

IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2015-SC-000478-MR

CLETUS ROBBINS, JR.

APPELLANT

V.

ON APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE KENT HENDRICKSON, JUDGE
NO. 14-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Cletus Robbins, Jr. appeals as a matter of right from a judgment of the Harlan Circuit Court sentencing him to twenty-five years' imprisonment. Ky. Const. § 110(2)(b). Robbins raises two issues on appeal: (1) the trial court erred by denying Robbins's motion for a directed verdict as to the charges of kidnapping and first-degree unlawful imprisonment; and (2) Robbins's convictions for two counts of second-degree assault, two counts of first-degree wanton endangerment, and first-degree unlawful imprisonment were barred by statutory double jeopardy. For the following reasons, we affirm the judgment and sentence of the Harlan Circuit Court.

FACTUAL AND PROCEDURAL BACKGROUND

During the evening of May 2, 2014, Cletus Robbins Jr. and Erica Bryant visited the home of Arbin Shepherd. Later that evening, Benji Stout and

Gabrielle Wright Cochran arrived at the residence. Subsequently, Robbins and Stout began to argue and the argument became physical, resulting in Stout being badly beaten and shot with a handgun. Beyond these facts, witness testimony differed as to what transpired that evening and what triggered the dispute and assault.

The Commonwealth's first witness was Bryant, who was dating Robbins's step-son at the time of this incident. Bryant was with Robbins when he received a phone call about visiting Shepherd's house that evening. In her interview with the police, Bryant explained that Shepherd called Robbins to inform him that he had "got the lady," who had sold them counterfeit Xanax pills and that she would be at his house that evening. As a consequence of this call, Bryant and Robbins went to Shepherd's home.

According to Bryant the mood in the house was tense. Asked specifically about Robbins's mood, Bryant recalled that he was angry. Once Stout and Cochran arrived at the residence, Stout was summoned by Robbins to come to the kitchen.¹ Due to her vantage point in the living room, which was immediately next to the kitchen, Bryant was able to observe how the conflict began. Initially, Bryant heard Robbins shout at Stout that he "had got him for \$600 the day before." Robbins then began to beat Stout and as the beating

¹ There was conflicting testimony at trial, about the presence of an unnamed "African-American man" who may have accompanied Stout and Cochran to Shepherd's residence.

continued Stout fell to the ground, with Robbins kicking him in the head. The beating continued despite Stout's pleas for Robbins to stop.

Afterwards, Robbins and Carl Edward Collins, tied Stout up with a nylon rope.² Robbins then placed a gun to Stout's head, stating he was going to get his \$600 back from Stout. While Stout was tied up, Collins took money and illicit narcotics from his person. That money was subsequently divided among Robbins, Collins, and Shepherd.

During this period, Bryant approached Robbins asking him to calm down. In response, Robbins pointed his gun in her face and informed her that he intended to shoot Stout. Bryant put her hands up and retreated to defuse the situation. Afterwards, Robbins returned his focus to Stout, untying his restraints. However, Robbins continued to yell at Stout about the money. During this exchange Bryant heard a gunshot and realized that Stout had been shot in the chest.

Bryant was ordered by Collins to clean up Stout's blood in the kitchen. While Bryant did so, she overheard Robbins boasting that he had "got [Stout]". Later, Cochran, Stout's companion, entered the kitchen and Robbins struck her in the face. After a short discussion, Robbins and Collins gave Stout some of his money back so he could pay for gas to return to Lexington. Prior to letting Stout and Cochran leave, Robbins told the pair not to stop on the way to

² Later, during cross-examination Bryant contradicted this portion of her account, saying that she did not see Stout tied up on the day in question.

Lexington or inform anyone about what had happened or he would kill Cochran's family.³

The Commonwealth's second witness was Shepherd, the homeowner. Shepherd admitted to having taken Xanax the day of the assault and that as a result he was in and out of consciousness throughout the evening. Shepherd testified that Robbins had come to his house to rendezvous with Stout and Cochran. Prior to the start of the altercation in the kitchen, Shepherd overheard Stout and Robbins discussing a prior drug deal for Xanax. While in and out of consciousness, Shepherd heard "scuffling" in the kitchen. The sound of the gunshot in the kitchen, lifted Shepherd from his stupor, and he went to his room to get his gun.

Shepherd went on to explain that his concern was to calm down Robbins and get everyone out of his home. In a tense moment, Robbins and Shepherd pointed their weapons at each other, but the moment passed without violence. Later, Shepherd watched Stout leave his residence, while Bryant worked to clean up his blood. During cross-examination, Shepherd claimed to not understand the reason for the dispute between Robbins and Stout, explaining

³ Robbins claims that Bryant's testimony reflected that "[t]he whole incident lasted about 25 minutes." This is rather misleading. The information cited by Robbins, is from a portion of Bryant's interview that was played for the jury. In the interview Bryant was asked, "[h]ow long do you expect that they were in the kitchen? How long did it take till the shooting happened in the kitchen you would guess while you all were in the living room?" Bryant responded saying "twenty-five minutes maybe." The twenty-five minute time period referenced by Bryant does not reflect the entire time that Stout and Cochran were present in the home, as is suggested by Robbins, but rather only the time from when Stout went into the kitchen with Robbins until the shooting occurred.

that he had purchased genuine Xanax which he used that evening. Shepherd explained that this was the second occasion in which Stout and Cochran came to his house to sell Xanax. Also, Shepherd denied that anyone had been tied up.

The Commonwealth's third witness was Collins. Collins, a convicted felon, testified that he was home in bed when he received a call from Shepherd's landline telephone, requesting that he come to the house. When Collins arrived at the residence, he discovered that Shepherd was unconscious and that Robbins had called him from Shepherd's phone. Collins explained that had he known that it was Robbins who had called him that he would not have gone to the house, as the two men did not get along.

Robbins told Collins that the drugs that he had previously purchased from Stout were counterfeit. Further, he told Collins that Stout and Cochran were on the way to the house to sell narcotics, as they had previously done once before. Collins observed that Robbins was angry and intended to harm Stout. To avoid a fight and a possible disruption in Stout and Cochran bringing drugs from Lexington, Collins offered to buy the counterfeit drugs from Robbins. While Robbins accepted Collins's money, he remained at Shepherd's house waiting for Stout and Cochran to arrive. When Stout and Cochran failed to arrive on time, Robbins used Shepherd's home phone and his cell phone to call and threaten Cochran's family.

A short while later, Cochran arrived at Shepherd's home and questioned Robbins about why he contacted her family, as they did not know that she and

Stout sold narcotics. Robbins told her that everything was fine and questioned her about Stout's whereabouts, who was still in the car. Collins testified that when Stout entered the living room, Robbins immediately got up, put his arm around Stout, and shot him in the chest. Robbins then began to beat Stout in the kitchen. During the beating, Stout screamed Collins's name in a desperate plea for help. After beating Stout for approximately ten minutes, Robbins took a taser from Stout's pocket and shocked him with it. Collins also testified about Robbins's crazed state, which was demonstrated by his subsequent use of the taser on himself.

Afterwards, Robbins pointed his gun at Shepherd, which led to Collins retrieving a gun that was located on top of the refrigerator. Collins explained that he obtained the weapon, so that if Robbins shot Shepherd, he would be able to retaliate against Robbins. Subsequently, Collins took Cochran into the living room, away from Robbins who continued to repeat that he was going to kill and bury them. Collins testified that he was concerned that Robbins intended to kill Stout and Cochran. In an attempt to calm Cochran down, he slapped her in the face and urged her to listen to him so they could get out of the situation.

Later, Collins observed Robbins standing in front of Cochran with her shirt half buttoned; he surmised that it was due to Robbins searching her person for narcotics. After deciding to not further harm Stout and Cochran, Robbins informed the pair that if they were to contact the police that he would respond by killing Cochran's whole family. Prior to Stout and Cochran's

departure, Collins helped clean up Stout and gave him advice on how to breathe in case his lung had been struck in the shooting. During his testimony, Collins denied that Stout had been tied up during his ordeal.

The Commonwealth's fourth witness was Kentucky State Police Detective Craig Miller. Detective Miller became involved in the case after receiving a report that Stout had visited Good Samaritan Hospital in Lexington claiming to be the victim of a gunshot wound. Subsequently, Detective Miller took witness statements from Stout and Cochran, created photo pack lineups, and obtained a search warrant for Shepherd's residence. The resulting search of Shepherd's residence led to the discovery of a green nylon rope, a .38 caliber handgun, and a .22 caliber rifle. Also, Stout had told the police that his beaded necklace was broken during the beating; police recovered beads in multiple locations in Shepherd's kitchen. Subsequently, Detective Miller arrested Robbins and interviewed him. In his interview, Robbins admitted to attacking Stout saying, "I beat the shit outta him; I beat his motherfucking brains out. . . ." Later, Robbins's wife provided to police the pills that Robbins had allegedly obtained from Stout and Stout's taser.⁴

The Commonwealth's final two witnesses were Stout and Cochran. Stout, a convicted felon, explained that he and Cochran were traveling to Harlan County to see their children who were staying with their maternal

⁴ The recovered pills were sent to the Kentucky State Police laboratory for forensic analysis. Jamie Hibbard testified that the pills contained alprazolam, the active ingredient in Xanax. However, those tests did not identify the percentage of the drug in each pill.

grandparents, Cochran's parents. In route to the house, Cochran received a phone call from her mother, informing her that someone had called her house. In response, Cochran informed Stout that they needed to make a stop at Shepherd's home.

After arriving at Shepherd's residence, Stout noted that there was a crowd of happy people who warmly welcomed them into the home. Subsequently, Robbins took Stout into the kitchen and began beating him with a gun. As part of this assault, Robbins struck Stout in the back of the head with the gun causing him to fall to the floor. Once on the ground, Robbins began to kick Stout, which included kicking him in the face. As Stout began to crawl towards the back door of the house, Robbins, using a racial epithet, told Stout he was going to kill him. Robbins then shot Stout in the chest.

Stout testified that he was forced into a chair and someone tried to remove his shirt. Then, Robbins observed that Stout had a taser, took it from him, and used it against him. Stout testified that throughout the beating, he was held at gunpoint. He also recounted being tied up by Bryant and Collins. Eventually, Stout was permitted to leave the residence. Prior to leaving, Stout was warned against going to the authorities, with Robbins threatening to kill Cochran's parents if he did so. Stout testified that he delayed going to the hospital in Lexington for three days due to his fear of Robbins's retaliation. During cross-examination, Stout denied possessing any illegal narcotics the night of the incident. He claimed to have \$2,400 in cash stolen from him that night, cash which he received for selling a vehicle.

Next, Cochran testified. She recounted that while on the way to visit her parents in Harlan, she received a call (the identity of the caller is unclear) in which it was made clear that Robbins was upset. The caller explained that Robbins believed that Cochran owed him money, and that she needed to meet with Robbins at Shepherd's residence. Additionally, Cochran's mother called and told her daughter that she had received a threatening call.

After arriving at Shepherd's house, Cochran told Stout to remain in the car while she went in to speak to Robbins. Cochran's efforts to resolve the situation were unsuccessful, as Robbins and Collins held her at gunpoint, while Shepherd went outside to tell Stout to come into the house. After Stout entered the residence, Robbins and Collins proceeded to beat him. In particular, Stout testified that Robbins struck Stout in the head over fifty times.

Afterwards, Robbins took Stout into the kitchen, but just before doing so pointed a gun at Cochran's head and told her to stay in the living room, and that he would deal with her next. In the kitchen, Robbins proceeded to break three chairs over Stout's head. During this period, Robbins repeatedly told Stout that he wanted \$500. Subsequently, he told Bryant to get rope and she proceeded to tie Stout's hands behind his back and tie his feet together. Once Stout was tied up, Robbins took money from him and then after the robbery was completed, Stout's bindings were removed.

After robbing Stout, Robbins went into the living room and demanded money from Cochran. Cochran refused Robbins's demand, telling him that she

did not owe him anything. In response, Robbins shoved his gun into her eye, then put it to her temple, before finally striking her in the head with the gun. Robbins then demanded that Cochran take off her clothes. When she refused, Robbins pulled her shirt open and began to fondle her breasts underneath her bra. After the robbery and this incident in the living room, Stout was shot.

Cochran testified that Robbins experienced periods of lucidity, before returning to crazed and violent actions. An example of his crazed state was Robbins's repeated use of the taser on Stout while he chased him around the kitchen. Additionally, when Stout began to pray, Robbins held his hand and joined in prayer with him asking God for forgiveness. Yet, Robbins later demanded money from Stout within four days-time, and threatened Cochran about going to the police and that if she did so he would kill her family.

During cross-examination Cochran denied that she and Stout were involved in the sale of narcotics. When asked about the money that Stout had on his person at the time of the robbery, Cochran explained that he had received it as part of a social security payment. At the conclusion of Cochran's testimony, the Commonwealth briefly recalled Detective Miller, and then rested its case.

Robbins called three witnesses. His first witness was Cochran's father, Lloyd Cochran. He testified that while he was out of the house that there was a missed call and that the caller ID indicated that it was from a person with the last name of Shepherd. Subsequently, he called the number back and spoke to "a Shepherd fella." Robbins's second witness was Cochran's mother Cathy

Cochran. She testified about a missed call, which her caller ID noted as being from "Arvin Shepherd." Additionally, she noted that her husband later returned the phone call.

Robbins then elected to testify on his own behalf. He explained that a couple of days before May, 2, 2014, he had been informed by Shepherd that there would be someone at his home selling Xanax. Subsequently, Robbins purchased \$600 of Xanax from Stout and Cochran. Stout claimed that the drugs were counterfeit drugs that contained as little as three percent alprazolam.

Robbins told the jury that on the date in question he had received a call from Shepherd that Cochran and Stout were going to meet him at his residence and, consequently, Robbins would have an opportunity to get his money back. Afterward, Robbins went to Shepherd's house to wait. After approximately twenty-five minutes, Stout and Cochran arrived, with Cochran entering first.

When Stout entered the house, Robbins accused him of selling sham Xanax. Stout told Robbins that he had "something else" to offer in his car, but Robbins informed him that he did not want anything else, but he did want his money back. Shortly thereafter, a brawl started between the two men. According to Robbins, when Stout attempted to take out his taser, he was disarmed and badly beaten by Robbins. During the altercation, heroin that Stout had on his person fell to the ground; those drugs were subsequently seized by Shepherd and Collins. Robbins placed the value on those drugs at

approximately \$2,400. Later Robbins gave Stout \$30 of his own money, so that he could afford gas to travel back to Lexington.

Robbins denied that the event was anything more than a fist fight. He denied shooting Stout or even having a gun, insisting that only Shepherd and Collins were armed with guns. Further, Robbins insisted that he did not strike Stout with chairs or tase him. Additionally, Robbins denied knowledge about rope or anyone being tied up that evening. Robbins also denied that he had hit or inappropriately touched Cochran. Finally, Robbins denied taking any money from Stout, but did admit to using some of his heroin later that evening.

According to Robbins, Stout and Cochran told Shepherd the following day that they would go to the police, unless Robbins paid for Stout's lost heroin. Robbins attempted to explain away the other witnesses' accounts of the evening, by saying that Collins and Stout were longtime friends. Also, Robbins alleged the existence of a love triangle involving Robbins, Shepherd, and Robbins's wife who also happened to be Shepherd's former spouse.

After weighing all the testimony and physical evidence, the jury found Robbins not guilty of the attempted murder of Stout and the second-degree assault of Cochran. The jury found Robbins guilty of the following offenses: kidnapping (with serious physical injury); first-degree robbery; two counts of second-degree assault against Stout; first-degree unlawful imprisonment of Cochran; two counts of first-degree wanton endangerment (Stout and Cochran); two counts of intimidating a participant in the legal process (Stout and Cochran); and being a first-degree persistent felony offender. For these

offenses the jury recommended a total sentence of twenty-five years. The trial court sentenced Robbins in conformance with the jury's recommendation.

Robbins brings this appeal as a matter of right.

ANALYSIS

I. The Trial Court Properly Denied Robbins's Motion for a Directed Verdict of Acquittal on the Kidnapping and Unlawful Imprisonment Charges.

Robbins contends that he should have been granted a directed verdict as to the charges of kidnapping and unlawful imprisonment due to the applicability of the kidnapping exemption statute, Kentucky Revised Statute (KRS) 509.050. Specifically, he argues that any interference with Stout and Cochran's liberty was incidental and occurred contemporaneously with the underlying crimes of first-degree robbery, second-degree assault, and first-degree wanton endangerment.

Kentucky Rule of Civil Procedure (CR) 50.01 states, in pertinent part "[a] motion for a directed verdict shall state the specific grounds therefor." "We have previously applied CR 50.01 to criminal cases and have held that its requirement of 'specific grounds' must be followed to preserve for appellate review a denial of a motion for a directed verdict of acquittal." *Potts v. Commonwealth*, 172 S.W.3d 345, 348 (Ky. 2005) (citing *Pate v. Commonwealth*, 134 S.W.3d 593, 597–98 (Ky. 2004); *Daniel v. Commonwealth*, 905 S.W.2d 76, 79 (Ky.1995)). Insufficiently specific motions for directed verdict are not reviewed under the "any rational juror" standard, but under the palpable error

standard of Kentucky Rule of Criminal Procedure (RCr) 10.26.⁵ *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 35 (Ky. 2011) (citing *Johnson v. Commonwealth*, 292 S.W.3d 889 (Ky.2009); *Potts*, 172 S.W.3d at 348). In determining whether Robbins was entitled to a directed verdict, the Court reviews the evidence in the light most favorable to the Commonwealth. See *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991); see also *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009).

Robbins acknowledges that he failed to raise the applicability of the kidnapping exemption in his motion for directed verdict. Accordingly, we conclude that this argument was not properly preserved for appellate review. In anticipation of this potential determination, Robbins alternatively requested that the Court conduct palpable error review under RCr 10.26. The Commonwealth argues against the Court granting palpable error review relying on an unpublished opinion, *Payne v. Commonwealth*, No. 2010-SC-000199-MR, 2011 WL 4430860 (Ky. 2011).⁶ However, *Payne* clearly does not stand for the proposition advanced by the Commonwealth.

⁵ The palpable error rule mandates reversal when “manifest injustice has resulted from the error.” *Elery v. Commonwealth*, 368 S.W.3d 78, 98 (Ky. 2012) (quoting RCr 10.26). To constitute manifest injustice the error must be so serious as to affect “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)).

⁶ Under CR 76.28(4)(c), “[o]pinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions . . . may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.”

Payne argued that his conviction for first-degree unlawful imprisonment should have been barred by the kidnapping exemption statute. 2011 WL 4430860 at 8. The Court concluded that Payne failed to raise the issue at trial and that as such the issue was not preserved. *Id.* However, the Court went on to state that “[u]nder the circumstances of this case, there was no palpable error.” *Id.* By reaching this conclusion, the Court demonstrated that it was willing to review an unpreserved argument concerning the kidnapping exemption statute for palpable error. Additionally, while there is no published opinion that would resolve this issue, *Payne* is consistent with prior unpublished cases from this Court. *See e.g. Cecil v. Commonwealth*, No. 2002-SC-0252-MR, 2003 WL 22975018 (Ky. 2003); *Downing v. Commonwealth*, No. 2004-SC-0059-MR, 2005 WL 1412448 (Ky. 2005). Accordingly, this Court will review for palpable error.

The kidnapping exemption in KRS 509.050 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 the offense, unless the interference exceeds that which is ordinarily incidental to commission of the offense which is the objective of his criminal purpose.

The exemption statute is designed to bar misuse of the kidnapping statute to obtain greater punitive sanctions for offenses that inherently involve restraint to accomplish the crime. *Calloway v. Commonwealth*, 550 S.W.2d 501, 503 (Ky. 1977).

To ascertain whether the kidnapping exemption statute applies, the Court employs a three-prong test. *Griffin v. Commonwealth*, 576 S.W.2d 514, 516 (Ky. 1978). First, we determine whether the underlying criminal purpose was the commission of a criminal offense defined outside of KRS Chapter 509. *Id.* Second, we review whether the interference with the victim's liberty occurred immediately with and incidental to the commission of the underlying offense. *Id.* Last, we examine whether the interference with the victim's liberty exceeded that which is ordinarily incident to the commission of the underlying offense. *Id.* Application of the exemption is determined on a case-by-case basis. *Gilbert v. Commonwealth*, 637 S.W.2d 632 (Ky. 1982), *cert. denied*, 459 U.S. 1149, 103 S. Ct. 794 (1983). It is firmly established that the decision to apply the kidnapping exemption is left solely to the discretion of the trial court and is not a matter on which the jury receives instruction. *Calloway v. Commonwealth*, 550 S.W.2d 501 (Ky. 1977). See also, *Duncan v. Commonwealth*, 322 S.W.3d 81 (Ky. 2010).

In the case at bar, the first prong of the test is satisfied as the underlying offenses of first-degree robbery (KRS 515.020), second-degree assault (KRS 508.020), and first-degree wanton endangerment (KRS 508.060) are each defined outside KRS Chapter 509. The question becomes whether the interference with Stout and Cochran's liberty occurred immediately with and was incidental to the commission of the underlying offenses. Also, in order for the exemption to apply, where the victim is restrained of his liberty in order to facilitate the commission of an offense, "the restraint will have to be close in

distance and brief in time.” *Timmons v. Commonwealth*, 555 S.W.2d 234, 241 (Ky. 1977).

While it was clear that the offense was close in distance (all of the activity occurred in Shepherd’s residence), there was differing testimony concerning the duration of Robbins’s restraint of the victims. In her interview with the police, Bryant explained that approximately twenty-five minutes passed from the time that Robbins and Stout entered the kitchen until Stout was shot. Given all the events that were alleged to have occurred at Shepherd’s residence that evening, the period of time that Stout and Cochran were restrained in the house easily would have exceeded thirty minutes under any view of the evidence.

Additionally, Cochran testified that the incident was significantly longer, as she and Stout arrived at Shepherd’s residence in Harlan at approximately 9:00 p.m., but did not arrive at their home in Lexington until the early hours of the following morning. Under this scenario, even assuming the most restrictive definition of “early hours” and a conservative commute time from Harlan to Lexington, Cochran and Stout would have been at Shepherd’s house for at least an hour. Cochran’s view of the long length of time they spent in Shepherd’s home is also supported by Bryant’s testimony that Cochran and Stout arrived at Shepherd’s home between 7 and 8 p.m.

This difference in time is critical as the Court has concluded that to trigger the kidnapping exemption the restraint must be limited in time. See *Mitchell v. Commonwealth*, 423 S.W.3d 152, 165 (Ky. 2014) (trial court did not abuse discretion by not applying kidnapping exemption where confinement of

victims was alleged to have lasted forty-five minutes.); *Murphy v.*

Commonwealth, 50 S.W.3d 173, 179-80 (Ky. 2001) (Restraint of the burglary victim for ten and one-half hours exceeded the scope of time necessary for defendants to commit the offense.). In the case at bar, Bryant and Cochran's testimony raise doubts that Robbins's restraint of Stout and Cochran was brief in time. Yet, even if the Court were to conclude that Robbins satisfied the second prong, it would afford him no relief, as he clearly does not meet the third and final prong of the test.

It is obvious that Robbins's restraint of Stout and Cochran exceeded that which is ordinarily incident to the commission of robbery, assault, and wanton endangerment. The jury heard testimony from several witnesses which conflicted on the timing of the events and the exact force employed against Stout. However, those witness accounts, with the exception of that provided by Robbins himself, were consistent that Stout was subjected to a tremendous amount of abuse from Robbins. By committing a series of acts that could serve only to terrify and coerce Stout and Cochran, Robbins exceeded the restraint necessary to commit the charged offenses.

As an example, the robbery of Stout could have been accomplished simply by threatening him at gunpoint, but Robbins instead opted to 1) repeatedly beat Stout through the use of his hands, feet and the gun; 2) have Stout physically restrained with rope; 3) hold Stout at gunpoint and place a gun at his head; 4) shoot Stout with a handgun; 5) break chairs over Stout's head; and 6) repeatedly use a taser on Stout. The testimony supports that

there were breaks in the commission of these violent acts, to lengthen the period of time in which Robbins tortured Stout. Additionally, Robbins took time out from injuring Stout to humiliate him by demanding that Cochran undress and when she refused to do so, ripped open her shirt and began to fondle her breasts. Finally, Robbins repeatedly threatened Stout, Cochran, and the lives of Cochran's family. By repeatedly using force and threats to extend the time of his crimes far beyond what was necessary to accomplish the charged offenses, Robbins cannot take advantage of the kidnapping exemption. *See Commonwealth v. Stinnett*, 364 S.W.3d 70 (Ky. 2011) (defendant was not entitled to the kidnapping exemption as his "substantial detours" from the commission of murder to "humiliate and degrade his victim," constituted a restraint on her liberty which "clearly exceeded what is ordinarily required to commit the offense of murder."). Accordingly, we find that the trial court properly denied Robbins's motion for directed verdict as to the kidnapping charge. There was no error and certainly no palpable error.

II. Robbins's Convictions Did Not Constitute Statutory Double Jeopardy.

Robbins claims that his convictions for two counts of second-degree assault, two counts of first-degree wanton endangerment, and unlawful imprisonment violate Kentucky's statutory protection against double jeopardy. Although Robbins failed to preserve this argument before the trial court, the lack of preservation does not bar appellate consideration of this claim. *See Walden v. Commonwealth*, 805 S.W.2d 102, 105 (Ky. 1991) (*overruled on other grounds by Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996)). Further, this

alleged error is subject to palpable error analysis under RCr 10.26. *Kiper v. Commonwealth*, 399 S.W.3d 736, 741-42 (Ky. 2012) (citing *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009)).

KRS 505.020 sets forth Kentucky's statutory structure for examining whether multiple convictions for the same course of conduct are permissible. *See Kiper*, 399 S.W.3d at 742. As the *Kiper* Court explained, "KRS 505.020 does not bar the prosecution or conviction upon multiple offenses arising out of a single course of conduct when the facts establish that two or more separate and distinct attacks occurred during the episode of criminal behavior." *Id.* at 745 (citing *Welborn v. Commonwealth*, 157 S.W.3d 608, 611-12 (Ky. 2005)). Yet, in order for those "multiple convictions to be proper there must have been a cognizable lapse in his course of conduct during which the defendant could have reflected upon his conduct, if only momentarily, and formed the intent to commit additional acts." *Id.* (citing *Welborn*, 157 S.W.3d at 612; *Terry v. Commonwealth*, 253 S.W.3d 466, 474 (Ky. 2008)).

A. Robbins's Conviction for Two Counts of Second-Degree Assault Did Not Violate Statutory Protections Against Double Jeopardy.

Robbins was convicted of two counts of second-degree assault against Stout. The first conviction was due to Robbins intentionally causing a physical injury to Stout by shooting him with a gun. The second conviction was due to Robbins causing a physical injury to Stout by striking him with a gun. Robbins alleges that his two convictions for second-degree assault cannot stand as they were part of an "uninterrupted continuous course of conduct." Specifically, he

maintains that “[t]he hitting and shooting came through a single struggle, a single argument, in which [Robbins] was trying to get money and drugs off [Stout]. As a result, [Stout] suffered one injury.”

However, the evidence presented at trial supports the proposition that there were interludes between Robbins’s violent acts against Stout. Multiple witnesses testified that Robbins took breaks in assaulting Stout. In particular, Cochran recalled that Robbins shot Stout after beating him with the gun and robbing him. As such, Robbins beating Stout with the gun did not occur simultaneously with the shooting. Rather than being one continuous act, there were a series of moments which afforded Robbins the opportunity to consider his behavior and “formulate intent to commit another act.” *Welborn*, 157 S.W.3d 608 at 612. *See Van Dyke v. Commonwealth*, 581 S.W.2d 563 (Ky. 1979) (defendant’s commission of sodomy and two counts of rape against one victim in a fifteen minute period did not protect the defendant from prosecution and conviction for each separate offense.).

Alternatively, each of Robbins’s second-degree assault convictions was based on a different act of violence perpetrated against Stout. Cochran’s and Stout’s testimony established that Robbins struck Stout in the head with the gun.⁷ However, Robbins also decided to shoot Stout in the upper portion of his chest. These injuries were markedly distinct from each other demonstrating Robbins’s differing intent in carrying them out. *See Quisenberry*, 336 S.W.3d

⁷ Bryant and Collins also testified that Robbins beat Stout repeatedly, although they did not say it was with the gun.

at 38-43 (convictions for facilitating attempted murder and facilitating a first-degree assault did not constitute double jeopardy, where defendant shot victim in the thigh and head.). Accordingly, Robbins's convictions for two counts of second-degree assault did not constitute double jeopardy. No error occurred, let alone palpable error resulting in manifest injustice.

B. Robbins's Conviction for First-Degree Wanton Endangerment Did Not Violate Statutory Protections Against Double Jeopardy.

Next, Robbins argues that his conviction for first-degree wanton endangerment was subsumed within the offense of second-degree assault. The basis of Robbins's conviction for first-degree wanton endangerment was his pointing a gun at Stout, which created a substantial danger of death or serious physical injury to him. Robbins asserts that this offense occurred when he pointed a gun at Stout right before he shot him in the chest. Accordingly, he argues that his actions constitute an unbroken course of conduct. Further, Robbins contends that in order for him to be found guilty of first-degree wanton endangerment that it would have required an "inconsistent finding of fact to establish the commission of the offenses."

Yet, as noted by the Commonwealth in its brief, there was testimony establishing multiple occasions during which Robbins pointed a gun at Stout. In one such instance, Bryant testified that after Stout had been beaten and tied up, Robbins placed a gun to his head and threatened him. This was a separate incident from when Robbins later pointed a gun at Stout and shot him in the chest. Relying on Bryant's account, the jury could have readily believed that Robbins committed first-degree wanton endangerment when he placed the gun

to Stout's head, a separate act from when he later pointed the gun at Stout to shoot him in the chest. There was no statutory double jeopardy error.

C. Robbins's Convictions for First-Degree Wanton Endangerment and First-Degree Unlawful Imprisonment Did Not Violate Statutory Protections Against Double Jeopardy.

Robbins's final argument is that his convictions for first-degree wanton endangerment and first-degree unlawful imprisonment violated statutory double jeopardy. Based on the instructions, the jury concluded that Robbins committed first-degree unlawful imprisonment when he unlawfully restrained Cochran, without her consent, and that the restraint occurred under circumstances which exposed her to serious physical injury. Additionally, the jury found Robbins guilty of first-degree wanton endangerment for pointing a gun at Cochran which created a substantial danger of death or serious physical injury. Robbins argues that this was impermissible as both convictions were based on the single course of conduct—Robbins pointing a gun at Cochran.

Yet, once again, various witnesses' testimony identified more than one instance in which Robbins pointed a gun at Cochran. First, Cochran stated that Robbins pointed at gun at her once she arrived at Shepherd's house. Later in the evening, Cochran testified that after she refused Robbins's demands for money, that he shoved his gun into her eye, then put it to her temple, before finally striking her in the head with the gun. As such, the jury could have believed that by pointing the gun at Cochran when she first arrived Robbins committed first-degree unlawful imprisonment. Also, the jury could

have concluded that by pointing the gun at Cochran later in the evening and striking her in the face with a loaded gun, that Robbins committed first-degree wanton endangerment. Accordingly, there was no double jeopardy error as to these two offenses against Cochran.

CONCLUSION

For the foregoing reasons, we affirm the conviction and sentence of the Harlan Circuit Court.

All sitting. All concur.

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