

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002412-MR

DONALD KING

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 02-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.  
SCHRODER, JUDGE. This is an appeal from a judgment in which appellant was convicted of first-degree assault for stabbing the victim in a dispute over the shooting of appellant's dog. Appellant argues that the prosecution improperly displayed the knife used in the crime during closing argument and that the victim was erroneously allowed to testify that he was attending a relatives' funeral prior to the incident. It is undisputed that both assignments of error were not preserved for appellate

review. From our review of the record, we cannot say that either alleged error was palpable error pursuant to RCr 10.26. Hence, we affirm.

On January 13, 2002, Brian Jordan shot a dog belonging to appellant, Donald King, because the dog had behaved aggressively toward Brian's young daughter. Brian Jordan and King lived across the street from one another, and after the shooting, King and Al Schneider began throwing rocks at Brian's house. Brian subsequently called his brother, Ronnie Jordan, and father, Jack Jordan, who were attending a funeral at the time. Ronnie and Jack thereafter arrived at Brian's house and went up to the property line and confronted Schneider, King, and King's son, Chris Hubbard. An argument ensued. At some point, Hubbard attempted to punch Ronnie Jordan, but missed. Ronnie then punched Hubbard in the head. As Ronnie prepared to punch Hubbard again, King stabbed Ronnie in the side. The knife punctured Ronnie's lung, diaphragm, and spleen, requiring surgery and hospitalization. It was undisputed that neither Ronnie nor his father was armed.

Immediately after the incident, King called the Kentucky State Police and reported that he had just stabbed someone. When the police arrived on the scene, King surrendered the knife to them.

King was tried by a jury on September 3, 2002, and convicted of first-degree assault. He was thereafter sentenced to ten years' imprisonment pursuant to the jury's recommendation. This appeal followed.

King first argues the prosecution improperly displayed the knife used in the crime during its closing argument. The knife in question was never introduced or admitted into evidence at trial. However, during closing argument the prosecutor got the knife out of the evidence envelope and held it before the jury, stating, "it didn't pop open; it didn't just come open; it didn't just jump into his hands." The prosecutor then pretended to open the knife while stating, "this defendant had to make a conscious decision to take that knife [inaudible] and put it on his body and pull it apart and open it up until it locked." King maintains he was prejudiced by this act because the prosecution thereby suggested that the assault was premeditated, negating his self-defense claim.

It is undisputed that this alleged error was not preserved. See RCr 9.22; Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990). King never objected to the prosecution's use of the knife during closing argument. Nevertheless, King urges us to review the argument under the palpable error rule, RCr 10.26. RCr 10.26 states as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Relief will be granted under RCr 10.26 only if there is a substantial possibility that the outcome would have been different had the error not occurred. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).

In our view, even if it was error for the prosecution to use the knife in closing argument, see Smith v. Commonwealth, Ky., 645 S.W.2d 707 (1983), that error was harmless. RCr 9.24. From our review of the evidence, we cannot say that the outcome would have been different had the Commonwealth not displayed the knife to the jury.

There was no issue at trial as to who stabbed Ronnie Jordan or as to the weapon used. King confessed to the stabbing, and Ronnie and Brian Jordan both gave eyewitness testimony as to what occurred. King's theory of the case was that he acted in self-defense. The Commonwealth used the knife during closing argument only to make the point that the knife had to have already been on King's person and unfolded prior to the stabbing. There was no dispute at trial as to the particular knife used or as to how it operated. Hence, the

knife did not add anything to the Commonwealth's case. The Commonwealth could have made the same point in its closing argument without actually displaying the knife. Further, there was other evidence that King did not need to stab Ronnie Jordan in order to defend himself or anyone else. It was undisputed that Ronnie Jordan was not armed at the time of the stabbing and that he did not use or threaten to use deadly force against Hubbard or King. Lastly, contrary to King's assertion on appeal, the prosecutor did not actually unfold the knife to demonstrate how the knife worked. As stated above, the prosecution appeared to simply casually mime unfolding the knife as he was speaking.

King's second assignment of error is that the trial court erred in allowing Ronnie Jordan to testify that he had been at his great aunt's funeral when Brian Jordan called prior to the stabbing incident. This alleged error was likewise not preserved by way of an objection to the testimony at issue. RCr 9.22. King contends that said error was palpable because it served to elicit additional sympathy for the victim. Once again, the error, if any, was harmless. We cannot say that King would not have been convicted had the jury not heard this testimony.

For the reasons stated above, the judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joanne Lynch  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III  
Attorney General

Janine Coy Bowden  
Assistant Attorney General  
Frankfort, Kentucky