

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000530-MR

WILLIAM GOLDSMITH

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT  
HONORABLE TIMOTHY A. LANGFORD, JUDGE  
ACTION NO. 08-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: William Goldsmith appeals the judgment of the Ballard Circuit Court convicting him of first-degree sexual abuse. After a careful review of the

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<sup>1</sup> Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

record, we affirm because the unpreserved error alleged did not amount to palpable error.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Goldsmith was incarcerated at the Ballard County Detention Center. He shared a holding cell close to the guard station with Frank Edgar and Richard Coleman. Sandra Alvarado, a Deputy Jailer at the Ballard County Detention Center, was called to the cell. Goldsmith asked her to turn off the lights so that they could go to sleep. Coleman testified that after the lights were out, Goldsmith and Edgar attacked him. The attack lasted about five minutes, then stopped for a few minutes.

While the attack on Coleman was stopped, Alvarado came to the cell and asked what they were doing and why they were being so loud, and Goldsmith and Edgar told her that they were just playing with Coleman and everything was fine. Coleman testified that Alvarado told them to quiet down and she left. Coleman attested that he did not say anything to Alvarado at that time because he was afraid of what Goldsmith and Edgar might do to him if Alvarado did not remove him from the cell.

Coleman testified that Goldsmith attacked him again. Goldsmith exposed himself to Coleman and stuck his penis close to Coleman's face and told him to look at it. Coleman then yelled out and asked the guards to take him out of the cell. Deputy Jeff Byrum came to the door. Edgar and Goldsmith again said that they were just playing with Coleman. Coleman attested that Byrum left, but

he returned two minutes later and removed Coleman from the cell. Byrum testified that when he removed Coleman from the cell, Coleman was visibly shaken and almost in tears.

Alvarado also testified at trial concerning the events of the evening in question. Alvarado testified that on that evening, she heard a loud noise and went to investigate. She heard a lot of joking and laughing in the holding cell that contained Goldsmith, Edgar, and Coleman, but she did not think any foul play was occurring in the cell. She peered through the window into the cell and saw that Goldsmith, Edgar, and Coleman were all laughing. She told them to be quiet. Alvarado checked again about thirty minutes later and saw that they were all laughing and joking around, so she told them to settle down and quiet down. She was able to talk to all three of them at that time, and all three said there was no problem.

Alvarado testified that when the cell was checked a third time, Byrum checked it instead of her. Coleman came to the door and said “take me out. These guys are trying to rape me.” After mentioning this at trial, the prosecutor instructed Alvarado not to state what someone else said, and Goldsmith’s defense attorney stated “yeah” in agreement but did not object to this testimony. Alvarado testified that after a period of time, Coleman was escorted out of the cell, and he appeared “shaken, scared, [and] frightened.”

Goldsmith was indicted on two counts of first-degree sexual abuse, violations of KRS<sup>2</sup> 510.110. The circuit court granted a directed verdict concerning one of those counts, and Goldsmith was found guilty of the remaining count and sentenced to four years of imprisonment, to be served consecutively to his sentences previously imposed in other cases.

Goldsmith now appeals, contending that improper hearsay statements introduced by Alvarado during her trial testimony bolstered the in-court testimony provided by Coleman, thereby prejudicing Goldsmith and resulting in palpable error.

## II. ANALYSIS

Goldsmith asserts that Alvarado made improper hearsay statements during her testimony, which bolstered Coleman's in-court testimony and resulted in prejudice to Goldsmith. The allegedly improper hearsay statements to which Goldsmith refers concern Alvarado's testimony that when the cell was checked the third time by Byrum, Coleman came to the door and said "take me out. These guys are trying to rape me." Goldsmith acknowledges in his appellate brief that this issue is unpreserved, but he contends that it should be reviewed for palpable error.

Kentucky Rule of Criminal Procedure (RCr) 10.26 provides as follows: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or

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<sup>2</sup> Kentucky Revised Statute.

preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.”

[T]he requirement of “manifest injustice” as used in RCr 10.26 . . . mean[s] that the error must have prejudiced the substantial rights of the defendant, . . . *i.e.*, a substantial possibility exists that the result of the trial would have been different. . . .

[The Kentucky Supreme Court has] stated that upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

*Castle v. Commonwealth*, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks omitted).

Goldsmith cites *Smith v. Commonwealth*, 920 S.W.2d 514 (Ky. 1995), in support of his argument that hearsay evidence which bolsters a victim’s credibility is highly prejudicial and, therefore, grounds for reversing a conviction. However, *Smith* is distinguishable from the present case. First, in *Smith*, the issue of hearsay evidence as bolstering credibility was preserved for appellate review, but the issue was not preserved in the present case. Thus, we are required to apply the higher “palpable error” standard in determining whether to reverse Goldsmith’s conviction, rather than simply applying the “reversible error” standard that was used in *Smith*.

Second, in *Smith*, the hearsay testimony at issue did not satisfy an exception to the hearsay rule, but the evidence in the present case does satisfy one of those exceptions, specifically, the excited utterance exception.

[A]n excited utterance is a statement describing a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. For an out-of-court statement to meet that definition, the declarant's condition at the time must give the impression that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation. The eight factors to consider in determining if a statement is an excited utterance are:

(i) lapse of time between the main act and the declaration . . . , (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.

*Hartsfield v. Commonwealth*, 277 S.W.3d 239, 245 (Ky. 2009) (footnote and internal quotation marks omitted and emphasis removed).

In the present case, the declaration occurred immediately after the main act; no allegation was made that Coleman fabricated the statement; shortly after he made the statement, Coleman appeared frightened, visibly shaken, and almost in tears; the statement was made from the jail cell where the assault occurred; the utterance was not made in response to any question; and the declaration was not against Coleman's interest, nor have there been any reasons given for why it would be self-serving. Therefore, the declaration qualifies for the excited utterance exception to the hearsay rule, and no error occurred in introducing it at trial. Thus, this claim does not meet the palpable error standard for reversing a conviction.

Moreover, we note that there is not a substantial possibility that the result of the trial would have been different if Alvarado had not repeated the excited utterance during trial because Coleman himself testified that Goldsmith and Edgar told him that they were going to rape him; Coleman attested that Goldsmith had forcibly committed sexual acts against him; and Byrum and Alvarado testified that Coleman appeared visibly shaken, frightened, and on the verge of tears when he was removed from the cell.

Accordingly, the judgment of the Ballard Circuit Court is affirmed.

ALL CONCUR.

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