

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MARCH 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0259-MR

DATE 4-13-06 ELIAC SCW/HJC

WILLIAM DILLARD SMITH

APPELLANT

V.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
2003-CR-0034

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Smith of sodomy in the first degree, two counts of sexual abuse in the first degree, sexual abuse in the second degree, sexual abuse in the third degree and two counts of incest. He was sentenced to serve life in the penitentiary.

Smith presents three questions for review: 1) whether rights to due process were violated when the jury found him guilty of sodomy in the first degree and the trial judge failed to direct a verdict in his favor; 2) whether evidence of other crimes, wrongs and bad acts violated KRE 404(b); and 3) whether there was error by the trial judge when it failed to change the pre-sentence report.

Smith, an over-the-road truck driver, his wife and two children from her previous marriage, lived together. The family experienced a string of multiple financial troubles. Smith's defense was that the charges leveled against him by the two children were, at

their core, fabrications developed by his wife as revenge for his refusal to sell the family homestead and solve the financial problems. One child testified to acts of sexual contact including being forced to perform oral sodomy on Smith sometime in 1999 or 2000. That child's 12th birthday was in the spring of 2000. Both Smith's wife and the child testified to several acts of abuse. Another child testified to additional sexual acts. At sentencing, Smith claimed that the listing of a prior drug conviction was an error in the pre-sentence report. The trial judge noted the objection but did not change the facts as presented in the report.

The jury convicted Smith of sodomy in the first degree, two counts of sexual abuse in the first degree, sexual abuse in the second degree, sexual abuse in the third degree and two counts of incest. He was sentenced to serve life in the penitentiary. This appeal followed.

I. Directed Verdict

Smith argues that it was error for the trial judge to fail to deliver a directed verdict in his favor on the charge of sodomy in the first degree. Although counsel made a general motion for directed verdict, instructions regarding the sodomy charge were tendered and this issue was never raised until appeal. See Anastasi v. Commonwealth, 754 S.W.2d 860, 862 (Ky. 1988). Specific grounds for a directed verdict are required pursuant to CR 50.01. See Daniel v. Commonwealth, 905 S.W.2d 76, 79 (Ky. 1995).

Even if this Court were to accept review under the "manifest injustice" standard of RCr 10.26, Smith is not entitled to relief. The witness testified that the act occurred and provided a range of dates. The jury evaluates that evidence. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). The jury chose a time when it thought the crime

occurred. This Court will not substitute its judgment for that of the jury. Commonwealth v. Jones, 880 S.W.2d 544 (Ky. 1994).

II. Evidence of Prior Abuse

The trial judge is granted wide discretion in its decisions involving rebuttal evidence. See Pilon v. Commonwealth, 544 S.W.2d 228 (Ky. 1976). The wife's testimony regarding the abuse was rebuttal and allowed by the trial judge after Smith opened the door by claiming the children reported any abuse only because their mother told them to do so. The testimony was material to the proposed defense that the children were not telling the truth. It was rebuttal evidence referring to Smith's allegations that the children were not telling the truth.

Evidence given to explain, repel, counteract or disprove facts given in evidence by the opposing party. That which tends to explain or contradict or disprove evidence offered by the adverse party. Black's Law Dictionary 876 (6th ed. 1991). There was nothing improper in the ruling of the trial judge. The error, if any, is harmless.

III. Pre-Sentence Report

When presented with the facts of the pre-sentence report, Smith claimed the listing of a prior conviction was in error and asked the trial judge to note his disagreement. The trial judge obliged. The Judgment and Sentence On Plea Of Not Guilty reflects Smith's contention that the pre-sentence report contained an error. Smith could have requested a hearing and there presented evidence to controvert the contents of the report. He did not request a correction. He did not request a new report. KRS 532.050(6). The trial judge provided all of the relief requested.

Smith now contends that any error in the pre-sentence report could potentially negatively affect him when he becomes eligible to meet the parole board. The claim has not been properly preserved for appellate review. Any issue is speculative and not ripe for review. Associated Industries of Kentucky v. Commonwealth, 912 S.W.2d 947 (Ky. 1995).

The judgment of conviction is affirmed

All concur except Cooper, J., dissents because he does not believe that Appellant's claim that his wife caused the children to report the sexual abuse "opened the door" to evidence of Appellant's bad character for violence.

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