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RENDERED: June 13, 2019
NOT TO BE PUBLISHED

FINAL
DATE 7/5/19 Kim Redmon, DC

# Supreme Court of Kentucky

2018-SC-000152-MR

MATTHEW C. HACKER, SR. — APPELLANT

V.

ON APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
NO. 14-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**REVERSING AND REMANDING**

Appellant, Matthew C. Hacker, Sr., seeks our review of his conviction for first-degree sexual abuse, first-degree rape, and first-degree sodomy. Hacker was sentenced to a total of twenty years in prison.

As grounds for relief Hacker contends that (1) the jury instructions violated his right to a unanimous jury verdict by failing to differentiate between the separate offenses charged; (2) the trial court violated double jeopardy principles when it failed to distinguish the sexual abuse charge from the sodomy charge in the jury instructions; and (3) the trial court erroneously admitted evidence related to Hacker's marital relations.

## I. FACTUAL AND PROCEDURAL BACKGROUND

When Shannon[1] was a pre-teen she sometimes stayed with Hacker and his wife Tressa Hacker, Shannon's maternal grandmother, for prolonged periods. Shannon testified that during these stays, Hacker would often have unwanted sexual interactions with her. Shannon testified that she could not remember exactly when Hacker first began abusing her, but the first occasion she could clearly recall occurred "on the higher end of [age] ten" during the summer of 2008. Shannon testified that on this occasion Hacker took her to his bedroom, performed oral sex on her, and touched her vagina. The testimony alleged Hacker's sodomy and sexual touching of Shannon occurred on several other occasions over an extended period of time, typically a couple times per week. According to Shannon, Hacker also tried to force her to touch his penis through his pants and perform oral sex on him, and penetrated her on two separate occasions.

Shannon testified that Hacker would sometimes play transvestite pornography while abusing her. Tressa was permitted to corroborate this with testimony that he would sometimes play the same kind of pornography during their consensual marital relations. However, she was also permitted to testify about other aspects of their marital relationship that lacked any nexus or similarity to Hacker's abuse of Shannon.

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[1] In order to protect the identity of the victim we refer to her by a pseudonym.

At the conclusion of the evidence Hacker was convicted of one count each of first-degree sexual abuse, first-degree rape, and first-degree sodomy, and sentenced to a total of twenty years' imprisonment.

## II. THE COMMONWEALTH CONCEDES THAT THE INSTRUCTIONS' FAILURE TO DISTINGUISH BETWEEN ACTS CONSTITUTING THE CONVICTIONS WAS REVERSIBLE ERROR

In a long line of cases this Court has made clear that "a general jury verdict based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof—violates the requirement of a unanimous verdict." *King v. Commonwealth*, 554 S.W.3d 343, 350 (Ky. 2018) (citing *Johnson v. Commonwealth*, 405 S.W.3d 439, 449 (Ky. 2013)). Because the instructions here failed to properly distinguish between the various acts which may have supported the convictions, the Commonwealth concedes that palpable error occurred and Hacker's convictions must be reversed.

Here, the instructions for first-degree sexual abuse, first-degree rape, and first-degree sodomy stated as follows:

**FIRST-DEGREE SEXUAL ABUSE**

You will find the Defendant guilty of First-Degree Sexual Abuse 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 on or about January 1, 2006 to October 31, 2008 and before the finding of the Indictment herein, he subjected [Shannon] to sexual contact;

AND

B. That at the time of such contact, [Shannon] was less than 12 years of age.

**FIRST-DEGREE RAPE**

You will find the Defendant guilty of First-Degree Rape 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 on or about January 1, 2006 to October 31, 2008 and before the finding of the Indictment herein, he engaged in sexual intercourse with [Shannon];

AND

B. That at the time of such intercourse, [Shannon] was less than 12 years of age.

**FIRST-DEGREE SODOMY**

You will find the Defendant guilty of First-Degree Sodomy 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 on or about January 1, 2006 to October 31, 2008 and before the finding of the Indictment herein, he engaged in deviate sexual intercourse with [Shannon];

AND

B. That at the time of such intercourse, [Shannon] was less than 12 years of age.

In this case, Shannon testified to multiple instances of illegal acts perpetrated by Hacker, each of which would fit within the statutory definitions for first-degree sexual abuse and first-degree sodomy. She also testified concerning at least two acts which would qualify as first-degree rape. However, the jury instructions for each count only provided for a general verdict. This meant that Hacker could be convicted of only one count for each charge out of the multiple instances described by Shannon. The instructions contained nothing to differentiate among the multiple acts identified. Therefore, because the individual jurors may have contemplated different acts committed by Hacker at different times in casting their guilty verdict votes, a unanimous verdict violation occurred as to each conviction.

In *Martin v. Commonwealth*, 456 S.W.3d 1, 9-10 (Ky. 2015), we held that "all unanimous-verdict violations constitute palpable error resulting in manifest injustice," essentially converting such a violation into structural error. *See also Johnson*, 405 S.W.3d at 457 ("This Court concludes that this type of error, which violates a defendant's right to a unanimous verdict and also touches on the right to due process, is a fundamental error that is jurisprudentially intolerable.").

Here, the Commonwealth concedes that these instructions allow for a non-unanimous verdict as to all convictions. It therefore agrees that, pursuant

to our holdings above, each of Hacker's convictions should be reversed and remanded for a new trial. *See also* Ky. Const. § 7 (requiring a unanimous verdict to sustain a conviction); *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008); *Miller v. Commonwealth*, 283 S.W.2d 690, 696 (Ky. 2009); *Jenkins v. Commonwealth*, 496 S.W.3d 435, 448 (Ky. 2016); *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky. 2013); *Hall v. Commonwealth*, 551 S.W.3d 7, 20 (Ky. 2018); *Gullett v. Commonwealth*, 514 S.W.3d 518 (Ky. 2017); and *Ruiz v. Commonwealth*, 471 S.W.3d 675, 678 (Ky. 2015). Cf. *Conrad v. Commonwealth*, 534 S.W.3d 779, 784 (Ky. 2017) (citing *Miller v. Commonwealth*, 77 S.W.3d 566, 574 (Ky. 2002)) (This court recognizes and has consistently maintained that the jurors may reach a unanimous verdict even though they may not all agree upon the means or method by which a defendant has committed the criminal act).

We accordingly reverse each of Hacker's convictions and remand for a new trial consistent with this opinion.

## III. DOUBLE JEOPARDY FOR FAILURE TO DISTINGUISH BETWEEN SEXUAL ABUSE AND SODOMY CHARGES

When a perpetrator commits sodomy against a victim he perforce commits sexual abuse against her. *Johnson v. Commonwealth*, 864 S.W.2d 266, 277 (Ky. 1993) (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 Shannon testified to multiple acts of sodomy, these acts could have qualified under the law as both an act of sodomy and sexual abuse. Here, the

jury instructions failed to differentiate between the two crimes. However, since we are reversing Hacker's convictions and remanding for a new trial as discussed above, this double jeopardy argument is now moot. Therefore, we need not address this issue. *King*, 554 S.W.3d at 356. Upon retrial the jury instructions should differentiate between acts which qualify as both sodomy and sexual abuse as necessary.

## IV. ADMISSION OF MARITAL RELATIONS EVIDENCE

Hacker also argues that "the trial court abused it discretion to the substantial prejudice of the Appellant when it allowed evidence that Appellant and his wife engaged in strange sexual behavior, violating KRE[2] 404(b), KRE 403, and KRE 402 and denying Appellant his right to a fair trial."

Hacker first argues that the trial court erred by allowing his wife to testify that Hacker would play transvestite pornography while having sexual relations with her, just as he allegedly did when abusing Shannon. While Hacker bases his argument against the admission of this evidence, in part, on KRE 404(b)(1), we disagree that testimony that the defendant viewed transvestite pornography while engaging in consensual sex with his wife is the type of "bad act" evidence requiring a KRE 404(b)(1) analysis. Instead, we are persuaded that a proper analysis under these circumstances is better limited to an analysis for its relevancy and prejudice under a KRE 401, 402, and 403.

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[2] Kentucky Rules of Evidence.

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. *Moorman v. Commonwealth*, 325 S.W.3d 325, 332–33 (Ky. 2010).

The transvestite pornography evidence was relevant and probative because the pornography evidence paralleled Hacker's alleged conduct when having sexual contact with Shannon. The evidence was therefore admissible because it tended to corroborate Shannon's version of the facts concerning her own abuse, and thus the evidence was highly probative and had a tendency to make the existence of a fact that is of consequence to the determination of the action more probable than it would be without the evidence. Moreover, this corroborating evidence, while perhaps inducing prejudice toward Hacker in the minds of some jurors, was certainly not substantially outweighed by the danger of *undue* prejudice because the corroborative value of the evidence was so strong. Further, the evidence was an essential detail relating to the circumstances surrounding the commission of the offenses. *See* KRE 404(b)(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."). Accordingly, the victim's testimony that Hacker would play pornography while he was abusing her is admissible upon retrial in corroboration of the victim's testimony that Hacker had illegal sexual contact with her. *Smith v. Commonwealth*, 60 S.W. 531, 533 (Ky. 1901) ("Evidence of conduct from which undue intimacy might be inferred is admissible [] in corroboration of the testimony relating to the commission of the offense.").

Hacker also alleges that the trial court erred by permitting his wife to testify that when they had relations Hacker liked to have her wear a strap-on device and have anal intercourse with him. Unlike the pornography evidence, however, this evidence has no parallels to the acts allegedly engaged in by Hacker with Shannon. And so the relevance and probative value of the evidence is slight, if any. On the other hand, the evidence has the potential to result in significant prejudice against Hacker given the atypical nature of the sexual conduct. We are therefore persuaded that this evidence is not admissible under a KRE 401-403 analysis. *Chavies v. Commonwealth*, 374 S.W.3d 313, 321 (Ky. 2012) ("Moreover, we have also consistently held that evidence that a defendant possessed pornography is inadmissible where the pornography is not linked to the charged crimes."); *Dyer v. Commonwealth*, 816 S.W.2d 647, 651–52 (Ky. 1991), *overruled on other grounds by Baker v. Commonwealth*, 973 S.W.2d 54 (Ky. 1998) ("citizens and residents of Kentucky are not subject to criminal conviction based upon the contents of their bookcase unless and until there is evidence linking it to the crime charged.").

## V. CONCLUSION

For the foregoing reasons the judgment is reversed, and the case is remanded to the Garrard Circuit Court for a new trial.

All sitting. Minton, C.J.; Hughes, and VanMeter, JJ., concur. Buckingham, J., concurs in result only by separate opinion. Keller, J., concurs in part and dissents in part by separate opinion in which Lambert and Wright, JJ., join.

BUCKINGHAM, J., CONCURRING IN RESULT ONLY. I concur in result only, as I would reverse based on the admission of the testimony of Hacker's ex-wife concerning the "strap-on device."

KELLER, J., CONCURRING IN PART AND DISSENTING IN PART: I concur in the majority's holdings regarding double jeopardy and evidence related to Hacker's sexual proclivities. However, I dissent from the majority's analysis of the alleged unanimity error. The alleged error here stems from Shannon's testimony regarding multiple incidents of alleged rape, sodomy, and sexual abuse. However, the Commonwealth proceeded to trial on only one count of each charge, with the same given date range of over two years on each count. The jury instructions did not specify any particular details as to which specific rape, sodomy, or sexual abuse was being referenced. Nevertheless, a unanimous jury found Hacker guilty on all three counts.

The majority correctly notes this Court's precedent finding "general jury verdicts" to be reversible in such circumstances. However, I continue to believe this is an inaccurate reading of our constitutional and statutory requirement

for unanimity in jury verdicts.[3] For decades, the Court held steadfast to a constant principle: when multiple theories of a crime are supported by the evidence, multiple-theory instructions are sufficiently protective of the right to a unanimous verdict. *See Wells v. Commonwealth*, 561 S.W.2d 85, 88 (Ky. 1978) ("It was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime ... as ... defined by statute."); *Harris v. Commonwealth*, 793 S.W.2d 802 (Ky. 1990) (overruled on other grounds by *St. Clair v. Commonwealth*, 451 S.W.3d 597 (Ky. 2014); *Davis v. Commonwealth*, 967 S.W.2d 574 (Ky. 1998). In contrast, when one of the alternative theories is unsupported by the evidence, then these multiple-theory instructions become a unanimity error. *See Boulder v. Commonwealth*, 619 S.W.2d 615 (Ky. 1980) (overruled on other grounds by *Dale v. Commonwealth*, 715 S.W.2d 227 (Ky. 1986)); *Hayes v. Commonwealth*, 625 S.W.2d 583 (Ky. 1981); *Burnett v. Commonwealth*, 31 S.W.3d 878 (Ky. 2000) (overruled on other grounds by *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010)); *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002).

In *Harp v. Commonwealth*, however, this Court refined a newer line of thinking in unanimity cases. In that case, the defendant sexually abused his girlfriend's four-year-old daughter, B.B., from December 2003 to February 2006. *Harp*, 266 S.W.3d 813, 816-17 (Ky. 2008). The jury was charged with

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[3] I will refrain from continuing in depth to explain this evolution of the so-called unanimity problem. However, a minority of this Court has repeatedly referenced the history of these cases in several separate opinions. *See King v. Commonwealth*, 554 S.W.3d 343, 365-77 (Ky. 2018) (Keller, J., concurring in part and dissenting in part).

instructions for seven counts of sexual abuse first-degree, one count of sodomy first-degree, and one count of indecent exposure. *Id.* at 817. The sexual abuse instructions were identical and factually undistinguished, all giving the same time period as described. *Id.* The Court held that "in a case involving multiple counts of the same offense, a trial court is obliged to include some sort of identifying characteristic in each instruction that will require the jury to determine whether it is satisfied from the evidence the existence of facts proving that each of the separately charged offenses occurred." *Id.* at 818. The Court also held that such error, if preserved, is reversible.[4] *Id.*

Other jurisdictions permit a distinction between multiple *crimes* evidence and alternative *means* evidence within the realm of sexual abuse cases.[5]

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[4] Yet, after this case was published, the Court continued to hold both that these kinds of undistinguished instructions in multiple count cases were error, *see Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009), while still finding the multiple-theory instructions, if both theories are supported by evidence, are adequate. *See Beaumont v. Commonwealth*, 295 S.W.3d 60 (Ky. 2009), *Jones v. Commonwealth*, 331 S.W.3d 249 (Ky. 2011).

[5] *See State v. Gustafson*, 350 N.W.2d 653, 663 (Wis. 1984) (The majority of the court "conclude[d] that these acts of sexual contact were simply alternative means of committing the *actus reus* element, i.e. the wrongful act of sexual contact, involved in the crime of second-degree sexual assault."); *State v. Godoy*, 284 P.3d 410, 413 (N.M. Ct. App. 2012) ("[J]ury unanimity is required only as to the verdict, not to any particular theory of guilt."); *State v. Ayala-Leyva*, 848 N.W.2d 546, 553-54 (Minn. Ct. App. 2014) ("A jury must unanimously agree that the state has proved each element of an offense. But the jury is not 'always required to agree on alternative ways in which a crime can be committed.'"); and *State v. Gardner*, 889 N.E.2d 995, 1005 (Ohio 2008) ("Unanimity is not required ... as to the means by which the crime was committed so long as substantial evidence supports each alternative means.").

Under these cases, the jury may disagree on the *mode* of how a crime was committed but all must agree the defendant committed the crime in question. All the jurors must agree that each *element* of the crime was satisfactorily proven. The jury members must agree that the prosecution proved each element beyond a reasonable doubt. So long as these fundamental elements are met, unanimity is satisfied.

Under this reasoning, Hacker's convictions would not be reversed based on the unanimity issue. He was charged and convicted of one count each of rape, sodomy, and sexual abuse. Even assuming *arguendo* that the jurors may have disagreed as to the *mode* or specific circumstance of rape, sodomy, or abuse, this would not require reversal. A disagreement as to the particular means with which a certain element was met does not create a unanimity error. All twelve jurors agreed that each element was proven by the Commonwealth beyond a reasonable doubt.

In *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013) the Court specifically addressed a single instruction for one count of a crime when the evidence at trial presented proof of more than one instance that would, on its own, meet the requirements of the instruction. The Court held "that such a scenario—a general jury verdict based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof—violates the requirement of a unanimous verdict." *Johnson*, 405 S.W.3d at 449.

Our Constitution and our prior case law have never required that juries unanimously agree on a particular set of facts. In fact, our case law has held just the opposite. *See Wells*, 561 S.W.2d at 88. Rather, it is the unanimity of the *verdict* that is integral to our constitutional analysis and it is the unanimity of the *verdict* that is a matter of due process. As Justice Cunningham stated in his dissent in *Johnson*, "[w]e are requiring juries to be unanimous on matters that the unanimous verdict requirement never anticipated." *Johnson*, 405 S.W.3d at 461. The constitution only requires a unanimous jury finding that the prosecution has proven each element of the offense.

Even if this Court chooses not to overrule this line of cases, I would encourage the Court to look to other jurisdictions' analysis of the issue in contrast to our treatment of unanimity. In most of these other jurisdictions, prosecutors are encouraged to elect the incident the jury is to consider *or* to give a generalized instruction on unanimity. I believe this handling could be helpful to practitioners and the bench in this Commonwealth. Additionally, other states look at the particular circumstances each time this issue is raised by a defendant. It is not simply that, *ipso facto*, unanimity error leads to reversing the conviction. Instead, it is an in-depth analysis which looks at the *rights* of the defendant and whether his right to a fair trial was impeded by the error.

In relation to this reversible error, I would also reiterate that the error described by the majority, even if error, is not palpable to require reversal. The majority of this Court has determined that the error described here, a general

instruction leading to an allegedly non-unanimous verdict, is palpable error. *See Johnson*, 405 S.W.3d at 457. It seems the Court determined, as a bright-line rule, that the alleged error would always be considered palpable. I disagree with this assumption.

"An error is 'palpable,' ... only if it is clear or plain under current law[.]" *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006)). Even then:

> An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'

*Jones*, 283 S.W.3d at 668 (quoting *Martin*, 207 S.W.3d at 4). Furthermore,

> Under this rule, an error is reversible only if a manifest injustice has resulted from the error. That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial.

*Martin*, 207 S.W.3d at 3 (quoting *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000) (quoting *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986))). "[T]he required showing [for relief from a palpable error] is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin*, 207 S.W.3d at 3.

Here, Hacker was a beneficiary of prosecutorial discretion. Rather than charging multiple counts of each sex crime, and subjecting Hacker to many more convictions, the prosecution charged one count of each crime. This

advantageous arrangement is potentially why Hacker chose to remain silent on the jury instruction issue and allow the process to take hold and then seek palpable error review. I disagree that this qualifies under current case law as palpable error.

First, I am disinclined to accept the position that a different instruction would have created a different result. To prove this, it would have to be shown that some of the incidents testified about by the victim were insufficient to find guilt beyond a reasonable doubt. This is not the case. Shannon spoke in depth about the abuse to which she was subjected. Each incident was sufficient for the jury to find guilt. If this is the case, then even with separate counts or testimony about only one incident, the result would have been the same. Clearly, the jury believed Shannon's account of what she endured.

Second, I do not succumb to the belief that Hacker's case was "shocking or jurisprudentially intolerable." It does not affront the judicial system as a whole. Hacker benefited from the choice to be indicted only on the specified charges. As this does not "threaten[] the integrity of the judicial process," I do not agree that the error here, if any, was palpable to warrant reversal of these particular convictions. Hacker's defense to the entire case was the same: "I did not do it." Clearly, the jury determined the victim was more credible than the defendant here. There was no parsing of defenses for each particular act; Hacker had one defense and the jury did not believe it. I do not subscribe to the notion that this situation is what our courts have traditionally referred to

as palpable error. Palpable error is an error that is egregious and offends the judicial process. This is simply not the case here.

For the foregoing reasons, I would affirm the convictions for first-degree rape and first-degree sodomy. However, because I believe the sexual abuse instruction violated double jeopardy, I would vacate that conviction.

Lambert and Wright, JJ., join.

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