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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000431-MR

RONNIE WAYNE TURNER — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 01-CR-00206

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE: Ronnie W. Turner brings this appeal from a February 21, 2002 judgment of the Henderson Circuit Court. We affirm.

Appellant was indicted by the Henderson County Grand Jury upon first degree burglary, Kentucky Revised Statutes (KRS) 511.020; first degree wanton endangerment, KRS 508.060; fourth degree assault, KRS 508.030; and terroristic threatening, (three counts), KRS 508.080. It appears that the victim, one Sabrina Kelly Barnes, was appellant's girlfriend. At preliminary hearing, Barnes testified that appellant forced his way into her apartment, assaulted her, and pulled on her what she thought to

be a gun. At trial, however, Barnes testified that she lied at the preliminary hearing and to the police. At the jury trial, appellant was found guilty of second degree burglary, fourth degree assault, and terroristic threatening. He was sentenced to a total of five years' imprisonment. This appeal follows.

Appellant contends that the circuit court committed reversible error by allowing the jury to consider evidence of his "prior bad acts." Angela Strong, a friend of Barnes, was called to testify for appellant. During direct examination, defense counsel asked Strong: "Have you ever seen Ronnie [appellant] show a temper tantrum?" She answered: "No, I haven't." In his brief, appellant objects to the following cross-examination of Strong:

MR. WOOD:	Ms. Strong, you indicated you've never known the defendant to have a "temper tantrum?"
MS. STRONG:	Um-hum (affirmative).
MR. WOOD:	Would you include assaulting other people?
MS. STRONG:	Yes.
. . . .	
MR. WOOD:	Were you familiar with an occurrence in this county involving the defendant in his assault upon Sabrina Kelly Barnes that occurred in this county on or about the 29th day of July of 1999 for which he was arrested and charged with Fourth Degree Assault upon Kelly Barnes?
MS. STRONG:	No, I'm not.
MR. WOOD:	Were you aware that he was convicted under a plea bargain agreement of a lesser offense of harassment of her that conviction being returned by the Henderson

	District Court on August the 4th of 1999.
MS. STRONG:	No, I didn't.
MR. WOOD:	Were you aware as well that Mr. Turner was arrested for the offense of disorderly conduct on March the 30th of 1997.
MS. STRONG:	No, no I'm, I'm not. I lived in Newburgh for a little while but I never heard that.
MR. WOOD:	And pled guilty to that offense and was convicted of that offense on April the 15th of 1997. Were you aware of that?
MS. STRONG:	No, I wasn't.
MR. WOOD:	Likewise were you aware that he was arrested and/or charged or arrested for the violation of a domestic violence order on August the 23rd of 1996.
MS. STRONG:	No, but I don't know how this works. I've never done this before, but can I say something.
MR. WOOD:	Were you aware of that?
MS. STRONG:	No, but.
MR. WOOD:	Were you aware that likewise based upon that charge he pled guilty and was convicted of violation of the emergency protection order by the Henderson District court on June the 29th of 1997.
MS. STRONG:	No, I wasn't.

Appellant's Brief at 4-6.

Appellant specifically claims it was error to admit the prior criminal acts into evidence. The circuit court concluded that such prior criminal acts were admissible during cross-examination because appellant had "opened the door" by placing his character in issue. Appellant claims that defense counsel's question to Strong "[h]ave you ever seen Ronnie show a temper-tantrum?", did not put his character in issue. Appellant argues

that "Strong was not asked to testify about [appellant's] character; her answer was neither 'reputation or opinion' as required by KRE 405(a). She merely stated that she personally had never seen him have a temper-tantrum. This did not place his character in issue." We must disagree. We believe the question directly related to the specific character trait of violence. We think the question tantamount to asking Strong if, in her opinion, appellant possessed a violent propensity. As such, we are of the opinion that appellant did, indeed, put his character in issue.

Appellant alternatively argues that the Commonwealth improperly utilized his prior criminal acts in its cross-examination of Strong. In Broyles v. Commonwealth, Ky., 267 S.W.2d 73, 74 (1954), the Court held:

> [I]t is the rule in this state that where the defendant introduces evidence of his good reputation, the witness so testifying may be asked on cross-examination whether he has heard reports of particular acts of misconduct by the defendant. (citations omitted). But the rule is not absolute. When there is an objection to such evidence or a motion to limit its effect, the court is required to admonish the jury that it is admitted only for the purpose of testing the accuracy and credibility of the witness' testimony and not as substantive evidence of defendant's guilt. (citation omitted). Moreover, inquiry may be made only about those acts of misconduct having some relation to the particular trait of character which the defendant has put in issue. (citations omitted).

Upon the above authority, we are of the opinion that specific acts of misconduct can be used on cross-examination of a character witness. Here, we think it showed that Strong lacked

reliable knowledge upon which to base her opinion concerning the non-violent tendencies of appellant. We also believe that these acts bear a direct relation to the particular character trait at issue. The particular trait of character put in issue by appellant was his non-violent tendencies; the particular acts of misconduct used by the Commonwealth were all violent offenses. Hence, we think the Commonwealth's cross-examination of Strong concerning prior bad acts of appellant was proper.

We observe that appellant's counsel objected to the introduction of the prior bad acts, but did not ask for an admonishment to the jury. Ky. R. Evid. (KRE) 105(a) states as follows:

> When evidence which is admissible as to one (1) party or for one (1) purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly. In the absence of such a request, the admission of the evidence by the trial judge without limitation shall not be a ground for complaint on appeal, except under the palpable error rule. (emphasis added).

We thus must determine whether the circuit court's failure to admonish the jury constituted palpable error. Ky. R. Crim. P.(RCr) 10.26, our palpable error rule, reads as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that **manifest injustice has resulted from the error.** (emphasis added.)

The requirement of "manifest injustice" means that there is a substantial probability that the result of the trial would have been different, but for the error. See Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). Upon the whole, we do not think that manifest injustice was involved in this case. We view the evidence as substantial upon appellant's guilt.

Officer Shannon Gibbs, of the Henderson Police Department, testified at trial for the Commonwealth. Officer Gibbs was dispatched to Barnes' residence in response to a 911 call. Upon arriving, Officer Gibbs testified that the apartment showed evidence that a struggle had taken place, and that Barnes' upper arms were red and swollen. Officer Gibbs also recounted that Barnes stated appellant had forced his way into the apartment, assaulted her and pulled a gun on her. Another witness, Karen Ligon, Barnes' mother, testified that Barnes called her on the day in question and claimed that appellant had threatened Barnes with a gun. Simply put, we cannot conclude that there was a substantial probability the jury would have acquitted appellant if the admonition had been given.

Appellant next asserts that the Commonwealth violated his constitutional right against self-incrimination. It appears that appellant testified upon his behalf at trial. In his brief, appellant specifically cites this Court to the following testimony.

> MR. WOOD: Now you talked about this is the first time anyone has ever heard your story I agree with that.
> MR. TURNER: I believe you're right.

MR. WOOD: That's your choice though, wasn't it?
MR. TURNER: I don't think that it was.
MR. WOOD: You could have turned yourself in. The day it happened you knew they were looking for you. Is that correct? After talking with Jay Workins?
MR. TURNER: After talking to Jay Workins I knew that the police were looking for me and I explained to him exactly that I needed time for counsel after he told me these charges are very serious Ronnie, there — he said it started off as one charge and it is building. He said there's several.
MR. WOOD: And that was on Friday.
MR. TURNER: Yes, it was.
MR. WOOD: The day this happened?
MR. TURNER: Yes, it was.
MR. WOOD: And you hung out for three days.
MR. TURNER: Absolutely.
MR. WOOD: During that time — you know how to write don't you?
MR. TURNER: How to write?
MR. WOOD: Yes, sir.
MR. TURNER: Yes, sir, I do.
MR. WOOD: So you could have written down whatever you wanted to write down and mailed it to anywhere, mailed it to Ms., to Officer Gibbs, mailed it to Jay Workins, mailed it to me, mailed it to Charlie McCollom, County Attorney. You could have mailed it to anybody.
MR. TURNER: I didn't know you at that time, sir. Like I said this is the first time I've laid eyes on you. No, I saw you yesterday.
MR. WOOD: You knew the police were looking for you.
MR. TURNER: Yes, I did, and I believe I tried to tell Jay what happened and he said Ronnie it would be better if you didn't talk to me about this.
MR. WOOD: I object to hearsay about what Mr. Workins told him.

[emphases in original].

Appellant's Brief at 11-12.

Appellant argues that the above questions by the Commonwealth concerning his "silence" violated his constitutional right against self-incrimination. We believe the Commonwealth's line of questioning certainly implicated appellant's constitutional right. The right to remain silent carries with it freedom from prejudicial comment. In Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the defendants changed their story at trial. Over objection of counsel, the Court permitted cross-examination as to why they had not offered the exculpatory explanations at the time of arrest. Their convictions were reversed with the Court pointing out that the right to remain silent prevented impeachment by use of their stance.

In the case at hand, however, there was no objection to the Commonwealth's line of questioning. We must, thus, review the allegation of error under the palpable error rule. RCr 10.26.

In Salisbury v. Commonwealth, Ky. App., 556 S.W.2d 922 (1977), the Commonwealth commented upon Salisbury's silence following his arrest. His trial counsel failed to object to the questioning. The Court held that line of questioning did not constitute palpable error and reasoned thusly:

> Even though Salisbury's substantial rights were involved by the Commonwealth's comment on his post-arrest silence, it does not necessarily follow that there was palpable error. . . . When a defendant's attorney is aware of an issue and elects to

> raise no objection, the attorney's failure to object may constitute a waiver of an error having constitutional implications. In the absence of exceptional circumstances, a defendant is bound by the trial strategy adopted by his counsel even if made without prior consultation with the defendant. . . .

Id. at 926-927.

Reviewing the cross-examination, under the palpable error rule, we are not constrained to find reversible error. There is ample evidence in the record to sustain appellant's conviction. At the time of the incident, the victim suffered obvious injuries. The police officers noted that the apartment was in disarray, and showed signs of a struggle. The victim's mother offered evidence suggesting that appellant had made prior threats.

Upon the foregoing testimony, we think there was sufficient evidence to sustain appellant's conviction, even in the absence of the cross-examination of which complaint is made.

Appellant finally maintains that his trial counsel was ineffective. Generally, appellate courts only review claims of error that have been presented to the trial court. See Caslin v. Commonwealth, Ky., 491 S.W.2d 832 (1973). The claim of ineffective assistance of counsel may be reviewed on direct appeal if there is a trial record or an evidentiary hearing held on motion for new trial and the trial court rules upon the issue. See Hopewell v. Commonwealth, Ky., 641 S.W.2d 744 (1982). The record herein, however, does not demonstrate that the issue has been properly preserved for our review. Ky. R. Civ. P. 76.12(c)(v).

For the foregoing reasons, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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