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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

FINAL

2004-SC-0109-MR DATE 10-13-05 ELA Grayson, D.C.

DANIEL HAYES APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
V. 2003-CR-00079

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A jury of the McCracken Circuit Court convicted Appellant, Daniel Hayes, of first degree rape and first degree sexual abuse. For these crimes, Appellant was sentenced to twenty-one years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

The evidence presented at trial tended to show that upon entering his sixty-eight-year-old stepmother's home by ruse and being permitted to stay the night, Appellant waited for his stepmother to retire for the evening and fall asleep. He then attacked her and tied her to the bedpost. Upon being tied to the bedpost, the victim was raped and sexually abused. Appellant offered his own testimony, admitting that he entered the

home and tied the victim to the bedpost, but explaining that he did not penetrate the victim, that the sexual contact was consensual, and that the contact was part of an ongoing affair.

Appellant first contends the trial court violated his Sixth Amendment right of confrontation when it sustained a Commonwealth objection to defense questioning of the victim regarding whether the victim had told Appellant that she had contracted a sexually transmitted disease. Appellant claims this line of questioning was relevant to prove the central theme of his defense; namely, that the victim falsely accused Appellant of rape because she did not want him to disclose the fact that she had a sexually transmitted disease. This argument cannot be reviewed any further, however, because Appellant did not preserve the alleged error for review pursuant to KRE 103(a)(2). KRE 103(a)(2) provides that where the trial court improperly excludes evidence, the complaining party must make a request for an offer of proof in order to preserve the alleged error for consideration on appeal. See Commonwealth v. Ferrell, 17 S.W.3d 520, 524 (Ky. 2000) ("[W]ithout an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial.")[1]. Furthermore, we do not find the alleged error in this case rises to the level of palpable error to warrant review pursuant to RCr 10.26 or KRE 103(e). Accordingly, we reject Appellant's argument as unpreserved for our review.

Appellant next argues the trial court erred by admitting irrelevant and prejudicial character evidence concerning the victim. He first contends he was prejudiced during a

[1] An offer of proof is also referred to in Kentucky as an offer by avowal. The procedure for offering evidence by avowal or proof in order to preserve an objection for appeal was previously codified in RCr 9.52 and CR 43.10. These rules were deleted in 2004 as redundant in light of KRE 103(a)(2). See Order 2004-5.

voir dire exchange when two panel members stated that they knew the victim. Upon answering affirmatively to the question of whether their knowledge of her would have any bearing upon their ability to sit impartially in the case, the trial judge asked whether they had a close relationship with the victim and whether it would be hard to doubt her veracity. The prosecutor followed up by asking "If [the victim] were to testify would you bring into the jury box an opinion of whether she was a truthful person or not?" The panel members answered affirmatively and indicated that they were more likely to believe what she said than not. Appellant argues that even though these panel members were stricken, the exchange unduly prejudiced the rest of the panel by introducing evidence of her character for truthfulness. Although we agree the exchange resulted in the admission of character evidence in violation of KRE 404(a), we believe such error was harmless beyond a reasonable doubt.

KRE 404(a) states in pertinent part, "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." In this case, the victim was scheduled to testify regarding acts which were being contested by Appellant. Accordingly, any evidence tending to show the victim's character for truthfulness in the absence of a recognized exception to the above stated rule was error. See Caudill v. Commonwealth, 120 S.W.3d 635, 659 (Ky. 2003) (introduction of evidence tending to show victim's character for being "very cautious" in case where there was an issue as to whether the defendants were invited into the victim's home the night she was murdered was inadmissible).

However, we have also stated that "the erroneous admission of evidence is subject to harmless error analysis even in a case where the death penalty has been imposed." Id. at 660. When determining whether an error is harmless, we inquire into

"whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty . . . ." Id. After careful review, we find the comments made by the panel members to have been unintentionally elicited and inconsequential in light of the entire *voir dire* process and subsequent trial. The trial court's act of striking the members mitigated the effect of the error by indicating to the jury that they may not bring preconceived notions of the victim's truthfulness into the trial. Furthermore, contrary to Appellant's contention, we find the truthfulness of the victim's testimony was established not through the parting comments of two stricken panel members, but through her own testimony and the inconsistent testimony and statements of Appellant at trial. When the circumstances are considered in their totality, we find the error to be harmless beyond a reasonable doubt.

Appellant further contends that impermissible character evidence was introduced during the trial. Namely, the victim testified to being retired after forty-four years in nursing and that after she retired, she engaged in various forms of volunteer and charity work to fill her time. While Appellant concedes that none of these alleged trial errors were preserved, when considered as a whole, he claims they should be deemed palpable error pursuant to RCr 10.26. We disagree. "Our Court has recognized that a certain amount of background evidence regarding the victim is relevant to understanding the nature of the crime; that victims are not mere 'statistics.'" Sanborn v. Commmonwealth, 754 S.W.2d 534, 542 (Ky. 1988). We do not believe the background information admitted at this trial was unduly prejudicial to Appellant and even if there was some error in its admission, it did not rise to the level of palpable error to warrant review pursuant to RCr 10.26.

Appellant next argues he was prejudiced by prosecutorial misconduct. During his opening statement, the prosecutor stated that evidence would support a theory that Appellant brought pornographic videos to the scene of the crime for the purpose of stimulating himself in preparation for the sexual assault. The evidence presented at trial established that Appellant had asked the victim whether she had a video cassette recorder (VCR). The victim replied that her VCR was broken. During the closing argument, the prosecutor conceded there was no direct evidence that Appellant brought pornographic videos to the scene, but argued that the question regarding whether the victim had a VCR implied such a fact, especially in light of testimony from both the victim and Appellant that Appellant utilized a vibrator during the sexual contact and that he could not obtain a full erection that night.

Appellant also alleges error in the following comments made by the prosecutor during closing argument, (1) he told the jury that he almost fell out of his chair when he received notice that Appellant intended to claim that he had prior sexual contact with the victim, (2) he told the jury that he was "absolutely certain" that the victim told the truth, and (3) he told the jury that he thought the sixty-eight-year-old woman resisted as much as a woman her age could.

"Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the entire trial." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). In order to grant Appellant a new trial, the misconduct must be so egregious as to render the trial fundamentally unfair. Id. In Wheeler v. Commonwealth, 121 S.W.3d 173, 180 (Ky. 2003), we stated:

> Opening and closing statements are not evidence and wide latitude is allowed in both. Counsel may draw reasonable inferences from the evidence and propound their explanations of the evidence and why the evidence supports their particular theory of the case.

Id. (citations omitted). Although the prosecutor made some provocative remarks, we do not believe they crossed the line into unduly prejudicial territory, nor did they render Appellant's trial fundamentally unfair. Furthermore, any potential prejudice was substantially mitigated by the trial court when it told the jury that opening and closing statements are merely arguments by counsel and do not constitute evidence in the case.

Appellant next argues his convictions should be reversed because the trial court allowed inadmissible and prejudicial hearsay evidence to be considered by the jury. Principally, he contends it was error to allow the Commonwealth to impeach Appellant's testimony by confronting him with a transcript of his fiancé's statements to police. Once again, we cannot address Appellant's argument because he did not timely object to this line of questioning. Rather, Appellant and his counsel approached the trial judge at the start of the next day's session and Appellant (with trial counsel standing by) complained to the judge that it was unfair to attack his credibility in that manner. The trial court explained that the Commonwealth was entitled to attack his credibility just as much as he was entitled to attack the victim's credibility. Appellant then stated that he did not like the trial judge's "attitude" and that such an "attitude" called for a mistrial.

It is well-established that "this Court is limited to the review of those issues that were raised [before] and ruled on by the trial court." Commonwealth v. Maricle, 15 S.W.3d 376, 380 (Ky. 2000). We do not find that the exchange cited above sufficiently presented the hearsay issue now argued by Appellant before the trial court. Accordingly, we do not find the issue preserved for our review. The alleged error also does not constitute palpable error to warrant review pursuant to RCr 10.26.

Appellant next argues there was insufficient evidence to support his conviction for first degree rape. He contends that uncontested evidence showing that he never achieved an erection or fully penetrated the victim during the sexual assault precluded a finding that Appellant engaged in sexual intercourse with the victim. However, while Appellant never achieved an erection during the sexual assault, the victim testified that he forcibly pushed the head of his penis into the opening of her vagina. She further testified that the head of his penis penetrated the opening of her vagina by approximately a half inch to an inch.

KRS 510.040 states in pertinent part that a person is guilty of rape in the first degree when "[h]e engages in sexual intercourse with another person by forcible compulsion." KRS 510.010 (8) states that "[s]exual intercourse occurs upon ***any penetration, however slight***; emission is not required." (Emphasis added). There is nothing ambiguous about this statute. Berry v. Commonwealth, 782 S.W.2d 625, 626 (Ky. 1990) ("An unambiguous statute is to be applied without resort to any outside aids."). Although the penetration was slight, it was sufficient to establish "sexual intercourse" within the meaning of KRS 510.010(8).

Appellant lastly argues error during the sentencing phase of his trial. He contends that objections made by the Commonwealth and sustained by the trial court during the questioning of Appellant's fiancé were erroneous. KRE 611 gives the trial court "broad discretion to control interrogation of witnesses and production of evidence and decisions made in the exercise of this discretion [will not be] disturbed without a clear showing of abuse and prejudice." Metcalf v. Commonwealth, 158 S.W.3d 740, 748 -749 (Ky. 2005).

First, Appellant contends the trial court erred when it refused to allow his fiancé to utilize a three page statement during her testimony. Appellant's counsel stated that the witness preferred to read a three page statement rather than be asked questions because she was afraid she might forget things she wanted to tell the jury. When the Commonwealth objected to the witness simply reading a statement to the jury, Appellant's counsel asked the trial court to allow the witness to use the statement as notes to assist her testimony, which the trial court refused. A writing may be used to assist testimony if it is used for a proper purpose. See Berrier v. Bizer, 57 S.W.3d 271, 276-77 (Ky. 2001) (comparing KRE 612 and KRE 803(5)). We find the trial court did not abuse its discretion when it found the use of the writing in this case to be improper. Furthermore, offering to use the writing as "notes" was not sufficient to establish a proper foundation for refreshing the witness' memory pursuant to KRE 612.

Next, Appellant argues the trial court erred when it sustained several objections during the questioning of his fiancé regarding (1) her opinion as to Appellant's truthfulness or reputation for truthfulness, (2) whether she loved Appellant, (3) whether Appellant ever expressed remorse, and (4) the propriety of several answers given by the fiancé to questions posed by Appellant's counsel. Appellant argues that such rulings, when considered as a whole, effectively precluded him from offering evidence in mitigation or in support of leniency pursuant to KRS 532.055(2)(b). After careful review, we disagree, finding that the trial court either did not err or that such error, when considered cumulatively, does not rise to the level of "abuse and prejudice." Metcalf, supra, at 749.

Last, Appellant argues that evidence regarding prior bad acts which he allegedly committed was inadmissible during the sentencing phase pursuant to KRS

532.055(2)(a). Specifically, he alleges the trial court erred by allowing the Commonwealth to question Appellant's fiancé regarding prior instances of coerced sexual acts he allegedly committed against her and to permit rebuttal testimony regarding her denial of the same. KRS 532.055(2)(a) permits the Commonwealth to present certain types of evidence during the sentencing phase which has been deemed by the legislature to be "relevant to sentencing." Appellant claims the Commonwealth submitted evidence outside the scope of this statute.

However, KRS 532.055(2)(a) does not apply in this case because the questioning and the evidence referred to above was not introduced as part of the Commonwealth's case in chief during the sentencing phase, but was introduced for the purpose of rebuttal pursuant to RCr 9.42(e). "The admission of rebuttal evidence is largely a matter of judicial discretion." Stopher v. Commonwealth, 57 S.W.3d 787, 799 (2001). In this case, Appellant's fiancé testified that he was a wonderful man who always put her needs ahead of others. She further testified during cross-examination that she and Appellant shared a relationship containing intimacy and trust. We find the trial court did not abuse its discretion by determining that such testimony "opened the door" for rebuttal by the Commonwealth regarding whether the fiancé ever accused Appellant of coercing her to endure certain sexual acts.

In sum, when the errors alleged by Appellant are reviewed in light of the entire record, we find the trial court did not abuse its discretion or commit any errors, either individually or in accumulation, which rise to the level of reversible or palpable error. The judgment and sentence of the McCracken Circuit Court are affirmed.

All concur.

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