

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2004-SC-762-MR

DATE 10-13-05 ELI A. GRAY III, D.C.

ROBERT JOHN HUMMEL, SR.

APPELLANT

V.

APPEAL FROM McCracken Circuit Court
HONORABLE R. JEFFREY HINES, JUDGE
NO. 03-CR-00439

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Robert John Hummel, Sr. was convicted on three counts of incest involving acts of deviate sexual intercourse with his two granddaughters, A.H. and N.H., who were both minors at the time. He appeals to this Court as a matter of right. Hummel argues that the trial court erred in overruling his motion for a directed verdict because there was insufficient evidence to support the conviction. In addition, he argues that improper cross-examination of defense witnesses and improper comments during closing argument by the prosecution resulted in substantial prejudice and a denial of due process. We disagree, and affirm Hummel's conviction.

I. FACTS

Robert John Hummel, Sr. was indicted on November 21, 2003, by the McCracken County Grand Jury on three counts of incest. Two counts involved deviate sexual intercourse with his granddaughter N.H.. The other count involved deviate sexual intercourse with his granddaughter, A.H..

In August 2001, a family friend, Tina Clark, came to appellant's house and explained that she was moving from her place of residence. When Ms. Clark asked for assistance, the appellant volunteered N.H. and himself to help her move. When they arrived at Clark's apartment, no one else was there. N.H. testified that she and the appellant engaged in deviate sexual intercourse while at the apartment. In April or May of 2002, N.H. testified that another act of deviate sexual intercourse occurred between the appellant and her. This occurred after the appellant pulled his car into an isolated area, and then asked for a sexual favor in exchange for cigarettes and money.

A.H. testified that in August of 2003, she and the appellant engaged in deviate sexual intercourse. According to A.H., this happened after they returned home from visiting Mrs. Joyce Lance in the hospital. The appellant denied any sexual contact with N.H. or A.H., and also testified that he believed the two granddaughters had fabricated the allegations because of the appellant's threat to turn in his son, their father, Bobby Hummel Jr., for dealing drugs, if he didn't stop dealing.

II. MOTION FOR DIRECTED VERDICT

The appellant first argues that the trial court erred by denying his motions for a directed verdict because there was insufficient evidence to support the conviction. It has been well established that the appropriate standard of review on appeal for judging the sufficiency of the evidence is: "If under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." Commonwealth v. Sawhill, 660 S.W.2d 3, 5 (Ky. 1983). Moreover, the evidence should be viewed in a light most favorable to the Commonwealth. Id. at 4.

In the instant case, both N.H. and A.H. testified the acts of incest occurred. The surrounding circumstances such as place and time were corroborated by the testimony

of other witnesses, including the appellant. Therefore, based on the testimony of N.H. and A.H., viewed in a light most favorable to the Commonwealth, it would not be clearly unreasonable for the jury to find the defendant guilty. Thus, the trial court did not err in denying the appellant's motions for a directed verdict.

III. CROSS-EXAMINATION OF DEFENSE WITNESSES

The appellant claims that the cross-examination of appellant's adult daughter, Christine Stevens, regarding a family court proceeding involving custody of Bobby Hummel, Jr.'s children was improper. However, this alleged error was not properly preserved for appellate review.

"RCr 9.22 imposes upon a party the duty to make 'known to the court the action he desires the court to take or his objection to the action of the court...' Failure to comply with this rule renders an error unpreserved." West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989) (citing Bowers v. Commonwealth, 555.S.W.2d 241 (Ky. 1977)). Pursuant to RCr 10.26, an unpreserved error which affects the substantial rights of a party may be reviewed and relief may be granted provided that manifest injustice has resulted from the error. But, as this Court explained in Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997): "We have interpreted the requirement of 'manifest injustice' as used in RCr 10.26 (formerly RCr 9.26) to mean that the error must have prejudiced the substantial rights of the defendant, Schaefer v. Commonwealth, 622 S.W.2d 219 (Ky. 1996), i.e., a substantial possibility exists that the result of the trial would have been different. Partin v. Commonwealth, 918 S.W.2d 219, 224 (1996)."

After a careful review of the record, this Court cannot find that manifest injustice resulted from the alleged error.

The appellant next argues that the cross-examination of Christine Stevens concerning criminal charges against her husband was improper. This issue was properly preserved for appellate review.

Regarding admissibility of evidence, the balancing of the probative value of evidence against the danger of undue prejudice is a task properly reserved to the sound discretion of the trial judge. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)(internal citations omitted).

Under KRE 611(b), a witness may be cross-examined on any matter relevant to the case. “The presentation of evidence and the scope and duration of cross-examination is within the sound discretion of the trial judge.” Baze v. Commonwealth, 965 S.W.2d 817, 821 (Ky. 1997) (citing Moore v. Commonwealth, 771 S.W.2d 34 (Ky. 1988)).

Detective Krueger, the lead investigator and arresting officer of the defendant in the present case, was also involved in the investigation of Christine Stevens’ husband for theft by deception. The Commonwealth’s Attorney cross-examined Christine Stevens about this fact, and such questioning was objected to on the grounds of relevancy. This Court finds that the testimony was relevant to show a potential bias of Christine Stevens against the cause of the Commonwealth. In addition, there has been no showing that the trial judge abused his discretion in balancing the probative value against the danger of undue prejudice.

The appellant also argues that the cross-examination of Helen Hummel concerning a basement in the appellant’s house was improper and is reversible error. Again, this alleged error was not properly preserved for appellate review. As previously stated above, RCr 10.26 requires a showing of manifest injustice before relief may be

granted for an unpreserved error. Here, the Commonwealth in its search for the truth was inquiring about the defendant taking the children into the basement. Although the result of the questioning was somewhat ambiguous, this is far from error. There has been no showing of manifest injustice here.

The appellant assigns error to the portion of the cross-examination of Helen Hummel where the Commonwealth's Attorney reminds her that she is under oath and subject to a penalty of perjury. The counsel for the defense did object to this at trial. After reviewing the record, it appears the prosecutor was merely attempting to determine what Ms. Hummel had specifically told Detective Krueger on a previous occasion. To remind a witness that he, or she, is under oath, and the consequences of such a situation, is not error in the manner asserted here. There has been no showing that the trial court abused its discretion in allowing this exchange to be heard by the jury. See Hillard v. Comm., 158 S.W.3d 758, 765 (Ky. 2005).

Next, the appellant alleges that the prosecutor badgered Mr. Robert John Hummel, Sr. and made comments outside the form of questions during cross-examination. The specific objections raised at trial involved a question which had been asked and answered, a compound question, and an argumentative comment not in the form of a question. The appellant also assigns error to a portion of the cross-examination which was not objected to, and thus, not properly preserved.

"The doctrine of nonprejudicial error, sometimes called 'harmless error,' is that in determining whether an error is prejudicial, an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

While it does appear that some of the prosecutor's questions were argumentative and improper, Mr. Hummel, the appellant, was well able to respond to the questions and promote his theory of the case by doing so. A brief comment not in the form of a question was made by the prosecutor, but it was immediately withdrawn after an objection was raised. Here, there is no substantial possibility that the result would have been any different absent the improper questions and comment by the prosecutor. Thus, the error, if any, was harmless.

The appellant next argues that an exchange between the prosecutor and the appellant regarding statements made by the appellant to Detective Krueger at the time of arrest was improper and constituted comment on his constitutional right to remain silent. This exchange was not properly preserved for appellate review. But again, an unpreserved error which affects the "substantial rights" of a defendant may be reviewed by an appellate court, and appropriate relief may be granted upon a showing that manifest injustice has resulted from the error. RCr 10.26.

The Supreme Court held in Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976) that it would be "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." The appellant urges this Court to find that the Commonwealth's Attorney questions concerning the exchange between the appellant and Detective Krueger amounted to a Doyle violation.

Doyle however, is distinguished from the present case. In Doyle, the appellant's post-arrest silence was used to impeach an exculpatory explanation offered later at trial. The principal rationale in Doyle was that Miranda warnings imply that one will not be penalized for invoking his or her right to remain silent. Doyle, 426 U.S. at 618, 96 S.Ct.

at 2245. In the present case, the appellant chose not to remain silent after he had been placed under arrest. In fact, he initiated the conversation in question by asking the Detective: “Aren’t we going to talk some more?” Then almost immediately stated: “Well, why should I tell you my side of the story? You’re not going to believe me anyway.” It is explicit in Miranda warnings that anything one says may be used against him or her in a court of law. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Thus, it was not improper for the Commonwealth’s Attorney to cross-examine the appellant about his post-arrest statements.

IV. CLOSING ARGUMENT

The appellant’s final assignment of error involves alleged instances of improper commentary by the Commonwealth’s Attorney during his closing argument, at both the guilt phase and the penalty phase. The first three claims of improper comment relate to the guilt phase, and the final claim involves a comment during the penalty phase. None of these alleged improper comments were properly preserved for appellate review. The appellant urges this Court, pursuant to RCr 10.26, to find that manifest injustice has resulted from the alleged errors.

When considering claims of prosecutorial misconduct, this Court “must determine whether the conduct was of such an ‘egregious’ nature as to deny the accused his constitutional right of due process of law.” Slaughter v. Commonwealth, 744 S.W.2d 407, 411 (Ky. 1987) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). In addition, the analysis must focus on the overall fairness of the trial, and not the culpability of the prosecutor. Slaughter, 744 S.W.2d at 411-12.

The first alleged improper comment came during the guilt phase of the trial when the Commonwealth’s Attorney told the jury that N.H.’s tears on the witness stand “were

the truest expression of the truth” that the courtroom had seen in a long time. This Court has previously stated that a prosecutor may offer his interpretation of the evidence to the jury. Hamilton v. Commonwealth, 401 S.W.2d 80, 88 (Ky. 1966). Similarly, a prosecutor is allowed to draw reasonable inferences from the evidence and may make reasonable comments upon such evidence. Hunt v. Commonwealth, 466 S.W.2d 957, 959 (Ky., 1971). The comment in question here was not improper, and amounted to no more than the prosecutor’s interpretation of, and reasonable comments upon, the testimony of N.H.

The appellant next argues that the prosecutor engaged in improper argument by stating that the evidence heard at trial was the same type of evidence used in courtrooms across this country every day to convict people for sex crimes. Generally, most prosecutions for sexual crimes against minors involve only two major witnesses – the perpetrator and the victim. Thus, it was not improper for the prosecutor to argue that the evidence presented to the jury was sufficient for a conviction. Without discussing the propriety of arguing what other juries across the United States do, nothing in this statement rendered the trial fundamentally unfair.

The appellant further contends that the Commonwealth’s Attorney improperly and prejudicially argued that the defense counsel “tried to pull a fast one” on the jury by mentioning N.H.’s recantation of a different allegation in hopes of the jury assuming that such recantation involved the allegations in the present case. In addressing whether it was improper for a prosecutor to accuse defense counsel of attempting to deceive the jury, this Court stated: “He accused counsel of pulling a ‘scam,’ and he questioned the sharpness of counsel. Great leeway is allowed to *both* counsel in a closing argument. It is just that—*an argument*. A prosecutor may comment on tactics, may comment on

evidence, and may comment as to the falsity of a defense position.” Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987). Just as in Slaughter, we find that the comment by the prosecutor was proper and certainly did not affect the overall fairness of the trial.

This final claim of improper commentary concerns a statement made during the penalty phase. The prosecutor stated that the appellant told “bald-faced lie after bald-faced lie” on the witness stand during the guilt phase.

As already stated above, a prosecutor is entitled to draw reasonable inferences from the evidence presented and is permitted to make reasonable comments on the evidence. Hunt, 466 S.W.2d at 959. Although the appellant denied committing incest with his two granddaughters, they testified to the contrary. Obviously, someone was not telling the truth at trial. We find that the prosecutor’s comments were properly confined to the evidence presented at trial and the permissible inferences that could be drawn from such evidence. While we might prefer “nicer language,” this is a trial and we must respect the adversarial setting.

After carefully reviewing the record, the prosecutor’s conduct during closing arguments was not of such an “egregious nature” as to deprive the appellant of his constitutional right of due process of law, nor can we find that manifest injustice resulted from any alleged error that occurred during closing arguments.

For the reasons stated above, we affirm.

All concur.

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