RENDERED: NOVEMBER 12, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001505-MR

KENNY D. HOLLAND APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
ACTION NO. 06-CR-00021

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Kenny Holland appeals from the judgment of the Webster Circuit Court sentencing him to fifteen years' imprisonment and a $500 fine. For the following reasons we affirm.

On February 28, 2006, Holland phoned Nancy Buchanan, his mother-in-law, and informed her he had ingested enough methamphetamine to kill himself. Buchanan drove Holland to a Madisonville, Kentucky hospital. While at the

hospital, Holland became agitated and ran out of the hospital. Once outside, Buchanan could not convince Holland to return to the hospital for treatment. Buchanan decided to drive Holland to her home in Providence, Kentucky.

While stopped at a stop light on the drive to Providence, Holland exited Buchanan's vehicle and began running down the road towards the police department. Providence Police Chief Keith Stine was alerted that a man was at the front of the station acting strange. When Chief Stine approached Holland, Holland said that he was being chased, left the station and crossed the street towards Horsehead Tobacco Store. Inside the store, Holland took a bottle of water, exited the store, returned and threw a one dollar bill on the ground. From the police station, Chief Stine observed Holland exit Horsehead's and walk to Huck's Store, at which point Chief Stine decided to drive to Huck's. Employees of Huck's, as well as Chief Stine, observed Holland pick up a Huck's gas nozzle in one hand, and attempt to ignite a lighter in his other hand. A store employee activated an emergency switch to turn off the gas pumps.

Chief Stine arrived and ordered Holland to drop the gas nozzle and step away from the gas pumps. Police officers placed Holland in a cruiser and drove him back to the station. Once at the station, Holland attempted to jump through a window and began hitting and kicking a glass door. Holland had to be restrained. A paramedic explained to Holland he was going to take a sample of his blood and began preparing the necessary equipment. Upon seeing this, Holland became

aggressive and a scuffle ensued in which Holland kicked Chief Stine and broke his leg.

Following a jury trial, Holland was convicted of theft by unlawful taking under $300, assault in the fourth degree, resisting arrest and wanton endangerment in the first degree (three counts). Holland was sentenced to twelve years' imprisonment. Holland appealed the conviction and sentence to this court. We affirmed the conviction, but reversed the sentence on the basis that the admission of Holland's juvenile criminal record from the state of Indiana without it being "certified by the judge, chief justice, or presiding magistrate" was improper. (No. 2007-CA-000082-MR).

Upon the empanelling of a new jury, on which a married couple sat, the Commonwealth and Holland presented evidence in support of aggravation or mitigation of sentencing. The jury returned a penalty verdict recommending an aggregate sentence of fifteen years and a $500 fine. This appeal followed.

Holland initially argues that the prosecutor engaged in two instances of misconduct: (1) by improperly introducing evidence of other crimes in violation of KRE[1] 404(b) and (2) by "shaming" the jury into recommending the maximum sentence. We disagree.

By Holland's own admission, his claim of prosecutorial misconduct was not preserved for appellate review; nonetheless, he requests this court to review it under the palpable error standard of RCr[2] 10.26. Generally, "a palpable error

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[1] Kentucky Rules of Evidence

[2] Kentucky Rules of Criminal Procedure.

'affects the substantial rights of a party' only if 'it is more likely than ordinary error to have affected the judgment.'" *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (citation omitted). Relief is not justified unless the palpable error has "resulted in a manifest injustice . . . in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Id*. (citation omitted). In addition, "we must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citation omitted).

In support of his claim of prosecutorial misconduct, Holland directs us to the Commonwealth's cross-examination of Holland asking him whether he paid child support to his former wife as improperly introducing evidence of other crimes in violation of KRE 404(b).

KRE 404(b) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." In this case, the only evidence elicited during the cross-examination of Holland was that he did not pay child support. The question was one of a number of questions asked of Holland, the Commonwealth did not follow up, and did not refer to it in closing argument. Furthermore, not paying child support is neither a crime nor a wrong unless one has a duty to support a child under a court order. *See* KRS[3] 530.050 (A person is guilty of nonsupport if subject to court order to pay

[3] Kentucky Revised Statutes.

support and is delinquent in meeting that duty). No evidence was introduced to the jury that Holland was in violation of any court order. Thus, while one could question the relevance of such evidence, the introduction of the evidence was not in violation of KRE 404(b), and certainly did not result in manifest injustice.

Holland next claims the Commonwealth engaged in prosecutorial misconduct during its closing argument of the penalty phase by "shaming" the jury into recommending the maximum sentence. The Commonwealth contends its statements were merely an encouragement for the maximum sentence by asking the jury to "send a message" to criminals.

In Kentucky counsel is permitted great leeway during closing arguments. *Wheeler v. Commonwealth*, 121 S.W.3d 173, 180 (Ky. 2003), *cert. denied*, 541 U.S. 1051, 124 S.Ct. 2180, 158 L.Ed.2d 746 (2004). Indeed, counsel may use closing argument in an attempt to convince the jurors to not deal with the matter lightly. *Brewer*, 206 S.W.3d at 350. Prosecutors have long been able to comment on the deterrent effect of a sentence. *Cantrell v. Commonwealth*, 288 S.W.3d 291, 298 (Ky. 2009). However, "[a]ny effort by the prosecutor in his closing argument to shame jurors or attempt to put community pressure on jurors' decisions is strictly prohibited." *Id*. at 299. In other words, "prosecutors may not argue that a lighter sentence will 'send a message' to the community which will hold the jurors accountable or in a bad light." *Id*.

Here, during closing argument, the Commonwealth argued the jury was the protector of the community, encouraged the jury to take the opportunity of

sentencing Holland to make a difference in the community, and stated that running the three sentences for wanton endangerment in the first degree concurrently would only punish Holland for endangering one life. In our view these statements are permissible arguments to be made to the jury, and do not rise to the level of "shaming" the jury by implying the community will view them in a bad light if they do not impose the maximum sentences. Our understanding is that these arguments were made in an attempt to persuade the jury to punish Holland severely for his unlawful behavior, as well as deter others from breaking the law in their community. Accordingly, we find no prosecutorial misconduct to justify reversal of Holland's sentences.

Holland finally argues that the trial court abused its discretion by allowing a married couple to serve on the jury that sentenced him to fifteen years' imprisonment because of the potential for undue influence. We disagree.

The parties dispute whether this claim of error was properly preserved, and thus disagree over the standard of review on appeal. The record reflects that Holland asked the trial court whether a married couple could sit on a jury together, but did not object or request that the court take any action. *See* RCr 9.22 (a party must make "known to the court the action which that party desires the court to take or any objection to the action of the court, and on request of the court, the grounds therefor[.]"). As a result, this claim of error was not properly preserved and will be reviewed for palpable error by the trial court.

We find the recently published opinion of the Kentucky Supreme Court, *Harris v. Commonwealth*, 313 S.W.3d 40 (Ky. 2010), to be controlling in this instance. In *Harris*, Appellant challenged the trial court's allowance of two married couples to serve on the jury that determined his guilt. *Id*. at 49. Appellant moved the trial court to randomly dismiss one member of each married couple, but the trial court denied the motion and held that the couples could be questioned to determine whether the jurors would be capable of independent thought or would be unduly influenced by their marital partner. *Id*. Appellant questioned the jurors during *voir dire*, and upon assurances that they would not discuss the case with their partners, each couple was sworn in to serve on the jury.

On appeal, Appellant argued the marital relationship between two jurors created the presumptions of undue influence and lack of independent thought. The Court held that "no presumption of undue influence or lack of independence arises from the fact of marriage alone." *Id*. at 50. Thus, "since the jurors' responses included nothing that would have compelled a dismissal," the trial court did not abuse its discretion by permitting the married jurors to serve on the jury. *Id*.

In the instant case, Holland had knowledge of the married couple during the *voir dire* process because the jurors indicated on their questionnaires they were a married couple. However, Holland chose not to question the married couple as to whether they would potentially influence one another or have difficulty refraining from discussing the case with one another. Therefore, the only evidence Holland is able to present to demonstrate undue influence is the fact that the couple was

married. Under the holding in *Harris*, marriage alone does not create the presumption of undue influence. Accordingly, the trial court did not err by permitting the married couple to serve on the jury that sentenced Holland.

The judgment and sentence of the Webster Circuit Court is affirmed.

CAPERTON, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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