

RENDERED: NOVEMBER 30, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2016-CA-001857-MR

DEMETRIET ALEXANDER ROSE

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT  
HONORABLE C. RENE' WILLIAMS, JUDGE  
ACTION NO. 15-CR-00150

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, D. LAMBERT AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Demetriet Rose appeals from the convictions of sexual abuse in the first degree and being a persistent felony offender in the first degree.

Appellant's arguments on appeal are that there was a violation of Kentucky Rule of Evidence (KRE) 615, the separation of witnesses rule, and that improper

statements were made during the Commonwealth's closing argument. We find no error and affirm.

Appellant was tried by a jury and found guilty of one count of sexual abuse in the first degree, victim under 12, and of being a persistent felony offender in the first degree. He was then sentenced to 15-years' imprisonment.

Appellant's first argument on appeal is that there was a violation of KRE 615 which requires a new trial. KRE 615 states:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion.

This rule does not authorize exclusion of:

- (1) A party who is a natural person;
- (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
- (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

Prior to trial, this rule was invoked. Three of the witnesses were segregated in the trial judge's office: Gloria Royster and Dr. Jennifer Lises were waiting to testify and Rhonda Welch was being made available for recall. Unbeknownst to the parties and the court, while the witnesses for the Commonwealth were testifying, a television in the judge's office was transmitting, both visually and audibly, the court proceedings.<sup>1</sup>

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<sup>1</sup> It is alleged by Appellant that the witnesses heard the testimony of all the Commonwealth's witnesses, but that is unclear from the record. In addition, upon questioning by the court, the

When this issue was discovered, Appellant moved for a mistrial. The trial court questioned Ms. Royster and Dr. Lises as to what they heard and any potential effect the overheard testimony would have on their testimony. The witnesses indicated they were not able to hear everything that was said, only bits and pieces, and they indicated their testimony would not change due to what they heard. Ms. Welch was not questioned and defense counsel did not request she be questioned. The court denied the motion for a mistrial, but the defense was not precluded from cross-examining these witnesses about any change in their testimony.

If the rule is invoked, exclusion of witnesses from the courtroom is mandatory at trial in the absence of one of the enumerated exceptions in exclusion of witnesses rule. The rationale behind the rule is the recognition that a witness who has heard the testimony of previous witnesses may be inclined, consciously or subconsciously, to tailor his testimony so that it conforms to the testimony given by other witnesses.

*McGuire v. Commonwealth*, 368 S.W.3d 100, 112-13 (Ky. 2012) (citations omitted).

The rule, however, does not expressly preclude the testimony of witnesses who have observed or heard other witness testimony. In some situations involving guilt phase testimony, the appropriate remedy is to bar testimony from a witness who listened to the testimony of other witnesses. Nevertheless, a trial court has broad

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witnesses indicated the audio from the television was poor and they could not hear everything that was said.

discretion to fashion an appropriate resolution of the issue, including holding the witness in contempt or disallowing the witness's testimony. Sometimes, simply permitting cross-examination of the witness as to the potentially corruptive influence of having heard prior testimony would be an adequate solution.

*Id.* at 113 (footnotes and citations omitted).

Here, we do not believe the trial court erred in going forward with the trial. The court questioned two of the witnesses about how the overheard testimony might affect their own testimony and was satisfied with their answers. In addition, the court allowed the defense to cross-examine the witnesses about any change in their testimony. Ms. Royster and Dr. Lises' testimony did not change from the statements made during the investigation stage and prior to trial. Ms. Welch's recall testimony also did not change.

Furthermore, Kentucky Rule of Criminal Procedure (RCr) 9.24 states:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

Any error in allowing the three witnesses to testify was harmless because the court questioned two of the witnesses and fashioned an appropriate remedy.

[The Kentucky Supreme Court] has recognized, however, that failure to separate witnesses may be harmless error under the particular circumstances of the case. *See Justice v. Commonwealth*, 987 S.W.2d 306, 315 (Ky. 1999) (rule designed to prevent witnesses from altering their testimony in light of evidence adduced at trial was not violated where there was no valid argument that particular witness had altered his testimony).

*Hatfield v. Commonwealth*, 250 S.W.3d 590, 595 (Ky. 2008).

Appellant's second argument on appeal is that the prosecution made improper comments during closing arguments. During closing arguments, the prosecution stated, among other things, that the nine-year-old victim "did pretty darn good" and that "she is someone I respect and I want you all to respect her."

The prosecutor also stated that the victim showed courage while testifying.

Appellant claims this was improper conduct.

This issue was not preserved so we will only review it for palpable error.

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.

RCr 10.26. "[I]f upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial." *Jackson*

*v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986) (citation omitted). “To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

For an error to be palpable, it must be “easily perceptible, plain, obvious and readily noticeable.” A palpable error “must involve prejudice more egregious than that occurring in reversible error[.]” A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis “boils down to” is whether the reviewing court believes there is a “substantial possibility” that the result in the case would have been different without the error. If not, the error cannot be palpable. Finally, when reviewing claims of prosecutorial misconduct, we must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings.

*Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (footnotes omitted).

“Great leeway is allowed to *both* counsel in a closing argument. It is just that—*an argument*. A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position.” *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987) (emphasis in original).

However, “[t]he personal opinion of the prosecutor as to the character of a witness

is not relevant and is not proper comment.” *Moore v. Commonwealth*, 634 S.W.2d 426, 438 (Ky. 1982).

In any consideration of alleged prosecutorial misconduct, particularly, as here, when the conduct occurred during closing argument, we must determine whether the conduct was of such an “egregious” nature as to deny the accused his constitutional right of due process of law. The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor.

*Slaughter* at 411-12 (citations omitted).

We do not believe these comments about the victim amount to palpable error. The Commonwealth was not speaking as to the truthfulness of the victim’s testimony, but merely stating that the nine-year-old girl was brave. Even if his statements were an impermissible personal opinion, it is not so egregious to be palpable error. We believe Appellant received a fair trial overall.

Based on the foregoing, we affirm the judgment of the Union Circuit Court.

ALL CONCUR.

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