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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000317-MR

DATE 9-14-06 ELA Grow Hpc

JEFFREY MONN — APPELLANT

V.

ON APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
NO. 04-CR-00026 AND 04-CR-00097

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jeffrey Monn, was convicted of sixty (60) counts of first degree sodomy and twenty-six (26) counts of first degree sexual abuse. The final judgment of the Boyd Circuit Court sentenced him to life imprisonment on each of the sodomy counts and five (5) years on each of the sexual abuse counts, all to run concurrently for a maximum term of life in prison. He now appeals as a matter of right.[1] The issue presented is whether Appellant was substantially prejudiced and denied a fair trial by the Commonwealth's introduction of allegedly inadmissible character evidence.

Appellant was indicted on February 12, 2004, by a Boyd County Grand Jury for sixty (60) counts of first degree sodomy, ten (10) counts of attempted first degree sexual abuse, and fifty-eight (58) counts of first degree sexual abuse. A second indictment returned on May 27, 2004, charged Appellant with an additional ten (10)

[1] Ky. Const. § 110(2)(b).

counts of first degree sexual abuse. The charges arose from Appellant's abuse of T.M., J.M., E.R., A.R., and S.M.[2]

Appellant gave a statement to police in which he admitted many of the charges. He stated that he placed his penis in T.M.'s anus on ten occasions, had oral sex with T.M. ten to fifteen times, that T.M. watched Appellant ejaculate on five occasions, that he tried to get T.M. to touch Appellant's penis five to ten times, and that T.M. came onto him on ten occasions to have oral sex. Appellant also admitted to placing his hand on E.R.'s penis on fifteen occasions and touching A.R.'s genitals on the outside of A.R.'s clothing.

The trial court granted Appellant's motion *in limine* to preclude the Commonwealth from referring to the Appellant as a youth pastor and to prohibit testimony about the Appellant's activities at area churches. The Appellant also requested a continuance because of a news article that had just been published discussing Appellant's church involvement as a youth pastor and volunteer. The continuance was denied.

At trial, T.M. testified that he was adopted by Appellant when he was five years old. T.M. stated that Appellant played with his penis and put it in his mouth. This occurred about twenty times. He also testified that Appellant put his penis in T.M.'s anus about thirty times. T.M stated that this often happened while he was standing on his bunk bed ladder. T.M. further testified that he observed "white stuff" come out of Appellant about fifty times. Appellant threatened that if T.M. told anyone, "he'd whip [him]."

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[2] The victims will be referred to by their initials in order to protect their anonymity.

E.R. is Appellant's adopted half-brother. He testified that he stayed overnight at Appellant's house about ten to twenty times. E.R. stated that during these times, Appellant would put his hand down E.R.'s pants and play with his penis. He estimated this occurred about ten times before E.R. turned twelve years old.

S.M. testified that she used to go to Appellant's house to play with the other children. She stated that on one occasion when she was about ten years old, Appellant asked her to sit on his lap and he touched her "up there."

J.M testified that Appellant was his next-door neighbor and that he stayed overnight at Appellant's house a few times. He stated that one night when he was fifteen years old, he was asleep on an air mattress at Appellant's home, and he woke up because Appellant was touching his penis. He also described a time that he woke up to find that his clothes were "pretty much off" and Appellant was standing in the room "acting like nothing had happened." J.M. stated that it was obvious that he had been touched and he did not say anything because he was ashamed.

A.R. testified that he spent the night at Appellant's house twice. He stated that he fell asleep on the couch and woke up to find Appellant's hand inside his pants touching his penis. This happened both times A.R. stayed overnight at Appellant's house.

At the close of the Commonwealth's evidence, the trial court granted Appellant's motion for directed verdict on ten (10) first degree attempted sodomy counts and thirty-one (31) first degree sexual abuse counts. Three counts of first degree sexual abuse were dismissed because they were replaced by the second indictment.

The jury convicted Appellant of sixty (60) counts of first degree sodomy and twenty-six (26) counts of first degree sexual abuse. He was sentenced to life imprisonment on each of the sodomy counts and five (5) years on each of the first degree sexual abuse counts. The sentences were ordered to run concurrently with one another.

Appellant alleges he was substantially prejudiced and denied a fair trial by the Commonwealth's introduction of inadmissible character evidence. Appellant made a motion *in limine* requesting that the trial court restrain the Commonwealth from mentioning or injecting into testimony that Appellant had worked in a religious capacity. Appellant was concerned that the mention of his religious involvement would analogize him to Catholic priests that commit sexual abuse, a topic that had been in the news extensively. The Commonwealth had no objection, and the motion *in limine* was granted.

Appellant specifically complains of three instances of inadmissible character evidence: (1) admission of evidence of Appellant's work as a Sunday school teacher, (2) admission of evidence of Appellant's work as a cook at a gay establishment, and (3) admission of evidence of Appellant's uncorroborated past sexual acts. Detective Kenny Diamond's taped interrogation of Appellant was played for the jury during the Commonwealth's direct examination of Diamond. During the interrogation, Diamond asked Appellant two questions concerning Appellant's involvement in the church. Diamond said, "I'm not here to judge your lifestyle. Okay. It's not my place and I know you used to be a Sunday school teacher so you know it's not anybody's place to judge somebody else." Diamond later mentioned Appellant's

involvement with Sunday school again when he inquired as to whether Appellant did anything with children when he used to teach Sunday school. Diamond then questioned Appellant about where he was working in Alabama prior to his arrest and asked if it was a gay bar. Appellant stated that it was "alternative." Detective Diamond also asked Appellant, "[d]o you remember a guy by the name of Doe[3] from a long, long time ago? Had a brother named John. Did John come after you for what you did to his brother?" Appellant denied anything happened with Doe. Then Diamond asked Appellant if he knew Jack Smith. Appellant said he did. Diamond asked if Appellant knew Smith's siblings and asked about his sexual behavior with the Smiths. Appellant did not confirm or deny that anything inappropriate happened, but was not charged for any incidents involving the Smiths.

During the penalty phase, on direct examination of parole officer Susan Thompson, the Commonwealth showed that after serving time in prison and any period of conditional discharge, Appellant would be under no type of supervision. The prosecutor asked, "[s]o nobody can come to his house, nobody can make sure what kind of work he's doing, nobody can ask for instance make sure he isn't teaching Sunday school or . . . working in a daycare or anything like that?" Appellant objected, but the objection was overruled. Appellant then made a motion for mistrial, but this too was denied.

The first instance of allegedly inadmissible character evidence that Appellant complains of is preserved. The trial court granted Appellant's motion *in limine*

[3] John Doe and Jack Smith are pseudonyms used to protect the anonymity of these persons.

to preclude evidence of Appellant's work as a Sunday school teacher. KRE 103(d) which deals with ruling on motions *in limine*, states the following:

> A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. *A motion in limine resolved by order of record is sufficient to preserve error for appellate review.* Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine (emphasis added).

This Court recently held that a pre-trial motion *in limine* is sufficient to preserve an evidentiary error under KRE 103(d), provided that the motion specifically identifies the evidence to which the party objects, identifies the reason that the party thinks the evidence should not be admitted, and is resolved by an order of the trial court.[4]

Although there was no contemporaneous objection to the taped interview in which Diamond asked Appellant if he ever taught Sunday school and if anything inappropriate happened with the children he taught, the motion *in limine* was specific enough to preserve this issue for appellate review. Appellant, however, did make a contemporaneous objection during the penalty phase when the prosecutor asked parole officer Susan Thompson whether Appellant would be able to teach Sunday school if he were released on parole. This objection, along with the specific motion *in limine*, preserves this issue for appellate review.

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[4] See Lanham v. Commonwealth, 171 S.W.3d 14, 20-23 (Ky. 2005); see also Metcalf v. Commonwealth, 158 S.W.3d 740 (Ky. 2005) (holding that a specific motion in limine preserves an error); Davis v. Commonwealth, 147 S.W.3d 709, 722 (Ky. 2004) (holding that "[w]here a party specifies what evidence should be suppressed and why, the question has been 'fairly brought to the attention of the trial court' and the trial court's ruling preserves the issue for appeal. In that scenario, the opponent of the evidence need not object when the same evidence is offered at trial.").

Although these statements may have been prejudicial, failure to prohibit this evidence from being introduced was harmless error.[5] This Court stated in Taylor v. Commonwealth[6] that "the test for harmless error is whether there is any reasonable possibility that, absent the error, the verdict would have been different."[7] A reasonable possibility does not exist that Appellant would have been acquitted or that the verdict would have been different even in the absence of the challenged evidence. The jury heard Appellant's statement in which he admitted to many of the charges as well as the testimony of the child victims concerning the acts committed upon them by Appellant. The fleeting statements that Appellant complains of were not a significant part of the trial or the Commonwealth's evidence. Appellant's mere speculation that the jury drew inferences from these statements and thereby linked Appellant to the criminal behavior of Catholic priests is not grounds for reversal.

The second and third instances of allegedly inadmissible character evidence that Appellant complains of are unpreserved because Appellant made no contemporaneous objection to the introduction of evidence concerning his employment at an alternative lifestyle establishment or to the introduction of evidence concerning prior allegations of abuse against him. Further, the pre-trial motion *in limine* asked the trial court to exclude evidence regarding Appellant's religious involvement; it did not

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[5] RCr 9.24 states "[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties."

[6] 995 S.W.2d 355 (Ky. 1999).

[7] Id. at 361.

address any other potential evidence. Since Appellant did not raise any objections to these two items, he cannot now complain about their introduction.[8]

While this claim of error is not preserved, this Court may review it for palpable error.[9] A palpable error is one which affects the substantial rights of a party and relief may be granted only upon a determination that a manifest injustice has resulted from the error.[10] Appellant claims that the evidence prejudiced the jury against him. However, the two limited instances referring to Appellant's work at an alternative lifestyles establishment and the introduction of evidence concerning prior allegations of abuse against him were only a small part of the testimony. The evidence which resulted in Appellant's convictions was the testimony from the child victims and the Appellant's own statements admitting to many of the charges. These two statements were not so prejudicial as to result in manifest injustice and do not rise to the level of palpable error.

Accordingly, Appellant's convictions are affirmed.

Lambert, C.J., and Graves, McAnulty, Minton, Roach, Scott, and Wintersheimer, JJ., concur.

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[8] RCr 9.22.
[9] RCr 10.26.
[10] See Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

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