RENDERED: DECEMBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001221-MR

JESSICA PADILLA — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 08-CR-00408

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Jessica Padilla appeals from a judgment of the Kenton Circuit Court which imposed a sentence of ten years after a jury found her guilty of criminal abuse in the first degree. Padilla raises two arguments on appeal: first, she requests palpable error review of her contention that, at her sentencing

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

hearing, the Commonwealth introduced false statistical evidence regarding her likelihood of receiving parole. Second, she contends that her right to confront witnesses was violated by one of the Commonwealth's medical witnesses who testified regarding the opinions of her colleagues. Upon review, we affirm the judgment of the Kenton Circuit Court.

Padilla was charged with criminal abuse after she brought her eight-month-old baby to the hospital with a broken arm. The child's left elbow was swollen, severely broken and significantly displaced. The pediatric orthopedic surgeon who operated on the child testified that the fracture was caused by hyper-extension, or a "bending back" of the elbow. At the hospital, it was discovered that the child suffered from six other fractures, to the left shoulder, right shoulder, right radius, right ulna, femur and tibia/fibula. Some of these fractures were partially healed. The child also had a lacerated liver and bruising of the face.

Padilla offered various explanations for the broken arm, including that she had dropped the baby, or lifted her up by the arms from her play pen and heard a popping sound. She stated that the bruising to the child's face was caused by force feeding and cleaning the child. According to the testimony of Dr. Berkeley Bennett of Cincinnati Children's Hospital, simply pulling an eight-month-old baby by the arms from her playpen would not cause the type of fracture suffered by the child in this case, because such a fracture would require a lot of force and twisting. Dr. Bennett testified that a normal household accident would not cause this type of injury either. As to the laceration of the liver, she testified that it would be caused

by the child being squeezed very hard, or by something hitting the child's abdomen very hard with a lot of force. The child's father, who had resided intermittently with Padilla, testified at her trial that he had cautioned her for being too rough with the baby. In her closing argument, Padilla's defense counsel focused on Padilla's mental state and argued that the Commonwealth had failed to prove that she had the requisite intent to commit first-degree criminal abuse.

On appeal, Padilla argues that testimony presented during her sentencing hearing by Talia Jefferson of the Kentucky Department of Corrections division of Probation and Parole office was false and constituted palpable error warranting reversal of her sentence. Jefferson was asked by the Commonwealth attorney when Padilla would become eligible for parole if she received a sentence of five years, then if she received a sentence of ten years. Jefferson responded one year and two years respectively. The Commonwealth attorney then asked whether Jefferson had any idea or knowledge of the likelihood of individuals being released on parole for this type of offense. Jefferson responded that forty-seven percent of those eligible are released. The Commonwealth attorney then asked, "So of all the cases the parole board looks at, almost half are released from prison?" Jefferson replied, "That is correct." The Commonwealth attorney asked, "On their first time before the board?" Jefferson replied, "Yes."

Although the alleged error was unpreserved, Padilla argues that the admission of this statistical evidence constitutes palpable error. As support for her argument, she relies on *Young v. Commonwealth*, 129 S.W.3d 343 (Ky. 2004). In

that case, a defendant convicted of capital murder sought to introduce statistical evidence of the likelihood of receiving parole in order to demonstrate to the jury that he did not have a high probability of receiving parole if given a sentence lesser than death. The trial court did not allow the statistical evidence to be admitted. The Supreme Court affirmed the trial court's decision, stating in part as follows:

> The statistics compiled by Young and sought to be introduced as to parole probability are not probative of his chances of being paroled. The evidence he attempts to present does not predict his actual chances of being paroled and therefore is irrelevant and incompetent. See KRE 401-403. The statistics presented for the years 1993 to 2001 cover only the actions of the current parole board. His parole determination will be made by a different board selected by a different administration which may have different parole policies. Parole determination is inherently an individualized decision based on the particular facts of the case under consideration and it is therefore difficult, if not impossible, to predict by generalized probability statistics.
>
> . . .
>
> Our review indicates that the trial judge did not abuse her discretion in refusing to accept the proffered statistical evidence from Young. The evidence simply fails to demonstrate what it is offered to prove; it does not indicate that Young is likely or unlikely to be paroled when he becomes eligible. The evidence relies on the assumption that the Young case is an "average" case and is highly speculative. The decision whether to grant parole to a defendant is an inherently individualized decision and although statistics may illustrate what happens in the average situation, they are not probative as to what will happen in a particular case.

Id. at 344-345 (internal citations omitted).

Relying on *Robinson v. Commonwealth*, 181 S.W.3d 30 (Ky. 2005), in which the Kentucky Supreme Court held that the use of incorrect or false testimony by the prosecution is a violation of due process when the testimony is material, Padilla argues that the use of parole statistics in sentencing hearings in an effort to imply that a specific defendant has a precise likelihood of being granted parole is a falsity warranting reversal as palpable error.

> For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. A palpable error must involve prejudice more egregious than that occurring in reversible error. A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis boils down to is whether the reviewing court believes there is a substantial possibility that the result in the case would have been different without the error. If not, the error cannot be palpable. (internal quotation marks and footnotes omitted).

Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding, . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

In *Robinson*, the testimony which constituted palpable error consisted of incorrect information as to when statutory good time credits would be applied to the defendant's sentence. *Robinson*, 181 S.W.3d at 38. By contrast, the statistics to which Jefferson testified are not false or incorrect. Neither were the statistics at issue in *Young*. Rather, the *Young* court ruled that the statements were properly

excluded because they were not probative and were in fact irrelevant and incompetent. Similarly, the statistics introduced in Padilla's case were irrelevant, incompetent and prejudicial. The question is whether the statistical evidence was so prejudicial that there is a substantial possibility that the result in this case would have been different had it not been introduced. In light of the factual circumstances of this case, and the grave nature of the injuries suffered by the child, we do not think that there is a substantial possibility that the statistical evidence seriously affected the jury's decision to impose the maximum sentence. Any error in the admission of the evidence was not palpable.

Padilla's next argument concerns the testimony of Dr. Berkeley Bennett regarding the possibility that the child may have had a genetic condition which made her bones fragile and more prone to fractures. She claims Dr. Bennett was improperly permitted to testify about the results of testing conducted by other doctors who were not called to testify, thereby violating Padilla's right to confront witnesses.

On cross-examination, Dr. Bennett testified that she was part of a child abuse team that was called upon to evaluate the child due to concerns about potential abuse. Padilla's trial counsel asked if she had not studied all possible causes of the child's injuries, and Dr. Bennett replied,

> We, whenever we make a, a decision of whether we think something is consistent with child abuse, we definitely consider if there are other possibilities in terms of metabolic bone diseases, accidental mechanisms, uh, and that was reflected in our workup as we, um, got a geneticist consult and took a history to see is there any

> other possible reason that [the child] would get fractures more easily than another child, um, are there any other possible accidental mechanisms, that's all part of our history and our evaluation.

Padilla's counsel then asked if it was her conclusion that this was abuse, and Dr. Bennett responded, "Yes."

On redirect examination, the Commonwealth attorney asked whether Dr. Bennett had looked at the history given. Dr. Bennett said, "Correct." The Commonwealth attorney then inquired, "You looked at the genetics testing to ensure she didn't have fragile bones?" Dr. Bennett replied,

> Well I looked at . . . we, we took a history and we even, we asked our genetics colleagues, those who specialize in that, to see her and evaluate if they thought further testing was needed. They did not feel further testing was needed.

Defense counsel objected, stating that Dr. Bennett had referred to the results of testing performed by other physicians, and that this testimony violated Padilla's right to confrontation under the Sixth Amendment. "The Sixth Amendment prohibits the admission of a testimonial statement of a declarant who does not appear at trial, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross examination." *Roach v. Commonwealth*, 313 S.W.3d 101, 111 -112 (Ky. 2010) citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The trial court overruled the objection, stating that factual routine descriptive findings are not covered by the holding in *Crawford v. Washington*.

Crawford violations are reviewed under a harmless error analysis. *Heard v. Commonwealth*, 217 S.W.3d 240, 244 (Ky. 2007). "The test is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction, . . . or, put otherwise, whether the error was harmless beyond a reasonable doubt." *Talbott v. Commonwealth*, 968 S.W.2d 76, 84 (Ky. 1998) (internal citations and quotation marks omitted).

If we assume, without deciding, that Dr. Bennett's reference to her other colleagues' feelings that further testing was not needed constituted testimonial evidence and was therefore inadmissible, there is no reasonable possibility that the purported error contributed to Padilla's conviction. "In *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972), the admission of a confession obtained in violation of *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) was held harmless, since it only contained information which was cumulative to that contained in three other admissible confessions." *Id*. The cross-examination of Dr. Bennett by Padilla's own defense counsel had already elicited the information that Dr. Bennett had consulted a geneticist and concluded that the child's injuries were the result of abuse. The more detailed information elicited by the Commonwealth on re-direct examination was merely cumulative. The admission of the statement does not entitle Padilla to relief.

The judgment of the Kenton Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Brandon Pigg
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

W. Bryan Jones
Assistant Attorney General
Frankfort, Kentucky