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RENDERED: SEPTEMBER 26, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000334-MR

MICHAEL CALLOWAY — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
NOS. 10-CR-000933 & 10-CR-001448

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING IN PART

Appellant, Michael Calloway, appeals as a matter of right, Ky. Const. § 110, from a judgment entered by the Jefferson Circuit Court convicting him of first-degree rape and first-degree sexual abuse and sentencing him to a total of fifty years' imprisonment. Appellant raises the following claims: (1) the instructions on first-degree rape and first-degree sexual abuse subjected him to double jeopardy and, further, contained references to time periods not supported by the evidence; (2) the trial court erred by failing to strike three prospective jurors for cause; (3) palpable error occurred when the victim was permitted to testify about abuse inflicted upon her by her adoptive family several years after the alleged crimes occurred; (4) the trial court violated KRE

404(b) by permitting the introduction of his prior drug use; and (5) he was denied a fair trial due to ineffective assistance of counsel.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2004 and 2005, when Anna[1] was between six and seven years old, she lived in a residence with her mother, her siblings, and Appellant, who was her mother's boyfriend at the time. Anna was eventually removed from her mother and placed with the Rodriguez family, who later adopted Anna and her siblings. However, conditions in the Rodriguez household were likewise abusive so Anna and her siblings were removed and placed with another foster family, the Richardsons. While living with the Richardsons, Anna attended therapy sessions. It was during these sessions, around August 2009, when Anna was eleven-years old, that she first disclosed that Appellant had raped her.

Appellant was indicted on one count of first-degree rape and one count of first-degree sexual abuse. Anna testified at trial that during the period of time that Appellant lived with her, he would get into bed with her, lift up her nightgown, and have sexual intercourse with her. She was unable to specifically recall the number of times this occurred; however, she testified that it happened "more than once," but was not sure if this occurred more or less than ten times. Anna did not testify to any distinguishing characteristic concerning any of the multiple episodes. Rather, she testified that it happened

[1] "Anna" is a pseudonym employed in this opinion to protect the child's identity.

the same way every time – at night and in her bed after everyone else was asleep.

A Jefferson Circuit Court jury found Appellant guilty of first-degree rape and first-degree sexual abuse. The jury recommended, and Appellant was sentenced to, fifty years' imprisonment for the first-degree rape conviction and five years' imprisonment for the first-degree sexual abuse conviction, to be served concurrently.

II. JURY INSTRUCTIONS

As further discussed below, Appellant alleges trial errors associated with the jury instructions given on the first-degree rape and first-degree sexual abuse charges. First, Appellant argues the instructions as written and provided to the jury created a double jeopardy violation because they permitted a conviction for both first-degree rape and first-degree sexual abuse based upon a single event of sexual intercourse. Second, Appellant claims that the jury instructions were flawed because they allowed a time frame for the commission of the offense that greatly exceeded the time frame established by the evidence. Each of these claims of error will be addressed below.

A. Double Jeopardy Violation.

A double jeopardy violation occurred in this case because the instruction on the first-degree sexual abuse charge was insufficiently distinguished from the instruction on the first-degree rape charge, thereby permitting a conviction for both rape and sexual abuse for a single act of rape. Appellant does not cite

us to his preservation of the issue, and so we treat the issue as unpreserved. Because Appellant is not arguing that it was improper to give instructions on both offenses, and is instead arguing that the instructions given were not properly worded, his argument is not barred by RCr 9.54(2). *See Martin v. Commonwealth*, 2012-SC-000225-MR, slip op. at 10 (Ky. Sept. 26, 2013) ("[A]ssignments of error in 'the giving or the failure to give' an instruction are subject to RCr 9.54(2)'s bar on appellate review, but unpreserved allegations of defects in the instructions that were given may be accorded palpable error review under RCr 10.26."). Thus, since the issue is unpreserved Appellant is not entitled to the standard appellate review for preserved allegations of error; his claim, rather, is subject only to RCr 10.26 palpable error review for manifest injustice.[2]

KRS 510.040 provides in relevant part as follows:

> (1) A person is guilty of rape in the first degree when:
>
> ....
>
> (b) He engages in sexual intercourse with another person who is incapable of consent because he:
>
> ....
>
> 2. Is less than twelve (12) years old.

[2] Pursuant to RCr 10.26, reversal is warranted under the palpable error standard "'if a manifest injustice has resulted from the error,' which requires a showing of the 'probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Ladriere v. Commonwealth*, 329 S.W.3d 278, 281 (Ky. 2010) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)). Manifest injustice has occurred if the error seriously affected the "fairness, integrity, or public reputation of the proceeding." *Martin*, 207 S.W.3d at 4.

(2) Rape in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

KRS 510.110 provides, in relevant part, as follows:

(1) A person is guilty of sexual abuse in the first degree when:

. . .

(b) He or she subjects another person to sexual contact who is incapable of consent because he or she:

. . .

2. Is less than twelve (12) years old;

. . .

(2) Sexual abuse in the first degree is a Class D felony, unless the victim is less than twelve (12) years old, in which case the offense shall be a Class C felony.

Consequently, the only difference between first-degree rape and first-degree sexual abuse is that rape requires "sexual intercourse," whereas sexual abuse requires "sexual contact." KRS 510.010 provides, in relevant part, as follows:

(7) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party;

(8) "Sexual intercourse" means sexual intercourse in its ordinary sense and includes penetration of the sex organs of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight . . . .

An examination of the definitions for sexual contact and sexual intercourse readily discloses that sexual intercourse is a type of sexual contact and,

therefore, if a defendant has sexual intercourse with a victim he necessarily has sexual contact with her.

With the above principles in mind, the double jeopardy problem that occurred in this case is reflected in Instruction Nos. 1 and 2. Instruction No. 1, the first-degree rape instruction, stated as follows:

> You will find the defendant, Michael Edward Calloway, guilty 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 between January 1, 2001 and December 31, 2008, he engaged in sexual intercourse with [Anna];
>
> AND
>
> B. That at the time of such sexual intercourse, [Anna] was less than twelve (12) years of age.

Instruction No. 2, the first-degree sexual abuse instruction, stated as follows:

> You will find the defendant, Michael Edward Calloway, guilty 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 between January 1, 2001 and December 31, 2008, he subjected [Anna] to sexual contact;
>
> AND
>
> B. That at the time of such sexual contact, [Anna] was less than twelve (12) years of age.

Accordingly, the first-degree rape instruction and the first-degree sexual abuse instruction properly reflected the elements of the respective crimes pursuant to the above statutes. However, a review of these instructions reveals that the jury, by finding Appellant guilty of a single count of rape under Instruction 1, would likewise be led by the instructions to adjudge him guilty

under Instruction 2 for that same sexual episode. The reason being that Appellant's act of sexual intercourse with Anna as charged under Instruction 1, necessarily constituted sexual contact with her under Instruction 2. Because there was otherwise no further differentiation to guide the jury, this is a double jeopardy violation.[3] *See Johnson v. Commonwealth*, 864 S.W.2d 266, 277 (Ky. 1993). Addressing a similar situation in *Johnson*, we stated as follows:

> In view of all the evidence, and considering the complexity of this case, we believe that these instructions were inadequate to inform the jury of the entire applicable law. We first observe (although the issue was not raised) that sexual abuse in the first degree is a lesser-included offense of both rape in the first degree and sodomy in the first degree, while at the same time it was in this case a primary charge of the indictment, relating to a separate instance of sexual contact (the insertion of the foreign objects and the touching of the breasts). The instruction, couched in general terms of "sexual contact" without differentiating the act from those acts constituting rape and sodomy, permitted the jury to find Johnson guilty twice for the same act, e.g., intercourse constituting rape and intercourse constituting sexual contact and, therefore, sexual abuse.

Id. at 277; *see also Miller v. Commonwealth*, 283 S.W.3d 690, 695-96 (Ky. 2009) (The trial court erred in using "identical jury instructions on multiple counts of third-degree rape and sodomy, none of which could be distinguished from the others as to what factually distinct crime each [instruction] applied to.").

Based upon our holdings in *Johnson* and *Miller*, a double jeopardy violation clearly occurred with respect to Instruction Nos. 1 and 2. We have

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[3] While there may also be an argument for an unanimous verdict violation, such an argument was not raised in the briefs to this Court. While it is important to emphasize that the failure to raise an issue on appeal cannot constrain this Court to affirm a judgment that is facially invalid or illegal, we decline to exercise that discretion here because in this case, the judgment is not illegal on its face.

held that double jeopardy violations of this type qualify as palpable error under RCr 10.26. *Banks v. Commonwealth*, 313 S.W.3d 567, 571–72 (Ky. 2010) (quoting *Miller*, 283 S.W.3d at 695) ("'[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.' If the jury instructions do not include factual differentiation between the charges, it is reversible error, even if the error is unpreserved.") (internal citations omitted).

As clarification, of course there may be a conviction for both rape and sexual abuse as a result of the same general episode if there are two independent acts of criminal conduct and the instructions sufficiently differentiate between the two criminal acts. For example, during the same general episode there may be separate acts, one qualifying as rape (intercourse) and the other qualifying as sexual abuse (e.g., fondling). However, even then, the instructions must adequately differentiate between the two criminal acts.

Accordingly, having determined a double jeopardy violation occurred we vacate the conviction and sentence for the lesser offense of first-degree sexual abuse. Because the judgment ordered that the five-year sentence for the first-degree sexual abuse conviction is to be served concurrently with Appellant's sentence for his first-degree rape conviction, Appellant's sentence of fifty-years' imprisonment remains unaffected.

B. Inclusion of Overly Broad Time Frame Not Supported By the Evidence.

Appellant argues that the instructions were further flawed because both the rape and sexual abuse instructions referred to the period of time "between January 1, 2001 and December 31, 2008" despite the fact that the only evidence presented at trial related to conduct occurring in 2004 and 2005, when Anna was living with Appellant. Specifically, the jury was instructed to determine whether Appellant engaged in sexual intercourse and/or sexual contact with Anna between January 1, 2001 and December 31, 2008. Appellant alleges that this error allowed the jury to believe that Anna may have been abused when she was older and therefore give more credence to her recollection. The Commonwealth concedes that this issue was preserved and, therefore, we will treat it as such.

Additionally, the Commonwealth concedes that the date range included in the instructions was too broad but argues that the error was harmless. While Appellant's indictment also included the 2001 – 2008 date range, the Commonwealth only presented evidence to prove that the rape and sexual abuse occurred between January 1, 2004 and July 2005. Thereby there was no reason for the instructions to have included the time periods covering 2001 – 2003 and 2006 – 2008; as such, this language was superfluous. Nevertheless, we find the inclusion of these superfluous dates to be harmless. *See Travis v. Commonwealth*, 327 S.W.3d 456, 452-53 (Ky. 2010) ("Though such a case presents an error in the instructions, namely, the inclusion of

surplus language, the error is simply harmless [when] there is no reason to think the jury was misled.")

Here, evidence was presented to the jury to show that multiple sexual acts occurred during the 2004 – 2005 time frame. Since we have already vacated the sexual abuse conviction, the only relevant discussion goes to the rape instruction. The rape instruction only required that the jury find that one instance of "sexual intercourse" occurred between the broad 2001 – 2008 date range. As such, there is no reason to think that the jury convicted Appellant upon the belief that the crime occurred outside the time frame established by the evidence. Therefore, we find that the inclusion of the overly broad date range in the jury instruction for first-degree rape was a harmless error.

III. FAILURE TO STRIKE JURORS FOR CAUSE

Appellant contends that the trial court abused its discretion by failing to strike three jurors for cause. Appellant argues that the following jurors should have been stricken for cause: Juror No. 1 because he stated that he would have an issue with the defendant not testifying, Juror No. 12 because he stated that he had been sexually abused at age seven and was good friends with a prosecutor who tries child abuse cases, and Juror No. 26 because she stated that she thought someone who did not testify might be hiding something.

RCr 9.36(1) provides, in pertinent part, that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Long-

standing Kentucky law has held that a trial court's decision on whether to strike a juror for cause must be reviewed for abuse of discretion. *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002). The court "must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007). Indeed, "[t]here is no 'magic question' that can rehabilitate a juror, as impartiality is not a technical question but a state of mind." *Id.* (citing *United States v. Wood*, 299 U.S. 123, 145–46 (1936). We have recently emphasized that in exercising its discretion in deciding whether to strike a juror, the trial court should err on the side of caution and strike the juror in marginal cases. *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013).

While Appellant failed to provide a preservation statement in his brief, his trial counsel did challenge these jurors for cause. Nevertheless, Appellant failed to provide reference to the record identifying where each juror made the alleged biased statements. Instead, Appellant cites to his counsel's summary of each juror's testimony, to which on one occasion the trial judge stated she had no recollection of such a statement being made.

Pursuant to CR 76.12(4)(c)(v), arguments included in the contents of a brief must be accompanied by "ample supportive references to the record and citations of authority pertinent to each issue of law and . . . at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review . . . ." Here, Appellant not only failed to provide ample references to the record but also failed to include a statement of

preservation. It is not the responsibility or function of this Court to research and make Appellant's arguments for him. *See Harris v. Commonwealth*, 384 S.W.3d 117, 130-31 (Ky. 2012). Therefore, it is in this Court's discretion to decline to review arguments failing to conform to established Kentucky rules. Accordingly, we will not address the merits of Appellant's arguments except to note that a friendship with a prosecutor not assigned to the case, standing alone, would not generally be grounds for dismissal for cause, nor would being a prior victim of the type of crime under trial. *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985) (The trial court did not err in failing to excuse for cause the Commonwealth's attorney's ex-brother-in-law and distant cousin from the jury pool.); *Brown v. Commonwealth*, 313 S.W.3d 577, 598 (Ky. 2010) ("The mere fact that a prospective juror has been the victim of a crime similar to the crime being tried does not by itself imply a disqualifying bias. Additional evidence of bias is required.").

Furthermore, from the limited record cited by Appellant, it does not appear that the trial judge abused her discretion. As to Juror No. 1, the trial judge stated that the juror "never said he could not be impartial if [Appellant] didn't testify." And, for Juror No. 26, the trial judge determined that the juror's view that someone who did not testify might be hiding something did not amount to an inability to be impartial. The judge noted that the juror gave this response after being asked what are the reasons a person may not testify. The judge determined that the juror's answer to this question does not equate to a bias of finding Appellant guilty based on his decision not to testify, as more

targeted questioning to that point is needed to identify such a bias. We find the trial judge's reasoning is sound and therefore the judge did not abuse her discretion in failing to strike the challenged jurors for cause.

IV. EVIDENCE OF ABUSE OF ANNA BY HER ADOPTIVE FAMILY

Appellant next contends that palpable error occurred as a result of the admission of evidence concerning Anna's abuse during the time she lived with the Rodriguez family. Anna was placed with the Rodriguez family after being removed from her mother, and the family eventually adopted Anna and her siblings. Appellant objects to Anna being permitted to describe in detail the terrible conditions at the Rodriguez residence, and the various instances of physical and emotional abuse she and her siblings endured while living there. Appellant alleges that the evidence was irrelevant, had no probative value regarding the crimes charged, and that the introduction of the testimony did nothing but garner sympathy from the jurors toward Anna because of the horrible events she had endured with the Rodriguez family.

In order to be admitted at trial, evidence must be relevant. KRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless

presentation of cumulative evidence." KRE 403; *see also Moorman v. Commonwealth*, 325 S.W.3d 325, 332–33 (Ky. 2010). Relevancy is established by any showing of probativeness, however slight. *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999).

Here, the evidence concerning Anna's time spent with the Rodriguez family was relevant for at least two reasons. First, it is relevant to explain her delay in disclosing Appellant's alleged conduct. Because she was constantly in an abusive situation, Anna may have had no trustworthy adults to whom she might confidently reveal the earlier abuse by Appellant. Second, this evidence is relevant to explain why she was attending therapy sessions with the therapist to whom she eventually disclosed the alleged abuse.

To establish these relevant facts, emotional testimony was elicited from Anna describing the specific details of the abuse she suffered while in the care of the Rodriguezes. While it might be reasonably debated that the degree of the detail included in this testimony was not necessary for the jury to understand Anna's delay in reporting the abuse inflicted by Appellant, the admission of this testimony does not rise to the level of palpable error. The evidence is relevant and probative because it explained to the jury why it took Anna so long to tell anyone about the abuse she suffered at the hands of Appellant. The specific nature of this testimony was not so prejudicial as to provide Appellant any relief because it is unlikely a different result would have resulted absent the specific details. Appellant alleges that this testimony was insurmountable because it allowed the jury to believe he was responsible for Anna's abuse while

at the Rodriguez household. This argument is unpersuasive as the testimony never implied such a link between Appellant and the terrible circumstances Anna endured while with the Rodriguez family.

V. APPELLANT'S DRUG USE

Appellant contends that the trial court erred by permitting the Commonwealth to introduce, and repeatedly emphasize, his prior cocaine use. During a police interview with Appellant in March 2010, Appellant stated that during the relevant period he was using cocaine frequently, that he and Anna's mother would frequently have sex while taking cocaine, and that Anna would sometimes be in the bed with them. Appellant also stated that he and Anna's mother stayed "naked all the time" while they were doing cocaine and that he had probably touched Anna in an inappropriate manner at some point.

KRE 404(b) provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

Generally, evidence of crimes other than those charged are not admissible. KRE 404(b); Robert G. Lawson, *Kentucky Evidence Law Handbook* § 2.25 (3d ed. 1993). However, "[e]vidence of other crimes or wrongful acts may

be introduced as an exception to the rule if relevant to show proof of motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident[,]" *Chumbler v. Commonwealth*, 905 S.W.2d 488, 494 (Ky. 1995) (citing KRE 404(b)(1)), or else are significantly interrelated to the crime charged. KRE 404(b)(2). "To be admissible under any of these exceptions, the acts must be relevant for some purpose other than to prove criminal predisposition" and they must be "sufficiently probative to warrant introduction." *Chumbler*, 905 S.W.2d at 494. Further, "the probative value of the evidence must outweigh the potential for undue prejudice to the accused." *Id.*

Prior to trial, Appellant filed a motion *in limine* to exclude, among other things, any prior bad acts not otherwise admissible under KRE 404(b). Following an evidentiary hearing the trial judge granted Appellant's motion, but specifically excepted Appellant's prior cocaine use. When asked by the trial judge if he agrees that Appellant's cocaine use was a part of the case, defense counsel stated:

> I don't necessarily agree but to the extent that the Commonwealth wishes to bring up [Appellant's] drug use at the time I don't think that that's something that is necessarily going to end up being a huge issue for us. I think that we anticipated that was likely to come out one way or the other.

The Commonwealth argues that Appellant's counsel conceded that Appellant's drug use was admissible during the trial. We agree, and thus find that Appellant waived appellate review of this claim. As we recognized in *Quisenberry v. Commonwealth*, "invited errors that amount to a waiver, *i.e.*, invitations that reflect the party's knowing relinquishment of a right, are not

subject to appellate review." 336 S.W.3d 19, 37-38 (Ky. 2011). Accordingly, we decline to address this matter on its merits.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Appellant contends that he received ineffective assistance of counsel during the trial proceedings because of various alleged deficiencies in his counsel's representation. However, as this Court stated in *Stacy v. Commonwealth*,

> "[a]s a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal . . . because there is usually no record or trial court ruling on which such a claim can be properly considered." . . . "This is not to say, however, that a claim of ineffective assistance of counsel is precluded from review on direct appeal, provided there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue."

396 S.W.3d 787, 793 (Ky. 2013) (quoting *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872-73 (Ky. 1998)) (citations omitted).

Here, Appellant did not request a new trial. Instead, he asked the trial court to remove his counsel, appoint new counsel, and continue his sentencing until a later date. Therefore, the trial court did not pass judgment on Appellant's claim that his prior counsel was defective in his representation and that such defects justified a new trial. As such, this argument is not preserved for our review. Accordingly, Appellant's proper avenue for relief is provided by RCr 11.42.

VII. CONCLUSION

For the reasons explained above, we affirm the judgment of the Jefferson Circuit Court except for the first-degree sexual abuse conviction and sentence, which is vacated.

All sitting. All concur.

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