

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

RENDERED: JANUARY 22, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2007-SC-000090-MR

DATE 2/12/09 Kelly Klaber D.C.

RICHARD WELLS

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
NO. 06-CR-000544

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

When T.M. was very young – less than eight years old – she and her sister J.M. lived with their father. They would frequently visit their grandmother and step-grandfather – the Appellant – on weekends. Their grandmother would regularly be absent from the home for work, and the girls would be left in the care of Appellant. T.M. testified that when her grandmother was gone, she would often sleep upstairs in her grandmother's bed with Appellant. When T.M. was in bed with Appellant, J.M. would sleep on the couch downstairs. Likewise, if J.M. slept in the bed with Appellant, T.M would sleep on the couch downstairs.

When T.M. slept in the bed with Appellant, he would touch her breasts and vaginal area. Appellant also put a vibrator inside T.M.'s vagina. Appellant raped T.M. on more than one occasion. When T.M. was eight or nine years old, the abuse stopped because her grandmother was in an automobile accident

and was no longer absent from the home. T.M. never told anyone about the abuse except for a few close friends whom she told to keep the information secret. T.M.'s father found out about the abuse when he found a letter that T.M. had written to her boyfriend. At trial, T.M. – then fifteen years old – identified this letter and read a portion of it, including a claim that Appellant had raped her. T.M. further testified that she had never discussed the letter or the abuse with her sister J.M.

J.M. also testified at trial. J.M. stated that she was around seven years old when she began sleeping in the bed with Appellant. She testified that Appellant would touch her with his hands and his penis. Appellant would also put his fingers inside her vagina. J.M. further stated that Appellant raped her, and that it caused her severe pain. J.M. related that she was forced to perform oral sex on Appellant, and that Appellant would perform oral sex on her. J.M. also testified that Appellant had pornographic pictures of her on his computer. J.M. recalled that the abuse occurred over a two-to-three-year period and that the abuse would always occur while her grandmother was at work. She was around ten years old when the abuse ended. J.M. never talked to her sister about the abuse. On the day that her father discovered T.M.'s letter, he brought the letter into J.M.'s room. When asked if the same thing had happened to her, J.M. began crying and told her father that Appellant had abused her.

A medical expert and pediatrician, Dr. Lisa Pfitzer, testified at trial for the Commonwealth. Pfitzer testified that she examined J.M. and saw tearing on an area of J.M.'s hymen that had healed. She further testified that it was

consistent with J.M.'s statement that she experienced "major pain" during penetration, and with J.M.'s statements that she was repeatedly raped from the ages of seven to nine.

Appellant took the stand at trial, denying all allegations of abuse. He testified that he was strict with the girls and speculated that J.M. and T.M. were mad at him when they were teenagers. T.M.'s friends, C.R. and N.J., also testified at trial. C.R. testified that T.M. made her aware of the sexual assault some three years prior, and that T.M. had asked her not to tell anyone. N.J. testified that she first learned about the allegations by T.M. in a health class at school. N.J. recounted that T.M. looked very upset, like she was about to cry, during a presentation about rape in their school health class. T.M. disclosed to N.J. that Appellant had sexually assaulted her.

Appellant was indicted for one count of Rape in the First Degree for J.M.; one count of Rape in the First Degree for T.M.; two counts of Sodomy in the First Degree for J.M.; two counts of Sexual Abuse in the First Degree for J.M.; and one count of Possession of a Matter Portraying a Sexual Performance by a Minor. In the indictment, only count five (Rape in the First Degree) named T.M. as a victim. Apparently, this was a typographical error and the Commonwealth moved to amend count six of the indictment (Sexual Abuse in the First Degree) to include T.M. as a victim. The court denied the Commonwealth's motion to amend the indictment.

At trial, Appellant's counsel discovered a piece of paper signed by the judge after the jury went back to deliberate. The paper contained a question from a juror about a verdict form that was a duplicate of another form. The

judge indicated that he had mistakenly sent back two copies of verdict form six. Defense counsel indicated that he did not believe the question was ever presented in open court, to which the trial judge replied: “They sent out two verdict forms and one was obviously a duplication of the other, so I just sent them back and told them that I had mistakenly sent back two, and to disregard the verdict form six which included [T.M.]” Defense counsel then requested that the court mark the piece of paper for the record. However, defense counsel did not object to the judge’s contact with the jury.

Appellant was convicted of two counts of Rape in the First Degree, two counts of Sodomy in the First Degree, and two counts of Sexual Abuse in the First Degree for illegal sexual contact with his step-grandchildren. Appellant was sentenced to 20 years on each of the rape charges, 20 years on each of the sodomy charges, and 5 years on each of the sexual abuse charges, to run concurrently for a total of 20 years. Appellant now appeals as a matter of right pursuant to Ky. Const. § 110(2)(b). Appellant argues that the Jefferson Circuit Court erred by: (1) engaging in a “question and answer” session with the jury off the record; (2) improperly admitting hearsay evidence; and (3) allowing the Commonwealth to introduce Kentucky Rule of Evidence (KRE) 404(b) evidence of prior bad acts without giving notice to Appellant. For the reasons set forth herein, we affirm.

Appellant first argues that the trial court erred by responding to a question from the jury without putting the exchange in the record or allowing Appellant to be present. RCr 9.74 states that:

No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.

It is expected in the course of jury trials that there will be occasions for conversation between the trial judge and individual jurors. Welch v. Commonwealth, 235 S.W.3d 555, 558 (Ky. 2007). However, most of these *ex parte* encounters will be innocuous because they do not concern material issues in the case and they do not “impugn the fundamental fairness of an otherwise constitutionally acceptable trial.” Id. Indeed, “[l]ong ago, we joined the trend away from a strict or technical application of the rules forbidding conversations with or among jurors.” Johnson v. Commonwealth, 12 S.W.3d 258, 266 (Ky. 1999). In cases with facts similar to the present one, we have held that there was no error. See St. Clair v. Commonwealth, 140 S.W.3d 510, 542 (Ky. 2004) (explanation by judge in response to jury question about whether jury transcripts could be read back in jury room was not error); and Johnson v. Commonwealth, 12 S.W.3d at 266 (explanation by bailiff in response to a juror question of whether there would be a separate sentencing phase if the defendant was found guilty was not error).

We agree that the communication between the judge and the jury was in violation of RCr 9.74 because the information was not given in open court and was given outside the hearing of the Commonwealth and defense counsel. However, in the present case, the error was not preserved for review. Defense counsel did not object or make any motion with respect to the note exchanged between the judge and jurors. Where error is not preserved for review, it is not

reversible unless it operates to prejudice the substantial rights of the party or results in manifest injustice. RCr 10.26. In cases such as this, where a trial judge is merely pointing out an administrative or clerical mistake, such basic communication does not constitute palpable error.

Appellant's second claim of error is that the trial court erroneously admitted the hearsay evidence of T.M.'s friends, C.R. and N.J. We review evidentiary rulings for abuse of discretion. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000). An evidentiary ruling will only be overturned where "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id. at 581.

At trial, T.M. took the stand and testified that she told her friends three years earlier about the alleged sexual abuse. T.M.'s friends, C.R. and N.J., also testified at the trial. C.R. took the stand first and stated that T.M. told her about the alleged sexual abuse three years earlier. Defense counsel objected to the statement as hearsay. The trial judge admonished the jury to disregard C.R.'s prior statement. The judge then allowed the Commonwealth to pursue a line of questioning where C.R. was asked when she first "learned" of a sexual abuse *allegation*, while directing the witness not to repeat any out-of-court statements. Both C.R. and N.J. took the stand and admitted to "learning" of a sexual abuse allegation three years prior to the trial. N.J. also recounted a situation where T.M. looked as if she was going to cry during a presentation on rape in their school health class.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted.” KRE 801(c). Here, the original statement by C.R. that T.M. reported to her that Appellant sexually abused her was hearsay because it was an out-of-court statement by the declarant. Defense counsel objected to the statement and the judge admonished the jury to disregard it. Admonitions are presumed to be effective. Combs v. Commonwealth, 198 S.W.3d 574, 581 (Ky. 2006). Indeed, it is well-settled law within the Commonwealth that a “jury is presumed to follow an admonition to disregard evidence; thus, the admonition cures any error.” Id. However, later statements made by C.R. and N.J. about when they “learned” of the abuse allegations were also hearsay. Defense counsel failed to object to these hearsay statements. Although the girls did not specifically repeat an out-of-court statement by T.M., the information they testified to was *derived from* her out-of-court statements.

We review these later statements under the palpable error rule because there was no contemporaneous objection. RCr 10.26. Although the testimony was hearsay, we do not find that it contributed to the verdict because it was cumulative of T.M.’s prior testimony. T.M. had already testified that she told C.R. and N.J. about the abuse three years earlier. As the girls’ testimony was cumulative of T.M.’s prior testimony, there is no manifest injustice. See Collins v. Commonwealth, 951 S.W. 2d 569, 576 (Ky. 1997). Accordingly, we affirm on this ground.

Appellant’s final claim of error is that he was never provided with notice, pursuant to KRE 404(c), of the Commonwealth’s intention to introduce evidence of prior bad acts. In this case, the indictment listed rape charges for both J.M. and T.M., however, it only named J.M. for the sexual abuse charges.

This was apparently a typographical error and the Commonwealth moved to amend the indictment. The Commonwealth's motion to amend was denied. Since Appellant was not indicted for the sexual abuse of T.M., he argues that evidence of the sexual abuse of T.M. is evidence of other crimes, wrongs, or acts under KRE 404(b).

As previously stated, we review evidentiary rulings for abuse of discretion. Goodyear Tire and Rubber Co., 11 S.W.3d at 577. KRE 404(c) states as follows:

In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule [other crimes, wrongs, or acts] as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or other such remedy as is necessary to avoid unfair prejudice caused by such failure.

In the present case, counsel for the defense failed to timely object to the testimony relating instances of sexual abuse. To begin, he let the testimony proceed at length before objecting. Moreover, defense counsel objected to further testimony concerning the sexual abuse, but did not ask the judge to admonish the jury or strike the prior testimony concerning sexual abuse. As we have previously stated, "RCr 9.22 imposes upon a party the duty to make 'known to the court the action he desires the court to take or his objection to the action of the court . . . .' Failure to comply with this rule renders an error unpreserved." West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989). Because the relief requested by defense counsel was granted and he requested no further action, the error is waived for the purposes of appellate review. Id.

Appellant has not requested palpable error review, and as we see no substantial miscarriage of justice, we affirm on this ground. See Dant v. Commonwealth, 258 S.W.3d 12, 21 (Ky. 2008).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., concurs in result only, believing that the cumulativeness of the hearsay does not alleviate, but contributes to, the error (as bolstering), but that the error was not palpable because the statements were brief, did not repeat the allegations, and did not indicate belief in the allegations, hence, the prejudicial effect was minimal.

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