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ACTION.

Supreme Court of Kentucky

2012-SC-000045-MR

LARRY D. BURNETT

APPELLANT

V. ON APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
NO. 11-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The events that occurred in the early morning hours of March 3, 2011, stem from a tumultuous five-year relationship between Appellant, Larry D. Burnett, and Demeka Peterson. Peterson ended the relationship in July of 2010, however, Appellant repeatedly attempted to reconcile with Peterson. When Appellant's efforts failed, he resorted to verbal threats.

Specifically, in January of 2011, Appellant threatened to kidnap, torture, and kill Peterson. Peterson filed charges against Appellant for these threats, which ultimately led to Appellant pleading guilty to terroristic threatening in the third degree. Subsequently, Appellant continued to contact Peterson. In an effort to conceal her location, Peterson moved in with her sister at the Royal Arms Apartments in Todd County, Kentucky. Her boyfriend and three children moved with her.

On March 3, 2011, while Peterson was walking to her vehicle parked outside of her sister's apartment, Appellant approached her and pointed a loaded gun at her head. Appellant forced Peterson into the driver's seat of her vehicle as he maneuvered himself into the backseat. Appellant then directed Peterson to drive to a nearby cornfield. Eventually, Peterson convinced Appellant to release her. Appellant threw his gun out of the car window and asked Peterson to drive him to Christian County so he could surrender himself to law enforcement. Along the way, police pulled Peterson over and apprehended Appellant.

A Todd County Circuit Court jury convicted Appellant of kidnapping, first-degree stalking, first-degree wanton endangerment, and possession of a firearm by a convicted felon. The trial court agreed with the jury's recommendation and sentenced Appellant to thirty years imprisonment. Appellant now appeals his conviction and sentence as a matter of right pursuant to Ky. Const. § 110(2)(b).

Double Jeopardy

By virtue of Appellant's kidnapping conviction, he claims that his rights under Section 13 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the United States Constitution were violated when he was summarily convicted of first-degree wanton endangerment and first-degree stalking. Due to Appellant's failure to preserve this issue, we will review for palpable error pursuant to RCr 10.26. *E.g., Cardine v. Commonwealth*, 283 S.W.3d 641, 651-53 (Ky. 2009) (discussing the numerous cases which state

that failure to preserve a double jeopardy claim does not render the right waived, rather palpable error review is appropriate).

The Double Jeopardy Clause seeks to prevent, *inter alia*, the use of cumulative punishments for a single criminal act. However, the Double Jeopardy Clause does not “prevent a person from being charged with multiple offenses arising from the same course of conduct.” *Commonwealth v. McCombs*, 304 S.W.3d 676, 678 (Ky. 2009). In analyzing potential double jeopardy violations, we have utilized what is known as the *Blockburger* test. *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). The *Blockburger* test states that “[d]ouble jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute ‘requires proof of an additional fact which the other does not.’” *Id.* The General Assembly codified the *Blockburger* test in its formulation of KRS 505.020. *Clark v. Commonwealth*, 267 S.W.3d 668, 676 (Ky. 2008). In addition to incorporating the *Blockburger* test, KRS 505.020 states as follows:

- (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:
 - (a) One offense is included in the other, as defined in subsection (2); or
 - (b) Inconsistent findings of fact are required to establish the commission of the offenses; or
 - (c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

Turning to the case *sub judice*, Appellant submits the following related arguments: (1) the convictions of kidnapping in conjunction with either stalking or wanton endangerment fail the *Blockburger* test; and (2) the wanton endangerment conviction in conjunction with either his kidnapping or stalking convictions violates 505.020(1)(b). We will address each argument in turn.

Kidnapping and Stalking

First, we will analyze whether Appellant's convictions of both first-degree stalking and kidnapping overcome the *Blockburger* test. In applying the *Blockburger* test, we must determine whether the statute proscribing kidnapping requires proof of a fact which the statute proscribing stalking does not. As our predecessor Court plainly questioned in *Burge*—is one offense included within the other? 947 S.W.2d at 811.

The elements of first-degree stalking are found in KRS 508.140. As applied to Appellant, the jury found him guilty of this offense when it concluded the following:

(1) Appellant intentionally stalked Peterson; (2) Appellant explicitly or implicitly threatened Peterson with the intent to place her in reasonable fear of serious physical injury or death; and (3) Appellant had pled guilty to terroristic threatening in the third degree against Peterson within the previous five years.

The elements of kidnapping are found in KRS 509.040. As applied to Appellant, the jury found him guilty of this offense when it concluded the following:

(1) Appellant knowingly and unlawfully restrained Peterson by holding her at gunpoint; (2) the restraint was without Peterson's consent; and (2) in restraining Peterson, Appellant intended to inflict bodily injury or to terrorize her.

We find it facially apparent that these two crimes, as applied to Appellant's case, require supplementary facts and elements independent of the other. Stalking does not require unlawful restraint, nor does it require that the assailant intend to inflict bodily injury or terrorize the victim. Furthermore, kidnapping does not require an actual threat to be implicitly or explicitly made, nor does it require a course of conduct element.

Consequently, Appellant's kidnapping conviction, along with his first-degree stalking conviction, does not violate the constitutional prohibition against double jeopardy.

Kidnapping and Wanton Endangerment

We next turn to whether Appellant's convictions of both kidnapping and first-degree wanton endangerment satisfy the *Blockburger* test. The elements of first-degree wanton endangerment are found in KRS 508.060. As applied to Appellant, the jury found him guilty of this offense when it concluded the following:

(1) Appellant held a gun to Peterson's head; (2) in doing so, Appellant created a substantial danger of death or serious physical injury to Peterson; and (3) Appellant's conduct manifested an extreme indifference to the value of human life.

Once more, we find it facially evident that first-degree wanton endangerment and kidnapping require proof of additional and independent

facts and elements. Kidnapping does not require a showing of extreme indifference to human life or a substantial danger of death or serious physical injury to the victim. Also, first-degree wanton endangerment does not require unlawful restraint. As a result, we find that Appellant's kidnapping and first-degree wanton endangerment convictions pass the *Blockburger* test.

Wanton endangerment

Our analysis does not end with the *Blockburger* test. Appellant also argues that the legislature intended to bar convictions for both first-degree wanton endangerment along with either kidnapping or stalking. Appellant alleges this is because the crimes require inconsistent factual findings. Specifically, the *mens rea* for wanton endangerment requires a wanton state of mind, while kidnapping and stalking require that the assailant act intentionally.

We do not believe the jury was required to find that Appellant simultaneously acted intentionally and wantonly. Over the course of several hours, Appellant committed multiple criminal acts and could certainly possess more than one *mens rea*. Appellant's intentional state of mind in stalking and kidnapping did not prohibit the jury from determining that when he pointed his gun at Peterson's head, he acted with a wanton state of mind. Therefore, Appellant's convictions did not require the jury to find inconsistent findings of fact as prohibited by KRS 505.020(1)(b).

Unanimous Verdict

Appellant also maintains that he was denied a unanimous verdict in regards to his kidnapping conviction. Due to Appellant's failure to preserve this issue for appeal, we will review for palpable error. *See Miller v. Commonwealth*, 283 S.W.3d 690, 695-96 (Ky. 2009). As aforementioned, the jury was instructed to find Appellant guilty of kidnapping if it believed (1) he knowingly and unlawfully restrained Peterson by holding her at gunpoint; (2) he did so without her consent; and (3) he intended to inflict bodily injury or terrorize her. Appellant argues that there was no evidence to allow a conviction based upon the theory that he intended to inflict bodily injury.

Unanimity issues usually occur when there is a general verdict arising from a combined jury instruction which presents two theories of guilt, one of which is unsupported by the evidence. *See, e.g., Boulder v. Commonwealth*, 610 S.W.2d 615, 617 (Ky. 1980) (overruled on other grounds by *Dale v. Commonwealth*, 715 S.W.2d 227, 228 (Ky. 1986)). We believe the jury instructions in the present case provided the jury with only one theory of guilt, which included the single element that Appellant intended to either inflict bodily injury or to terrorize Peterson. KRS 509.040 defines kidnapping as follows:

- (1) A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:
 - (a) To hold him for ransom or reward;
 - (b) To accomplish or to advance the commission of a felony;or
- (c) To inflict bodily injury or to terrorize the victim or another; or

- (d) To interfere with the performance of a governmental or political function; or
- (e) To use him as a shield or hostage; or
- (f) To deprive the parents or guardian of the custody of a minor, when the person taking the minor is not a person exercising custodial control or supervision of the minor as the term “person exercising custodial control or supervision” is defined in KRS 600.020.

As evident from its language, KRS 509.040 presents six separate theories of guilt. To inflict bodily injury and to terrorize the victim are categorically grouped together into a single theory of guilt. The official commentary to KRS 509.040 states that “[k]idnapping may be committed only if a defendant's conduct possesses all of the elements of unlawful imprisonment, as defined in this chapter, and is accompanied by an intent to achieve *one* of the objectives listed in KRS 509.040(1).” (Emphasis added). Therefore, it follows that allowing a jury to find guilt upon the finding of either or both the intent to inflict bodily injury or to terrorize the victim is sufficient to find Appellant guilty of kidnapping.

Even assuming, *arguendo*, that KRS 509.040(1)(c) provides two distinct elements of the crime of kidnapping, the Commonwealth provided the jury with sufficient evidence of Appellant's intent to inflict bodily injury on Peterson. For example, Peterson testified that during the course of the kidnapping Appellant stated he was going to kill her. “It has long been held by this Court that intent can be inferred from the act itself and the surrounding circumstances.” *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002). Appellant's threats, along with his possession of a loaded gun, certainly allowed the jury to infer

that Appellant intended to bodily injure Peterson at some point during the commission of the crime. Consequently, we believe Appellant was afforded a unanimous verdict.

Judge's Note to Parole Board

Lastly, Appellant requests that we set aside the trial court's judgment due to the judge's handwritten note to the Parole Board. On the final judgment, the trial judge noted that he, "strongly recommends against early release and/or parole." Once more, Appellant failed to preserve this issue for our review.

We do not believe that the trial judge's actions in noting his disdain for Appellant's early release or parole rises to the level of palpable error. The trial judge's note is not binding on the Parole Board and does not affect Appellant's sentence. Thusly, we cannot find that the alleged error so "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) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

Conclusion

For the forgoing reasons, the Todd Circuit Court's judgment is hereby affirmed.

All sitting. All concur.

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