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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MAY 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 7-22-05 E.U.A. Grantham D.C.

2003-SC-1062-MR

ANTHONY THOMAS GRIMES — APPELLANT

V.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, JUDGE
2003-CR-0078

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Grimes of two counts of first-degree rape, six counts of first-degree sodomy, eight counts of first-degree sexual abuse and one count of second-degree sexual abuse. He was sentenced to a total of fifty-nine years in prison.

The questions presented are whether Grimes was entitled to instructions on lesser-included offenses to first-degree rape; whether he was entitled to instructions on lesser-included offenses to other charges contained in the indictment; whether the prosecutor's arguing of facts not in the record was palpable error; whether an *ex parte* communication between the prosecutor and the trial judge prejudiced the defendant;

whether the prosecutor misstated the in-court identification of the defendant by the victims; whether the reference to the defendant as a salesman and to his appearance resulted in a manifest injustice; whether the defendant was required to characterize a prosecution witness as a liar; and whether an alleged unsolicited response by a witness was palpable error.

Grimes was indicted for eighteen counts of sexual offenses against his two stepdaughters. Thirteen of those counts related to the oldest stepdaughter and included two counts of first-degree rape, six counts of first-degree sodomy, four counts of first-degree sexual abuse and one count of second-degree sexual abuse. The five other charges related to the youngest stepdaughter and involved first-degree sexual abuse. One of those charges was later dismissed at trial. Both victims, ages 18 and 12 at the time of the September 2003 trial, testified about the sexual acts committed by Grimes over a sixty-five month period that began in June 1997 and ended in October 2002. Their mother also testified that Grimes made certain admissions of sexual abuse to her after the allegations came to light. Grimes testified in his own defense and completely denied the charges.

The jury convicted Grimes of all the submitted charges. The two rape charges (15 years each), two of the sodomy counts (10 years each) and two of the sexual abuse charges (five and four years) were ordered to run consecutive to the remaining counts which varied in terms of 12 months to twenty years. The total sentence was fifty-nine years in prison. This appeal followed.

I. Instructions on Lesser-Included Offenses to Rape

Grimes argues that the trial judge erred by not giving lesser-included offense instructions to the two counts of first-degree rape. He claims that the mother's

testimony concerning a conversation she had with him after the sexual misconduct came to light supports his position. That testimony was as follows:

> . . . I asked him if, first I asked him if [the oldest victim] could be pregnant and he said he never touched them with his penis. He said that the only thing he did is he used his fingers on them and he never put them in them no deeper than fingernail depth. . .

Defense counsel did seek instructions on lesser-included offenses to the two counts of first-degree rape, but that was not predicated on the testimony of the mother. Instead, he indicated that Grimes was entitled to the instructions based on his testimony that he did not have sexual intercourse with the victims. Defense counsel cited the commentary to 1 Cooper, Kentucky Instructions to Juries (Criminal) §4.23, at 201 (4th ed. Anderson 1999), particularly, this sentence: "If there is evidence that sexual intercourse did not occur, an instruction on First-Degree Sexual Abuse should be given as a lesser included offense." He did not tender any instructions.

A party may preserve an error in the giving or failure to give an instruction by stating specifically the matter to which he objects and the ground or grounds of his objection. RCr 9.54(2). He is not permitted to argue different grounds on appeal than were raised below. Commonwealth v. Duke, 750 S.W.2d 432 (Ky. 1988). Because this issue was not fairly and adequately presented to the trial judge, Grimes did not properly preserve this issue for appellate review.

In any event, there was no factual basis to support an instruction on lesser-included offenses to first-degree rape. That is only required if, considering the totality of the evidence, the jury could have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense. Clifford v. Commonwealth, 7 S.W.3d 371 (Ky. 1999).

The entire import of the defense evidence here was that the events alleged had not in fact occurred. This does not entitle Grimes to instructions on lesser-included offenses. Trial defense counsel misinterpreted the commentary from Cooper, supra, § 4.23. Additionally, rape and sexual abuse are two different crimes. Evidence was introduced that both acts of sexual misconduct occurred over a number of years and once on the same date. Under these circumstances, Grimes' statement to his wife can only be interpreted as a complete denial that the rapes occurred, but an admission that he did sexually abuse the victims. The instructions given by the trial judge were correct.

II. Instructions on Lesser-Included Offenses to Other Charges

Grimes also contends that he was entitled to lesser-included offense instructions on counts four through eleven of the indictment. Those counts allege first-degree rape, first-degree sodomy and first-degree sexual abuse against the oldest victim. We disagree with this argument.

At the instruction conference, defense counsel claimed that there was evidence that forcible compulsion did not occur because Grimes denied the allegations. Thus, he asserted that the victim's age could be a factor that would support the lesser crimes. He again relied on the commentary to Cooper, supra, §§ 4.23, 4.35 and 4.47. On appeal, Grimes directs our attention to a comment made by the prosecution in closing argument that he says would raise a factual issue concerning the victim's consent. That comment regarding a statement attributed to Grimes by the mother was as follows: "[The oldest victim's] like you, she said no, she told me no, I'd leave her alone."

This issue is not properly preserved for appellate review for the same reasons we gave in the first issue addressed in this opinion. Moreover, it is completely without merit. Having carefully reviewed the entire record, it is clear that the alleged statement

was never introduced into evidence. Statements made by the prosecution in the closing argument are not evidence. The trial judge correctly concluded that there was no factual basis to give instructions on lesser crimes.

III. Arguing of Facts Not in Evidence

Predictably, Grimes next alleges that he suffered manifest injustice when the prosecutor during closing argument of the guilt phase argued facts neither in evidence nor reasonably inferable from the evidence. This of course being when the prosecutor told the jury that Grimes had said to the mother on the telephone that "[The oldest victim's] like you, she said no, she told me no, I'd leave her alone."

The comment by the prosecutor was apparently taken from a memorandum prepared by the Commonwealth summarizing a pretrial interview with the mother. The statement at issue was never introduced into evidence and there was no objection when the prosecutor mentioned it during his closing argument.

When reviewing claims of error in closing argument, our analysis must focus on the overall fairness of the trial and not the culpability of the prosecutor. Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987). Reversal is only justified when the alleged prosecutorial misconduct is so serious as to render the trial fundamentally unfair. Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir.1979); Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996). In this case, the isolated misstatement by the prosecutor did not prejudice Grimes in any manner. There was no manifest injustice.

IV. *Ex Parte* Communication

Grimes complains that an *ex parte* contact by the prosecutor with the trial judge denied him a fair trial. We disagree.

When the youngest victim began to cry during her direct testimony, defense counsel asked to take a break. The trial judge declared a five-minute recess and then went off the record. Twenty-five seconds later, the trial judge went back on the record, and the trial videotape shows the prosecutor at the bench and the jury still in the jury box. Defense counsel is not present at the bench, but the videotape record does not show whether he or the defendant are outside the courtroom. The prosecutor advised the trial judge that the youngest victim needed her mother. The trial judge indicated that she could see her mother, but that they were not to talk about her testimony. The prosecutor agreed and the trial judge went off the record again until the testimony of the youngest victim resumed. The entire exchange between the prosecutor and the trial judge lasted approximately twenty seconds.

A defendant has a right to be present at all critical stages of his prosecution. RCr 8.28(1). The test with respect to whether an *ex parte* communication violates that right is whether the presence of counsel was necessary to insure fundamental fairness or whether the defendant was deprived of a "reasonably substantial ... opportunity to defend against the charge." Gabow v. Commonwealth, 34 S.W.3d 63, 74 (Ky. 2000), *quoting*, United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

Here, Grimes has not been denied any fundamental rights. His claim that the mother could have coached the victim is highly speculative. The youngest victim had already testified to a number of sexual improprieties committed by Grimes before the recess was called. She did not testify to anything more than what she had told the police initially. When the mother testified later in the trial, she did not recount any acts of abuse that her daughter had related. The trial judge permitted the mother to be with

her then twelve-year-old daughter who was visibly upset. He admonished the prosecutor that mother and child were not to discuss their testimony and the prosecutor acknowledged that he understood that condition. Although the better practice could have been for defense counsel to be present at the bench during the exchange, we find no prejudice to Grimes.

V. Phrasing of In-Court Identification

Grimes argues that he suffered manifest injustice when the prosecutor stated during his direct examination of each of the two alleged victims that the record should reflect the witness had "correctly identified" him as the perpetrator. He admits that this issue is unpreserved, but seeks review pursuant to RCr 10.26.

Near the end of his direct examination of the two victims, the prosecutor asked each of them if the person who had sexually abused them was present in the courtroom, and if so, to point him out to the jury. Each victim pointed to Grimes and identified him by the color of his shirt. In each instance, the prosecutor asked the trial judge to let the record reflect that the victim "correctly identified the defendant." The trial judge responded that the record reflected that the witness pointed toward the defendant.

The use of the word "correctly" did not improperly bolster and vouch for the testimony of the victims. Even if it did, it could not have prejudiced Grimes because identify was never at issue in this case. No prosecutorial misconduct occurred. There was no error and certainly no palpable error.

IV. Comment on Defendant's Profession

Grimes contends that he suffered manifest injustice when the prosecutor in the guilt phase closing statements argued facts not reasonably inferable from the evidence,

telling the jury that, as a professional salesman, it was his [Grime's] "job as a salesman to try to sell to [the jury] that he is not guilty. He concedes that this issue is not preserved, but asks for review under the palpable error rule. RCr 10.26.

The defendant testified that he was a sales representative for a company that sold construction equipment. In his closing statement, the prosecutor addressed the defense theory that Grimes was telling the truth and that the victims and their mother were lying. He mentioned the possibility that some of the jurors might disbelieve the victims because they thought that when Grimes testified he didn't look like a child molester. The prosecutor then stated the following:

> . . . No, he looked well. He dressed well. He testified professionally. His chosen profession is a salesman. I'm not knocking salesman. But it's his job as a salesman to try and sell to you that he's not guilty. But the evidence, the proof and the details show otherwise. You know, he looks good. He's dressed up now, but how did he look to . . . [the two victims] when he was abusing them?

We have held it permissible to refer to a defendant as a "bit of evil," Slaughter, supra, as a "beast," Ferguson v. Commonwealth, 401 S.W.2d 225 (Ky. 1965) and as a "desperado," Holbrook v. Commonwealth, 249 Ky. 795, 61 S.W.2d 644 (1933). A defendant was not denied a fair trial even after being called worse than all the convicts and traitors in hell. Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979). The comments here about Grimes being a salesman and references to his appearances are certainly less offensive than the descriptive names in the above-cited cases. There was no error.

IV. Characterization of Witness Testimony

Grimes claims that he suffered manifest injustice when the prosecutor required him on cross-examination to characterize the testimony of his wife as "not true" and to

state whether there was anything in her testimony about his alleged telephone confession that she was "telling the truth about." This was proper cross-examination. The prosecutor was attempting to clarify the differences in their testimony, some of which Grimes admitted was accurate. Grimes was never asked whether his wife was lying and even if it could be interpreted in that manner, there was not palpable error. See Moss v. Commonwealth, 949 S.W.2d 579 (Ky. 1997).

VIII. Unsolicited Response

Grimes asserts that he suffered manifest injustice when the mother volunteered during cross-examination by the defense that the early development of her daughters' breasts were physical evidence that both daughters had been sexually abused. We disagree.

Defense counsel asked the mother a series of questions regarding whether her daughters had reported any abuse to her in the last five years or whether she noticed any changes in their behavior. He then asked her whether there were any emotional indications of any kind, and she responded that the girls were developing early. Defense counsel did not object to the response and even commented that he thought the youngest victim looked more mature than she did a year ago. Grimes cannot reasonably claim any palpable error here.

Grimes received a fundamentally fair trial. He was not denied any due process under either the state or federal constitutions.

The judgment of conviction is affirmed.

All concur except Johnstone, J., who concurs in result only.

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