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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: FEBRUARY 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0123-MR

DATE 3-16-06 Elizabeth Graves, D.C.

STEPHEN MILES — APPELLANT

V.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
04-CR-125-2

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Following a two-day trial in January 2005, a McCracken Circuit Court jury convicted Appellant, Stephen Miles, of three counts of first degree robbery, KRS 515.020, one count of first degree burglary, KRS 511.020, and further found him to be a persistent felony offender in the first degree, KRE 532.080(3). The jury recommended enhanced sentences of fifty years on each conviction to run consecutively for a total of two hundred years. The trial court accepted the jury's recommendation but limited the maximum aggregate sentence to seventy years pursuant to KRS 532.110(1)(c). Appellant appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting entitlement to a new trial because (1) the prosecutor's opening statement during the guilt phase of the trial improperly bolstered the subsequent testimony of the Commonwealth's witnesses; (2) the prosecutor mistakenly told the jury during the

opening statement of the penalty phase of the trial that Appellant had a prior conviction of aggravated kidnapping; and (3) the prosecutor made improper statements during closing argument of the penalty phase of the trial. Finding no error, we affirm.

On March 28, 2003, Appellant and Scott Haynes drove from Tennessee to McCracken County, Kentucky, in a red Ford Probe bearing a Tennessee license plate. They planned to burglarize the Knights of Columbus hall ("K.C. hall") at the conclusion of a charitable bingo game being held that evening. Upon arriving in McCracken County, they stopped at a convenience store to ask directions to the K.C. hall. The person who gave the directions followed them because he was proceeding in the same direction. He noticed that the vehicle bore a Tennessee license plate and witnessed the vehicle turn into the parking lot of the K.C. hall. Appellant and Haynes waited in the parking lot, armed with shotguns, until the bingo players had departed. Harold Neihoff, his wife Theresa Neihoff, Weda Thompson, and Aaron Wurth, a fourteen-year-old boy, remained behind to clean up the hall. When Mr. Neihoff went outside to empty a mop bucket, Haynes struck him with his shotgun; Appellant then entered the building and held Thompson and Mrs. Neihoff at gunpoint while Haynes forced Mr. Neihoff to crawl back into the building on his hands and knees. When Wurth, who had been at the outside trash dumpster, appeared in the doorway, Appellant ordered him to "get in here" and also held him at gunpoint. Appellant and Haynes eventually bound all four victims, robbed the two women of money and personal items, attempted to rob Mr. Neihoff, and stole all of the bingo proceeds. The witness who had given Appellant and Haynes directions to the K.C. hall subsequently read about the crime in the newspaper and reported his information to the police, describing Appellant and the red Ford Probe with

the Tennessee license plate. In May 2003, Appellant was apprehended in Tennessee and voluntarily confessed to his involvement in the robbery.

I. GUILT PHASE OPENING STATEMENT.

Appellant contends that he was substantially prejudiced by the Commonwealth's opening statement during the guilt phase of his trial because the prosecutor improperly bolstered the testimony of its witnesses. The prosecutor's opening statement was approximately thirty-five minutes long. He described at length the expected testimony of each witness, read Appellant's confession to the jury, and showed the jury the twine with which Appellant and Haynes had bound their victims, a diagram of the K.C. hall, and photographs of the victim's injuries. Appellant claims that the prosecutor improperly bolstered the testimony of the Commonwealth's witnesses by telling the jury virtually word-for-word how each witness would testify and by reading Appellant's confession to the jury. Appellant concedes this issue is unpreserved and requests palpable error review. RCr 10.26.

> A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, and the error must have resulted in "manifest injustice." Authorities discussing palpable error consider it to be composed of two elements: obviousness and seriousness, the latter of which is present when a failure to notice and correct such an error would seriously affect the fairness, integrity, and public reputation of the judicial proceeding. A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily dependent upon the facts of each case.

Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005) (citations and quotations omitted).

The purpose of an opening statement is to outline to the jury the law and facts supporting the charge against the accused. Turner v. Commonwealth, 240 S.W.2d 80, 81 (Ky. 1951). In an opening statement, counsel should not argue the case or mention

his personal opinions about the facts he expects to prove. Id.; see also Mills v. Commonwealth, 310 Ky. 240, 220 S.W.2d 376, 378 (1949); Lickliter v. Commonwealth, 249 Ky. 95, 60 S.W.2d 355, 357 (1933). However, opening and closing statements are not evidence and counsel is allowed wide latitude during both. Stopher v. Commonwealth, 57 S.W.3d 787, 805-06 (Ky. 2001); see also Commonwealth v. Mitchell, 165 S.W.3d 129, 132 (Ky. 2005). Although the prosecutor's opening statement was substantially more than an "outline," he did not go outside the bounds of the facts he expected to prove. His preview of the evidence was accurate, and he did not argue the case or insert his personal opinion into the proceedings. Turner, 240 S.W.2d at 81. Therefore, we find no error with respect to the Commonwealth's opening statement during the guilt phase of the trial.

II. PENALTY PHASE OPENING STATEMENT.

During penalty phase opening statement, while reciting a list of seventeen prior offenses of which Appellant had previously been convicted, the prosecutor mistakenly stated that Appellant had been previously convicted of aggravated kidnapping. Appellant did not object at that time to the statement. However, after conclusion of testimony by a probation and parole officer and after examining the certified copies of the prior convictions offered into evidence by the Commonwealth, defense counsel belatedly moved for a mistrial on grounds that the prosecutor's statement that Appellant had been convicted of aggravated kidnapping was erroneous.[1] The trial court denied the motion, expressing skepticism that a misstatement with respect to one of many prior convictions was sufficiently prejudicial to warrant a mistrial, and offered to give an

[1] Defense counsel pointed out that the charge of aggravated kidnapping had been dismissed.

appropriate admonition to the jury. The prosecutor also offered to admit his error to the jury. Defense counsel opined that an error that serious could not be cured by an admonition, but expressed his preference that the prosecutor admit the error to the jury in lieu of an admonition from the court. The prosecutor subsequently told the jury that he had misspoken during his opening statement and that Appellant had not been convicted of aggravated kidnapping, but instead of "theft over ten thousand dollars."

To preserve an error for appeal, a "party must timely inform the court of the error and request the relief to which he considers himself entitled." West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989) (emphasis added); see also RCr 9.22. The prosecution's misstatement in reciting the list of Appellant's previous convictions is the type of prejudice easily cured by an admonition, and "there is a presumption that the jury will heed such an admonition." Matthews v. Commonwealth, 163 S.W.3d 11, 17-18 (Ky. 2005); Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000). The trial court offered to admonish the jury, but Appellant agreed to accept an admission of error and correction by the prosecutor in lieu of an admonition. Although preservation of the alleged error is doubtful because Appellant did not contemporaneously object to the misstatement and never formally objected, any error was cured by the prosecutor's admission and correction of the error.

Appellant characterizes the misstatement by the prosecutor as prosecutorial misconduct. In addressing a claim of prosecutorial misconduct, the court must determine whether the prosecutor's conduct was so egregious as to deny the accused due process of law. Slaughter v. Commonwealth, 744 S.W.2d 407, 411 (Ky. 1987) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 647-48, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974)). "The required analysis, by an appellate court, must focus on the

overall fairness of the trial, and not the culpability of the prosecutor." Id. at 411-12 (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78 (1982)); see also Maxie v. Commonwealth, 82 S.W.3d 860, 866 (Ky. 2002). One mistake, subsequently corrected, in reading a long list of Appellant's previous convictions could hardly render the whole penalty phase of the trial unfair to Appellant. The prosecutor's mistake did not infect the trial with unfairness amounting to a denial of due process.

Whether to grant a mistrial is within the sound discretion of the trial court. Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky. 2004). "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice." Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996). One error in the recitation to the jury of a lengthy list of prior convictions (six robberies, two burglaries, one assault, two forgeries, two statutory rapes, a felony theft, and three misdemeanor thefts) is not a fundamental defect in the proceedings that rises to the level of manifest injustice. Gould, 929 S.W.3d at 738. As a result, the trial court did not abuse its discretion in denying the motion for a mistrial.

III. PENALTY PHASE CLOSING ARGUMENT.

During penalty phase closing argument, the prosecutor made numerous comments that Appellant characterizes as prosecutorial misconduct, i.e., (1) that the victims were "as good of people that you will find . . . raising money for local charities . . . [g]iving of their time to be a valuable member of the community;" (2) that the victims never "will really feel safe again . . . and that's what they'll live with for the rest of their life [sic]," and (3) that he had "no faith that he's [Appellant has] changed his ways . . . he's not given me any inkling, any indication that he's anything other than a predator . . .

he's the poster boy for the revolving door prison." Appellant concedes that there was no objection to any of these statements and thus requests palpable error review.

Reversal for prosecutorial misconduct in a closing argument is mandated "only if the misconduct is 'flagrant' or if each of the following three conditions is satisfied: (1) Proof of defendant's guilt is not overwhelming; (2) Defense counsel objected; and (3) The trial court failed to cure the error with a sufficient admonishment to the jury." Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002) (citing United States v. Carroll, 26 F.3d 1380, 1390 (6th Cir. 1994); United States v. Bess, 593 F.2d 749, 757 (6th Cir. 1979)). Appellant has failed to satisfy his burden of proof with regard to all three conditions: proof of Appellant's guilt was overwhelming (his confession and testimony of multiple eyewitnesses) and defense counsel did not object, making the third condition irrelevant. Thus, there is no need to inquire into these comments unless they amounted to flagrant misconduct.

No flagrant misconduct occurred here. Counsel is allowed wide latitude in closing argument. Butcher v. Commonwealth, 96 S.W.3d 3, 12 (Ky. 2002); Stopher, 57 S.W.3d at 805-06. The "Commonwealth's Attorney is entitled to draw reasonable inferences from the evidence, to make reasonable comment upon the evidence and to make a reasonable argument in response to matters brought up by the defendant . . . ." Hunt v. Commonwealth, 466 S.W.2d 957, 959 (Ky. 1971); see also Slaughter, 744 S.W.2d at 412. With reference to the comments about the victims, the prosecutor simply drew inferences from the evidence and the demeanor of the victims, i.e., that the victims were "good people" because they were volunteering to raise money for charity at the bingo game, and that as victims of a violent crime they will feel apprehensive in the future. It is not improper to refer to victim-impact evidence during the penalty phase

of a felony trial. KRS 532.055(2)(a)(7). The prosecutor noted that Mr. Neihoff choked up emotionally while recounting the events that had occurred at the K.C. hall almost two years prior to trial. The prosecutor's statements that he had "no faith that [Appellant] changed his ways . . . he's not given me any inkling, any indication that he's anything other than a predator . . . he's the poster boy for the revolving door prison" were fair comments on Appellant's lengthy criminal history.

Appellant also contends that when the prosecutor stated that Appellant had "not given me any inkling, any indication that he's anything other than a predator," he was commenting on Appellant's failure to testify in violation of the Fifth Amendment. Griffin v. California, 380 U.S. 609, 613, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965). The Fifth Amendment privilege against compelled self-incrimination prohibits any direct reference by the prosecution to a criminal defendant's failure to testify in his own behalf. Id. at 613, 85 S.Ct. at 1232; see also Lent v. Wells, 861 F.2d 972, 975 (6th Cir. 1988); Rachel v. Bordenkircher, 590 F.2d 200, 202-03 (6th Cir. 1978) (requiring a new trial when the prosecutor remarked that he could not say what happened because the defendant "won't tell us"); Bradley v. Commonwealth, 261 S.W.2d 642, 643 (Ky. 1953) ("There was one person in my opinion who could have told you, but if anybody told you I didn't hear it."). An indirect reference to the failure of a defendant to testify requires reversal only if the statements were "manifestly intended by the prosecutor as a comment on the defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure of the accused to testify." Bagby v. Sowders, 894 F.2d 792, 797-98 (6th Cir. 1990); see also Byrd v. Commonwealth, 825 S.W.2d 272, 275 (Ky. 1992), overruled on other grounds by Shadowen v.

Commonwealth, 82 S.W.3d 896 (Ky. 2002); Tinsley v. Commonwealth, 495 S.W.2d 776, 782 (Ky. 1973).

Here, the prosecutor's statement was not a direct reference to Appellant's failure to testify; he did not mention anything about Appellant's silence during the trial. The statement was at most an indirect reference and, as it occurred during a discussion of Appellant's criminal history, the statement clearly was not "manifestly intended" to be a comment on Appellant's silence. Bagby, 894 F.2d at 797-98. The jury could well have interpreted the prosecutor's comment that Appellant had not given him "any inkling, any indication that he's anything other than a predator" as referring to his repeat offenses even after having previously been incarcerated. (In fact, that is the most logical interpretation of those remarks.) Certainly, the statement was not one that a jury would reasonably and naturally assume to be a comment on Appellant's failure to testify. Id.; see also Tinsley, 495 S.W.2d at 782.

Accordingly, the judgment of convictions and the sentences imposed by the McCracken Circuit Court are affirmed.

All concur.

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