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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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 DATE 12-14-05 E.L.A. Gravitt, D.C.

2004-SC-0884-MR

EDUARDO AGRAMONTE ACOSTA — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
02-CR-001514

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Eduardo Acosta, was convicted by a Jefferson Circuit Court Jury of first-degree rape, three counts of first-degree sodomy, and first-degree sexual abuse. The jury recommended an aggregate sentence of 105 years, which the trial judge reduced to 70 years. Appellant appeals to this Court as a matter of right. Ky. Const. § 110 (2)(b). For the reasons stated herein, we affirm.

I.

Appellant was indicted on July 11, 2002. The charges resulted from various sex acts Appellant committed upon the seven-year-old daughter of Appellant's live-in girlfriend.

The abuse occurred on multiple occasions while the victim's mother was at work. The victim told her mother about the abuse in May 2002, approximately one week after the last abusive incident. Dr. Alcid treated the victim at a local hospital. Subsequently, Dr. Hancock of Children First, a non-profit abuse prevention agency, evaluated the victim. Both physicians testified at trial and explained that many sex abuse cases have no conclusive evidence because a child's injuries heal very quickly. The doctors further testified that the physical examinations revealed abnormal findings which were consistent with vaginal trauma.

Appellant's expert witness, Dr. Ophoven, did not examine the victim, but reviewed the reports of the treating physicians. Dr. Ophoven testified that there was no evidence of trauma or abuse, but she also admitted that children heal quickly.

Appellant testified that he was alone with the victim for an hour each day while the victim's mother worked, but Appellant denied he sexually abused the victim.

The jury returned a guilty verdict on all counts. During sentencing, the jury recommended 25 years for each of the rape and sodomy charges, and 5 years for the sexual abuse charge, all to run consecutively.

Appellant moved for a new trial, or in the alternative asked the trial court to reduce the sentence as required by KRS 532.110(c).[1] The trial court granted the motion to reduce Appellant's sentence to 70 years and entered final judgment accordingly.

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[1] "The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years."

II.

In raising two issues on appeal, Appellant concedes that neither claim is preserved for appellate review, but urges review as palpable error under RCr 10.26. Relief may be granted for palpable error under RCr 10.26 only if "manifest injustice" results from an error affecting the "substantial rights" of a party. Accordingly, the reviewing court must consider the case as a whole, and "conclude that a substantial possibility exists that the result would have been different in order to grant relief." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

First, Appellant alleges prosecutorial misconduct occurred during the Commonwealth's closing argument when the prosecutor improperly discredited the value of Dr. Ophoven's testimony, leading the jury to believe the physicians testifying for the Commonwealth were more credible. Specifically, Appellant claims the prosecutor implied Dr. Ophoven was less credible because she resided out of state and was a "hired gun" for the defense.

However, we find that Appellant suffered no manifest injustice as a result of the Commonwealth's comments. Any prejudice that may have occurred certainly does not reach or even approach the threshold of palpable error.

Even had there been proper preservation for review, Appellant's claim would fail on the merits. To warrant reversal, prosecutorial misconduct must be so egregious "as to render the entire trial fundamentally unfair." Caldwell v. Commonwealth, 133 S.W.3d 445, 452 (Ky. 2004). Furthermore, the Commonwealth is free to discuss the evidence, as well as the tactics of the defense, when arguing before the jury. Id. In this case, the prosecutor's comments were within reasonable bounds and did not create any fundamental unfairness.

III.

Appellant next alleges palpable error in the trial court's reduction of the jury's sentence. Appellant contends the trial court should have ordered a new sentencing proceeding to ensure Appellant received a sentence imposed by a jury. We find no palpable error.

Had there been an instruction on the maximum sentence, Appellant opines the jury would have recommended less than the 70-year statutory maximum. This claim is pure speculation since the jury imposed a 105-year sentence. As a result, Appellant did not suffer prejudice amounting to palpable error.

Additionally, the sentence imposed by the jury is a recommendation, and it is the trial judge who sets the final sentence. Commonwealth v. Johnson, 910 S.W.2d 229, 230 (Ky. 1995). This Court previously addressed a similar issue, stating, "the jury's sentencing recommendation fell outside the required statutory range, and the trial court properly corrected the sentence to conform to the law." Neace v. Commonwealth, 978 S.W.2d 319, 322 (Ky. 1998). Accordingly, the trial court acted correctly by reducing Appellant's sentence to 70 years.

IV.

We find Appellant suffered no manifest injustice warranting relief under RCr 10.26.

For the foregoing reasons, the judgment and sentence of the Jefferson Circuit Court are hereby affirmed.

All concur.

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