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Supreme Court of Kentucky

2022-SC-0123-MR
2022-SC-0183-TG

NATHAN A. ANDERSON

APPELLANT

V. ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
NOS. 19-CR-01071 & 21-CR-00909

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Following a jury trial, Nathan A. Anderson (Anderson) was convicted of one count of first-degree unlawful transaction with a minor under 16, two counts of third-degree sodomy, and one count of first-degree sexual abuse. He now appeals his convictions and resulting thirty-year sentence as a matter of right.¹

I. FACTS AND PROCEDURAL BACKGROUND

At the time of the underlying events in this case Anderson and the victim, Jane,² were both residents of Metropolis, Illinois. Sometime in 2016, thirteen-year-old Jane began attending the same church as forty-four-year-old

¹ Ky. Const. § 110.

² The victim in this case was a child when these crimes occurred. We will therefore identify her via pseudonym to protect her privacy.

Anderson and his family. At the time, Jane's home life was turbulent. Her father Richard was a long-haul truck driver, and her mother "Cricket" worked double shifts as a school nurse and a home health nurse. In addition, Cricket was required to travel frequently to care for her own mother who had cancer. Jane's parents were also in the middle of a hostile divorce, and it was undisputed that her father had "an explosive temper" and was abusive and threatening towards Jane.

Because Jane attended church with the Andersons, she knew that they had an extra room in their home and that they had previously taken in other young girls in need. In October 2016, Jane's mother asked the Andersons if Jane could stay with them "off and on" to ensure she was not home alone and had transportation to her many extracurricular activities. The Andersons agreed, and Jane began to frequently stay with Anderson, his wife Laura, and their son Blake,³ who is a year younger than Jane and has spastic cerebral palsy. We note for clarity that Jane would also sometimes stay at her mother's house.

Jane testified that Anderson's behavior was "off" from the first time she stayed with the Andersons, and that he would frequently find ways to get her alone. He also instructed her to communicate with him exclusively through Snapchat, a text, photograph, and video messaging app that deletes a message shortly after it is opened by the recipient. Laura acknowledged that, although

³ Because the Andersons' son was also a minor during this time, we refer to him by pseudonym as well.

her marriage had issues prior to Jane moving in, Jane's presence in her home caused it to deteriorate further. Laura and Anderson often fought because of the amount of time he was spending with Jane, particularly because of the time he spent in Jane's bedroom.

On March 8, 2017, less than a week after Jane's fourteenth birthday, her father violated an interpersonal protection order Cricket had been granted against him which forbade him from contacting Cricket or Jane or going near the Anderson home. Cricket was so fearful for Jane's safety that she asked the Andersons to take Jane out of town for the night. Anderson took Jane, by himself, to Cape Girardeau, Missouri⁴ and rented a hotel room for the night. Laura claimed that she and Blake did not go with Anderson and Jane that night because Jane and Anderson did not want her to go. Laura had to call the police on Jane's father that night because he tried to beat in a door of her home while she and Blake were inside. Jane testified that the night Anderson took Jane to Cape Girardeau was the first time he vaginally raped her. Jane remembered that the hotel room was on the first floor and had two beds. She further recounted that Anderson wore a condom, that "it hurt," and that afterwards he told her she would "get used to it" and that it would not hurt as much in the future.

Sometime around the Cape Girardeau incident Sargent Detective Rick Griffey (Sgt. Griffey) with the Metropolis Police Department began investigating

⁴ Cape Girardeau is approximately 60 miles from Metropolis, Illinois.

Anderson. Someone filed a complaint against Anderson with the Illinois Department of Child and Family Services concerning his allegedly inappropriate relationship with Jane, and on March 22, 2017, Sgt. Griffey observed a forensic interview of Jane at a child advocacy center. At that time, Jane did not disclose that anything illegal had occurred between herself and Anderson. Sgt. Griffey therefore could not take any action against Anderson, but he continued to investigate the allegations as best he could. Of note, Sgt Griffey got a search warrant for Anderson's Snapchat account. According to certified Snapchat records, between the dates of June 10 and July 7, 2017, Anderson sent over 1,500 Snapchat messages to Jane, and received over 1,400 from her. The sum of all his other Snapchat interactions between his wife, son, friends, etc., sent or received, was 600.

On April 12, 2017, the day before Laura's and Anderson's wedding anniversary, Laura signed into Anderson's Snapchat account without his knowledge and saw a message that Anderson sent Jane that caused an intense verbal altercation between Laura and Anderson. Jane testified that the message said, "I love when you're asleep in my arms," while Laura testified that it said, "I love being able to lay with you." Laura had to unlock Jane's bedroom to confront Anderson, and the ensuing argument culminated in Laura telling Anderson that she and Blake were leaving. But before Laura and Blake could gather their things to leave, Jane attempted to take her own life by taking all her prescribed antidepressant medication at once. Laura and Anderson immediately stopped fighting and called an ambulance. Jane told the

emergency medical personnel at the hospital that she felt safe at the Anderson home and wanted to continue staying there.

Not long after Jane's suicide attempt, Anderson began taking her on several overnight trips out of state. In early June 2017, Anderson and Jane went alone to Nashville, Tennessee to go ziplining. They stayed overnight in a hotel room together, but Jane did not testify that any sexual contact occurred on that trip. When Anderson and Jane came back from the Nashville trip, his marriage to Laura continued to deteriorate. On June 18 and 19, 2017, Anderson got a hotel room in Paducah, Kentucky⁵ because he and Laura were fighting. On June 18, Anderson drove Jane from Metropolis to his hotel in Paducah. Jane testified that while she was there Anderson kissed her breasts, performed oral sex on her, and penetrated her vaginally. He then took her back to Metropolis.

The next day, on June 19, Anderson again drove Jane from her mother's home to his hotel. Jane was taking a shower when Anderson got into the shower with her and asked her to have anal sex. Jane testified that she agreed, and he anally penetrated her, but it was painful and she fell. Anderson told her she was "being dramatic." They then got dressed and drove back to Metropolis. Anderson dropped Jane off at her mother's house while he went to his house to get clothes. He then picked Jane up from her mother's house and took her back to Paducah to Michelson Jewelers. There, he bought her a "my

⁵ Paducah, Kentucky is approximately 13 miles away from Metropolis, Illinois.

princess tiara” ring, which was exchanged later that day for the same ring in a different size. A little over a month later, on July 24, they exchanged that ring for two rings meant to be worn as a set: a “cloud 9” band, and a different “my princess” ring that looked like a tiara. The ring set itself, as well as the purchase history of Anderson’s account with Michelson Jewelers confirming those dates and ring descriptions, were admitted into evidence.

On the following day, June 20, 2017, Laura attempted to take her own life by overdosing on medication and was hospitalized from June 20 to June 27. While she was in the hospital, Anderson took Jane and Blake to Holiday World, an amusement park. Jane did not testify that any sexual contact occurred on that trip. Laura had previously planned a trip to Disney World in Orlando, Florida for the four of them that was to begin on July 4, a week after she was released from the hospital. Although Laura felt well enough for the trip, she did not go. She claimed that if she went the other three were not going to go, but she was not asked to elaborate further. She wanted to ensure Blake got to go on the trip, so she stayed at home. Jane did not claim that any sexual contact happened while they were in Orlando, Florida. However, on their way back from Florida they stopped in Sevierville, Tennessee at a hotel with a water park attached to it. Jane claimed that while Blake was at the water park, Anderson took her back to the room the three of them were staying in and “had sex” with her.

After the Disney World trip, Jane never stayed with the Andersons again. The Andersons permanently separated soon after, and their divorce was

finalized in November of that year. Jane began living with her mother full-time again, and after Jane's parents' divorce was finalized, she and Cricket moved to Paducah. Cricket remarried, and Jane's life slowly began to stabilize over the next two years. In October 2019, when Jane was sixteen years old, she disclosed Anderson's abuse to her mother. They immediately reported the crimes to Sgt. Griffey, and he reopened his investigation into Anderson. Sgt. Griffey found the hotel in Paducah based on the information Jane gave him and obtained a receipt confirming Anderson had reserved a room there from June 18-19, 2017.

Sgt. Griffey also involved Detective Sarah Martin (Det. Martin) with the McCracken County Sherriff's Department in the investigation. The officers arranged a controlled call between Anderson and Jane. The goal of the call was to get Anderson to agree to meet Jane in Paducah so they could arrest him. During the call, once Anderson had agreed to meet Jane, the following exchanges occurred:

Jane: Is it just like, are we just going to eat or is it going to be a little more, or?

Anderson: I don't know, I don't know what you're wanting. I don't know, let's just, let's go grab a bite to eat or something, and how things go from there, see what you're wanting to talk about and see what's going on.

Jane: Okay.

Anderson: I'm also very very cautious about talking about this on the phone. I mean, you have to understand something, you haven't called me or spoke to me in like what? Six months.

Jane: Yeah.

Anderson: And then all of a sudden to call me and say you want to see me. It is a little weird [Jane].

[. . .]

Jane: Well can I ask you a question?

Anderson: Sure.

Jane: Is your girlfriend moving in?

Anderson: Yes.

Jane: I got you, I got you. So then I can't see you after this, right?

Anderson: I didn't say that. There's just some explainings (sic) and some explanations that's got to come around. Okay?

Jane: Yeah. But would she be suspicious of anything?

Anderson: No, not at all. But, I mean she is going to be suspicious you would have to understand, somebody that she knows used to live with me, she knows I was married, she knows that your parents got divorced. She knows basically you went to Paducah, I got divorced, it wasn't appropriate being a single man for you to be living with me. You went with your mother. Which your mother got a new house and got away from her ex-husband. All she knows about Richard is that, it didn't work well, okay? I didn't give her no—

Jane: [inaudible] something sexually happened between the two of us? Right? She doesn't know about anything that happened between the two of us?

Anderson: No. There's, that's something that I'm not comfortable talking about on the phone.

Jane: Oh, okay. So you won't tell me if you told your girlfriend that we had sex?

Anderson: I have never told anything to anyone about any sexual relationship with anybody. I will make that statement, okay?

Jane: Okay.

[. . .]

Jane: So you won't tell me if you told your girlfriend that we had sex?

Anderson: I did not tell anybody anything about my sexual past. That answers your question. Very clearly.

Jane: Okay.

Anderson: I did not tell anyone anything about my sexual past.

Jane: Okay.

At the end of the call, Anderson agreed to text Jane about meeting her later that week. Det. Martin monitored those text exchanges, and on November 4 Anderson was arrested at a restaurant in Paducah where he had agreed to meet Jane. He was later indicted in McCracken County Circuit Court for the crimes that occurred in Paducah on June 17 and 18, 2017.

At trial, Anderson's defense was that none of the alleged sexual contact between himself and Jane occurred. His counsel argued that the evidence of other overnight trips was a red herring and that there was no evidence, other than Jane's testimony, that she was with Anderson in Paducah on the dates at issue: no physical evidence, no eyewitnesses placing her there, no messages between Anderson and Jane arranging the trip, etc. Anderson argued that Jane was a "troubled and unstable girl" with a history of mental illness that predated her living with the Andersons, and that she fabricated all her accusations.

The defense primarily focused on inconsistencies in Jane's testimony regarding the Paducah offenses. During a pre-trial interview Jane told Det. Martin that the hotel room was on the second floor but testified at trial that she

believed it was on the first floor. Jane acknowledged the discrepancy during cross-examination but said that she later recalled that the room had to have been on the first floor because she remembered seeing a truck outside the room with men standing by it drinking beer. The defense later presented undisputed witness and photographic testimony that the room Anderson rented in Paducah faced an inner courtyard and a pool and that the parking lot was on the opposite side of the building. Jane also told Det. Martin that it was cold outside on June 18 and that Anderson wore a jacket. She clarified on cross-examination that she meant it was cold because it was raining that day. Finally, Jane testified that Anderson took her to the hotel on the second day in the afternoon. The defense later elicited testimony from the hotel's front desk clerk that checkout was at 11 a.m. Based on the foregoing, the defense argued that Jane was not in the hotel room with Anderson on June 18 and June 19.

The defense attempted to further discredit Jane's credibility by highlighting that she testified she could not remember going to the emergency room for suicidal ideation a week before her suicide attempt on April 17, 2017, even after being shown a medical record of the event. And, that Jane could remember neither her therapist's name nor the names of the medications she was currently taking. Additionally, Jane acknowledged during cross-examination that the Andersons purchased her a gift certificate to Michelson Jewelers in May 2017 when she graduated from junior high school. An employee of the store explained that because the gift certificate was purchased on Anderson's account, anything purchased with the gift certificate would also

appear under Anderson's account. Moreover, if an item purchased with the gift certificate was later exchanged, the exchange would also appear under Anderson's account. The defense argued that Jane purchased the rings using her gift certificate, that she exchanged the rings herself, and that the rings were not romantic gifts from Anderson as she claimed.

After considering the foregoing competing theories of this case, the jury found Anderson guilty of first-degree unlawful transaction with a minor, victim under 16; third-degree sodomy (oral); third-degree sodomy (anal); and first-degree sexual abuse. The jury recommended, and the trial court imposed, a thirty-year sentence.

Additional facts are discussed below as necessary

II. ANALYSIS

A. The Commonwealth's failure to re-indict Anderson in 19-CR-01071 does not mandate reversal.

In November 2019, a grand jury indicted Anderson under indictment number 19-CR-01071 (first indictment) for one count each of third-degree rape; third-degree sodomy; third-degree sexual abuse; and first-degree unlawful transaction with a minor under 18. Over a year and a half later in June 2021, the Commonwealth obtained a superseding indictment in 19-CR-01071 (superseding indictment). Under the superseding indictment, the third-degree rape and third-degree sodomy counts remained the same. However, the Commonwealth added a second count of third-degree sodomy, differentiating between the oral sodomy that occurred on June 18 and the anal sodomy that occurred on June 19. The Commonwealth also amended the count of third-

degree sexual abuse (a Class B misdemeanor) to first-degree sexual abuse (a Class D felony) and amended the count of unlawful transaction with a minor under 18 (a Class C felony) to unlawful transaction with a minor under 16 (a Class B felony).

Anderson moved to dismiss the superseding indictment as unduly prejudicial given that they were two weeks away from trial. On July 7, 2021, the trial court denied Anderson's motion based on its conclusion that "[a] trial court has no authority to dismiss a superseding indictment because it was returned too close to the trial date" and arraigned Anderson on the superseding indictment. However, the next day the circuit court changed course and entered an order dismissing the superseding indictment without prejudice, finding: "There is no authority permitting a grand jury to amend a rendered indictment to add a new charge. *Crabtree v. Commonwealth*, 2010 WL 1005992 *8, 9 (Ky. March 18, 2010); *Bishop v. Caudill*, 87 S.W.3d 1, 3 (Ky. 2002)."

Nevertheless, in the same order, the trial court granted "[t]he Commonwealth's motion to amend Count 4 of the underlying indictment to charge the defendant with First-Degree Unlawful Transaction with a Minor Under 16[,]" as the first indictment stated that Jane was fourteen years old. The court did not require the Commonwealth to reindict Anderson, and an order dismissing the first indictment was never entered. Anderson did not object to the court's amendment of the unlawful transaction count in the first indictment and never argued that he needed to be reindicted. It therefore

appears that, after the superseding indictment was dismissed, the parties and the court intended to revert to the first indictment and proceed to trial on those counts.

Based on unrelated motions filed by Anderson, the trial was then continued until December 14-16, 2021. On November 4, 2021, the Commonwealth obtained a second indictment, this time under indictment number 21-CR-00909 (second indictment). The second indictment charged one count of third-degree sodomy and one count of first-degree sexual abuse. The sodomy count in the second indictment was to be tried in addition to the sodomy count charged under the first indictment, while the first-degree sexual abuse count replaced the third-degree abuse count in the first indictment. The Commonwealth soon after filed a motion to join the first indictment and the second indictment for trial. Anderson objected to the joinder solely on the grounds that the Commonwealth had plenty of time to seek the second indictment but waited “until the last second” to do so. The trial court granted the motion to join, and at trial the jury was instructed on unlawful transaction with a minor under 16, third-degree rape,⁶ one count of third-degree sodomy (oral), one count of third-degree sodomy (anal), and one count of first-degree sexual abuse.

⁶ The trial court found that third-degree rape was a lesser included offense to unlawful transaction, and therefore instructed the jury that it could find Anderson guilty of either unlawful transaction or third-degree rape, but not both.

Anderson now argues for the first time on appeal that the trial court's failure to reindict him after the superseding indictment was dismissed violated his due process rights. He acknowledges this issue was not properly preserved, but requests review for palpable error under RCr⁷ 10.26.

We will reverse under the palpable error standard only when a "manifest injustice has resulted from the error." "[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." When we engage in palpable error review, our "focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process."⁸

Anderson contends that once he was arraigned on the superseding indictment, the first indictment ceased to exist. Therefore, he argues, once the superseding indictment was dismissed without prejudice, there was no longer any indictment against him in 19-CR-01071. He concludes that he was therefore only properly tried under 21-CR-00909 (one count each of third-degree sodomy and first-degree sexual abuse) and that his convictions under 19-CR-01071 (one count each of unlawful transaction with a minor under 16 and third-degree sodomy) must be declared void. Anderson has provided this Court with no published Kentucky case law that directly supports his argument, while the Commonwealth primarily relies on *Kelly v. Commonwealth*⁹ for its argument that Anderson's convictions should be

⁷ Kentucky Rule of Criminal Procedure.

⁸ See, e.g., *Baumia v. Commonwealth*, 402 S.W.3d 530, 542 (Ky. 2013) (internal citations omitted).

⁹ 554 S.W.3d 854 (Ky. 2018).

upheld. While the facts of *Kelly* are somewhat different than the ones now before us, it is nonetheless dispositive.

In *Kelly*, Jeremy Kelly was indicted on several felony offenses in July 2014 and a bench warrant was issued for his arrest.¹⁰ By December of that year law enforcement still had not apprehended him, and the trial court granted the Commonwealth's request to place Kelly's case on its "fugitive docket."¹¹ To do this, the trial court "entered a written order, dismissing the case without prejudice and stating that 'upon the arrest of the defendant, the indictment may be reinstated and redocketed on motion of the Commonwealth.'"¹² Kelly was apprehended the following year and was arraigned in October 2015.¹³ The trial court sustained the Commonwealth's motion to "reinstate the indictment," and Kelly raised no objection.¹⁴ The case proceeded to trial and Kelly was convicted.¹⁵ He appealed his convictions, arguing that the indictment against him was dismissed and prosecuting him without reindicting him was a *per se* violation of his due process rights.¹⁶ While this Court agreed that the trial court committed a procedural error, it

¹⁰ *Id.* at 857.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 858.

¹⁶ *Id.* at 858, 862.

held that the error did not result in the court losing subject matter jurisdiction over the case and that no due process violation occurred.¹⁷

The *Kelly* Court began by noting that “a dismissal without prejudice is a final and appealable order, and [] after dismissal without prejudice and loss of trial court jurisdiction, a defendant must be recharged,” unless the order was vacated within ten days pursuant to CR¹⁸ 59.¹⁹ The Court held that “[t]here is no procedural mechanism for a mere reinstatement of an indictment after a dismissal without prejudice[,]” and that “[t]he prosecution must seek another indictment or warrant just as in any original prosecution.”²⁰ Accordingly, the trial court’s “reinstatement” of the indictment was procedural error.²¹

Nevertheless, this Court went on to hold that the error did not result in the trial court losing subject matter jurisdiction over Kelly’s case:

“Whether a court has subject-matter jurisdiction is determined at the beginning of a case, based on the type of case presented. **“[A] court will retain jurisdiction over such a case so long as jurisdiction was proper in the first place.”** “Indeed, once a court has acquired jurisdiction, no subsequent error or irregularity will remove that jurisdiction, so that a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law, or both.” “Once filed, a court has subject matter jurisdiction of the case so long as the pleadings reveal that it is the kind of case assigned to that court by a statute or constitutional provision.” **“A court, once vested with subject matter jurisdiction over a case, does not suddenly lose subject matter jurisdiction by**

¹⁷ *Id.* at 861, 862-63.

¹⁸ Kentucky Rule of Civil Procedure.

¹⁹ *Kelly*, 554 S.W.3d at 859 (quoting *Commonwealth v. Sowell*, 157 S.W.3d 616 (Ky. 2005)).

²⁰ *Id.* at 859.

²¹ *Id.*

misconstruing or erroneously overlooking a statute or rule governing the litigation.”

. . . .

Felony prosecutions are squarely within the subject-matter jurisdiction of the circuit courts and there is no claim that this

particular case originally failed in some way to trigger that jurisdiction. Thus, the case was properly before the circuit court at the inception of the case. Subject-matter jurisdiction was invoked properly. Therefore, any loss or issue arising from procedural defects instead refers to the trial court's particular-case jurisdiction over Kelly's case specifically.²²

A trial court's particular case jurisdiction, "refers to a court's authority to determine a specific case (as opposed to the class of cases of which the court has subject matter jurisdiction)."²³ Particular case jurisdiction can therefore be waived, and this Court held that it was waived by Kelly's failure to object or raise any potential issues with reinstating the indictment.²⁴ Notably, this Court further proclaimed that it "[would] not allow Kelly to ignore an issue, fail to bring the situation to light until after a conviction, and then succeed in obtaining a dismissal of his case on a purely procedural technicality."²⁵ Finally, the *Kelly* Court held that Kelly failed to show prejudice resulted from the procedural error such that his due process rights were violated.²⁶ It noted that

²² *Id.* at 860 (internal citations omitted) (emphasis added).

²³ *Id.*

²⁴ *Id.* at 861.

²⁵ *Id.*

²⁶ *Id.*

[u]nder the Due Process Clause, the sufficiency of an indictment is measured by two criteria: first, that an indictment sufficiently apprise a defendant of the criminal conduct for which he is called to answer; and, second, that the indictment and instructions together provide adequate specificity that he may plead acquittal or conviction as a defense against any future indictment for the same conduct and that he not be punished multiple times in this action for the same offense.²⁷

And, “[n]onprejudicial errors and defects do not invalidate indictments which otherwise fulfill [these] two prime requisites.”²⁸ Kelly had not argued that his indictment did not meet these criteria, but rather that “the entire prosecution against him was a ‘*per se* violation’ of his constitutional rights.”²⁹ This Court disagreed and concluded that Kelly’s due process rights had not been violated.³⁰

In this case, Anderson argues that the superseding indictment replaced the first indictment, and when the superseding indictment was dismissed without prejudice there ceased to be an indictment against him in 19-CR-01071. But, in accordance with *Kelly*, the dispositive issue is not whether the trial court committed a procedural error by failing to have Anderson re-indicted. Rather, the dispositive issues are, first, whether Anderson’s first indictment properly invoked the court’s subject matter jurisdiction, and second, whether the first indictment was sufficient under the due process clause.

²⁷ *Id.* (quoting *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 325 (Ky. 2006)).

²⁸ *Id.* at 862 (quoting *Payne v. Janasz*, 711 F.2d 1305, 1312 (6th Cir. 1983)).

²⁹ *Id.*

³⁰ *Id.* at 863.

As noted in *Kelly*, “[f]elony prosecutions are squarely within the subject-matter jurisdiction of the circuit courts”³¹ and Anderson does not argue that the first indictment somehow failed to trigger that jurisdiction. Accordingly, the first indictment properly granted the McCracken Circuit Court subject matter jurisdiction from the outset and, once vested, the court did not suddenly lose that jurisdiction by its failure to have Anderson reindicted after the superseding indictment was dismissed.³² Additionally, Anderson does not allege that his first indictment did not contain sufficient information to satisfy the due process clause’s notice requirements, only that the trial court was required to reindict him after the superseding indictment was dismissed. We hold that reversal is accordingly not warranted and echo the sentiment of the *Kelly* Court that Anderson will not be permitted to “ignore an issue, fail to bring the situation to light until *after* a conviction, and then succeed in obtaining a *dismissal* of his case on a purely procedural technicality.”³³

B. The trial court did not abuse its discretion by allowing other bad acts evidence.

Anderson next alleges that the trial court abused its discretion by allowing the Commonwealth to introduce evidence of the uncharged crimes he committed in Cape Girardeau, Missouri, and Sevierville, Tennessee. He

³¹ *Id.* at 860.

³² *Id.*

³³ *Id.* at 861.

contends that the admission of those uncharged crimes violated his due process rights, and that his convictions must be vacated.

In June 2021, the Commonwealth filed a pre-trial notice of its intent to introduce KRE³⁴ 404(b) evidence. This notice included evidence that Anderson had sexual contact with Jane in both Cape Girardeau and Sevierville. Initially, Anderson's position was that the evidence the Commonwealth sought to introduce was "probably inextricably intertwined" with the evidence of the Paducah crimes. Three months later, however, Anderson filed a motion in limine to exclude the allegations of sexual abuse in Cape Girardeau and Sevierville as inadmissible other bad acts evidence. Following a hearing on Anderson's motion, the trial court found that the uncharged other bad acts were "admissible pursuant to KRE 404(b)(1) to prove Anderson's plan and *modus operandi*." The court reasoned that both the charged Paducah acts and the uncharged other bad acts involved taking Jane on an out-of-town trip and having sex with her in a hotel room.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion.³⁵ This Court must accordingly uphold the trial court's decision to admit the other bad acts evidence unless doing so was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."³⁶ KRE 404(b), entitled "[o]ther crimes, wrongs, or acts," directs that

³⁴ Kentucky Rule of Evidence.

³⁵ See, e.g., *Meece v. Commonwealth*, 348 S.W.3d 627, 645 (Ky. 2011).

³⁶ *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

Anderson asserts that neither of the uncharged bad acts satisfy the three-part test established by *Bell v. Commonwealth*³⁷ concerning the admissibility of KRE 404(b) evidence. In response, the Commonwealth argues this Court's often stated tenet that "evidence of similar acts perpetrated against the same victim are almost always admissible" to prove intent, plan, or absence of mistake or accident.^{38,39}

KRE 404(b) "protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character, or criminal disposition, the concern being that juries are unduly susceptible to that type of evidence."⁴⁰

³⁷ 875 S.W.2d 882, 889 (Ky. 1994).

³⁸ *Bartley v. Commonwealth*, 485 S.W.3d 335, 343 (Ky. 2016) (citing *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002); *Harp v. Commonwealth*, 266 S.W.3d 813, 822 (Ky. 2008)).

³⁹ The Commonwealth also argues that the evidence was admissible under KRE 404(b)(2). But, because we hold that the trial court did not abuse its discretion by finding the evidence was admissible under KRE 404(b)(1), we limit our analysis to that finding.

⁴⁰ *Jenkins v. Commonwealth*, 496 S.W.3d 435, 457 (Ky. 2016) (citing *Bell*, 875 S.W.2d at 889).

It does not, however, “preclude the use of extrinsic act evidence for proper purposes, such as the purposes listed in KRE 404(b)(1) and 404(b)(2).”⁴¹

“To help with the often difficult distinction between proper and improper uses of extrinsic act evidence, the *Bell* Court . . . recommended the assessment of such evidence by means of a three-part inquiry into relevance, probativeness, and prejudice.”⁴² Under this test, a reviewing court asks: whether “the other crimes evidence [is] relevant for some purpose other than to prove the criminal disposition of the accused”; whether “evidence of the uncharged crime is sufficiently probative[,]”⁴³ “i.e., [whether the jury could] ‘reasonably infer that the prior bad acts occurred and that [the defendant] committed such acts’”⁴⁴; and whether “the potential for prejudice from the use of other crimes evidence substantially [outweighed] its probative value.”⁴⁵

In this case, the evidence of the Cape Girardeau and Sevierville uncharged acts certainly had relevance other than to prove Anderson’s criminal disposition. As previously noted, this Court has consistently held that evidence of similar acts perpetrated against the same victim are almost always admissible to prove intent, plan, or absence of mistake or accident. Both the charged Paducah crimes and the Cape Girardeau and Sevierville uncharged

⁴¹ *Id.* at 457

⁴² *Id.*

⁴³ *Bell*, 875 S.W.2d at 889-90.

⁴⁴ *Jenkins*, 496 S.W.3d at 457.

⁴⁵ *Bell*, 875 S.W.2d at 890.

bad acts occurred within a four-month span, and each involved staying with Jane in a hotel room outside of Illinois without another adult.

Next, concerning the evidence's probative value, the jury could have reasonably inferred that the other uncharged bad acts occurred. Anderson did not dispute that he took Jane to Cape Girardeau and Sevierville, and Jane's "testimony was sufficient to permit a reasonable juror to conclude that the prior act occurred and that [Anderson] was the actor."⁴⁶

Finally, the evidence's probative value was not substantially outweighed by a risk of undue prejudice. Jane did not go into much detail regarding either the Cape Girardeau or Sevierville bad acts and was subjected to extensive cross-examination by Anderson's counsel. Moreover, those incidents were not emphasized by the Commonwealth.

Based on the foregoing, we cannot hold that the trial court's finding that the other bad acts were admissible under KRE 404(b)(1) as evidence of Anderson's "plan" was an abuse of discretion, and we affirm.

C. The trial court did not abuse its discretion by allowing a photograph of Jane posed with Tigger at Disney World to be admitted.

During Jane's testimony about the Disney trip, the Commonwealth sought to introduce a photograph of Jane posed with a Disney employee in a Tigger costume. Anderson's counsel objected to the photograph's admission, and the following sidebar occurred:

⁴⁶ *Jenkins*, 496 S.W.3d at 459.

Defense: I think [the photograph is] unduly prejudicial. There's no reason to show her with Tigger, or Pooh, or Mickey Mouse. That's, give me a break.

Court: What's the relevance of it?

CW⁴⁷: Well it shows that she's at Disney World around that time frame and her age is definitely a relevant factor in the case so—

Defense: I don't have a problem with her being at Disney World, but we don't need to have her with Mickey Mouse or Winnie the Pooh.

Court: I'll overrule the objection.

Jane then testified that she was fourteen in the picture and that it was taken at Disney World by Anderson.

The trial court's decision to allow the photograph into evidence is reviewed by this Court for abuse of discretion.⁴⁸ We must therefore affirm that decision unless it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."⁴⁹

"All relevant evidence is admissible Evidence which is not relevant is not admissible."⁵⁰ Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁵¹ "This standard is powerfully inclusionary and is met upon a showing of minimal

⁴⁷ Commonwealth.

⁴⁸ *Meece*, 348 S.W.3d at 645.

⁴⁹ *English*, 993 S.W.2d at 945 .

⁵⁰ KRE 402.

⁵¹ KRE 401; *Wager v. Commonwealth*, 751 S.W.2d 28, 31 (Ky. 1988) (noting "photographs must have some probative value to be admitted into evidence").

probativeness.”⁵² Relevant evidence may nevertheless be excluded “if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.”⁵³

Anderson argues that the photograph was not relevant because the Commonwealth had already presented photographic evidence of Jane’s age: a picture of Jane during the Holiday World trip in June 2017, and another picture of Jane in August 2017. Anderson further asserts that the photograph “was nothing but prejudicial, and that was its only purpose,” but, as with his argument before the trial court, he does not articulate exactly how it was unduly prejudicial or would have inflamed the jury. The Commonwealth responds that evidence of the Disney World trip was crucial because it marked the end of Jane staying at Anderson’s home and because he had sexual contact with her in a hotel room in Sevierville on the way back from that trip.

Given the inclusionary nature of the relevance standard, and the fact that Jane’s age was a fact of consequence to the determination of the action—all of Anderson’s charges had statutory age requirements—we cannot hold that the trial court abused its discretion by finding the evidence was relevant.

Moreover, we agree that the evidence’s probative value was not substantially

⁵² *Roe v. Commonwealth*, 493 S.W.3d 814, 820 (Ky. 2015) (citing Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.05(2)(b) (LexisNexis Matthew Bender) (“The inclusionary thrust of the law of evidence is powerful, unmistakable, and undeniable, one that strongly tilts outcomes toward admission of evidence rather than exclusion.”)).

⁵³ KRE 403.

outweighed by a danger of undue prejudice. “Evidence that is unduly prejudicial is that which ‘appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.’”⁵⁴ We hold that the trial court’s finding that the photograph did not rise to this high level of prejudice was not arbitrary or unsupported by sound legal principles.

D. Anderson did not properly preserve his argument that he was entitled to a directed verdict, and we will not review it.

Anderson’s final assertion is that the trial court erred by denying his motion for directed verdict. In particular, he asserts that the only evidence of his guilt was Jane’s testimony, and that her testimony was inconsistent and unreliable. However, Anderson failed to preserve this argument for our review.

[I]n order to preserve an alleged directed verdict issue for appeal, criminal defendants must: (1) move for a directed verdict at the close of the Commonwealth’s evidence; (2) renew the same directed verdict motion at the close of all the evidence, unless the defendant does not present any evidence; and identify the particular charge the Commonwealth failed to prove, and must identify the particular elements of that charge the Commonwealth failed to prove.⁵⁵

Here, at the close of the Commonwealth’s evidence Anderson simply “[moved] for a directed verdict” and argued that Jane could not have been at the Paducah hotel on June 18 or June 19 based on her inaccurate testimony

⁵⁴ *Breazeale v. Commonwealth*, 600 S.W.3d 682, 693–94 (Ky. 2020) (quoting *Richmond v. Commonwealth*, 534 S.W.3d 228, 232 (Ky. 2017)).

⁵⁵ *Ray v. Commonwealth*, 611 S.W.3d 250, 266 (Ky. 2020).

regarding the hotel room's location and her claim that Anderson took her to the hotel after the checkout time on June 19. Anderson's motion for directed verdict at the close of all the evidence was essentially the same. He never identified a particular charge the Commonwealth failed to prove or the elements of that charge that the Commonwealth failed to prove. His directed verdict argument is therefore not preserved, and he has not requested palpable error review. "Ordinarily, when an issue is unpreserved at the trial court, this Court will not review it unless a request for palpable error review under RCr 10.26 is made and briefed by the appellant."⁵⁶ Consequently we decline to address Anderson's directed verdict argument.

III. CONCLUSION

Based on the foregoing, we affirm.

VanMeter, CJ.; Bisig, Conley, Keller, Lambert and Thompson, JJ.,
sitting. All concur. Nickell, J., not sitting

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⁵⁶ *Webster v. Commonwealth*, 438 S.W.3d 321, 325 (Ky. 2014).

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