

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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NOT TO BE PUBLISHED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

2002-SC-0293-MR

**FINAL**

DATE 1-22-04 ELLA GROWITT, D.C.

KURT ROBERT SMITH

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
CASE NO. 01-CR-00693

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Following a jury trial in the Fayette Circuit Court, Appellant, Kurt Robert Smith, was convicted of wanton murder for the death of his infant son, Blake Smith. Appellant was sentenced to a maximum term of life imprisonment. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth below, we affirm.

On March 21, 2001, Blake Smith, the victim herein, was transported to the University of Kentucky Medical Center for medical attention. On March 23, 2001, the six-week-old victim was pronounced dead. Results from a preliminary autopsy indicated that death resulted from blunt force trauma to the victim's head.

Because Appellant was a juvenile at the time of the victim's death, the proceedings against him began in the Fayette District Court. Pursuant to KRS 640.010, Appellant was transferred to the Fayette Circuit Court as a youthful offender. In July of

2001, the Fayette County grand jury returned an indictment charging Appellant with murder. During the course of the trial, Appellant admitted he caused the victim's death. He testified that due to exhaustion and frustration with the child's crying, he lost control and shook the victim until the victim's head was flopping back and forth. Appellant further testified that he then dropped the victim to the floor.

The jury received instructions on intentional murder, wanton murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide. The jury returned a verdict of guilty on the charge of wanton murder, and recommended a life sentence. The trial court adopted the recommendation and sentenced Appellant accordingly. This appeal followed as a matter of right.

Appellant advances six assignments of error in this appeal. We shall address each in turn.

I.

For his first assignment of error, Appellant alleges that the evidence was not sufficient to prove him guilty of wanton murder. While conceding his conduct was criminal, Appellant contends that such conduct did not manifest extreme indifference to human life. We disagree.

A person is guilty of wanton murder when, "under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." KRS 507.020(1)(b).

A person acts wantonly if he or she "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(3). "The risk must be of such nature and degree that disregard

thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” Id.

This Court’s opinion in Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), provides the applicable standard of review. “On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” Id. at 187; see also, Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). Following a careful examination of the record on appeal, the evidence shows that the jury’s verdict was not unreasonable.

Medical evidence presented at trial revealed that the victim’s injuries included a skull fracture, bleeding inside the skull and around the spinal column, and bruising on the back and buttocks. Testimony was given that the victim’s injuries were consistent with shaken baby syndrome. During his testimony, Appellant admitted that he shook the victim and subsequently dropped the victim to the floor. On cross-examination, Appellant stated that he was cognizant that his actions could cause serious injury and further conceded that he disregarded such.

The evidence presented here indicates that a rational juror could believe that Appellant wantonly engaged in conduct which created a grave risk of death to another and thereby caused the victim’s death under circumstances manifesting an extreme indifference to human life.

We thus hold that the trial court did not commit reversible error when it denied Appellant’s motion for a directed verdict.

II.

Appellant claims error in the trial court's instruction to the jury on first-degree manslaughter. Specifically, he complains that the concept of extreme emotional disturbance (EED) was not included within the instruction. However, this issue was not preserved for appellate review.

RCr 9.54(2) provides:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of his objection.

"Failure to comply with RCr 9.54(2) has been consistently held to prohibit review of alleged error in instructions because of the failure to properly preserve the claimed error." Commonwealth v. Duke, Ky., 750 S.W.2d 432, 433 (1988). Appellant concedes that he did not object to the jury instructions, but, nevertheless, requests this Court review this issue as palpable error under RCr 10.26.

RCr 10.26 provides that an alleged error improperly preserved for appellate review may be revisited upon a demonstration that it resulted in manifest injustice. Palpable error affects the substantial rights of a party and, under Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996), relief will only be granted if the reviewing court concludes "that a substantial possibility exists that the result would have been different" absent the error.

Butcher v. Commonwealth, Ky., 96 S.W.3d 3, 11 (2002). Having examined the instructions, we find no error. Baze v. Commonwealth, Ky., 965 S.W.2d 817, 823 (1997).

III.

Prior to trial, the Commonwealth gave notice that it intended to introduce evidence that the victim suffered a bruise on his nose while in Appellant's care and regarding incidents where Appellant would yell in the victim's face when he cried. At a

pre-trial hearing, Appellant objected by arguing that the evidence should be excluded as prior bad acts under KRE 404(b). Appellant further argued that the evidence was unduly prejudicial. The trial court determined that the evidence of Appellant yelling at the victim was admissible as evidence of wantonness. The trial judge reserved ruling on the evidence of the bruise until trial, but ultimately allowed that evidence to be admitted as evidence of absence of mistake or accident.

Appellant alleges that the trial court committed error by permitting the Commonwealth to introduce the above evidence. He contends that it is not relevant to any of the factors set forth in KRE 404(b). Also, he contends that even if the above evidence is deemed relevant, its probative value cannot outweigh its prejudicial effect. We disagree.

KRE 404(b) provides:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

“The trial court has discretion to admit evidence of prior crimes, wrongs or bad acts if it is ‘relevant, probative and the potential for prejudice does not outweigh the probative value of such evidence.’” Brown v. Commonwealth, Ky., 983 S.W.2d 513, 516 (1999) (quoting Parker v. Commonwealth, Ky., 952 S.W.2d 209, 213 (1997)). Absent an abuse of discretion, this Court will not reverse a trial court’s ruling concerning the admission of evidence. Commonwealth v. King, Ky., 950 S.W.2d 807, 809 (1997). Specifically when considering a case of child abuse, this Court has held that “the probative link between evidence of prior bad acts and a particular defendant does not have to be established by direct evidence.” Parker v. Commonwealth, Ky., 952 S.W.2d 209, 213 (1997). The

evidence complained of more than meets that standard and demonstrates “the animus of [Appellant] towards the child and to show the absence of accident or mistake.” Id. at 214.

The evidence at issue here was probative and relevant to show the absence of mistake or accident. Moreover, it is our view that none of the evidence – neither the evidence of the bruise, nor the evidence of the yelling – was unduly prejudicial to Appellant’s defense. We cannot say that it was an abuse of discretion for the trial court to allow such evidence to be admitted. Accordingly, we find no reversible error.

#### IV.

During the cross-examination of Appellant, the Commonwealth asked about letters sent to the district court by members of Appellant’s family on his behalf. Appellant contends that this line of questioning could be construed to mean that Appellant was perpetrating a fraud on the court by asserting his right to remain silent at the same time the members of his family prayed for leniency. We note that no objection was raised during the cross-examination. Therefore, it is not properly preserved for our review. However, Appellant seeks review pursuant to RCr 10.26.

Appellant’s claim does not rise to the level of palpable error because it first ignores the fact that once the accused takes the stand, he is subject to cross-examination for all matters pertaining to the prosecution, including state of mind which “may be inferred from actions preceding and following the charged offense.” Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 549 (2001) (quoting Parker v. Commonwealth, Ky., 952 S.W.2d 209, 212 (1997)). There was no manifest injustice arising from this line of questioning, thus no error.

V.

Appellant claims that it was erroneous for the trial court to admit into evidence a photograph depicting injuries suffered by the victim. He asserts that the jury could not have been significantly aided by the photograph and further argues that what little probative value the photograph may have is clearly outweighed by its prejudicial effect. We cannot agree.

An otherwise admissible photograph does not become inadmissible merely because it is gruesome and the crime is heinous. Butler v. Commonwealth, Ky., 560 S.W.2d 814, 816 (1978). A photograph that is probative of the nature of the injuries inflicted will not be excluded unless it is so inflammatory that its prejudicial effect substantially outweighs its probative value. Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 794 (2003); KRE 403.

The photograph at issue here, which displays injuries inflicted upon the victim's back and buttocks, while distressing, is simply not inflammatory, as contended by Appellant. It displayed the location and severity of the victim's bruising and was clearly admissible for that very purpose. Hodge v. Commonwealth, Ky., 17 S.W.3d 824 (2000). Therefore, we hold that the trial court did not abuse its discretion by permitting the photograph to be admitted as evidence. Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

VI.

At trial, following the Commonwealth's closing argument, Appellant's defense counsel claimed that the Commonwealth failed to correctly state the law in defining intentional acts. After a bench conference, and pursuant to defense counsel's suggestion, the trial judge admonished the jury by reminding its members that the



arguments of the attorneys at trial were just that – arguments. He further reminded the jury members that one must refer to a particular instruction and verify that all of the elements listed therein are satisfied before a defendant can be found guilty.

Appellant now asserts that the Commonwealth’s closing argument stated a reasonable interpretation of the plain language of the instructions, and argues that the error is not that the Commonwealth misquoted the instructions; rather, the instructions misstated the law. Appellant seeks review under RCr 10.26.

Just as we noted previously in this opinion, instructional error must be preserved for appellate review. (See Part II of this opinion, supra). Appellant’s trial objection in no way brought this issue to the trial court’s attention. Appellant sought an admonition when the original issue arose. He received it and is entitled to no other relief.

The judgment of the Fayette Circuit Court is affirmed.

All concur.

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