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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0380-MR

DATE 9-15-05 Ena A. Grant, D.C.

WILTON LANE WESTERFIELD APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
02-CR-00245

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant was convicted in the Warren Circuit Court of first-degree robbery, first-degree sodomy, two counts of kidnapping, three counts of first-degree sexual abuse, one count of fourth-degree assault, and for being a second-degree persistent felony offender. He was sentenced to life imprisonment and appeals to this Court as a matter of right.

Appellant's convictions stem from crimes that he committed in the late night of February 17, 2002. P.A. and her eleven-year-old daughter, J.W., were shopping at a K-Mart in Bowling Green. As they entered their automobile, Appellant forced his way inside the car at knifepoint. Appellant proceeded to sexually abuse P.A. inside the vehicle. Appellant forced P.A. to drive to an ATM machine and withdraw money for

him. J.W. remained inside the car throughout the events. P.A. and J.W. eventually escaped from the car and came upon a house where they called 911.

I.

First, Appellant alleges that he was denied his right to a fair trial when the trial court denied his motions for a change of venue and a new trial. Appellant claims that the publicity and media coverage regarding the crime was extensive in Warren County and created a community wide bias.

Under either the due process clause or KRS 452.210, a court should grant a motion for a change of venue if it appears that the defendant cannot have a fair trial in the county wherein the prosecution is pending. Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997); Brewster v. Commonwealth, 568 S.W.2d 232 (Ky. 1978). The moving party must show that: (1) there has been prejudicial news coverage, (2) it occurred prior to trial, and (3) the effect of such news coverage is reasonably likely to prevent a fair trial. Brewster, supra at 235 (citing Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)); see also Bowling, supra. "The mere fact that jurors may have heard, talked, or read about a case is not sufficient to sustain a motion for change of venue, absent a showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant." Brewster, supra, at 235.

In both his motions before the trial court and in his appeal to this Court, Appellant has not demonstrated that the news coverage was reasonably likely to prevent a fair trial. Appellant's counsel conducted an extensive *voir dire* examination regarding the publicity of the case. Several jurors stated that they were exposed to media coverage regarding the case in some capacity, but also explained that they could not remember

details and were not prejudiced as a result. Those individuals who were exposed to and remembered prejudicial publicity and/or who had formed an opinion as to guilt or innocence were excused from the jury panel. In addition, the trial court informed the jurors to refrain from media exposure during their jury service. Appellant does not identify any seated jurors who were prejudiced by media publicity. The trial court has discretion to determine whether to grant a motion for change of venue, and we find no abuse of discretion. Kordenbrock v. Commonwealth, 700 S.W.2d 384 (Ky. 1985). See also Bowling, supra (no abuse of discretion occurred where almost every potential juror had heard or read something about the case, but the seated jury did not remember the details of publicity and indicated that they had not prejudged the case).

II.

Appellant argues that he was entitled to a directed verdict on one of the three counts of first-degree sexual abuse. He claims that the evidence, taken in the light most favorable to the Commonwealth, only supports two counts of sexual abuse. Appellant speculates that J.W.'s testimony confused the jury. Although no charges of sexual abuse related to J.W., she testified to being sexually abused by Appellant without prior notice of this testimony.

Appellant's claim is not properly preserved for review. Appellant's motions for directed verdict and a new trial pertained to venue and did not raise the issue of insufficiency of the evidence. CR 50.01 requires a motion for directed verdict to "state the specific grounds therefor." See Daniel v. Commonwealth, 905 S.W.2d 76 (Ky. 1995). Additionally, we find that Appellant's argument to be without merit as a possible palpable error. Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003). "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." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The evidence presented at trial details repeated acts of sexual abuse that occurred throughout the evening, not including the instance of sodomy. These acts consist of Appellant repeatedly touching P.A., and forcing P.A. to touch him. Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, it was clearly reasonable for jurors to find Appellant guilty on three separate counts of sexual abuse.

III.

Next, Appellant claims that the Commonwealth violated KRE 404(b) by introducing, without notice, testimony that Appellant touched J.W. on the chest during the incident. Appellant claims that this testimony was inadmissible evidence of a prior crime because none of the charges related to J.W. Appellant also alleges that the Commonwealth violated KRE 404(c) by failing to give reasonable pretrial notice of its intention to introduce this evidence. These issues are not preserved, and Appellant requests review as a possible palpable error. RCr. 10.26.

Without delving into questions of whether the Commonwealth purposefully elicited or knew about the disputed testimony from J.W., and whether there was any violation of KRE 404, we can state simply that Appellant suffered no manifest injustice from the disputed testimony. RCr. 10.26 ("Appropriate relief may be granted upon a determination that manifest injustice has resulted."). In light of the totality of evidence supporting Appellant's convictions on all counts, we do not find that J.W.'s testimony that Appellant touched her – during the same course of events – prejudiced the jury in any significant manner or had a substantial effect on the outcome of the case. Partin v.

Commonwealth, 918 S.W.2d 219 (Ky. 1996)(in order to find palpable error, there must be a substantial possibility that the result would have been different without the error). Furthermore, as discussed above, we disagree with Appellant's contention that the jury based one of the first-degree sexual abuse convictions on J.W.'s testimony.

IV.

Appellant argues that he was denied a fair trial because the jury was allowed to see an unredacted copy of his statement to the police. Appellant's police statement made a reference to his earlier sex offense conviction. The trial court granted a motion to suppress the portions of his statement that referred to that conviction.

During a bench conference at trial, the Commonwealth indicated that it intended to distribute a transcribed copy of Appellant's police statement to the jury so that they could read along as the audio of the statement was played. The Commonwealth stated that this transcription had been redacted to exclude evidence of Appellant's prior conviction. Defense counsel had no objection. Almost immediately after the copies were distributed, and before the audio was played, defense counsel approached the bench and inquired as to whether the version of the transcript given to the jury was the redacted version. The Commonwealth stated that it had missed the redaction of one portion. The jury was asked to stop reading the transcript. The trial court asked both parties whether they would accept recessing for the evening, redacting the transcript once again, and resuming in the morning. Both parties agreed to this proposition. In the morning, the jury was given the fully redacted transcript.

Appellant now argues that his conviction should be reversed and remanded because the jury was exposed to highly prejudicial material. Upon review of the record, we find that this alleged error is not properly preserved for review. Defense counsel

accepted the trial court's remedy of redacting the inadmissible portion of the transcript and redistributing it in the morning, and made no objection or request for relief of any kind. Therefore, we will only review this issue as a possible palpable error. RCr. 10.26.

Although neither party has alerted us to the exact wording of the information that was mistakenly not redacted in the first version of the transcript, we can assume that it was information pertaining to Appellant's previous conviction. Nevertheless, we do not find palpable error. The jury possessed the unredacted transcript for a brief period of time, approximately forty-five seconds. Given the fact that this was a transcript for the jury to read along with as the audio played, it is unlikely that the jury read ahead to the prejudicial information in the forty-five seconds that it possessed the information. As such, it is not obvious, and fairly doubtful, that there was any error at all. See Ernst v. Commonwealth, 160 S.W.3d 744, 759 (Ky. 2005) (obviousness is an element of palpable error). Both parties found the trial court's cure to be acceptable, and we find no reason to hold otherwise.

V.

Next, Appellant claims that he was entitled to a directed verdict of acquittal on the defense of intoxication. Appellant argues that his voluntary intoxication negated the element of criminal intent on all charges. See KRS 501.080(1)("Intoxication is a defense to a criminal charge only if such condition ... negatives the existence of an element of the offense."). Appellant did not move for directed verdict on this specific ground. Therefore, for reasons discussed above, this issue is not properly preserved. Even upon review as a possible palpable error, Appellant's argument fails.

The above discussed test for appellate review of directed verdict, as applied to the defense of intoxication, requires the evidence to be "so overwhelming as to compel

a finding by the jury" that the defendant "was intoxicated to the degree that he did not know what he was doing." Salisbury v. Commonwealth, 556 S.W.2d 922, 924 (Ky. App. 1977). In short, the evidence does not come close to compelling a finding that Appellant was intoxicated to the degree that it negates criminal intent. Aside from Appellant's statement to the police that he was intoxicated, the only other evidence that tends to show that Appellant was intoxicated at all is the fact that Appellant vomited during the evening. P.A.'s account of the events suggests that Appellant was clear-headed and deliberative. For example, the fact that he took steps to ensure that he would not be caught, including his asking P.A. whether she had a cell phone, and holding a knife to her while advising her that she not do anything "stupid" indicates that he was aware of his actions.

VI.

Finally, Appellant argues that he was denied his Sixth Amendment right to a jury verdict on all elements of the offense when the trial court failed to submit to the jury the question of whether a knife was a dangerous instrument. Appellant admits that this issue is unpreserved, and requests review as a palpable error. RCr. 10.26. We decline to review this alleged error in detail because there is not a substantial possibility that the outcome of the case would be any different regardless of whether or not the jury instructions required a finding that the knife was a dangerous instrument. See Partin, supra. No reasonable juror could conclude that the knife was not a dangerous instrument under the facts of this case.

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

All concur.

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