IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 23, 2017
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000644-MR

MICHAEL MILLS — APPELLANT

V.

ON APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY ALLEN LAY, JUDGE
NO. 14-CR-00083

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Knox Circuit Court jury convicted Appellant, Michael Mills, of first-degree rape and first-degree sodomy. He was sentenced to two concurrent terms of life in prison. On appeal, he raises the following claims of error: (1) that the trial court's finding him competent to stand trial was not based on substantial evidence, and (2) that the trial court erred in allowing the minor victim to sit at counsel's table for the Commonwealth during voir dire after Mills invoked witness exclusion under KRE 615. This Court affirms.

I. BACKGROUND

In June 2014, Mills lived with his fiancée and her two minor daughters, then-eleven-year-old Mandy[1] and her seven-year-old sister.

[1] Mandy is a pseudonym.

On June 3, Mills and Mandy traveled to Barbourville for Mandy to get a haircut and manicure. Mills allowed Mandy to drive a portion of their trip, which was not uncommon.

On the way back, Mills asked Mandy to stop the car at an abandoned barn so that he could search it for wire. He found no wire. Before he allowed Mandy to drive away from the barn, however, he sexually assaulted her, penetrating her anus and vagina with his finger and penis.[2] Mills claimed that the encounter was consensual. Mandy claimed it was not.

Before trial, defense counsel asked the trial court to order a competency evaluation under KRS 504.080. The court initially denied the motion, relying largely on the colloquy transcript of a guilty plea Mills entered in a 2010 case to find him competent. Counsel renewed the motion, elaborating on her concerns. Based on these concerns, the court agreed to order a competency evaluation and hold a hearing. Kentucky Correctional Psychiatric Center psychologist Steven Sparks, Ph.D, evaluated Mills and testified at the competency hearing. Mills put on no proof of his own at the hearing. Relying on Dr. Sparks's opinions, the trial court found that Mills was competent to stand trial under KRS 504.060(4).

The jury eventually convicted Mills of first-degree rape and first-degree sodomy and recommended life sentences for each to be run consecutively. The trial court sentenced him to two concurrent life sentences.

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[2] There was never much dispute the sexual encounter occurred, as Mills admitted as much to police. It was also corroborated by the results of Mandy's hospital examination the next day. Although she had no bruises or scratches, medical personnel noted evidence of anal and vaginal tearing. They also discovered DNA evidence which lab analysis tied to Mills.

Mills now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b).

II. ANALYSIS

A. Substantial evidence supported the trial court's ruling on Mills's competency to stand trial.

Mills's first claim involves the trial court's finding that he was competent to stand trial, which he insists was clearly erroneous.

The constitutional right to a fair trial prohibits the trying of incompetent individuals. *Pate v. Robinson*, 383 U.S. 375, 384 (1966). Recognizing this, the General Assembly has by statute prohibited the trying, convicting, and sentencing of any defendant who is incompetent to stand trial. KRS 504.090. It has defined *incompetency to stand trial* to mean "as a result of mental condition, [a] lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense." KRS 504.060(4). In reviewing competency determinations, we have also consistently referred to the Supreme Court's test of incompetence in federal cases, which asks "whether a criminal defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *Drope v. Missouri*, 420 U.S. 162, 172 (1975) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)); *see also, e.g.*, *Keeling v. Commonwealth*, 381 S.W.3d 248, 262 (Ky. 2010).

A defendant has the burden of proving his incompetency to stand trial based on a preponderance of the evidence. *Thompson v. Commonwealth*, 147 S.W.3d 22, 32 (Ky. 2004). A reviewing court may not disturb a competency

determination unless it was clearly erroneous—that is, not supported by substantial evidence. *Chapman v. Commonwealth*, 265 S.W.3d 156, 174 (Ky. 2007).

The trial court here made its determination after holding a hearing at which the only evidence presented[3] came from Dr. Steven Sparks, a psychologist working for the Kentucky Correctional Psychiatric Center who evaluated Mills's competency under court order. *See* KRS 504.100. This included a report of Dr. Sparks's findings as well as his hearing testimony explaining those findings.

Dr. Sparks reviewed various past records for Mills, noting his 2007 motorcycle accident and brain injury from which he appeared to have improved. He noted that Mills's CT scan and EEG results were normal. He also noted Mills's history of seizures both before and after the accident. He diagnosed cognitive disorder and anti-social personality traits.

Dr. Sparks believed that Mills had been malingering—i.e., giving low effort and even at times intentionally exaggerating poor results—to a degree during his evaluation. He reached this conclusion despite the results of various tests geared toward discovering such behavior having been largely inconclusive, or at least as consistent with malingering as other mental

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[3] Although Mills put on no proof at the hearing, he attached to his motion for a competency evaluation and hearing a discharge summary from Cardinal Hill Rehabilitation Hospital. This summary involved treatment for a traumatic brain injury suffered during a motorcycle accident in 2007. It included findings of severe problem-solving, moderate memory, and mild-to-moderate comprehension impairments. The motion also contained defense counsel's observation that Mills seemed unable to comprehend that the decision of whether to plead guilty was his alone to make. In renewing the motion, defense counsel added that Mills had seemed unable to understand possible defenses or to participate in preparing his defense. Counsel also pointed out Mills's history of seizures and his complaints that his mind "flips on him."

deficits. Dr. Sparks highlighted how Mills had appeared depressed and "sullen" during the evaluation, despite having been observed by other KCPC personnel to be "jovial" during his time on the unit. In the end, Dr. Sparks believed Mills had not put forth a full effort, had been very reluctant to provide information, and thus had "appeared to be attempting to exaggerate deficits."

Dr. Sparks went on to explain that despite Mills's poor cognitive capacity and low I.Q. of 62, he generally performed within the range of those found competent to stand trial. Emphasizing Mills's "not putting forth full effort," he explained that "with encouragement" he could usually elicit a proper response. As Dr. Sparks explained: "When they lack full effort, I try to get enough to show if they do have an understanding of court procedure and ability to participate rationally. [Mills] did demonstrate those abilities."

To be sure, Mills emphasizes other evidence of his mental and cognitive defects, much of which he elicited through cross-examining Dr. Sparks. This included his low mental-processing speed, low memory scores, poor academic history and illiteracy, and history of polysubstance abuse. But as Dr. Sparks's report and testimony make clear, his evaluation accounted for all of this and more.

In the end, the trial court chose to believe Dr. Sparks's opinions and relied on them to conclude that Mills was competent to stand trial. That evidence suffices to uphold its decision. The trial judge had the discretion to accept the expert opinions of Dr. Sparks—doing so was far from clear error. Although the other evidence that Mills highlights would have supported finding him incompetent, it did not compel it.

Also, Mills's contention that the trial court (and, presumably, Dr. Sparks) inadequately considered whether and to what degree he is intellectually disabled[4] falls flat. The trial court here was tasked with determining Mills's competence to stand trial under KRS 504.090. As discussed above, the statute and caselaw lay out what that inquiry entails. Significantly, it does not entail determining the extent to which a criminal defendant may be intellectually disabled or have a mental illness.[5]

Instead, under our Penal Code, the significance of being intellectually disabled or having a mental illness lies in whether the individual can be held criminally liable at all for his otherwise criminal deeds. *See* KRS 504.020.[6] That is a different inquiry than the competency determination at issue here; it is irrelevant to our review of that determination whether, as he now alleges, Mills is intellectually disabled as that term is used in KRS Chapter 504. His chance to raise and prove intellectual disability in exculpation of his criminal

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[4] KRS 504.060(7) defines *individual with an intellectual disability* as "an individual with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period and is a condition which may exist concurrently with mental illness or insanity."

[5] KRS 504.060(6) defines *mental illness* as "substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors."

[6] KRS 504.020 provides, in part:

> (1) A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or intellectual disability, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
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> . . .
>
> (3) A defendant may prove mental illness or intellectual disability, as used in this section, in exculpation of criminal conduct.

conduct was in the trial court below, not on appeal under the guise of an allegedly unsupported competency ruling.

In sum, substantial evidence in the form of Dr. Sparks's report and testimony supported the trial court's determination that Mills was competent to stand trial under KRS 504.090.

B. Mills neither preserved nor asked for palpable-error review of the victim's presence at the prosecution's table during voir dire.

Mills also complains about Mandy having been allowed to sit at the Commonwealth's counsel table during voir dire, claiming this violated the witness-sequestration rule, KRE 615, as well as his right to due process. Although he asserts in his brief to this Court that he preserved this claim through invoking the rule and specifically objecting to Mandy's presence during voir dire, the Commonwealth disputes that he ever raised such objection. This Court has reviewed the video recording of the bench conference during which Mills invoked the rule and determined that the Commonwealth's characterization of the discussion that took place is accurate.

The trial court conducted a bench conference before commencing voir dire to settle a variety of matters, one of which was the exclusion of witnesses during trial. Invoking KRE 615, Mills's counsel asked the court to order all witnesses excluded from the courtroom during trial and preemptively objected to the extent the Commonwealth may have intended to seek an exception for the victim-witness to allow her to assist during trial. *See* KRE 615(3) (excepting from exclusion "[a] person whose presence is shown by a party to be essential to the presentation of the party's cause").

The prosecutor responded by agreeing that he had "no objection, Your Honor, after voir dire." He asserted that it is appropriate and common for witnesses to remain or be called into the courtroom during voir dire. He then concluded by acknowledging Mills's prospective objection and indicating that the investigating state trooper, and not the victim, would remain to assist during the trial.

Defense counsel did not object or otherwise respond to these statements. In fact, defense counsel nodded along agreeably throughout the prosecutor's response. And when the trial court stated that he would indeed order the exclusion of witnesses after voir dire and before opening statements, defense counsel both nodded and vocalized her assent.

So it is clear, as the Commonwealth pointed out in its brief, that Mills did not preserve the specific claim of error that he now raises on appeal, namely Mandy's being present during voir dire. *See* RCr 9.22. As with all unpreserved claims, palpable-error review is the only avenue thus available to him here. *See* RCr 10.26. But as this Court has emphasized time and again, "[a]bsent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable-error review . . . unless such a request is made and briefed by the appellant." *Webster v. Commonwealth*, 438 S.W.3d 321, 327 (Ky. 2014) (quoting *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008)).

Mills has neither asked that we review this unpreserved claim for palpable error nor explained how the alleged error amounted to palpable error.[7]

[7] It is not surprising that Mills failed to request palpable-error review in his initial brief, considering the apparent differences between his appellate counsel's

Nor do we consider this case to present such "extreme circumstances" that might otherwise compel us to undertake an unrequested and unbriefed palpable-error review. So we decline to address further the substance of this claim.

III. CONCLUSION

We affirm the judgment of the Knox Circuit Court convicting Mills of first-degree rape and first-degree sodomy and sentencing him to life in prison.

All sitting. All concur.

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perception of the record and the Commonwealth's. Given that the Commonwealth's responsive brief refuted Mills's position on preservation, however, it is surprising that Mills did not request and argue palpable error in reply—filing no reply at all was indeed a curious strategy here.