

**Commonwealth Of Kentucky**

**Court of Appeals**

NOS. 2002-CA-001791-MR  
AND 2002-CA-001792-MR

JAMES RAY SOLOMON

APPELLANT

APPEALS FROM CALLOWAY CIRCUIT COURT  
v. HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NOS. 01-CR-00216 & 01-CR-00152

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: DYCHE, JOHNSON, AND VANMETER, JUDGES.

VANMETER, JUDGE. James Solomon appeals from a judgment of the Calloway Circuit Court sentencing him to ten years' imprisonment upon his conviction for both second degree rape and first degree persistent felony offender (PFO). On appeal, appellant argues that the trial court erred by permitting the Commonwealth to introduce hearsay evidence and to improperly attack the credibility of appellant's son. For the reasons stated hereafter, we affirm.

On May 12, 2001, H.G., the twelve-year-old victim, spent the night at a friend's house. Besides the two girls, three other persons were present: Penny, the friend's mother; appellant; and Tyler Solomon ("Tyler"), appellant's fifteen-year old son. Appellant denied any sexual contact with H.G. However, H.G. testified that the thirty-seven-year-old appellant came into the bedroom where she was trying to sleep, laid down beside her, and proceeded to kiss her, fondle her breasts and vagina, and ultimately have sexual intercourse with her.

After the incident, H.G. wrote appellant a letter postmarked June 7, 2001, stating that she missed and loved him. Penny's ex-husband found the letter and informed H.G.'s father. The authorities were notified and appellant was arrested on June 13, 2001. On June 4, 2002, a jury found appellant guilty of second degree rape and first degree PFO.

At appellant's trial, after laying a foundation for their introduction, the Commonwealth moved to introduce the letter and two diary entries written by H.G. In the diary entry of June 6, 2001, H.G. stated that appellant "french kissed" her and that they "made love." In the diary entry of June 9, 2001, H.G. stated that appellant was her best friend and the greatest event in her life occurred when appellant kissed her.

Appellant raises two points of error: first, that the court erred in permitting introduction of the letter and the

diary entries because all constituted hearsay; and second, that the Commonwealth impermissibly impeached Tyler's credibility as a witness by raising issues as to his gang involvement and his exposure to the juvenile justice system.

The claimed errors with respect to the letter and diary entries, and with respect to Tyler's exposure to the juvenile justice system, were not raised in the trial court by means of a contemporaneous objection. The claimed error as to Tyler's gang involvement was raised by an objection which was sustained by the trial court, but no admonition was requested or given to the jury. Appellant requests that we review these errors under the palpable error rule of RCr 10.26.

In *Commonwealth v. Pace*, Ky., 82 S.W.3d 894 (2002), the court held that the palpable error rule "is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review." *Id.* at 895. In looking at the language of RCr 10.26, the Court stated that "[a]n 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.'" *Id.* at 895. In determining whether an error is palpable, our review is "whether on the whole case there is a substantial possibility that the result would have been any different." *Id.* (citing *Commonwealth v. McIntosh*, Ky., 646

S.W.2d 43, 45 (1983)). See also *Brock v. Commonwealth, Ky.*, 947 S.W.2d 24, 28 (1997); *Partin v. Commonwealth, Ky.*, 918 S.W.2d 219, 224 (1996); *Schaefer v. Commonwealth, Ky.*, 622 S.W.2d 218 (1981); *Jackson v. Commonwealth, Ky. App.*, 717 S.W.2d 511, 513 (1986).

In the instant case, appellant neither describes how the admission of the letter or the diary entries affected his substantial rights, nor argues that, on the whole case, there is a substantial possibility that the result would have been different. To the contrary, appellant's trial counsel made no objection to the introduction of the letter or journal entries, and in fact counsel took considerable pains to cross-examine H.G. on her inconsistent statements to the police, to medical personnel, and in the letter and journal entries. Viewed against this background, the failure to object to the letter or journal entries appears to be in line with trial strategy developed by trial counsel. See *West v. Commonwealth, Ky.*, 780 S.W.2d 600, 602 (1989)(court noting that counsel at trial makes a number of strategic and tactical decisions and that ordinarily the defendant is bound by such decisions).

In any event, KRE 801A(a)(2) permitted the Commonwealth to introduce the letter and diary entries. As one exception to the hearsay rule, KRE 801A(a)(2) allows the introduction of prior consistent statements which are "offered

to rebut an express charge against the declarant of recent fabrication or improper influence or motive." Here, appellant's counsel stated in his opening statement:

". . . the events which you have heard by the Commonwealth happened only in the imagination of this little girl. . . . She was thrilled to have attention and somehow this blossomed into a fantasy, a fantasy that she created that did not happen."

Therefore, under KRE 801A(a)(2) the Commonwealth was entitled to rebut appellant's opening charge of fabrication with evidence that appellant had sexual intercourse with H.G. The introduction of the letter shows that a relationship existed between H.G. and appellant, and the diary entries indicate that appellant "french kissed" and "made love" to H.G. As this evidence was offered to rebut appellant's opening statement that H.G. imagined or fantasized having sexual intercourse with appellant, it falls within the exception to the hearsay rule set out in KRE 801A(a)(2).<sup>1</sup>

The next claimed error raised by appellant is that the trial court erred by permitting the Commonwealth to attack improperly Tyler's credibility on cross-examination by asking the following questions:

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<sup>1</sup>*Miller v. Commonwealth, Ky.*, 77 S.W.3d 556 (2002), cited by appellant, does not dictate a different result. The facts in *Miller* were that the letters written by the victim were offered during the prosecutor's case in chief, no charge of fabrication had been made at that point in the proceeding, and defense counsel did not cross-examine the victim about the letters. In addition, the letters in *Miller* contained statements by a third party who was not a witness in the proceeding. 77 S.W.3d at 571.

Q: What are the Bloods?

A: It's a gang.

Q: Have you ever told anyone you're a member of the Bloods?

A: No ma'am.

Appellant's counsel objected and both parties approached the bench for conference. The trial court sustained the objection, but appellant did not ask for an admonition to the jury, and no admonition was given. Appellant now requests our review under the palpable error rule of RCr 10.26 because the trial judge did not admonish the jury *sua sponte*.

Appellant's failure to ask the trial court for an admonition after his objection was sustained is treated as either a waiver or an element of trial strategy.<sup>2</sup> Under RCr 9.22, a party is obligated to tell the court what action he wants taken at the time of the court's ruling on an objection.<sup>3</sup> The trial court's failure to admonish the jury *sua sponte*, coupled with the fact that Tyler denied being a gang member prior to counsel's objection, does not rise to the level of "manifest injustice" under RCr 10.26.

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<sup>2</sup>In *Hall v. Commonwealth*, Ky., 817 S.W.2d 228 (1991)(overruled on other grounds by *Commonwealth v. Ramsey*, Ky., 920 S.W.2d 526 (1996)), the court held that a trial court does not err by failing to admonish a jury *sua sponte*. See also *Taylor v. Commonwealth*, Ky., 432 S.W.2d 805 (1968).

<sup>3</sup>In *Taylor v. Commonwealth*, Ky., 432 S.W.2d 805, 808 (1968), the court emphasized "it seems plain that the accused may not play fast and loose with the court by failing to request an admonition and then assigning the failure to give such an admonition as reversible error."

Finally, appellant contends that, based on *Manns v. Commonwealth*, Ky., 80 S.W.3d 439 (2002), and KRE 609(a), the trial court erred by permitting the Commonwealth to impeach Tyler based on his juvenile felony convictions.<sup>4</sup> Again, appellant failed to object but requests review under the palpable error rule of RCr 10.26.

In reviewing the whole case, we do not believe a substantial possibility exists that the results of the trial would have been different if the elicited testimony had been excluded. At trial, the following dialogue occurred between **appellant's counsel** and Tyler:

Q: Are you presently in detention?

A: I'm in a treatment center, yes sir.

Q: . . . and as part of that treatment are you getting counseling on telling the truth?

A: Yes sir.

On the subsequent recross-examination by the Commonwealth, the following exchange occurred:

**Q: Tyler, what are you receiving treatment for?**

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<sup>4</sup>KRE 609(a) states "evidence that a witness has been convicted of a crime shall be admitted if elicited from the witness," but only if the crime was a felony. In *Manns*, in reversing the conviction, the court held that KRS 532.055(2)(a), which allows prior felony convictions of juveniles to be admitted for impeachment purposes during criminal trials and sentencing, violated the separation of powers doctrine of Section 28 of the Kentucky Constitution. 80 S.W.3d at 445. Moreover, the Kentucky courts have never allowed evidence of a juvenile adjudication to impeach the credibility of a witness, even if the crime is the equivalent of a felony. *Id.* at 446; see also *Thomas v. Commonwealth*, Ky., 864 S.W.2d 252, 262 (1993) (Leibson, J., concurring in part/dissenting in part), *cert. denied*, 510 U.S. 1177, 114 S.Ct. 1218, 127 L.E.2d 564 (1994).

**A: Well, what are you asking what my charges are? Or?**

**Q: Well, I'll take that for now. Yes, what are you in for?**

A: Fleeing and evading, wanton endangerment.

Q: Anything else?

A: No ma'am.

**Q: Well, what are you receiving treatment for?**

A: I don't understand the question.

Q: Well, there's substance abuse treatment, there's alcohol abuse treatment, there's behavioral treatment . . . Why are you receiving treatment?

A: Mainly drugs and alcohol.

Although Tyler testified to juvenile charges, and even if the Commonwealth could be said to have elicited the information in contravention of *Manns*, our review of Tyler's entire trial testimony reveals that Tyler's credibility was suspect even without the intrusion of the Commonwealth's question. For instance, Tyler testified on direct examination that he fabricated a story that Penny had raped him on the night of May 12, 2001, because he was angry about the charges against his father. Furthermore, the Commonwealth introduced Tyler's written statement that on May 12, 2001, he smoked marijuana to fall asleep and was with appellant at Penny's residence the entire evening. This statement contradicted Tyler's testimony on direct examination that he did not smoke marijuana, and that appellant and he were not at Penny's residence at the time in question because they were driving through southwestern Kentucky for five to five and one-half hours until the morning of May 13,

2001. Tyler further undermined his credibility by testifying both that marijuana is his drug of choice, and that he received counseling for not telling the truth.

Given Tyler's lack of credibility as a witness, including the inconsistencies between his oral testimony and the written statements, it follows that any reference to Tyler's felony conviction was not palpable error. See *Jackson v. Commonwealth*, Ky. App., 717 S.W.2d 511, 512-14 (1986) (court found no palpable error after raising the numerous inconsistencies and improbabilities of defendant's alibi between witness and defendant testimony). The Commonwealth's reference to Tyler's juvenile charges does not rise to the magnitude of manifest injustice under RCr 10.26.

The judgment of the Calloway Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kimberly A. Brooks  
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III  
Attorney General

Anitria M. Franklin  
Assistant Attorney General  
Frankfort, Kentucky