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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0322-MR

DAVID WAYNE KING — APPELLANT

V.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
03-CR-00018

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, David Wayne King, was convicted by a Grayson Circuit Court jury of first-degree rape, first-degree sodomy, and incest. The jury recommended that Appellant serve ten years in prison for the incest charge, twenty-four years for first-degree rape, and twenty-four years for first-degree sodomy, all to run concurrently for a total of twenty-four years. The trial court entered judgment according to the jury's recommendation. Appellant appeals as a matter of right. Ky. Const § 110 (2)(b). For the reasons stated herein, we affirm.

I. FACTUAL BACKGROUND

Appellant dropped out of school at age sixteen (16), unable to read or write. For many years he worked as a laborer on hog farms near his home in Grayson County.

Recently, his sole income has been social security disability benefits. Appellant is divorced. He has two biological children from his marriage, T.K. and A.K.

A few years after Appellant's divorce, his nineteen-year-old daughter, T.K., wrote a letter to her mother describing deviant sexual acts between T.K. and Appellant. The acts occurred when she was between five and nine years of age. T.K. told her mother that when no one else was at home, her father promised her gifts in return for oral sex and intercourse. T.K.'s mother gave the letter to her attorney who turned it over to the Kentucky State Police.

Appellant consented to a polygraph examination which was conducted by the state police examiner, Richard Kurtz. During the examination, Appellant admitted putting his penis in T.K.'s mouth, but did not remember committing any other sexual acts. After the polygraph examination, State Police Detective Chaffins interviewed Appellant a second time. Appellant made the same admission, but denied sexual intercourse or performing oral sex on T.K.

The polygraph examiner, Richard Kurtz, testified regarding his interview with Appellant. The trial court ruled that the word "polygraph" or "lie detector" would not be mentioned in front of the jury. Defense counsel intended to show the videotape of the polygraph examination to demonstrate for the jury the circumstances which led to Appellant's confession to Kurtz. Defense counsel advised the trial court he did not dispute Appellant's confession or its admissibility, but wanted to show the video to apprise the jury of the tactical, and perhaps coercive, style of the interview. The trial court gave defense counsel leave to determine his trial strategy during Kurtz's testimony.

Kurtz testified that his interview lasted two hours and thirty-seven minutes. On cross-examination, Kurtz admitted the only incriminating statement Appellant made was T.K.'s performing oral sex. Appellant told Kurtz that he did not remember any other sexual acts with T.K. Kurtz acknowledged that his questioning was suggestive and that he advised Appellant that the most important issue was for him to receive counseling.

Detective Chaffins testified that Appellant had confessed to T.K.'s performing oral sex, but denied any other sexual acts. Detective Chaffins explained that Appellant had initially denied the allegations, but confessed during a second interview.

At this point, there was another in-chambers conference. Because defense counsel was concerned the tape might inadvertently reveal to the jury the interview was actually a polygraph examination, counsel could not decide whether to play the redacted videotape exam for the jury. Defense counsel explained that Kurtz's testimony described the interview situation, and showing the video would essentially be a "repeat." On the other hand, defense counsel wanted to show the video so the jury could see the "totality of the circumstances" surrounding Appellant's confession. The trial court offered to review the tape with defense counsel to determine admissibility. However, defense counsel ultimately decided not to offer the video into evidence or play it for the jury.

Appellant testified in his own defense, stating that he did not remember any of the interviews he had with either Kurtz or Detective Chaffins. Appellant further testified that the sexual abuse never happened because he worked all the time and hardly ever saw his children when they were young.

II. ANALYSIS

A. Video tape of the polygraph examination

Appellant first argues the trial court erred by denying the jury a viewing of the circumstances of Appellant's confession on the videotape of the polygraph test. Appellant's argument fails for several reasons.

Defense counsel spoke to the trial judge in chambers regarding the possibility the jurors may learn the interview was in the context of a polygraph examination. Both counsel and the trial judge feared a mistrial would result were the word "polygraph" to be mentioned to the jury inadvertently. The trial judge offered to review portions of the video with defense counsel to determine if there were any indications that a polygraph examination was being conducted. Defense counsel, however, vacillitated on whether he wanted to use the video, ultimately deciding not to play it for the jury.

Appellant relies on Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), in which the United States Supreme Court held a defendant may introduce evidence describing the environment in which police elicited the confession. Id. at 691, 106 S.Ct. at 2147. Likewise, Appellant cites Rogers v. Commonwealth, 86 S.W.3d 29 (Ky. 2002), for the proposition that a defendant may show the jury evidence of a polygraph test to illustrate the credibility of a confession. Id. at 40. However, these cases are inapplicable. The issue is not preserved for appeal as defense counsel never moved the trial court for a ruling on admitting the videotape and playing it for the jury. "RCr 9.22 . . . requires contemporaneous objections . . . and gives the trial judge an opportunity to remedy any errors in the proceedings." Salisbury v. Commonwealth, 556 S.W.2d 922, 926 (Ky. App. 1977). In this case, defense counsel could not decide whether to play the tape. Since counsel did not move to offer the tape into evidence,

there were no rulings by the trial court regarding the admissibility of the videotape. As a result, RCr 9.22 precludes review of this issue on appeal.

Appellant further contends that if the error is not preserved, this Court should review as palpable error. We disagree. RCr 10.26 allows appellate review where an unpreserved error in the trial court is so substantial as to result in "manifest injustice" to the party. It is apparent that there is no manifest injustice. Defense counsel explained to the trial court that during the examiner's testimony he elicited all of the favorable testimony he wanted. Counsel further stated playing the videotape would be a "repeat." The trial court afforded defense counsel several opportunities for a review of the videotape, but as trial strategy, counsel declined to pursue the issue.

Appellant further argues the trial court essentially denied his privilege against self-incrimination by making it necessary for him to testify regarding the videotaped interview. This position is also untenable. Before the controversy regarding the videotape became an issue, defense counsel stated Appellant would testify on his own behalf. Appellant also testified on his own behalf, yet had no recollection of any prior interviews. Likewise, defense counsel consulted Appellant regarding whether the videotape should be shown.

We hold Appellant's claim does not constitute palpable error under RCr 10.26.

B. Trial Court Statement to Jurors During *Voir Dire*

Appellant concedes his second argument is not preserved for appeal, but claims it should be reviewed as palpable error. Appellant argues the trial court improperly defined "reasonable doubt" for the jury during *voir dire*. Appellant cites RCr 9.56, which prohibits defining "reasonable doubt" in jury instructions. Appellant also cites Commonwealth v. Callahan, 675 S.W.2d 391 (Ky. 1984), for the proposition that

counsel is not allowed to define reasonable doubt for the jury during trial. Id. at 393 (emphasis added). While this is a correct statement of law, a Callahan issue is not present in this case.

There is no evidence of the trial judge's attempting to define reasonable doubt. Appellant refers to a specific instance at the close of *voir dire*; however, it was not defining the term for the jury. The trial judge told the jury, "[u]nder the law, the testimony of the victim is sufficient to sustain a verdict of guilt if you find the testimony of that victim to be believable and credible." The trial judge continued on this theme, clarifying for the jury that their duty was to weigh the credibility and truthfulness of each witness, and return a verdict based on credible testimony. The record accurately describes the judge's discourse as clarifying the law regarding witness testimony for the jury. There was no impropriety on the part of the trial judge, and accordingly, there was no error.

III. CONCLUSION

Neither issue Appellant raised on appeal was properly preserved for this Court, nor do the claims constitute palpable error. Accordingly, the judgment and sentence of the Grayson Circuit Court are affirmed.

All concur.

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