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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JANUARY 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-000412-MR

DATE 2-12-04 Ella Growth, D.C.

KEITH GUY — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
CRIMINAL NO. 00-CR-00070

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant stands convicted for the kidnapping and first degree sodomy of L.S., a minor child under twelve (12) years of age. Appellant waived jury sentencing, choosing instead to rely upon the Commonwealth's sentencing recommendations. The trial court followed these recommendations, fixing Appellant's punishment at thirty (30) years for the sodomy conviction and ten (10) years for kidnapping, with each sentence to run concurrently. Appellant now appeals to this Court as a matter of right.

At trial, Appellant testified that he invited L.S. to accompany him for an overnight stay so that the young girl might get to know his wife and children. Plans were also made to visit a local theme park the next morning. The grandmother of L.S. gave her consent, and Appellant picked up L.S. for the evening. Unbeknownst to L.S. or her grandmother, however, Appellant's wife strongly objected to this overnight visit. In fact,

opposition to these plans led Appellant's wife to ask for the house key back from her husband. Therefore, instead of driving L.S. to his home or calling off the visit altogether, Appellant took the child to a vacant apartment where the sodomy allegedly occurred.

According to L.S., upon arriving at the vacant apartment, Appellant expressed concern that their clothing might aggravate his son's allergies. For this ostensible reason, L.S. testified that she and Appellant showered together. Afterwards, Appellant provided L.S. with an intoxicating mixture of wine and grape soda, and encouraged her to drink quickly. L.S. testified she became dizzy and passed out, but later awoke to find Appellant orally sodomizing her. L.S. kicked free of Appellant, dressed herself, then demanded to be taken home. Following a rambling, all-night drive through the countryside, Appellant eventually complied, dropping L.S. off at her great-grandmother's house.

I. Standard of Review

Appellant raises a number of unpreserved errors on this appeal, and in lieu of palpable error review, Appellant urges this court to apply the somewhat more deferential standard applicable in death penalty cases. See KRS 532.075(2) (requiring the Supreme Court to consider "any error enumerated by way of appeal" whenever a death sentence is imposed). To support his position, Appellant equates his thirty (30) year sentence to the death penalty, positing that the combination of his sentence and his age means he will likely die behind bars.

Although Appellant's concerns regarding his future prospects are valid, the death penalty differs markedly from his punishment in both severity and finality. See Beck v. Alabama, 447 U.S. 625, 637, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Execution allows no reprieve, whereas Appellant's sentence, although lengthy, is not immutable.

Accordingly, the extraordinary safeguards associated with death penalty review are not herein required.

II. Allegations of Judicial Mistake and Misconduct

Appellant claims that several "judicial errors" violated his due process rights and denied him a fair and impartial trial. Appellant's first allegation involves a letter he sent to presiding Fayette Circuit Judge Gary D. Payne prior to trial. In this letter, Appellant expressed unease over the preparation of his defense counsel. Appellant now contends that Judge Payne failed to address this concern. The record, however, shows otherwise.

The circuit court received Appellant's letter on the Friday before trial. On Monday, before commencing voir dire, Judge Payne asked Appellant if he still had misgivings regarding his representation in this case. Appellant answered: "Not so much as a concern, Your Honor. I think they can do an adequate job, you know, but it was just some things that we had went over that I brought to their attention. And since then I think that we've pretty much covered it." The judge further questioned Appellant and counsel, extensively vetting this issue before proceeding with trial. We therefore find no basis for Appellant's claim that Judge Payne ignored this matter. Nor do we find error in the judge's decision to allow defense counsel to continue in their representation of Appellant, for Appellant waived this issue prior to trial.

Appellant next alleges that Judge Payne worked and played games on a computer throughout trial, depriving Appellant of the judge's undivided attention. As further evidence of lax trial oversight, Appellant contends that the judge neglected to preserve four juror communications as part of the record on appeal. According to Appellant, this behavior created a structural defect in the conduct of the entire trial,

calling into question the reliability of the verdict and undermining confidence in the judiciary.

Our review of the record reveals that Appellant's claims are largely unsubstantiated. For example, although the videotapes of trial do show Judge Payne using a computer on several occasions, the tapes disclose nothing more. Likewise, from the record we are unable to determine if Judge Payne ever received communications from jurors during trial, let alone misplaced them. Civil Rule 75.13 provides a means for documenting such events not otherwise recorded at trial, and defense counsel has not availed herself of this procedural device.

After paring away the unsupported allegations, we are left to consider only whether Judge Payne's computer usage during trial created a structural error, depriving Appellant of the "'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" Neder v. United States, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), quoting Rose v. Clark, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). We think not. Appellant has not detailed any specific harm stemming from the judge's computer usage, nor has Appellant described any instance where this practice impeded Judge Payne's ability to effectively preside at trial.

As a final allegation of judicial error, Appellant asserts that Judge Payne failed to conduct a competency hearing, *sua sponte*, after defense counsel complained that the child victim appeared sedated during her testimony. Not only is this issue unpreserved, but counsel has come dangerously close to misrepresenting the facts. In her brief, counsel for Appellant implies that this issue was raised during the trial testimony of L.S.

Instead, we note that defense counsel first voiced this complaint following the close of the Commonwealth's case, more than twenty-four hours after L.S. had testified.

At the time of trial, L.S. was twelve years of age, having been ten years old when the charged offenses occurred. Youth will not bar a witnesses from testifying, for even young witnesses are generally presumed competent to testify at trial. Price v. Commonwealth, Ky., 31 S.W.3d 885, 891 (2000). The steady and even demeanor of L.S. on the witness stand could easily be viewed as strength of character instead of Appellant's suggestion that she was under sedation. There was no indication that L.S. lacked the capacity to recollect, express or truthfully relate her version of events. Furthermore, any inconsistencies in the testimony of L.S., which Appellant points out in great detail, are matters of credibility for the jury, not of competency of the witness. See Price, supra, at 891. Therefore, lacking any contemporaneous motion for a competency hearing, we find no merit in Appellant's claim.

III. Grand Jury Indictment

Prior to trial, Appellant moved to dismiss the indictment against him on the grounds that the prosecutor knowingly introduced false and misleading testimony before the grand jury. The trial judge, following an evidentiary hearing, denied Appellant's motion. On appeal, Appellant not only asserts that the trial judge erred in his ruling, but now claims the prosecutor surreptitiously altered the tape recording of grand jury proceedings.

The primary basis for Appellant's claim of error stems from the grand jury testimony of Detective Ann Guiterrez. Appellant contends the detective misstated by several orders of magnitude the victim's blood alcohol level following her encounter with Appellant. The Commonwealth acknowledges this mistake, but counters that the

detective simply repeated incorrect information given to her by hospital personnel. Once the error was discovered, the Commonwealth immediately notified Appellant through supplemental discovery, although by this time the grand jury had indicted Appellant for kidnapping and sodomy.

Typically, a court will not look behind the face of a grand jury indictment to test the legality or sufficiency of the evidence on which the indictment is based. Jackson v. Commonwealth, Ky., 20 S.W.3d 906, 907 (2000); Rice v. Commonwealth, Ky., 288 S.W.2d 635, 638 (1956). Appellant, however, compares the prosecutor's conduct before the grand jury with that described in Baker v. Commonwealth, Ky. App., 11 S.W.3d 585 (2000). In Baker, the Court of Appeals affirmed the dismissal of an indictment where a Commonwealth's Attorney intentionally elicited false testimony in order to elevate the degree of an offense. Specifically, the Commonwealth's Attorney represented that an aluminum baseball bat was used in an assault, when in reality the weapon was nothing more than a wooden stick. Id. at 589.

The Court of Appeals in Baker responded to a "flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment." Id. at 588, citing Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988). In the present case, Detective Guiterrez averred that she simply informed the grand jury of statements made to her by hospital personnel. Beyond noting a lack of the same brazen disregard for the facts as in Baker, we are reticent to engage in any reevaluation of the evidence supporting this otherwise valid indictment, for to do so would infringe upon the province of the grand jury. See Holland v. Commonwealth, Ky., 114 S.W.3d 792, 808 (2003).

Consequently we find no error in the trial court's denial of Appellant's motion to dismiss the indictment.

In a similar vein, we also reject Appellant's argument that prosecutors should be required to present grand jurors with all evidence affecting the credibility of witnesses, thereby extending to these early proceedings the holding of Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963). The grand jury adequately serves its gatekeeping function by considering the sufficiency of evidence to support an indictment, rather than weighing all the evidence to determine the likelihood of guilt. To insist that a prosecutor "present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." United States v. Williams, 504 U.S. 36, 51, 112 S.Ct. 1735, 1744, 118 L.Ed.2d 352 (1992).

Finally, we find wholly unpreserved Appellant's claim that the prosecutor secretly edited the tape recording of grand jury proceedings. This issue was not raised before the trial court, nor has the grand jury tape been included in the record on appeal. An appealing party has the responsibility to ensure that all materials necessary for effective review are included in the record. Oldfield v. Oldfield, Ky., 663 S.W.2d 211 (1983); Fanelli v. Commonwealth, Ky., 423 S.W.2d 255 (1968). Counsel's personal transcription of the grand jury tape is not properly before this Court. Any further review, based upon a silent record, would be entirely speculative. Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 144 (1985).

IV. Exclusion of Evidence

Appellant charges that the Commonwealth conspired with local government "to prosecute the Appellant with trumped up false criminal charges" in retaliation for

Appellant's role in separate criminal and civil cases involving a local political figure, Ron Berry. See generally Berry v. Commonwealth, Ky. App., 84 S.W.3d 82 (2001). Appellant contends that he was denied the opportunity to present his "Micro-City Government—Ron Berry—Commonwealth" conspiracy theory at trial, and that the exclusion of evidence supporting this theory prevented Appellant from demonstrating the bias of key prosecution witnesses. However, like many of Appellant's claims of error, Appellant failed to raise this issue at trial.

Other than defense counsel's brief reference to Appellant as a "political prisoner," the Commonwealth points out that at no time during trial did Appellant seek to portray a governmental conspiracy against him. Instead, during his attempts to impeach the credibility of the victim and her family, Appellant sought to introduce the details of his separate suit against Mr. Berry. The Commonwealth argued such details were irrelevant to establish the possible bias of the victim and her family, and the trial judge agreed. Appellant now attempts to ratchet the exclusion of the facts surrounding the Berry case into an exclusion of Appellant's conspiracy theory defense.

Based on the arguments presented at trial, Judge Payne permitted Appellant considerable leeway to establish the possible biases of the victim and her family, including the family's attempted seizure of Berry settlement funds from Appellant, but excluded other specific details of the Berry case on relevancy grounds. A trial judge may "impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant.'" Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 483, 102 L. Ed. 2d 513 (1988) quoting Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.

Ct. 1431, 1435, 89 L. Ed. 2d 674 (1986). Because Appellant failed to inform the trial judge of any possible connection between the Berry case details and Appellant's conspiracy theory, Appellant cannot now be heard to complain. Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976).

V. Admissibility of Forensic Evidence

Appellant asserts the trial court improperly admitted DNA evidence that implicated Appellant in the sodomization of L.S. The initial forensic testing of the victim's panties yielded no spermatozoa, but a later test indicated the presence of saliva. Subsequent genetic analysis of a swatch cut from the panties revealed a mixture of two DNA profiles, a mixture from which neither Appellant nor L.S. could be eliminated.

According to Appellant, the Commonwealth failed to establish a credible chain of custody for the panties. Without recounting the lengthy series of events surrounding the collection, inspection, storage and testing of this evidence, Appellant's complaint centers on the fact that a forensic serologist neglected to reseal the bag in which the panties were stored following her initial examination of this evidence. Thereafter, all individuals who inspected the panties, including the prosecutor, also failed to reseal the collection bag.

Appellant links the unsealed evidence bag with the prosecutor's "private viewing" of the panties to suggest tampering with this evidence. Undeniably, the saliva and DNA evidence which tied Appellant to these crimes was not discovered until after the prosecutor examined the panties. However, as we stated in Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6, 8 (1998), "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long

as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.'" quoting United States v. Cardenas, 864 F.2d 1528, 1532 (10th Cir.1989), cert. denied, 491 U.S. 909, 109 S.Ct. 3197, 105 L.Ed.2d 705 (1989).

In the present matter, the Commonwealth adequately established the chain of custody for the evidence in question. All relevant persons documented their handling of this evidence, and the panties, although kept in an unsealed bag, were transported within a larger sealed container. In addition, Appellant's assertion that the prosecutor tampered with this evidence is nothing more than speculation. "The burden of the State to establish integrity is not absolute; all possibility of tampering need not be negatived." Brown v. Commonwealth, Ky., 449 S.W.2d 738, 740 (1969). Any lingering uncertainty regarding the unsealed bag in which the panties were kept simply affected the weight, rather than the overall admissibility of this evidence. See Rabovsky, supra, at 8.

Appellant also claims the trial court erred by neglecting to conduct a Daubert hearing to determine the admissibility of the forensic evidence in this case. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). This issue was not raised at trial, therefore this matter is not preserved for appellate review. See Tharp v. Commonwealth, Ky., 40 S.W.3d 356, 367-68 (2000), cert. denied 534 U.S. 928, 122 S.Ct. 289, 151 L.Ed.2d 213 (2001) (declining to "speculate on the outcome of an unrequested Daubert hearing, or to hold that the failure to conduct such a hearing *sua sponte* constitutes palpable error"). Nonetheless, we observe that the reliability of the Polymerase Chain Reaction DNA comparison technique, used here to link Appellant to these crimes, has been sufficiently established so as to no longer require a Daubert hearing. Fugate v. Commonwealth, Ky., 993

S.W.2d 931, 937 (1999). We therefore find no error in the trial court's decision to deny Appellant's motion to exclude the DNA evidence.

VI. Voir Dire

Prior to trial, Appellant moved the court to permit individualized voir dire in order to determine the effect of pre-trial publicity on potential jurors. Defense counsel argued that they could not "explore this publicity issue in detail in group voir dire without the risk of prejudicing previously impartial jurors." Without specifically denying this motion, the trial judge instead elected to first ask the entire panel if they were aware of any media reports regarding Appellant's pending case. When two panelists affirmatively responded, the judge invited them to the bench where they were individually questioned.

Appellant claims that the trial judge's rejection of individualized voir dire for all potential jurors "preempted Appellant's substantial right to knowledgeably exercise his preemptory challenges." We disagree. The record shows that Appellant had ample opportunity to individually voir dire each of the panelists who admitted prior knowledge of this case. Moreover, the fact that just two venire members evinced some familiarity with Appellant or this case appears to contradict Appellant's claims regarding the widespread effects of pre-trial publicity upon potential jurors. The decision of whether to allow individualized voir dire, except in death penalty cases, is a matter of judicial discretion. See RCr 9.38; Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 539 (2001). We find no such abuse of discretion here.

VII. Allegations of Prosecutorial Misconduct

Under the heading of prosecutorial misconduct, Appellant makes a number of claims of error, including the contention that the prosecutor refused to offer a plea

bargain or participate in a pretrial conference. In support of this particular claim, Appellant points out that local Rule 10(A) of the Fayette Circuit Court requires the Commonwealth's Attorney to attend a pretrial conference in all criminal cases. The trial judge addressed this matter, but stated that he could not compel the prosecutor to meet with Appellant before trial.

Although a technical violation of local rule 10(A) may have occurred, the error was harmless. We observe that "[n]o defendant has a constitutional right to plea bargain. The prosecutor may engage in it or not in his sole discretion. If he wishes, he may go to trial." Commonwealth v. Reyes, Ky., 764 S.W.2d 62, 64 (1989), citing Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). There is little likelihood that the results would have been any different had the judge ordered a pretrial conference, for at most the judge could only order prosecutor's attendance, not actual negotiation.

In regard to Appellant's remaining claims of "prosecutorial misconduct," we observe that none involve the knowing use of false evidence, the *sine qua non* for such allegations. Davis v. Commonwealth, Ky., 967 S.W.2d 574, 579 (1998). Furthermore, Appellant failed to preserve these allegations for our review. As we have often stated, "unpreserved claims of error cannot be resuscitated by labeling them cumulatively as 'prosecutorial misconduct.'" Young v. Commonwealth, Ky., 50 S.W.3d 148, 172 (2001); Davis, supra, at 579. We therefore decline further review of these matters.

VIII. Motion for Directed Verdict

With no supporting facts or argument, Appellant asserts the evidence adduced at trial was not sufficient to support his conviction. We disagree. The prosecution introduced far more than a mere scintilla of evidence from which a juror could infer guilt.

Considering the evidence as a whole, including the saliva and DNA found on the panties of L.S., the victim's testimony, and Appellant's corroboration of many of the events on the night in question, we cannot say the jury's verdict was clearly unreasonable. See Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

IX. Cruel and Unusual Punishment

Lastly, Appellant asserts that his thirty (30) year sentence constitutes "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments to the United States Constitution as well as Section 17 of the Kentucky Constitution. Notwithstanding the fact that Appellant expressly waived jury sentencing in lieu of the Commonwealth's recommended term of incarceration, we do not believe Appellant's sentence is disproportionate to the nature of his offenses. See Solem v. Helm, 463 U.S. 277, 290, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 637 (1983).

We note that the permissible range for a particular sentence is "purely a matter of legislative prerogative." Hampton v. Commonwealth, Ky., 666 S.W.2d 737, 741 (1984), citing Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). Appellant's sentence falls well within the prescribed ranges for his offenses. As a reviewing court, we are hesitant to disturb any sentence that does not exceed the statutory maximum. See Marshall v. Commonwealth, Ky., 60 S.W.3d 513, 524 (2001), cert. denied, 535 U.S. 1024 (2002). Furthermore, a thirty year sentence does not strike us as a greatly disproportionate punishment for the kidnapping and sodomy of a ten year old child.

Therefore, the judgment of conviction and the sentence imposed upon Appellant by the Fayette Circuit Court are hereby affirmed.

All concur.

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