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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 23, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-000806-MR

DATE 12/14/05 ELIZABETHTOWN, KY

MICHAEL JACKSON — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
01-CR-00032

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Michael Jackson, was convicted of murder and first-degree wanton endangerment. He was originally sentenced to life imprisonment without parole for twenty-five years for the murder and one year for the wanton endangerment with the sentences to run consecutively. On Appellant's initial appeal, in an unpublished memorandum opinion dated October 23, 2003, we remanded the case to the circuit court for a new penalty phase, holding that the sentence was impermissible because the jury had not found any aggravator that would allow the imposition of a life sentence without parole. On remand, Appellant was sentenced to forty-eight years imprisonment. Appellant argues that this sentence is also impermissible because the penalty phase jury was not adequately advised as to facts he implies were developed during the guilt phase of his trial. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). Having found no error, we affirm Appellant's sentence.

Appellant's sole argument is that his sentence must be reversed because the penalty phase jury on remand was given insufficient information with which to decide his punishment. In particular, Appellant claims that his attorney failed to introduce evidence that would have tended to show "possible motives [he] had for the killing of Jamie Turner, including the crucial fact that Turner had raped [Appellant's] 13 year-old sister the morning of the killing."[1] While the omission of such evidence, if it exists, is potentially troubling, standing alone it is not an error on the part of the trial court, particularly when considered in light of the circumstances in the case.

At the outset, we agree that the jury received scant evidence with which to make its decision. The following information was all that was presented to the jury: (1) a short opening statement and summation of the facts by the prosecutor; (2) the testimony and cross-examination of an employee of the State Department of Corrections' Division of Probation and Parole; and (3) short closing statements from both Appellant's attorney and the prosecutor. From opening to closing statements, the entire sentencing hearing lasted less than twenty-five minutes.

Despite the brevity of the proceeding and the limited information on which the jury decided the sentence, we discern no error by the trial court. At no time did Appellant's attorney make any objection as to the scope of the evidence that was presented or suggest there was more evidence that the jury ought to consider. Furthermore, the trial judge, Hon. William Shadoan, was careful to ensure that Appellant's attorney at the penalty phase had every opportunity to present evidence that might have benefited his client. During a pre-hearing conference, Judge Shadoan asked Appellant's attorney, "[Counsel], do you want to address the jury too, or say

---

[1] Appellant does not cite to anywhere in the record in this case or in the guilt phase of his original trial to support this assertion.

anything? You can if you want to." Counsel replied, "Depending on what Mr. Langford [the prosecutor] says, but probably just for closing." Similarly, after the opening statement and recitation of the facts by Langford, Judge Shadoan asked, "[Counsel], could you make any additions to the factual statements?" Counsel declined, replying simply, "No sir." At the conclusion of the Commonwealth's proof, which consisted of the testimony of a state parole officer as to the relevant parole eligibility guidelines, counsel declined to offer any evidence on behalf of Appellant, stating, "No proof, your Honor." Counsel did make a short closing statement, asking the jury to be lenient and requesting they sentence Appellant to twenty years, the minimum term of imprisonment for which he was eligible. It is clear that despite being given many opportunities by the trial judge, Appellant's attorney repeatedly declined to offer substantial evidence or argument on behalf of his client. If there was important, mitigating evidence of the type alleged in Appellant's brief, it should have been presented by his attorney at the sentencing hearing.

In addition to his decision not to present any significant evidence, Appellant's attorney generally agreed with the hearing procedures followed by the trial court and did not raise any objection pertinent to the issues discussed in this appeal.[2] Despite this, Appellant argues that the trial court nevertheless erred in failing to conform the re-sentencing proceedings to the requirements of Boone v. Commonwealth, 821 S.W.2d 813 (Ky. 1992). In that case, we laid out a framework to help trial courts determine the appropriate scope of evidence to be presented during re-sentencing proceedings, stating:

---

[2] Appellant's counsel did inform the trial court that he had erred during voir dire by mistakenly failing to use a peremptory strike as requested by his client. However, this topic is not addressed by Appellant and is unimportant to his alleged claim of error.

> [W]e believe it would suffice, in most cases, for the jury to have read to it (a) the charges from the indictment of which the defendant was found guilty; (b) any charge of which the defendant was found guilty which was a lesser-included offense to a charge set out in the indictment; (c) the jury instructions given by the trial court at the guilt phase; and (d) the jury's verdict.
>
> In addition to the matters set out above, should both sides agree, each could read a concise summary of the evidence which it offered and which was admitted at the guilt phase of the earlier trial. Similarly, the closing arguments of both sides from the guilt phase could be read or projected if both agreed.
>
> In the event that the parties cannot agree as to the summaries of the evidence referred to above, then each could submit its proposed summary to the opposing party and the court, who could then determine what the summaries would contain after hearing any objections and argument from the opposing party.

Id. at 814-815. While there is little question that the trial court in this case did not strictly adhere to Boone, we have noted that the framework set forth in that case is not a rigid requirement:

> While the types of admissible evidence delineated in Boone are guidelines for the trial court, we do not agree with Appellant that Boone should be read as a strict limitation on the types of evidence admissible in a penalty phase trial where the defendant has pled guilty. Nor does Boone itself purport to create such a strict limitation: the Court in Boone provided a list of what types of evidence "might be pertinent." . . . As noted in Boone itself, the sentencing jury cannot be expected to fix punishment "in a vacuum without any knowledge of the defendant's past criminal record or other matters that might be pertinent to consider in the assessment of an appropriate penalty." With that principle in mind, the trial court must use its discretion in admitting relevant evidence that will sufficiently inform the jury of the crimes committed, while avoiding undue prejudice.

Thompson v. Commonwealth, 147 S.W.3d 22, 37 (Ky. 2004) (internal citations and footnotes omitted).

Both Boone and Thompson reflect the broad discretion a trial judge has to admit evidence that is relevant to a jury's sentencing decision. In both cases, we rejected the defendants' arguments that their sentences should be overturned because evidence was admitted in error. The mere fact that trial courts have wide latitude in deciding the admissibility of evidence does not give rise to a requirement that judges are responsible for developing and presenting evidence for the jury to consider. This is especially true where trial counsel repeatedly chose not to offer additional evidence on behalf of Appellant despite being offered the chance to do so by the judge. Absent a showing that the trial judge acted to prevent the production of relevant evidence, we cannot conclude that the trial court erred.

Finally, Appellant asserts that the trial court's failure to ensure the jury was informed of all facts pertinent to its sentencing decision was structural error, and is thereby subject to automatic reversal despite being unpreserved. We would only note that "[t]he category of structural error has been reserved for a 'very limited class of cases.' That class includes only the most pervasive and debilitating errors." United States v. Padilla, 415 F.3d 211, 219 (1st Cir. 2005) (citing Johnson v. United States, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). Appellant's claim, consisting of what amounts to a claim of ineffective assistance of counsel, does not fall in this "very limited class of cases," thus we reject his contention that his sentencing hearing was fatally flawed by the existence of a structural error.

The judgment of the Fulton Circuit Court is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Karen Maurer
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204