# ***IMPORTANT NOTICE***

## ***NOT TO BE PUBLISHED OPINION***

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: FEBRUARY 20, 2003
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL

DATE 3-13-03 ELAGrowth, DC.

2001-SC-0825-MR

STANLEY WAYNE KISKADEN — APPELLANT

V.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
CRIMINAL NO. 00-CR-0016

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellant, Stanley Wayne Kiskaden, was convicted in the Bracken Circuit Court of first-degree burglary, second-degree assault, two counts of first-degree sodomy and the status offense of persistent felony offender in the first-degree. The jury fixed his total sentence at 85 years, which the court subsequently reduced to 50 years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

## I. Facts

In the early morning hours of May 19, 2000, Appellant was observed walking up Sycamore Alley toward the Augusta, Kentucky, mobile home of Frances Ellis. Minutes later, Appellant was again seen, this time running down the alley, away from the victim's

home. Police Chief Greg Cummins soon arrived at the scene, only to find the victim, then age 59, standing in her doorway naked, crying hysterically and bleeding from a deep laceration on her hand. There was blood throughout the home — in the kitchen, living room and bathroom as well as all over the bedroom including stains on the victim's bed. EMT's transported the injured woman by ambulance to Meadowview Regional Medical Center in Maysville for treatment of her injuries. Chief Cummins remained behind, and acting on a hunch, found Appellant "scooted down" in the seat of an old pick-up truck, his clothes covered by the victim's blood.

At trial, the victim testified that Appellant, brandishing a large hunting knife and wearing a blue bandanna to hide his face, had forced his way inside her home. Once inside, Appellant threatened to kill her and demanded money and jewelry. A struggle ensued and the victim was stabbed in the hand. Appellant dragged her from room to room, forcing her at knifepoint to perform oral sex. He then shoved her face down on her bed, ripped off her nightgown, and attempted to sodomize her anally. The torment continued as he ran the blade of his knife up and down her back, leaving long scratch marks that were later documented at the hospital. Finally, Appellant fled the mobile home after the victim feigned activating a silent alarm and lashed out at him with a knife she had sequestered under the bed.

**II. Opinion Testimony**

Appellant asserts that the circuit court abused its discretion in allowing a lay witness, Nurse Kay Forman, to offer an expert opinion at trial. The Commonwealth, on the other hand, maintains that Nurse Forman was not offered as an expert at all, instead arguing that her testimony was the properly admitted lay opinion of a treating

nurse. Nurse Forman is a sexual assault nurse examiner, or SANE nurse, who participated in the treatment of the victim at Meadowview Regional Medical Center. SANE nurses are licensed by the Kentucky Board of Nursing "to conduct forensic examinations of victims of sexual offenses." KRS 314.0112 (14). In conformance with her duties, Nurse Forman collected and preserved evidence, such as blood and hair, from both Appellant and the victim.

At trial, Nurse Forman described the victim as "extremely distraught," "angry and fearful" and "very upset" while at the emergency room, descriptions which Appellant concedes are admissible as "collective facts." See Commonwealth v. Sego, Ky., 872 S.W.2d 441 (1994); Emerine v. Ford, Ky., 254 S.W.2d 938 (1953). However, Appellant contends that Nurse Forman's testimony strayed from permissible lay testimony into areas more properly left to the province of experts during the following colloquy:

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|---|---|
| Prosecution: | Could you tell, from [the victim's] demeanor, whether she had had a consensual sexual experience, or a pleasurable experience from the way she acted? |
| Appellant: | Objection — that calls for a conclusion. |
| The Court: | Overruled. |
| Prosecution: | In your experience and training and education, are you familiar with the various people that come in? |
| Nurse Forman: | Her manner was not consistent with consensual intercourse. |

Appellant insists that only mental health professionals, such as psychologists or psychiatrists, are competent to offer expert opinions regarding whether or not one's demeanor is consistent with consensual sexual relations. Furthermore, because Nurse

Forman was never formally qualified as an expert by the circuit court, Appellant claims her testimony circumvented the procedural safeguards embodied within the rules of evidence.

We note that Appellant's objection is not properly preserved for review. At trial, Appellant objected to Nurse Forman's testimony on the grounds that any answer by the nurse called for a conclusion. No objection was made on the basis that Nurse Forman was not qualified as an expert. KRE 103(a)(1) requires a party to articulate the basis for an objection "upon request of the court stating the specific ground of objection, if the specific ground was not apparent from the context." RCr 9.22 is analogous. The rules therefore contemplate that general objections will be the norm, unless the court requests clarification. However, KRE 103(a)(1) and RCr 9.22 do not address the present situation, in which Appellant offered grounds for an objection on his own initiative, without prompting by the trial judge, but on appeal puts forth a different basis for error.

Prior to the adoption of the Kentucky Rules of Evidence in 1992, this Court held that "if a party chooses to state the grounds for objection without request by the trial court, he is bound thereby." Crain v. Dean, Ky., 741 S.W.2d 655, 657 (1987). See also Harris v. Commonwealth, Ky., 342 S.W.2d 535, 539 (1961) (stating that "[a] party is confined to the specific grounds of objection to the admission of evidence and is deemed to waive any other ground. It is too late to present any other grounds on appeal"). Specific objections assist the trial judge in determining the proper basis for determining a course of action. Such objections also give opposing counsel the opportunity to correct the alleged error. See R. Lawson, The Kentucky Evidence Law

Handbook, § 1.10, at 27-29 (3d ed. Michie 1993). While it is true that KRE 103(a)(1) and RCr 9.22 do not require parties to volunteer specific grounds for an objection, once a party has stated the basis for an objection and had it fully considered by a trial court, it is a waste of judicial resources to allow the issue to be reconsidered under a different theory on appeal.

By volunteering grounds for an objection at trial, Appellant waived alternative theories of error on appellate review. Assuming, *arguendo*, that Appellant's objection had been properly preserved, the admission of Nurse Forman's testimony would have amounted to nothing more than harmless error. The determination of harmless error rests on "whether there is any reasonable possibility that absent the error the verdict would have been different." Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 797 (1995), citing Crane v. Commonwealth, Ky., 726 S.W.2d 302 (1987), cert. denied, 484 U.S. 834 (1987).

Whether considering Nurse Forman's testimony as that of layperson or alternatively as that of an expert, her statement that the victim's "manner was not consistent with consensual intercourse" was harmless. The jury had already heard several descriptions of the victim's general hysteria while at the hospital. Analyzed as lay opinion under KRE 701, Nurse Forman's opinion was not "helpful to a clear understanding of the witness' testimony." Surely the jury could infer, based on the demeanor testimony that they had already heard, that the victim's manner at the hospital was not consistent with one who had just had consensual sex. Similarly, if Nurse Forman's testimony is examined as expert opinion under KRE 702, it is possible to say that her statement did not "assist the trier of fact to understand the evidence"

because no expert analysis was needed for the jury to interpret the demeanor evidence already introduced. Simply because this testimony should have been excluded under the rules does not automatically make it prejudicial to Appellant, for here its impact is negligible when viewed in light of the total evidence heard by the jury regarding the victim's demeanor.

Appellant vigorously contends that only a psychiatrist or psychologist has the qualifications necessary to draw inferences from the victim's general demeanor. However, formal education and training is not an indispensable requirement for finding an expert competent to testify, for expertise may be gained through firsthand experience. Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 935 (1999); Kentucky Power Co. v. Kilbourn, Ky., 307 S.W.2d 9, 12. (1957). We express no opinion as to whether Nurse Forman, as a SANE nurse, had the necessary "specialized knowledge," as required by KRE 702, to render an expert opinion. However, we do recognize that a number of courts have found SANE nurses qualified to testify as experts, albeit for the purposes of interpreting physical rather than psychological evidence. See Griffin v. State, 531 S.E.2d 175, 180 (Ga. Ct. App. 2000); State v. Humphrey, 36 P.3d 844, 850-51 (Kan. App. 2001); Velazquez v. Commonwealth, 557 S.E.2d 213, 219 (Va. 2002).

Finally, the fact that Nurse Forman was never formally qualified by the circuit court as an expert would not necessarily be detrimental to the introduction of her testimony. In Mills v. Commonwealth, Ky., 996 S.W.2d 473, 487 (1999), cert. denied 528 U.S. 1164 (2000), we held that the trial court, without a formal hearing, had "ruled by implication" that a witness was qualified as an expert. Our reasoning focused on the amount of evidence pertaining to the witness' training and experience, the lack of

any objection by the opposing party and the simple fact that the court admitted the testimony of the witness. Id. Furthermore, "the decision as to the qualifications of an expert rests in the sound discretion of the trial court and we will not disturb such ruling absent an abuse of discretion." Fugate, supra, at 935, citing Ford v. Commonwealth, Ky., 665 S.W.2d 304 (1983).

**III. Sentencing Phase**

Appellant's next claim or error is that his federal and state due process rights were denied during the penalty phase, because the jury was given incorrect information concerning parole eligibility. He also alleges inaccurate testimony regarding good time credit as well as the prosecution's failure to inform the jury that a three-year period of conditional discharge would be added onto Appellant's final sentence. None of these issues are preserved for appellate review. However, because the introduction of inaccurate parole eligibility guidelines has a significant chance of affecting the "substantial rights" of a party by altering jury sentencing decisions, we review this matter for "palpable error." KRE 103(e); RCr 10.26.

**A. Parole eligibility evidence**

Parole eligibility for Appellant's Sodomy I conviction, categorized in this instance as a Class B felony, is controlled by KRS 439.3401. The most recent amendment to this statute prevents release on parole until at least eighty-five percent (85%) of a sentence for a term of years has been completed. If the sentence is instead for life imprisonment, a minimum of twenty (20) years must be served before the offender is eligible for parole. Judicial interpretation, coupled with legislative reenactment, modifies the parole eligibility for those sentenced to a term of years, so that despite the plain

language of the statute, a Class B offender must only serve eighty-five percent (85%) of the sentence imposed, or twenty (20) years, whichever is less. Hughes v. Commonwealth, Ky., 87 S.W.3d 850, 854-856 (2002); Sanders v. Commonwealth, Ky. 844 S.W.2d 391, 393-394 (1992). Offenses committed prior to July 15, 1998, are governed by the superseded version of the statute. KRS 439.3401(7); 1992 Ky. Acts 173 § 4. Parole eligibility for these crimes begins after the lesser of fifty percent (50%) of the sentence or twelve (12) years imprisonment. Sanders, *supra*, at 394.

It appears that neither party was aware that the eighty-five percent (85%) and twenty (20) year parole eligibility guidelines apply to Appellant's year 2000 crimes. During the penalty phase, probation and parole officer Charles Cottrell was the sole witness to testify. When shown a copy of the Kentucky Department of Corrections form for calculating parole eligibility, Mr. Cottrell frankly stated that he was only "somewhat" familiar with the document. Mr. Cottrell then proceeded to testify, at the prompting of the prosecution, that Appellant would be eligible for parole after serving "fifty percent of the sentence imposed, or twelve years, whichever is less." The defense counsel elicited a similar response without noticing that Mr. Cottrell had apparently read each time from the pre-amendment guidelines.

Despite this error, this issue is essentially moot because the jury imposed the minimum sentence allowable, 20 years, for Appellant's PFO enhanced first-degree sodomy conviction. KRS 510.070; 532.060(2)(a); 532.080(6)(a). In determining if there is palpable error, this Court "must consider whether on the whole case there is a substantial possibility that the result would have been any different." Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983). With the imposition of the minimum

sentence, the result could not have been any more favorable to Appellant.

**B. Good time credit and conditional discharge**

Appellant asserts that although the jury heard testimony regarding potential good time credit, the prosecution failed to inform it of a number of factors that can limit such credit for violent or sex offenders. The Appellant also correctly states that the prosecution did not inform the jury that pursuant to KRS 532.060(3), a mandatory three-year period of conditional discharge that will automatically be added to his sentence. We note that KRS 532.055(2)(a), part of the so-called "truth-in-sentencing" statute which governs the introduction of evidence by the prosecution during the penalty phase of trial, states that "[e]vidence *may* be offered by the Commonwealth relevant to sentencing." (emphasis added). Nowhere does this statute mandate that the prosecution must introduce all factors that are favorable to Appellant. This Court has never before been asked to decide if due process considerations require the prosecution to introduce all evidence which may help the defendant's position during the penalty phase. Because this issue is not properly preserved for appellate review, we decline to do so now.

Accordingly, Appellant's conviction and sentence are affirmed.

Lambert, C.J., Cooper, Graves, Johnstone, Stumbo and Wintersheimer, J.J. concur.

Keller, J., concurs in result only.

Counsel for Appellant

Shelly R. Fears
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

Counsel for Appellee

A.B. Chandler III
Attorney General

Carlton S. Shier
Assistant Attorney General
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601