

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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RENDERED: JANUARY 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0854-MR

FINAL

DATE 2-12-04 E.A.G. Grewitt, D.C.

MICHAEL RAY HOWARD

APPELLANT

V.

ON APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL BRADEN, JUDGE
2002-CR-0004

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Michael Howard, was convicted of two counts of first-degree sodomy and one count of second-degree sodomy by a Whitley Circuit Court jury. He now appeals to this Court as a matter of right, raising four issues for review. We affirm.

Facts

In the fall of 1997, Howard began to commit acts of sodomy on his stepson, A.N., then age nine. At the time, Howard was married to Jody Nelson and lived with Nelson and her two sons from a previous relationship. Due to Nelson's medical condition, Howard slept in a bedroom with the two boys, while Nelson slept in another bedroom. The abuse continued on a regular basis until August of 2001, when Howard and Nelson separated. It was during the pendency of the following divorce that A.N. revealed the abuse to his mother. A.N.'s brother, D.N., also told his mother that Howard had sodomized him.

Nelson reported the abuse to the authorities. Dr. Richerson, a pediatrician in McKee, eventually examined the boys and identified an anomaly in both. At trial, Dr. Richerson testified that both boys had irritation, flattening of the muscles, and tears around the anal openings that are consistent with sexual abuse. Detective Stacy Anderkin of the Kentucky State Police later interviewed Howard. During the interview, Howard confessed to having oral and anal sex with A.N. A portion of that confession was tape recorded by Detective Anderkin.

On January 14, 2002, Howard was indicted by a Whitely County Circuit Court Grand Jury of five (5) counts of first-degree sodomy by engaging in deviate sexual intercourse with a minor under twelve (12) years of age. On July 17, 2002, Howard was convicted by a jury of two counts of first-degree sodomy and one count of second-degree sodomy. Howard was not found guilty of any counts as to D.N.

Denial of a Directed Verdict

Howard first alleges error where the trial court failed to grant a directed verdict. On appellate review, a trial court's denial of a motion for directed verdict will be upheld if, reviewing the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). "[T]he trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." Id. at 187-88. Applying that standard to the present case, we find that a directed verdict was not warranted.

The prosecution produced well over a mere scintilla of evidence. Howard was convicted of both first-degree and second-degree sodomy as to A.N. First-degree sodomy requires a finding that Howard engaged in deviate sexual intercourse with a person who is physically helpless or under the age of twelve (12). KRS 510.070. For

the second-degree sodomy charge, it was necessary that the prosecution prove that Howard was older than eighteen (18) years when he engaged in deviate sexual intercourse with a person less than fourteen (14) years old. KRS 510.080.

A.N. testified that Howard had sodomized him almost every night from 1997 to 2001; A.N. was nine (9) years old in 1997 and thirteen (13) years old in 2001. Dr. Richerson's examination of A.N. revealed anomalies in the area of the anal opening consistent with sexual abuse. A taped confession, obtained during Howard's interview with Detective Anderkin, was played for the jury. Reviewing this evidence as a whole, the trial judge was correct in concluding that a reasonable jury could fairly find guilt beyond a reasonable doubt. There was considerable evidence presented by the Commonwealth and it was proper to submit the evidence to the jury for its deliberation.

Alleged Prosecutorial Misconduct in Closing Arguments

Howard next claims that prosecutorial misconduct occurred during closing arguments that resulted in manifest injustice. Specifically, Howard claims that statements made by the Commonwealth attorney during closing arguments amounted to testimony concerning child abuse sexual accommodation syndrome. No objection was made and therefore, this issue was not preserved for appellate review. However, Howard asserts that the strength of the prohibition against such testimony or evidence, and the resulting palpable error, warrant reversal. Out of an abundance of caution, we address the merits of Howard's unpreserved issue, and conclude that no prosecutorial misconduct occurred.

During closing arguments, the Commonwealth attorney made the following statements to which Howard now objects:

And, ladies and gentlemen, I'm amazed at Mr. Findell saying that a child, it's inconceivable that a child could go four years without saying that.

Ladies and gentlemen, a child who is abused by someone in a superior position, a father, a stepfather, a preacher, a priest, a teacher, they can go for years. They can go for decades, for twenty years, thirty years, and never tell a soul. Even when they become adults they can keep that deep secret inside until some event, until something happens where they can tell. Sometimes it's when that person is removed from their lives. When that person has left the home then they can tell. That's what [D.N.] did. That's what [A.N.] did. After that person was out of their lives, after those threats didn't mean anything anymore they can tell what happened to them. . . . They didn't tell. They were scared.

Howard argues that these statements are essentially testimony as to the symptoms of child abuse sexual accommodation syndrome, which is inadmissible pursuant to Bussey v. Commonwealth, Ky., 697 S.W.2d 139 (1985), and its progeny. However, no contemporaneous objection was made to these comments. Therefore, in order to seek review, Howard asks this Court to find that the alleged misconduct of the prosecutor in making these statements resulted in a palpable error that affected his substantial rights.

Our decision in Young v. Commonwealth, Ky., 25 S.W.3d 66, 74 (2000), sets forth the following factors to be considered in a palpable error review of instances of prosecutorial misconduct in the sentencing phase closing arguments; those factors are applicable here: (1) the weight of the evidence supporting the verdict; (2) whether the Commonwealth's statements are supported by facts in the record; (3) whether the statements challenged appear to rebut arguments raised by defense counsel; and (4) whether the closing argument, taken as a whole, is within the wide latitude granted to counsel during closing arguments.

Applying those factors to the present case, we hold that Howard did not suffer a manifest injustice as a result of the Commonwealth's closing arguments. The Commonwealth produced substantial evidence to support the verdict, including Howard's taped confession and the testimony of the victim, the victim's physician, and

the investigating detective. The statements made by the Commonwealth's attorney are supported by facts in the record: A.N. testified that Howard had forced him to remain silent with threats and that he was scared to reveal his abuse sooner for that reason. Furthermore, the comments made by the Commonwealth's attorney were in direct response to statements made by defense counsel. Howard's attorney, during closing arguments, argued that A.N.'s four-year silence was evidence that the abuse was fabricated. The Commonwealth's attorney, to rebut that argument, simply stated that it is possible for victims of abuse to remain silent for several years. Reviewing the closing arguments as a whole, we find no evidence of prosecutorial misconduct. The prosecutor is allowed reasonable latitude during closing arguments. Lynem v. Commonwealth, Ky., 565 S.W.2d 141 (1978). We conclude that the Commonwealth's attorney did not exceed reasonable bounds in making his closing argument, and that Howard did not suffer a manifest injustice.

Alleged Prosecutorial Misconduct in Voir Dire

Howard also claims prosecutorial misconduct occurred where the Commonwealth's attorney referred to defense counsel as a public defender during voir dire. Defense counsel moved the trial court for a mistrial, which was denied. The decision to grant a mistrial is within the trial judge's discretion and his ruling will not be disturbed absent a showing of an abuse of discretion. Chapman v. Richardson, Ky., 740 S.W.2d 929 (1987). The granting of a mistrial is an extreme remedy, to be used only where there is a fundamental defect in the proceedings that would result in a manifest injustice. Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734 (1996).

In the present case, Howard offers no evidence that he suffered any prejudice as a result of the comment of the Commonwealth's attorney. The trial judge offered to

make an admonition to the jurors, which defense counsel refused. The isolated statement made by the prosecutor was not of such character, magnitude, or nature that Howard was denied a fair or impartial trial as a result. Furthermore, even assuming arguendo that the prosecutor's comment did constitute error, there is no evidence that the result of the trial would have been different if the comment had not been made. Where there is no substantial possibility that the result would have been different, the error is harmless. Abernathy v. Commonwealth, Ky., 439 S.W.2d 949 (1969). We conclude that Howard was not prejudiced by the prosecutor's comment, and therefore the trial judge did not abuse his discretion in denying Howard's motion for a mistrial.

Introduction of Howard's Taped Confession

Finally, Howard claims he suffered substantial harm where the trial judge failed to suppress the taped confession. Howard alleges that the confession was the result of coercion and that he never validly waived his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). However, Howard concedes that this issue is not properly preserved. Although not artfully stated in his brief, it seems that Howard is also asking this Court to review the introduction of the taped confession as a substantial error under RCr 10.26.

Here, no defects of the taped confession were ever brought to the attention of the trial court. Defense counsel did not move to suppress the taped confession before trial. At Howard's trial, the Commonwealth's attorney played the taped confession for the jury at the conclusion of the direct examination of Detective Anderkin. No objection was made. The prosecutor then asked the court to introduce the taped confession as evidence. Defense counsel objected but failed to state a basis, merely asking the court if he could cross-examine Detective Anderkin and then enter objections to the

introduction of the tape. Defense counsel explained that, depending on Detective Anderkin's responses during cross-examination, he "may have an objection." The trial court refused and the tape was introduced; defense counsel even stated in reply that he "could always move to strike it then afterwards." However, no further objection was made, and defense counsel never moved to strike the confession.

This Court is not at liberty to review alleged errors that are not presented to the trial court for determination. Todd v. Commonwealth, Ky., 716 S.W.2d 242 (1986). Even where the claimed error concerns confessions allegedly obtained in violation of a defendant's Constitutional rights, this Court has refused review where the issue was not presented to the trial court. Henson v. Commonwealth, Ky., 20 S.W.3d 466 (1999). In Henson, the appellant had raised issues concerning the voluntariness of a confession during a pre-trial suppression hearing. However, this Court refused to examine the confession for violations of the appellant's Fifth Amendment rights because that specific issue was not brought to the attention of the trial court. Similarly, in Kennedy v. Commonwealth, Ky., 544 S.W.2d 219 (1976), this Court determined that the voluntariness of a confession was not properly preserved for review, even though the appellant had raised other issues concerning the admissibility of the confession. Here, no objections whatsoever concerning the admissibility of Howard's confession were presented to the trial court. Therefore, we find that Howard has not preserved for our review any issue relating to the taped confession.

Furthermore, we reject Howard's contention that the introduction of the confession constitutes substantial error pursuant to RCr 10.26. Again, because no objections were entered concerning the confession, we find that the trial court did not commit palpable error where it failed to exclude the tape on its own motion. Moreover,

there is nothing in the record that would have alerted the trial court that the confession was obtained in violation of Howard's Miranda rights; in fact, the Miranda rights are recited to Howard within the first minute of the taped confession. See Henson, 20 S.W.3d at 471. ("In any event, we feel it would stretch the limits of RCr 10.26 to hold that a trial court commits palpable error when it fails to rule, on its own motion, that a confession was obtained in violation of the Appellant's right against self-incrimination when the only evidence suggesting that conclusion is the Appellant's own self-serving statement.") We hold that the trial court did not err in admitting Howard's taped confession into evidence.

For the foregoing reasons, the judgment of the Whitley Circuit Court is affirmed.

Cooper, Graves, Johnstone, Keller, Stumbo, and Wintersheimer, JJ., concur.

Lambert, C.J., concurs in result only.

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