

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001531-MR

KENNETH WELLS

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 04-CR-00362

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM, SPECIAL JUDGE.

THOMPSON, JUDGE: Kenneth Wells appeals his judgment of conviction in the Perry Circuit Court for assault in the second-degree under extreme emotional disturbance and assault in the fourth-degree. For the reasons stated herein, we affirm. On July 30, 2004, Wells and his girlfriend, Betsy Wilkerson, and her infant son went to the residence of Chastity Gamble, Betsy's sister. While the family was

preparing to leave the residence, John Jeffrey, Betsy's cousin, approached the residence in a truck. Betsy gave John a hug and then Wells and Betsy began to argue.

After Wells cursed Betsy, she smacked him. Wells then struck Betsy in the face with a beer bottle. The force of the impact shattered the bottle and Betsy began bleeding profusely from her face. Additionally, a shard of glass slashed the leg of Betsy's minor son who was in the arms of a family member standing beside Betsy at the time of impact. Betsy and her son were then taken for medical treatment.

On December 9, 2004, Wells was indicted by a Perry County grand jury on two counts of second-degree assault. Following a jury trial, Wells was found guilty of assault under extreme emotional disturbance for striking Betsy and of fourth-degree assault for injuring Betsy's son. In accordance with the jury's recommendation, the trial court sentenced Wells to five-years' imprisonment. This appeal followed.

Wells contends that he was prejudiced by Perry County Deputy Sheriff Jay VanVranken's testimony that Betsy's family members informed him that Wells struck her with a beer bottle. He contends that VanVranken's testimony was inadmissible investigative hearsay and the prejudicial effect of its admission requires the reversal of his conviction. We disagree.

During direct examination, VanVranken testified that Betsy's family members "gathered around me to advise me that Mr. Wells had indeed struck—."

VanVranken was quickly interrupted by defense counsel's objection, and the trial court sustained the objection before informing the witness that he could not repeat the family members' out-of-court statements. Thus, the trial court prevented VanVranken from reciting what he had been told by Betsy's family.

VanVranken's testimony did not prejudice Wells's right to a fair trial. Although the jury probably believed that the family informed VanVranken that Wells had struck her, multiple witnesses testified that Wells struck Betsy on her face with a beer bottle. Our precedent establishes that the reversal of a conviction is unnecessary when the testimony was proven by other properly admitted evidence. *Shepherd v. Commonwealth*, 327 S.W.2d 956, 957-58 (Ky. 1959). Accordingly, because other witnesses testified to what VanVranken attempted to state, his testimony does not warrant the reversal of Wells' conviction.

Wells next contends that Probation and Parole Officer Lana Rose was improperly permitted to prove Wells' prior conviction without the introduction of documentation. During the sentencing phase, to establish Wells' prior conviction, Rose testified that she believed Wells had been convicted for murder but believed it had been amended down to manslaughter. However, no documentation regarding the conviction was read to the jury or admitted in the record. Although Wells did not object to this testimony, he contends that the prosecution's failure to introduce the original or a certified copy of his judgment of conviction is palpable error. We disagree.

Under palpable error analysis, an appellate court may review for any error which affects the substantial rights of a defendant even when the error was not preserved by a proper objection at trial. *Bell v. Commonwealth*, 245 S.W.3d 738, 741 (Ky. 2008). For an error to be palpable, the error must be so easily perceptible and obvious that a “manifest injustice” would result if appropriate relief is not granted. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). Palpable error analysis boils down to whether or not there is a substantial possibility that the outcome of the defendant’s case would have been different absent the error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

Although Wells correctly argues that the prosecution must introduce an original or certified copy of his judgment of conviction, he does not state that Rose’s testimony was incorrect. To the contrary, Wells concedes that he had been convicted of manslaughter prior to his assault convictions. Therefore, Rose’s testimony and the failure to introduce documentation regarding his prior conviction was not palpable error.

ALL CONCUR.

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