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RENDERED: SEPTEMBER 23, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10-14-10 ElIA Grau, D.C.

2009-SC-000445-MR

GARY LYNN KEIM — APPELLANT

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
V. HONORABLE JOHN L. ATKINS, JUDGE
NO. 08-CR-00568

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

In March 2009, Appellant, Gary Lynn Keim, was convicted by a Christian Circuit Court jury of two counts of Use of a Minor in a Sexual Performance, victim under the age of sixteen; three counts of third-degree Unlawful Transaction with a Minor; and one count of third-degree Sexual Abuse.[1] For these crimes, Appellant was sentenced to thirty years' imprisonment and assessed fines totaling $1,750.00. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). We now affirm Appellant's conviction and sentence, but reverse the assessment of fines.

[1] It is pertinent to note that Appellant was charged, in addition to these crimes, with two counts of rape. However, it appears that because of Appellant's testimony, that he weighed approximately five hundred pounds and was impotent at the time of the incident, the jury believed that a rape did not transpire.

I. Background

During the summer of 2007, Appellant's nephew, J.G., and his niece, B.G., both under the age of sixteen, visited Appellant in Christian County. Sometime during the evening, Appellant asked B.G. to call his neighbor, D.S., also a minor under sixteen years of age, and ask her if she wanted to spend the night at Appellant's residence. Once D.S. arrived, the four went into Appellant's bedroom where they drank alcohol and watched pornography. B.G. testified that while they were in the bedroom, Appellant had her and D.S. undress and dance with each other.

At some point, Appellant began playing "drinking games" with the three children, which resulted in D.S. falling asleep on Appellant's bed. Thereafter, in the middle of the night, B.G. awoke and witnessed Appellant initiate coitus with D.S. J.G. also testified to witnessing this act.

In May 2008, J.G., B.G., and D.S. again visited Appellant. The four went swimming, and according to J.G. and B.G., Appellant removed his trunks while in the pool with them. After swimming, they went into the house, drank alcohol, and smoked cigarettes. There was also testimony that D.S. and Appellant smoked a "green drug" in a pipe. Eventually, D.S. and B.G. became intoxicated and Appellant instructed the two to strip and had them bend down in front of him so that he could subject them to cunnilingus. J.G. and B.G. testified that Appellant later made J.G. and D.S. have intercourse although D.S. testified that she was not sure whether intercourse actually took place.

D.S. testified that she believed B.G. and Appellant had sex that night as well. She testified that she witnessed Appellant unclothed and on top of B.G. J.G. also witnessed this, but he did not believe B.G. and Appellant were having sex. J.G. also testified that Appellant told D.S. to perform oral sex on him.

Later, J.G. informed his grandmother about the incidents and the police were notified. Detective Randall Greene of the Hopkinsville Police Department investigated the allegations. He interviewed the three victims and discovered that Appellant had shown them pornography. He then searched Appellant's house and seized a computer and some "porno movies." However, no results of any computer search were ever turned over to Appellant.[2]

At trial, three witnesses mentioned Appellant's possession of pornography. J.G. was the first to testify to Appellant's possession of pornography at which point Appellant objected on grounds that he had not received the police's search results concerning his computer. He further argued that since the Commonwealth seized the computer, allegedly after the victims informed the police that Appellant had used it to show them pornography, any mention of pornography should not be allowed. In response, the Commonwealth acknowledged that Appellant's use of pornography was not essential to its case. Thereafter, the trial court sustained Appellant's objection

[2] At trial, Appellant's counsel acknowledged that while police had seized the computer they had not "checked" it for pornography. Therefore, we are not presented with a case where the Commonwealth executed a search warrant and subsequently refused to provide the defendant with the search results.

and offered an admonition, which Appellant declined. Instead, Appellant moved for a mistrial, which the court denied.

The next witness, B.G., testifying to the same incident as J.G., stated that Appellant went to a pornographic website while the three children visited Appellant's home. Appellant again objected and the judge stated "it's all right" indicating, in context, that a bench conference was unnecessary. The Commonwealth instructed B.G. not to talk about the computer.

Detective Greene was the last witness to mention Appellant's possession of pornography, stating he had seized Appellant's computer and some pornographic movies. Appellant again objected, arguing that his possession of pornography constituted uncharged criminal conduct and that its mention warranted a mistrial. The trial court again sustained the objection, but denied the motion for a mistrial.[3]

Appellant now asserts that a mistrial was warranted after the jury was exposed to multiple statements regarding Appellant's possession of pornography because the testimony was both irrelevant and unduly prejudicial under KRE 403. In this regard, he asserts that the testimony did not relate to "any element of any of the charged crimes" and that its mention created a "pervasive stink" in the courtroom, which denied him a fair and impartial trial.

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[3] We note that Appellant's argument at trial, that his possession of pornography constituted uncharged criminal conduct, alludes to a KRE 404 analysis. However, that issue is simply not presented in this appeal. Instead, Appellant relies solely on KRE 401, 402, and 403 for the proposition that he was entitled to a mistrial. See discussion, *infra*, pages 7-8.

Appellant further concludes that an admonition, which he rejected, would not have adequately remedied the situation.

The Commonwealth responds by noting that the prosecution is allowed "to present a complete, unfragmented picture of the crime and investigation." *Adkins v. Commonwealth*, 96 S.W.3d 779, 793 (Ky. 2003). Specifically, the Commonwealth relies on our decision in *Gilbert v. Commonwealth*, and maintains that the testimony regarding Appellant's possession of pornographic materials was relevant in that it explained his overall scheme, plan, and intent. 838 S.W.2d 376, 378 (Ky. 1991). In the alternative, the Commonwealth asserts that if any error occurred, an admonition to the jury (which the trial court offered and Appellant declined) would have rectified the error, thus any error was waived.

Because we find that the evidence in this case *was* relevant and passed the balancing test under KRE 403, we thus hold that a mistrial was unwarranted as no error, or harmful error, occurred.

II. Analysis

A. Kentucky Rules of Evidence

As framed by Appellant, the issue in this case is whether a mistrial was merited after the jury was exposed to testimony regarding Appellant's possession of pornography. The premise of Appellant's argument is that because the testimony was both irrelevant and unduly prejudicial, its mention was error and warranted a new trial. Furthermore, Appellant argues that an

admonition would not have cured the alleged error. However, because we find that the evidence was relevant and that it passes the considerations outlined in KRE 403 (and KRE 404(b)), no admonition was necessary and a mistrial would have been inappropriate.

The rules of evidence in this Commonwealth are inclusive in nature and all evidence, which has 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, is relevant and admissible. KRE 401. However, as provided in KRE 402, under certain circumstances relevant evidence may not be introduced. KRE 403 is such a rule, and directs a trial court to exclude relevant evidence when its probative value is substantially outweighed by the danger of undue prejudice. *Id.* Undue or "unfair prejudice" means:

> [T]he undue tendency to suggest a decision based on improper consideration; it does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence. Evidence is unfairly prejudicial only if . . . it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.

Ten Broeck Dupont, Inc. v. Brooks, 283 S.W.3d 705 (Ky. 2009) (internal quotations and citations omitted).

Indeed all evidence is subject to the considerations outlined in KRE 403. *Brown v. Commonwealth*, 313 S.W.3d 577, 606 (Ky. 2010). But in that same vein, virtually all evidence submitted by the Commonwealth for the purposes of

implicating a defendant is prejudicial to some degree. *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991). Nevertheless, the prejudice required by KRE 403 must be undue and it must substantially outweigh the evidence's probative value before it may be excluded. KRE 403. Undue or unfair prejudice as used in rule 403 is not to be equated with testimony simply adverse to the opposing party. *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977).

Applying these rules in a case bearing uncanny resemblance to the case at bar, we found similar evidence relevant where it is necessary for the jury "to see the entire picture" and further concluded that "evidence that provides necessary perspective is competent." *Gilbert*, 838 S.W.2d at 379 (*citing Ware v. Commonwealth*, 537 S.W.2d 174 (Ky. 1976). And although Appellant characterized this evidence as "other crimes" at trial and now concentrates only on KRE 401, 402, and 403, it should be noted that KRE 404 applies only to other events temporally disconnected from the actual crimes at issue. KRE 404(b)(2). Thus, to fall within KRE 404's prohibition against "conformity" or "propensity" evidence, an event must be a prior or subsequent event. Therefore, one may not segregate one course of conduct into several separate events or steps so as to artificially create a prior or subsequent event for KRE 404 purposes. KRE 404(b)(2); *see also Morgan v. Commonwealth*, 189 S.W.3d 99, 110 (Ky. 2006) overruled on other grounds by *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007) (*citing Gilbert*, 838 S.W.2d 376, 378 (Ky. 1992) ("This is

no different than Johnny Gilbert's use of alcohol, marijuana and pornographic movies to control, force or induce his stepdaughters into adult sexual activity; wherein we stated, "[i]t was necessary that the jury see the entire picture . . . evidence that provides necessary perspective is competent. Juries do not have to perform their function of fact-finding in a vacuum."); *see also Ware*, 537 S.W.2d at 174 (Ky. 1976) ("[T]he Commonwealth was not required to limit its testimony to any single part of the transaction, but was justified in proving everything that occurred, from the time that the four defendants took charge of the wandering young woman and placed her in appellant's automobile until the termination of the whole execrable excursion.").

In any event, the application of these rules requires a balancing of the evidence's tendencies appropriately reserved to the trial courts as they stand in the best position to make such a determination. *Glens Falls Ins. Co. v. Ogden*, 310 S.W.2d 547 (Ky. 1958). Thus, appellate courts should not disturb such a ruling absent an abuse of discretion. *Tumey v. Richardson*, 437 S.W.2d 201 (Ky. 1969).

1. KRE 401 & 402

With these rules in mind, we find that the three witnesses' statements concerning Appellant's possession of pornography were relevant. Our conclusion derives from a plain reading of KRS 531.310, which provides in pertinent part: "A person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or *induces* a minor to

engage in a sexual performance." (emphasis added). As is clear, the *inducement* of a minor to engage in a sexual performance is a violation of this statute. Thus, it is quite conceivable that the jury could have drawn a reasonable inference that Appellant used the pornography as a catalyst to arouse the children, inducing them into performing a sexual act while he observed. *See United States v. Postel*, 524 F. Supp. 2d 1120, 1123 (N.D. Iowa 2006) (where the defendant distributed child pornography to induce, arouse, and entice the child victim to engage in prohibited sexual contact with him). Therefore, we find the testimony regarding Appellant's possession of pornography relevant in this case.

We also agree with the Commonwealth that the evidence tended to show Appellant's scheme of action and was a necessary part of the entire picture which the jury was entitled to see. This evidence provided necessary perspective and we conclude that it was competent as it relates to Appellant's plan, scheme, and intent. *Gilbert*, 838 S.W.2d at 379 (*citing Ware*, 537 S.W.2d at 174). We reiterate today that juries "do not have to perform their function of fact-finding in a vacuum." *Id.* What's important is still important.

Therefore, because the testimony was relevant (as it supported an element of the crime charged) and because its admission helped to paint the entire picture surrounding Appellant's criminal activity, we reject the notion that it was incompetent evidence in this regard.

2. KRE 403

We next turn to Appellant's contention that even if the testimony was relevant, the undue prejudice created by its mention outweighed its probative value and, furthermore, that it misled the jury. KRE 403.

In response, the Commonwealth posits that the three fleeting statements regarding Appellant's possession of pornography created little prejudice in light of the facts and circumstances surrounding this case. Furthermore, the Commonwealth again relies on our decision in *Gilbert*, 838 S.W.2d at 378, for the premise that the testimony was probative to the extent that it established Appellant's plan and intent.

As noted above, virtually all evidence put forward by the Commonwealth in an attempt to implicate a criminal defendant is prejudicial. But, again, that prejudice should not be equated with the adverse nature of the evidence. More is required, particularly when a defendant requests that a trial court grant the extraordinary remedy of a mistrial.

We believe that the children's testimony regarding Appellant's possession of the pornography was *probative* of the "inducement" element outlined in KRS 531.310, and was part of the scheme used in Appellant's ploy to seduce the children. As noted above, the jury could have easily drawn the conclusion that the pornography induced the children into "performing" for Appellant. Thus, we conclude that the testimony was *probative* to this end.

With regard to the prejudicial nature of the testimony, we agree that the testimony was indeed adverse to Appellant, but nothing more. We conclude that in light of the facts surrounding this case, the testimony complained of by Appellant appears almost benign—and certainly not devastating. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) (citations omitted). There was graphic testimony of sexual conduct between Appellant and two of the victims and between the three victims themselves. We cannot say that in this case the three statements were so inflammatory as to reach the conclusion that their probative value was substantially outweighed by their prejudicial effect. *Id.* Appellant suffered no unfairness when the jury heard these statements, and neither was the jury misled as the testimony directly proved an element of the charged crimes.

We do, however, pause to note that Officer Greene's testimony may have had less probative value than that of the children as we recognize that Appellant's simple possession did not directly probe the question of inducement even though it circumstantially supported the children's testimony of its existence and use. However, in any event, given the context of the evidence adduced, any error was certainly harmless.

Thus, because we find that the testimony was both relevant and in compliance with KRE 403, no mistrial was warranted.

B. Imposition of Fines on an Indigent Defendant

Appellant next argues that because of his indigent status the trial court violated KRS 534.040(4) when it fined him $1,750.00. Because Appellant did not object to the imposition of the fines at trial, he now requests that we invoke our authority under RCr 10.26, and review this issue for palpable error. In support of his position, Appellant cites *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994) and *Moore v. Commonwealth*, No. 2006-SC-000794-MR, 2008 WL 3890168, at *5 (Ky. April 21, 2008).

The Commonwealth notes that we have found palpable error in other cases similar to the case at bar, but asserts that any ruling on this issue should not affect the disposition of the convictions.

To review an error under the palpable error standard, we must find that a manifest injustice has resulted from an error not properly preserved for appeal. RCr 10.26. We also require a demonstration that a different outcome would have resulted at trial or evidence of an error so fundamental as to threaten a defendant's entitlement to due process of law. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). The burden to demonstrate palpable error is high, as a defendant must show that the error involved prejudice more egregious than that occurring in reversible error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006). Indeed we must make an ultimate finding that the error was shocking or jurisprudentially intolerable. *Martin*, 207 S.W.3d at 4. Applying these rules, we conclude that a manifest

injustice has occurred because an assessment of fines against an indigent defendant is jurisprudentially intolerable.

In *Huber v. Commonwealth*, we questioned, under palpable error review, a trial court's imposition of fines on an indigent defendant and noted:

> KRS § 534.040(4) provides: "Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." Furthermore, KRS § 23A.205(2) states that "taxation of court costs against a defendant, upon conviction in a case, shall be mandatory . . . unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay court costs in the foreseeable future." Here, the jury fixed Appellant's punishment for twelve of the thirteen misdemeanor convictions at $500 for each Class A misdemeanor, pursuant to KRS § 534.040(2)(a). This must have been an oversight by the trial court. Appellant was an indigent person as provided for by the laws of this Commonwealth, and thus any levying of fines is specifically prohibited in this instance.

No. 2004-SC-000912-MR, 2006 WL 2452506, at *7 (Ky. August 24, 2006). We find no reason to depart from the position we took in *Huber*. Therefore, we vacate the trial court's order imposing fines upon the Appellant.

III. Conclusion

For the aforementioned reasons, we affirm Appellant's conviction and sentencing, however, we vacate the imposition of the fines therein totaling $1,750.00.

All sitting. All concur.

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