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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: DECEMBER 19, 2002
NOT TO BE PUBLISHED

FINAL DATE 3-20-03 ELIA Grant, D.C.

Supreme Court of Kentucky

2001-SC-0253-MR

MATTHEW L. EDMONDSON — APPELLANT

V.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
00-CR-10

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND
REVERSING IN PART

Appellant Matthew L. Edmondson was convicted by a Grant Circuit Court jury of two counts of felony theft by unlawful taking, KRS 514.030(2), and of being a persistent felony offender in the first degree, KRS 532.080(3). He was sentenced to two consecutive enhanced sentences of ten years in prison and appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

On November 11, 1999, Michael Dickey reported the theft of two fifty-five gallon wild game feeders that he used for hunting on his father's farm in Grant County. Also stolen were two pieces of lumber, a "Ducks Unlimited" canvas chair, and some camouflage netting from a tree stand that Dickey used for hunting deer. On February 1, 2000, Dickey reported the theft of his red and white International 434 tractor from the

same farm. The two wild game feeders and the tractor were subsequently found on Appellant's farm.[1] Dickey was able to identify the game feeders by strips of orange and white tape that he had placed on the bottom of each feeder and by a large screw that he had inserted in one of the feeders. Appellant claimed he had purchased the game feeders on December 4, 2000, from "Frank Smith," a peddler at the Bluegrass Stockyards in Lexington. Appellant testified that he paid Smith forty dollars each for the feeders and produced a hand printed receipt signed by Smith as proof of purchase. Appellant's girlfriend, Nicole McNay, testified that she was with Appellant when he purchased the feeders and that she had insisted that Appellant obtain the receipt from Smith. The owner of Bluegrass Stockyards testified that he knew all the peddlers who sold merchandise on his property and that he had never heard of "Frank Smith."

Appellant admitted the tractor belonged to Dickey but claimed he had borrowed it with the permission of Cindy Charles, who lived on a 1.5 acre tract of the Dickey farm that she was attempting to purchase through a contract for deed. Charles denied giving Appellant permission to take the tractor and testified that Appellant approached her after the tractor was discovered on his property and attempted to persuade her to support his claim that she had given him such permission. Appellant theorized at trial that Charles denied loaning him the tractor because she feared Dickey would retaliate by somehow voiding her contract for deed.

On appeal, Appellant asserts six claims of error: (1) use by the prosecutor of evidence that a key defense witness refused to take a polygraph examination; (2) interjection by the prosecutor of extra-judicial scientific evidence during cross-

---

[1] The lumber, canvas chair, and camouflage netting were never recovered.

examination of Appellant; (3) insufficiency of proof that the game feeders, lumber, chair, and camouflage netting had a cumulative value of $300 or more; (4) use by the prosecutor of Appellant's eleven-year-old son, Matthew Edmondson, Jr., as a witness against Appellant without appointing a guardian ad litem; (5) denial of effective assistance of counsel; and (6) imposition of cruel and unusual punishment. The first three issues relate only to Appellant's conviction under Count II (theft of the game feeders and other items from the tree stand). The fourth and fifth issues pertain to both Count I (theft of the tractor) and Count II. The sixth issue also implicates Count III (persistent felony offender in the first degree). For the reasons hereafter stated, we affirm Appellant's convictions under Count I and Count III and reverse his conviction under Count II for a new trial.

I. POLYGRAPH EVIDENCE.

During direct examination by the prosecutor, the Kentucky State Police detective who investigated both thefts testified, inter alia, with respect to his interview of Appellant's girlfriend, Nicole McNay, who claimed to have witnessed Appellant's purchase of the game feeders from "Frank Smith":

> And I said I'm having a hard time believing you that this is an actual receipt. . . . And I said, you know, I want to believe you, but I requested that she take a polygraph. She got offended. She said she wasn't saying anything without a lawyer and she got up and left.

Defense counsel objected and the prosecutor agreed at the ensuing bench conference that the testimony was improper. The trial judge then admonished the jury: "I just wanted to advise you all at the request of the attorneys that a polygraph is not

admissible into evidence. It's an investigative tool used by the police from time to time but it is not admissible, in this, in this Commonwealth."

The trial proceeded without any further mention of the polygraph issue until the closing argument of the Commonwealth's Attorney wherein he stated:

> Well folks, if you are going to judge credibility and believability, and he wanted her to take a polygraph, you've got to know what the relationship is between the person that you are talking to and the person you are talking about [emphasis added].

There was no contemporaneous objection to this remark.

The results of polygraph examinations are inadmissible as evidence. Perry v. Commonwealth, Ky., 652 S.W.2d 655, 662 (1983); Stallings v. Commonwealth, Ky., 556 S.W.2d 4, 5 (1977). So, too, is any reference to the taking of a polygraph examination, Roberts v. Commonwealth, Ky., 657 S.W.2d 943, 944 (1983), or to the offer or refusal to take a polygraph examination. Id. at 944; Penn v. Commonwealth, Ky., 417 S.W.2d 258 (1967). The principle is the same whether the person taking, offering, or refusing the examination was the accused or another witness. Ice v. Commonwealth, Ky., 667 S.W.2d 671, 675 (1984); Roberts, supra, at 945. While we have held that an inadvertent, isolated, and ambiguous utterance of the word "polygraph" during a trial does not require reversal, Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 33 (1998), McQueen v. Commonwealth, Ky., 669 S.W.2d 519, 523 (1984), the result is otherwise when the evidence, as here, serves "to bolster the claim of credibility or lack of credibility of a particular witness or defendant." Ice, supra, at 675.

Nevertheless, the detective's testimony, standing alone, would not have required reversal. Defense counsel's objection was sustained and the jury was given an admonition to which defense counsel did not object (albeit the jury was not admonished

not to consider the evidence, but only that the evidence was inadmissible). A mistrial was not requested. Thus, we assume defense counsel considered the admonition to have been sufficiently curative.

The repetition of this inadmissible evidence during the prosecutor's closing argument, however, was inexcusable. It is elementary that neither party may refer in closing argument, even indirectly, to evidence that has been excluded by the trial judge. Mack v. Commonwealth, Ky., 860 S.W.2d 275, 276-77 (1993) (improper to tell the jury that "there exists a vast store of incriminating evidence, the presentation of which is obstructed by 'rules of evidence' and 'legal proceedings.'"); Moore v. Commonwealth, Ky., 634 S.W.2d 426, 437 (1982) ("I know you didn't get to hear all the tape recorded statement. I wish you could have."); Nolan v. Commonwealth, 261 Ky. 384, 87 S.W.2d 946, 950 (1935) (recitation in closing argument of deceased victim's out-of-court statement previously excluded as incompetent: "I call Wash Hensley from the grave and through the mouth of the witness, Browning, he tells you, 'I was standing there and he shot me for nothing.'").

The Commonwealth, of course, argues that the error was not preserved for appellate review because of defense counsel's failure to register a contemporaneous objection. "Absent contemporaneous objections, 'prosecutorial misconduct' is not grounds for reversal . . . unless the acts complained of rise to palpable error." (Citation omitted.) Justice v. Commonwealth, Ky., 987 S.W.2d 306, 316 (1998). It is rare, indeed, to assign palpable error, KRE 103(e), RCr 10.26, to statements made during closing argument, as opposed to, e.g., improperly admitted evidence. Nevertheless, we have done so. Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 163 (1995) (arguing incorrect parole eligibility guidelines during the penalty phase of a capital case);

Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 495 (1995) (arguing incorrect statistical data to prove the probability that a cigarette butt found at the scene had been smoked by the accused -- "The statistical calculations rival a polygraph in their unreliability and propensity to mislead and may have convinced jurors of modest analytical ability that no one but Michael could have committed the crime.").

Although no Kentucky case has addressed whether reference to excluded evidence during closing argument constitutes palpable error, at least two federal courts of appeals have so held.[2] United States v. Flores-Chapa, 48 F.3d 156, 159-61 (5th Cir. 1995); Garris v. United States, 390 F.2d 862, 866 (D.C. Cir. 1968). In Flores-Chapa, it was held that the error was magnified by the government's conduct at trial, i.e., eliciting the improper and ultimately excluded evidence from a government witness then citing it in closing argument to bolster the credibility of the same witness. Id. at 161. Here, the prosecutor conceded when the polygraph evidence was introduced that it was improper -- then used the admittedly improper evidence in his closing argument to impugn the credibility of McNay, Appellant's main alibi witness. Application of the "plain error" rule has been held appropriate in federal courts when the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Filani, 74 F.3d 378, 387 (2d Cir. 1996) (quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)). We believe the same principle applies here. Furthermore, since Appellant necessarily would have been acquitted under Count II of the indictment if the jury had believed McNay's testimony, "a substantial possibility exists that the result would have been different" had the excluded evidence not been

---

[2] The corresponding Federal Rule of Evidence (FRE) refers to this as "plain error." FRE 103(d).

erroneously employed by the prosecutor to attack McNay's credibility as a witness. Cf. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

This palpable error requires a new trial as to Count II of the indictment. Since other allegations of error with respect to Appellant's conviction under Count II are likely to recur upon retrial, we will also address those issues. Springer v. Commonwealth, Ky., 998 S.W.2d 439, 445 (1999).

II. INTERJECTION OF EXTRA-JUDICIAL SCIENTIFIC EVIDENCE.

The "receipt" that Appellant allegedly obtained from "Frank Smith" for the two game feeders was hand printed, as opposed to scripted, on what appears to have been part of an envelope. Even Smith's signature was printed. Apparently, Appellant had offered prior to trial to furnish a handwriting exemplar to be used for comparison analysis with the handwriting on the "receipt." During cross-examination by the prosecutor, the following colloquy occurred:

Q. So, you get this piece of paper-- and I notice another thing about the piece of paper. It's all printed out.

A. Well, does that--

Q. There is no handwriting on it.

. . .

Q. Don't you know that there is no way to do any type of handwriting comparison if it's not in handwriting, it's all handprint?

A. No, I did not know that because I--

Q. The first time you have ever heard that, right now.

A. Right now.

Q. Now . . .

A. Can I say something?

Q. Sure.

A. I've asked Mr. Wright [defense counsel] several times if they think I wrote the receipt, why haven't they done a handwriting sample on me?

Q. So, you are saying that you don't know anything about the printing and the fact that it's printed, that you can't do a handwriting sample because it's not handwriting, is that what--

A. No, I did not know that until right at this moment.

Q. So that's the first time you have ever heard of that?

A. The very first.

Appellant did not object to this line of cross-examination but requests review for palpable error. (Perhaps, defense counsel expected the Commonwealth to support its cross-examination assertions with expert opinion evidence that handprinting cannot be subjected to handwriting comparison analysis.) The Commonwealth's theory was that either Appellant or McNay forged the receipt to support Appellant's alibi that he purchased the grain feeders from "Smith." The obvious purpose for interjecting the extra-judicial information was to explain why the Commonwealth did not prove its theory by handwriting comparison analysis.

Presenting prejudicial evidence to the jury by dint of cross-examination without being prepared to prove it is generally regarded as reversible error. United States v. Brown, 519 F.2d 1368, 1370 (6th Cir. 1975). The Commonwealth did not produce a witness to testify that a handwriting comparison analysis can be made only from script and not from print; thus, the prosecutor improperly interjected extra-judicial scientific evidence into this trial with no intent to prove it. The error, however, involved a collateral matter only tangentially connected to the issue of Appellant's guilt or

innocence. Thus, it did not affect Appellant's "substantial rights," KRE 103(e), or rise to the level of "manifest injustice," RCr 10.26, so as to constitute palpable error. Upon retrial, however, the trial court should sustain a timely objection to this type of cross-examination.

III. VALUE OF THE STOLEN PROPERTY.

Appellant next claims that the evidence was insufficient to prove that the value of the two game feeders met the $300.00 minimum required for a felony conviction under KRS 514.030(2). Dickey testified that the cost of the game feeders was $159.95 each but admitted on cross-examination that the list price for the feeders was $149.95 each and the balance was for shipping and handling costs. This debate, however, becomes immaterial in view of the fact that Count II also charged Appellant with theft of the canvas chair, the camouflage netting, and the lumber. Dickey testified that he paid $50.00 for the chair, $25.00 for the camouflage netting, and $16.00 for the lumber. Added to the listed price of the game feeders, the total exceeds $300.00. It was proper to aggregate all property stolen from Dickey on the same occasion in order to reach the felony threshold level. Hensley v. Commonwealth, Ky., 655 S.W.2d 471, 472 (1983).

The testimony of the victim as to the value of personal property stolen from him satisfies the Commonwealth's burden of proof with respect to that element of the offense. Phillips v. Commonwealth, Ky., 679 S.W.2d 235, 237 (1984); Brewer v. Commonwealth, Ky. App., 632 S.W.2d 456, 457 (1982); Braden v. Commonwealth, Ky. App., 600 S.W.2d 466, 468-69 (1978). All of the stolen items, including the game feeders, had been purchased in 1999, the same year in which they were stolen; thus,

the jury could reasonably believe that they had not substantially depreciated in value prior to the theft.[3]

IV. TESTIMONY OF APPELLANT'S SON.

Appellant asserts that it was reversible error to compel his eleven year-old son, Matthew Edmondson, Jr., to testify against him without appointing a guardian ad litem. Appellant does not question the ruling of the trial court that Matthew was competent to testify; instead, he states that his son was not competent to determine whether he should testify. Appellant cites no authority for this proposition. The trial judge found that Appellant's son possessed the ability to perceive, recollect and adequately express himself and that he understood his obligation to tell the truth. These are the minimal requirements of competency for a witness to testify, KRE 601, and, absent the assertion of a recognized privilege, no witness has the right to refuse to testify. KRE 501.

V. INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellant also claims that he was denied his constitutional right to the effective assistance of counsel. However, Appellant did not raise this issue during his trial or in his motion for a new trial. As a general rule, a claim of ineffective assistance of counsel not brought before the trial judge for consideration, either during trial or in a motion for a new trial, is not ripe for review on direct appeal and must be reserved for collateral attack under RCr 11.42. Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 69 (2000);

---

[3]The jury instructions are not in the record; so we are assuming, as we must, that the jury was instructed on the theft of all the property described in Count II of the amended indictment and not just on the theft of the game feeders.

Humphrey v. Commonwealth, Ky., 962 S.W.2d 870, 872 (1998). Such claims "are best suited to collateral attack proceedings, after the direct appeal is over." Humphrey, supra, at 872. Since there is no record or ruling from the trial court on this issue, we decline to review it on direct appeal.

VI. CRUEL PUNISHMENT.

Lastly, Appellant argues that his aggregate sentence of twenty years imprisonment for two counts of theft by unlawful taking violates the constitutional proscription against cruel punishment. This issue is partially mooted by our reversal for a new trial of Appellant's conviction under Count II of the indictment. Regardless, the claim is meritless.

The Eighth Amendment of the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 17 of the Constitution of Kentucky is identical, except that it proscribes "cruel punishment" instead of "cruel and unusual punishments." We regard this variation in phraseology as a distinction without a difference. In Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946), our predecessor court noted that "cruel punishment" is regarded as "primarily relating to the kind and character or method of punishment, referring to inhumane or barbarous treatment or punishment unknown to the common law or which has become obsolete with the progress of humanitarianism." Id., 196 S.W.2d at 469. (Emphasis added.) However, Weber also noted that "cruel punishment" can relate to the severity in the amount or duration of the punishment, but if the punishment is within the maximum prescribed by the statute violated, courts generally will not disturb the sentence. Id., 196 S.W.2d at 169-70; see

also Monson v. Commonwealth, Ky., 294 S.W.2d 78, 79 (1956), overruled on other grounds, Owens v. Commonwealth, Ky., 487 S.W.2d 897, 900 (1972); Mills v. Commonwealth, 305 Ky. 44, 202 S.W.2d 1005, 1007-08 (1947); McElwain v. Commonwealth, 289 Ky. 446, 159 S.W.2d 11, 12 (1942); Bradley v. Commonwealth, 288 Ky. 416, 156 S.W.2d 469, 470 (1941).

All criminal offenses in this jurisdiction are statutory, and all penal statutes set maximum limits on penalties that can be imposed for their violation. Appellant was convicted of two Class D felonies, each of which carries a penalty of one to five years imprisonment. KRS 514.030(2); KRS 532.060(2)(d). Because Appellant was also found to be a persistent felony offender in the first degree, the maximum penalties for his offenses were enhanced to ten to twenty years in prison. KRS 532.080(6)(b). Thus, Appellant received the minimum sentence authorized by statute for each offense (though twenty years was the maximum aggregate sentence that could be imposed, KRS 532.110(1)(c)). It was within the sentencing judge's discretion to require that the sentences be served consecutively rather than concurrently. KRS 532.110(1).

Appellant makes a general claim that his ultimate sentence is disproportionate to the nature of his offenses. Solem v. Helm, 463 U.S. 277, 290, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 6837 (1983). Any proportionality analysis of a claim of cruel punishment requires consideration of three factors:

(1) The gravity of the offense and harshness of the penalty;

(2) The sentences imposed on other criminals in the same jurisdiction;

(3) The sentences imposed for commission of the same crime in other jurisdictions.

Id. at 290-92, 103 S.Ct. at 3010-11.

Appellant asserts that ten years in prison is too severe a penalty for a mere theft. However, the sentence fixed by the jury for each theft conviction was only three years. The enhancement of each sentence to ten years was because of Appellant's status as a persistent felony offender in the first degree.[4] Commonwealth v. Messex, Ky., 736 S.W.2d 341, 342 (1987). "[A] State is justified in punishing a recidivist more severely than a first offender." Solem, supra, at 296, 103 S.Ct. at 3013. Nor are the sentences disproportionate to sentences that have been imposed on other habitual offenders convicted of theft offenses in this jurisdiction. E.g., Brown v. Commonwealth, Ky., 818 S.W.2d 600, 601 (1991) (two and one-half years enhanced to ten years); Commonwealth v. Messex, supra (one year enhanced to fifteen years); Collett v. Commonwealth, Ky. App., 686 S.W.2d 822, 824 (1984) (eighteen months enhanced to ten years).

For satisfaction of the third prong of the Solem test, we need look no further than the United States Supreme Court's decision in Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). There, a life sentence imposed upon a third-offense felon for conviction of obtaining $120.75 by false pretenses was held not to be cruel and unusual punishment, despite the fact that the defendant's prior convictions were also for non-violent offenses. Id. at 285, 100 S.Ct. at 1145. Solem, supra, later held that it was cruel and unusual punishment to impose a penalty of life in prison without possibility of parole upon a third-offense felon convicted of uttering a worthless check in the amount of $100.00 and whose prior convictions were all for non-violent offenses. 463 U.S. at 303, 103 S.Ct. at 3016. However, Solem did not overrule

---

[4]Appellant had six prior convictions of receiving stolen property.

Rummel, supra, but distinguished it on the basis that Rummel would be eligible for parole in twelve years whereas Helm was effectively ineligible for parole. 463 U.S. at 300-03, 103 S.Ct. at 3015-16. Here, Appellant Edmondson will be eligible for parole after serving twenty percent of his sentence. KRS 532.080(7); KRS 439.340; 501 KAR 1:030 § 3(a).

Appellant's reliance on Workman v. Commonwealth, Ky., 429 S.W.2d 374 (1968), is misplaced. The appellants in that case were fourteen-year-old boys who had been sentenced to life in prison without the possibility of parole upon their convictions of rape of a female over twelve. KRS 435.090 (repealed 1974 Ky. Acts, ch. 406, § 336). Our predecessor court held that "confinement without parole constitutes cruel and unusual punishment and is in violation of section 17 of the Constitution when applied to a juvenile." Id. at 378. Thus, two crucial facts distinguish Workman from the case sub judice: (1) Appellant is not a juvenile, and (2) he was not sentenced to life without the possibility of parole. On the basis of our proportionality analysis, we conclude that Appellant's aggregate sentence of twenty years was not cruel punishment.

Accordingly, Appellant's convictions under Count I and III of the indictment and the sentence imposed therefor are affirmed and his conviction under Count II of the indictment is reversed for a new trial in accordance with the contents of this opinion.

Cooper, Graves, Johnstone, Keller, and Stumbo, JJ., concur. Lambert, C.J., concurs in result only. Wintersheimer, J., dissents by separate opinion.

COUNSEL FOR APPELLANT:

Thomas D. Bullock
Bullock & Coffman, LLP
108 West High Street
Lexington, KY 40507

COUNSEL FOR APPELLEE:

A. B. Chandler, III
Attorney General
State Capitol
Frankfort, KY 40601

Dennis W. Shepherd
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601

RENDERED: DECEMBER 19, 2002
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0253-MR

MATTHEW L. EDMONDSON — APPELLANT

V.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
00-CR-10

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from the majority opinion because the single passing reference to the polygraph situation during closing arguments was not reversible error. The comment by the prosecutor during closing argument was a direct reference to the defense witness being asked to take a polygraph and was not an improper or intentional reference to any evidence that had been excluded by the trial judge. The limited, obviously casual or offhand remark was as follows:

> Well, folks, if you are going to judge credibility and believability, and he wanted her to take a polygraph, you've got to know what the relationship is between the person that you are talking to and the person you are talking about.

Defense counsel made no objection and the issue was not properly preserved in any manner for appellate review. See Roberson v. Commonwealth, Ky., 913 S.W.2d 310 (1994).

In Tamme v. Commonwealth, Ky., 973 S.W.2d 13 (1998), we held that the mere utterance of the word "polygraph" is not grounds for reversal. As in Tamme, supra, and in McQueen v. Commonwealth, Ky., 669 S.W.2d 519 (1984), *cert. denied* 469 U.S. 893, 83 L.Ed.2d 205, 105 S.Ct. 269 (1984), there was no indication that any polygraph examination was taken. We said in Tamme that there must arise a clear inference that there was a result and that the result was favorable or some other manner in which the inference could be deemed prejudicial. In the absence of evidence that a polygraph examination was taken, no such inference could possibly arise. Cf. Phillips v. Commonwealth, Ky., 17 S.W.3d 870 (2000). Any conceivable error arising from the single brief reference by the prosecution to polygraph in the closing arguments was not of such a dimension that the final outcome would have been changed in any way. Any possible error was totally harmless. RCr 9.24; Jarvis v. Commonwealth, Ky., 960 S.W.2d 466 (1998).

I would affirm the conviction in all respects.