

RENDERED: June 25, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2000-CA-002025-MR

THELMA MICHELLE CAMPBELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 00-CR-00157

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE, JUDGE; AND EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE. Thelma Campbell was convicted of rape, third degree and persistent felony offender, second degree. She was sentenced to two years' imprisonment on the rape charge and five years' imprisonment on the PFO conviction. On appeal she raises numerous issues most of which were not properly preserved for review.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A jury found that on or about September 4, 1999, Campbell, who was over the age of twenty-one, engaged in sexual intercourse with a child less than sixteen years of age. At trial, Campbell denied that she had sexual intercourse with the child and testified that on the date in question she was with her family. As a part of her defense, Campbell alleged that the child's family fabricated the sexual intercourse story and pursued the charges in retaliation because the child's aunt, Melissa Brumley, believed Campbell had a sexual affair with Melissa's husband, Gordon Brumley. Additionally, Campbell's mother and Melissa had, two weeks prior to September 4, 1999, a physical altercation resulting in disorderly conduct charges against both women.

Campbell raises various issues on appeal; most, however, are not preserved for review. Absent a contemporaneous objection by counsel, a trial error cannot be the basis for reversing a conviction unless it is a palpable one resulting in a manifest injustice.² The palpable error rule and the limitations imposed on a reviewing court were explained in Commonwealth v. Pace:³

The palpable error rule set forth in RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an

² Kentucky Rules of Criminal Procedure (RCr) 10.26.

³ Ky., 82 S.W.3d 894, 895 (2002).

error for review. RCr 9.22. The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived. See *Bell v. Commonwealth*, Ky., 473 S.W.2d 820 (1971). An appellate court may consider an issue that was not preserved if it deems the error to be a "palpable" one which affected the defendant's "substantial rights" and resulted in "manifest injustice." RCr 10.26. In determining whether an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." *Commonwealth v. McIntosh*, Ky., 646 S.W.2d 43, 45 (1983).

We have reviewed Campbell's allegations of error, and because of their number, do not discuss each in detail. However, we explain the application of RCr 10.26 to those we believe in need of comment.

Campbell contends that Detective Jessie Harris was erroneously permitted to testify that it is common in child sexual abuse cases for there to be delay in reporting the incident and for fifteen-year-olds to be inconsistent as to time and date when an incident occurred. In *Miller v. Commonwealth*,⁴ the court held that the trial court should have sustained defense counsel's objection to similar evidence of the habit of a class of individuals:

[A] party cannot introduce evidence of the habit of a class of individuals either to prove that another member of the class acted

⁴ Ky., 77 S.W.3d 566, 572 (2002).

the same way under similar circumstances or to prove that the person was a member of that class because he/she acted the same way under similar circumstances. (Emphasis original.)

Although Miller, supra, indicates that a proper objection to Detective Harris's testimony should have been sustained, the question we must resolve is whether the error was a palpable one. We cannot conclude that the testimony met the standard set forth in Pace, supra. After review of the evidence in this case, it is apparent to the court that Detective Harris's generalizations about children in sex abuse cases was not so prejudicial to Campbell that it affected the outcome of the proceedings. We are not convinced that the jury was most persuaded by one witness's remark. Without going into every detail of the testimony, we observe that this is one of the few cases where a sex crime had witnesses present at the time of its occurrence. Absent a proper objection to the testimony, we do not find the error rises to the level required under RCr 10.26.

Campbell's defense consisted of proving a scheme of retaliation by the alleged victim's family. On direct examination, Campbell denied that she had an affair with Gordon Brumley but testified that Gordon made sexual advances toward her. To impeach her testimony, the Commonwealth called Gordon and another witness to testify that there had been sexual

contact between Gordon and Campbell. We find no error, palpable or otherwise. As the court in Smith v. Commonwealth,⁵ observed:

[O]ne who opens the book on a subject is not in a position to complain when his adversary seeks to read other verses from the same chapter and page.

The Commonwealth was permitted to ask each of its witnesses called during its case in chief whether their in-court statements were consistent with those given out of court. Detective Harris was also permitted to testify, without objection, that the witnesses's statements given to him were consistent with each other. A witness's prior consistent statement admitted to bolster a witness's credibility can constitute error.⁶ However, the error, if any, is not one of constitutional proportions and we find that in this case it does not warrant reversal under RCr 10.26.

Campbell's contention that the trial judge displayed bias against her and counsel by making unfavorable remarks in front of the jury is meritless. The trial tape reveals that the trial judge at all times acted with proper judicial decorum with respect for all parties and the judicial process.

In addition to allegations against the trial judge, Campbell also accuses the Commonwealth of engaging in

⁵ Ky., 904 S.W.2d 220, 222 (1995).

⁶ Smith v. Commonwealth, Ky., 920 S.W.2d 514 (1995).

prosecutorial misconduct, both in its closing and in questioning of witnesses. Reversal on the basis of prosecutorial misconduct is justified only when the alleged misconduct is so egregious as to render the trial fundamentally unfair.⁷ The issues raised were either unreserved by contemporaneous objection and do not rise to the level of palpable error or did not render the trial fundamentally unfair.

During the Commonwealth's case-in-chief, Aretta Roberts, the victim's grandmother, was asked how she felt when the victim admitted to the sexual encounter. She responded "I felt as if he might have got a death sentence." Campbell's attorney immediately approached the bench and requested a mistrial. The court denied the request and no further remedy was sought. Campbell contends that the witness's statement suggested to the jury that Campbell gave the victim a sexually transmitted disease. We do not believe that the statement had such a literal meaning. It is most logical that the jury simply took the statement as a grandmother's reaction after learning that her fifteen-year-old grandson had sex with a twenty-one-year-old woman. A simple request for an admonition would have removed any possible prejudice feared by Campbell.⁸ The trial

⁷ Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

⁸ Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993).

court did not abuse its discretion in refusing to grant a mistrial.⁹

We find no merit to the remaining issues raised. The judgment of the trial court is affirmed.

ALL CONCUR.

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⁹ Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 906 (2000).