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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0496-MR

DATE 11-9-06 ElliaGrowitt D.C.

MARK EDWARD NEWTON — APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
2005-CR-0032

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Newton of four counts of first-degree sodomy. He was sentenced to a total of 70 years in prison and received a fine of $4,000.

The questions presented are whether the evidence of bad character was improperly admitted against Newton and did the trial judge incorrectly permit evidence that bolstered the testimony of the victim.

The evidence in this case demonstrate that Newton engaged in oral and anal sexual contact on multiple occasions with a female relative. She was between the ages of 5 and 7 years at the time of the events. The victim testified about the incidents and Newton testified denying any wrong doing. Upon conviction and sentence, this appeal followed.

I. Introduction Of Character Evidence

Newton was once married but it ended in a divorce. He later married the victim's aunt. Newton's prior spouse was a cousin of his then current wife and her sister who was the victim's mother. At trial, the victim's mother was asked if she was happy that Newton and her sister were married. She replied "not really". She was then asked why she was not happy about the marriage. Newton objected but was immediately overruled by the trial judge. The victim's mother then stated that she witnessed difficulties between Newton and her cousin and she did not want to see her sister "have to go through that".

The mere voicing of an objection to a question without any request for relief is not sufficient to preserve the issue for review. Ferguson v. Commonwealth, 512 S.W.2d 501 (Ky. 1974). Although Newton objected to the question, he never objected to the answer and did not request an admonition or mistrial. It is incumbent upon a party to request relief from the trial judge.

Evidence of wrongs or acts is generally not admissible to prove a person's character and to show conformity therewith. KRE 404(b). The comment could be viewed as being evidence of wrongs or acts directed toward Newton's character. That alone is not sufficient to prohibit its introduction. The intent of the testimony must also tend to show conformity to that testimony. Here, the testimony did nothing more than indicate the witnesses' dislike for Newton. It had no relationship to a character trait that was at issue. There was no error.

Even if the statement could be construed as error it would not affect Newton's substantial right to a fair trial. See RCr 9.24. The conviction will not be reversed unless there is an indication beyond a reasonable belief it would change the outcome of the trial. Chapman v. California, 386 U.S.18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Stiles v. Commonwealth, 570 S.W.2d 645 (Ky. 1978). In this case, the testimony of the victim provided overwhelming evidence of Newton's guilt. The simple non-responsive statement from another witness is insufficient to cause reversal.

II. Bolstering of the Victim's Testimony

The victim disclosed the illegal sexual contact to her parents. They waited a week and confronted her again before reporting the matter to the police. Both parents testified regarding the wait and they along with another testified regarding the victim's lack of being in trouble at school or at home because she was truthful and honest.

Bolstering is the enhancement of unimpeached testimony with other evidence. See Black's Law Dictionary 186 (8^{th} ed. 2004). Here, the additional evidence was used to explain to the jury why the parents did not immediately report the incidents. It was not intended to bolster or enhance the testimony of the victim. The parents wanted to be as sure as they could be before reporting the events to the police. They waited a week and then confronted the child again. They took great pains to be as sure as they possibly could be that the disclosure was the truth. It was entirely reasonable to do so and equally reasonable to explain to the jury why there was a one week delay before reporting the crimes. The evidence did not infringe on the jury's role of assessing the credibility of a witness. See Newkirk v,. Commonwealth, 937 S.W.2d 690 (Ky. 1996). There was no error.

The judgment of conviction for four counts of First Degree Sodomy and the resulting sentence of 70 years imprisonment is affirmed.

Graves, Minton, Scott and Wintersheimer, JJ., concur. Lambert, C.J., concurs and files a concurring opinion in which McAnulty, J., joins. Roach, J. concurs in result only.

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Supreme Court of Kentucky

2005-SC-000496-MR

MARK EDWARD NEWTON — APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
NO. 05-CR-00032

COMMONWEALTH OF KENTUCKY — APPELLEE

CONCURRING OPINION BY CHIEF JUSTICE LAMBERT

I concur in result as to issue II, but only because the error was unpreserved and does not rise to the requirements of palpable error. If Appellant had objected I would vote to reverse for a new trial.

Additional facts are necessary. At trial, Rebecca Baumgardner, the victim's stepmother, testified that when the victim first told her that she had been molested, she and the victim's father decided to wait a week or so to ask the ten year old child victim about it again to ensure the child was telling the truth. On the second occasion, the stepmother spoke to the victim alone and told her that if she had been lying, this was the one time she would not get into trouble if she would admit it. The stepmother further stated that she told the victim they would go tell the police, but if the victim later said she was lying she would be in big trouble with the police. The witness stated that she waited for a week in order to ensure that the victim was being honest.

Furthermore, she stated that the child victim did not get in trouble at school and did not make up stories either at school or at home.

The Commonwealth elicited similar testimony from Ben Baumgardner, the victim's father. The father testified that when his wife told him what the victim had alleged about Appellant, they waited a week and questioned her again because he knew if she said the same thing when they spoke to her the second time, it had to be true. The father further testified that the victim never got in trouble at school or at home for making up stories. Tina Baumgardner, the victim's mother, also testified that the victim never got in trouble at school or at home for making up stories or telling lies.

KRE 404(a)(3) states that evidence of the character of a witness is not admissible at trial except as permitted under KRE 607, KRE 608, and KRE 609. Pertinent to this opinion, KRE 608(a) provides in part as follows:

> Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

"[I]t continues to be the law that evidence of good character cannot be introduced until after the witness' character has been attacked."[1] In this case, the victim's character for truthfulness had not been attacked when the Commonwealth elicited the bolstering testimony from the witnesses. "The word 'character,' used most narrowly and accurately, describes the personal disposition or personality of an individual . . . . [A] person's character is an intermediate fact that is offered to prove some other ultimate

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[1] Pickard Chrysler, Inc. v. Sizemore, 918 S.W.2d 736, 741 (Ky. App. 1995).

fact, primarily to support an inference that a person acted (or did not act) in conformity with his or her character on a given occasion."[2] The obvious inference in this case was that the victim never told lies, and was not lying in this instance. Very recently we reaffirmed in Fairrow v. Commonwealth[3] that bolstering testimony is inadmissible "because KRE 608(a)(2) requires credibility to be attacked before it is supported."[4] Had the defense called into doubt the propensity of the victim to tell the truth, then the bolstering testimony might have been proper. But generally, a witness may not vouch for the truthfulness of another witness.[5] This is because such testimony "remove[s] the jury from its historic function of assessing credibility."[6] This is particularly true when a witness is allowed to state his opinion as to the truthfulness of another witness, where that opinion leads, as it did in this case, to a conclusion that the defendant is guilty.

When the father and the stepmother testified that they waited a week before asking the victim about the molestation, they were in essence saying, "we believe the victim, so should you." The majority excuses this evidence rules violation on the basis that the "additional evidence was used to explain to the jury why the parents did not immediately report the incidents . . . They took great pains to be as sure as they possibly could be that the disclosure was the truth." It is doubtful that the one week delay could be perceived as a legitimate concern by either the defense or the prosecution. No rational defense counsel would have attacked the ten year old victim's credibility based on a one week parental delay in reporting to the authorities. But if

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[2] Fairrow v. Commonwealth, 175 S.W.3d 601, 605 (Ky. 2005) (citing Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.15[2], at 97 (4th ed. 2003)).
[3] Id.
[4] Id. at 606 (citations omitted).
[5] Stringer v. Commonwealth, 956 S.W.2d 883, 888 (Ky. 1997).
[6] Newkirk v. Commonwealth, 937 S.W.2d 690, 696 (Ky. 1996).

defense counsel had been so unwise, the parents devastating rebuttal would have been proper. From the looks of this case the three veracity witnesses had but one purpose – to tell the jury to believe the child victim.

Moreover, the additional testimony regarding the truthfulness of the victim generally at school and at home had no bearing on the one week delay. It was a transparent endorsement by the witnesses of the child's credibility.

Professor Lawson stated the reasons for the prohibition on bolstering testimony as follows:

> Good reasons exist for requiring litigants to defer efforts to establish the credibility of witnesses until questions on the subject have been raised by opposing parties. Permitting credibility to be bolstered ahead of attack would waste enormous amounts of time, increase risks of unfair prejudice, and add unnecessarily to the difficulty and complexity of litigation. To avert these effects, courts have widely, if not universally, adopted prohibitions against bolstering (or rehabilitating) the credibility of witnesses before their credibility has been attacked.[7]

The effect of the bolstering testimony in this case was prejudicial to Appellant. Although not reflected in the majority opinion, there was no physical evidence or evidence of any kind against Appellant other than the testimony of the child victim. The jury was required to believe the victim or believe Appellant's categorical denial. It cannot be said that the bolstering testimony did not make the difference.

As it is clear that there was error in the admission of the bolstering testimony, I now turn to the most difficult question in this case – whether this error requires reversal. Appellant admits in his brief that this error is unpreserved, but asks

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[7] Lawson, *supra*, §4.00[2], at 265.

the Court to reverse based on palpable error. Our palpable error standard is contained in RCr 10.26 and that rule states as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Under this rule, reversal will only be granted if a manifest injustice has resulted from the error. "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable."[8] The testimony of the victim was quite graphic and detailed in describing the abuse. While the bolstering testimony was error and added weight to the Commonwealth's case, I cannot conclude that there was manifest injustice. Without the bolstering testimony, the Commonwealth nevertheless had highly persuasive testimony from the child victim. I conclude, therefore, that the error did not rise to the level of palpable error and join in the result of affirming the convictions.

McAnulty, J., joins this concurring opinion.

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[8] Martin v. Com., __ S.W.3d __, 2006 WL 1358364 (Ky. 2006).