RENDERED: MAY 11, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001636-MR

MICHAEL ALLEN HALLUM — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 01-CR-00061

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Michael Allen Hallum appeals from a judgment of conviction and final sentencing entered by the Logan Circuit Court on June 24, 2004, in which Hallum was convicted, after a jury trial, of five counts of sexual abuse in the first degree, a Class D felony, and was sentenced by the trial court to serve a total of fifteen years in state prison. On appeal, Hallum first argues that the victim testified about other uncharged acts of sexual contact in violation of the Kentucky Rules of Evidence (KRE) 404(b). Second, Hallum argues that the trial court abused its discretion by not granting a mistrial

due to a social worker's testimony that she found the victim believable and credible. Third, Hallum argues that the trial court erred by not granting a mistrial due to the prosecutor's misconduct during closing argument. Fourth, he contends that the trial court erred by allowing an unqualified juror to sit on the jury, and lastly that the trial court erred when it expressed an improper opinion regarding Hallum's guilt. After a careful review of the record, we find no error and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 22, 2000, the victim, C.K., told her mother that from age six until age twelve, she had been sexually abused by her stepfather, Michael Allen Hallum. C.K.'s mother contacted the Cabinet for Families and Children, now the Cabinet for Health and Family Services, and a social worker, Missy Perry, investigated C.K.'s allegations of abuse. While meeting with Perry and Detective Fitts of the Kentucky State Police, C.K. divulged four specific incidents of sexual contact with Hallum and one incident of attempted rape. *Id*. at 18. After Perry and Detective Fitts completed their investigation, a Logan County grand jury indicted and charged Hallum with four counts of sexual abuse in the first degree, Kentucky Revised Statutes (KRS) 510.110, and one count of rape in the first degree, KRS 510.040.

On April 22, 2004, Hallum's case proceeded to trial. At trial, the Commonwealth presented no physical evidence regarding the alleged sexual abuse; instead, the Commonwealth relied upon the testimony of C.K., C.K.'s friend, C.K.'s mother, social worker Missy Perry, and Detective Fitts. While on the stand, C.K.

testified in detail about incidents of sexual abuse. She also testified that the abuse occurred on a regular basis and that Hallum had molested her approximately fifteen-to-forty times over a six-year period. After hearing the evidence, the jury convicted Hallum of five counts of sexual abuse in the first degree. The jury recommended that Hallum serve three years on each count, consecutively, for a total of fifteen years. At Hallum's final sentencing, the trial court sentenced Hallum in accordance with the jury's recommendation.

II. ANALYSIS

A. APPELLANT'S FIRST ASSIGNMENT OF ERROR

1. STANDARD OF REVIEW

Hallum's first assignment of error addresses the trial court's decision allowing testimony regarding prior bad acts. When reviewing a trial court's evidentiary decision, we will not disturb the lower court's ruling unless it has abused its discretion. *Colston Investment Co. v. Home Supply Co.,* 74 S.W.3d 759, 765 (Ky. App. 2001) (citing *Goodyear Tire & Rubber Co. v. Thompson,* 11 S.W.3d 575, 577 (Ky. 2000)). If a trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles, only then has it abused its discretion. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

2. PRIOR BAD ACTS CLAIM.

Prior to trial, the Commonwealth gave Hallum notice that it intended to have C.K. testify that Hallum had molested her fifteen-to-forty times over a six-year

period. On the morning of trial, in the trial court's chamber, Hallum pointed out that such testimony would be evidence of prior bad acts. In chambers, C.K. told the trial court that when the various incidents occurred her brother was present but never witnessed anything because he was usually napping. She also stated that the incidents always occurred while her mother was at work. The trial court decided that the proposed testimony was admissible as evidence of motive, opportunity, preparation, or plan under the exceptions set forth in KRE 404(b)(1). In addition, the trial court determined that C.K.'s proposed testimony was admissible pursuant to the one exception set forth in KRE 404(b)(2) allowing testimony that is inextricably intertwined with other evidence essential to the case.

At trial, C.K. testified in detail regarding five incidents of abuse committed by Hallum. According to C.K., the first incident occurred when she was in the fourth grade. C.K. had asked Hallum for a new pair of tennis shoes. Hallum told her that he would get her the shoes if she would do something for him. He then took C.K. into her bedroom, removed her clothes, held her down, and fondled her breasts and vagina for approximately fifteen-to-twenty minutes. According to C.K., at the time of the incident, her mother was at work and her brother, who was five years younger than her, was napping. C.K. testified that the second incident occurred when Hallum took her into a guest bedroom. Once there, Hallum removed C.K.'s clothes, held her down, and fondled her vagina. According to C.K., her mother was at work and her brother was either asleep or not there. C.K. testified that the third incident occurred while she was lying on the

living room floor watching television. According to C.K.'s testimony, Hallum approached her from behind and picked her up by her ankles. He then rubbed her buttocks up and down on his erect penis. C.K. testified that during this incident, she was clothed. According to C.K., the fourth incident occurred when Hallum entered her bedroom, lowered his pants, and sat down on her bed. He then removed her pants and underwear, and, holding her from behind, he lowered C.K. onto his erect penis in an attempt to force sexual intercourse. C.K. testified that she screamed and ran from the room. C.K. testified that the fifth incident occurred around the time of Christmas. C.K. stated that while she was in the garage, Hallum entered the garage, cornered her, and took off her clothes. Hallum then fondled C.K.'s vagina for twenty-to-thirty minutes. According to C.K., she escaped Hallum by running outside while still naked.

In addition, C.K. testified that these five incidents were not the only ones. According to C.K.'s testimony, Hallum molested her not less than fifteen times but no more than forty times. C.K. pointed out that all the incidents occurred at the same house and all the incidents occurred when her mother was at work and her brother was asleep. C.K. testified that during each incident, Hallum would hold her down and fondled her vagina except for the one time he tried to penetrate her.

On appeal, Hallum argues that the trial court abused its discretion when it allowed C.K. to testify about prior and contemporaneous acts of molestation committed by Hallum against C.K. Hallum insists that the Commonwealth failed to establish the proper foundation to introduce C.K.'s testimony as required by *Billings v.*

Commonwealth, 843 S.W.2d 890, 892 (Ky. 1992). According to Hallum, the Commonwealth had to show that there was such a high degree of similarity between the charged and uncharged acts that it established a direct relationship between the charged and uncharged acts that was independent of the defendant's character.

According to KRE 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

However, despite this rule, the Supreme Court of Kentucky has held that evidence of similar acts perpetrated against the same victim is almost always admissible to prove intent or plan. *Noel v. Commonwealth,* 76 S.W.3d 923, 931 (Ky. 2002). In *Noel,* the victim testified that the defendant had sexually abused her "more than one time." *Id*. The Supreme Court held the victim's testimony did not violate the prohibition found in KRE 404(b) against the introduction of evidence regarding uncharged prior bad acts. *Id*.; s*ee also Pendleton v. Commonwealth,* 83 S.W.3d 522, 528 (Ky. 2002). The trial court, thus, did not abuse its discretion when it allowed C.K. to testify that Hallum had molested her on a regular basis and that this had happened approximately fifteen to forty times.

B. APPELLANT'S SECOND ASSIGNMENT OF ERROR

1. STANDARD OF REVIEW

Because Hallum's second assignment of error addresses one of the trial court's evidentiary rulings, we will not reverse the trial court's decision absent an abuse of discretion. *Colston Investment Co.,* 74 S.W.3d at 765.

2. CLAIM THAT THE SOCIAL WORKER VOUCHED FOR THE VICTIM'S CREDIBILITY

At trial, the Commonwealth called Miss Perry, the social worker that investigated C.K.'s allegations, to testify on the Commonwealth's behalf. During direct examination, the prosecutor asked Perry if C.K. had displayed "anything emotionally" when Perry interviewed her. Perry responded that she found C.K. to be "very credible and very believable in what she was saying[.]" Hallum immediately objected to Perry's testimony and asked the trial court to admonish the jury to disregard it. The trial court sustained Hallum's objection and informed the jury that it was improper for one witness to address another witness's credibility and admonished the jury to disregard Perry's testimony.

On appeal, Hallum recognizes that, in general, a jury is presumed to follow an admonition, but he notes there are two exceptions to that rule. One of those exceptions is "when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant[.]" *Johnson v.*

Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). According to Hallum, Perry was an expert on sexual abuse, so he reasons that the jury was unlikely to disregard her testimony. Furthermore, because his defense was actual innocence, Perry's testimony vouching for C.K.'s credibility devastated his defense. Thus, Hallum concludes that the admonition was not sufficient and the trial court should have granted a mistrial despite the fact that Hallum never requested one.

If a criminal defendant claims that he is entitled to a mistrial, then it is incumbent upon him to make a timely motion with the trial court for such relief. *West v. Commonwealth,* 780 S.W.2d 600, 602 (Ky. 1989). In addition, the Supreme Court of Kentucky has previously held that if a party has failed to move for mistrial after objecting and receiving an admonition from the trial court, then such a failure indicates that the party was satisfied with the admonition. *Id*. In the present case, Hallum asked for an admonition regarding Perry's testimony, and he received that admonition as requested. Furthermore, the record indicates that Hallum never requested a mistrial. Hallum now contends that the admonition was not sufficient to cure the error and insists that the trial court should have declared a mistrial. However, Hallum received the relief that he requested at trial, so he cannot now ask for further relief on appeal. *See Templeman v. Commonwealth,* 785 S.W.2d 259, 260 (Ky. 1990). Because Hallum received the requested relief from the trial court, there was no abuse of discretion.

C. APPELLANT'S THIRD ASSIGNMENT OF ERROR

1. STANDARD OF REVIEW

In Hallum's third assignment of error, he alleges that the admonition given by the trial court did not cure the prosecutor's alleged misconduct. However, it is presumed that when a trial court admonishes a jury, the jurors will heed the admonition. *Boone v. Commonwealth,* 155 S.W.3d 727, 729-730 (Ky. App. 2004).

2. PROSECUTORIAL MISCONDUCT CLAIM

At trial, the prosecutor stated during the Commonwealth's closing argument, "But I ask you to go back and find these guilty verdicts, and perhaps we can protect some future young lady[.]" Hallum immediately objected to the prosecutor's statement about protecting future victims and argued that it suggested that the jury had a responsibility to protect society and such a suggestion was improper. At the bench, Hallum's trial counsel asked that the jury disregard the prosecutor's remark, and Hallum's counsel stated, "I want to ask for a mistrial, I guess." The trial court then said to Hallum's counsel, "So you want me to admonish the jury to disregard this." Hallum's counsel replied, "This last statement about finding him guilty in order to protect other people." The trial court then admonished the jury to disregard the prosecutor's remark about finding Hallum guilty in order to protect other people.

In his third assignment of error, Hallum first notes that the Supreme Court of Kentucky has condemned a prosecutor's remarks suggesting that a jury should convict

a criminal defendant in order to protect future victims. *Ice v. Commonwealth,* 667 S.W.2d 671 (Ky. 1984). Because such remarks are condemned, Hallum insists that the trial court's admonition to the jury to disregard the prosecutor's remarks was not sufficient to cure the prosecutorial misconduct. Relying on the exceptions found in *Johnson,* 105 S.W.3d at 441, Hallum argues that prosecutor's remarks created an overwhelming probability that the jury could not disregard his remarks because the prosecutor left the words "guilty" and "protect" on a large tablet in front of the jury. According to Hallum these words acted as a constant reminder to the jury regarding the prosecutor's improper remarks. In addition, Hallum argues that there was a strong probability that the prosecutor's remarks were devastating to his defense because the present matter was a classic "he said/she said" case requiring the jury to resolve the case based on the credibility of the witnesses.

In *Bratcher v. Commonwealth,* 151 S.W.3d 332, 350 (Ky. 2004), the defendant made a particular motion *in limine,* but the trial court never ruled upon the motion. The Supreme Court held that the issue was not preserved for appeal because the defendant did not ask the trial court for ruling after initially arguing the motion. *Id*. In other words,

> [t]he policy of RCr 9.22 and 10.12 is to require a defendant in a criminal case to present to the trial court those questions of law which may become issues on appeal. The appellate court reviews for errors, and a nonruling is not reviewable when the issue has not been presented to the trial court for decision.

Turner v. Commonwealth, 460 S.W.2d 345, 346 (Ky. 1970).

In the present case, in response to the prosecutor's remarks, Hallum requested both an admonition and a mistrial. Pursuant to Hallum's request, the trial court admonished the jury to disregard the prosecutor's improper remarks. However, the trial court did not rule on Hallum's request for a mistrial, and Hallum never argued for a mistrial and never requested a ruling. Thus, Hallum failed to preserve that issue for appellate review. *See Bratcher,* 151 S.W.3d at 350. Because Hallum received the admonition that he requested and failed to request a ruling on his request for a mistrial, we must presume the jury heeded the trial court's admonition regarding the prosecutor's inappropriate comment. *Boone,* 155 S.W.3d at 729-730. Accordingly, we find no error regarding this claim.

D. APPELLANT'S FOURTH ASSIGNMENT OF ERROR

1. STANDARD OF REVIEW

Hallum's fourth assignment of error was not preserved for appeal; therefore, he asks us to review it pursuant of the Kentucky Rules of Criminal Procedure (RCr) 10.26. RCr 10.26 reads:

> 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.

According to the Supreme Court of Kentucky, palpable error is an irregularity that affects the substantial rights of a party and will result in a manifest injustice if it is not addressed by an appellate court. *Schoenbachler v. Commonwealth,* 95

S.W.3d 830, 837 (Ky. 2003). In other words, after considering the whole case, if we do not believe that there is a substantial possibility that the result would have been any different, then we will deem the irregularity to be non-prejudicial. *Id*.

2. CLAIM THAT A POTENTIAL JUROR HAD THE ODOR OF ALCOHOL ON HIS PERSON

During voir dire, the bailiff told the trial court that he thought he smelled alcohol on the breath of one of the potential jurors. The trial court then informed both parties about the situation. Two hours later, the trial court called the potential juror to the bench, and the following exchange occurred:

> Trial Court: How are you doing today . . .? Make it alright today?
>
> Potential Juror: Yes, sir.
>
> Trial Court: The reason I asked you to step up here is that somebody had mentioned that you might not be feeling very well today. Are you feeling OK today?
>
> Potential Juror: Yeah, pretty fair.
>
> Trial Court: You feeling fine? OK. Any problems with you sitting on the case today?
>
> Potential juror: No.
>
> Trial Court: OK. I just want to be sure you're feeling alright. Alright, any questions from counsel?

After this exchange, neither counsel asked the potential juror any questions, and the trial court commented that it had not detected the odor of alcohol on the potential juror's person. Hallum's trial counsel stated that he did not detect the odor of alcohol

either. Later, the potential juror served on the jury that convicted Hallum, without any further suspicion of alcohol consumption or questionable behavior.

On appeal, Hallum argues that the trial court erred because it did not sufficiently investigate the potential juror to determine if alcohol had impaired his ability to perform his duty as a juror. *State v. Hart,* 566 N.E.2d 129 (Ohio 1945). In addition, Hallum opines that the trial court was required to directly ask the potential juror whether he had consumed alcohol on the morning of the trial and to do so in a timely fashion because the odor of alcohol dissipates over time.

We note that there is nothing in the record, other than the baliff's suspicions, to indicate that the potential juror was intoxicated or had even been drinking alcohol on the morning of Hallum's trial. The trial court stated on the record that he detected no odor of alcohol and gave Hallum's trial counsel ample opportunity to explore the possibility that the potential juror had been drinking. However, Hallum's trial counsel declined the trial court's offer and acknowledged that nothing had surfaced to substantiate the bailiff's initial concern.

We are unable to locate any case law in the Commonwealth that directly addresses this particular issue. Yet, despite this dearth of case law, we believe it is fair and within constitutional limitations to hold that, absent a showing that a juror is in fact intoxicated or absent a showing that the consumption of alcohol has prevented said juror from acting in a reasonable and appropriate manner, the *mere suspicion* that a juror may have the odor of alcohol on his person during voir dire does not affect a defendant's

substantial rights and does not result in manifest injustice. *See* RCr 10.26; *Schoenbachler,* 95 S.W.3d at 837. Thus, we conclude that, in the present case, the mere suspicion of alcoholic consumption without any further questionable behavior on the part of a potential juror does not rise to the level of palpable error.

E. APPELLANT'S FIFTH ASSINGMENT OF ERROR

1. STANDARD OF REVIEW

Hallum's fifth assignment of error was not preserved for appeal; therefore, we review it pursuant to RCr 10.26 for palpable error.

2. CLAIM THAT THE TRIAL COURT INAPPROPRIATELY EXPRESSED HIS OPINION REGARDING APPELLANT'S GUILT

According to Hallum, during the bench conference regarding the prosecutor's comment about protecting future victims, the trial court stated, "I don't want them, yeah, I want them to focus on the instructions, I want them to find guilt, well, even though that may be a consequence of finding guilt, if they believed it beyond a reasonable doubt[.]" Citing and relying on KRS 26A.015(2), Hallum argues that a judge shall disqualify himself when he has "expressed an opinion concerning the merits of the proceeding." Citing *Sommers v. Commonwealth,* 843 S.W.2d 879 (Ky. 1992), Hallum reasons that the trial court expressed an opinion regarding the merits of the present case; thus, the trial court should have declared a mistrial and should have recused himself from any subsequent re-trial.

It is clear from a review of the complete record, and not just a small section taken out of context, that the trial court was merely expressing the desire that the jury

find guilt if they believed beyond a reasonable doubt that Hallum was guilty. Contrary to Hallum's argument, this comment was not "an opinion concerning the merits of the proceeding" but was an appropriate and expected position for a trial court to take.

Furthermore, the trial court made this remark during a bench conference; thus, the jury never heard it. Additionally, Hallum has failed to cite any other instance where the trial court appeared to be unfair or partial to either side. We find nothing in the record to lead us to the conclusion that the trial court acted in any inappropriate manner. *See Webb v. Commonwealth,* 904 S.W.2d 226, 229 (Ky. 1995). This fragment, taken out of context, is not sufficient proof for us to decide the trial court was biased in any way. *See Howerton v. Price,* 449 S.W.2d 746, 748 (Ky. 1970).

Ultimately, Hallum received a fundamentally fair trial. None of his state or federal constitutional rights was violated; thus, his substantial rights were not affected, nor was there any manifest injustice. In the present case, we hold that the trial court's comments did not rise to the level of palpable error.

III. CONCLUSION

Finding no merit to any of Hallum's assignments of error, we AFFIRM the judgment of conviction entered by the Logan Circuit Court.

ALL CONCUR.

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