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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 18, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000659-MR

RAYMOND KEETON — APPELLANT

V.

ON APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES CLAUD BRANTLEY, JUDGE
NO. 07-CR-00044

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

Appellant, Raymond Keeton, was convicted by a Hopkins Circuit Court jury of two counts of first-degree rape and one count of first-degree sodomy. For these crimes, Appellant received a sentence of sixty years' imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts three arguments on appeal: 1) that the identical jury instructions given for each rape count denied him due process because they did not protect against a non-unanimous verdict or double jeopardy; 2) that he was entitled to a directed verdict on all charges; and 3) that testimony from the victim's stepmother was impermissible hearsay. Because the identical jury instructions for each rape charge constitute palpable error per *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009), we reverse Appellant's convictions for the two counts of first-degree rape, and remand this matter to the Hopkins

Circuit Court for proceedings consistent with this opinion. We affirm Appellant's conviction and sentence for first-degree sodomy.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2007, the victim, H.F., told her stepmother that Appellant had sexually abused her. As a result of this disclosure, the stepmother contacted Officer Justin Jones of the Madisonville Police Department. Officer Jones interviewed H.F., and based on that interview, sought and obtained a warrant for Appellant. Appellant was arrested and interrogated by Officer Jones in the presence of Officer Jason Lutz and Officer Corey Miller.

At Appellant's trial, Officer Jones testified that during the interrogation, Appellant made an incriminating statement. Officer Jones testified that Appellant said he woke up one morning to discover he had an erection and was wet from sexual intercourse. Appellant's statement seemed to imply that H.F. had raped him. Officer Lutz verified Officer Jones's testimony, except he testified that Appellant never actually stated that H.F. raped him, but that he instead answered affirmatively to Officer Jones's question "so you're saying she [H.F.] raped you?" H.F. testified that Appellant had sexual intercourse with her twice and that Appellant had also licked her genitalia.

Appellant testified at trial that he did not commit any of the alleged acts against H.F. He believed that H.F. made up the allegations against him because he reported H.F.'s biological mother to law enforcement for drug related crimes and food stamp fraud. However, rebuttal testimony was

provided that there was no record of Appellant reporting the biological mother to law enforcement. Based on the testimony at trial, the jury found Appellant guilty on all counts.

I. THE JURY INSTRUCTIONS ON EACH RAPE COUNT WERE IDENTICAL AND THUS VIOLATED APPELLANT'S DUE PROCESS RIGHT BY POTENTIALLY DEPRIVING HIM OF THE RIGHT TO A UNANIMOUS VERDICT

Appellant first argues that the jury received identical instructions for each count of first-degree rape, which denied him due process by depriving him of the right to a unanimous verdict and by violating double jeopardy.[1] The jury received the following instruction for both rape charges:

> You will find the Defendant guilty of First Degree Rape 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 sometime in the summer of 2005 and before the finding of the Indictment herein, he engaged in sexual intercourse with [H.F.];
>
> AND
>
> B. That at the time of such intercourse [H.F.] was less than twelve (12) years of age.

Since the jury instructions for the two counts of first-degree rape were identical, Appellant argues that our decision in *Miller*, 283 S.W.3d at 696, mandates he receive a new trial on the charges. In *Miller*, we held that providing identical jury instructions for multiple charges of third-degree rape

[1] Appellant did not raise this issue in his initial brief to this Court, but on August 27, 2009, moved to file a supplemental brief in light of our decision in *Miller*, 283 S.W.3d 690. We granted the motion.

and sodomy constituted palpable error and that the error "prejudiced the substantial rights of the defendant" by denying him the right to a unanimous verdict and to challenge the sufficiency of the evidence of the individual convictions on appeal. *Id.* This was due to the fact that "there is no assurance that the jurors were voting for the same factually distinct crime under each of the indistinguishable instructions." *Id.* at 694.

The Commonwealth argues that this matter is factually different from *Miller*, and that the identical jury instructions provided for the two counts of first-degree rape do not constitute palpable error. First, the Commonwealth argues that Appellant agreed to the jury instructions at trial, and thus has waived any allegation of error pertaining to them. However, Appellant's agreement to the jury instructions only indicates that the alleged error was unpreserved and we may conduct a palpable error review. RCr 10.26. Second, the Commonwealth argues that Appellant was only charged with two counts of first-degree rape, unlike the defendant in *Miller,* who was charged with six counts of third-degree rape as well as two counts of third-degree sodomy. The Commonwealth further argues that since evidence was presented at Appellant's trial to differentiate between the two first-degree rape charges he has suffered no harm. However, the introduction of facts which differentiate between the charges does not automatically cure the error, and the Commonwealth has the burden of proving that "no prejudice resulted from the error" in the jury instructions. *Id.* at 695. In this case, the Commonwealth fails to meet that

burden. While Appellant was charged with only two counts of first-degree rape, he has a Constitutional right to a unanimous verdict on those two charges. Ky. Const. § 7. The jury instructions provided do not guarantee that he received such a verdict. We note that the error in the instructions could have been easily corrected because the same facts in evidence, which the Commonwealth says differentiates the two rapes, could have been used in the instructions to distinguish the two charges.

Thus, we find that the error committed in *Miller* is identical to the error committed in this case, and we reverse Appellant's convictions and sentences for the two counts of first-degree rape and remand this matter for a new trial consistent with this opinion. We will now address Appellant's other allegations of error.

II. APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT

Appellant next argues that the trial court erred by denying his motion for a directed verdict on all charges. Appellant's main argument in support of his motion is that the testimony given at trial by H.F. and the two police officers provided insufficient grounds for a jury to find him guilty. Appellant also argues that he should have been granted a directed verdict because the Commonwealth never established that he committed the offenses in the "summer of 2005" as stated in the jury instructions. We find that the trial court correctly denied Appellant's directed verdict motion.

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the

> Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Accordingly, "[c]redibility and weight of the evidence are matters within the exclusive province of the jury." *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). "Jurors are free to believe parts and disbelieve other parts of the evidence including the testimony of each witness." *Reynolds v. Commonwealth*, 113 S.W.3d 647, 650 (Ky. App. 2003) (citing *Smith*, 5 S.W.3d at 129). Here, the Commonwealth presented adequate evidence to convict Appellant. H.F. unambiguously testified that Appellant raped and sodomized her. The testimony of the victim alone is sufficient to support a rape conviction. *Garrett v. Commonwealth*, 48 S.W.3d 6, 8 (Ky. 2001) ("Corroboration in a child sexual abuse case is required only if the unsupported testimony of the victim is ' . . . contradictory, or incredible, or inherently improbable.'" (quoting *Robinson v. Commonwealth*, Ky., 459 S.W.2d 147, 150 (1970))); *Fletcher v. Commonwealth*, 250 Ky. 597, 63 S.W.2d 780, 781 (1933). The jury was properly given the ability to judge the credibility of all witnesses and chose to believe their testimony.

Further, while the trial record indicates that H.F. did not specifically testify that the criminal acts occurred during the summer of 2005, she did

provide testimony about events which occurred that summer. Such testimony included what grade of school she would be entering in after the summer, what job her mother worked, where she lived, and most importantly, that Appellant babysat her that summer. All of this testimony regarding the summer of 2005 provides a sufficient basis for a jury to infer that the criminal acts happened at that time. Additionally, in child sexual assault cases, failure to prove specific offense dates is not fatal to the charge as long as each allegation is supported by sufficient evidence. *Hampton v. Commonwealth*, 666 S.W.2d 737, 740 (Ky. 1984). Looking at all of the evidence and drawing all reasonable inferences "in favor of the Commonwealth" the trial court correctly denied Appellant's directed verdict motion. *Benham*, 816 S.W.2d at 187.

III. THE TESTIMONY OF H.F.'S STEPMOTHER WAS INADMISSIBLE HEARSAY, BUT WAS NOT PALPABLE ERROR

Appellant finally argues that testimony provided by H.F.'s stepmother constituted inadmissible hearsay. Appellant failed to object to this testimony, but we will review the allegation for palpable error. RCr 10.26. At trial, the Commonwealth asked H.F.'s stepmother if H.F. had identified the perpetrator. She testified that H.F. stated it was "her mother's ex-boyfriend [Appellant]." Appellant argues that this statement is inadmissible hearsay because it falls under no specific exception to the hearsay rule. *Benjamin v. Commonwealth*, 266 S.W.3d 775 (Ky. 2008). The Commonwealth presents no exception to the hearsay rule which would have made this testimony admissible. We also can

find no exception which would apply to the testimony, and thus the admission of this testimony was error. However, we do not find that this error is palpable.

Palpable error is one "which affects the substantial rights of a party." RCr 10.26. Such error only affects the substantial rights of a party if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005). While the stepmother's testimony may have provided some limited bolstering to H.F.'s testimony, her testimony likely did not affect the judgment. H.F. herself testified at trial that Appellant raped and sodomized her and told the jury that she told her stepmother about it. The stepmother's testimony was cumulative to other evidence presented, and therefore not palpable error. On retrial, effort should be made to keep such testimony from being admitted unless the facts develop as such where the testimony falls under an exception to the hearsay rule.

CONCLUSION

Thus, for the foregoing reasons, Appellant's convictions and sentences for the two counts of first-degree rape are reversed and the matter is remanded to the Hopkins Circuit Court for proceedings consistent with this opinion. Appellant's conviction and sentence for first-degree sodomy is affirmed.

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

SCOTT, J., CONCURRING IN PART AND DISSENTING IN PART OPINION:

Although I concur on the other issues, I respectfully dissent on issue I—the unanimous verdict issue. I do not see *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009) as applicable here, since *Miller* involved three (3) convictions out of six (6) third-degree rape charges and only one (1) of two (2) counts of third-degree sodomy. Thus, in *Miller*, one could not assert that each of the jurors found guilt under the same factual circumstances. Here, Appellant was charged and convicted of both charges and the evidence plainly demonstrated that there were two separate offenses. Plainly then, each juror found the same occurrence.

Cunningham, J., joins.

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