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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001561-MR

THOMAS J. HUNT, SR. APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET COLEMAN, JUDGE
ACTION NO. 01-CR-00224

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: This is an appeal from the denial of appellant's RCr 11.42 motion alleging that his counsel was ineffective in failing to object to impermissible and prejudicial KRE 404(b) character evidence and thereby rendering error in the introduction of that evidence unpreserved for appellate review. We affirm.

Appellant was convicted of two counts of sexual abuse and one-count of first-degree sodomy for which he was sentenced

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to fifty years' imprisonment. One prong of his direct appeal to the Supreme Court of Kentucky focused upon his complaint of palpable error in the admission of evidence of his bad character in violation of KRE 404. In rejecting this line of attack on appellant's conviction, the Supreme Court reached the following conclusion:

> Character and Bad Acts Evidence
>
> Hunt argues that the extensive introduction of varied forms of character evidence, including evidence of other bad acts, so permeated the trial below as to require that the conviction be reversed. The evidence in question concerned the heavy drinking and violent acts of Hunt. He concedes that he did not object to the evidence at trial, but claims the issue is preserved because he included it in a motion for a new trial. Alternatively, he seeks review pursuant to RCr 10.26.
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> This issue is not properly preserved for appellate review. Defense counsel only objected to the evidence in a motion for a new trial. An objection to alleged improprieties that occurred during the trial cannot be made after the jury verdict. *Patrick v. Commonwealth,* Ky., 436 S.W.2d 69 (1968).
>
> The palpable error rule 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 judge and request a ruling on that objection, or the issue is waived. *See Commonwealth v. Pace,* Ky., 82 S.W.3d 894 (2002). *See also 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.” *Pace, supra, quoting Commonwealth v. McIntosh,* Ky., 646 S.W.2d 43, 45 (1983).

Evidence of other crimes or bad acts, even if dissimilar to the charged crime, is relevant if the evidence tends to prove a matter of consequence other than the bad character or propensity of the defendant to commit the crime charged. *See* KRE 404(b)(1). The evidence of the drunk and violent behavior of the defendant was relevant to explain why the victim had not earlier exposed the sexual abuse. The probative value was not substantially outweighed by unfair prejudice. The testimony was properly admissible and although the Commonwealth did not provide proper notice pursuant to 404(c), that error was not palpable.

We take a slightly different view of the evidence introduced during cross-examination of the defendant's son. The prosecutor questioned the witness concerning how his dad had dressed when he attended his (the son's) wedding. The son responded that his dad had worn denim overalls even though the entire wedding party was dressed in tuxedos. Although the testimony had no relevance, any error in its admission was certainly harmless. RCr 9.24.

Hunt also complains that the prosecutor's closing argument relating to the bad acts evidence was improper. Specifically, the prosecutor asked the jury the following two questions:

1) Is the kind of man who would mistake his La-Z-Boy for a toilet the kind of man who would rape his own daughter?

2) Is the kind of man who takes a shotgun to his daughter because she didn't clean the

> dishes the kind of man who would rape his daughter?
> Defense counsel made no objection to this part of the closing argument. Although the statements were an improper comment on the evidence, considering all the circumstances, there was no palpable error.

The trial judge relied upon this view of the character evidence in concluding that appellant had failed to demonstrate that his trial counsel's performance fell within the Strickland[2] standard for assessing ineffective assistance of counsel or that it had deprived him of a fair trial. We fully agree with the trial judge's analysis.

Even a cursory reading of the opinion in appellant's direct appeal makes clear that introduction of the character evidence in this case could not rise to the level of palpable error because it was either admissible or harmless error. The impact of this holding cannot be altered by simply couching it in terms of ineffective assistance. If the evidence was otherwise admissible or harmless, it plainly follows that the failure to object to its admission did not affect the outcome of appellant's trial and could not constitute ineffective assistance of counsel. These matters are fully apparent from a review of the record and thus an evidentiary hearing was not warranted.

The judgment of the Hardin Circuit Court is affirmed.

[2] Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

ALL CONCUR.

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