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RENDERED: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11/19/09 Kelly Klaber D.C.

2008-SC-000216-MR

OVERSON JACKSON APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
NO. 05-CR-002608

COMMONWEALTH OF KENTUCKY APPELLEE

AND

2008-SC-000264-MR

DESHAWN MOFFETT APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
NOS. 05-CR-002022-004 AND 07-CR-003657

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING IN PART

In the early part of 2005, in Jefferson County, Appellants, Overson Jackson and Deshawn Moffett, were members of a group known as the "Click

Tight" gang or the "Stick Em Up" kids. Jackson suggested that the group begin robbing people to get money. These robberies eventually escalated into a series of burglaries. During one of these burglaries, a Hispanic female known as E.D. was raped and sodomized.

Jackson and Moffett were tried as codefendants in a joint trial. Other members of the group accepted plea bargains and testified against both individuals. Prior to the commencement of trial, Jackson and Moffett each filed motions for a separate trial on the basis that the Commonwealth would introduce statements of codefendants in violation of Crawford v. Washington, 541 U.S. 36 (2004). Moffett also moved to separately try the multiple counts included in the indictment. The Commonwealth contended that Crawford would allow the introduction of statements by codefendants, provided that those statements were sufficiently redacted in accord with Richardson v. Marsh, 481 U.S. 200 (1987). The trial court denied both of these motions.

A jury trial was conducted from November 15 through December 10, 2007. Jackson was tried for 134 offenses and was found guilty of one count of complicity to rape, one count of complicity to sodomy, two counts of complicity to kidnapping, four counts of complicity to burglary in the first degree, sixty-four counts of complicity to robbery in the first degree, one count of complicity to unlawful imprisonment, and one count of possession of a handgun by a minor.[1] The jury recommended a sentence of 369 years, and the trial court reduced the recommendation, pursuant to KRS 532.110(1)(c), to 70 years.

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[1] At final sentencing on February 6, 2008, the possession of a handgun by a minor charge was dismissed by the trial court upon motion of Jackson.

Moffett was tried for 72 offenses and was found guilty of one count of complicity to rape, one count of complicity to sodomy, two counts of complicity to kidnapping, four counts of complicity to burglary in the first degree, thirty-three counts of complicity to robbery in the first degree, and one count of being a persistent felony offender in the second degree. The jury recommended a sentence of 321 years, and the trial court reduced the recommendation, pursuant to KRS 532.110(1)(c), to 70 years. The trial court also assessed court costs of $125.00 and a fine of $10,000.00 as to each Appellant.

Both Jackson and Moffett appeal their respective judgments as a matter of right, Ky. Const. § 110(2)(b). Their appeals have been consolidated for our review, and each appeal raises a number of errors which we will address.

Redacted statements and testimony from codefendant witnesses

Jackson contends that the trial court violated his Sixth Amendment right under the United States Constitution and Section 11 of the Kentucky Constitution when it allowed the introduction of redacted statements made during a police interrogation by codefendant Moffett. Additionally, Jackson contends that his confrontation rights were again violated when other codefendants were permitted to testify about statements Moffett made to them. To support his argument, Jackson argues that Crawford v. Washington, id. implicitly overrules Richardson v. Marsh, id. According to Jackson, redacting the testimony of a non-testifying codefendant is not a valid substitute for confrontation and cross-examination.

The Sixth Amendment guarantees a defendant's right to cross-examine witnesses. Bruton v. United States, 391 U.S. 123, 126 (1968). Bruton held that, in a joint trial, the confession of one codefendant, which implicates both defendants, may not be introduced despite the court's limiting instruction that the confession be considered only against the confessing defendant. Id. at 128. The Bruton rule was subsequently modified in Richardson, 481 U.S. 200. In that case, the Supreme Court held that the Sixth Amendment is not violated where the non-testifying codefendant's confession is admitted with a limiting instruction, provided that the confession is redacted to eliminate both the defendant's name and any reference to his or her existence. Id. at 211. However, in Crawford, the Supreme Court held that "the admission of testimonial statements against an accused without an opportunity to cross-examine the declarant is alone sufficient to establish a violation of the Sixth Amendment." Heard v. Commonwealth, 217 S.W.3d 240, 243 (Ky. 2007). We are then left with the issue of whether Crawford forbids the introduction of a redacted statement in compliance with the Richardson guidelines.

Multiple federal courts confronted with this same issue have made it clear that the U. S. Supreme Court's interpretation of the scope of the Confrontation Clause in Crawford does *not* change the analysis for the admission of codefendant statements. The 5th Circuit, for example, held that:

> "[W]hile Crawford certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules

> governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by Bruton, Richardson, and Gray."

United States v. Ramos-Cardenas, 524 F.3d 600, 609-10 (5th Cir. 2008). See also United States v. Williams, 429 F.3d 767, 773 n.2 (8th Cir. 2005) ("We note that Crawford did not overrule Bruton and its progeny."); United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004) ("[W]e see no indication that Crawford overrules Richardson or expands the holding of Bruton."); United States v. Vasilakos, 508 F.3d 401, 407-08 (6th Cir. 2007) (applying Bruton and finding no violation of the Confrontation Clause in the reading of a codefendant's redacted statement); United States v. Rodríguez-Durán, 507 F.3d 749, 768-70 (1st Cir. 2007) (separately analyzing admission of an out-of-court statement for Bruton error and Crawford error).

We unanimously adopted this reasoning in Rodgers v. Commonwealth, 285 S.W.3d 740 (Ky. 2009). In Rodgers, this Court held that the introduction, in a joint trial, of a declarant-codefendant's self-incriminating, extra-judicial statement where the defendant's name is redacted and a neutral term is substituted, avoids any Sixth Amendment or Bruton violation. Id. at 746. In this case, before introducing any of Moffett's statements to the police at trial, the Commonwealth redacted each reference to Jackson. Though the transcript used by the Commonwealth still at times utilized masculine pronouns such as "he" or "they," those instances cited by Jackson could just have easily referenced any of the other testifying accomplices in this matter. The

statements became incriminating "only when linked with evidence introduced later at trial." Richardson, 481 U.S. at 208.

There is a crucial difference between the statement at issue in Crawford and the redacted statements by Moffett that Jackson challenges here. The Crawford statement was both facially incriminating and introduced against the defendant challenging the statement. The redactions here either eliminated the existence of Jackson entirely or utilized neutral pronouns. The statements do not facially incriminate anyone except Moffett himself. Nor, and most importantly for confrontation purposes, were any of the statements introduced as evidence against Jackson, who did not make them. We find no error.

Jackson also contends that the testimony of the codefendant witnesses concerning statements made to them by Moffett, which he concedes were non-testimonial in nature, implicated his right of confrontation. Jackson points to the following testimony: Dante Felton testified, "They took the little chick to the back room, they raped her."; Donnie Nelson testified, "He said that, after, uh, Overson Jackson proceeded to do . . ."; Thomas Williams testified, "They went and robbed somebody, uh, cause they was supposed to sell him some weed but he ended up coming short with the money so they ended up robbing him." Jackson argues that these statements, in addition to implicating his confrontation rights, were hearsay and not subject to any exception.

The admissibility of non-testimonial statements is dependent on whether or not the statement falls within a firmly rooted hearsay exception, or there is

some showing of particularized guarantees of trustworthiness. See United States v. Franklin, 415 F.3d 537, 546 (6th Cir. 2005), citing United States v. Saget, 377 F.3d 223, 229 (2d Cir. 2004); United States v. Gibson, 409 F.3d 325, 338 (6th Cir. 2005). We therefore review the trial court's determination of admissibility under an abuse of discretion standard. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

Dante Felton testified about a statement Moffett made to him concerning a robbery near the University of Louisville. This statement did not implicate Jackson nor was it offered against him. Therefore, Jackson's confrontation rights were not violated. Additionally, Felton recalled a conversation with Jackson concerning a robbery in which people were thrown on the ground and their money taken, and who were then forced to crawl under nearby vehicles. This testimony was based upon a statement made to Felton by Jackson and, therefore, was clearly admissible under KRE 801A(b)(1). Finally, Felton testified about a robbery which led to the rape of a woman named E.D. The testimony concerning Moffett's own involvement in the attack, and the use of the masculine pronoun "they" was not a clear reference to Jackson. It could just have easily referenced any of the other testifying accomplices. Moreover, this statement was made by Moffett and introduced only against Moffett. As such, the court did not abuse its discretion in permitting Felton to testify about these statements.

Donnie Nelson testified about statements made by Moffett after the rape

of E.D. During his testimony, however, he used Jackson's name. The Commonwealth interrupted Nelson and rephrased the question so that Nelson's testimony would be limited to what Moffett said about Moffett's own involvement. Jackson did not object and no testimony was given concerning Moffett's statements about Jackson's involvement. The mere mention of Jackson's name by Nelson was harmless in this instance, especially when considered in light of the wealth of evidence of Jackson's complicity or active involvement in the rape of E.D.

Finally, Thomas Williams' testimony concerned Moffett's and Jackson's own statements regarding their respective involvement in multiple burglaries. As such, each was admissible under KRE 801A(b)(1). The use of the pronoun "they" in the statement referenced by Jackson was harmless, as testimony had been given by a female victim that several men were involved in the home invasion. In fact, the victim identified Jackson as one of the men at the home because his face was left uncovered. Because of this testimony identifying Jackson, there was no error warranting reversal.

In light of the foregoing, we hold that the trial court did not abuse its discretion in allowing the introduction of Moffett's redacted statements or the testimony from the codefendant witnesses.

Police testimony establishing victim identities where victims did not testify

Of the seventy-four counts of which Jackson was convicted, thirty-one

were presented without victim testimony. Additionally, sixteen victims had their identities established solely through the testimony of police officers. Over defense counsel's objections, the trial court allowed the police officers to testify as to the identity of the victim and the crime he or she reported. According to Jackson, the testimony of the "name-reader" witnesses constituted inadmissible hearsay and were testimonial in nature, in violation of his confrontation rights. Thus, he contends that the guilty verdicts cannot stand for these offenses. Jackson specifically points to five separate occasions where the identities of the following victims were established solely through police officer testimony: Jennie Frias; Laura Frias; Angel Lopez; Carlos Rico; Jessica Weinstein; Brenda Ramirez; Francisco Ramirez, Sr.; Francisco Ramirez, Jr.; Jose Ramero-Ramos; Duran Victor Gonzalez; Francisco Hernandez Mendoza; Angel Mendoza; Jose C. Ramirez; Juan Jose Ramirez; Joseph Martin Ramirez-Mendoza; and E.D. In addition, although another witness identified Jonathan Nunn as being present at a certain location, Officer Riggs was the only witness, according to Jackson, to provide evidence that Jonathan Nunn had reported being robbed. At the conclusion of the evidence, Jackson moved for a directed verdict on those counts. The trial court denied his motion.

We disagree with Jackson that the officers' testimony should be barred on either confrontation or hearsay grounds. The Supreme Court has made clear that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter

asserted. Tennessee v. Street, 471 U.S. 409, 414 (1985). Evidence as to names is commonly regarded as not being hearsay, either because it is not introduced to prove the truth of the matter asserted, or it is so imbued with reliability because of the name's common usage as to make any objection frivolous. See United States v. Patrick, 959 F.2d 991, 999-1000 (D.C.Cir. 1992); Wigmore on Evidence § 667a, at 928 (Chadbourn rev. 1979); United States v. May, 622 F.2d 1000, 1007 (9th Cir. 1980) ("[A] name, however learned, is not really testimonial. Rather, it is a bit of circumstantial evidence."). Even assuming that the testimony was hearsay, its admission would clearly be harmless. The identity of the victim is not, although almost always given, absolutely necessary to establish that an offense occurred. See Decker v. Commonwealth, 303 Ky. 511, 513, 198 S.W.2d 212, 214 (1946) (holding that whether stolen property was owned by "the Church of England, the King of Siam or John Doe made no material difference"); Kirk v. Commonwealth; 192 Ky. 460, 233 S.W. 1060 (1921) (holding that indictment charging defendant with murder in the death of a homeless man whose identify was not known and who was identified in the indictment as "John Doe" conformed to requirements of Criminal Code). In each instance where the victim's identity was established solely through police testimony, the Commonwealth introduced ample evidence to support each count. On every occasion cited by Jackson, the Commonwealth offered testimony from someone with first-hand knowledge of the event who described a scene involving

multiple victims. The fact that these witnesses may not have known the names of all of the other victims at the scene does not nullify their testimony.

Kim Graham's testimony concerned a robbery that involved her and eight or nine other Hispanic individuals. She testified with first-hand knowledge of the incident, and the identities of the other victims were established through officer testimony. Thomas Williams testified that he saw Jackson rob and punch an intoxicated female on March 18, 2005. The victim's identity was then supplied by Officer Barbara Bailey. Carlos Halcomb testified that he witnessed Jackson pull a gun on a man coming out of an apartment and subsequently force his way inside the home. The home was occupied by a woman and child. The identities of the three victims were established by Detective Dwayne Colebank, who responded to a call from the family after the robbery took place. Multiple victims testified concerning a burglary that led to the rape of a Hispanic woman identified as E.D. Other victims were in the residence at the time of the events, and their identities were established through the testimony of Detective Clark. Finally, Tony Crain witnessed Jonathan Nunn lying naked on the ground after he had been robbed. Crain approached Nunn and was eventually robbed himself and his dog shot with a gun. This testimony is consistent with that of Lewis Clark, who testified about an incident where Jackson and another individual robbed two people, stole a van, and shot a dog.

The standard for appellate review of a denial of a motion for a directed

verdict, based on insufficient evidence, is if under the evidence as a whole it would be clearly unreasonable for a jury to find the defendant guilty. Commonwealth v. Sawhill, 660 S.W.2d 3, 4-5 (Ky. 1983). Considering the evidence offered by the Commonwealth in this case, the trial court did not err in denying Jackson's motion for a directed verdict.

Admissibility of Derrick Huddleston's handwritten statement

Jackson argues that the trial court erred when it deemed Derrick Huddleston's handwritten statement inadmissible. Huddleston testified that he and his girlfriend, Donetta Cornwell, made a list of items taken from them the night they were robbed at gunpoint. On cross-examination, Jackson attempted to introduce a handwritten notation on Cornwell's list, purportedly made by Huddleston, which included the phrase, "Donnie Nelson robbed me and my girlfriend." Huddleston testified that the statement concerning Nelson appeared to be in his own handwriting, but he could not recall identifying anyone as the person that had robbed him and had stolen his car. He further testified that he did not know why he would have written that on Cornwell's list. The trial court then ruled that the document was inadmissible because it had not been properly authenticated.

The decision to admit or exclude evidence is within the sound discretion of the trial court, and its determination will not be overturned on appeal absent a showing of abuse of that discretion. Mullins v. Commonwealth, 956 S.W.2d 210, 213 (Ky. 1997). The test for an abuse of discretion is whether the trial

judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Brewer v. Commonwealth, 206 S.W.3d 313, 320 (Ky. 2006).

KRE 901(a) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The burden on the proponent of authentication is slight; only a prima facie showing of authenticity is required. Johnson v. Commonwealth, 134 S.W.3d 563, 566 (Ky. 2004). "This rule 'treats preliminary questions of authentication and identification as matters of conditional relevance according to the standards of [FRE] 104(b).'" Id., quoting United States v. Reilly, 33 F.3d 1396, 1404 (3rd Cir. 1994).

Here, evidence concerning the circumstances surrounding the writing was sufficient to cross the threshold requirements of admissibility. The statement was written on a document prepared after the robbery occurred. Huddleston testified that it appeared to be in his own handwriting. Additionally, he indicated that his telephone number and mailing address were written in his handwriting directly below the statement. The testimony indicating Huddleston's confusion as to why his handwriting was on Cornwell's list of stolen items, or that he did not recall identifying anyone and "[didn't] even know who Donnie Nelson [was]," affected its weight, not its admissibility. There was sufficient evidence before the trial judge to support a finding that the statement was what defense counsel purported it to be. See Turner v.

Commonwealth, 914 S.W.2d 343, 346 (Ky. 1996) ("An item of evidence . . . need not prove conclusively the proposition for which it is offered . . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence."). We therefore find that the trial court abused its discretion in refusing to admit Huddleston's handwritten statement.

However, we believe that the trial court's error was harmless in nature. "The question here is not whether the jury reached the right result regardless of the error, but whether there is a reasonable possibility that the error might have affected the jury's decision." Crane v. Commonwealth, 726 S.W.2d 302, 307 (Ky. 1987). After reviewing the record before us, we cannot say that there is a likely possibility that the result of the trial would have been different had Huddleston's handwritten statement been introduced into evidence. On at least three separate occasions during the brief cross-examination, Huddleston was directly asked about the content of the statement. During each instance, defense counsel virtually read the statement verbatim. Defense counsel asked, "Did you ever identify somebody as having robbed you as Donnie Nelson? And it says that Donnie Nelson robbed me and my girlfriend. It appears to be your handwriting. And it indicates that Donnie Nelson robbed me and my girlfriend." Though the document itself was ruled inadmissible, the jury had already heard its substance. See Fields v. Commonwealth, 274 S.W.3d 375, 401 (Ky. 2008). As such, there is little possibility that the jury was prejudiced by the trial court's evidentiary ruling. Therefore, reversal in this instance is not

required.

Burglary instructions

Jackson contends that the trial court violated his constitutional right to a unanimous verdict in the complicity to first-degree burglary instructions given to the jury. Jackson takes issue with the language in Section D:

> "That when in effecting entry or while in the building or immediate flight therefrom, he, or a complicitor, was armed with a deadly weapon or used or threatened the use of a dangerous instrument against [names of victims] or caused physical injury to [names of victims] who were not participants in the crime."

Specifically, Jackson objects to the language regarding "use of a dangerous instrument" and "caus[ing] physical injury" because, according to Jackson, no evidence was introduced to support a conviction under either theory.

It has long been clear that in this state a defendant cannot be convicted of a criminal offense except by a unanimous verdict. Ky. Const. § 7; Cannon v. Commonwealth, 291 Ky. 50, 163 S.W.2d 15 (1942); RCr 9.82(1). In the past, this Court has stated that a "combination" instruction permitting a conviction of the same offense under either of multiple alternative theories does not deprive a defendant of his right to a unanimous verdict, so long as there is evidence to support a conviction under either theory. Johnson v. Commonwealth, 12 S.W.3d 258, 265-66 (Ky. 1999); Miller v. Commonwealth, 77 S.W.3d 566, 574 (Ky. 2002).

Any "impairment of physical condition," as used in KRS 500.080(13), simply means any "injury." Commonwealth v. Potts, 884 S.W.2d 654, 656 (Ky. 1994). See also Covington v. Commonwealth, 849 S.W.2d 560, 564 (Ky.App. 1992) (holding facial bruise and scratch below the eye to be physical injuries); Meredith v. Commonwealth, 628 S.W.2d 887, 888 (Ky.App. 1982) (holding superficial knife wound to be a physical injury); Key v. Commonwealth, 840 S.W.2d 827, 829 (Ky.App. 1992) (holding sore ribs and having one's breath knocked out to be physical injuries). Considering the facts of this case, we have no difficulty in holding that the evidence was sufficient to prove the physical injury requirement necessary to convict Jackson of burglary in the first degree. The Commonwealth offered testimony from victims who were restrained in such a manner as to cause cuts and bruises on their wrists and legs. These were clearly physical injuries, and the jury could reasonably believe that they resulted from Jackson tying the victims' wrists and legs together.

Additionally, we do not agree with Jackson that a gun cannot be both a "deadly weapon" under KRS 500.080(4) and a "dangerous instrument" under KRS 500.080(3). The two are not mutually exclusive. See Commonwealth v. McCombs, No. 2007-SC-000127-DG, 2009 WL 735794, at *5 (Ky. Mar. 19, 2009) (stating reasonable jurors could determine a crowbar to be either a "deadly weapon" or a "dangerous instrument"); Heard v. Commonwealth, 217 S.W.3d 240, 245 (Ky. 2007) (finding defendant guilt of second-degree assault

despite fact that no evidence of gun or other dangerous instrument persuasively linked to the assault). Subsection (3) of KRS 500.080 defines dangerous instrument as "*any* instrument . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury." (Emphasis added.) In this case, there was substantial evidence that guns were used in the burglaries by either Jackson or a complicitor. A reasonable juror could no doubt conclude that a gun is readily capable of causing serious physical injury, and even death, and would thus constitute a dangerous instrument. As such, we find no error.

Failure to give cautionary instruction on accomplice testimony

Jackson's next assignment of error is that the trial court erred in failing to give an instruction to the jury regarding the "reliability of accomplice testimony." Jackson submitted to the trial court instructions modeled after pattern instructions for the United States Court of Appeals for the Sixth Circuit. Jackson urges this Court to require an instruction on accomplice testimony, especially in cases where it constitutes the only evidence with respect to some of the offenses. We have previously addressed this issue and find Jackson's argument to be without merit.

Kentucky follows the "bare bones" principle with respect to jury instructions. Peak v. Commonwealth, 197 S.W.3d 536, 545 (Ky. 2006). Instructions, such as those offered by Jackson, tend to overemphasize

particular aspects of the evidence. Hodge v. Commonwealth, 17 S.W.3d 824, 850 (Ky. 2000). "Generally, evidentiary matters should be omitted from the instructions and left to the lawyers to flesh out during closing arguments." Baze v. Commonwealth, 965 S.W.2d 817, 823 (Ky. 1997). See also McGuire v. Commonwealth, 885 S.W.2d 931, 936 (Ky. 1994). As such, the trial court committed no error in failing to give the proposed jury instructions.

RCr 6.20 violates Section 7 of the Kentucky Constitution

Moffett contends that Section 7 of the Kentucky Constitution mandates a separate trial for every defendant. Section 7 of the Kentucky Constitution provides that "[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution." According to Moffett, Section 7 "prohibits legislative or judicial tinkering" with "the mode of trial at the time the language was adopted." Moffett cites the precursor to RCr 6.20, Criminal Code Section 237, which provided that "[i]f two or more defendants be jointly indicted for a felony any defendant is entitled to a separate trial." This, Moffett contends, shows that, at the time of the adoption of the Constitution, the defendant had an absolute right to demand a separate trial. Because RCr 6.20 is permissive instead of mandatory, Moffett claims it runs afoul of Section 7 of the Kentucky Constitution.

The constitutional questions raised here were not presented to the trial court for its consideration. Because Moffett failed to assert this matter before

the trial court, we hold that this was not properly presented for or our review. Harrison v. Commonwealth, 858 S.W.2d 172, 177 (Ky. 1993) ("A new theory of error cannot be presented on appeal."). Thus, the issue is unpreserved, and we decline to address it in this case.

Failure to instruct the jury on KRS 532.110

Jackson and Moffett next argue that the trial court erred in failing to instruct the jury on the 70-year sentencing cap of KRS 532.110. Prior to the sentencing phase of the trial, Jackson's counsel requested that the jury instructions include a reference to the 70-year sentencing cap. Moffett's counsel objected on the basis that there was some disagreement concerning whether the cap would apply to someone who committed the offenses while on probation, and that such an instruction would create prejudice by encouraging the jury to assign a longer sentence to Moffett than it assigned to Jackson. The trial court ruled that neither party was to instruct the jury as to the sentencing cap because the language of the statute required the trial court to apply it as a matter of law. The trial court then stated that the statute would be applied to each codefendant by the court at sentencing.

Neither Jackson nor Moffett has shown any prejudice in this case that is based upon anything more than speculation. While this Court has held that the jury should be instructed on the sentencing cap of KRS 532.110, the trial court's failure to so instruct in this case is harmless. See Allen v. Commonwealth, 276 S.W.3d 768, 774 (Ky. 2008). 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). By the plain terms of the statute, Jackson and Moffett were subject to a maximum 70-year sentence, far below the 369 years and 321 years, respectively, recommended by the jury. This Court previously addressed the issue of the proper procedure for when "the jury's sentencing recommendation [falls] outside the required statutory range." Neace v. Commonwealth, 978 S.W.2d 319, 322 (Ky. 1998). We held that "the trial court can correct [the] sentence at any time" to ensure that it correctly conforms to the law. Id. Accordingly, the trial court acted correctly by reducing Moffett's and Jackson's sentences to the 70-year maximum mandated by KRS 532.110.

Trial court's assessment of fine and court costs

In Jackson's final assignment of error, he alleges the trial court improperly assessed a fine and court costs against him, despite the fact that the trial court had already recognized his indigent status pursuant to KRS Chapter 31. Jackson concedes that this alleged error is not preserved for appellate review, but nonetheless requests the Court to review the issue pursuant to the palpable error standard of RCr 10.26.

On November 22, 2005, Jackson's private counsel withdrew from the case and the Jefferson Circuit Court appointed the Office of the Louisville Metro Public Defender to represent Jackson in this matter. After the imposition of a 369-year sentence, the trial court assessed a $10,000 fine and

$125 in court costs against Jackson. The trial court explained Jackson's appellate rights, including his right to have a public defender represent him on appeal if he was unable to afford private counsel. The trial court then signed an order allowing Jackson to proceed *in forma pauperis* on appeal, and the Office of the Louisville Metro Public Defender was appointed to represent him.

KRS 534.030(1) authorizes the imposition of fines for those defendants convicted of a felony. Subsection (4) of KRS 534.030, however, provides that "[f]ines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." As this Court said in Simpson v. Commonwealth, 889 S.W.2d 781 (Ky. 1994):

> "Pursuant to [KRS 534.030], the judge must independently determine the appropriateness of any fine, and if so, the appropriate amount and method of payment thereof. In so doing, the judge must also consider whether the appellant is indigent. In this connection, we observe that at sentencing in this case, the appellant was represented by an assistant public advocate. Thus, we may assume that the trial judge had already determined that the appellant was indigent."

Id. at 784.

Nor may court costs be levied upon defendants found to be indigent. KRS 23A.205(2). As noted above, at the time of his trial and sentencing, Jackson was receiving the services of a public defender and he was granted the right to appeal *in forma pauperis*. Thus, the trial court clearly erred in imposing a fine and court costs upon Jackson. We find that the trial court's

failure to recognize Jackson's indigent status resulted in manifest injustice. But for the court's error, the result would have been different.

At final sentencing, the trial court also assessed Moffett the same fine and court costs as Jackson. Like Jackson, Moffett was also indigent and represented by a public defender. Also like Jackson, Moffett did not raise an objection to the imposition of the fine and court costs at sentencing. Unlike Jackson, however, Moffett does not raise this issue on appeal. Nonetheless, we find that, under RCr 10.26, it would be manifest injustice not to afford Moffett the same relief as we do Jackson.

Therefore, for the reasons set out above, the respective judgments and sentences of the Jefferson Circuit Court are hereby affirmed, except for those portions thereof imposing fines and court costs, which are hereby vacated.

Minton, C.J.; Abramson, Cunningham, Scott and Venters, JJ., concur. Schroder, J., concurs in part and dissents in part by separate opinion in which Noble, J., joins.

SCHRODER, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART: Of the seventy-four counts for which Appellant was convicted, I would affirm fifty-eight. I have a problem with sixteen of the thirty-one convictions where the victims were not present to testify. I can accept a conviction where the sole evidence is the testimony of another that witnessed a robbery, even if the witness does not know the victim's name. However, where the officer that prepared the offense report is permitted to read the victim's name and the

crime that he or she reported, I see a problem. The non-testifying victims' statements to the police reporting the crime are testimonial statements being admitted into evidence for the truth of the matter asserted (that they were robbed, etc.). The admission of these statements against the accused without an opportunity to cross-examine violates the Sixth Amendment's Confrontation Clause. See Crawford v. Washington, 541 U.S. 36 (2004). Even in the cases where the officer's testimony may not have been necessary to obtain these convictions, it is not possible to say that the error was harmless.

Noble, J., joins.

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