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Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000974-MR

GARY DAVIDSON

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
INDICTMENT NO. 03-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

MINTON, JUDGE:

I. INTRODUCTION.

A Knox Circuit Court jury convicted Gary "Moose" Davidson of first-degree unlawful imprisonment and second-degree assault. He argues on direct appeal that the judgment of conviction and sentence should be reversed because the trial court erred when it failed to direct a verdict of acquittal on

both charges. He asserts that the Commonwealth failed to introduce sufficient evidence on one essential element of both crimes. We disagree that the trial court erred when it refused to direct a verdict. And we affirm the conviction for first-degree unlawful imprisonment. But we must reverse the second-degree assault conviction for a palpable error in the jury instruction that allowed the jury to find that Davidson's hands were dangerous instruments as he used them to strike the victim. While the evidence amply supported a finding that Davidson inflicted a physical injury with his fists, it did not support a finding that Davidson inflicted a serious physical injury with his fists. And Kentucky Revised Statutes (KRS) 500.080(3) requires that in order for parts of the human body to qualify as a dangerous instrument, the body part must directly cause a serious physical injury. So the portion of the judgment convicting Davidson of second-degree assault is reversed, and the case is remanded for a retrial on fourth-degree assault.

II. THE TRIAL.

According to the evidence presented at trial, on the night of March 26, 2003, Davidson and his current girlfriend, Tracey Rogers, together, beat up, tied up, and threatened Davidson's ex-girlfriend, Crystal Williams, when she appeared at Davidson's trailer. Davidson allegedly kicked Williams down the

steps twice; shot at her with a shotgun; beat her with his fists; twice tried to stuff her into a large dog crate; choked her; held her down while Rogers kicked her; dragged her across the ground by a belt wrapped around her neck; gagged her by wrapping multiple layers of duct tape around her head, over her mouth, and across her nostrils; hog-tied her;¹ and discussed with Rogers the possibility of getting a brick and a blanket and dumping Williams into the lake. Williams, who was manifestly under the influence of drugs at the time, intermittently lost consciousness during the ordeal.

Davidson and Rogers were tried together in circuit court. At the close of the evidence, the court instructed the jury on the following crimes concerning Davidson: first-degree unlawful imprisonment, second-degree unlawful imprisonment (a lesser included offense), second-degree assault, fourth-degree assault (a lesser included offense), first-degree wanton endangerment, and second-degree wanton endangerment (a lesser included offense). The court also gave an instruction on self-protection.² The jury acquitted Davidson of the wanton

¹ Williams's hands were bound with baling twine, and her feet were bound with a leather strap. Finally, her hands and feet were bound together with a rope.

² Davidson testified at trial that Williams was "wired up," belligerent, and physically and verbally abusive when she showed up at his trailer. He claimed that he physically restrained her and tied her up only to prevent her from hurting him, Rogers, or herself.

endangerment charge but found him guilty of first-degree unlawful imprisonment and second-degree assault. The jury recommended the minimum sentences on both convictions.

III. ANALYSIS.

A. Standard of Review and Preservation of Error.

A trial court can grant a directed verdict of acquittal only if the Commonwealth's evidence is not "sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty[.]"³ When ruling on a motion for directed verdict, the trial court must assume that the evidence for the Commonwealth is true and "must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth."⁴ But it must leave for the jury questions concerning the weight and credibility of the evidence.⁵ On appeal, the trial court's denial of the directed verdict for acquittal must be sustained unless "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]"⁶

³ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

The failure to state the specific ground for a motion for directed verdict forecloses appellate review of the trial court's denial of the motion.⁷ Kentucky Rules of Civil Procedure (CR) 50.01 specifies that "[a] motion for a directed verdict shall state the specific grounds therefor." Moreover, a directed verdict of acquittal should be granted only "when the defendant is entitled to a complete acquittal[,] i.e., when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses."⁸

In some cases, there may be insufficient evidence to satisfy the burden of proof on the primary offense while there is sufficient evidence to satisfy the burden of proof on a lesser included offense. The way to preserve this issue regarding the insufficiency of the evidence is by timely objection to the jury instruction on the primary offense.⁹ Under Kentucky Rules of Criminal Procedure (RCr) 9.54(2), the failure

⁷ Pate v. Commonwealth, 134 S.W.3d. 593, 597-598 (Ky. 2004).

⁸ Campbell v. Commonwealth, 564 S.W.2d 528, 530 (Ky. 1978). *Accord*, Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998).

⁹ Campbell, 564 S.W.2d at 530; Kimbrough v. Commonwealth, 550 S.W.2d 525, 529 (Ky. 1977) (holding that "[w]hen the evidence is insufficient to sustain the burden of proof on one or more, but less than all, of the issues presented by the case, the correct procedure is to object to the giving of instructions on those particular issues").

to object timely to a jury instruction waives any error concerning it.¹⁰

We may review unpreserved error under the palpable error standard of RCr 10.26.¹¹ For an error to be considered palpable, it must be "easily perceptible, plain, obvious[,] and readily noticeable."¹² Only an error resulting from an action taken by the court, as opposed to an act or omission of the parties or their counsel, may be considered as palpable error.¹³

The prejudice caused by palpable error must be "more egregious than that occurring in reversible error[.]"¹⁴ A palpable error must be so grave in nature that the failure to correct it would seriously affect the fairness of the proceedings.¹⁵ Relief should be granted only if, upon the consideration of the case as a whole, there exists a substantial

¹⁰ Campbell, 564 S.W.2d at 530-531.

¹¹ RCr 10.26 provides that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

¹² Burns v. Level, 957 S.W.2d 218, 222 (Ky. 1997) (citing BLACK'S LAW DICTIONARY (6th ed. 1995)).

¹³ Carrs Fork Corp. v. Kodak Mining Co., 809 S.W.2d 699, 701 (Ky. 1991).

¹⁴ Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005) (citing ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 1.10[8][b] at 54, n.146 (4th ed. 2003)).

¹⁵ Ernst, 160 S.W.3d at 758 (citing LAWSON § 1.10[8][b] at 54).

possibility that the result in the trial court would have been different but for the error.¹⁶

B. Unlawful Imprisonment in the First Degree.

The elements of first-degree unlawful imprisonment are set forth in KRS 509.020(1): "A person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully restrains another person under circumstances which expose that person to a risk of serious physical injury."

Davidson asserts that he was entitled to a directed verdict on the charge of first-degree unlawful imprisonment because there was insufficient evidence to support a finding that Williams was exposed to a risk of serious physical injury. We disagree.

Since Davidson did not give the trial court any reason for his motion for a directed verdict on the charge of first-degree unlawful imprisonment, he did not properly preserve this issue.¹⁷

Even if he had preserved this issue, Davidson was not entitled to a directed verdict of acquittal on the charge of first-degree unlawful imprisonment. At a minimum, there was sufficient evidence to convict him of a lesser included offense, second-degree unlawful imprisonment. The elements of second-

¹⁶ Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003); Butcher v. Commonwealth, 96 S.W.3d 3, 11 (Ky. 2002).

¹⁷ See Pate, 134 S.W.3d at 597-598.

degree unlawful imprisonment are set forth in KRS 509.030(1):

"A person is guilty of unlawful imprisonment in the second degree when he knowingly and unlawfully restrains another person." The jury was also instructed on this lesser included offense.

Williams described how Davidson held her down, twice tried to stuff her into a dog crate, hog-tied her, and gagged her with duct tape. Mark Ledford, an eyewitness, testified that he saw Davidson wrestling with Williams and then saw Davidson try to stuff her into the dog crate. Deputy Dallas Eubanks testified that when he arrived at Davidson's trailer,¹⁸ Williams was lying on the floor, hog-tied. She had at least three layers of duct tape covering her mouth and nostrils.

Based on all of this evidence and more, there was ample evidence to support a finding that Davidson knowingly restrained Williams. Because there was sufficient evidence for the jury to find Davidson guilty of second-degree unlawful imprisonment, a lesser included offense of first-degree unlawful imprisonment, he was not entitled to a directed verdict on the primary charge.¹⁹

¹⁸ The Sheriff's Department was responding to a telephone call from another witness, Cleveland Smith. Smith had heard Williams struggling with Davidson in Davidson's yard and calling for help.

¹⁹ See Campbell, 564 S.W.2d at 530. See also, Baker, 973 S.W.2d at 55.

Furthermore, Davidson did not object to the court's first-degree unlawful imprisonment instruction, nor did he tender proposed instructions to the court. Thus, his first-degree unlawful imprisonment arguments are unpreserved. However, as any unpreserved error may still be reviewed under the palpable error standard of RCr 10.26, we must consider whether the trial court erred in instructing the jury on the charge of first-degree unlawful imprisonment.

Sufficient evidence was presented to support every element of the crime, including a finding that Davidson restrained Williams under circumstances exposing her to a risk of serious physical injury, an element of the crime.²⁰ KRS 500.080(15) defines "[s]erious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ[.]" "Physical injury" is defined as "substantial physical pain or any impairment of physical condition[.]"²¹ The Commonwealth only needed to establish that Williams was restrained "under circumstances which expose[d] [her] to a risk of serious physical injury."²² The Kentucky

²⁰ See KRS 509.020(1).

²¹ KRS 500.080(13).

²² KRS 509.020 (emphasis added).

Supreme Court has held that the act of binding two people hand and foot before abandoning them placed them at risk of serious physical injury.²³ Thus, Davidson's similar binding of Williams placed her at risk of suffering serious physical injury, such as asphyxiation. Deputy Eubanks testified that when he arrived, Williams was having difficulty breathing because she had at least three layers of duct tape over her mouth and nostrils. He had to cut the tape off so she could breathe. This was sufficient evidence to support a finding that Williams was restrained under circumstances exposing her to a risk of serious physical injury or death.²⁴ So the trial court did not err in instructing the jury on first-degree unlawful imprisonment. Absent error by the trial court, there can be no palpable error.

C. Assault in the Second Degree.

Davidson asserts that he was entitled to a directed verdict on the charge of second-degree assault because the Commonwealth failed to offer sufficient evidence to support an element of the crime. The specifics of this allegation will be described in greater detail below. First, we must address whether this issue was properly preserved.

²³ Jordan v. Commonwealth, 703 S.W.2d 870, 874 (Ky. 1985).

²⁴ Davidson does not challenge the jury's findings with respect to the other elements of first-degree unlawful imprisonment: that the restraint be done knowingly and unlawfully. We need not address these elements of the crime but note that there was sufficient evidence to support his conviction on this charge.

At the close of the Commonwealth's case, Rogers's counsel moved for a directed verdict on the charge of second-degree assault on the ground that there was insufficient evidence to support a finding that Williams received a serious physical injury. Davidson's counsel moved to join in this motion with regard to the second-degree assault charge against Davidson, presumably for the same reason. He renewed this motion by reference at the close of all the evidence. We find Davidson's directed verdict motion to be sufficiently specific to preserve for review the issue of its denial.

The trial court properly denied Davidson's motion for a directed verdict of acquittal on the second-degree assault charge because, as with the charge of first-degree unlawful imprisonment, there was sufficient evidence for the jury to find him guilty of a lesser included offense, fourth-degree assault, for which the jury was also instructed. KRS 508.030(1) provides that "[a] person is guilty of assault in the fourth degree when: (a) He intentionally or wantonly causes physical injury to another person[.]"

Dr. Sturgill testified that Williams had strangulation marks around her neck and had numerous contusions on her body. Dr. Sturgill said that some of Williams's facial contusions, including one around her eye, were actually ecchymoses, very severe bruises with a greater pooling of blood than an ordinary

contusion. All of this evidence, plus that evidence previously mentioned, supports a finding that Davidson inflicted physical injury on Williams. And there was ample evidence to support a finding that his acts were intentional or wanton. Therefore, there was sufficient evidence to support a conviction for fourth-degree assault. Thus, Davidson was not entitled to a directed verdict of acquittal on the second-degree assault charge.²⁵

Davidson asserts that the trial court erred by instructing the jury on second-degree assault based on the theory that his fists were a dangerous instrument because there was insufficient evidence to support one of the elements of this crime. Again, however, he never objected to the jury instruction concerning second-degree assault nor presented alternative jury instructions. So he has waived any error with regard to the trial court's giving this instruction. Thus, we may review only for palpable error.

KRS 508.020 sets forth three possible theories of second-degree assault; but the trial court only instructed the jury on the one involving the use of a dangerous instrument, KRS 508.020(1)(b). KRS 508.020 specifies as follows concerning the elements of this theory of second-degree assault: "(1) A

²⁵ See Baker, 973 S.W.2d at 55; Campbell, 564 S.W.2d at 530; and Kimbrough, 550 S.W.2d at 529.

person is guilty of assault in the second degree when: . . .

(b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument"

Specifically, the instruction given required the jury to decide whether Davidson's fists were a dangerous instrument. The jury was not permitted to find that any other instrument or article, such as the duct tape over Williams's mouth and nose, was a dangerous instrument.²⁶

Davidson asserts that the trial court erred by instructing the jury on this theory of second-degree assault because there was insufficient evidence to support a finding that Williams suffered serious physical injury. At first glance, second-degree assault by means of a dangerous instrument, KRS 508.020(1)(b), seems to require only proof of physical injury rather than serious physical injury.²⁷ But Davidson's argument rests on the statutory definition of a "dangerous instrument" contained in KRS 500.080(3) and incorporated in the elements of second-degree assault by means

²⁶ The jury instruction on second-degree assault was consistent with the indictment, which charged Davidson with second-degree assault only on the theory that he committed the offense "by knowingly and intentionally striking [Crystal Williams] with [his] fists and thereby causing physical injury to Crystal Williams[.]"

²⁷ Compare KRS 508.020(1)(b) (requiring proof of "physical injury") with KRS 508.020(1)(a) (requiring proof of "serious physical injury") and KRS 508.020(1)(c) (requiring proof of "serious physical injury").

of KRS 508.020(1)(b). Davidson asserts that KRS 500.080(3) specifies that a part of the human body, such as a fist, cannot be a dangerous instrument unless the use of that part of the human body directly results in a serious physical injury. He further asserts that his fists could not be a dangerous instrument because they did not directly result in serious physical injury to Williams. Therefore, he concludes that there was insufficient evidence to convict him of second-degree assault on the theory that his fists were a dangerous instrument. For reasons provided below, we agree.

KRS 500.080(3) defines a "[d]angerous instrument" as "any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury[.]" In Johnson v. Commonwealth,²⁸ this Court considered whether a hand could be a dangerous instrument within the meaning of KRS 500.080(3). This Court stated as follows: "We believe the inclusion of parts of the human body as dangerous instruments depends on the facts of the case and

²⁸ 926 S.W.2d 463 (Ky.App. 1996).

the capability of the body part to 'cause death or serious physical injury.'" ²⁹

Johnson concerned an adult male defendant who was convicted of first-degree assault based on the theory that his hand was a dangerous instrument when he used it intentionally by striking his two-month-old son, squeezing him, and dropping him onto the floor.³⁰ Under the facts of the case, this Court held that the appellant's hand could be a dangerous instrument as defined under KRS 500.080(3) and that it was not error for the trial court to submit the case to the jury on the charge of first-degree assault based on the use of a dangerous instrument.³¹

Johnson did not address whether a part of the human body can be a "dangerous instrument" within the meaning of KRS 500.080(3) where the use of that body part does not directly

²⁹ *Id.* (quoting Cooper v. Commonwealth, 569 S.W.2d 668 (Ky. 1978)).

³⁰ See Johnson, 926 S.W.2d at 464-465.

³¹ *Id.* at 465-466. See KRS 508.010(1)(a). But see Roney v. Commonwealth, 695 S.W.2d 863 (Ky. 1985) (holding that a fist was not a "dangerous instrument" as that term is used in the second-degree assault statute.) We note that Roney was decided on the rule of lenity because the Court could not determine from the ambiguous language of KRS 500.080(3), as it then existed, whether the General Assembly intended for fists or feet to be considered an "instrument, article, or substance." *Id.* at 864. At that time, KRS 500.080(3) read as follows: "[d]angerous instrument' means any instrument, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury[.]" See *id.* KRS 500.080(3) was amended in 1990 to its present form. Johnson was decided under this later version of the statute.

result in a serious physical injury. So this is an issue of first impression.

The most important rule of statutory interpretation is that a statute is to be given its "plain meaning"³² unless doing so would produce a patently absurd result.³³ The General Assembly has directed that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature"³⁴ If at all possible, we are to construe a statute in a manner that does not render any part of it meaningless or ineffectual.³⁵

Based on the plain meaning of KRS 500.080(3), it is clear that parts of the human body are to be treated differently from any other instruments, articles, or substances in determining whether they are dangerous instruments. To establish that an instrument, article, or substance other than a part of the human body qualifies as a dangerous instrument, the Commonwealth must prove only that it is "readily capable of causing death or serious physical injury" "under the

³² Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004).

³³ *Id.* (quoting Executive Branch Ethics Com'n v. Stephens, 92 S.W.3d 69, 73 (Ky. 2002)).

³⁴ KRS 446.080(1).

³⁵ Bowling v. Lexington-Fayette Urban County Government, 172 S.W.3d 333, 341 (Ky. 2005).

circumstances in which it is used, attempted to be used, or threatened to be used[.]”³⁶ Thus, there need only be the risk of death or serious injury. Under these circumstances, the fact that serious physical injury did not, in fact, occur would not be dispositive of whether a dangerous instrument was used.

But the plain meaning of the statutory definition of “[d]angerous instrument” as “any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body . . .” adds an additional element to establishing that a part of the human body is a dangerous instrument.³⁷ Where the instrument in question is a part of the human body, such as a fist or foot, it is not enough to show the risk of serious injury or death. Instead, the Commonwealth must establish that serious physical injury actually occurred as a direct result of the use of that part of the human body. This is the only way to give meaning to the clause, “when a serious physical injury is a direct result of the use of that part of the human body,” in the context of the statute as a whole. If we construed the statute to mean that a human body part, like any other instrument, need only be capable of causing death or serious physical injury we would render this

³⁶ KRS 500.080(3).

³⁷ *Id.*

clause surplusage in contravention of the canons of statutory construction.

In the instant case, the jury's instruction for second-degree assault required the jury to determine, in part, whether Davidson "intentionally caused a physical injury to Crystal Williams by striking her with his fists" and whether his "fists were a dangerous instrument." But if there was insufficient evidence in the record to support the finding that Davidson's fists were a dangerous instrument, it was an error for the trial court to instruct the jury on second-degree assault based on this particular theory.³⁸ As we have concluded that fists cannot be a dangerous instrument as a matter of law unless serious physical injury is a direct result of the use of the fists, we must consider whether Davidson's fists directly caused serious physical injury to Williams.

Dr. Sturgill testified that his final diagnosis of Williams was that she suffered contusions and ecchymoses as a result of her beating,³⁹ and she required no prescription medicine or additional medical care.

³⁸ Whether the evidence presented might have supported an instruction on second-degree assault based on another theory is not relevant to the question of whether the trial court erred by submitting the second-degree assault charge to the jury on the theory that Davidson's fists were a dangerous instrument.

³⁹ Williams was also diagnosed with an apparent history of depression; a urinary tract infection; an elevated white blood count (presumably as a result of the urinary tract infection); and a positive urine

Thus, although Davidson's conduct toward Williams was deplorable, Williams did not suffer a serious physical injury due to Davidson's beating her with his fists. There was no evidence that Williams experienced a serious or prolonged disfigurement,⁴⁰ prolonged impairment of health,⁴¹ or prolonged loss or impairment of the function of any bodily organ⁴² as a result of being struck by Davidson's fists. And there was no evidence that Williams was placed at substantial risk of death⁴³

drug screening showing traces of cocaine, methamphetamine, marijuana, and benzodiazepines. However, none of these conditions was a result of Davidson's actions against her. Nor did Dr. Sturgill say that any of these conditions had been worsened due to Davidson's actions.

⁴⁰ See, e.g., Brooks v. Commonwealth, 114 S.W.3d 818, 824 (Ky. 2003) (holding that knife wounds to face, throat, arms, and hands can be a prolonged disfigurement).

⁴¹ See, e.g., Parson v. Commonwealth, 144 S.W.3d 775, 786-787 (Ky. 2004) (holding that victim's numbness lasting for five months and substantial pain lasting for nineteen months due to headaches, neck pains, and muscle spasms, which, together, contributed substantially to victim's decision not to return to work, can be a prolonged impairment of health).

⁴² Clift v. Commonwealth, 105 S.W.3d 467, 472 (Ky.App. 2003) (holding that eleven-month-old child's inability to use its arm for four weeks due to a fracture could be a prolonged impairment of health).

⁴³ Compare the instant case with the facts in those cases which have held that the victim was placed at substantial risk of death: Brooks, 114 S.W.3d at 820, 823-824 (victim's throat was cut with a knife; and his face, arms, and hands were stabbed or slashed, resulting in a large amount of blood loss); Johnson, 926 S.W.2d at 464-465 (doctor stated that she had seen other infants die of injuries similar to the infant victim's injuries, which included four fractured ribs, two broken femurs, a broken forearm bone, a skull fracture, bruising of the brain, bleeding, and swelling); Commonwealth v. Hocker, 865 S.W.2d 323, 325 (Ky. 1993) (victim suffered a skull fracture with hemorrhaging and blood clots as a result of the skull fracture; he required sutures above his eye and

as a result of Davidson's striking her with his fists.⁴⁴

Because the evidence did not support a finding that Williams suffered a serious physical injury as a direct result of Davidson's fists, his fists were not a dangerous instrument as a matter of law. Therefore, the trial court erred in submitting the instruction on second-degree assault to the jury on the theory that Davidson's fists were a dangerous instrument. Because this error was unpreserved, we must determine whether it is a palpable error requiring reversal.

D. The Trial Court's Error in Instructing the Jury on the Charge of Second-Degree Assault was Palpable Error.

First, we must determine whether this error is palpable, meaning "easily perceptible, plain, obvious[,] and

lip; he was hospitalized for eight days, including two in intensive care; and was required to make a follow-up visit to the neurosurgery clinic on discharge); Cooper, 569 S.W.2d at 670-671 (victim was a seventy-four-year-old woman with a chronic pulmonary condition and a heart problem, who was strangled and raped).

⁴⁴ The conclusion that Williams was not placed at substantial risk of death as a result of Davidson's beating her with his fists may seem incongruent with our earlier conclusion that she was restrained under circumstances which exposed her to a risk of serious injury because she was placed at substantial risk of death due to the duct tape over her mouth and nose. But there are different instrumentalities involved, fists versus duct tape. Whether the trial court could have instructed the jury on the alternative theory that Davidson committed second-degree assault by using the duct tape as a dangerous instrument is not before us and is not relevant to the question of whether the trial court committed error by instructing the jury on the theory that Davidson's fists were a dangerous instrument.

readily noticeable.”⁴⁵ An error may be readily noticeable and palpable where the trial court fails to follow clear, binding precedent. But there were no previous factually similar cases construing the relevant language in KRS 500.080(3). Kentucky courts have not addressed whether a trial court’s erroneous statutory construction can be considered a palpable error when it concerns an issue of first impression. However, following the similar federal standard for plain error, the Eighth Circuit has stated as follows:

Usually, for an error to be plain, it must be in contravention of either Supreme Court or controlling circuit precedent. The lack of such precedent, however, does not prevent a finding of plain error if the error was, in fact, clear or obvious based on the materials available to the district court.

In the absence of controlling precedent of either this court or the Supreme Court, the district court is granted more discretion under the plain error standard simply because the less guidance there is, the smaller the realm of decisions that would be clearly or obviously wrong under current law. There is ultimately, however, a limit to what the district court can do, even under plain error review, and, for example, in the statutory construction context, it is possible that the construction of the statute proffered by the district court departs so far from the text that it is clearly incorrect as a matter of law.⁴⁶

⁴⁵ See Burns, 957 S.W.2d at 222 (citing BLACK’S LAW DICTIONARY (6TH ed. 1995)).

⁴⁶ United States v. Lachowski, 405 F.3d 696, 698-699 (8th Cir. 2005) (citations omitted).

Other courts have issued similar decisions.⁴⁷

In the instant situation, we find that the plain meaning of the statute is clear. For the reasons described above, the language of the statute makes it explicit that Davidson's fists cannot be a dangerous instrument unless they directly caused serious physical injury. And it is apparent that there is insufficient evidence to support a finding that Williams received a serious physical injury as a result of Davidson's fists. Therefore, the trial court committed an error obvious enough to be considered palpable by instructing the jury on the charge of second-degree assault based on the theory that Davidson's fists were a dangerous instrument.

Furthermore, we find that the erroneous instruction was serious enough to undermine the fairness of the proceedings.⁴⁸ As the Kentucky Supreme Court has explained:

It is now elementary that the burden is on the government in a criminal case to

⁴⁷ See, e.g., United States v. Gibson, 356 F.3d 761, 766 (7th Cir. 2004) (finding that error apparent from the language of a federal statute was plain error); United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003) (recognizing exception to the general rule that there can be no plain error absent binding precedent except for situations "where the explicit language of a statute or rule . . . specifically resolve[s] an issue"); Utah v. Wallace, 55 P.3d 1147, 1152 (Utah Ct. App. 2002) (recognizing exception to the general rule that error concerning issues of first impression cannot be considered plain or palpable for situations in which "the issue is addressed in existing statutory language").

⁴⁸ Ernst, 160 S.W.3d at 758.

prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.⁴⁹

The trial court's error resulted in Davidson's conviction for second-degree assault despite the Commonwealth's failure to establish one of the elements, violating Davidson's due-process rights.

In order to warrant reversal, the substantial possibility must exist that the result in the trial court would have been different but for the error.⁵⁰ In the instant case, the only theory of second-degree assault submitted to the jury was assault by a dangerous instrument, namely Davidson's fists. Therefore, if the trial court had not erroneously submitted this theory of second-degree assault to the jury, Davidson could not have been convicted of second-degree assault. The outcome of the trial would definitely have been different if not for the trial court's error. For all of these reasons, due process

⁴⁹ Miller v. Commonwealth, 77 S.W.3d 566, 576 (Ky. 2002) (citing In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970)).

⁵⁰ Schoenbachler, 95 S.W.3d at 836; Butcher, 96 S.W.3d at 11.

requires that Davidson's conviction for second-degree assault be reversed.

We note that there was sufficient evidence presented to convict Davidson of second-degree assault based on another theory premised on the duct tape over Williams's mouth and nose being a dangerous instrument. "Ordinary objects have been found to constitute dangerous instruments when used in certain circumstances."⁵¹ Because duct tape is an instrument other than a part of the body, it would not be necessary to establish that Williams suffered serious physical injury as a direct result of Davidson's use of the duct tape. Instead, the Commonwealth would only need to establish that the duct tape was "readily capable of causing death or serious physical injury" "under the circumstances in which it is used, attempted to be used, or threatened to be used[.]"⁵² We recognize that the indictment did not include this theory of second-degree assault. It was never suggested at trial or in post-trial motions. It was not presented to us by either party to this appeal. We must

⁵¹ Binion v. Commonwealth, 891 S.W.2d 383, 387 (Ky. 1995). See, e.g., *id.* (a glass ashtray); Commonwealth v. Potts, 884 S.W.2d 654, 657 (Ky. 1994) (steel-toed work shoes and scissors); Smith v. Commonwealth, 610 S.W.2d 602, 603-604 (Ky. 1980) (a carrot).

⁵² KRS 500.080(3).

consider the case as it was actually tried. And we may not *sua sponte* inject an alternative theory on appeal.⁵³

E. A New Trial on Second-Degree Assault Based on Either Theory Would Place Davidson in Double Jeopardy.

Reversing Davidson's conviction for second-degree assault raises the question whether a retrial is permissible on the charge of second-degree assault based on the theory that his fists were a dangerous instrument. The Fifth Amendment of the Constitution of the United States and Section 13 of the Constitution of Kentucky guarantee that no person shall be tried twice for the same offense.⁵⁴ Ordinarily, the prohibitions against double jeopardy do not bar retrial after reversal of a conviction,⁵⁵ including cases where the defendant was convicted based on an incorrect jury instruction. But an exception to this rule applies where a reviewing court has found the evidence legally insufficient to support the conviction.⁵⁶ The reversal of a conviction based on the insufficiency of the evidence is the equivalent of an acquittal,⁵⁷ as an acquittal on a particular

⁵³ Thomas v. Commonwealth, 153 S.W.3d 772, 782 (Ky. 2004).

⁵⁴ Commonwealth v. Scott, 12 S.W.3d 682, 684 (Ky. 2000).

⁵⁵ McGinnis v. Wine, 959 S.W.2d 437, 438 (Ky. 1998).

⁵⁶ *Id.*, citing Burks v. United States, 437 U.S. 1, 18 (1978).

⁵⁷ Burks v. United States, 437 U.S. at 11. See also Hobbs v. Commonwealth, 655 S.W.2d 472, 473 (Ky. 1983); Perkins v. Commonwealth, 694 S.W.2d 721, 722 (Ky.App. 1985); Coomer v.

charge bars retrial on that charge, even if the acquittal was erroneous.⁵⁸

Our determination that there was insufficient evidence to support a conviction of second-degree assault based on the theory that Davidson's fists were a deadly weapon is the equivalent of an acquittal on that theory. Therefore, Davidson may not be retried for second-degree assault based on this theory. Moreover, a retrial on the previously ignored duct tape theory is also barred by double jeopardy.⁵⁹

F. A New Trial on the Lesser Included Offense of Fourth-Degree Assault Would Not Place Davidson in Double Jeopardy.

Having determined that Davidson cannot be retried for second-degree assault under any theory, we must determine whether he may be retried for fourth-degree assault, a lesser included offense.

The following rule has been established concerning retrial on the charge of a lesser included offense after a reversal of the greater offense: "Where a conviction of an offense is reversed on appeal for insufficient evidence, the Double Jeopardy Clause protects the accused from retrial on that offense[;] but the defendant may still be tried on a lesser

Commonwealth, 694 S.W.2d 471, 472 (Ky.App. 1985); McIntosh v. Commonwealth, 582 S.W.2d 54, 57-58 (Ky.App. 1979).

⁵⁸ United States v. Scott, 437 U.S. 82, 91 (1978).

⁵⁹ See Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988).

offense if the evidence at the first trial was sufficient to support a conviction of the lesser offense."⁶⁰

We are reversing Davidson's conviction of second-degree assault because there was insufficient evidence to establish one of the elements of that crime, the use of a dangerous instrument, under the only theory presented to the jury. But there was sufficient evidence upon which to convict Davidson of fourth-degree assault, a lesser included offense of second-degree assault, which was also presented to the jury. Thus, there is no impediment to his being retried for the lesser included offense of fourth-degree assault.

IV. DISPOSITION.

Consistent with the discussion above, Davidson's conviction for first-degree unlawful imprisonment is affirmed; and his conviction for second-degree assault is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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⁶⁰ 21 AM.JUR.2D *Criminal Law* § 366 (1998).