

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001981-MR

GEORGE DEVORE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 01-CR-00495

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, HUDDLESTON AND KNOFF, JUDGES.

GUIDUGLI, JUDGE. George Devore ("Devore") appeals from a judgment of the Fayette Circuit Court reflecting a jury verdict of guilty on four counts of first-degree sexual abuse. We affirm.

On May 14, 2001, Devore was indicted by the Fayette County Grand Jury on four counts of first-degree sexual abuse. The charges stemmed from a complaint received by the Lexington Police Department on March 9, 2001, in which Devore's former wife, Darla Devore ("Darla"), maintained that Devore had engaged in unlawful sexual conduct with three of Devore's minor sons. An investigation ensued, during which it was determined that Devore allegedly showed pornographic videos to the children, fondled

their genitals, and exposed himself to them. The investigation included a taped interview with Devore in which he confessed to the allegations.

A jury trial was held on July 5, 2001, after which a guilty verdict was returned on all four counts. Devore received a sentence of five years in prison on each count, with two of the counts to be served consecutively and two to be served concurrently for a total of ten years in prison. This appeal followed.

Devore first argues that the trial court committed reversible error in ruling that the Commonwealth gave reasonable notice of its intent to introduce prior bad acts testimony pursuant to KRE 404(B). Specifically, he maintains that the trial court erred in permitting the Commonwealth to introduce the testimony of Devore's son, N. D., regarding alleged prior bad acts. He argues that the remedy for the alleged error is a new trial.

We have closely examined the record and find no error on this issue. As the Commonwealth properly notes, Devore made no contemporaneous objection to the introduction of N. D.'s testimony, instead moving for a mistrial after the conclusion of his testimony. As such, the claim that the testimony was improperly admitted is not preserved for appellate review. RCr 9.22. Arguendo, even if the alleged error was properly preserved by a contemporaneous objection, it is clear from the record that Devore received actual notice of the allegations and of N. D.'s involvement. N. D. was one of the alleged victims, and the

police report, subsequent investigation, Devore's taped confession, and indictment address this fact. Thus, even if the matter was properly preserved, we find no error in the trial court's ruling that Devore was aware of the nature and extent of N. D.'s testimony. Similarly, if the issue is framed in terms of whether Devore was entitled to a mistrial (since Devore moved for a mistrial after N. D.'s testimony), we also find no error.

Devore also argues that the trial court erred in improperly failing to allow into evidence the testimony of Darla's mother and sister. He maintains that these witnesses could have corroborated his assertion at trial that Darla was mentally unstable and had fabricated the allegations against him. He maintains that denying him the right to produce this testimony denied him the right to confront his accuser, Darla, and that as a result, he is entitled to a new trial.

The testimony of Darla's mother, Shelia Nagy ("Nagy"), which was taken by avowal, described a statement allegedly made by another of Devore's sons, who had not been sexually abused, and described his reaction to a statement made by another son, J. D. relating to the sexual abuse allegations. Upon the Commonwealth's objection, this portion of Nagy's statement was excluded as hearsay because it relayed what J. D. said and how he reacted. We find no error in this ruling, and Devore cites no case law or evidentiary rule which would lead us to an opposite conclusion. As to the exclusion of the testimony of Darla's sister, Luann Askins ("Askins"), she was asked if Darla had made statements regarding the veracity of the charges against Devore.

Askins's testimony was properly excluded either as hearsay. We find no basis for disturbing the judgment on appeal on this issue.

Devore's third argument is that the trial court improperly denied his motion for a directed verdict on a count involving his son, J.D. He maintains that it was clearly unreasonable to allow this count to go to the jury because the indictment alleged two occasions of improper touching even though J. D. testified that the improper touching occurred only once. We find no error. Devore's taped confession includes an admission that he improperly touched J. D. on more than one occasion. This tape, taken alone, forms a sufficient basis to overcome Devore's motion for summary judgment as to this count. See generally Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), holding, in relevant part, that the trial court must draw all fair and reasonable inferences in favor of the Commonwealth.

Lastly, Devore argues that the trial court committed palpable error in failing to determine if his sons were competent to testify and that their testimony was not tainted by suggestive questioning or parental prepping. He maintains that the trial court should have undertaken this inquiry, and that this failure constitutes substantial error resulting in manifest injustice.

We are not persuaded by this argument. First, it is uncontroverted that this issue was not raised at trial and is not preserved for appellate review. As such, we may disregard it. Hays v. Commonwealth, Ky., 625 S.W.2d 575 (1981). We are also not persuaded that it constitutes palpable error, as there is no

evidence in the record to support such a conclusion and Devore does not even allege that such evidence exists. Rather than directing our attention to portions of the record upon which we might conclude that the boys were incompetent or that their testimony was tainted by improper external influence, he merely argues that the trial court should have undertaken this inquiry sua sponte. We have closely studied the record, with special attention to the boys' testimony, and find no factual or legal basis for concluding that the trial court erred in failing to examine the boys' competency to testify. As such, we find no error.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

HUDDLESTON, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN RESULT ONLY.

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