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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000668-MR

JOHN CARLISLE SHEESLEY — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN LYNN SCHULTZ, JUDGE
NO. 09-CR-000032

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, John Carlisle Sheesley, was indicted by a Jefferson County grand jury on January 8, 2009, and charged with six counts of first-degree sodomy. On September 15, 2010, Appellant was convicted in the Jefferson County Circuit Court of all six counts and sentenced to twenty-seven years in prison. Appellant now appeals the judgment and convictions as a matter of right. Ky. Const. § 110(2)(b).

At trial, the twelve-year-old child victim, C.W., testified that Appellant "rape[d] him sexually." Appellant and his wife were close friends with C.W.'s family. They often socialized with C.W.'s family for events such as birthdays and going to the pool. Also, they occasionally baby-sat C.W. and his siblings.

C.W. testified that Appellant would lick his penis and that he would lick Appellant's penis. C.W. further testified that this would happen at the pool, at his house, and at his church. C.W. further testified that Appellant sodomized him several times a week over a four-year period.

C.W. testified that, when he was at the pool, Appellant would have him go into the shower area of the bathroom while his parents were packing to leave. Further, C.W.'s father testified that on one occasion, when he was at the pool with his three kids, he found Appellant in the back of the shower area with C.W. When he saw the two in the shower, C.W.'s father said that Appellant told him he was showing C.W. how the shower worked.

C.W. also testified that, while at Appellant's house, he would go into the bedroom alone with Appellant. During a surprise birthday party for Appellant's wife at his church, C.W. testified that he went into the bathroom with Appellant and some other boys. There, Appellant asked the other boys to leave and he took C.W. to another room and sodomized him. The following day, C.W. told his mother what had happened and she called the police. C.W. later testified that he had not told anyone about these incidents because Appellant told him not to.

Failure to Strike Juror #21

During voir dire, Appellant made motions to strike Juror #21 and Juror #25 for cause. The trial court denied Appellant's motion to strike Juror #21 and Appellant subsequently used a peremptory strike to remove this juror. The trial court, however, granted Appellant's motion to strike Juror #25.

Appellant argues that the trial court erred in failing to strike Juror #21 for cause. However, this issue is not properly preserved for appellate review. "[I]n order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck." *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009). Appellant concedes that he failed to note any alternative juror on his strike sheet, but argues that he made it verbally clear on the record that he would have used the strike on Juror #25.

This argument does not have merit. First, Appellant's verbal motion was not sufficient to preserve this issue under *Gabbard*. Second, because the trial court granted his motion to strike Juror #25 for cause, Appellant could not have subsequently used one of his peremptory strikes on that juror. As a result, Appellant did not preserve this issue for appellate review.

Motion for Directed Verdict

Next, Appellant argues that "the [trial] court should have dismissed this case for a lack of evidence." Although Appellant presents no authority in support of this argument, we can only assume that he is referring to the trial court's denial of his motion for a directed verdict at the close of proof. Appellant contends that the trial court should have dismissed the case for two reasons. First, Appellant argues there was no physical evidence to support the allegations of the victim. Secondly, Appellant points out that C.W. repeatedly

stated that he "did not remember" some of the details surrounding the incidents.

In response to Appellant's first argument, this Court is unaware of, and Appellant has not presented, any binding authority requiring physical evidence in order to sustain a conviction. In response to Appellant's second argument, our rule for a directed verdict is well established:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. 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 a verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

There was ample evidence introduced at trial for a jury to conclude that Appellant was guilty of the charged offenses. The fact that C.W. testified that he did not remember some of the details surrounding the incidents did not necessarily undermine his remaining testimony. C.W. testified as to numerous occasions of sodomy involving Appellant. C.W.'s father testified that he saw Appellant in the shower at the pool alone with C.W. These two testimonies provide sufficient evidence for a reasonable jury to find Appellant guilty.

Accordingly, the trial court did not err in denying Appellant's motion for a directed verdict.

First Motion for Mistrial

Next, Appellant argues that the trial court erred in denying his two motions for a mistrial—although one of these arguments is only found in his statement of the case. Appellant made motions for a mistrial on two separate instances where he alleged prosecutorial misconduct.

Appellant made his first motion for a mistrial when C.W.'s father's testified that Appellant said he was trying to show C.W. how the shower works. Appellant objected to this statement because the Commonwealth had not disclosed it to Appellant prior to trial. The Commonwealth explained that it had not intended to introduce the evidence, but that C.W.'s father had volunteered it unsolicited.

Under RCr 7.24(1), it makes no difference whether the Commonwealth was intending to introduce the evidence. That rule states in part that "the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness[.]"

The trial court sustained the objection and admonished the jury to disregard it. The court made its ruling for the same reasons that Appellant now argues his motion for a mistrial should have been granted. This complaint is wholly without merit.

First of all, it does not appear to this Court that the statement was incriminating. C.W.'s father had already testified that he had observed Appellant and C.W. alone together in the shower at the pool. Even if the statement had been admitted into evidence, or the admonition had not been given, it was a rather logical and innocent explanation of Appellant simply being there to show a young child how to operate the shower.

In any case, an adequate admonition was given about the stricken testimony. We have long held that a mistrial is a harsh remedy to trial error and is within the broad discretion of the trial judge. "A mistrial is unwarranted absent a 'manifest' or 'real necessity' for such an extraordinary remedy." *Sherroan v. Commonwealth*, 142 S.W.3d 7, 17 (Ky. 2004) (quoting *Grundy v. Commonwealth*, 25 S.W.3d 76, 82 (Ky. 2000)). Also, where there is an erroneous admission of evidence, "an admonition is usually sufficient to cure [it], and there is a presumption that the jury will heed such an admonition." *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005).

Surely, there is nothing that suggests the jury could not have followed the admonition given by the trial court in this case, or that the testimony would have been devastating to Appellant. The trial court did not abuse its discretion in denying Appellant's first motion for a mistrial.

Second Motion for Mistrial

Appellant made a second motion for a mistrial when the Commonwealth was questioning the lead detective in the case concerning his interview with Appellant. The Commonwealth, referring to the transcript of the interview,

stated: "So, for convenience sake, and for clarity's sake, for all the parties, so that everyone knows where we are, *uh, that's allowed to have a copy*, if you could go to page four of the defendant's transcript." (Emphasis added).

Appellant asserts that the trial court should have granted his motion for a mistrial because this statement suggests to the jury that the defense was somehow preventing the jury from hearing the "whole story." The trial court denied Appellant's motion, but offered to give an admonition to the jury explaining that juries are never given copies of transcripts. However, Appellant declined to have the admonition given.

Appellant's argument is a stretch to begin with. The trial judge was more than fair in dealing with the objection. The trial court did not abuse its discretion in denying Appellant's second motion for a mistrial.

Entire Statement of Appellant

Next, in a three-sentence argument, Appellant claims that the trial court erred in not allowing the entire statement he made to the police to be presented to the jury. He also argues that the court erred in allowing the Commonwealth to introduce portions of his statement through the testimony of the lead detective. His complete argument amounts to a generic claim that the trial court should have admitted the entire statement because the portions that were introduced by the Commonwealth were taken out of context and did not comply with the "rule of completeness." Appellant does not provide any analysis as to how he thinks the statement was taken out of context. Further, he cites no authority whatsoever in support of this argument, except to say

that the Commonwealth "may argue that this issue is governed by *Rodgers v. Commonwealth,* 285 S.W.3d 740 (Ky. 2009)." Accordingly, Appellant presents no argument for this Court to consider. *Grief v. Wood,* 378 S.W.2d 611, 612 (Ky. 1964).

Jury Instructions

At the close of the evidence, the trial judge instructed the jury on six counts of sodomy. Appellant argues that the jury instructions did not sufficiently differentiate the alleged incidents because the dates listed in the six counts overlap. Appellant believes the instructions did not assure a unanimous verdict, which constitutes reversible error.

In order for an appellant to argue a jury instruction on appeal, the objection at trial must state "specifically the matter to which the party objects and the ground or grounds of the objection." RCr 9.54(2). "If a defendant objects to a part of an instruction, but not to other parts, the error is preserved only as to that part to which the objection was addressed." *Davis v. Commonwealth,* 967 S.W.2d 574, 580 (Ky. 1998) (citing *Wallen v. Commonwealth,* 657 S.W.2d 232 (Ky. 1983)). At trial, Appellant generally objected to the giving of the instructions, but he did not mention anything regarding the factual differentiation between the charges. As a result, this issue is not preserved.

If unpreserved, instructions may still constitute palpable error, under RCr. 10.26, if they do not adequately differentiate between the charged offenses so as to assure a unanimous verdict. *Miller v. Commonwealth,* 283 S.W.3d

690, 695 (Ky. 2009). *See also Harp v. Commonwealth,* 266 S.W.3d 813 (Ky. 2008). There is adequate differentiation "[s]o long as the instruction for each count enables the jury to identify the instruction with a specific crime established by the evidence and avoids the likelihood of confusion with other offenses presented against defendant in the same trial." *Banks v. Commonwealth,* 313 S.W.3d 567, 573 (Ky. 2010). The sodomy instructions in this case distinguished between the six separate charges and assured that the verdict was unanimous.

The instructions given by the trial court read:

> Instruction No. 1 – (a) That in this county at 8611 Garden Gate Circle, the defendant's home, between the 15th day of April, 2004 and the 28th day of December 2008, he engaged in deviate sexual intercourse by placing his mouth on C.W.'s penis.
>
> Instruction No. 2 – (a) That in this county at 8611 Garden Gate Circle, the defendant's home, between the 15th day of April, 2004 and the 28th day of December 2008, he engaged in deviate sexual intercourse by having C.W. place his mouth on defendant's penis.
>
> Instruction No. 3 – (a) That in this county at 319 Browns Lane, the defendant's church, between the 15th day of April, 2004 and the 28th day of December 2008, he engaged in deviate sexual intercourse by placing his mouth on C.W.'s penis.
>
> Instruction No. 4 – (a) That in this county at 319 Browns Lane, the defendant's church, between the 15th day of April, 2004 and the 28th day of December 2008, he engaged in deviate sexual intercourse by having C.W. place his mouth on defendant's penis.
>
> Instruction No. 5 – (a) That in this county at 8408 Hudson Lane, the Happy Acres Pool, between the 15th day of April, 2004 and the 28th day of December 2008,

he engaged in deviate sexual intercourse by placing his mouth on C.W.'s penis.

Instruction No. 6 – (a) That in this county at 8408 Hudson Lane, the Happy Acres Pool, between the 15th day of April, 2004 and the 28th day of December 2008, he engaged in deviate sexual intercourse by having C.W. place his mouth on defendant's penis.

Appellant contends that the instructions here are similar to Instruction Nos. 6 and 7 in *Banks, id.*, which this Court held did not sufficiently differentiate. The instructions in *Banks,* however, had overlapping dates, as well as virtually indistinguishable acts. Although the dates overlap in the instructions given in this case, the places and acts do not. There was no likelihood that they would cause the jury to confuse the charged offenses because each instruction identified the particular *place* and *act* that constituted each specific offense. Each instruction paired a particular place (home, church, or pool) with a particular act (defendant placing his mouth or C.W. placing his mouth). The jurors could tell them apart because no two instructions had both the same place and act. As a result, the instructions sufficiently differentiated between the charged offenses and assured a unanimous verdict.

For the above-mentioned reasons, the judgment of the Jefferson Circuit Court is hereby affirmed.

All sitting. All concur.

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