

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001733-MR

STEVEN RAY THOMAS

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE JOHN T. DAUGHADAY, JUDGE  
ACTION NO. 01-CR-00225

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND DYCHE, JUDGES.

EMBERTON, CHIEF JUDGE. Steven Thomas was convicted of first-degree sexual abuse and sentenced to five years' imprisonment. The issue raised on appeal is whether a written statement given before a waiver of rights had been signed by Thomas, the integrity of which the trial court found suspect and inadmissible in the Commonwealth's case-in-chief, was admissible to impeach Thomas if he took the witness stand in his defense.

The trial court ruled the statement admissible for purposes of impeachment. Thomas argues that because of the court's ruling allowing impeachment he elected not to testify. The statement was not admitted as evidence nor used for impeachment.

In Hayes v. Commonwealth,<sup>1</sup> the court held that to preserve the issue of the use of a three-year-old misdemeanor conviction for impeachment purposes, the defendant must have taken the stand and testified. As stated by the court:

To reach the merits on this issue without Hayes's testimony would require a reviewing court to speculate as to whether prejudicial harm had occurred and to assume that the adverse ruling was the sole motivation for not testifying. We will not require a reviewing court to engage in making such tenuous assumptions and speculations.<sup>2</sup>

Additionally, the court recognized that to permit a defendant to claim the trial court erred in permitting impeachment evidence without requiring the defendant to testify would give the defendant the opportunity to "plant" reversible error in the event of conviction.<sup>3</sup>

Thomas was not precluded from taking the stand, but chose not to testify in his own behalf. The issue is not properly preserved for review.

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<sup>1</sup> Ky., 58 S.W.3d 879 (2001).

<sup>2</sup> Id. at 881.

<sup>3</sup> Id. at 881-82 (citing Luce v. United States, 469 U.S. 38, 42, 105 S.Ct. 460, 464-65, 83 L.Ed.2d 443, 448 (1984)).

The judgment is affirmed.

ALL CONCUR.

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