Commonwealth of Kentucky
Supreme Court
No. 2005-SC-862-MR

DAVID A. CLARK — **APPELLANT**

v.

Appeal from Hardin Circuit Court
Hon. Janet P. Coleman, Judge
Indictment No. 03-CR-311

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I hereby certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed on this 16th day of March, 2007, via U.S. Mail, first-class postage prepaid, to the Hon. Janet P. Coleman, Judge, Hardin Circuit Court, Hardin County Justice Center, 120 East Dixie Avenue, Elizabethtown, Kentucky 42701; sent via electronic mail to the Hon. Chris Shaw, Commonwealth's Attorney, 54 Public Square, P.O. Box 1146, Elizabeth, Kentucky 42702; and sent via messenger mail to the Hon. Emily Holt Rhorer, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, Counsel for Appellant.

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INTRODUCTION

This is a criminal case in which Appellant, David A. Clark, is appealing from a Hardin Circuit Court jury verdict finding him guilty of perpetrating the following sex crimes against his own two children and another child that he raised as his own: first-degree rape, seven counts of first-degree sodomy, three counts of second-degree sodomy, eight counts of incest, promoting a sexual performance by a minor, two counts of use of a minor in a sexual performance, criminal attempt to commit promoting a sexual performance by a minor, and two counts of criminal attempt to commit use of a minor in a sexual performance. Appellant was sentenced to a life term of imprisonment.

STATEMENT CONCERNING ORAL ARGUMENT

Because the issues are sufficiently addressed in the parties' briefs, the Commonwealth does not believe that oral argument is necessary in this appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Susan Preston and Appellant lived together as husband and wife for thirteen years. (SUPPLEMENTAL VR, 8/25/05, 9:35:23, 9:36:00). Preston had a son, V.P., when she met Appellant. (Id., 9:36:34). Preston and Appellant's son, K.C., was born in 1991, a year and a half after Preston and Appellant got together. Their daughter, M.C., was born the following year. (Id., 9:36:52).

At Preston and Appellant's Radcliff residence in April of 2003, Preston discovered sexually explicit notes containing Appellant's handwriting in the trash. (Id., 9:39:53). When her children arrived home that day, Preston questioned them about the notes, but each child denied knowing anything about them. (Id., 9:58:00). However, K.C. later came to Preston and informed her that he had a secret, but had promised that he would not tell it. (Id., 9:58:30). After the conversation, Preston told K.C. not to say anything to Appellant about them speaking. (Id., 9:59:32). Preston also had a conversation with V.P.; after their conversation, Preston told V.P. that she believed him. (Id., 9:59:57).

The next day, Preston went to the police and reported that Appellant was molesting her children. (Id., 10:08:45). Detective Jody Ennis of the Radcliff Police Department, who is assigned to the Crimes Against Women and Children Unit, was advised about the allegations Preston had made and about the notes Preston had discovered. (SUPPLEMENTAL VR, 8/25/05, 11:43:30). Upon receiving this information, Detective Ennis interviewed K.C. and V.P. at their school. (Id., 11:44:18). After speaking with them, Detective Ennis obtained a warrant for Appellant's arrest. (Id.,

11:50:30). Detective Ennis arrested Appellant in Vine Grove later that day. (Id., 11:52:09).

While he was in jail after his arrest, Appellant frequently called Preston and the children on the telephone. (Id., 9:59:35). Appellant asked all of them to lie for him. (Id., 10:00:15, 1:52:38, 2:43:00, 4:05:50).

On June 27, 2003, the Hardin County Grand Jury returned a thirty-two count indictment against Appellant in Indictment No. 03-CR-311. (TR, Vol. I, 1-5). Appellant was charged with first-degree rape (Count 1), nine counts of class A felony first-degree sodomy (Counts 2-10), three counts of class B felony first-degree sodomy (Counts 11-13), ten counts of incest (Counts 14-23), three counts of first-degree sexual abuse (Counts 24-26), promoting a sexual performance by a minor (Count 27), two counts of use of a minor in a sexual performance (Counts 28-29), criminal attempt to commit promoting a sexual performance by a minor (Count 30), and two counts of criminal attempt to commit use of a minor in a sexual performance (Counts 31-32). (Id.).[1] Appellant was arraigned on the foregoing charges on August 12, 2003, at which time he entered a plea of not guilty. (VR No. 1, 8/12/03, 1:17:20; TR, Vol. I, 36-37).

A jury trial was held in this case in August of 2005.[2] The prosecution summoned Preston, Detective Ennis, K.C., V.P., M.C., and forensic pediatrician Dr.

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[1] Counts 9-10 and 23-26 were subsequently dismissed. (TR, Vol. II, 187).

[2] This was the second trial held in this case. The first trial ended in a mistrial on May 5, 2004. (VR No. 2, 5/5/04, 11:31:52; TR, Vol. I, 65).

Betty Spivack[3] to the witness stand during its case-in-chief. Appellant was the only witness to testify for the defense.

After considering all of the witness testimonies and other evidence presented during trial, the jury returned a verdict finding Appellant guilty of first-degree rape, seven counts of first-degree sodomy, three counts of second-degree sodomy, eight counts of incest, promoting a sexual performance by a minor, two counts of use of a minor in a sexual performance, criminal attempt to commit promoting a sexual performance by a minor, and two counts of criminal attempt to commit use of a minor in a sexual performance. (VR No. 10, 8/29/05, 7:22:53; TR, Vol. II, 132-156). At final sentencing, the Hardin Circuit Court sentenced Appellant to a life term of imprisonment. (VR No. 1, 10/11/05, 2:06:30; TR, Vol. II, 195). This appeal ensued as a matter of right.

Any additional facts will be discussed, when needed, in the argument section of this brief.

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[3] Dr. Spivack examined the victims herein in May and June of 2003. (VR No. 7, 8/29/05, 10:24:05, 10:26:00, 10:27:00).

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO DISQUALIFY THE ENTIRE JURY PANEL.

For his first designated point of error, Appellant asserts that the trial court should have disqualified the entire jury panel. Appellant's basis for this assertion is that some members of the panel had sat on the jury in a case, i.e., Commonwealth v. Heck, a few days prior where a local newspaper reporter had berated some of the jurors for acquitting the criminal defendant therein of sex crimes. However, this assertion is misplaced. The trial court properly determined not to disqualify the entire jury panel in this matter.

In the case at bar, the motion to strike the entire jury panel was not granted. The trial judge in this case ruled that she was going to attempt to empanel a jury. The trial judge stated that the lawyers for both sides had the right to call prospective jurors up to the bench and ask them anything they thought to be relevant. (VR No. 3, 8/22/05, 9:26:05). A short time later, just after the trial judge asked if counsel wanted to say anything else about the issue regarding the newspaper reporter, the prosecutor inquired as to the manner in which Appellant wanted to address the issue. (Id., 10:17:04, 10:18:00). Appellant's counsel stated that they would ask if any member of the jury pool served on the Heck trial. Any such juror would then be brought up and questioned individually at side-bar, and would be asked if he or she had been approached by the reporter and if that incident had any impact on them sitting in this case. (Id., 10:18:37).

Seven jurors who were involved with the Heck case were subsequently questioned individually at the bench. Each of them indicated that the incident concerning the reporter would have no bearing in this case. (Id., 11:13:03, 11:18:15, 11:21:10, 11:24:37, 11:27:00, 14:04:55, 14:07:18). After each prospective juror was individually questioned, the trial judge asked if either Appellant's counsel or the prosecutor had any motion respecting the juror. Neither party made a motion as to any of them. (11:15:34, 11:19:00, 11:21:53, 11:24:57, 11:28:04, 14:06:10, 14:08:45).

In Pelfrey v. Commonwealth, 842 S.W.2d 524 (Ky. 1992), this Court held that "a continuance motion for a new panel is not the equivalent of individually challenging jurors for cause." Id. at 526. Accordingly, and as stated, the trial court in this case properly determined not to disqualify the entire jury panel. At this point, as set forth in Pelfrey, the "method for reviewing the bias issue was to specifically challenge jurors." Id. As detailed above, Appellant was given the opportunity to, and did, individually question any prospective juror that was involved in Heck. However, Appellant never moved to strike any of them because of their involvement in that case. Consequently, Appellant has "clearly waived [the] jury challenge" that he currently asserts. Id.

"The general rule is that objection to a juror because of his disqualification is waived by a failure to object to such juror until after verdict." Pelfrey, 842 S.W.2d at 526. Instantly, Appellant merely surmises that the entire jury panel may have been affected by the actions of the newspaper reporter following the Heck case. However, any objection to a juror in that regard should have been made before now. Appellant had the opportunity to voice his objection to the jurors involved in Heck during voir dire.

However, he voiced no such objection. Indeed, it seems that after hearing the jurors aver that the incident concerning the reporter would have no bearing on their service in this matter, Appellant's trial counsel prudently determined that their involvement in Heck did not render them unfit to sit on the jury here.

"A juror is qualified to serve unless there is a showing of actual bias. It is incumbent upon the party claiming bias or partiality to prove the point." Key v. Commonwealth, 840 S.W.2d 827, 830 (Ky. App. 1992) (citations and quotation marks omitted). Here, Appellant cannot demonstrate any actual bias on the part of any of the jurors who were involved in the Heck case. Appellant's arguments under this issue are purely speculative and are not supported by the appellate record. As such, the trial court did not abuse its discretion when it declined to disqualify the entire jury panel. There was no error here. Thus, reversal is not justified.

II.

APPELLANT WAS PROPERLY FOUND GUILTY OF BOTH PROMOTING A SEXUAL PERFORMANCE BY A MINOR AND USE OF A MINOR IN A SEXUAL PERFORMANCE WITH RESPECT TO VICTIM V.P.

For his second designated point of error, Appellant contends that his convictions for both promoting a sexual performance by a minor and use of a minor in a sexual performance regarding victim V.P. constitute a double jeopardy violation. Appellant is mistaken. Indeed, Appellant was properly found guilty of the aforesaid crimes.

As Appellant concedes, this issue is not preserved. However, in light of

the rule in Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977), this Court will likely consider this unpreserved issue, since it concerns a double jeopardy claim. See Baker v. Commonwealth, 922 S.W.2d 371, 374 (Ky. 1996). All the same, the Commonwealth submits that review of this issue should be denied due to the lack of preservation.

In Commonweatlh v. Burge, 947 S.W.2d 805 (Ky. 1997), this Court adopted the federal constitutional test for double jeopardy from Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), for determining whether two offenses are the same for purposes of the double jeopardy clauses of the federal and state constitutions. The question that must be answered is whether one offense is included in the other offense. Burge, 947 S.W.2d at 811.

The promoting a sexual performance by a minor statute, KRS 531.320(1), plainly requires proof that a person produce, direct, or promote a sexual performance involving a minor. The use of a minor in a sexual performance statute, KRS 531.310(1), does not require proof of such. Rather, the use statute requires proof that a person employ, consent to, authorize, or induce a minor to engage in a sexual performance. The focus of the promoting statute is the direction or promotion of the sexual performance, while the focus of the use statute is the minor's actual engagement, i.e., the "use" of the minor, in a sexual performance.

Here, Appellant committed the offense of promoting a sexual performance by a minor when he unbuckled V.P.'s belt, nudged V.P. over to M.C., and directed V.P. to get on top of her. (SUPPLEMENTAL VR, 8/25/05, 2:34:50, 3:55:15). In directing

V.P. to get on top of his sister, Appellant, for all intents and purposes, "produce[d] ... [a] performance which include[d] sexual conduct by a minor." KRS 531.320(1). Appellant committed the offense of use of a minor in a sexual performance whenever he pushed V.P. up and down on M.C. while he masturbated on the bed. (Id., 2:35:22).

Clearly, Appellant's criminal act of promoting a sexual performance by a minor primarily concerns the direction involved. Again, the focus of the promoting statute is the direction of the performance itself. On the other hand, Appellant's criminal act of use of a minor in a sexual performance primarily concerns the actual engagement or "use" of V.P. in the performance. Under the circumstances, the promoting offense and the use offense in question here are separate and distinct crimes. Consequently, Appellant's convictions for those offenses do not violate the double jeopardy clauses of the federal and state constitutions. Therefore, the argument Appellant presently advances must fail.

In sum, Appellant was properly found guilty of both promoting a sexual performance by a minor and use of a minor in a sexual performance with respect to victim V.P. There was no error here, palpable or otherwise. As such, Appellant is entitled to no relief as to this point of error.

III.

APPELLANT'S THIRD DESIGNATED POINT OF ERROR IS NOT PRESERVED FOR APPELLATE REVIEW AND DOES NOT CONSTITUTE PALPABLE ERROR.

For his third designated point of error, Appellant asserts that the jury instructions on Counts 27 and 30 of the indictment allowed the jury to convict him of

offenses not charged in the indictment in violation of RCr 6.16. However, this issue is not preserved for appellate review. As such, it should not be considered any further. Nevertheless, Appellant seeks this Court to grant palpable error review under RCr 10.26. However, such relief is not justified with respect to this unpreserved claim.

A palpable error is one "which affects the substantial rights of a party." RCr 10.26. Relief may be granted for palpable errors only "upon a determination that manifest injustice has resulted from the error." Id. As was recently set forth in Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 2006), "the required showing [in that regard] is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." Id. at 3. In the case at bar, there was no substantial possibility that the outcome would have been different absent the error Appellant presently alleges. Nor was the present allegation of error violative of Appellant's entitlement to due process of law.

In any event, Appellant's contention that he was convicted of offenses not charged in the indictment in violation of RCr 6.16 is clearly incorrect. In fact, all that needed to be altered in the language of Counts 27 and 30 were the names of the victims – in this instance, initials. Contrary to Appellant's position otherwise, there were no substantive changes here. "RCr 6.16 permits the court to amend the indictment prior to the verdict if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." Watkins v. Commonwealth, 565 S.W.2d 630, 631 (Ky. 1978).

In Watkins, "[a]t the close of the proof for the Commonwealth, the

prosecutor moved to amend the indictment to charge the appellant with the robbery of Walter Smith instead of Donald Goeing." 565 S.W.2d at 631. There, this Court rejected the assertion that the trial court "erroneously permitted the prosecutor to amend the indictment." Id. Accordingly, if this issue had been raised at trial, a motion to formally amend the indictment could have been made and same would have been properly granted. That being the case, Appellant's present contention is of no moment. Further, it should be noted that the Watkins Court "found no prejudice in merely changing the names of the victims." Id. Similarly, Appellant suffered no prejudice when the names of the victims were correctly set forth in the instructions in this case.

In sum, Appellant's third designated point of error is not preserved for appellate review. As such, it should not be entertained at this time. Also, there was no manifest injustice under RCr 10.26. "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding ... to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." Martin, 207 S.W.3d at 4. A review of the appellate record patently demonstrates there to be no manifest injustice here. Thus, the instant claim does not constitute palpable error. There was no reversible error as to this unpreserved issue. Hence, reversal is not required.

IV.

APPELLANT'S COMPLAINTS REGARDING THE TESTIMONY OF SUSAN PRESTON ARE WANTING IN MERIT AND SHOULD BE REJECTED.

At trial, Susan Preston testified that she did not have a conversation with M.C. on the day she discovered the notes with Appellant's handwriting because she was

worried that M.C. might say something to Appellant. (SUPPLEMENTAL VR, 8/24/05, 10:00:31). Preston did not want anything said to Appellant "out of fear." (Id., 10:00:50). Preston stated she knew how Appellant acted and reacted. (Id., 10:01:04). She then proceeded to state that Appellant had beaten her before on different occasions. (Id., 10:01:09).

Instantly, Appellant basically claims that the forgoing testimony constituted improper other bad act evidence, and contends that the admission of such denied him due process and a reliable sentence determination. However, even if one assumes for the sake of argument that Appellant's claim is correct, Appellant fails to show in what way he was substantially prejudiced by this information. This is particularly true considering that essentially the same evidence was put before the jury during the testimony of V.P. Indeed, without objection, V.P. testified that Appellant had threatened to beat Preston up or shoot her with a gun. (SUPPLEMENTAL VR, 8/25/05, 2:30:42). Also, Appellant's trial counsel questioned V.P. about an altercation that V.P. had observed between Appellant and Preston. (Id., 3:05:59). Further, Appellant himself testified that he hit Preston. (VR No. 7, 8/29/05, 11:18:30). Moreover, and most significantly, as Appellant so states in his brief, "[t]he defense theory of the case was that [the] charges were manufactured so the family would no longer have to live with [Appellant] who was physically abusive." (Appellant's Brief, 7).

In light of the foregoing, Appellant's complaint regarding Preston's testimony that Appellant beat her is not well taken. Indeed, any possible error respecting this claim was, at best, nonprejudicial, i.e., harmless, to Appellant. According to RCr

9.24, harmless error shall not be grounds for reversal on appeal. Any defect in the proceedings that does not affect the substantial rights of a party shall be disregarded. RCr 9.24. "The doctrine of nonprejudicial error, sometimes called 'harmless error,' is that in determining whether an error is prejudicial, an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983). Based on the record herein, there is no substantial possibility that the outcome at trial would have been any different absent this alleged error.

Additionally, Appellant complains with respect to Preston's testimony that Preston was testifying for the prosecution because she thought Appellant should be punished for what he did. (SUPPLEMENTAL VR, 8/25/05, 11:32:35). Appellant posits that such testimony presupposes his guilt and, as a result of this, he was denied his rights to due process, to present a defense, and a fundamentally fair trial. However, this position is of no consequence considering that Preston was the one who reported Appellant to the authorities and is the mother of the victims herein. Be that as it may, it cannot legitimately be contended that Preston's testimony that Appellant needed to be punished had any effect whatsoever on the jury's verdict. Any possible error arising from this testimony was undeniably harmless and did not unduly prejudice Appellant.

Without question, Appellant's complaints regarding Preston's testimony are wanting in merit. Thus, the arguments advanced by Appellant under his fourth, and final, designated point of error should be rejected. Simply put, there was no reversible error here. Ergo, reversal is not warranted.

CONCLUSION

Wherefore, for the reasons expressed herein, Appellant's convictions and sentence should be affirmed.

Respectfully submitted,

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