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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: APRIL 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0095-MR DATE 5-13-04 ELIA Grant, D.C

BILLY J. JOHNSON APPELLANT

V.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
CRIMINAL NO. 01-CR-0149

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Billy J. Johnson, was convicted in the Harlan Circuit Court of criminal attempt to commit first-degree rape, first-degree sodomy, and first-degree sexual abuse. He was sentenced to a total of twenty years imprisonment and appeals to this Court as a matter of right.

Appellant was indicted in September 2001, for one count of first-degree rape, one count of first-degree sodomy and two counts of first-degree sexual abuse, stemming from acts committed against his three minor stepdaughters, S.S., J.S., and A.S., in the spring of 2000. Appellant was tried in April 2002. On the morning of trial, prior to the first witness taking the stand, the Commonwealth moved that the three victims be permitted to testify behind a screen placed in the courtroom so they would

not have to look at Appellant while testifying. In denying the request, the trial court agreed with defense counsel that the presence of the screen could have the effect of prejudicing Appellant by creating the inference that the victims feared him. The trial court noted, however, that had it received earlier notice, arrangements could have been made for the victims to testify via closed-circuit television. Nonetheless, all three victims testified before the jury and in the presence of Appellant. The trial court ultimately declared a mistrial after the jury failed to reach a verdict.

Appellant was again tried for the offenses in October 2002. Prior to the first victim's testimony, the trial court announced that they would testify in-chambers via closed-circuit television. While the prosecutor and defense counsel were present in-chambers, Appellant remained in the courtroom with the jury and viewed the testimony on a video monitor.

The evidence established that at the time of the offenses, S.S., A.S., and J.S were ten, eleven, and twelve years of age, respectively. The girls made the accusations against Appellant shortly after he and their mother divorced. Each girl testified not only about the acts Appellant committed against her, but also about witnessing acts committed against the other two victims. In addition, a younger brother, E.J.S., testified to one occasion when Appellant locked him out of the house, resulting in Appellant and the three victims being alone inside while their mother was at work. At the close of the evidence, the trial court dismissed the sexual abuse charge relating to J.S. because the evidence established that she was not under the age of twelve at the time of the offense. The jury found Appellant guilty of all other charges and he was sentenced to twenty years imprisonment. This appeal followed. Additional facts are set forth as necessary.

I.

Appellant first argues that the trial court erred in permitting the three victims, as well as their younger brother E.J.S., to testify via closed-circuit television that was displayed to the jury in the courtroom. Present in-chambers during each child's testimony were the trial judge, the prosecutor, defense counsel, the particular child testifying, and either the child's mother or grandmother. Although Appellant was not present, defense counsel was afforded a recess after the testimony to consult with Appellant.

Appellant points out that the trial court did not hold a hearing or make any findings to determine the need for having the victims testify in-chambers. In fact, Appellant argues that the victims' testimony in the first trial, which was given on the stand and in open court, was much more forthcoming and detailed. Also, Appellant notes that because there was no audio contact between Appellant and defense counsel, he was only able to communicate with his attorney during requested recesses. However, defense counsel neither objected to the procedure nor requested that the trial court make findings as to the necessity of employing such procedure. Further, in his motion for a new trial, Appellant did not raise the issue of the video testimony.

Notwithstanding, Appellant argues that his objection during the first trial to the Commonwealth's request to use a screen preserved the issue for review. We disagree. Defense counsel's objection at the first trial was based solely on the ground that the screen would prejudice Appellant by suggesting to the jury that the witnesses had a reason to fear him. In sustaining the defense's objection to the screen, the trial court even put counsel on notice that it would have employed the video procedure had it been timely requested. As such, we must conclude that Appellant's objection at the first trial

failed to properly preserve his objection to the use of closed circuit television. RCr 9.22; Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997), cert. denied, 523 U.S. 1052 (1998); Tucker v. Commonwealth, Ky., 916 S.W.2d 181 (1996); West v. Commonwealth, Ky., 780 S.W.2d 600 (1989). Furthermore, we cannot conclude that the trial court's use of the video testimony rises to the level of palpable error warranting reversal of Appellant's convictions. RCr 10.26.

The United States Supreme Court has held that under certain circumstances it is constitutionally permissible under the Confrontation Clause to permit child witnesses in a child abuse case to testify against the defendant at trial outside the defendant's physical presence by one-way closed circuit television. Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). This Court has similarly upheld that procedure in accordance with KRS 421.350[1]. Danner v. Commonwealth, Ky., 963

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[1] KRS 421.350 applies to a limited number of offenses, when the act has been committed against a child twelve years old or younger, and applies not only to statements of the victim, but also to statements of another child twelve years old or younger that witnessed an offense. KRS 421.350(2) provides, in pertinent part:

> The Court may, on motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. . . . The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

KRS 421.350(5) states: "For the purposes of subsections (2) and (3) of this section, 'compelling need' is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence."

S.W.2d 632 (1998), cert. denied, 525 U.S. 1010 (1998); Commonwealth v. Willis, Ky., 716 S.W.2d 224 (1986).

In Price v. Commonwealth, Ky., 31 S.W.3d 885 (2000), the defendant was excluded from the courtroom and required to view the child victim's testimony in another anteroom on closed-circuit television, where he could not be in constant audio contact with his attorney. The defendant appealed his conviction, arguing that the use of the video procedure violated his constitutional right under the Confrontation Clause to be present in the courtroom at every stage of trial, and further that the denial of continuous audio contact with his attorney violated his Sixth Amendment right to effective assistance of counsel. In holding that the trial court erred in failing to find a "compelling need," which is necessary pursuant to KRS 421.350 to use video testimony as the alternative to obtaining truthful testimony from the child, we stated:

> The requisite finding of necessity must be a case-specific one: The trial court must hear evidence and determine whether the use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face to face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child would be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e. more than "mere nervousness or excitement or some reluctance to testify."

Price, supra, at 893 (Quoting Maryland v. Craig, supra, at 855-856, 110 S.Ct. at 3169). We further held that it was error to deny the defendant the right to be in continuous audio contact with his attorney during the victim's testimony.

The crucial distinction, however, between Price and the instant case is the total lack of preservation. While it is apparent from a review of the record that the trial court failed to use the standard of "compelling need" necessary for the use of video testimony, defense counsel neither objected nor asked for further findings. With respect to the right to be in constant audio contact with counsel, Appellant does not assert that he was hindered in any manner from imparting information to his counsel. Indeed, the trial court granted a recess for defense counsel to confer with Appellant, after which, defense counsel was able to ask the witnesses further questions.

RCr 10.26 permits review of an unpreserved error and the granting of appropriate relief if the Court determines that manifest injustice has resulted from the error. Nothing contained in the rule, however, precludes the waiver of palpable error or even a constitutional right. West, supra. In Futrell v. Commonwealth, Ky., 437 S.W.2d 487, 488 (1969), our predecessor Court stated:

> Violations of constitutional rights, the same as of other rights, may be properly waived by failure to make timely and appropriate objection. Of course in an aggravated case involving violations of such proportions as in effect to deprive the defendant of due process, the appellate court may grant relief notwithstanding failure to make proper objection.

In Salisbury v. Commonwealth, Ky. App., 556 S.W.2d 922, 927 (1977), the Court of Appeals held that the prosecutor's comment on the defendant's post-arrest silence was not palpable error in the absence of a contemporaneous objection:

> When a defendant's attorney is aware of an issue and elects to raise no objection, the attorney's failure to object may constitute a waiver of an error having constitutional implications. In the absence of exceptional circumstances, a defendant is bound by the trial strategy adopted by his counsel even if made without prior consultation with the defendant. The defendant's counsel cannot deliberately forego making an objection to a curable trial defect when he is aware of the basis for an objection.

The record in this case does not reveal whether defense counsel's failure to object to the use of video was tactical, deliberate, or inadvertent. Given Appellant's acknowledgment that the victims were quite forthright in their testimony in the first trial, counsel may have believed that the more intimate setting in the trial court's chambers would be more intimidating. Indeed, it appears that the victims were much more hesitant in testifying during the second trial. Nevertheless, there is nothing to indicate that the failure to either object to the video procedure or request findings was anything but a tactical decision. Thus, despite the trial court's disregard for the procedure set forth in KRS 421.350, we are unable to conclude that any error which occurred warrants reversal under RCr 10.26. West, supra.

II.

Appellant next contends that the trial court abused its discretion in questioning the victims during their in-chambers testimony. Appellant asserts that the trial court's questions elicited information that had not been revealed through either the Commonwealth or defense counsel's line of questioning. After reviewing the record, we find no reversible error.

After the Commonwealth and defense counsel finished questioning the first victim, A.S., the trial court proceeded to question her. While the questions initially pertained to the victims' ages and relationship, the trial court then asked A.S. what she had observed between her siblings and Appellant. A.S. volunteered a great deal of information concerning specific acts she saw Appellant commit against the other two victims, conversations between the girls about the situation, and alleged threats by Appellant that he would hurt them or their mother if they told on him. The trial court

thereafter gave both attorneys the opportunity to further question A.S. While the Commonwealth did so, defense counsel declined further questioning.

During an in-chambers bench conference following A.S.'s testimony, defense counsel objected to the trial court's line of questioning on the grounds that it elicited prejudicial information that had not been brought out on either direct or cross-examination. The trial court noted that it had asked the questions because of a discrepancy in its notes from the first trial. However, the trial court admitted surprise at A.S.'s responses, as well as expressed discomfort about the fact that new information had been disclosed to the jury as a result of its questions. The trial court stated that while A.S.'s testimony was not improper in light of the charges pending against Appellant, it would limit any further questions to matters raised by counsel's questions. Defense counsel did not request any further relief.

KRE 614(b) permits a trial court to "interrogate witnesses called by itself or by a party." Professor Lawson, in The Kentucky Evidence Law Handbook, § 3.25(2) p.249 (4th Ed. 2003), comments that although that Kentucky courts have not addressed the rule since its adoption, the issue has been decided in pre-rule decisions:

> The authority of a judge to interrogate witnesses is firmly rooted in pre-Rules Kentucky case law, as is the expectation that this authority will be exercised with the greatest of caution. As observed in one case, a judge's actions "usually carry such weight with the jury that they must be subject to safeguards against abuse." The pre-Rules case law is general rather than specific with respect to limitations on interrogation by judges, although it is said that the judge may not produce evidence that the parties could not introduce on their own. More importantly, this case law leaves no doubt that the questioning must be conducted without revealing the judge's personal opinions about the evidence, the witness, or the issues of the case. (Footnotes and internal citations omitted.)

Recently, in United States v. Sanchez, 325 F.3d 600, 603 (5th Cir. 2003), the Fifth Circuit Court of Appeals discussed the federal counterpart to KRE 614(b):

> Federal Rule of Evidence 614(b) permits the trial judge to "interrogate witnesses, whether called by himself or by a party." In exercising this discretion, the trial court may question witnesses and elicit facts not yet adduced or clarify those previously presented. However, a judge's questions must be for the purpose of aiding the jury in understanding the testimony. Furthermore, the trial court's efforts to move the trial along may not come at the cost of "strict impartiality."
>
> In reviewing a claim that the trial court appeared partial, this court must review the entire record and the "totality of the circumstances" surrounding the judge's conduct to "determine whether the judge's behavior was so prejudicial that it denied the defendant a fair, as opposed to a perfect, trial." To rise to the level of a constitutional error, the . . . judge's conduct, viewed as a whole, must amount to a "quantitatively and qualitatively" substantial intervention that could have led the jury to "a predisposition of guilt by improperly confusing the functions of judge and prosecutor." (Citations omitted).

Here, the trial court's questions to A.S. clearly elicited information that had not been previously disclosed to the jury. However, as the trial court found, the evidence was not improper in light of the charges against Appellant, and could have been introduced by either party. In fact, J.S. and S.S. subsequently reaffirmed much of what A.S. testified to. Finally, the video confirms that there was nothing in the trial court's demeanor or tone of questioning that would have conveyed to the jury any sense of partiality on the part of the trial court. Considering the totality of the circumstances, the trial court's line of questioning was permissible.

III.

Appellant frames his third issue as the trial court's failure to grant a directed verdict on all charges. However, his argument is based, in part, on what he considers to be the vagueness of the indictment. Specifically, Appellant contends that the

indictment violated RCr 6.10 because it set forth the charges without identifying the victims' names. Nonetheless, Appellant's failure to file a pretrial motion pursuant to RCr 8.18, objecting to the indictment, waived any defect, and failed to preserve the issue for appellate review.

Nor do we find any merit in Appellant's contention that he was entitled to a directed verdict on all charges. Contrary to his assertion, the Commonwealth's evidence did not lack the "atmosphere of verisimilitude" and "fitness to produce [a] conviction." Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 802 (2001), cert. denied, 535 U.S. 1059 (2002). In fact, the evidence, when viewed in the light most favorable to the Commonwealth, was more than sufficient to withstand a directed verdict. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

The judgment and sentence of the Harlan Circuit Court are affirmed.

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

Stumbo, J., dissents without opinion.

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