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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: DECEMBER 16, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000471-MR

ARTEZ GARRETT — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
NO. 05-CR-00723-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On October 7, 2005, Appellant and his two colleagues, John Edwards and Rayshawn Kelly, broke into a Kenton County house where they found three residents: Shawn Ruff, Michael Johnson, and Phillip Northcutt. The first housemate the perpetrators encountered was Shawn Ruff. While Kelly threatened Ruff, forcing him to the couch on the first floor, Appellant and Edwards went upstairs and found Michael Johnson lying on a bed. They put a gun to his head and demanded money. He gave them $650.00. Johnson was told that if he looked up he would be shot. The perpetrators then took Johnson's cell phone and a lock box belonging to Phillip Northcutt. As Appellant left, he turned back towards the couch and shot Ruff, who was attempting to shut the front door.

Later that day, when police arrested Appellant and his two comrades, they found $240.00 on Appellant and the lock box containing marijuana and drug-dealing accessories. Appellant admitted entering the house and firing his pistol, but maintained that he was only trying to scare the residents.

On December 9, 2005, Appellant, Edwards, and Kelly were indicted on two counts. The first count charged Appellant with first-degree robbery, in violation of KRS 515.020, and stated that Appellant "committed a theft, in Kenton County, Kentucky and during the theft . . . used or threatened the immediate use of physical force upon another person to accomplish the theft." The second count charged Appellant with first-degree assault when "he intentionally shot with a gun Shawn Ruff and caused Ruff to suffer a serious physical injury, which is in violation of KRS 508.010."

Three months later, on March 3, 2006, Appellant was again indicted. This indictment charged Appellant as a second-degree persistent felony offender, to which he ultimately entered a guilty plea. Although it was a new indictment, the charge was labeled as Count Three and exhibited the same case number as the original indictment.

Several days later, Appellant was indicted a third time on two more robbery charges, which were marked as Counts Four and Five and were virtual replicas of the initial robbery charge contained in the original indictment. The only distinction is that the latter charges identified Phillip Northcutt and Michael Johnson as the specific victims of the robbery. These charges were

also labeled with the same case number as the original indictment. However, the latter robbery charges were subsequently severed from the other charges for purposes of trial.

Appellant was convicted as charged in the original indictment for first-degree robbery and first-degree assault. He received a sentence of ten years on each conviction, enhanced to twenty years by virtue of his status as a persistent felony offender. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Unanimity and Due Process

Appellant challenges his conviction on the first-degree robbery charge on due process and unanimity grounds. He states that the jury was permitted to convict him of first-degree robbery based on any of four possible combinations of victims. At trial, Appellant objected to the court's instructions and tendered his own. However, he never raised any specific concern about the instructions given by the court. His own instructions did not improve on those of the court as to the unanimity issue. They refer to unidentified "persons," whereas the instructions now being challenged simply identify those persons. In essence, they say the same thing. Therefore, the issue was not preserved and is subject to review only for palpable error. *See* RCr 10.26.

To say the least, the drafting of the indictments in this case, as well as the jury instructions, was ineptly done and constituted error. The three indictments returned against Appellant referred to varying identities of the

victims. In fact, as Appellant argues in one of his claims of error, the instructions to the jury included victims from counts which had been severed from this trial and set for trial at a later time. This was clearly error; however, the challenged instruction was merely a consolidation of all the offenses into one and for all of which there was sufficient evidence. We cannot find that Appellant suffered palpable error, when in reality he received a break by being convicted of only one count of first-degree robbery. The bungling of the charges and instructions did not create "manifest injustice." RCr 10.26. *See Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006) (holding that an unpreserved error does not justify relief "unless the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'"); *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009).

Instruction No. 5 given to the jury in this case advised the jury to find Appellant guilty of first-degree robbery if they believed three elements beyond a reasonable doubt:

> A. That [he] . . . stole or attempted to steal property from Michael Johnson and/or Phillip Northcutt;
>
> AND
>
> B. That in the course of so doing, and with intent to accomplish the theft, he used or threatened the immediate use of physical force upon Shawn Ruff and/or Michael Johnson;
>
> AND
>
> C. That when he did so, he was armed with a deadly weapon . . . .

Appellant asserts that based on these instructions, especially the two alternatives listed in both A and B, there are four distinct ways in which the jury could convict him of first-degree robbery. Namely, the jury could convict Appellant of:

1. stealing or attempting to steal from Johnson and using or threatening physical force against Ruff;

2. stealing or attempting to steal from Johnson and using or threatening physical force against Johnson himself;

3. stealing or attempting to steal from Northcutt and using or threatening physical force against Ruff; or

4. stealing or attempting to steal from Northcutt and using or threatening physical force against Johnson.

Appellant contends that these combinations permitted the jury to convict him without reaching a unanimous verdict.

This Court held more than thirty years ago "that a verdict can not [sic] be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense." *Wells v. Commonwealth*, 561 S.W.2d 85, 88 (Ky. 1978). *See also Ice v. Commonwealth*, 667 S.W.2d 671, 677 (Ky. 1984); *Caudill v. Commonwealth*, 120 S.W.3d 635, 666-67 (Ky. 2003).

In *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 925 (Ky. 1986), the trial court instructed the jury to find the defendants guilty of murder under either

principal or complicity thereof. Although the instructions led to a guilty verdict that was silent as to which jurors found principal liability and which found complicity, this Court found no error. The Court stated: "A verdict cannot be attacked as being non-unanimous where both theories are supported by sufficient evidence." *Id.* As there was sufficient evidence of both principal and complicity liability, the Court determined that the defendants had not been deprived of their right to a unanimous verdict. *Id.*

With this case law soundly in place, we now apply it to the facts in this case.

The first requirement of the instruction in question was that Appellant "stole or attempted to steal property from Michael Johnson and/or Phillip Northcutt." The evidence was ample that he did. He took $650.00 and a cell phone from Michael Johnson and a lock box from Phillip Northcutt. The second element required that, "with the intent to accomplish the theft, he used or threatened the immediate use of physical force upon Shawn Ruff and/or Michael Johnson." Appellant and his partners in crime shot Shawn Ruff. They also placed a gun to the head of Michael Johnson.

Therefore, while there may have been more than one way in which Appellant could have been convicted of first-degree robbery, each theory was amply supported by the evidence. It should be noted that for first-degree robbery, under KRS 515.020, there is no requirement that the theft be committed against the same person against whom the physical force is used or

threatened to be used. *Morgan v. Commonwealth*, 730 S.W.2d 935, 938 (Ky. 1987). Appellant was ultimately convicted of a single offense of first-degree robbery. The fact that the evidence and jury instructions could have amounted to several convictions of first-degree robbery is of no significance as long as all theories are supported by sufficient evidence.

The U.S. Supreme Court held in 1991 that there was no due process violation when, under the instructions, the defendant could have been convicted of either intentional killing or felony murder—two entirely different types of murder. *Schad v. Arizona*, 501 U.S. 624 (1991). It would be stretching "palpable error" to the breaking point in this case when the U.S. Supreme Court deems such type of instruction as not being a due process violation. Therefore, we conclude that Appellant did not suffer "manifest injustice" when the instructions exposed him to conviction of one solitary count of first-degree robbery. In summary, the evidence was sufficient to support four different ways by which Appellant could have been found guilty of first-degree robbery.

Double Jeopardy

While there is certainly a jeopardy issue injected into this case, the relief to which Appellant is entitled is a bar to future prosecution. It is not a situation that creates double jeopardy problems here. We confronted a similar situation in *White v. Commonwealth*, No. 2008-SC-000192-MR, 2009 WL 3165547, at *7 (Ky. Oct. 1, 2009). There, the defendant was charged with third-degree assault "when he intentionally caused and/or attempted to cause

physical injury to a city police officer." *Id.* However, the proof at trial showed that White had attempted to injure two separate officers. The jury instructions provided further ambiguity. The jury was charged with determining whether White "intentionally attempted to cause physical injury to an officer of the Paducah Police Department." *Id.* Again, these instructions did not specify a particular officer. White attempted to argue that this ambiguity would leave him subject to further prosecution for the same assault. However, this Court, in a unanimous decision, held that White's conviction "does not and will not subject White to double jeopardy." *Id.* at *8. This is so, because

> the government would be estopped from asserting, for double jeopardy purposes, that the jury's general verdict was not a final resolution of both crimes charged in Count II [the duplicitous count]. Principles of equity prohibit the government from benefitting [sic] from the prejudicial ambiguity that the government alone was responsible for creating. It was the government which submitted the duplicitous indictment to the jury, and which decided not to seek a special verdict. By these actions, the government has effectively conceded that the indictment is not impermissibly duplicitous, i.e., that the defendant will not be prejudiced by the harms caused by duplicity, including the harm arising from a jury verdict that does not definitively communicate the jury's findings with respect to the two crimes charged in Count II. For double jeopardy purposes, therefore, defendant is not prejudiced by the duplicitous indictment because the government is estopped from acting on any interpretation of the jury's verdict that would prejudice defendant's double jeopardy rights.

Id. (quoting *United States v. Sturdivant*, 244 F.3d 71, 77-78 (2nd Cir. 2001)).

As in *White*, the Commonwealth is responsible for the duplicitous count

and, as such, is thereby estopped from any subsequent prosecution that would implicate Appellant's double jeopardy rights.

Directed Verdict

Lastly, Appellant claims the trial court erred by not directing a verdict in his favor. When evaluating a motion for directed verdict on appeal, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 188 (Ky. 1991). The reviewing court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Id.*

It is clear from the evidence, which has been recounted here at length, that reasonable people could conclude beyond a reasonable doubt that Appellant was guilty of the first-degree robbery for which he was convicted. Therefore, the trial court's denial of the motion for directed verdict was not error.

For all of the above-stated reasons, the conviction is hereby affirmed.

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

NOBLE, J., DISSENTING: The plurality insists that an erroneous instruction that Appellant be found guilty if he committed *either* of two robberies, does not infringe on his right to a unanimous verdict and, in doing

so, relies on such cases as *Wells* and *Halvorsen*. Because I do not believe this case is controlled by *Wells* or *Halvorsen*, but rather by such cases as *Bell* and *Miller*, which hold this error to be palpable, I respectfully dissent.

I begin by emphasizing that I completely stand by this Court's decisions in *Wells* and *Halvorsen* as well as the plurality's analysis of them in its opinion. What the plurality overlooks, however, is that both *Wells* and *Halvorsen* dealt with instructions that a defendant be found guilty if the jury believed, through either of two theories, that he committed a *single* offense.

In *Wells*, 561 S.W.2d at 87, the trial court instructed the jury to find the defendant guilty of a single murder of a particular victim through either his intentional or wanton conduct. Likewise, in *Halvorsen*, 730 S.W.2d at 925, the court instructed the jury to find the defendant guilty of a single murder under either principal or complicity liability. As there was sufficient evidence of both intentional and wanton murder in *Halvorsen*, and both principal and complicity liability in *Wells*, the Court determined that the defendants had not been deprived of their right to a unanimous verdict. In each case, the instruction assured the Court that the verdict was unanimous as to a single murder. Whether or not individual jurors believed the murder was intentional or wanton, principal or complicit, they all found beyond a reasonable doubt that the defendant committed *that* murder. Thus, there was no doubt the defendant received a unanimous verdict.

I would continue to "hold that a verdict can not be successfully attacked

upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the *same* offense." *Wells*, 561 S.W.2d at 88 (emphasis added). However, the application of this *Wells* and *Halvorsen* rule is limited to situations where multiple theories of liability both implicate the same offense. This situation is different because multiple discrete offenses are alleged in the same instruction.

If the instruction at issue here simply presented two theories for the jury to find Appellant guilty of robbing Johnson or two theories of how he robbed Ruff, then I would readily join the plurality and its application of *Wells* and *Halvorsen*. However, as the plurality duly notes, the instruction failed to specify one robbery victim. On the contrary, it instructed the jury to convict Appellant of robbing either of multiple victims.

"Kentucky has long held that a single act which affects multiple victims constitutes multiple criminal offenses." *Smith v. Commonwealth*, 734 S.W.2d 437, 447 (Ky. 1987). Robberies, like other crimes, are differentiated by their victims. For each use or threat of use of force against a separate person during a robbery, a separate robbery has occurred. *See Stark v. Commonwealth*, 828 S.W.2d 603, 608 (Ky. 1991), *overruled on other grounds by Thomas v. Commonwealth*, 931 S.W.2d 446, 447 (Ky. 1996). Even if those robberies are contemporaneous, that does not conflate them into one robbery. *See id.* ("The three robberies, although taking place on the same occasion, constitute three

separate offenses upon three different individuals.").

Although under the pre-Penal Code paradigm, "the person robbed [was] regarded as the owner of the property whereof he was robbed," *Lamb v. Commonwealth*, 266 Ky. 561, 564, 99 S.W.2d 441, 442 (1936); *see also Douglas v. Commonwealth*, 586 S.W.2d 16, 18 (Ky. 1979), the "victim" of a robbery is now considered to be the person upon whom force was used or threatened. *Ross v. Commonwealth*, 710 S.W.2d 229, 231 (Ky. 1986), *overruled on other grounds by Morgan v. Commonwealth*, 730 S.W.2d 935, 938 (Ky. 1987). "[R]obbery is an offense against a person and not an offense against property . . . ." *Stark*, 828 S.W.2d at 607. Conceptually, any force used or threatened related to the theft element of a robbery converts what would otherwise simply be theft, into a robbery. That force or threat of force need not be against the owner of the property taken, but must occur "in the course of" the theft. Thus, each person against whom Appellant used or threatened force is a "victim" for the purposes of charging a robbery. *Cf. id.* at 607–08. Thus, a defendant who steals only a single item but makes threats to, or uses force on, multiple persons (even if they have no property taken) in the course of that theft has committed multiple robberies—one against each who is threatened.

Under this approach, the alleged victims of robbery in the present case are Johnson, to whose head Appellant allegedly held a gun, demanding money, and Ruff, whom Appellant allegedly shot in the shoulder in the course of escaping the house and completing the robbery. These allegations constitute

two separate robberies—one against Johnson and one against Ruff.[1]

In such a scenario, separate instructions (and separate verdicts) must be given for each offense. Multiple instances of an offense (e.g. two first-degree robberies or two murders) cannot be included in a single jury instruction and give rise to a single conviction. To join them is equally as erroneous as joining a first-degree robbery with a murder.

As such, the instruction given here is not akin to *Wells* or *Halvorsen.* Rather than describing two different theories of the same robbery, the jury instruction in question erroneously combines these two separate robberies into a single count. Consequently, there is no assurance that Appellant received a unanimous verdict. Did all twelve jurors find beyond a reasonable doubt that Appellant robbed Johnson? Did all twelve find he robbed Ruff? Or perhaps, did six believe he only robbed Johnson and another six only Ruff? Without any answer to these questions, Appellant has not received a unanimous verdict.

As the plurality stresses, there was certainly sufficient evidence for the jury to find either robbery, or both. The existence of sufficient evidence,

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[1] Any question that these are multiple robberies can be easily resolved by looking at the various indictments returned against the Appellant. The first indictment was generic and named no "victim," though a later bill of particulars indicated it applied to Ruff. On the other hand, the subsequent additional indictment, which added two counts of robbery, specifically identified other "victims" as the persons against whom the threats were made. As noted above, after the language "[Appellant] used or threatened the immediate use of physical force upon another person," Count Four and Count Five parenthetically insert "Phillip Northcutt" and "Michael Johnson," respectively, to show that the robberies were committed against them. These counts were not tried and were eventually dismissed. *At the very least, this means that the instructions included an offense for which Appellant was not on trial.* This in and of itself is a due process problem, since Appellant was only on notice that he was being tried for the robbery against Ruff.

however, is inadequate to convict a defendant of a particular crime. Twelve jurors must believe that evidence beyond a reasonable doubt. Absent any record that twelve jurors actually agreed upon the same offense, a conviction cannot stand.

This principle is not novel to Kentucky law; it has been repeatedly affirmed, most recently in unanimous opinions such as *Bell* and *Miller*, both ignored by the plurality. In the former, "[t]he jury was instructed on . . . five counts of sodomy in the first degree. . . . Each sodomy instruction was identical." *Bell v. Commonwealth*, 245 S.W.3d 738, 743 (Ky. 2008), *overruled in part on other grounds by Harp v. Commonwealth*, 266 S.W.3d 813, 819-21 (Ky. 2008). The defendant was convicted on only one of the five counts. *Bell*, 245 S.W.3d at 741. However, because it was impossible to determine which particular sodomy that single conviction reflected, the Court found palpable error. *Id.* at 744. The Court carefully distinguished the case from the *Wells* and *Halvorsen* line, noting, "The problem herein does not involve the sufficiency of the evidence. The Commonwealth, during its opening and closing arguments, identified five distinct instances during which K.T. was allegedly sodomized. . . . K.T.'s testimony provided sufficient evidence as to each incident to overcome a motion for a directed verdict." *Id.* at 743-44 (citation omitted). Notwithstanding the sufficient evidence to convict the defendant not only of one sodomy, but of five, "[t]he wording of the instructions . . . call[ed] into question the unanimity of the verdict." *Id.* at 744. The Court stated, "It

must be evident and clear from the instructions and verdict form that the jury agreed, not only that Bell committed one count of sodomy, but also *exactly* which incident they all believed occurred." Because the instructions and verdict evidenced an agreement only that the defendant committed *a* sodomy, and not exactly which sodomy, the Court found palpable error. *Id.* at 744.

This Court addressed the issue most recently in *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009). There, the Court plainly stated "that it is now settled that a trial court errs in a case involving multiple charges if its instructions to the jury fail to factually differentiate between the separate offenses according to the evidence." *Id.* at 695. "Being error," the opinion continued, "we now hold such instructional error as this to be palpable error." *Id.* at 696.

The instructional flaw in *Bell*, *Miller*, and the case at hand is identical: There is no guarantee that twelve jurors believed the defendant committed a particular crime. While certainly possible that the juries would have awarded the same (or even harsher) punishments under proper instructing, "[s]atisfaction of Kentucky's unanimity requirement cannot be based on this type of conjecture." *Bell*, 245 S.W.3d at 744. As such, the conviction here ought to be reversed as occurred in *Bell* and *Miller*.

Minton, C.J., joins this dissenting opinion.

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