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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MARCH 22, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000196-MR

BRUCE WAYNE VINCENT — APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
NO. 10-CR-00205

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Bruce Wayne Vincent, was indicted and tried on three counts of sodomy in the first degree of a child under the age of twelve years. The victim was S.L., the niece of Appellant's long-time girlfriend, Janet Nally. Though unmarried, Appellant and Nally had been in a committed relationship for twenty-three years and together moved into a home on Hill Street in Radcliff in February of 2000.

The evidence adduced at trial established that S.L. would often visit her aunt's home on Hill Street due to domestic issues between her own parents. These visits began in the summer of 2000, when S.L. was seven years old. During the school year, she would frequently spend one or two weekends each month at the house. She would stay for longer periods during the summer. Both Nally and Appellant testified that they enjoyed S.L.'s visits and had built a

playhouse and swing in the backyard for her enjoyment. S.L.'s visits stopped around 2005, when her parents divorced.

S.L. testified as to three instances of sexual contact with Appellant, all taking place at the house on Hill Street. The first incident occurred in 1999 when she was seven years old, just before Halloween of her second grade school year. According to S.L., Nally had gone to bed while she and Appellant watched a movie on the couch. Appellant unzipped his pants and instructed S.L. to orally sodomize him.

The second incident occurred in the summer of 2003, when S.L. was ten years old. She testified that, again, Nally had gone to bed early while she and Appellant watched a movie on the couch. Appellant unzipped his pants, pulled her by the arm, and lowered her head to his groin. While on her knees in front of Appellant, S.L. orally sodomized him. This time, Appellant heard a noise and instructed S.L. to make certain that her aunt was asleep. Upon returning to the living room, S.L. found that Appellant had zipped up his pants.

The final incident occurred later in the summer of 2003. S.L. testified that Appellant called for her to come out to the garage. He led her to a walled-off portion of the garage and unzipped his pants. He placed his hand on S.L.'s shoulder and guided her down to her knees, whereupon she performed oral sex. S.L. stopped after a short period and ran from the garage crying.

About six years later, S.L. revealed the sexual abuse allegations to her stepmother. During the course of the resulting police investigation, Detective Tom Bingham of the Radcliff Police Department interviewed S.L. twice and

Appellant four times. Detective Bingham testified about his interviews with Appellant.

At the first interview, Appellant denied any wrongdoing. At the second interview, conducted about two months later, Appellant claimed that on one occasion he fell asleep on the couch and awakened to find his penis in S.L.'s hand. In a later interview that same day, Appellant said that he awakened to find his penis in S.L.'s mouth. He repeated this story at a final interview held four days later.

Detective Bingham testified that, at the final interview, he told Appellant that the police had his DNA on a blanket, though in fact they had no such physical evidence. As told to Appellant, S.L. had informed police that Appellant had ejaculated in her mouth and she had spit it out on a blanket. The blanket was brought to the police for testing. Unaware that this was a fabrication, Appellant denied to Detective Bingham that his DNA would be on a blanket. He theorized that the police must have broken into his house, stolen his underwear, and rubbed it on a blanket.

Both Nally and Appellant testified at trial. Nally testified to the fact that she and Appellant had bought the house on Hill Street in February of 2000, some four months after S.L. claimed that the first incident of sodomy had occurred at the home. Additionally, Nally provided detailed testimony concerning Appellant's mental limitations and the fact that Appellant suffered from several learning disabilities. According to Nally, Appellant could not read or write anything but the most basic words. He relied on her completely to

manage his personal affairs. Appellant dropped out of school in the eighth grade at the age of fifteen. He worked various minimum wage jobs until 2004, when he injured his back on the job. After 2004, Appellant began receiving Social Security benefits, not only for the back injury but also due to his cognitive impairments.

Appellant testified in his own defense and denied all the charges. He denied being sexually attracted to S.L. or having any sexual contact with her. When questioned about his statements to Detective Bingham, Appellant correctly noted that he initially denied any wrongdoing. But then, according to Appellant, the police "freaked him out" by telling him about the supposed blanket containing his DNA. He also testified that he felt compelled to tell Detective Bingham that he awoke to find S.L.'s mouth or hand on his penis, even though this was not the truth. He claimed that he was told that, if he admitted S.L. had his penis in her hand, he would just have to "get some counseling" and be able to go home.

The jury acquitted Appellant of two counts of sodomy, specifically the incident alleged to have occurred in 1999 and the incident in the garage. The jury convicted Appellant of the one count of sodomy alleged to have occurred in the summer of 2003 on the living room couch. Accepting the jury's recommendation, the trial court sentenced Appellant to imprisonment for twenty years. He now appeals as a matter of right, raising two issues for review. Ky. Const. 110(b).

Appellant first argues that he was incompetent to stand trial. He claims that his due process rights were violated when the trial court did not order a competency evaluation or hearing, and he suggests a retrospective competency hearing as appropriate relief. We disagree.

A criminal defendant has the right to a competency hearing pursuant to KRS 504.100. Additionally, a criminal defendant's due process rights under the Fourteenth Amendment are implicated when he or she is tried despite substantial evidence on the record that would raise doubt as to his or her competency to stand trial. *Pate v. Robinson*, 383 U.S. 375 (1966). The statutory right to a competency hearing can be waived. *Padgett v. Commonwealth*, 312 S.W.3d 336, 348 (Ky. 2010). The defendant's constitutional rights, however, cannot be waived when the requisite substantial evidence of incompetency exists on the record. *Id.*

Appellant concedes that he waived any statutory right to a competency hearing and instead argues that his due process rights have been violated. In arguing that substantial evidence of incompetency exists, he points exclusively to his learning disabilities and cognitive limitations. Indeed, the uncontroverted evidence is that Appellant is functionally illiterate, has only maintained manual labor jobs, and receives Social Security benefits, in part, due to his learning disabilities. These intellectual impairments alone, however, do not constitute substantial evidence that he could not "consult with his lawyer with a reasonable degree of rational understanding" or that he lacked a "rational as well as factual understanding of the proceedings against him."

Woolfolk v. Commonwealth, 339 S.W.3d 411, 422 (Ky. 2011) (citing *Godinez v. Moran*, 509 U.S. 389, 396 (1993)). Indeed, even criminal defendants whose intellectual impairments are so severe as to rise to the level of mental retardation are "frequently" found competent to stand trial. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

There is nothing else on the record demonstrating an incompetency to stand trial. Appellant's demeanor and behavior at all pre-trial proceedings were appropriate. *See Padgett*, 312 S.W.3d at 347 (a defendant's irrational behavior and demeanor at trial are relevant to issue of competency). *Cf. Hunter v. Commonwealth*, 869 S.W.2d 719, 724 (Ky. 1994) (defendant's bizarre courtroom behavior and inappropriate laughter were considered relevant to issue of competency to continue trial). He correctly and coherently answered questions posed to him by the trial court at his circuit court arraignment. Until a back injury four years prior to trial, Appellant had maintained steady employment. He has been in a committed, long-term relationship for over twenty years and holds a driver's license.

More importantly, just prior to *voir dire*, defense counsel noted to the trial court that she had reviewed a competency evaluation that had been conducted eleven months prior and determined that competency "would not be an issue." Counsel did not elaborate on the substance of the evaluation or why it had been conducted, nor was the report entered into the record. Presumably, Appellant was deemed competent to stand trial following the

evaluation and defense counsel found no reason to pursue the issue of competency.

There was not substantial evidence on the record of Appellant's incompetency so as to trigger his constitutional right to a hearing. As such, no hearing was required by due process and there is no need for a retrospective competency hearing.

Appellant next claims that his statements to Detective Bingham were involuntary due to his low level of intellectual functioning, warranting reversal of the conviction. This issue, however, is unpreserved for appellate review and Appellant requests palpable error review pursuant to RCr 10.26.

The consideration of any supposed palpable error lies within the discretion of the appellate court. *See* RCr 10.26 ("A palpable error which affects the substantial rights of a party *may* be considered . . . by an appellate court on appeal . . . .") (Emphasis added). An error is palpable only when it is "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). Even when a palpable error is detected, relief is granted only upon a determination that a manifest injustice has occurred. RCr 10.26.

The evaluation of Appellant's claim is particularly difficult, if not impossible, because defense counsel never moved to suppress the statements made to Detective Bingham. No hearing was held and no testimony was taken concerning the specific circumstances surrounding the statements. A reviewing court cannot review that which has not been placed in the record,

nor is this Court willing to speculate as to how the trial court might have ruled had a hearing been conducted. Absent a more developed record on the issue, we simply are unable to conclude that any error occurred. Accordingly, with no showing of a "plain" or "obvious" error, this Court declines to conduct a palpable error review.

The judgment of the Hardin Circuit Court is affirmed.

All sitting. All concur.

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