

RENDERED: May 5, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-002462-MR

WILLIAM L. MORGAN

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
INDICTMENT NO. 03-CR-00088

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KNOPF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

HUDDLESTON, SENIOR JUDGE: William L. Morgan was convicted of first-degree rape in Butler Circuit Court and sentenced to ten years' imprisonment. On appeal Morgan contends that the circuit court committed four errors that warrant reversal of his conviction. Additionally, Morgan alleges juror misconduct constituting reversible error. First, Morgan charges improper and prejudicial testimony relating to alleged "prior bad acts" was admitted. Next, he claims the court abused its discretion

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

by denying him a continuance. Morgan also contends the trial court erred in dismissing a juror, and he claims there was juror misconduct during deliberations. Finally, Morgan alleges the court improperly instructed the jury regarding reasonable doubt.

The rape in question occurred in July 1998. At the time, the victim, MNS, was thirteen years old. MNS was a distant relative of Morgan's, and she occasionally visited his home with her mother. MNS testified at trial that she was alone in a barn on Morgan's property on the day of the rape. Morgan stepped up behind MNS, put her on the ground, and forcibly raped her. MNS stated Morgan threatened to kill her if she told anyone what had happened. MNS further testified she was afraid of Morgan and waited several years before finally admitting to her mother what happened. No scientific or physical evidence of the rape was introduced. In Morgan's defense, the jury heard testimony disputing the details of MNS's claim.

The first issue on appeal concerns the testimony of MNS that Morgan fondled her breasts and touched her inappropriately over the course of two years preceding the rape. Morgan insists this is inadmissible evidence of "prior bad acts" under Kentucky Rules of Evidence (KRE) 404(b). Morgan claims this issue is preserved for our review by his motion in limine to preclude KRE 404(b) evidence.

Morgan's motion in limine was in response to the Commonwealth's notice of intent to introduce KRE 404(b) evidence. The Commonwealth's notice contemplated introducing testimony from six alleged victims of Morgan's inappropriate touching. The Commonwealth's motion did not address any testimony anticipated by MNS. In Morgan's motion in limine, he asked the court to exclude the testimony cited by the Commonwealth; he did not address any potential testimony by the victim. On the day of trial, the Commonwealth advised the court it was not going to use any of the KRE 404(b) testimony outlined in its notice.

"Evidence of similar acts against the same victim is admissible under KRE 404(b)(1) as proof of 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'"<sup>2</sup> The crux of Morgan's argument relates to his alleged lack of notice as to MNS's testimony of prior acts of fondling. However, Morgan did not object to the line of questioning or to MNS's answers.

In *West v. Commonwealth*,<sup>3</sup> the Supreme Court said that "it is clear that a party must timely inform the court of the error and request the relief to which he considers himself

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<sup>2</sup> *Pendleton v. Commonwealth*, 83 S.W.3d 522, 528 (Ky. 2002).

<sup>3</sup> 780 S.W.2d 600 (Ky. 1989).

entitled. Otherwise, the issue may not be raised on appeal."<sup>4</sup> Accordingly, Morgan's claim is not properly preserved for appellate review.

Morgan next claims that the trial court abused its discretion by denying his requested continuance. We find no abuse of discretion. Morgan's attorney was involved in a trial in another county during the week Morgan's trial was set to begin in Butler County. The trial court held the motion to continue in abeyance until it was determined whether defense counsel's other trial would be concluded prior to the date scheduled for Morgan's trial. Counsel was, in fact, ready to begin the trial on the scheduled date and announced in court that the defense was prepared to go forward with the trial. Consequently, there was no error.

Morgan asserts that the trial court erred when it denied his motion for a mistrial. The Commonwealth brought to the attention of the court that the victim's mother had witnessed what appeared to be improper contact between a juror and Morgan's wife. The victim's mother told the court she saw the juror touch the victim's mother's arm as he exited the courtroom. Both the juror and the victim's mother denied that any such incident had occurred.

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<sup>4</sup> *Id.* at 602.

The trial court denied Morgan's motion for a mistrial and ultimately dismissed the juror as an alternate before deliberations took place. Morgan argues dismissal of the juror was improper, and the Commonwealth unfairly prejudiced Morgan by waiting a few hours before advising the trial court of the alleged misconduct.

The Supreme Court has found no error where the trial court dismissed a juror as an alternate after alleged juror impropriety.<sup>5</sup> While the Commonwealth should have raised the issue to the court immediately, any resulting error is harmless. The trial court has broad discretion when deciding whether to exclude a juror for cause, and the determination will not be disturbed on appeal unless it is clearly erroneous.<sup>6</sup> In this case we are unable to conclude that the trial court committed clear error.

Morgan claims that juror misconduct deprived him of a unanimous verdict. Morgan submitted an affidavit from a juror who swore that the foreman of the jury improperly told his fellow jurors about his experience on other juries and potential sentencing in the case under Megan's Law. However, Morgan makes this argument for the first time on appeal. Because the trial

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<sup>5</sup> *Pendleton, supra, note 2*, at 527.

<sup>6</sup> *Commonwealth v. Lewis*, 903 S.W.2d 524, 527 (Ky. 1995).

court was never given the opportunity to address alleged juror misconduct, this issue is not preserved for our review.

Morgan's final argument is that the trial court erred when instructing the jury because it failed to explain to the jurors they could find Morgan not guilty. This argument lacks merit, as review of the record shows that the court properly instructed the jury and explained that the verdict must be unanimous. Morgan again relies on a juror affidavit alleging certain jurors were confused by the unanimity requirement. This issue is raised for the first time on appeal and is unpreserved for our review.

For the foregoing reasons, the judgment is affirmed.

ALL CONCUR.

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