

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

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RENDERED: JANUARY 24, 2008

NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2006-SC-000835-MR

DATE 2-14-08 EJA/Graham, D.C.

JASPER POLLINI

APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE WILLIAM DOUGLAS KEMPER, JUDGE  
NO. 02-CR-001146

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Jasper Pollini appeals to this Court as a matter of right. Pollini was originally tried before a Jefferson County jury in June of 2003, and found guilty of complicity to murder, complicity to first-degree burglary, complicity to second-degree burglary, and complicity to receiving stolen property. He was sentenced to life without the possibility of parole for twenty-five years for the murder conviction, fifteen years' imprisonment for the first-degree burglary conviction, ten years' imprisonment for the second-degree burglary conviction, and one year imprisonment for the receiving stolen property conviction, to be run concurrently. On direct appeal to this Court, Pollini's burglary and receiving stolen property convictions were affirmed. However, holding that the murder did not occur during the commission of a burglary, and therefore could not be used as an aggravating circumstance, Pollini's murder sentence was vacated and remanded for re-sentencing. Pollini now appeals from the final judgment of that re-sentencing trial, at

which the jury imposed the maximum sentence of life imprisonment to be run consecutively with the remaining sentences. He raises two issues for review. Finding no error, we affirm.

The factual background underlying Pollini's convictions is thoroughly set forth in Pollini v. Commonwealth, 172 S.W. 3d 418 (Ky. 2005). In short, Pollini was found guilty of the murder of Byron Pruitt. Pollini, who was seventeen years old at the time of the offenses, broke into a residential garage to steal tools and a generator. He was unable to remove the generator, however, and sought help from Jason Edwards, the boyfriend of his sister. After the pair loaded the generator into their vehicle, Pollini decided to break into another garage at the home of Dan Ziegler.

Ziegler awoke during the break-in and confronted Pollini with a gun. Pollini ran and Ziegler called 911. He also called his neighbor, Pruitt, to warn him. Meanwhile, Pollini had returned home and realized he had left his toolbox in Ziegler's garage. Edwards refused to return, but Pollini was able to persuade his sister, Crystal Plank, to drive him back to Ziegler's home. As they approached, Pruitt was coming down the driveway towards Plank's car; he was carrying a pistol. Pollini, who had obtained a gun when he returned home, pointed the gun out of the window and fired a shot which struck Pruitt in the chin. He died several hours later.

At the re-sentencing trial of Pollini's murder conviction, the jury was presented with a written summary of the evidence from the first trial which had been prepared by the trial court. Additionally, the jury reviewed videotapes from the guilt phase of Pollini's original trial. These tapes included the testimonies of defense expert witness, Dr. Allen Josephson; Pruitt's mother, Anna Pruitt; and Dan Ziegler.

In his first allegation of error, Pollini challenges the introduction of testimony from Anna Pruitt. Pollini argues that the testimony constituted improper victim impact testimony under KRS 532.055(2)(a)(7). Further, Pollini asserts that the testimony was irrelevant, cumulative and unduly prejudicial.

When a new jury is impaneled for retrial of a penalty phase, it is generally necessary to admit evidence from the earlier guilt phase proceedings, as the new jury cannot be expected "to sentence 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." Boone v. Commonwealth, 821 S.W.2d 813, 814 (Ky. 1992) quoting Commonwealth v. Reneer, 734 S.W.2d 794, 797 (Ky. 1987). The amount and type of evidence provided to the new jury is within the trial court's sound discretion. Neal v. Commonwealth, 95 S.W.3d 843, 851 (Ky. 2003).

Ms. Pruitt's testimony concerned the evening of her son's death, how she learned that he had been shot, and the actions of the EMS personnel treating Byron. She testified that she was initially told that his injuries were not life-threatening, and that she followed the ambulance to the hospital in her own vehicle. However, upon her arrival to the hospital, she learned that Byron had died en route.

Ms. Pruitt's testimony provided the re-sentencing jury a full understanding of the evening of Byron's death, a description of the victim's physical state after being shot, and the circumstances of his final moments. While the jury had been provided the trial court's written summary of the offenses, Ms. Pruitt's testimony afforded a more comprehensive understanding of the aftermath of the shooting. The testimony allowed the re-sentencing jury to fully understand the circumstances surrounding the commission of Pollini's crimes. Thompson v. Commonwealth, 147 S.W.3d 22, 37 (Ky.

2004)(in re-sentencing trial, trial court has discretion to admit evidence from prior proceedings that is “relevant and reasonably calculated to inform the jury of the nature of the crimes”). For these reasons, we find no abuse of discretion in the trial court’s decision to admit the testimony.

Moreover, upon a review of the testimony, we do not believe that Ms. Pruitt’s testimony was unduly prejudicial or cumulative. Though emotional, the testimony consisted entirely of Ms. Pruitt’s factual description of the evening of her son’s death. Furthermore, it provided a more detailed and thorough understanding of the crime and its aftermath than could be gleaned from the recitation of the facts included in the trial court’s written summary. There was no error in the admission of the testimony.

Furthermore, Pollini’s assertion that Ms. Pruitt’s testimony was improperly admitted victim impact testimony is without merit. The Commonwealth sought to call Ms. Pruitt as a live witness at the re-sentencing proceedings to provide victim impact testimony. The trial court properly rejected this request under KRS 532.055(2)(a)(7), as the Commonwealth’s right to present victim impact testimony was satisfied by the live testimony of Susan Pruitt, Byron’s widow. Anna Pruitt’s videotaped testimony was limited entirely to a factual account of the offenses. She gave no testimony concerning the crime’s impact on her life. Upon review of the record, it is clear that the trial court denied the Commonwealth’s request to present Anna Pruitt’s live victim impact testimony, but permitted her prior, videotaped testimony to help the jury fully understand the nature of the crimes. There was no error.

Pollini next alleges multiple instances of prosecutorial misconduct in the Commonwealth’s closing argument: (1) that the Commonwealth’s Attorney improperly appealed to the jury’s passion by referencing “juvenile crime in general”; (2) that the

Commonwealth's Attorney improperly denigrated the mitigating evidence of Pollini's age at the time of the offense; (3) that the Commonwealth's Attorney improperly commented on Pollini's chance of receiving parole and urged the jury to abdicate sentencing to the Parole Board; and (4) that the Commonwealth's Attorney improperly inserted his own personal experiences in other cases involving juveniles. Pollini urges that, considered collectively or individually, the Commonwealth's statements during closing arguments constituted flagrant misconduct, which denied him due process of law.

Upon review of the record, we do not believe that the Commonwealth exceeded the wide latitude afforded attorneys in making closing arguments. Tamme v. Commonwealth, 973 S.W.2d 13, 39 (Ky. 1998). The Commonwealth's brief reference to general difficulties in sentencing a juvenile as an adult was neither improper nor prejudicial. We likewise find no error in the Commonwealth's comments concerning Pollini's young age at the time of the crime, as the comments were limited strictly to the specific circumstances of this case. Hodge v. Commonwealth, 17 S.W.3d 824, 853 (Ky. 2000)("[W]hile it would be improper in closing argument to attack the concept of mitigating circumstances, a prosecutor may question the validity and propriety of the specific evidence offered in mitigation in a particular case."). When reviewed in their entirety, the Commonwealth's remarks regarding Pollini's parole eligibility were accurate and based on the evidence admitted during the re-sentencing proceedings. Cf. Perdue v. Commonwealth, 916 S.W.2d 148, 164 (Ky. 1995)(finding reversible error in closing argument where prosecutor made several "misstatements concerning parole eligibility"). Finally, the Commonwealth's remarks concerning his personal experiences with juvenile offenders did not exceed the lines of propriety. The comments did not compare Pollini

to other specific offenders, but rather were made in an attempt to express his personal opinion as to the appropriate sentence based on the evidence.

Accordingly, the trial court did not err in overruling defense counsel's multiple objections to the Commonwealth's closing argument. To the extent that certain of these alleged errors are unpreserved, we further find that none rise to the level of palpable error. RCr 10.26. The conduct of the Commonwealth's Attorney in this case was not so prejudicial as to deprive Pollini of due process of law. Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

Lambert, C.J.; Abramson, Cunningham, Minton, Schroder, and Scott, JJ., concur. Noble, J., concurs, but would agree with the trial court that this evidence having been admitted in the first trial and not held to be error on appeal, makes it admissible in the re-sentencing as no more than the original jury would have heard, and not because it gives "a more comprehensive understanding of the aftermath of the shooting."

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