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RENDERED: MARCH 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 4-8-04 ELA, Grayhill, D.C.

2002-SC-0759-TG

TIMOTHY SMITH — APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
00-CR-00669

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Following a jury trial in the Kenton Circuit Court, Appellant, Timothy M. Smith, was convicted of First-Degree Sodomy and sentenced to twenty (20) years imprisonment. Appellant appeals his conviction to this Court as a matter of right,[1] and he sets forth six (6) issues that he relies upon in seeking reversal of his conviction: (1) whether the trial court should have ordered a Daubert[2] hearing sua sponte prior to allowing the introduction of testimony relating to "repressed memory syndrome"; (2) whether testimony that the victim was "credible" and "believable" should have been excluded by the trial court; (3) whether the evidence was sufficient to support the

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[1] KY. CONST. § 110(2)(b).

[2] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

conviction; (4) whether the trial court erred in failing to excuse a juror for cause; (5) whether pictures depicting the messiness of Appellant's home were irrelevant and prejudicial, and (6) whether the Commonwealth's Attorney's closing argument was improper and therefore denied Appellant a fair trial. Finding no reversible error, we affirm the judgment of the Kenton Circuit Court.

II. BACKGROUND

In December 2000, Appellant was indicted for First-Degree Sodomy of K.S., his daughter. The indictment alleged that the offense occurred between February 9, 1987 and February 9, 1990. In March 2001, an indictment for Use of a Minor in a Sexual Performance was returned against Appellant. This second indictment was based on an allegation that Appellant took nude photographs of K.S. in August 1999. The first indictment was amended in July 2001 to charge that the offense took place between February 9, 1990 and February 9, 1997, rather than between February 9, 1987 and February 9, 1990 as alleged in the first indictment. In support of the Commonwealth's motion to amend the first indictment, the Commonwealth stated "that all of the [d]iscovery provided, fairly placed [Appellant] on notice that he was defending against activity that took place while his daughter was aged generally 7-12[,]" and that "[t]he time for her being those ages is generally 1990-1997." But, the amended dates of the indictment reflect an age of between seven (7) and fourteen (14) for K.S., who was born in 1983. At the time of trial, September 5, 2001, K.S. was eighteen (18) years of age.

Appellant and his wife have five (5) daughters; K.S. is the second-oldest. Both Appellant and his wife are alcoholics, and in mid-1999, when concern arose that the children were being neglected, the Cabinet for Families and Children intervened and recommended that the couple seek treatment. Approximately one (1) year later, the

couple's five (5) daughters were placed with friends and relatives. K.S. went to live with her cousin, who testified that she suspected that K.S. was the victim of sexual abuse and questioned K.S. on the matter prior to K.S.'s recall of Appellant's sexual abuse.

K.S. testified that in June 2000, while performing oral sex on her boyfriend, she suddenly remembered performing the same act upon her father when she was between the ages of seven (7) and twelve (12). After recalling that she had been sexually abused by Appellant, K.S. contacted the Northern Kentucky Child Advocacy Center where she was interviewed. The Center also interviewed Appellant's three (3) younger children, who denied any allegations of sexual abuse by their father. The Commonwealth's Attorney's Office then referred the matter to Kim Wolfe [hereinafter Wolfe], a mental health nurse, and asked her to review K.S.'s allegations. Wolfe interviewed K.S. and her siblings. Wolfe met with K.S. for five (5) one-hour sessions over the course of a week and determined that she suffered from "repressed memory syndrome." The testimony regarding K.S.'s repressed memory and the want of a Daubert hearing prior to such testimony are Appellant's primary contentions in this appeal.

K.S. testified that the sexual abuse started with her father "soft tickling" her all over and progressed into Appellant placing his genitals in her mouth. She could not recall specific details, dates, or events although she was certain that it happened when she was between seven (7) and twelve (12) years of age. K.S. recalled that she was required to perform sexual acts when she stayed home from school or when she wanted to go outside to play. K.S. stated that Appellant would spank her with a ping-pong paddle if she did not "do it" right. She could not remember how often the sexual

contact had occurred but maintained that it was more than ten (10) times but less than six thousand times.

As noted previously, Appellant was convicted of First-Degree Sodomy and sentenced to twenty (20) years imprisonment. The jury found Appellant not guilty of the charge of Use of a Minor in a Sexual Performance.

III. ANALYSIS

A. DAUBERT HEARING

Appellant's first claim of error is that the trial court should have sua sponte ordered a Daubert hearing on the admissibility of testimony concerning repressed memory syndrome. Appellant further maintains that such a hearing would have led to the exclusion of the Commonwealth's expert witness testimony on this issue. Appellant did not object to the testimony with respect to repressed memory syndrome, nor did he request a Daubert hearing with respect to the theory of repressed memory syndrome or offer any objection with respect to Wolfe's qualifications as an expert on the subject. Thus, the alleged error was not preserved.

Appellant, however, urges this Court to review the claim as palpable error. "'Palpable' is defined as easily perceptible, plain, obvious and readily noticeable[,]"[3] and under RCr 10.26, "[a] palpable error which affects the substantial rights of a party may be considered . . . 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."[4] "What it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial

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[3] Burns v. Level, Ky., 957 S.W.2d 218, 222 (1997) quoting BLACKS LAW DICTIONARY (6th ed.1995).

[4] RCr 10.26.

possibility that the result would have been any different, the irregularity will be held nonprejudicial."[5] Here, from a consideration of the whole case, we believe that a substantial possibility exists that the result would have been different without the repressed memory syndrome testimony. Consequently, if we should determine that the testimony was improperly introduced into evidence, we would be compelled to hold that the error was prejudicial and affected Appellant's substantial rights, and we would thus be required to reverse Appellant's conviction. However, that logical progression cannot begin without our first finding that the repressed memory syndrome testimony was inadmissible, and we cannot make that finding on the basis of the record before us.

In Mitchell v. Commonwealth,[6] this Court adopted the Daubert standard for the admissibility of expert testimony:

> When "[f]aced with a proffer of expert scientific testimony," the trial judge must determine at [a preliminary hearing] "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." According to the United States Supreme Court, the trial court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts in issue. "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation--i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." In addition, "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." In applying Rule 702, "lower courts should look at whether the scientific knowledge being presented has been tested, whether it has been subject to peer review and publication,

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[5] Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952-53 (1969), overruled in part on other grounds by Blake v. Commonwealth, Ky., 646 S.W.2d 718 (1983).

[6] Ky., 908 S.W.2d 100 (1995).

> what the evidence's known rate of error is, and whether the evidence has a particular degree of acceptance in the relevant community."[7]

And, later, in Goodyear Tire and Rubber Co. v. Thompson,[8] we adopted the reasoning of the Supreme Court in Kumho Tire Company v. Carmichael[9] and extended the Daubert standard "to testimony based on "technical" and "other specialized" knowledge[,]" and "conclude[d] that a trial court may consider one or more of the more specific factors that Daubert . . . mention[ed] when doing so will help determine that testimony's reliability."[10]

If Wolfe's repressed memory syndrome testimony did not satisfy the Daubert standard, its admission into evidence would constitute palpable error. Admittedly, in this case, the trial court could have conducted sua sponte a Daubert hearing under KRE 104[11] and determined whether Wolfe's testimony was admissible. But, in Tharp v. Commonwealth,[12] this Court declined to impose such a requirement upon trial courts:

> Appellant complains of the trial court's failure to conduct sua sponte a "Daubert hearing," before permitting the assistant state medical examiner to render opinions as to the ages of the child's bruises based upon their coloration. In support of this claim of error, Appellant cites passages from several medical journal articles which question the accuracy of such determinations. Presumably, the assistant medical examiner would have defended her opinions if challenged to do so and the trial judge's ruling as to admissibility is far from a foregone conclusion. Although we find no reported Kentucky

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[7] Id. at 101-02 (citations omitted).

[8] Ky., 11 S.W.3d 575 (2000).

[9] 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

[10] Goodyear Tire, 11 S.W.3d at 577.

[11] KRE 104(a) ("Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court[ ] . . . .").

[12] Ky., 40 S.W.3d 356 (2000).

> cases addressing this issue, such testimony has been routinely admitted in other jurisdictions. We decline to speculate on the outcome of an unrequested Daubert hearing, or to hold that the failure to conduct such a hearing sua sponte constitutes palpable error.[13]

However, even if we were to assume that the trial court's failure to conduct a Daubert hearing was palpable error, in order to grant Appellant the relief he seeks, we would also have to determine that the repressed memory syndrome evidence was improperly introduced and that manifest injustice resulted from its introduction.[14] However, we have no basis to make those determinations in this case. There is considerable debate both in the scientific community and the courts concerning repressed memory syndrome,[15] and the record in this case does not contain sufficient evidence to allow us to address the merits of the issue. Further, we are not willing to speculate as to what might have occurred if the trial court had conducted a Daubert hearing, nor may we substitute the relevant information presented in Appellant's brief to this Court for the deficient trial record. In other words, a reviewing court cannot review

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[13] Id. at 367-68 (emphasis added).

[14] Sherley v. Commonwealth, Ky., 889 S.W.2d 794, 802 (1994) (Leibson, J., concurring) ("[T]he palpable error concept requires more than just an error the appellate court can palpate and more than what is reversible error if preserved by contemporaneous objection. It requires an unpreserved error '[so] substantial ... that manifest injustice has resulted from the error.' RCr 10.26. The key issue here is whether 'manifest injustice has resulted from the error.'").

[15] E.g., Lopez v. State, 18 S.W.3d 220, 226 n. 1 (Tex. Crim. App. 2000) ("I note particularly the false charges of child sexual abuse that have resulted from "junk science" such as repressed memory syndrome . . . ."); Moriarty v. Garden Sanctuary Church of God, 511 S.E.2d 699, 705 (S.C. App. 1999) ("We acknowledge that within the scientific community there is considerable debate among the two schools of thought concerning repressed memory theory. When pared to their essential premises, the two schools may be classified as follows. The proponent school of thought asserts repressed memory theory is a scientifically valid theory and recalled memories are accurate memories. The opposing school of thought contends repressed memory theory is not scientifically valid and memories based upon this theory are neither accurate nor reliable. We conclude repressed memories of childhood sexual abuse can exist and can be triggered and recovered."(citations omitted)).

that which has not been placed in the record. Thus, this inquiry must wait for another day as we are not able to determine from the record before us whether the introduction of this evidence represented palpable error.

B. WOLFE'S TESTIMONY

Appellant's second claim of error is that under Stringer v. Commonwealth,[16] the trial court should have excluded Wolfe's testimony "on whether repressed memory syndrome exists and whether K.S. suffered from [repressed memory]." In Stringer, this Court held that "[e]xpert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of Daubert . . ., (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702."[17]

In his first brief, Appellant concedes that this claimed error was not preserved for appeal and urges this Court to consider the trial court's failure to exclude the testimony as palpable error under RCr 10.26. In his reply brief, however, Appellant claims that KRE 103(d) preserves this matter for appeal because at the end of the first day of trial, in response to Appellant's motion, the trial court stated that Wolfe would not be permitted to testify as to the ultimate issue in the case, i.e., whether K.S. was telling the truth. Appellant maintains that his motion was a motion in limine, and thus, under KRE 103(d), a contemporaneous objection is not required to preserve the issue for appeal. KRE 103(d) reads as follows:

> Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence.

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[16] 956 S.W.2d 883 (1997).

[17] Id. at 891.

> The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.[18]

Even if we assume that Appellant's motion was a proper motion in limine, it does not preserve for review the issue of whether Wolfe's testimony should have been excluded under Stringer because Appellant's motion was to prevent Wolfe from testifying as to what he called the "ultimate issue," that is, whether K.S. was being truthful. This is not the contention that he is now making to this Court; instead, he asserts that Wolfe's testimony failed to meet Stringer's requirements for expert testimony. "An objection made prior to trial will not be treated in the appellate court as raising any question for review which is not strictly within the scope of the objection as made, both as to the matter objected to and as to the grounds of the objection."[19]

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[18] But see Tucker v. Commonwealth, Ky., 916 S.W.2d 181, 183 (1996) ("While this Court has approved the use of motion in limine as a means of obtaining pretrial rulings concerning the admission and exclusion of evidence, we have not repealed the contemporaneous objection rule. One claiming error may not rely on a broad ruling and thereafter fail to object specifically to the matter complained of. When trial counsel is aware of an issue and fails to request appropriate relief on a timely basis, the matter will not be considered plain error for reversal on appeal."). Cf. Garland v. Commonwealth, Ky., ___ S.W.3d _____, _____ (2003) (Keller, J., dissenting) ("The majority acknowledges KRE 103(d), but instead of applying the language of the rule, relies upon Tucker v. Commonwealth and concludes that the allegation of error was unpreserved because Appellant did not object to the testimony at trial. I question the majority's reliance on Tucker and observe that both of the cases that Tucker cited as support for this questionable proposition predate our adoption of the Kentucky Rules of Evidence. Moreover, the leading authorities on Kentucky evidence law have questioned the Tucker holding and characterized it as 'plainly at odds with KRE [103(d)]' and 'in direct conflict with the language of KRE 103(d)!' Thus, to the extent that Tucker stands for a proposition that is directly contrary to the language of KRE 103(d), the opinion should be overruled." (footnotes omitted)).

[19] Tucker, 916 S.W.2d at 183. Accord Sherley v. Commonwealth, Ky., 889 S.W.2d 794, 803 (1994) (Leibson, J., concurring) ("We should not extend the reach of protection by motion in limine to cases where we cannot infer the trial court knew evidence excluded by motion in limine was being introduced anyway.").

Like Appellant's first claim of error, the record, or more aptly-stated, the lack of a record, prevents our review of this issue. We are unable to evaluate the admissibility of Wolfe's testimony under Stringer, because we are once again presented with a deficient record upon which to base that decision and we again decline to speculate as to what the record would have contained. Among other things, Stringer requires a Daubert analysis and as noted above in Part III(A), any meaningful determination under Daubert is simply not possible. As with Appellant's first claim of error, we decline to speculate as to the outcome of a Stringer analysis, and therefore, we are unable to determine whether the admission of Wolfe's testimony was error or resulted in manifest injustice to Appellant. Thus, we decline to review this unpreserved claimed error.

C. DIRECTED VERDICT

Appellant's third claim of error is that the trial court erred when it failed to grant a directed verdict on the charge of First-Degree Sodomy. Appellant claims that there was insufficient evidence to support the verdict. We analyze this claim of error under the standard articulated in Commonwealth v. Benham:[20]

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserv[e] to the jury questions as to the credibility and weight to be given to such testimony.
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> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly

[20] Ky., 816 S.W.2d 186 (1991).

> unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict.[21]

Thus, we consider the evidence in the light most favorable to the Commonwealth. Under such review, we do not find that the trial court erred in its denial of Appellant's directed verdict motion. Quite simply, K.S.'s testimony was "sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the [Appellant] is guilty[.]"[22] Thus, we find that Appellant's third claim of error is without merit.

D. FOR CAUSE CHALLENGE TO JUROR #69

Appellant next claims that he was prejudiced when the trial court refused to dismiss juror #69 for cause. During voir dire, the potential juror informed the trial court that his cousin had been the victim of sexual abuse, committed against her by her father, and her father had been convicted of the offense. Juror #69 was then questioned by defense counsel (DC), the Commonwealth's Attorney (CA), and the trial judge (Judge) regarding whether that experience would prevent him from acting as a fair and impartial juror:

> DC: Do you think that experience will affect how you receive and process the evidence this week?
>
> Juror #69: You know, I can't say for sure, you know.
>
> DC: What do you think of my defendant, my client, right now?

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[21] Id. at 187. See also Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 4-5 (1983) ("The clearly unreasonable test seems to be a higher standard for granting a directed verdict... constitut[ing] an appellate standard of review."); Trowel v. Commonwealth, Ky., 550 S.W.2d 530, 533 (1977).

[22] Dyer v. Commonwealth, Ky., 816 S.W.2d 647, 651 (1991) (overruled on other grounds by Baker v. Commonwealth, Ky., 973 S.W.2d 54 (1998)) ("Even if the evidence of the alleged victim is viewed as uncorroborated, standing alone it is still sufficient to prove all the elements of the crime charged, and to create a jury issue. It has long been the rule in Kentucky in rape cases that 'the unsupported testimony of the prosecutrix, if not contradictory or incredible, or inherently improbable, may be sufficient to sustain a conviction,' and there is no rationale for a different rule in a sodomy case." (citation omitted)); Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001).

Juror #69: Well uh, he's innocent 'til proven guilty right now.

DC: Do you think you can be fair to my client?

Juror #69: If the evidence proves him innocent.

DC: OK.

Juror #69: ...I mean...

DC: So you think that the evidence is going to have to prove him innocent for you to find him innocent?

Juror #69: Well, I mean if the evidence proves him guilty, I would find him guilty.

DC: And truthfully now, if you were in my client's shoes, would you want someone like you sitting on he jury?

Juror #69: Uh, probably not.

DC: And that's because someone like you with your experience – difficult for them to be fair, wouldn't it?

Juror #69: I could see that, yeah.

DC: Right. And in fact it would be difficult for you to be fair wouldn't it?

Juror #69: It...maybe. I may have a tendency to lean that way towards...

DC: Sure. I mean, everyone, we're all shaped by our own experience.

CA: Let me ask you this [sir], do you think that you could listen to the evidence that the judge permits you to hear, from the witness stand, and enter a verdict based upon that evidence?

Juror #69: Yes sir.

CA: And you could be a fair and just juror?

Juror #69: I believe I could, I suppose.

CA: Put aside your issues with regard to your cousin's situation, her individual situation, and decide this case on the evidence?

Juror #69: I could decide on the evidence, yes.

Judge: Is your experience going to make you tend to look at that evidence more favorably just, not because of the evidence itself but because of your feelings, for or against either of the parties as they stand here today?

> Juror #69: Like I said, you know, the evidence. I gotta go on the evidence. I can't say whether he did it or anything right now. I don't know for sure.
>
> Judge: But this experience, is it bringing any prejudice with you other than the fact that it happened and you know about it?
>
> Juror #69: I'd say as far as evidence goes, you know, I sat on a civil trial with a child that'd been hit by a car, you know, so...
>
> Judge: So you know how to weigh it.
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>
> Judge: I think what he's saying is he's letting you know he has this experience that he brings to the table but I don't believe he's said he can't be fair and impartial ...
>
> Juror #69: ...according to the evidence...
>
> Judge: ... and I think his answers to your questions were based on the form of your questions. So if you're moving to dismiss for cause the court is overruling it.

The trial court then stated that the juror would not be stricken for cause and Appellant used a peremptory challenge to remove him. Appellant used all of his peremptory challenges, and thus, preserved this claimed error for appeal under Thomas v. Commonwealth.[23]

Appellant claims that the potential juror was so biased by the experience of his cousin that he was unable to render a fair and impartial verdict.[24] Whether a potential juror should be excused for cause is a determination that lies within the sound discretion of the trial court and this Court will look upon such determinations with great deference,

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[23] Ky., 864 S.W.2d 252, 259 (1993) ("A party must exercise all of his peremptory challenges in order to sustain a claim of prejudice due to the failure of the court to grant a requested challenge for cause. When a defendant *does* exhaust all his peremptory challenges, he has been denied the full use of peremptory challenges by having been required to use peremptory challenges on jurors who should have been excused for cause." (jnternal quotation marks and citation omitted)).

[24] RCr 9.36(1) ("When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified.").

absent an abuse of discretion.[25] Upon review of the record, we find that it was not an abuse of discretion for the trial court to determine that the prospective juror could render a fair and impartial verdict. Juror #69 repeatedly stated that he would render a decision based upon the evidence, and these assertions were not in response to leading questions. On the other hand, the statements by the prospective juror to which Appellant objects most strongly were in response to leading questions by defense counsel. Accordingly, we find that the trial court did not err in refusing to excuse juror #69 for cause.[26]

E. PHOTOGRAPHS OF APPELLANT'S BEDROOM

Appellant next claims that the trial court erred in allowing the Commonwealth to introduce into evidence Exhibits 10 and 12, which are photographs of Appellant's bedroom. Appellant maintains that the photographs should have been excluded as irrelevant and highly prejudicial. The photographs were taken during a search of Appellant's home on September 18, 2000, which was several months after Appellant had sent his children to live with relatives. In fact, during the search of the premises, Appellant and his wife were out of the state and attending an alcohol rehabilitation program. The photographs reveal the bedroom area in complete disarray, with trash covering the floors and used dishes and food remnants lying about.

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[25] Mills v. Commonwealth, Ky., 95 S.W.3d 838, 843 (2003) ("It is within the trial court's discretion to excuse a juror for cause, and great deference is afforded that decision in the absence of an abuse of discretion."); Furnish v. Commonwealth, Ky., 95 S.W.3d 34, 44 (2002) ("[The] decision whether to excuse a juror for cause is a matter within the sound discretion of the trial court.").

[26] Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997) (The standard of review for a trial court's decision on a challenge for cause is whether there was an abuse of discretion.).

The trial court permitted Exhibit 10 to be presented to the jury in order to show a package of Salem Lights that was similar to a package of cigarettes found in a cookie jar in K.S.'s room. The cookie jar contained the sexually explicit photographs upon which the Commonwealth based the Use of a Minor in a Sexual Performance charge. The Commonwealth contended that this evidence was relevant to the Use of a Minor in a Sexual Performance charge because Appellant had made an issue of the cookie jar being found in K.S.'s room and the Commonwealth wanted to show that the jar also contained items belonging to other family members. The trial court further stated that it would admit Exhibit 12 in order to "balance out" the state of the evidence with regard to K.S.'s room. During the bench conference on the photographs, the Commonwealth's Attorney in response to defense counsel's objection to the photographs stated that they were necessary to demonstrate that the rest of the house was also unkempt, and not simply K.S.'s room. The Commonwealth maintained that Appellant had elicited testimony throughout the trial regarding the cleanliness of K.S. and her room, and as a consequence, it was important to inform the jury that other parts of the home were kept in disarray. Appellant claims that the trial court did not properly balance the potentially prejudicial effects of the photographs against the relevancy of the photographs.

We first "observe[ ] that the admissibility of photographs is within the sound discretion of the trial court, and its ruling in this respect will not be interfered with on appeal except upon clear showing of an abuse of discretion."[27] And, "[w]eighing the relevancy against the prejudice is peculiarly within the province of the trial court."[28] Although the photographs are prejudicial, that factor alone is not dispositive of the

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[27] Gorman v. Hunt, Ky., 19 S.W.3d 662, 667 (2000).

[28] Foley v. Commonwealth, Ky., 942 S.W.2d 876, 888 (1996).

inquiry because all probative evidence is prejudicial. The relevant inquiry is whether their probative value is substantially outweighed by the danger of undue prejudice to Appellant.[29] From our consideration of the record, we find that the photographs were admitted for a relevant purpose, and their probative value, albeit slight, is not substantially outweighed by the danger of undue influence; the photographs just show a very messy home. We fail to see how this created a danger of undue prejudice to Appellant. We therefore hold that the trial court did not abuse its discretion in admitting the photographs into evidence.

F. PROSECUTION'S CLOSING ARGUMENT

Finally, Appellant claims that he was substantially prejudiced and denied due process of law because of statements made by the Commonwealth's Attorney during his closing argument. This claim was not preserved by a contemporaneous objection; thus, Appellant again urges us to review the claim as palpable error under RCr 10.26. While we agree that some of the Commonwealth's Attorney's statements were improper, "[i]n analyzing claims of improper argument, this Court must 'determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law.'"[30] Accordingly, "'[t]he required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor.'"[31] The lawyers "are permitted 'great leeway' in closing argument."[32] However, our inquiry does not stop there, as any misconduct in this case must also rise to the level of palpable error, since this claim of error was not preserved. As previously

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[29] KRE 403.

[30] Foley v. Commonwealth, Ky., 953 S.W.2d 924, 939 (1997) (citation omitted).

[31] Id.

[32] Id.

stated, RCr 10.26 provides that a palpable error is one that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court. If "upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial."[33] In the present case, we are not persuaded that the Commonwealth's Attorney's statements rise to the level of palpable error that resulted in manifest injustice. Appellant has not demonstrated that, but for the Commonwealth's Attorney's improper statements, the jury would have returned a different verdict. As a result, we find that the Commonwealth's Attorney's statements were not so egregious as to render Appellant's trial fundamentally unfair and thus hold that Appellant's final claim of error is without merit.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Kenton Circuit Court.

All concur.

[33] Shoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836-37 (2003)(citing Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969), overruled in part on other grounds, Blake v. Commonwealth, Ky., 646 S.W.2d 718 (1983).).

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