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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 23, 2005
NOT TO BE PUBLISHED

FINAL
DATE 2-23-06 Ella Grouth, D.C.

Supreme Court of Kentucky

2004-SC-0537-MR

ERIN HENSON — APPELLANT

V.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, SPECIAL JUDGE
03-CR-13

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Laurel Circuit Court jury convicted Appellant, Erin Henson, of one count of sexual abuse in the first degree, KRS 510.110, for which he was sentenced to five years in prison, and one count of sodomy in the first degree, KRS 510.070, for which he was sentenced to life in prison. Appellant appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting four claims of reversible error: (1) the admission of testimony regarding uncharged acts of forcible sodomy, (2) the failure to grant a mistrial after a prosecution witness testified that Appellant was a sex offender, (3) the admission of hearsay statements that improperly bolstered the Commonwealth's case, and (4) the impermissible bolstering of the complaining witness's credibility by a police officer. Appellant also asserts that this Court should vacate the sentencing court's order

overruling his pro se RCr 11.42 motion and remand that issue for an evidentiary hearing.

A Laurel County grand jury indicted Appellant on the charges of sexual abuse in the first degree ("sexual abuse 1st") and sodomy in the first degree ("sodomy 1st") in January 2003. The charges arose after his stepdaughter, H.H. (then fourteen), told her biological father that Appellant had repeatedly sexually abused her when she was between the ages of about six and ten. H.H. claimed she had reported the abuse to her mother and stepgrandmother at the time the abuse began, but that they did not believe her.

After H.H. told her father about the abuse, he contacted the police. Detective Anderkin, a police officer specializing in child sexual abuse cases, interviewed H.H. and Appellant. She then presented the case to the Laurel County Multi-disciplinary Task Force, which recommended presentation to a grand jury. The Commonwealth charged Appellant with sodomy 1st and sexual abuse 1st in connection with two incidents that occurred when H.H. was six or seven years old. The first incident, resulting in the sodomy 1st charge, involved H.H. performing oral sex on Appellant after he ordered her to do so. The second incident, resulting in the sexual abuse 1st charge, involved Appellant digitally penetrating H.H.'s vagina.

I. EVIDENCE OF UNCHARGED ACTS.

As mandated by KRE 404(c), the Commonwealth notified Appellant of its intention to introduce evidence under KRE 404(b)(1) "that the sexual abuse to H.H. occurred on more than one occasion, even though only one offense is charged in order to prove motive, intent, opportunity, plan, identity, knowledge, or absence of mistake or accident." Appellant filed a motion in limine to exclude evidence of his "past

wrongdoings" because "the probative value of such evidence is strongly outweighed by its prejudicial effect." The parties subsequently agreed that the Commonwealth would present evidence of a pattern of abuse, but not specific instances of conduct. The trial court then overruled Appellant's motion in limine, finding that "because of the youth of the victim and the concept of time that children often have at that age . . . these matters [were] so entwined as to allow for [introduction] under the exception set out in 404(b) of the Kentucky Rules of Evidence."

The trial court appears to have ruled that evidence of other acts of abuse by Appellant against H.H. were admissible because they were "so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." KRE 404(b)(2). This provision does not apply to the case sub judice;[1] thus, the trial court's ruling was erroneous. However, we held in Pendleton v. Commonwealth, 83 S.W.3d 522 (Ky. 2002), that "[e]vidence of similar acts against the same victim is admissible under KRE 404(b)(1) as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. at 828 (internal quotations omitted); see also Price v. Commonwealth, 31 S.W.3d 885, 888 n.4 (Ky. 2000). Thus, the trial court's

[1] KRE 404(b)(2) is reserved for situations where the evidence proves an "integral part[] of one continuous transaction," Caldwell v. Commonwealth, 503 S.W.2d 485, 489 (Ky. 1972), or is necessary to show a "complete, unfragmented picture of the crime and investigation," Adkins v. Commonwealth, 96 S.W.3d 779, 793 (Ky. 2003). "[T]he key to understanding this exception is the word 'inextricably.' The exception relates only to evidence that must come in because it 'is so interwoven with evidence of the crime charged that its introduction is unavoidable.'" Funk v. Commonwealth, 842 S.W.2d 476, 480 (Ky. 1992) (emphasis added) (quoting Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.20, at 37 (2d ed. Michie 1984); see also Metcalf v. Commonwealth, 158 S.W.3d 740, 743-44 (Ky. 2005); Lawson, supra, § 2.25[4], at 136-40 (4th ed. LexisNexis 2003).

decision to admit this evidence was correct though for the wrong reason. Noel v. Commonwealth, 76 S.W.3d 923, 929 (Ky. 2002).

The Commonwealth elicited the following testimony during the direct examination of H.H.:

> Prosecution: Did [the defendant] ever physically make you suck his penis? Do you ever remember a time like that?
>
> H.H.: There was times that he would force me.
>
> Prosecution: Can you explain to this jury what you mean by force. Okay?
>
> H.H.: He would grab my hand or my head, and he would force my head down to his penis.
>
> Defense: Your Honor I object.

Appellant objected on grounds that the Commonwealth was referring to specific instances of conduct rather than limiting its examination to a general pattern of abuse, as the parties had agreed. The trial court implicitly sustained the objection by telling the Commonwealth's Attorney to focus his questioning on the charged acts. Appellant did not request any additional relief.

Appellant now asserts it was reversible error to admit the above testimony because: (1) the Commonwealth's pretrial notice was insufficient under KRE 404(c) because, although the notice cited acts of "sexual abuse," the prosecutor elicited evidence of acts of forcible sodomy from H.H., and (2) that the probative value of the evidence was substantially outweighed by its prejudicial effect. To preserve an issue for appeal, a party must inform the court of its error and the requested relief. RCr 9.22; West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989). Furthermore, "[w]here a party specifies his grounds for an objection at trial, he cannot present a new theory of error on appeal." Gabow v. Commonwealth, 34 S.W.3d 63, 75 (Ky. 2000); Ruppee v.

Commonwealth, 821 S.W.2d 484, 486 (1991), overruled on other grounds by Lovett v. Commonwealth, 103 S.W.3d 72 (Ky. 2002).

Appellant's objection to H.H.'s testimony did not state either ground of error that he now asserts on appeal. Furthermore, after his objection was implicitly sustained, he did not request any additional relief. Therefore, no error in lack of KRE 404(c) notice is preserved for appeal. Gabow, 34 S.W.3d at 75; West, 780 S.W.2d at 602.

Appellant did make a motion in limine to exclude evidence of "past wrongdoings" on the grounds that the probative value of the evidence would be outweighed by its prejudicial effect, and such motions normally preserve issues for appeal without need for an objection at trial. KRE 103(d). However, to preserve error without further objection at trial, a motion in limine to exclude evidence cannot be "broad" or "generic;" it must "specif[y] what evidence should be suppressed and why . . . ." Davis v. Commonwealth, 147 S.W.3d 709, 722 (Ky. 2004). As a result, a general request to exclude all of Appellant's "past wrongdoings" was not specific enough to preserve for appeal an objection to a specific instance of misconduct. To preserve the issue, Appellant needed to object at trial. Id. at 722-23. He did so, but not on the grounds he now asserts on appeal. Finally, since the trial court did not sustain Appellant's motion in limine, we assume it concluded that the prejudicial effect of the evidence did not substantially outweigh its probative value. KRE 403. A trial court's balancing of probative value against prejudicial effect is reviewed for abuse of discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). We conclude that the trial court did not abuse its discretion in this regard.

II. MISTRIAL.

Appellant asserts that a mistrial should have been granted after H.H.'s mother testified on cross-examination that Appellant was a sex offender. The victim's mother was the Commonwealth's witness, and during defense counsel's cross-examination, he inquired:

> Attorney: Have you ever been involved with the Cabinet for Families and Children?
>
> Witness: Yes.
>
> Attorney: And how did that come about? First?
>
> Witness: That's when Erin [Appellant] got out of jail, he, when he got out, he came to where I lived at. He was drunk, and he assaulted my eleven year old, and that's when the social workers found out that he was a sex offender, and they took my kids from me.

Appellant did not request that the jury be admonished to disregard this testimony and did not request a mistrial until almost an hour after the testimony was adduced.

The witness's statement about Appellant's status as a sex offender was undoubtedly prejudicial. However, the question was asked by Appellant's own counsel, and "[o]ne who asks questions which call for an answer has waived any objection to the answer if it is responsive." Mills v. Commonwealth, 996 S.W.2d 473, 485 (Ky. 1999) (quoting Estep v. Commonwealth, 663 S.W.2d 213, 216 (Ky. 1983)). The answer here was responsive to the cross-examination question and was "properly attributable to [the] actions of the complaining party." Lawson, supra note 1, § 1.10[5], at 43 (4th ed. LexisNexis 2003). Therefore, Appellant's right to object to the answer or request a mistrial was waived. Had Appellant wished to foreclose such a response, he might have asked a question requiring a yes or no answer.

Even if Appellant's motion for a mistrial had not been waived, whether to grant a mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed absent an abuse of that discretion. Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky. 2004). "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice." Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996). The fact that Appellant asked a question on cross-examination that elicited an unexpected and prejudicial response is not a fundamental defect in the proceedings resulting in manifest injustice. It is the type of prejudice easily cured by an admonition, Matthews v. Commonwealth, 163 S.W.3d 11, 18 (Ky. 2005); Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000), and Appellant did not request a curative admonition. Therefore, the trial court did not abuse its discretion by refusing to grant a mistrial.

III. HEARSAY AND IMPROPER BOLSTERING.

Appellant asserts that his conviction should be reversed because multiple hearsay statements at trial in the form of prior consistent statements had the effect of improperly bolstering H.H.'s credibility. Conceding that the issue is unpreserved, he requests palpable error review under KRE 103(e). The statements at issue were: (1) statements by H.H. that she told her mother and stepgrandmother about the crimes soon after they occurred and informed her biological father when she was fourteen, (2) a statement by H.H.'s biological father that he contacted the state police after H.H. confided in him about "some things that [Appellant] may have done to her," and (3) a statement by Detective Anderkin that H.H. told her about experiencing digital penetration and oral sex since the age of seven.

The latter two statements were clearly hearsay, i.e., out-of-court statements "offered into evidence to prove the truth of the matter asserted." KRE 801(c). All of the statements related prior consistent statements made by H.H. and were offered to bolster her trial testimony that the sexual abuse actually occurred, i.e., the truth of the matter asserted. Hearsay is generally inadmissible, KRE 802, and Appellant properly cites Miller v. Commonwealth, 77 S.W.3d 566 (Ky. 2002), as authority that under KRE 801A(a):

> [t]here are only three circumstances when a prior hearsay statement of a witness is admissible as substantive evidence at trial: (1) when the prior statement is inconsistent with the witness's present testimony; (2) when the prior statement is consistent with the witness's present testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or (3) when the prior statement is one of identification of a person made after perceiving the person.

Id. at 570. H.H. and two other witnesses testified that she made prior statements consistent with her trial testimony that Appellant sodomized and sexually abused her. Appellant argues that these statements were inadmissible because they were not offered to rebut any express or implied charge of recent fabrication, KRE 801A(a)(2), as they were elicited during the prosecution's case-in-chief at a time when no charge of recent fabrication had been made.

Assuming, arguendo, that Appellant's contention is correct, the fact remains that he did not object to any of the statements at trial. Therefore, we review for palpable error, or an error that affected Appellant's substantial rights and resulted in manifest injustice. KRE 103(e); Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997). Palpable error must be such that "a failure to notice and correct [it] would seriously affect the fairness, integrity, and public reputation of the judicial proceeding. A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily

dependent upon the facts of each case." Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005) (internal citations and quotations omitted).

It was pointed out during trial that Appellant was separated from H.H.'s mother for a period of seven years. During that time, H.H.'s mother had unsuccessfully attempted reconciliation with H.H.'s biological father and H.H. had lived with her biological father for short periods of time. Prior to the separation, Appellant had disciplined H.H., and H.H. admitted that she and Appellant did not get along well. Appellant moved back in with the family only three or four days before H.H. reported to her biological father that Appellant had molested her some eight years before. This evidence strongly suggested that H.H. reported the alleged molestation to her biological father in order to get rid of Appellant or, at least, so that she could live permanently with her biological father. In fact, defense counsel recounted this evidence during closing argument as giving H.H. a "reason to lie." During cross-examination of H.H., defense counsel also opined to the trial judge within hearing of the jury that H.H had been "coached" by the prosecutor, to which the judge replied that "the jury will decide whether she has been coached." In light of these insinuations and considering the entire record, we conclude that any bolstering of H.H.'s testimony by introduction of her prior consistent statements did not rise to the level of manifest injustice. Cf. Reed v. Commonwealth, 738 S.W.2d 818, 821 (Ky. 1987) (when rehabilitation evidence is admitted before credibility is attacked, any error is harmless as long as credibility is in fact later impeached). Therefore, there was no palpable error.

IV. IMPERMISSIBLE BOLSTERING.

Appellant next asserts that Detective Anderkin further improperly bolstered H.H.'s credibility by testifying that "[H.H] answered the questions to the best of her ability."

Again, there was no objection to this testimony; thus, we review only for palpable error. KRE 103(e).

A police officer may not testify that he or she believes the complaining witness told the truth. Alexander v. Commonwealth, 862 S.W.2d 856, 859 (Ky. 1993), overruled on other grounds by Stringer v. Commonwealth, 956 S.W.2d 883, 859 (Ky. 1997); Bussey v. Commonwealth, 797 S.W.2d 483, 485-86 (Ky. 1990). However, Detective Anderkin did not state that she believed H.H told her the truth. She simply stated that H.H. answered the questions to the best of her ability, implying that H.H. was cooperative during the interview. The admission of Detective Anderkin's testimony that H.H. answered the interview questions "to the best of her ability" was not erroneous, thus could not have been palpable error.

V. RCr 11.42 MOTION.

Appellant prepared a pro se RCr 11.42 motion alleging ineffective assistance of counsel. During his sentencing hearing, the court took notice of the motion, heard argument from Appellant, his counsel, and the Commonwealth's Attorney, and overruled the motion. Appellant now asks this Court to vacate the sentencing court's order overruling his RCr 11.42 motion and to remand his motion for an evidentiary hearing. First, this issue is not properly before us. This aspect of Appellant's appeal is from the denial of his RCr 11.42 motion, not from his conviction and sentence of twenty years or more in prison, Ky. Const. § 110(2)(b). Therefore, he should have appealed the denial of his RCr 11.42 motion to the Court of Appeals. KRS 22A.020(1).[2] Nevertheless, in

[2] CR 73.01(2), made applicable to criminal cases by RCr 12.02, details the appellate procedure that should have been followed in this case.

the interest of judicial economy, we will review the issue rather than remand it to the Court of Appeals.

Appellant alleged in his RCr 11.42 motion that his counsel was deficient in: (1) failing to request a mistrial immediately after H.H.'s mother, in response to a question by Appellant's counsel on cross-examination, mentioned that Appellant was a sex offender, (2) failing to present evidence of Appellant's genital birthmark after H.H. testified that she noticed nothing unusual about Appellant's genitals, and (3) failing to present an allegedly favorable defense witness.

When an RCr 11.42 motion is filed, certain procedures must be followed.

> 1. The trial judge shall examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion may be summarily dismissed.
>
> 2. . . . [T]he trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.
>
> 3. If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing. If the movant does not request appointment of counsel, the trial judge has no duty to do so sua sponte.

Fraser v. Commonwealth, 59 S.W.3d 448, 452-453 (Ky. 2001) (internal citations omitted).

In addressing the motion, the sentencing court followed the procedure outlined in Fraser. The court examined the motion and allowed Appellant to proceed, presumably finding that the motion "specifie[d] grounds and supporting facts that, if true, would warrant relief." Id. at 452. Appellant's claim with respect to the motion for a mistrial was subject to resolution from the face of the record. As previously noted, the introduction of

the evidence in question was not grounds for a mistrial. The other two claims could not be resolved from the face of the record because to substantiate them Appellant needed to present proof that he had a genital birthmark to show that its existence would have impeached H.H.'s credibility, and proof that his allegedly favorable witness would have testified to his advantage. Therefore, an evidentiary hearing was required.

Appellant was given an opportunity to produce whatever would have supported his claims of ineffective assistance and did not proffer any evidence in support of his allegations. He was represented by trial counsel at the hearing and did not request that a new and different attorney represent him on the motion. As the failure to move for a mistrial did not prejudice Appellant and no evidence was presented to prove his other claims, the sentencing court did not err in overruling Appellant's RCr 11.42 motion.

Accordingly, we affirm the convictions and sentences imposed by the Laurel Circuit Court and the denial of Appellant's RCr 11.42 motion.

All concur.

COUNSEL FOR APPELLANT:

Irvin Halbleib, Jr.
P.O. Box 16175
Louisville, KY 40256

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General
State Capitol
Frankfort, KY 40601

George G. Seelig
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601