

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2002-SC-0999-MR

DATE 11-13-03 E.A.G. GROW, H.D.C.
APPELLANT

THOMAS J. HUNT

V. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
2001-CR-0224

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict, which convicted Hunt of two counts of first-degree sexual abuse and one count of first-degree sodomy. He was sentenced to a total of fifty years in prison.

The questions presented are whether character and other bad acts evidence were improperly admitted into evidence and whether the introduction of an order entered in a collateral proceeding was unduly prejudicial.

Hunt was indicted for one count of first-degree rape, one count of first-degree sexual abuse and one count of first-degree sodomy. All of the alleged offenses were against his own daughter and occurred between 1983 and 1986. The victim, who was twenty-five years old at the time of trial, testified that when she was six years old, Hunt forced her to engage in oral and genital sex. According to the victim, Hunt continued to

sexually abuse her until she was fourteen years old. She testified that she was afraid of her father and that is why she delayed in pressing criminal charges.

Among other witnesses for the Commonwealth, the victim's grandmother testified that when the victim was six years old, she reported the sexual abuse to her. The grandmother took her to the family doctor, whose notes reflected that the victim alleged sexual abuse. Two other medical professionals, one who saw the victim in 1983 and the other who saw her in 1993, also testified that she alleged sexual abuse by her father.

The victim's mother testified that when she learned of the sexual abuse, she initiated divorce proceedings. The circuit judge in that matter entered an order in October 1983 that required an adult to supervise Hunt's visitation with his daughter. That order, which was not part of this record, also prohibited Hunt from having sexual contact with his infant daughter. At the time of the order, the victim was approximately six years old.

The Commonwealth also introduced evidence through the victim, her mother and, to some extent, her half-brother, about the violent and drunk behavior of Hunt. This included testimony that Hunt drank heavily and that sometimes he did not know what he was doing. That on one occasion he mistook a La-Z-Boy in the living room for a toilet. It also included testimony that he was very violent. In one incident, Hunt broke all the dishes in the house and in another, he fired a shotgun in the home, hitting the victim with one of the pellets.

Anticipating the defense's strategy, the Commonwealth informed the jury about an affidavit signed by the victim when she was seventeen years. The affidavit and the circumstances surrounding it are rather unusual. According to the affidavit and the

testimony at trial, the victim was charged with assault against her mother and was taken by Hunt to an attorney for representation. The affidavit informed the victim that the attorney had represented her father in the past and may represent him in the future regarding her charges of sexual abuse. It then states that the allegations of abuse are false and that the victim fabricated the story because she was mad at her father for taking away her car. At trial in this case, the victim testified that she signed the affidavit under duress.

Hunt testified in his own defense and denied the charges. The jury convicted him of two counts of first-degree sexual abuse and one count of first-degree sodomy. Hunt was sentenced to five years on each sexual abuse charge and forty years on the sodomy charge, the sentences to run consecutively for a total of fifty years in prison. This appeal followed.

I. Character and Bad Acts Evidence

Hunt argues that the extensive introduction of varied forms of character evidence, including evidence of other bad acts, so permeated the trial below as to require that the conviction be reversed. The evidence in question concerned the heavy drinking and violent acts of Hunt. He concedes that he did not object to the evidence at trial, but claims the issue is preserved because he included it in a motion for a new trial. Alternatively, he seeks review pursuant to RCr 10.26.

This issue is not properly preserved for appellate review. Defense counsel only objected to the evidence in a motion for a new trial. An objection to alleged improprieties that occurred during the trial cannot be made after the jury verdict. Patrick v. Commonwealth, Ky., 436 S.W.2d 69 (1968).

The palpable error rule in RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. RCr 9.22. The general rule is that a party must make a proper objection to the trial judge and request a ruling on that objection, or the issue is waived. See Commonwealth v. Pace, Ky., 82 S.W.3d 894 (2002). See also Bell v. Commonwealth, Ky., 473 S.W.2d 820 (1971).

An appellate court may consider an issue that was not preserved if it deems the error to be a "palpable" one which affected the defendant's "substantial rights" and resulted in "manifest injustice." RCr 10.26. In determining whether an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." Pace, *supra*, quoting Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983).

Evidence of other crimes or bad acts, even if dissimilar to the charged crime, is relevant if the evidence tends to prove a matter of consequence other than the bad character or propensity of the defendant to commit the crime charged. See KRE 404(b)(1). The evidence of the drunk and violent behavior of the defendant was relevant to explain why the victim had not earlier exposed the sexual abuse. The probative value was not substantially outweighed by unfair prejudice. The testimony was properly admissible and although the Commonwealth did not provide proper notice pursuant to 404(c), that error was not palpable.

We take a slightly different view of the evidence introduced during cross-examination of the defendant's son. The prosecutor questioned the witness concerning how his dad had dressed when he attended his (the son's) wedding. The son responded that his dad had worn denim overalls even though the entire wedding party

was dressed in tuxedos. Although the testimony had no relevance, any error in its admission was certainly harmless. RCr 9.24.

Hunt also complains that the prosecutor's closing argument relating to the bad acts evidence was improper. Specifically, the prosecutor asked the jury the following two questions:

- 1) Is the kind of man who would mistake his La-Z-Boy for a toilet the kind of man who would rape his own daughter?
- 2) Is the kind of man who takes a shotgun to his daughter because she didn't clean the dishes the kind of man who would rape his daughter?

Defense counsel made no objection to this part of the closing argument.

Although the statements were an improper comment on the evidence, considering all the circumstances, there was no palpable error.

II. 1983 Divorce Order

Next, Hunt argues that the trial judge erred by allowing the Commonwealth to introduce an order which had been entered in the 1983 divorce action between himself and his wife which placed restrictions on his visitation rights. He claims that the order had only minimal probative value and its prejudice greatly outweighed its value. We disagree.

During opening argument, the Commonwealth made reference to the order entered in the 1983 divorce proceeding between Hunt and his wife. As noted earlier in this opinion, that order required adult supervision anytime Hunt visited the victim and barred him from any sexual contact with his daughter. Defense counsel's objection to the introduction of the order was overruled by the trial judge, who stated that the order was relevant as to "who said what to whom."

The order was relevant and the probative value substantially outweighed any prejudice. The clear inference to be drawn from the order is that when the victim was approximately six years old she made a sexual abuse allegation against her father. The probative value of this inference is that it tends to offset the significance of her subsequent recantation in the affidavit, which she signed when she was seventeen years old. No error occurred.

Therefore, the judgment of conviction is affirmed.

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

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