

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

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RENDERED: OCTOBER 21, 2004  
NOT TO BE PUBLISHED

**Supreme Court of Kentucky**

**FINAL**

2003-SC-1025-MR

DATE 11-11-04 EJA/Gawitt, DC

RALPH VANCE

APPELLANT

V.

APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
2003-CR-089

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Vance of first-degree robbery and being a second-degree persistent felony offender. He was sentenced to a total of twenty years in prison.

The questions presented are whether the Commonwealth made statements and introduced evidence which improperly evoked sympathy and preyed upon the fears of jurors; whether the Commonwealth violated the "Golden Rule" during its closing argument; whether other bad act evidence was erroneously introduced; whether impermissible opinion testimony was admitted into evidence; whether the trial judge erred in excluding evidence proffered by Vance; whether a witness was wrongly permitted to bolster the testimony of other witnesses; and whether there was cumulative error.

The Hardee's Restaurant in Mount Sterling, Kentucky was robbed at gunpoint at approximately 10 p.m. on January 20, 2003. There were two employees working at the time of the robbery and they were in the process of locking the doors for the night when the masked intruder entered. The robber threatened both employees with a gun and demanded the money from the safe. After forcing the two victims into a freezer, the suspect fled the restaurant with \$612 in cash and an undetermined amount of gift certificates. Both employees testified at trial, but neither was able to identify Vance as the robber.

Sometime later, the police received an anonymous tip that Vance and his friend, Johnson, may have been involved in the robbery. Originally, both were considered suspects, but the police began to focus their attention on Vance after Johnson, a convicted felon, gave a sworn statement implicating his friend. Further investigation led police to obtain a note written by Vance to his former girlfriend the day after the Hardee's robbery. The note contains rap lyrics which describe a robbery.

Vance was indicted on one count of first-degree robbery and one count of being a second-degree persistent felony offender. The persistent felony offender charge related to prior convictions for theft by unlawful taking, criminal mischief and third-degree burglary.

At trial, a police detective testified to the parallels between the rap lyrics in the note Vance admitted writing and the Hardee's robbery. This included key information that was not released to the public. The detective concluded that the rap lyrics written by Vance described the Hardee's robbery.

Johnson testified that Vance owed him money for stereo equipment and that Vance told him that he was going to get the money somehow. He stated that Vance

was at his house on the night in question and informed him that he was going to rob the Hardee's. Vance left his house and returned with a gun and a blue bag containing money and Hardee's coupons.

Johnson's version of events was largely corroborated by his wife's testimony and that of Vance's former girlfriend, both of whom were at the house that night.

According to the former girlfriend, Vance left the house twice and upon returning the second time he had a bag of money. She indicated that Vance communicated to her through the rap lyrics that he had robbed a place. When she later learned that the Hardee's had been robbed, she concluded that it was the place that Vance had robbed.

Vance did not testify at trial, but primarily asserted an alibi defense through the testimony of two witnesses - a second girlfriend with whom he had a child and the girlfriend's mother. Both of these witnesses claimed that the two of them, Vance and the mother's nephew were all at the mother's home on the night of the robbery.

The jury convicted Vance of first-degree robbery and being a second-degree persistent felony offender. He was sentenced to twenty years in prison. This appeal followed.

Vance concedes that none of the issues presented by him are properly preserved for appellate review. He seeks review pursuant to the palpable error rule in RCr 10.26. That rule, however, 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.

#### I. Alleged Improper Comments and Testimony

Vance argues that the trial judge erred in permitting the Commonwealth to present evidence and make comments to evoke sympathy and prey upon the fears of the jurors. We will address the two prongs of this issue separately.

First, Vance complains that the Commonwealth, during its opening statement and through the testimony of its witness, preyed upon the fears of the jury by telling them of the large number of unsolved robberies occurring in the community. We disagree.

The statement by the prosecutor concerning the rash of unrelated robberies was used to explain the investigative technique employed by the police. That is, the police kept the public informed about the criminal activity in the community, but also withheld certain information about the crimes in order to aid their investigation. It was this nonpublic information that the Commonwealth planned to introduce and did introduce through its witnesses in order to prove its case. The comment by the prosecutor was proper.

Nor was the testimony by the police detective improper. This witness testified concerning the numerous robberies in the area. He first mentioned this fact to convey that the robbery of the Hardee's was getting the full attention of the police. The second reference was to explain the investigative technique used by the police. There was no error in the introduction of this testimony.

Second, Vance asserts that the prosecution played on the jury's sympathy by sensationalizing the suffering of the victims during the actual robbery. We must agree

that portions of the employees' testimony did include improper victim impact evidence.

Particularly, the following testimony of the female employee during the guilt phase:

Comm. Has this [the armed robbery] bothered you since?

Witness: Most definitely.

Comm. How?

Witness: Well, for starters, it's one of the things that you think that will never happen to you. And when it does, it's very emotional, if you will. You – it takes something away from you, if you will, but I cannot say what it is. Things like I was scared to stay home by myself. I wouldn't take a shower if no one was there with me, you know, things like that.

We also agree that the prosecutor made improper reference to the victim impact evidence in his closing argument. To wit:

And the other thing she said that I found to be heartening was, that for a long time she couldn't take a shower unless there was somebody else in the house because she was afraid. That's the kind of consequences that this kind of crime has.

Vance did not object to the testimony or the closing argument. Although we agree that portions of both were improper, we cannot conclude that the error is palpable.

## II. "Golden Rule" Argument

Vance contends that the Commonwealth violated the "Golden Rule" during its closing argument by stating the following:

It's an important case because of what I talked to you about in my opening statement to you this morning. An important case because that young lady over there [female victim] and [male victim] were out doing what folks have to do. They

were out making a living for a few bucks an hour, in a place where at 10:00 at night you got to go up front and lock the door and you're the only two people in there, and then the most horrifying thing can happen to you absent harm coming to you happens, and that is that somebody walks in that front door with their face covered up and gloves on their hands and in a coat, and they walk in there and they put a gun at you, and they tell you, I want your money. (emphasis added).

A "Golden Rule" argument is the kind which calls upon the jury to put itself in the place of a victim when they are considering the verdict to be arrived at. Lycans v. Commonwealth, Ky., 562 S.W.2d 303 (1978). E.g., "Suppose you run a store and somebody comes in on you and does that to you. What's it worth?" Lycans, supra, at 305-06. Here, even if we considered the language used in the summation as a "Golden Rule" type argument, there was no objection to it at trial and we cannot conclude that any palpable error occurred.

### III. Other Bad Act Evidence

Vance claims that the trial judge erred in permitting testimony implicating him in other crimes or bad acts during the guilt phase of the trial. He complains about the following testimony by the police detective:

Detective: We began to set up surveillance on Mr. Johnson and Mr. Vance to attempt to see if they were going to commit another robbery.

...

Comm: Did you learn anything of interest as you engaged in this surveillance?

Detective: I followed them. I did not - - they did not commit – commit any other crimes while we were doing the surveillance.

...

Comm: Did Mr. Vance explain why he would have written this note?

Detective: No. His comment was, it wasn't this robbery he was talking about.

The detective's testimony did not implicate Vance in any other crimes or bad acts. In fact, he testified to the opposite, that Vance was not involved in any other robberies. Only the detective's last statement is remotely capable of being interpreted as implicating Vance in other crimes, but, contrary to the prosecutor's closing argument, that is only one interpretation. The other is simply that the note was not about a robbery or a robbery committed by Vance. The testimony was not improper KRE 404(b) evidence as alleged by Vance and certainly did not rise to the level of palpable error.

Vance also complains about the following testimony given by Johnson:

Comm: Now later, did you have the occasion to be anywhere that Mr. Vance was?

Johnson: Yeah.

Comm: Where was that?

Johnson: In jail with me.

Comm: Where?

Johnson: Montgomery County

Comm: Did Mr. Vance make any statements to you about this situation while you were in jail?

Johnson: One – one comment I heard him make was after David had come and talked to him and he seen a letter that he had wrote to Angie, and he just said he would kill her is all he said.

Comm: Said he would kill Angie?

Johnson: Uh-huh (affirmative).



This testimony was evidence which implicated Vance in other bad acts. It may have been admissible under KRE 404(b)(1) and KRE 403. However, there was no objection to the testimony and the trial judge never had the opportunity to rule on the matter. Considering the entire record, we conclude that neither the introduction of the evidence nor the failure of the Commonwealth to give notice pursuant to KRE 404(c) constituted palpable error.

#### IV. Opinion Testimony

Vance asserts that the trial judge erred in permitting opinion testimony regarding the written lyrics, defendant's guilt and state of mind. More to the point, he claims that the police detective and former girlfriend were improperly allowed to express the opinion that he was guilty.

Neither witness expressed an opinion on the guilt or innocence of the defendant. The detective applied his knowledge of the Hardee's robbery to the lyrics and made a reasonable conclusion that assisted the jury in understanding the significance of the note. KRE 701. The former girlfriend was properly allowed to offer lay testimony about a note she watched being composed by Vance the day after the robbery. KRE 701. There was no error in permitting the introduction of the testimony and there certainly was no palpable error.

#### V. Excluded Evidence

Vance argues that the trial judge erred by excluding evidence offered by the defense to demonstrate the propensity of violence and crime in rap music lyrics. At the inception of the defense's case, counsel for Vance sought to introduce some rap lyrics which apparently were taken from the Internet. No reason was identified for their

introduction and counsel admitted that they had not been provided to the Commonwealth. The trial judge disallowed the evidence because it had not been provided to the Commonwealth in discovery.

There is nothing in the record for this Court to review. Defense counsel did not introduce the evidence by way of avowal. The failure to make a complete avowal is fatal to appellate review of a ruling that excludes evidence. See Commonwealth v. Ferrell, Ky., 17 S.W.3d 520 (2000).

#### VI. Bolstering of Testimony

Vance claims that the trial judge erred when he permitted the Commonwealth to bolster the testimony of critical witnesses. He contends that the detective bolstered the testimony of several other witnesses by implying that because they had knowledge of nonpublic investigative information their stories must be credible.

Not only was there was no objection on this basis at trial, we have reviewed the record and find no grounds for even implying that the detective bolstered the testimony of witnesses. There was no error of any kind.

#### VI. Cumulative Error

Having reviewed all of the alleged and unpreserved errors raised by Vance, we find none of his arguments individually requires reversal of his conviction. This Court has also considered his concern that cumulative error might arise so as to deny him his right to a fair trial. After careful consideration of the entire record, we must reject any such conclusion in this case.

The judgment of conviction is affirmed

All concur.

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