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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MAY 18, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 6-8-06 [illegible] D.C.

2004-SC-000548-MR

JAMES R. BEARD, SR. APPELLANT

VS. APPEAL FROM HARDIN CIRCUIT COURT
HON. KELLY MARK EASTON, JUDGE
INDICTMENT NO. 03-CR-00209

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from a judgment entered on June 14, 2004, by the Hardin Circuit Court sentencing James R. Beard, Sr. (appellant) to a life term of imprisonment upon conviction of two counts of first-degree rape, ten (10) years for each of two counts of incest, and ten (10) years for first-degree unlawful transaction with a minor. The appellant appeals to this court as a matter of right pursuant to Ky. Const. §110(2)(b).

The appellant argues on appeal that the trial court committed reversible error and denied the appellant due process when it failed to excuse two prospective jurors for cause and allowed admission of highly prejudicial evidence at trial. He moves this Court to reverse his conviction and remand to the Hardin Circuit Court for a new trial.

Final sentencing occurred on June 14, 2004, and notice of appeal was filed on July 12, 2004. After review of the record, we AFFIRM the trial court's ruling.

FACTS

After the appellant's mobile home caught fire in December of 1997, he and his adopted son, C.B., moved into the home of his son, Gregory. Melissa, Gregory's wife, and their two children, J.W. and R.B., resided in the home. At some point in the spring of 1998, R.B. was left alone with the appellant while her mother was out of town and her father, brother, and C.B. were outside. He told R.B. he needed to "check" her without any clothing because it was his duty to make sure that R.B.'s mother was taking good care of her and keeping her clean. He proceeded to take her into his bedroom. There, the appellant began touching her body, pulled his pants down, and put his penis inside of her "private part."[1] The appellant told her he would kill her if she told anyone. R.B. was seven years old.

Several months later, the appellant and C.B. moved into a new mobile home. R.B. and her brother would go over and visit the appellant to fish in his pond, play with his dogs, and feed the animals. On one visit, while R.B., her brother, and C.B. were fishing, the appellant told R.B. to come into his home. After she entered the appellant's home, he gave her a candy bar, and she sat down to eat it. Then, the appellant showed her a piece of wood that was carved to the likeness of a male's penis. He told R.B. the wooden penis would help

[1] R.B. referred to her vagina and a male's penis as private parts.

keep her clean, and he then proceeded to insert the wooden penis into her "private part."

On another occasion, the appellant took R.B. and C.B. into his bedroom and forced C.B. to hold R.B. down while he raped her.[2]

All these events took place in 1998. In 2002, R.B. reported these allegations to a friend, whose mother notified authorities. R.B. first told a social worker that the appellant only touched her on top of her clothes, but later changed her story stating she was afraid he would kill her if she told anyone.

On May 30, 2003, the Hardin County Grand Jury returned indictment No. 03-CR-209, charging the appellant with two counts of first-degree rape, two counts of incest, and first-degree unlawful transaction with a minor. The appellant entered a plea of not guilty on June 24, 2003. A jury trial was held in March of 2004, and the jury returned a verdict of guilty. On June 1, 2004, the Hardin Circuit Court sentenced the appellant to a life term of imprisonment. This appeal followed.

ISSUES

Denial of motions to strike jurors P and L for cause

The appellant argues that the trial court erred when it overruled his motions to strike two prospective jurors, P and L, for cause. Both jurors were struck by the appellant's peremptory challenges after the trial court denied his motions to strike them for cause. Neither juror participated in the verdict in this case.

[2] C.B. was approximately 14 years old when this incident occurred. R.B. was now eight years old.

"It is elementary that the determination of whether to excuse a prospective juror rests within the sound discretion of the trial judge and ought not to be set aside by a reviewing court unless the error is manifest." Peters v. Commonwealth, 505 S.W.2d 764, 765 (Ky. 1974) (citing 47 Am.Jur.2d Jury §305, page 880); See Butcher v. Commonwealth, 96 S.W.3d 3, 11 (Ky. 2002) (defining manifest as an error that affects the substantial rights of a party.) "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Peters, 505 S.W.2d at 765 (citing Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L .Ed.2d 751 (1961)). "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." Id.

"The real test is whether, after having heard all the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." Bowling v. Commonwealth, 942 S.W.2d 293, 299 (Ky. 1997) (citing Mabe v. Commonwealth, 884 S.W.2d 668 (Ky. 1994)). "Disqualification of a juror is merited only when the juror's knowledge precludes impartiality." Id. at 300. Furthermore, there is no constitutional violation "as long as the jury that actually hears and decides the case is impartial," and "even if a juror should have been removed for cause, such error does not violate the constitutional right to an impartial jury if the person did not actually sit on the jury." Morgan v. Commonwealth, --- S.W.3d ---, 2006 WL 140564, 5 (Ky. 2006) (citing Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct 2273, 101 L.Ed.2d 80 (1988); Turpin v. Commonwealth, 780 S.W.2d 619 (Ky. 1989)). "[F]or there to be error,

[he] has the burden of showing that [his] use of a peremptory challenge to strike each venireman 'resulted in a subsequent inability to challenge additional unacceptable veniremen.'" Foster v. Commonwealth, 827 S.W.2d 670, 676 (Ky. 1991) (citing Marsch v. Commonwealth, 743 S.W.2d 830 (Ky. 1988)).

JUROR P

Juror P told the court that his daughter was sexually assaulted on a school bus when she was in high school and that this trial may bring back memories of that experience.[3] However, he assured the court that he could be fair and impartial because his personal experience had no bearing on this matter. Although the trial judge said it was "close," he overruled the appellant's motion to strike for cause.

There have been closer calls upheld by this Court. In Whalen, a case involving rape and sodomy, it was held that the trial court did not abuse its discretion in refusing to strike a juror who had been raped by her stepfather after satisfying the court that she could objectively evaluate the evidence on all counts and render a fair verdict. Whalen v. Commonwealth, 891 S.W.2d 86 (Ky. App. 1995) *overruled on other grounds by* Moore v. Commonwealth, 990 S.W.2d 617 (Ky. 1999); Bowling v. Commonwealth, 942 S.W.2d 293, 299 (Ky. 1997). Based on the record, Juror P assured the trial court that he could be impartial and make a decision based on the evidence in the case. He stated that his past experience would have no influence on the case at hand, and the trial court made its

[3] Juror P approached the bench after the jurors were asked if anyone had ever been convicted of a felony or had other family members convicted of a felony. Juror P's son-in-law had been convicted of a DUI. Juror P stated his daughter was 22 at the time of this trial.

decision based upon its inquiry of Juror P. Therefore, the trial court did not abuse its discretion when it denied the motion to strike Juror P for cause.

JUROR L

Later during voir dire, the prosecutor asked whether or not the members could consider the minimum and maximum penalties if the appellant was found guilty beyond a reasonable doubt. At that time, Juror L approached the bench and stated that he had a preconceived opinion that anyone who would mistreat a twelve year old should get the maximum penalty.

When a juror states "that he would follow the law and consider the full range of penalties, [t]hat is all that is required on this issue." Hodge v Commonwealth, 17 S.W.3d 824, 837 (Ky. 2000). "The trial judge [is] not required to excuse him for cause [simply] because the juror favors severe penalties, so long as he or she will consider the full range of penalties." Hodge, 17 S.W.3d at 837 (citing Bowling v. Commonwealth, 873 S.W.2d 175 (Ky. 1993) *cert. denied*, 513 U.S. 862, 115 S.Ct. 176, 130 L.Ed.2d 112 (1994)). In Hodge, one of the jurors stated that although she could consider the minimum penalty, she would "have trouble" imposing a minimum sentence. Id. at 837. "Nevertheless, she reiterated that she could consider the full range of penalties, including the minimum," and this Court held there was no error in failing to excuse her for cause. Id.

Juror L ultimately indicated to the court that he could consider the entire range of penalties, along with any mitigating evidence. He additionally stated that he would be able to listen to mitigating evidence and give all possible sentences fair consideration. Like the juror in Hodge, Juror L assured the trial

court he could consider the full range of penalties. The trial court, after considering all his answers within context, did not err when it denied the appellant's motion to strike Juror L for cause.

Pornographic materials

Detective Mark Gillingham of the Kentucky State Police testified that during the search of the Appellant's home, numerous pornographic magazines were found. The appellant made no objection to this testimony, therefore, we will only review this issue for palpable error.

As provided in RCr 10.26, "an alleged error improperly preserved for appellate review may be revisited upon a demonstration that it resulted in manifest injustice." Butcher v. Commonwealth, 96 S.W.2d 3, 11 (Ky. 2002). Manifest injustice has resulted if there is "a palpable error . . . which affects the substantial rights of a party [and] relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

The prosecution did not attempt to introduce the pornographic magazines into evidence and no other reference to the pornographic magazines was made at trial. The testimony referring to the pornographic magazines did not rise to a palpable error, resulting in manifest injustice. Therefore, the appellant's argument that he was denied due process because of this testimony is without merit.

Admission of wooden penises

R.B. testified that the appellant used a wooden carved "boy private part" to make sure that she was clean. Detective Mark Gillingham of the Kentucky State

Police testified that during the search of the appellant's home, three wooden penises were found. At the time of the testimony, the appellant made no objection. However, the appellant did object when the prosecution laid the foundation to introduce the three wooden penises into evidence. The appellant argued that since R.B. testified that those particular wooden penises were not used on her, they were not admissible. The trial court allowed their admission, over the appellant's objection, stating that the wooden penises were corroborative of R.B.'s testimony.

"It is within the sound discretion of the trial judge to determine whether the probative value of evidence is outweighed by its possible prejudicial effect and to admit or exclude it accordingly." King v. Grecco, 111 S.W.3d 877, 885 (Ky. App. 2002)(citing Rake v. Commonwealth, 450 S.W.2d 527 (Ky. 1970)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

Additionally, true replicas are allowed when they are a "useful aid to the jury in understanding the evidence and in obtaining a clear comprehension of the physical facts." Hogan v Cooke Pontiac Company, 346 S.W.2d 529, 532 (Ky. 1961); Cincinnati, N. O. & T. P. Ry. Co. v. Duvall, 263 Ky. 387, 92 S.W.2d 363 (Ky. App. 1936). "Any evidence to the contrary goes to weight, not admissibility" of the evidence. Allen v. Commonwealth, 901 S.W.2d 881, 885 (Ky. App. 1995).

Here, the prosecution laid the proper foundation for the admission of the wooden penises. R.B. testified that she was sexually assaulted by the appellant with a wooden carved "boys private part." She identified the wooden penises as

being the same type as the one used on her, except the one used on her was smaller. Also, the detective testified that the wooden penises were found in the appellant's home.

In Allen, supra, the defendant argued that the trial court erred when it allowed a paddle to be introduced into evidence. The admission of the paddle was upheld because a victim identified it to be the same width and length as the paddle used on him. Id. at 884. Even though the victim testified it was not the one used on him because "it bent more easily," its admission was upheld. Id. Like Allen, the evidence was exactly as she had described, wooden carvings of a "boy's private part." This evidence was properly admitted because the wooden carvings were established as being true replicas of the instrument used during the appellant's sexual assault of R.B., pursuant to Allen and Hogan, supra.

Beatings of C.B.

During the trial, multiple witnesses testified that the appellant physically abused his adopted son C.B. However, the appellant made no objection to the introduction of this testimony.

If "[t]he record reveals that there was no objection made to the argument, [then] the error, if any, was not preserved." Lamb v Commonwealth, 599 S.W.2d 462, 464 (Ky. App. 1979). "RCr 9.22 requires some contemporaneous objection in order that error be preserved for appellate review and the absence thereof precludes our comment." Id. (citing Ross v. Commonwealth, 577 S.W.2d 6 (Ky. App. 1978)). Thus, this issue is unpreserved, and we will only review for palpable error.

As stated previously, RCr 10.26 provides, "an alleged error improperly preserved for appellate review may be revisited upon a demonstration that it resulted in manifest injustice." Butcher v. Commonwealth, 96 S.W.2d 3, 11 (Ky. 2002). Manifest injustice has resulted if there is "a palpable error . . . which affects the substantial rights of a party [and] relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). "This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief." Id. (citing Jackson v. Commonwealth, 717 S.W.2d 511 (Ky. App. 1986)).

Based on the record, there was more than enough evidence to conclude that the appellant committed the crime. Without the evidence of the beatings of C.B., the outcome of the trial would have been the same. Even so, the beatings show that the appellant would use forceful threats to pursue his activities, corroborating R.B.'s testimony. Likewise, C.B. adhered to the appellant's demands out of fear. Because C.B. was afraid of being beaten, he held R.B. down while the appellant raped her. Of course, this testimony was relevant to show how the appellant forced the children to obey him by his use of threats. Regardless of the appellant's objections now, they are not preserved for review. No palpable error exists here because, based on the record, the outcome without this testimony would have been no different.

CONCLUSION

In conclusion, the Hardin County Circuit Court's rulings and the appellant's conviction and sentence are affirmed.

All concur.

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