

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2004-SC-1108-MR

DATE 3-16-06 E.A. Grawitt P.C.

JAMES R. BEARD, JR.

APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
03-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Charles Richard Beard, Jr., was convicted by a Hardin Circuit Court jury of first-degree sodomy, incest, and first-degree persistent felony offender (PFO). The jury recommended a twenty year sentence, and the trial court entered judgment accordingly. Appellant appeals to this Court as a matter of right. Ky. Const. § 110 (2)(b). For the reasons stated herein, we affirm.

FACTUAL BACKGROUND

In January 2001, Appellant's biological daughter, V.B., told her guidance counselor she was being sexually abused by her father. V.B. wrote a statement recounting the details of January 17, 2001, specifically stating that Appellant had forced V.B. to perform oral sex on him. At trial, V.B. testified that Appellant began molesting her after her thirteenth birthday in May 2000. V.B. explained that when she was in trouble, Appellant would decrease her punishment if she performed sexual favors.

Appellant testified on his own behalf, claiming V.B. made these allegations as retaliation for being grounded after she misbehaved.

Appellant raises three issues on appeal: 1) trial court error in denying Appellant's motion to dismiss the indictment; 2) sufficiency of the evidence on the sodomy charge; and 3) prosecutorial misconduct.

I.

Appellant first argues the trial court should have granted his motion to dismiss the superseding indictment issued by the Commonwealth. The first indictment listed the date of offense as January 17, 2001; however, the superseding indictment amended the date to reflect May 2000 – January 2001 as the date of offense. Other than the change in date, no other information was added or deleted to the indictment. Appellant claims the superseding indictment was duplicative because it alleged a continuing course of conduct, and it denied Appellant the right to a unanimous jury verdict. We find these contentions without merit.

An indictment is duplicative when two separate charges are made in one single count. Benge v. Commonwealth, 304 Ky. 609, 201 S.W.2d 892, 894 (1947). In the case at bar, Appellant was charged with one count of incest, one count of first-degree sodomy, and one count of first-degree PFO. Revising the indictment to read “May 2000 – January 2001” does not result in multiple charges under a single count. This situation is similar to cases where an indictment is amended to reflect a different date of offense. See, e.g., Anderson v. Commonwealth, 63 S.W.3d 135, 140-41 (Ky. 2001). RCr 6.16 allows amendment of an indictment “if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.” Although in this case the prosecutor formally dismissed the indictment and issued a superseding indictment, only

the dates were changed. Appellant was not prejudiced by the superseding indictment, nor was the indictment duplicative.

Appellant also claims he was denied the right to a unanimous verdict. In closing, the prosecutor recounted the testimony of V.B. describing earlier incidents of abuse. Appellant opines the jury was confused and convicted Appellant for these earlier events, which did not meet the statutory threshold of sodomy.

We find this argument unpreserved for our review and without merit. RCr 9.22 requires a party to inform the trial court of a perceived error and the remedy desired. Appellant did not object to the prosecutor's comments, nor did he object to the jury instructions.

II.

Appellant's second claim is trial court error in denying his motion for a directed verdict. Appellant argues the Commonwealth failed to prove the statutory elements of sodomy, therefore entitling Appellant to a directed verdict of acquittal on the charge. We disagree.

First, we find that this issue is not properly preserved for our review. Appellant moved for a directed verdict at the close of the Commonwealth's case; however, he failed to renew the motion at the close of all evidence. Appellant claims the issue is preserved because he moved for judgment notwithstanding the verdict at the end of the trial. Alternatively, Appellant requests review as palpable error. RCr 10.26.

It is well settled in Kentucky that "[a] motion for a directed verdict made at the close of the plaintiff's [here the Commonwealth's] case is not sufficient to preserve error unless renewed at the close of all the evidence. . . ." Kimbrough v. Commonwealth, 550

S.W.2d 525, 529 (Ky. 1977); see also, Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998).

Even if the issue were preserved, Appellant does not have a viable claim. “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). In this case, the Commonwealth introduced ample testimony and evidence for the jury to convict the Appellant of first-degree sodomy. Consequently, the trial court properly denied Appellant’s motion for directed verdict of acquittal, and we find palpable error review unnecessary.

III.

Appellant’s final claim is prosecutorial misconduct. Appellant alleges the Commonwealth misstated the law during its closing argument and confused the jury as to the definitions of “sexual abuse” and “sodomy.” Appellant concedes this issue is not preserved for our review, but urges palpable error review under RCr 10.26.

Relief may be granted for palpable error under RCr 10.26 only if “manifest injustice” results from an error affecting the “substantial rights” of a party. Since the error claimed by Appellant is not structural, the reviewing court must consider the case as a whole, and “conclude that a substantial possibility exists that the result would have been different in order to grant relief.” Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

We find Appellant’s argument without merit. In this instance it cannot be said the prosecutor’s statements “baffled” the jury and created an error of manifest injustice. It is also relevant that the jury instructions stated the correct definitions of the offenses under

consideration, and Appellant did not object to the instructions submitted to the jury. Accordingly, the prosecutor's comments do not constitute reversible error.

Conclusion

For the reasons stated herein, the judgment and sentence of the Hardin Circuit Court are affirmed.

All concur.

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