

RENDERED: OCTOBER 26, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000057-MR

MICHAEL TODD SETTLES

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE  
ACTION NO. 09-CR-001113

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,<sup>1</sup> SENIOR  
JUDGE.

LAMBERT, SENIOR JUDGE: Michael Todd Settles appeals from his conviction  
in the Jefferson Circuit Court for attempted rape. He was sentenced to a term of

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

nine years of imprisonment. On appeal, Settles argues that the jury instruction was fatally flawed and that reversal is required.

At trial, the victim, C.K., testified that her sister, her brother-in-law, and Settles arrived at her house after a night of drinking, to continue celebrating her sister's birthday. Once there, C.K. and the other three individuals got into the hot tub and continued drinking. C.K. testified that she had a boyfriend and was not romantically interested in Settles.

Later that evening, Settles became ill, vomited, and exited the hot tub. He then passed out at C.K.'s kitchen table. C.K. stayed in the hot tub until around one in the morning. When she exited the hot tub, her sister and her sister's husband remained. C.K. went to her bedroom and went to sleep.

C.K.'s sister and her husband testified that they remained in the hot tub for approximately one more hour. Inside, they awakened Settles and showed him upstairs to a bedroom where he could sleep. C.K.'s sister testified that she closed the hot tub cover before going to bed.

C.K. testified that she awakened in the middle of the night to find Settles ripping the covers from her bed. Settles climbed onto her back (C.K. was sleeping on her stomach) and began sucking and biting at her neck. He pushed her head down into the bed and told her to "shut up," while lifting her bottom and

penetrating her with his penis. C.K. testified that after about twenty minutes of struggling and kicking her legs, Settles grew frustrated and left.

The police were called soon thereafter and Settles was arrested where he was found, the basement of the home. C.K.'s sister noted, after the police arrived, that the hot tub cover was no longer closed.

A rape examination was performed, revealing bruising on C.K.'s neck and legs, swollen lymph nodes, and a sore spot on her buttocks. The nurse who performed the examination testified that the sore spot was consistent with a thumb print. A forensic examination revealed a mixture of DNA consistent with C.K. and Settles on swabs taken from C.K.'s neck. No DNA foreign to Settles was found on his penile swabs, and no semen was found on C.K.'s vaginal swabs.

Settles' account of the events of the night differed markedly from C.K.'s. Settles testified that he believed he and C.K. were "hitting it off" earlier in the evening and that she liked him. Settles recalled being awakened from the kitchen table and led upstairs. Settles recounted opening the door to C.K.'s room and asking her what happened that night. He testified that C.K. raised the covers, where she was naked underneath. He testified that he climbed on top of C.K. and kissed her upper body and neck.

Settles testified that when he began to kiss C.K. on the mouth, she did not kiss him back. He stated that he asked C.K. if she "was into" what he was doing, and that she said "no." Settles testified that he promptly reclothed himself and asked C.K. where he could sleep. Settles testified that C.K. pointed to the door

and he left, eventually ending up in the basement. His next memory was that of being awakened by a police officer.

Near the end of trial, the Commonwealth tendered proposed jury instructions, including an instruction for attempted rape in the first degree. Defense counsel objected to the giving of an attempt instruction. The trial court overruled the objection, instead ruling that an attempt instruction was proper because the jury could have reasonably concluded that Settles attempted to penetrate C.K., but that he had failed. The Defense made no objection over the wording of the instruction, nor did defense counsel object to the absence of a definition in the instruction for “substantial step.”

Settles was thereafter convicted by a Jefferson Circuit Court jury for attempted rape. He now appeals to this Court arguing that the attempted rape instruction was fatally flawed because it did not contain a definition of “substantial step.”

Settles admits on appeal that the error is unpreserved, however, he fails to request palpable error review under Kentucky Rules of Criminal Procedure (RCr) 10.26. As such, we decline to review the issue. *Dant v. Commonwealth*, 258 S.W.3d 12, 21 (Ky. 2008)(“Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the Appellant.”); *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008)(Unless briefed and requested, an appellate court will not review pursuant to

RCr 10.26 except under extreme circumstances). We discern no such extreme circumstances.

ALL CONCUR.

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