properly instructed on kidnapping as to that victim and that Appellant's conviction for the offense was proper, I would affirm that conviction.

The kidnapping exemption set forth in KRS 509.050 has as its fundamental purpose avoiding double jeopardy by prohibiting dual charges for kidnapping and an additional offense when the actions of the defendant form a continuous series of steps necessary for the commission of the other crime, that is, where the other crime has "as an essential element, or as an incidental element, a restriction on another's liberty." KRS 509.050 cmt. The gravamen of the exemption is whether there are actions of the defendant that go beyond being done immediately with and ordinarily incidental to committing the other offense. See KRS 509.050 cmt. ("The provision seeks to express a policy against the use of kidnapping to impose sanctions upon conduct which involves

a movement or confinement (of another person) that has no criminological significance to the evil toward which kidnapping is directed. It then provides a flexible standard by which courts are to enforce that policy. Before criminal behavior that is directed toward the completion of robbery, rape, or some other offense can constitute kidnapping, there must be an interference with liberty in excess of that which ordinarily accompanies that offense.”).

Under the facts of this case as established by the testimony of L.H., Appellant did unlawfully restrain her in order to accomplish the offenses of rape and robbery. He physically controlled her, forced her upstairs, bound her hands with duct tape, cut off her clothes and raped her. He then forced her downstairs and unlawfully took possession of her money and ATM card. At that point, the rape and robbery were complete. L.H. was still restrained and in fear for her life. Appellant could have left at that point without further unlawful restraint or interference with her liberty.

Instead, Appellant forced L.H. back upstairs to her bedroom, further interfering with her liberty, with the implied intent to murder her, having told her before they went downstairs to get the money, “You know I cannot let you go.” Her continued restraint and threatened murder cannot be considered “ordinarily incident” to committing either rape or robbery.

Admittedly, these events did occur relatively close in time to the commission of the rape and robbery. However, the language of the statute is clear that for the exemption to apply, the kidnapping must not only “occur immediately with” the other crimes, but must also be “ordinarily incident to the commission” of them. Appellant’s actions in further restraining and terrorizing L.H. and threatening to murder her after the rape and robbery were separate from those crimes, going far beyond that necessary to

commit them, and are sufficient to support a separate kidnapping charge standing alone. See Arnold v. Commonwealth, 192 S.W.3d 420, 426-27 (Ky. 2006) (upholding separate conviction for kidnapping for restraint occurring after the completion of an assault). As such, that charge is clearly outside the kidnapping exemption.

Scott, J., joins.