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RENDERED: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-1010-MR

MICHAEL MILLER — APPELLANT

V.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
00-CR-67

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Michael Miller, was convicted by a Breathitt Circuit Court jury of two counts of second-degree manslaughter. He was sentenced to a total of twenty years in prison and appeals to this Court as a matter of right, Ky. Const. §110(2)(b), claiming that (1) he was denied his constitutional right to a fair trial due to improper comments made by the prosecutor during closing argument in the guilt phase of the trial; and (2) the Commonwealth was erroneously allowed to present testimony from the mothers of both victims as victim impact evidence during the penalty phase of his trial. Finding no error, we affirm.

This is a vehicular homicide case. At approximately 11:00 p.m. on August 23, 2000, Joe Stacy and Paul Thompson were traveling south in Stacy's Chevrolet Nova on Main Street in Jackson, Kentucky. Appellant was driving north on Main Street in his

Ford Mustang. Appellant's Mustang crossed the center line of the roadway and collided head-on with Stacy's Nova causing it to leave the roadway, strike an embankment, and overturn. Stacy and Thompson died instantly. Officers who responded to the scene found Appellant bloodied and disoriented, but alive. The officers and paramedics noted that Appellant smelled of alcohol and appeared intoxicated; his speech was slurred. The officers searched his vehicle and found two empty beer cans. Paramedics transported Appellant to a local hospital where he voluntarily provided blood and urine samples. A test of Appellant's blood sample revealed a blood-alcohol level of 0.11 grams per milliliter.

Appellant did not testify at trial. Defense counsel urged the jury during closing argument to find Appellant guilty only of two counts of reckless homicide. Instead, the jury found him guilty of two counts of second-degree manslaughter.

I. ALLEGED PROSECUTORIAL MISCONDUCT.

Appellant asserts that his conviction should be reversed because of prosecutorial misconduct during the Commonwealth's closing argument. Recall that defense counsel did not dispute the facts of the case in his closing argument but only asserted that those facts proved reckless homicide, not second-degree manslaughter. In his closing argument, the prosecutor responded:

> See, the defense has done what defendants, I submit, do, when they are faced with overwhelming evidence. I submit they have to cut their losses where they can, and to do that, [they are] asking you to find their client guilty of a lesser included offense.

Appellant objected and moved for an admonition, which the trial court overruled. The prosecutor continued:

> Now, there's something else significant in what the defendant told us – told Louise Dial. And that was that day was his birthday – August 23 – the same day that he took the lives of those two boys was his birthday. And I submit to you, ladies and gentlemen, use your common sense and your experience to know that when you have a birthday, you usually celebrate it. And I submit to you, from the evidence, you can conclude that this celebration for the defendant led to his consuming that alcohol, which led to this tragedy, and it is indeed a tragedy.
> . . . .
>
> [W]hat we have here is, we have a friend taking another friend to work, driving a Chevrolet Nova. The defendant, I submit, who had been out celebrating – partying – got drunk, and . . . .

Appellant again objected and requested that the trial judge admonish the jury to disregard the prosecutor's statement. The trial judge denied Appellant's request for an admonition, but required the prosecutor to rephrase his statement by informing the jury that they could infer that Appellant had been partying and drinking (leading to his intoxication) from the fact that the accident occurred on his birthday. The prosecutor then rephrased his statement in accordance with the instructions of the trial judge and continued his closing argument. Appellant now claims that the prosecutor committed misconduct that denied him his right to a fair trial. We disagree.

It is well settled that "[a] prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 412 (1987). Likewise, a prosecutor may comment on defense strategy by providing his or her interpretation of the weight of the evidence against the defendant during closing argument. Woodall v. Commonwealth, Ky., 63 S.W.3d 104, 125 (2001) (finding no error where prosecutor stated during penalty phase closing arguments that defendant pled guilty to capital murder only after realizing amount of evidence against him). The prosecutor's remark that Appellant was seeking a lesser included offense due to the overwhelming evidence of his guilt did not

approach the threshold previously deemed acceptable by this Court. See Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 806 (2001) (prosecutor's classification of defense theory as "stupid," while harsh, did not exceed bounds of proper closing argument); Luttrell v. Commonwealth, Ky., 952 S.W.2d 216, 218 (1997) (prosecutor's characterization of defense witnesses' testimony as a "story" not misconduct); Slaughter, supra, at 412 (prosecutor's statements during closing argument criticizing defense counsel for presenting a "great octopus defense" and "pulling a scam" within appropriate bounds of closing argument). The prosecutor's comments as to Appellant's defense strategy were within the bounds of closing argument and did not deprive him of a fair trial.

The prosecutor's reference to Appellant's "partying" on the night of the accident was similarly innocuous. "In his closing remarks, a prosecutor may draw all reasonable inferences from the evidence and propound his explanation of the evidence and why it supports a finding of guilt." Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 39 (1998). Evidence presented during trial established that (1) the accident occurred on Appellant's birthday, August 23, 2000; (2) Appellant was legally intoxicated at the time of the accident; and (3) two empty beer cans were found in his wrecked automobile. Thus, although neither party introduced direct evidence that Appellant was "partying" prior to the accident, such was a reasonable inference from the evidence. There was no prosecutorial misconduct; thus, the trial court did not err in overruling Appellant's objection.

II. VICTIM IMPACT EVIDENCE.

Appellant objected to the Commonwealth's introduction of victim impact evidence via the testimony of the victims' mothers, Myrtle Thompson and Rosalie Stacy. Both witnesses had testified during the guilt phase of the trial and provided general background evidence about their sons.[1] The Commonwealth wished to have both witnesses testify again during the penalty phase about the effect the deaths of their sons had on their own lives. After a brief bench conference, the trial court overruled Appellant's objection but limited the witnesses' testimony to psychological impact. Both Thompson and Stacy described their relationships with their sons and the resulting psychological impact their sons' deaths had on their own lives.

Appellant advances a two-pronged argument. First, he argues that the testimony of Thompson and Stacy was irrelevant and served only to inflame the passions of the jury. Second, he argues that even if such testimony were relevant, the trial court should not have allowed the witnesses to testify personally but should have required them to submit written victim impact statements per KRS 421.500. Both arguments lack merit.

KRS 532.055(2)(a)7 permits the Commonwealth to offer evidence during the sentencing phase that is "relevant to sentencing," including:

> The impact of the crime upon the victim, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim.

(Emphasis added.)

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[1] Of course, background information is not "victim impact evidence," which is inadmissible during the guilt phase of the trial. See Bennett v. Commonwealth, Ky., 978 S.W.2d 322, 325-26 (1998) (introduction of victim impact testimony during guilt phase was error, though harmless).

A "victim" for purposes of KRS 532.055 is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." KRS 421.500(1). A parent is a "victim" under this statute when, as here, the actual victim of the crime is deceased and had no spouse or children at the time of his or her death. KRS 421.500(1)(c). Thus, KRS 532.055(2)(a)7 explicitly entitled the Commonwealth to present relevant victim impact evidence during the penalty phase of Appellant's trial through the testimony of the victims' mothers.

Appellant's reliance on Commonwealth v. Bass, Ky., 777 S.W.2d 233 (1989), is misplaced. Bass held that a defendant could not introduce the details of a plea bargain between the prosecution and a codefendant, including the criminal record of that codefendant, as mitigating evidence during the sentencing phase of the trial. Id. at 234. In reaching this conclusion, we held that "[t]he purpose of the 'Truth-in-Sentencing Act' – KRS 532.055 – is to insure having a jury well informed about all pertinent information relating to the person on trial. It cannot be used to wheelbarrow into evidence incompetent evidence relating to third persons." Id. Appellant cites Bass for his argument that the trial court erred in allowing both witnesses to testify because their testimony did not "relat[e] to the person on trial," i.e., Appellant.

Bass is inapplicable to the present case for multiple reasons. First, we decided Bass prior to the 1998 amendment of KRS 532.055 which added subsection (2)(a)7 to specifically admit victim impact evidence. 1998 Ky. Acts, ch. 606, §111. Second, Bass dealt with the construction of KRS 532.055(2)(b), a different subsection dealing with the defendant's right to "introduce evidence in mitigation or in support of leniency," which, prior to the 1998 amendments, was limited to evidence that the defendant did not have a criminal history. Finally, the language "relating to the person on trial" in Bass refers to

the criminal defendant, not the "victim" of the crime as defined by KRS 421.500(1). To require that victim impact evidence relate only to the criminal defendant would effectively bar the introduction of all such evidence and write KRS 532.055(2)(a)7 completely out of existence.

We have previously upheld the admission of victim impact evidence during the penalty phase of a criminal trial, explaining that the admission of such evidence is often necessary to "bring[] to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community." Woodall, supra, at 125; see also Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 301-02 (1997) (victim impact testimony of mother of one victim and widow of second victim admissible during penalty phase of capital murder trial). Therefore, the testimony of these witnesses as to the psychological impact of their sons' deaths on their lives was relevant and admissible during the penalty phase of Appellant's trial. Woodall, supra, at 125 ("Victim impact evidence is another method of informing the sentencing authority about the specific harm caused by the crime.").

The argument that victim impact evidence is admissible only by way of a written victim impact statement confuses KRS 421.520 and KRS 532.055. The General Assembly enacted KRS 421.520 in 1986. 1986 Ky. Acts, ch. 212, § 3. It requires the Commonwealth's attorney, upon the conviction of the defendant, to notify the victim of the crime that he or she has the right to submit a written victim impact statement to the trial court for inclusion in the written presentence report. KRS 421.520(1). The trial judge is then required to consider this statement "prior to any decision on the sentencing or release . . . of the defendant." KRS 421.520(3).

The General Assembly amended KRS 532.055 in 1998 to provide for the introduction of "victim impact evidence" and imposed no limitation on whether that evidence could be submitted in oral or written form. 1998 Ky. Acts, ch. 606, §111. In fact, submission of written evidence at a trial would be hearsay and would violate the defendant's right of Confrontation. The trial court did not err in admitting the victims' mothers' testimony as victim impact evidence during the penalty phase of Appellant's trial.

Accordingly, the judgment of convictions and the sentences imposed by the Breathitt Circuit Court are affirmed.

All concur.

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