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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 21, 2002
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2000-SC-1109-MR

WILLIS RAY NEACE — APPELLANT

V.

APPEAL FROM THE BREATHITT CIRCUIT COURT
HONORABLE WILLIAM LARRY MILLER, JUDGE
INDICTMENT NO. 97-CR-0026

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Willis Ray Neace, was convicted of one count of rape in the first degree, two counts of rape in the second degree, one count of rape in the third degree, two counts of sodomy in the first degree, and incest. He was sentenced to twenty years on each of the first degree rape and first degree sodomy counts, five years for each of the second degree rape and incest counts, and one year for the count of rape in the third degree, all to run consecutively for a total of seventy-six years imprisonment. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant was convicted at his third trial on the above charges for the sexual abuse of his step-daughter (A.N.) that began when the child was around six years of age and lasted until she was approximately fourteen years of age. Appellant's first trial resulted in a mistrial, while his second resulted in a hung jury. Appellant advances

numerous arguments on appeal and we will examine each in turn.

I. EXCLUSION OF LETTERS AND EVIDENCE OF VICTIM'S CHARACTER

Appellant contends that the trial court erred when it excluded several letters written by A.N. to her schoolmates that, Appellant alleges, show A.N.'s motive to fabricate the charges against him. The trial court excluded these letters pursuant to Kentucky Rules of Evidence (KRE) 412 and Violett v. Commonwealth, Ky., 907 S.W.2d 773 (1995). Appellant argues that KRE 412 and Violett do not apply in this case, or in the alternative, that the letters should be excepted under KRE 412(b)(3). It is true that evidence of specific acts of a victim's sexual history is generally inadmissible unless it is excepted under KRE 412(b) subsections (1), (2), or (3). Specifically, subsection (3) allows evidence that is "[a]ny other evidence directly pertaining to the offense charged." Similarly, Violett, supra, excluded letters from the victim to her boyfriend that indicated the two were in a sexual relationship because the evidence did not directly relate to the offense charged. Id. at 776. Appellant is correct in his assertion that KRE 412 and Violett do not apply because the letters in the case at bar do not refer to any past sexual behavior of A.N. In fact, the letters that Appellant seeks to introduce are not relevant at all. They are merely letters between classmates, with passing references to A.N.'s *friends'* possible sexual behavior, and a love letter to a boyfriend that does not even mention sex. Appellant attempts to link A.N.'s language in the letters, particularly calling her friends "minihussies" and use of the phrase "ride the pony," to her motive to fabricate charges of sexual abuse against her stepfather. Appellant attempts to portray A.N. as a rebellious child whose behavior and choice of friends angered her mother, thus precipitating a huge fight between the two. This fight and A.N.'s mother's threats to have her removed from the home, Appellant contends, led to A.N. concocting a

history of sexual abuse by her stepfather. There is also some mention by Appellant's trial counsel that the defense sought to introduce the letters in order to show A.N.'s knowledge of sexual matters so that the jury could infer that she acquired knowledge of specific sexual acts testified to from her sexually active friends, and not from sexual experiences with Appellant. Regardless of Appellant's chosen theory or the trial court's basis for exclusion, the letters are irrelevant and the trial court was correct in excluding them.

Appellant also contends that the trial court erred in preventing him from presenting evidence, through the testimony of A.N. and others, of A.N.'s physical appearance, habits, and temperament at the time the allegations of abuse were made. Specifically, Appellant wanted to elicit testimony showing that A.N. listened to Marilyn Manson, wore all black, gothic clothing, green lipstick and nail polish, and read books about tarot cards and palm reading. This evidence purportedly would help the jury see the genesis of the contention between mother and daughter that eventually led to a physical altercation (not the first) between the two the day before the allegations were made. Appellant argues that the jury in the first two trials was able to observe A.N.'s appearance and demeanor as they were at the time of the accusations, but the third jury was presented with a grown-up, well-dressed college student who had since gotten her life on track. Appellant presented evidence of A.N.'s dress and listening habits through her testimony on avowal; however, A.N. denied that it was a point of contention between her and her mother. The Commonwealth argues that this evidence is merely an improper attempt at character assassination of the victim and should be excluded under KRE 608. While we do not find that this type of evidence falls under KRE 608, evidence of character, we do find that this evidence does not meet the initial threshold

of relevancy mandated by KRE 402 and therefore was correctly excluded.

II. FAILURE TO PROVIDE SPECIFIC DATES OF OFFENSES

Appellant contends that he was denied the ability to prove a full alibi defense because the indictment failed to provide for the specific date of each alleged incident of abuse. Although there may have been objections made in Appellant's first two trials, it does not appear from the record of the third trial that this objection was renewed and therefore the issue is not preserved for appellate review and is not properly before this Court.

III. EXAMINING PHYSICIAN'S TESTIMONY

Appellant argues that the trial court erred when it allowed A.N.'s examining physician to testify to hearsay statements made by A.N. during the course of the examination. Appellant also contends that Dr. Bates bolstered A.N.'s credibility by stating that her exam findings were consistent with sexual abuse, rather than mere sexual activity.

KRE 803(4) sets forth an exception to the hearsay rule regarding statements made for the purpose of medical treatment or diagnosis. Specifically, the exception states that "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis" are excluded from the hearsay rule and may be admissible as evidence. Here, Dr. Bates testified that A.N. had given her a history of sexual abuse that began around age six and had lasted until age fourteen. She further testified that her medical findings, specifically a loose vaginal opening and tear of the hymen, were consistent with the history of sexual abuse given by A.N. The

trial court properly admitted this testimony as it was given in the course of eliciting patient history for the purpose of a medical diagnosis. See Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001). There was no error in allowing Dr. Bates to testify that her medical findings were consistent with sexual abuse. Testimony that states merely that physical findings are consistent with sexual abuse "is only a relevant evidentiary fact tending to make the ultimate fact more or less probable." Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997) (citing KRE 401). Dr. Bates at no time testified that she believed A.N.'s allegations of sexual abuse and therefore did not bolster A.N.'s credibility with her testimony. Appellant further contends that Dr. Bates' testimony was more prejudicial than probative and therefore the trial court should have excluded it pursuant to KRE 403. KRE 403 states that even relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." It was within the trial judge's sound discretion to determine whether Dr. Bates' testimony was more prejudicial than probative. Garrett v. Commonwealth, Ky., 48 S.W.3d 6, 14 (2001). Accordingly, we find there was no abuse of discretion in the trial court's admission of Dr. Bates' testimony.

IV. PROSECUTORIAL MISCONDUCT

Appellant alleges numerous incidents of prosecutorial misconduct, most of which are not preserved for appellate review. Specifically, Appellant asserts: (1) the prosecutor improperly cross-examined three defense witnesses; (2) made improper and prejudicial comments during his closing argument regarding the evidence and the appellant's credibility; and (3) made an improper appeal to the community in the penalty

phase to help in crime prevention. Appellant's arguments are wholly without merit.

When reviewing claims of prosecutorial misconduct, we must rule based on the overall fairness of the entire trial and not just on the misconduct of the prosecutor. Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411-412 (1987), cert. denied, 490 U.S. 1113, 109 S. Ct. 3174, 104 L. Ed.2d 1036 (1989). The cross-examination of T.N. (A.N.'s brother) was objected to by defense counsel and the trial court sustained the objection by ordering the prosecutor to refrain from badgering the witness. This Court has held that "[m]erely voicing an objection, without a request for a mistrial or at least for an admonition, is not sufficient to establish error once the objection is sustained." Hayes v. Commonwealth, Ky., 698 S.W.2d 827, 829 (1985). Here Appellant's objection was effectively sustained by the trial court and the record does not show any further action was requested by defense counsel. Therefore, this issue is not preserved for review. Although, we might note that even if it had been, such was not anywhere near conduct "of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." Slaughter, supra at 411. Appellant also objected to the prosecution's cross-examination of D.N. (A.N.'s sister); however, the trial court allowed Appellant's counsel to "straighten it out" on redirect. As a result, there was no error. Similarly, Appellant's contention that Juanita Neace (A.N.'s mother) was ridiculed while on the stand is not preserved for review, as there was no objection in the record. RCr 9.22. Notwithstanding Appellant's failure to preserve, the cross-examinations conducted by the prosecutor do not rise to the level of palpable error when reviewed under RCr 10.26.

Appellant also objects now to other comments voiced by the prosecutor during closing argument at both phases of the trial, some of which were preserved for review.

Regardless of preservation, we have reviewed both arguments in their entirety and find that the prosecutor did not exceed the bounds of his office. "[P]rosecutors are allowed wide latitude during closing arguments and may comment upon the evidence presented." Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 866 (2002). Therefore, we cannot say that the prosecutor's comments, when viewed in light of the fairness of the entire trial, denied Appellant his right to a fair trial. Moreover, those instances where the comments were not preserved for review do not constitute palpable error resulting in manifest injustice to Appellant. RCr 10.26.

V. APPELLANT'S MOTION FOR DIRECTED VERDICT

Appellant argues that the trial court erred when it denied his motion for a directed verdict of acquittal because A.N.'s allegations of sexual abuse were vague and not supported by the evidence adduced at trial. An appellate court must review a trial court's decision to grant a directed verdict under the standard enunciated in Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). In Benham, we held that the appellate court must review the trial court's decision to grant or deny a directed verdict by looking at the evidence as a whole, and only then uphold a directed verdict if it would be clearly unreasonable for a jury to find guilt. Id. at 187. A trial court is required to "draw all fair and reasonable inferences from the evidence in favor of the Commonwealth" but reserve questions of credibility and weight of testimony for the jury. Id. Here the trial court correctly denied Appellant's motion for a directed verdict because a reasonable juror could clearly find guilt beyond a reasonable doubt. Because there was equivocal physical evidence, this case boiled down to a "swearing contest" between defendant and the victim. The weight and credibility of each witness was a question for the jury and the trial court correctly submitted the case for their

determination.

VI. SENTENCING

Appellant was sentenced on numerous counts of rape, sodomy, and incest to run consecutively, giving him a total of seventy-six years imprisonment. Appellant argues that he was improperly sentenced in violation of Kentucky Revised Statutes (KRS) 532.110(1)(c) which states that the aggregate of indeterminate terms to which a person can be sentenced shall not exceed seventy years. KRS 532.110(1)(c), as amended in 1998, *currently reads*:

> The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. *In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.* (Emphasis added).

Therefore, in order to determine the maximum length of sentence allowed for consecutive indeterminate terms, we are directed to KRS 532.080(6)(a)'s limit on persistent felony offenders to be used as a yardstick. However, both KRS 532.110 and KRS 532.080 were amended in 1998, *after Appellant committed the offenses.* The seventy year limit imposed in today's version of KRS 532.110 was not in effect when Appellant committed his crimes that began in 1987 and lasted until approximately 1997. Courts are required to sentence a defendant in accordance with the laws in effect at the time the offense was committed unless the defendant specifically consents to the application of the new law that mitigates his punishment. KRS 446.110; Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 550 (2001). Although the amendment to KRS 532.110 was in effect when Appellant was tried and sentenced, there is no evidence in the record that he requested to be sentenced under the new law that would have mitigated his sentence, thus effecting his consent. Kentucky law has long held that it

must be evident from the record that the defendant has consented to a punishment that is mitigated by a new law in order to benefit from the same. Earl v. Commonwealth, 202 Ky. 726, 261 S.W. 239, 240 (1924). See also, Commonwealth v. Phon, Ky., 17 S.W.3d 106, 108 (2000); Lawson, supra, at 550-551. Therefore, since Appellant did not raise this issue in the trial court, he was correctly sentenced under KRS 532.110 as it read prior to its amendment in 1998. Moreover, prior to the 1998 amendment to KRS 532.080, that is to be read in tandem with KRS 532.110 when fixing the maximum indeterminate terms allowed, that statute's cap on a Class A felony (the highest class of crime imposed against Appellant) was set at life imprisonment. Specifically, KRS 532.080(6)(a) read in pertinent part:

> If the offense for which he presently stands convicted is a Class A or Class B felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty (20) years nor more than life imprisonment.

Therefore, Appellant was also sentenced correctly under KRS 532.080(6)(a) which had no upper limit on aggregate consecutive indeterminate terms that could be assessed against a defendant prior to the 1998 amendment. See Violett v. Commonwealth, Ky., 907 S.W.2d 773, 777 (1995).

VI. CONCLUSION

For the aforementioned reasons, the judgment of the Breathitt Circuit Court is hereby affirmed.

Lambert, C.J.; Cooper, Graves, Johnstone, Stumbo, and Wintersheimer, JJ., concur. Keller, J., concurs in result only.

COUNSEL FOR APPELLANT:

Misty Dugger
Department of Public Advocacy
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

A. B. Chandler III
Attorney General
Capitol Building
Frankfort, KY 40601

J. Gary Bale
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Ky 40601-8204

Perry T. Ryan
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204