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RENDERED: AUGUST 25, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000836-MR

MARTIN PHILLIP JACKSON — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
NO. 07-CR-001666

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Martin Phillip Jackson, was convicted in Jefferson Circuit Court of kidnapping, second-degree assault, and fleeing and evading. He received a combined sentence of 52 years. He appeals his convictions and sentence, raising concerns of insufficiency of the evidence, his improper removal from the courtroom during the sentencing phase, and the erroneous admission of evidence found at his home. Finding none of these concerns to constitute reversible error, we affirm.

I. Background

On May 4, 2007, Derby Eve in Louisville, Appellant was operating what he describes as a "bootleg" taxicab. Although his taxicab license had been suspended, Appellant placed signs and a light on his two-door Cadillac to designate it as a taxicab. On Bardstown Road, Appellant picked up two out-of-towners, Tana and Angela, who were looking for a ride back to the Germantown

neighborhood house they had rented for the weekend. Both Tana and Angela were highly intoxicated, Tana more so, from a night out at the bars.

Although the house the women had rented was not far from the pick-up location, Appellant lacked street sense of the specific area, making for a long ride. Along the way, Tana intermittently passed out while slumped over in the backseat and became highly nauseous. Appellant, purportedly familiar with reflexology, insisted on treating Tana by removing her shoe and pressing on her foot.

Finally arriving at their destination, Angela got out of the car to unlock the house. Rather than let Tana out from the backseat, however, Appellant sped off because, according to him, he noticed a police car behind him and feared getting caught driving a "bootleg taxicab." He drove to the stop sign at end of the street before turning into a nearby alley to wait a while and remove the taxicab identifiers from his car. Eventually, Appellant drove out of the alley near the Germantown house and, according to him, in a continued attempt to avoid police, drove his car, with Tana still in the back, to the apartment complex where he lived.

Tana testified that when she awoke in the parking lot of that apartment complex, she found Appellant blocking the car door and pulling at her clothes. Tana managed to temporarily escape and ran across the parking lot, screaming for help. Appellant caught her, however, and dragged her back to the car. Back in the car, Appellant hit her, attempted to remove her clothes, threatened to kill her and choked her into unconsciousness. Before blacking out, Tana

thought she was going to be raped. Tana's next recollection was flashing lights and being in an ambulance.

At some point during the struggle, police, alerted by Angela, made contact with Tana's phone. Sergeant Joe Dennis of the Louisville Metro Police testified that he heard Tana screaming, "No! No! No! Get off me," while a male shouted, "Shut up! Stop yelling!" Tana's screams gradually became muffled, indicating her mouth being covered. Sergeant Dennis then heard gurgling sounds before the phone finally went dead.

At trial, Appellant admitted to covering Tana's mouth to prevent her from alerting police or anyone else. However, he claimed his only purpose in doing so, and indeed his only reason for kidnapping Tana at all was to avoid police detection of his "bootleg taxi," and not to engage in any further wrongdoing.

Worried the screaming would attract attention, Appellant drove the car away, without headlights. Exiting the apartment complex, Appellant drove by Police Officer Alex Payne who had been alerted to the scene by Tana's screams. Office Payne chased after Appellant as they travelled through speeds upward of 70 miles per hour through a residential area. Appellant eventually spun out on the wet roads and was arrested by Officer Payne, who found Tana unresponsive in the backseat. Tana had a faint pulse and was immediately transported to a hospital, where she recovered.

Appellant was charged with kidnapping, second-degree assault, attempted rape, and first-degree fleeing or evading, and as a second-degree persistent felony offender, or PFO. The jury found him not guilty of the

attempted rape, but guilty of all other crimes. It recommended a sentence of thirty years for kidnapping, ten for assault, enhanced to fifteen by the PFO, and five for fleeing or evading, enhanced to seven by the PFO, and recommended the sentences run consecutively. The court followed the jury recommendation and issued a combined sentence of 52 years.

Appellant now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

Appellant raises three claims on appeal. First, he contends that the Commonwealth failed to prove the existence of a serious physical injury, an essential element of both the kidnapping and second-degree assault convictions. Second, he claims that the trial court violated constitutional and procedural rules in removing him from the courtroom during the penalty phase. Third, he claims error in the admission of allegedly irrelevant and prejudicial items found at his home in a search subsequent to arrest.

A. Serious Physical Injury

Serious physical injury is an essential element of two of Appellant's convictions. Appellant was convicted of kidnapping as a class A felony, which requires that "the victim has suffered serious physical injury." KRS 509.040(2). Appellant's second-degree assault conviction also demanded proof that "[h]e intentionally cause[d] serious physical injury to another person." KRS 508.020(1)(a). At trial, Appellant unsuccessfully moved for a directed verdict of acquittal on these two counts on this ground.

"'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." KRS 500.080(13). Tana testified, with corroborating medical testimony, that Appellant had choked her, causing her to lose consciousness. Further expert testimony explained that when a victim is choked into unconsciousness, the brain fails to receive adequate oxygen to function properly, which can result in brain injury or death.

This is sufficient evidence for a reasonable jury to conclude that blacking out can constitute serious physical injury. Expert testimony was sufficient to establish that blacking out involves "prolonged impairment" of the brain, as well as the resulting "substantial risk of death." This Court has previously held, in *Cooper v. Commonwealth*, 569 S.W.2d 668, 671 (Ky. 1978), that blacking out can create such a risk. The Court stated that "'substantial risk of death' turns on the unique circumstances of an individual case." *Id.* In determining the circumstances in that case to have manifested a substantial risk of death, the Court noted that the victim suffered from a chronic pulmonary condition, which made her more vulnerable to loss of oxygen. *Id.*

Admittedly, Tana was perhaps a healthier and less vulnerable victim than in *Cooper*. However, other facts, unique to this case, were sufficient to prove that she too faced a substantial risk of death, namely, the weak pulse

police found when they rescued her from Appellant's car. As such, sufficient evidence was presented for both the kidnapping and second-degree assault.

B. Removal from Courtroom

Appellant next claims reversible error in his removal from the courtroom during the sentencing phase. Appellant had been disruptive and disrespectful throughout trial and as the penalty phase of trial was about to begin, he could be heard yelling from the holdover cell. Fearing possible violence, the court ordered the deputy to "use all precaution bringing him into the courtroom." The court further explained, "If all we have to do is get him to waive his appearance to go forward, I'm happy to do that and we can put him back in the hold . . . ." Appellant was then brought into the courtroom in four point shackles.

When Appellant entered the courtroom, the court engaged him in the following dialogue to determine whether he would enter into a plea agreement about sentencing:

> Court: We're on the record outside the presence of the jury. Mr. Jackson, I've given you and your attorneys sufficient time to negotiate an agreement to resolve . . .
>
> Defendant: Sufficient time? Let me finish.
>
> Court: What would you like to do? Would you like . . .
>
> Defendant: I was talking to my counselor. They was giving me some advice. Your big bullies came back and got me.
>
> Court: Well, do we have an agreement or are we going to begin the penalty phase?
>
> Defendant: We were discussing . . .

Court: I'm tired of waiting.

Defendant: We were discussing . . .

Court: I'm tired of waiting. It's time to proceed, Mr. Jackson.

Defendant: Sir, I've waited 27 months.

Court: I don't care if you've waited 27 months.

Defendant: Then screw you, sir!

Court: Okay.

Defendant: Screw you!

Court: Take him out. We'll proceed without him.

Defendant: Can I sign the plea deal first?

Court: No, we're done.

Appellant was then taken out of the courtroom.

It is critical to note that although the court had clearly contemplated removing Appellant prior even to his entrance, it never warned him prior to taking such action. Appellant sufficiently objected to his removal by asking if he could at least sign his plea deal before being removed. He now claims that removing him against his will violated state and federal constitutional requirements, as well as Kentucky's rules of procedure.

The United States Supreme Court has held that the right to be present at trial is protected under the Sixth Amendment, which is applicable to the states under the Fourteenth Amendment. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970); *see also Snyder v. Massachusetts*, 291 U.S. 97, 107–08 (1934), *overruled on other grounds, Malloy v. Hogan*, 378 U.S. 1 (1964) (noting that "the

presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence"). Kentucky's Constitution, specifically Section 11, provides similar protection. *See Price v. Commonwealth,* 31 S.W.3d 885, 892 (Ky. 2000). And this Court's procedural rules expressly protect these rights. *See* RCr 8.28(1) ("The defendant shall be present at the arraignment, at every critical stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of the sentence . . . .").

"The right to be present at every critical stage of the trial protects a defendant against purposeful or involuntary exclusion but not voluntary exclusion." *Fugate v. Commonwealth*, 62 S.W.3d 15, 19 (Ky. 2001) (citations and alterations omitted). Thus, if Appellant voluntarily excluded himself, he would have no recourse here. However, as described above, Appellant's exclusion was not voluntary. On the contrary, he specifically asked to sign a plea deal instead of being removed from the courtroom, and after that motion was denied, he was removed through physical force, against his will.

The Commonwealth argues that Appellant's disruptive and disrespectful actions—voluntary in themselves—constituted a waiver of his right to be present at the guilt phase. We cannot find waiver so easily. There is a strong presumption against a waiver of constitutional rights and only evidence that a defendant actually intended to waive such can overcome this presumption. Indeed, "courts must indulge every reasonable presumption against the loss of constitutional rights." *Allen*, 397 U.S. at 343 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

However, even where the defendant has not waived the right, it can be forfeited by the defendant's behavior. See *id.* at 342. As the U.S. Supreme Court has held,

> a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom

Id. at 343; *see also id.* at 350 (Brennan, J., concurring) ("[N]o action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior."). Thus, a defendant who is disruptive may be removed from the courtroom, even during a critical stage of a trial, so long as he has been warned first of the possible consequences and given a chance to cease his behavior. *See Gray v. Moore*, 520 F.3d 616, 621-22 (6th Cir. 2008) ("*Allen* stands for the proposition that a trial court must warn a defendant of the possible consequences of continued misbehavior prior to removing him from the courtroom . . . ."). The right to a warning is also protected by this Court's procedural rules, which allow a judge to remove a disruptive defendant only *after* giving a warning. *See* RCr 8.28(2) ("A defendant who persists in engaging in disruptive conduct after being warned by the court that such conduct will cause him or her to be removed may be excluded from the courtroom.").

In this case, however, the Appellant was given no warning before he was removed from the courtroom. While the Commonwealth emphasizes several

instances of similar behavior by Appellant earlier in the trial, the lack of a warning on any of these occasions prevented Appellant from appreciating the possibility of this consequence. Absent voluntariness in his exclusion, which was not shown in this case, the trial court deprived Appellant of his Sixth Amendment and Section Eleven rights to be present in the courtroom.

Yet this does not end our inquiry. Federal and state constitutional errors are subject to harmless error review. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Greene v. Commonwealth*, 197 S.W.3d 76, 83 (Ky. 2006). The review of such constitutional errors for harmlessness is more exacting than for other errors. Specifically, a constitutional error can only withstand reversal when it is harmless beyond a reasonable doubt. *See Chapman, 386 U.S.* at 24 ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."); *Parson v. Commonwealth*, 144 S.W.3d 775, 785 (Ky. 2004) (applying *Chapman* standard to state constitutional error).

After Appellant was removed, two witnesses testified for the Commonwealth in the penalty phase. They established Appellant's prior record to meet the elements of PFO, and described the parole eligibility applicable to the range of penalties the jury could impose.

Although claiming his exclusion to be harmful, Appellant has not actually explained what harm it actually caused. Theoretically, one can imagine great value in a defendant's presence during the penalty phase. For example, he might realize some error in the description of his prior record by

the Commonwealth. Cross-examination on that point might completely undermine the Commonwealth's PFO proof. However, Appellant, now having full access to the penalty phase proceeding has not mentioned any inaccuracies or facts he would have explained. With regard to the testimony presented, he has simply failed to show how his presence would have mattered.

Even without any testimonial impact, there are some situations where a defendant's presence itself might be beneficial. It is possible that a jury would be more lenient in determining the sentence of someone it has to look at during the entire penalty phase. The circumstances of this particular case, however, make such a benefit extremely unlikely. The very reason Appellant was removed was his disrespectful, disruptive, and potentially violent behavior. Indeed, he had only been permitted in the courtroom adorned in four point shackles. With such behavior and appearance, Appellant would be hard pressed to draw the sympathies of the jury. More likely, Appellant's presence would just have revolted the jury even more. Given the totality of these circumstances, his removal was harmless beyond a reasonable doubt.

C. Other Items Seized

Days after Appellant's arrest, police searched his residence and seized the following items which were introduced into evidence: a camera, a video camera, six computer discs, a reflexology chart, and a bag containing women's panty hose. Appellant objected to the admission of this evidence, questioning its relevance. The Commonwealth countered that the seizure of these items demonstrated the thoroughness of its investigation.

It was completely improper to admit these items into evidence. The investigation is irrelevant to whether or not Appellant kidnapped or assaulted Tana. If the thoroughness of the search served any purpose, it was to bolster the testimony of the officers who participated in the search. However, such bolstering is only admissible if a witness's character has been called into question, and even then, may not be achieved through the admission of extrinsic evidence. KRE 608(b).

The Commonwealth's independent justification for the admission of the reflexology chart in particular fails for the same reason. The Commonwealth claims it corroborates how Appellant applied pressure to Tana's foot. Even if this fact, which is conceded by Appellant, was at issue, the chart would simply be extrinsic evidence offered to bolster testimony at trial. None of this evidence was relevant, and should have been found inadmissible.

Despite their irrelevance, the admission of this evidence only requires reversal if it "affect[ed] the substantial rights" of the Appellant. RCr 9.24. This Court holds an error harmless if it can determine "with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009). What prejudice could a camera, a video camera, computer discs, a reflexology chart, or women's pantyhose have caused?

Appellant postulates that his possession of the cameras and discs implied to the jury that he was engaged in child pornography. While creative, this suggestion is overly cynical and far-fetched. Cameras and computer discs

are extremely standard items possessed in many, if not most, modern households. We reject any claim that a jury would assume possession of such items indicates he was involved in child pornography or any other illegal activity.

We are more concerned with the introduction of the pantyhose. Unlike cameras and discs, a bag of pantyhose is a much more unusual collection for a man to possess in his room, and thereby more likely to raise flags to the jury. This odd collection is particularly significant in a case such as this, charging a defendant with the attempted rape of a female victim. The possession of women's undergarments might easily suggest to the jury that a defendant has some form of sexual perversion, perhaps making him more likely a rapist.

However, it is also very significant that Appellant was acquitted of attempted rape, the only sexually related crime he was charged with. The jury's acquittal on this charge is good evidence that the erroneous introduction of pantyhose did not unfairly taint the verdict.

We are fairly assured that the admission of the pantyhose did not sway the jury to convict Appellant of kidnapping, assault, or fleeing and evading. Indeed, Appellant admits to committing most elements of the aforementioned crimes. He disputes any violence against Tana, but admits to driving her, against her will, around Louisville, to his apartment complex. He further admits to subduing her so as to not alert police or anyone else. We cannot conclude that the introduction of pantyhose swayed the jury's opinion as to Appellant's violence against Tana, and thus find this error to be harmless.

III. Conclusion

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

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

CUNNINGHAM, J., CONCURRING IN RESULT: At the risk of appearing overly cautious, I write to concur in result. I agree completely with the opinion of the majority, except for some troublesome wording dealing with the admission of the items seized from the search of Appellant's residence. I further agree that these items should not have been admitted into evidence. However, I am bothered by the wording of the majority in saying: "The thoroughness of an investigation is itself irrelevant to whether or not Appellant kidnapped or assaulted Tana." The thoroughness of an investigation is always relevant. Otherwise, the simplest cross-examination by the defense regarding a detective's work would be prohibited. The Commonwealth can provide to the jury a full picture of the work its investigators performed to discount potential doubts of the efficacy of the investigation. However, the permission to introduce such proof is not a license to introduce extraneous, prejudicial, or inadmissible evidence as was done in this case. Here, the Commonwealth could have simply established that a search was conducted, but not have admitted into evidence the items taken. The thoroughness of its investigation was relevant. The items seized were not.

Scott, J., joins.

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