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Supreme Court of Kentucky

2009-SC-000042-MR

CHARLES COX

APPELLANT

V.

ON APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
NO. 06-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Charles Cox of first-degree burglary, two counts of wanton endangerment, and kidnapping. He appeals the kidnapping conviction, claiming that it was barred by the statutory kidnapping exemption. This Court disagrees and affirms the trial court's judgment.

I. BACKGROUND.

While bingeing on alcohol, Cox broke into the home of his ex-girlfriend, Barbara Jackson (now Barbara Ziemski). After talking to Jackson's fourteen-year old daughter for five minutes, Cox, carrying a gun, proceeded upstairs to Jackson's bedroom. Meanwhile, Jackson phoned police to report that Cox was in the house with a gun.

When Cox arrived in the bedroom, he threatened Jackson repeatedly, stating, "I'm going to [expletive] you before I blow your brains out." Waving his gun at Jackson, he forced her to remove her gown. He then attempted sexual intercourse but was unable to perform. Cox then took Jackson downstairs. Police were outside the house with the daughter. Cox dragged Jackson back upstairs, where he again attempted unsuccessfully to rape her. While Cox detained Jackson, police initiated brief telephone conversations with them several times. During at least two of those conversations, Cox notified police that he wanted 30 minutes more with Jackson.

Eventually, Jackson was able to throw Cox onto the bed and run downstairs. Cox shot at her; but, with the aid of police officers, she escaped out the door.

Cox was then arrested. The entire episode lasted approximately one hour.

Cox was charged with first-degree burglary, attempted murder, attempted rape, first-degree wanton endangerment, and kidnapping. At trial, he was acquitted of the attempted rape and attempted murder but was convicted of first-degree wanton endangerment as a lesser-included offense. He was also convicted on the other wanton endangerment charge and the burglary and kidnapping charges. He was sentenced to fifteen years for burglary, five years for each wanton endangerment, and twenty years for

kidnapping, all to be served concurrently, for a total of twenty years. This matter-of-right appeal contests only the kidnapping conviction.

II. ANALYSIS.

For purposes of this appeal, Cox concedes his conduct amounted to kidnapping as described in KRS 509.040(1): “A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is . . . (b) To accomplish or to advance the commission of a felony; or (c) To inflict bodily injury or to terrorize the victim” As Cox apparently concedes, his kidnapping conviction could stem from his intent to commit the felonies of rape or murder, both of which he threatened, or even his intent generally to terrorize Jackson with those threats.

Cox’s sole argument on appeal is that his conviction for kidnapping was barred by the kidnapping exemption set forth in KRS 509.050. At trial, Cox moved to dismiss the kidnapping charge under the exemption; but the trial court denied his motion. The kidnapping exemption statute provides, in relevant part:

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.

KRS 509.050.

This Court has read the statute as laying out a three-prong test to determine the applicability of the exemption.

First, the criminal purpose must be the commission of an offense defined outside Chapter 509; second, the interference with the victim's liberty must occur immediately with and incidental to the commission of the underlying offense; and finally, the interference with the victim's liberty must not exceed that which is normally incidental to the commission of the underlying offense.

Murphy v. Commonwealth, 50 S.W.3d 173, 180 (Ky. 2001). If all three of these criteria are met, the kidnapping effectively merges under the statute into the other offense, thereby barring a duplicative conviction.

“The purpose of the statute is to prevent misuse of the kidnapping statute to secure greater punitive sanctions for rape, robbery, and other offenses which have as an essential or incidental element a restriction of another’s liberty.” *Gilbert v. Commonwealth*, 637 S.W.2d 632, 635 (Ky. 1982). The exemption also prevents the addition of a kidnapping charge when paired with “[o]ther offenses [that] may involve a restriction of someone's liberty because of the manner in which they are committed.” KRS 509.050 cmt. In other words, the exemption serves to prevent double punishment for essentially the same act.

“The trial court, rather than the jury, determines whether the [kidnapping] exemption applies” *Duncan v. Commonwealth*, 322 S.W.3d 81, 94 (Ky. 2010). Accordingly, on appellate review, we must determine whether the trial court abused its discretion in refusing to apply the exemption. *Id.* This observation carries significance in the present case because the jury acquitted Cox of attempted rape and attempted murder, charges that could

potentially merge with kidnapping. Those acquittals notwithstanding, they factor into the exemption analysis.

Cox's request for the exemption is, in fact, premised on his contention that kidnapping merged into the attempted rape or, alternatively, into the attempted murder.¹ Neither theory suffices.

Cox's argument that kidnapping merges with attempted murder in this case is inconsistent with the second prong of the exemption: the restraint was not immediate with and incidental to the other crime. Although Cox might have had designs on murder from his initial break-in, the actual attempt did not occur until Jackson had actually escaped Cox's control and was running out of the house. By this point, the restraint had ceased. There was no overlap between the restraint and the attempted murder. So the restraint did not occur immediately with the attempted murder.

Merger with attempted rape, on the other hand, fails the third prong of the exemption: the restraint must not exceed that amount normally incidental to the commission of the offense. In this case, Cox restrained Jackson even beyond his final attempted rape, until she actually escaped. Such restraint was excessive for purposes of the exemption. *Cf. Murphy*, 50 S.W.3d at 180.

We hold that the trial court correctly determined that the kidnapping exemption did not apply.

¹ Appellant has not claimed that the kidnapping merged with the burglary.

III. CONCLUSION.

For the foregoing reasons, the judgment is AFFIRMED.

All sitting. Minton, C.J.; Abramson, Cunningham, Schroder, Scott, and Venters, JJ., concur. Noble, J., concurs in result only.

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