

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001601-MR

CLARISSA GILLIAM

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 00-CR-00327-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, GUIDUGLI, and VANMETER, JUDGES.

VANMETER, JUDGE. Appellant appeals from a judgment of the Hardin Circuit Court sentencing her to nine years for conviction on three counts of second degree criminal abuse. We affirm.

The basic facts were that appellant and her three children, D.G., A.G., and T.G., were living with Thomas O. Dixon. The abuse to the children came to light when appellant and a neighbor, Freda O'Neal, brought A.G. to the Hardin

Memorial Hospital emergency room. The examination revealed that A.G. was unable to urinate as his penis was so swollen as to be "deformed." In addition, A.G. had bruises across his thighs. Jennifer Kidwell, the examining nurse, in speaking with the appellant about the injuries to A.G., noticed a large amount of bruising around T.G.'s ears. Upon examining T.G., Nurse Kidwell discovered that T.G. was covered "from head to toe" with bruises of varying ages. Nurse Kidwell notified the police and social service authorities. After the authorities became involved, it was discovered that the appellant's third child, D.G., also had bruises.

Each of the three indictments for first degree criminal abuse charged that appellant either intentionally abused her three children or permitted Dixon to abuse them. After a jury trial, appellant was convicted of three counts of second degree criminal abuse. She was sentenced to three consecutive sentences of three years each. This appeal followed.

Appellant raises for review three errors: (i) the failure to exclude evidence of prior bad acts, specifically evidence that appellant had left the children alone on prior occasions; (ii) introduction of opinion evidence from witnesses, primarily as to the severity of the abuse and injuries; and (iii) prosecutorial misconduct in presenting speculative

evidence as to the future effect of the abuse on the children. None of the errors was preserved for review at the trial court. Appellant requests review of the errors under the "palpable error" rule of RCr 10.26.

In the recent case of *Commonwealth v. Pace*, Ky., 82 S.W.3d 894 (2002), the Kentucky Supreme Court discussed the palpable error rule:

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 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). 82 S.W.3d at 895.

In reviewing the whole case, the evidence is overwhelming that all the children were subjected to a great deal of physical abuse. Dixon testified that he "disciplined" the children at the appellant's request. The pictures showing the extent of the children's injuries were compelling, to say

the least. The extent of the children's injuries¹ is not accounted for by appellant's explanation that T.G., a two-year old female, had fallen, and that Dixon had beaten A.G. the night before appellant took A.G. to the hospital. By convicting appellant of second degree criminal abuse on each count, the jury found that appellant's mental state was such that she "wantonly" permitted the children to be abused by Dixon.²

In reviewing the whole case, we are of the opinion that there is **not** a substantial possibility that the result would have been any different if the evidence complained of had been excluded. Hence, any error was not palpable and appellant is not entitled to relief on appeal.

The judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joanne Lynch
Louisville, Kentucky

BRIEF FOR APPELLEE:

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¹ The injuries to the children consisted of the following: T.G., bruises on face and ears, swollen genitals, scraped areas on face, ears, back, chest, neck and genitals; A.G., swollen penis, bruises on thighs, groin and lower trunk; and D.G., healed scratches, bruises and scars on thighs and trunk.

² A person acts "wantonly" with respect to a result or to a circumstance when she is "aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020 (3). Under the jury instructions, the case was presented on the theory that appellant permitted each of the children to be abused by Dixon. The differentiation between first, second or third degree criminal abuse turned on whether appellant acted intentionally, wantonly, or recklessly.