RENDERED: July 2, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2998-MR

TIMOTHY SARGENT — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
INDICTMENT NO. 96-CR-0647

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AFFIRMING

* * * * * *

BEFORE: DYCHE, JOHNSON, and KNOPF, Judges.

DYCHE, JUDGE. Timothy Sargent was convicted of three counts of first-degree sexual abuse in Fayette Circuit Court on September 10, 1996. He appeals from that conviction, alleging two errors. First, he claims that the trial court improperly excluded testimony concerning other instances of sexual abuse against the victim perpetrated by another person while the family was living in West Virginia. Second, he claims that the trial court erred by not allowing him to testify that he was sexually abused as a child. We disagree with appellant's assertions, and affirm.

Appellant had been living with Sally Sargent since 1987, and they were married in 1993. The victim, R.G., was Sally's daughter from a previous marriage, and was appellant's stepdaughter. R.G. was nine years old at the time of the offenses. Appellant and Sally also had one daughter together.

The family moved from West Virginia to Lexington in November, 1995. On April 27, 1996, the victim told her mother that appellant had made "bad touches" on her. When Sally confronted appellant with the information that evening, he was angry at first but eventually confirmed that the touchings had occurred, but only three times. That night, Sally and her two daughters slept behind a locked door away from appellant. The following day, Sally called the Child Abuse Hotline, and received a visit from an officer who suggested that Sally and the girls leave the home. That night they stayed with Sally's sister.

The following day, Sally and R.G. met with Detective Stella Plunkett. Because appellant had been calling Sally, Det. Plunkett suggested that Sally attempt to record a conversation with appellant during which he might discuss the allegations. Appellant would not discuss the allegations on the phone, except to say that "I ain't like that no more," and that he did not need counseling since "I helped myself because I realized what I was doing."

After Det. Plunkett interviewed R.G., appellant was taken to police headquarters for questioning. Appellant was advised of his rights and admitted to touching his stepdaughter on three occasions. The first instance occurred when the victim was sitting

on appellant's lap reading a book. The second and third instances involved appellant asking the victim to undress, then rubbing his penis across the victim's buttocks. After giving his taped statement, appellant was arrested on four counts of sexual abuse.

Prior to trial, the prosecutor made a motion in limine to exclude all reference to abuse that R.G. had suffered at the hands of another while in West Virginia. The prosecutor stated that the allegations occurred when R.G. was four years old, that discussions with prosecutors in West Virginia had not yielded conclusive information about the allegations, and the information was therefore irrelevant. Appellant countered that the earlier incident was relevant to show that the victim had learned that such statements might successfully remove an offender from the household. Because of the child's age at the time of the earlier alleged offense, and because of the uncertainty of what exactly had transpired in West Virginia at that time, the trial court sustained the Commonwealth's motion. Appellant offered no avowal testimony on the matter.

The prosecutor also made a motion in limine to prevent appellant from testifying about any sexual abuse he had been subjected to as a child. Counsel for appellant stated that he had no plans to offer such testimony, and the motion was granted.

Defendant's motions for directed verdict were denied by the trial court, and the jury returned a verdict of guilty on three counts of first-degree sexual abuse, and a verdict of not guilty on one count. The jury then recommended a sentence of three years on

each count, the time to be served consecutively. Final judgment was entered on October 28, 1996, consistent with the jury's recommendation. This appeal followed.

Kentucky Rules of Evidence (KRE) 401 defines relevant evidence as "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 403 provides that even if evidence is relevant, it "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." A trial court's decision on admissibility of evidence will not be disturbed absent an abuse of discretion. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996).

The trial court granted the Commonwealth's motion to exclude evidence of a prior incident of sexual abuse perpetrated on R.G. by another person in West Virginia because of the victim's age at the time of the earlier alleged offense, and because the information available from West Virginia authorities was unclear as to the extent of the allegations. Appellant offered nothing further in the form of an avowal to establish what the testimony would have been, or whether the testimony would have been helpful to the court in its ruling on admissibility. As stated in Cain v. Commonwealth, Ky., 554 S.W.2d 369, 375 (1977), "without an avowal to show what a witness would have said an appellate court has no

basis for determining whether an error in excluding his proffered testimony was prejudicial."

We cannot speculate about what West Virginia authorities might have said concerning an earlier instance of abuse, or even if they could have substantiated the claim of abuse. Such evidence, if proven, may have satisfied the definition of relevance set forth in KRE 401. However, due to the absence of an avowal, it is not possible to determine from the record whether the evidence could have survived the balancing test prescribed by KRE 403. Counsel's version of the testimony is insufficient; the testimony of the witness must be in the record for appellate review. Partin, 918 S.W.2d at 223. The issue is not preserved, and the record does not indicate that the trial court abused its discretion by granting the Commonwealth's motion.

Appellant's second assignment of error -- that he should have been allowed to testify about abuse he suffered as a child -- is likewise not preserved for review. When the Commonwealth made its motion in limine to exclude this evidence, appellant's counsel indicated that he did not intend to offer such testimony. Appellant did not object to this ruling until he reached this Court. "Until the trial court's attention is directed to a matter and he has the opportunity to rule on it, there is no error." Green v. Commonwealth, Ky., 556 S.W.2d 684, 686 (1977).

Further, we cannot say that appellant's grievances amount to palpable error affecting his substantial rights, and thus subject to appellate review in spite of their insufficient

preservation. Kentucky Rules of Criminal Procedure (RCr) 10.26. The evidence of appellant's guilt was overwhelming, including not only a taped confession given to the police, but also appellant's admission at trial that he had committed the offenses charged. There is no "substantial possibility" that the result of the trial would have been any different had the alleged errors not occurred; the errors cannot therefore be considered prejudicial. Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511, 514 (1986).

The judgment of the Fayette Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS AND WRITES A SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING. I concur with the Majority Opinion, but since I believe this appeal is frivolous I write separately. The appellant has failed to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv) which requires that each argument in his brief contain a statement concerning the preservation of error. See Elwell v. Stone, Ky. App., 799 S.W.2d 46 (1990); and Hollingsworth v. Hollingsworth, Ky. App., 798 S.W.2d 145 (1990). The two alleged errors were not preserved; and in light of the appellant admitting these offenses before and during trial, a good faith argument cannot be made that relief should be granted under the palpable error rule. RCr 10.26. In fact, the appellant makes no reference to RCr 10.26. Further, the appellant has not filed a reply brief to refute the Commonwealth's arguments that the alleged errors have not been preserved for review. This appeal is frivolous; and if the Commonwealth had sought sanctions,

I would have voted for them. It is unfortunate that the limited resources of the Fayette County Legal Aid have been wasted on this appeal.

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BRIEF FOR APPELLEE

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