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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001926-MR

JIMMY HOUNSHELL AND
LORA HOUNSHELL — APPELLANTS

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
ACTION NO. 06-CI-00387

BRANDON TINCHER AND
BRENDA TINCHER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, J. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: This appeal arises from a boundary dispute precipitated by a logger in the employ of Jimmy and Lora Hounshell being told the land he was working belonged to the Tincher family, not the Hounshells. To resolve the

dispute, the Hounshells and their neighbors, Brandon and Brenda Tincher,[1] who both claimed ownership of the same approximately forty-acre tract of land, retained licensed surveyors[2] to give opinions about ownership of the parcel. Following a jury trial on October 14 and 15, 2013—in which jurors found in favor of the Tinchers by a vote of nine to three—the Breathitt Circuit Court entered judgment finding the Tinchers owned the disputed tract. The Hounshells now challenge that judgment claiming the trial court: altered the jury's verdict; failed to support the judgment with findings of fact specifying the location of the boundary; erroneously struck two jurors for cause; and, allowed inadmissible evidence to be introduced during cross-examination. After careful review of the record, the briefs and the law, we affirm.

We begin by focusing on the rules of appellate practice and the importance of preserving errors for appellate review. CR[3] 76.12 governs the construction of appellate briefs. In particular, CR 76.12(4)(c)(v) requires each argument to begin with "a statement with reference to the record showing whether the issue was properly preserved for review, and, if so, in what manner." This is not a hollow requirement. As a court of review, we cannot consider claims raised on appeal for the first time in this Court. *Keeton v. Lexington Truck Sales, Inc.,*

[1] Suit was originally filed against William and Janice Tincher, but the subject property was subsequently sold to Brandon and Brenda Tincher who, by agreed order entered February 5, 2010, were substituted as defendants of record.

[2] Surveyor David Altizer testified on behalf of the Hounshells; surveyor Wayne Davis appeared on behalf of the Tinchers.

[3] Kentucky Rules of Civil Procedure.

275 S.W.3d 723, 726 (Ky. App. 2008). The trial court must be given the opportunity to address and, if warranted, correct any alleged errors. Thus, it is imperative that a party tell us whether—and if—a claim was raised below. *Elwell v. Stone,* 799 S.W.2d 46, 48 (Ky. App. 1990). If the claim was not properly preserved below, a party may request palpable error review under CR 61.02.

The Hounshells have raised four arguments on appeal, but have not told us whether, or where, three of the four issues were preserved. For only one of the issues do they indicate objections were voiced. This is a problem because we ordinarily will not search a record for errors. *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). Moreover, the Hounshells have not requested palpable error review. In addition to omitting the required statement of preservation—perhaps because three of the four claims were not preserved—the Hounshells have cited an unpublished case, *Luttrell v. Cox,* No 2012-CA-000637-MR, 2013 WL 3193364 (Ky. App. 2013), without including a "copy of the entire decision" in the appendix to the brief for appellant as required by CR 76.28(4)(c).

Counsel for the Tinchers specifically argues the claim about two jurors being erroneously stricken for cause was waived by lack of an objection, but otherwise has not asked for sanctions or commented upon whether CR 76.28 was satisfied. When a party fails to comply with the appellate rules, we have options such as dismissing the appeal, striking the brief or imposing fines. CR 73.02. Any of these options seems harsh when it is likely the party's attorney, rather than the party, that erred. We have chosen not to impose any of these sanctions, but

counsel is cautioned we may not be so generous in future cases. The facts of the actual boundary dispute are of no real consequence to our resolution of the appeal which turns primarily on procedural issues. It is against this backdrop that we conduct our review.

The first issue we tackle is the claim that two jurors were erroneously stricken for cause. Oddly, the Hounshell brief does not reveal the names of the two jurors it alleges were wrongfully struck—making review of the claim even more challenging. After viewing the entire *voir dire,* we now know the two jurors stricken for cause at the request of the Tinchers were two women named Johnson[4] and Combs.[5] We also know the Hounshells *did not object* to either woman being struck from the jury pool. In fact, as noted in the Tincher brief, when defense counsel moved to strike Johnson for cause, plaintiff's counsel responded, "I understand Mr. Herald's position" and said nothing more. Having failed to

[4] Johnson stated her brother was currently charged with manufacturing methamphetamine in the first degree. She and her husband had attended court proceedings, including a suppression hearing the previous month, to support her brother. At the bench, Johnson stated she was not "uncomfortable" with counsel for the Tinchers—Hon. Darrell Herald—who also serves as the Commonwealth Attorney in the 39th Judicial District combining Breathitt, Wolfe and Powell Counties—and was therefore prosecuting her brother—especially since she was not the person standing trial. She also stated her family is "close." Without objection, Johnson was released from the jury pool on motion made by counsel for the Tinchers.

[5] Combs stated counsel for the Hounshells—Hon. Melissa Howard—is her brother's attorney in both a completed divorce and a pending disability case. She further stated she had transported her brother—who does not have a driver's license—to Howard's office several times and had accompanied him to both court and to his attorney's office. She said she could be impartial and would not favor one party over another. Herald moved for Combs to be released. Howard did not object; instead she asked that another juror—(Little)—who had testified as a victim in a criminal case Herald had prosecuted, be released for the same reason—familiarity with counsel—and the trial court also released that potential juror. There was far more discussion at the bench about whether Little should be released, rather than whether Combs should remain.

contemporaneously allege error in the trial court—where the allegation could have been explored and any necessary change made or denial explained—the Hounshells cannot allege error now. Reversal due to jury composition is unwarranted.

Next we address two intertwined allegations—that the trial court changed the jury's verdict in drafting its final judgment, thereby denying the Hounshells the jury trial they had demanded; and, the trial court failed to locate the boundaries of the disputed tract and reflect such in its final judgment. At the outset we note the Hounshell's reliance upon CR 52.03 is for naught because this case was tried by a jury and CR 52.03 applies "[w]hen findings of fact are made in actions tried by the court without a jury." As explained below, we reject both contentions *in toto*.

> The Hounshells tendered the following instruction:
>
> The law places the burden on the Plaintiff, Jimmy Hounshell and Lora Hounshell to prove by a preponderance of the evidence that they own the land encompassing the following description:
>
> > "BEGINNING at the mouth of a small drain below the mouth of Flat Branch on the opposite side of South Fork and opposite side of South Fork (sic) and opposite James Noble's house, being a corner to J.E. Tincher, James Noble and Dora Hounshell; thence up said drain so it meanders to head of said drain; thence a straight line to the top of hill to a rock marked "X"; thence around ridge between Falling Rock Branch and J.E. Tincher branch to three small rocks, corner to Dora Hounshell and Barnett heirs; thence continuing with Barnett line and ridge to the

> University of Kentucky's line; thence with said University's line to J.E. Tincher's corner; thence with said J.E. Tincher's line to the beginning, containing 35 acres, more or less."
>
> If after all the evidence, you are certain the Plaintiffs, Jimmy Hounshell and Lora Hounshell, own the property, you shall return a verdict for the Plaintiffs.

Next we set out the instruction given by the trial court.

> The law places the burden on the Plaintiffs, Jimmy Hounshell and Lora Hounshell to prove by a preponderance of the evidence that they own the following description of property: **See attached Plaintiff Exhibit #18, David Altizer, Surveyor, description.**
>
> If after all the evidence, you are certain the Plaintiffs, Jimmy Hounshell and Lora Hounshell, own the aforesaid property (Altizer Survey), you shall return a verdict for the Plaintiffs, otherwise you shall find for the Defendants. (Proceed to next page-Verdict Form)

The verdict form used by the trial court read as follows:

> VERDICT
>
> You will find for the Plaintiffs, Jimmy Hounshell and Lora Hounshell if you are satisfied from the evidence that the property referred to in Instruction #2 is owned by the Plaintiffs, Jimmy Hounshell and Lora Hounshell, otherwise you will find for the Defendants, Brandon Tincher and Brenda Tincher.
>
> We the Jury find for the Plaintiffs,
> Jimmy Hounshell and Lora Hounshell
>
> [followed by blank signature lines for the foreperson and eleven others]
>
> OR

> We the Jury find for the Defendants
> Brandon Tincher and Brenda Tincher
>
> [signed by the foreperson and eight others]

In its final judgment, the trial court wrote in pertinent part:

> WHEREFORE, pursuant to the findings of the jury, it is the Judgment of the Court that the Defendants, Brandon Tincher and Brenda Tincher, own the forty-acre tract which was the subject of this action.

The Hounshells do not point us to any objection to the wording of the instruction—perhaps because the instruction given by the trial court closely tracked the instruction they tendered. Thus, the Hounshells not only failed to cite us to their objection, as required by CR 51, they are also precluded from alleging error when the court instructs the jury as the party requested—as happened here. *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 214 (Ky. 2012).

Importantly, the jury answered the only question posed by the Hounshells—and the trial court correctly summarized that answer in its final judgment. That the trial court did not recite a metes and bounds description of the disputed property is not the fault of the trial court. We are not cited to any request for such a description during trial nor in a post-trial CR 52.04 motion for critical findings of fact. If the Hounshells wanted to know the boundaries of the disputed tract, the onus was on them to pose that question to the jury and to ask the trial court to include those details in the final judgment. Having done neither, we will not fault the trial court because it was not a mind reader. The trial court having

presided over a jury trial in which the jury answered the only question posed by the plaintiffs, there is no ground upon which we can say the Hounshells were denied a jury trial. Similarly, the trial court having accurately reflected the jury's verdict in its final judgment there is no ground upon which we can grant relief.

The remaining claim pertains to three evidentiary rulings made during defense counsel's cross-examination of Jimmy Hounshell. Plaintiff's counsel objected three times—once on grounds that the witness was not testifying inconsistently from his deposition (presumably to thwart an attempt at impeachment); once that defense counsel was arguing the case to the jury rather than asking questions of the witness; and finally, that a question assumed facts not in evidence. We have reviewed the questions and testimony that prompted each objection and discern no reversible error.

We review evidentiary rulings for an abuse of discretion. *Wiley v. Commonwealth*, 348 S.W.3d 570, 580 (Ky. 2010) (internal citation omitted). Abuse of discretion occurs when a court's ruling is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994).

This case was about a single tract of land the Hounshells had purchased from Mildred Barnett in 2003. The deed conveying the disputed tract of land also conveyed two other tracts and Jimmy Hounshell testified about multiple pieces of property at trial. Inartful questioning by defense counsel during both the deposition and at trial led to confusion about which parcel was being discussed;

defense counsel tried to eliminate that confusion by asking more questions. In resolving the objections, the trial court: found reading verbatim to Jimmy Hounshell from his own deposition to determine whether there was an inconsistency would not be misleading; directed defense counsel to refrain from commenting on evidence during cross-examination; and, allowed defense counsel to engage in wide open cross-examination as allowed by KRE[6] 611 and explained in *Derossett v. Commonwealth*, 867 S.W.2d 195, 198 (Ky. 1993) (Kentucky allows cross-examination on any relevant matter even when it exceeds scope of direct examination, but trial court may impose reasonable limits). Reviewing the trial as a whole, we cannot say the trial court abused its discretion in controlling the introduction of evidence. *Wiley*.

WHEREFORE, the judgment of the Breathitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melissa C. Howard
Tammy E. Howard
Jackson, Kentucky

BRIEF FOR APPELLEE:

Darrell A. Herald
Jackson, Kentucky

[6] Kentucky Rules of Evidence.