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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 27, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000630-MR

ERNEST SHAFFER — APPELLANT

V.

ON APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
NO. 05-CR-00132

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Ernest Shaffer, appeals from a judgment of the Adair Circuit Court convicting him of one count of first-degree sodomy and being a second-degree persistent felony offender. Appellant was sentenced to life imprisonment, and appeals to this Court as a matter of right. We affirm.

The charge in this case stemmed from an allegation by Appellant's then seven-year-old niece, C.C., that Appellant committed an act of sodomy upon her at her grandmother Kathy Shaffer's house in Adair County, Kentucky, during a July 2005 visit. Kathy Shaffer is Appellant's mother. C.C. is the daughter of Kathy's oldest son Freddy. C.C. lived in Louisville with her mother, Corina, who had been separated from Freddy since C.C. was four or five years

old. Corina would send C.C. and her older brother J.C. to visit their grandmother Kathy for several weeks every summer.

In July 2005, C.C., then seven years old, and J.C., then eleven years old, came to Adair County for their usual summer visit with Kathy. At the time, Appellant, then 29 years old, was living in Kathy's home. Kathy's younger sons Devon and Dale, then ages 14 and 17, respectively, lived in Kathy's home as well. At some point during C.C. and J.C.'s visit, Appellant moved out of Kathy's home into a trailer across the street. The children had been at Kathy's home for about three weeks when C.C. alleged that Appellant touched her while she was in the bathroom of his trailer taking a bath. Kathy notified the police. C.C. subsequently alleged that Appellant also committed an act of sodomy upon her during the visit, on a morning when Kathy was not home and Devon and J.C. had gone to the store. As a result of this allegation, Appellant was ultimately indicted on one count of first-degree sodomy. Appellant was also charged with being a second-degree persistent felony offender. A jury trial commenced on July 1, 2009.

At trial, Devon, then 18 years old, testified as follows. One morning during the July 2005 visit, he, J.C., and C.C. were sitting around the house. There was a little store down the road, about a two-minute walk from the house. Appellant, who was living at Kathy's home at the time, said that he would give them money if they would go down to the store and get him something to eat. C.C. did not want to go, and Appellant said C.C. was too young to be walking down there. Appellant was wearing only his boxers and

had a "boner." Devon had a bad feeling about leaving, but J.C. was hungry so they went. They were gone about twenty minutes. When they returned, C.C. did not say anything, but Devon did not find this unusual because C.C. was normally a quiet and shy child. A few days later, Appellant and Kathy got into an argument over an unrelated matter.[1] The police were called, and Appellant was removed from the home.

The next day, Appellant moved into a trailer across the street from Kathy's home. At some point after Appellant moved out, Kathy's water was shut off for a day. Devon and C.C. went over to Appellant's trailer to take showers. Devon ran a bath for C.C., and told C.C. to lock the door to the bathroom when she took her bath. Devon then went in the trailer's other bathroom to take a shower. Devon forgot his towel, and when he came out to get it, he saw Appellant with a key in his hand outside the bathroom door where C.C. was inside. Appellant said that C.C. forgot to turn the water off and needed help with it. Devon was not sure if Appellant was coming out of, or about to go into, the bathroom. Devon testified that he did not hear the water running and that C.C. would not have needed help. Devon went back in the other bathroom, not sure what to do.[2] He stood there for a minute and then took his shower. When he came out of the bathroom, C.C. came out of the other bathroom, looking upset. Devon asked C.C. what was wrong, and she said that Appellant touched her.

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[1] Appellant testified that the argument was over money.

[2] Devon was fourteen years old at the time.

Devon immediately took C.C. back across the street to Kathy's house. Devon called Kathy at work, and she came home. Devon had C.C. tell Kathy what she had told him. Kathy had Appellant, who was outside, come inside, and had C.C. tell him what she had just told them. Appellant got angry, and denied doing anything to C.C., and said it was a lie that his (Appellant's) ex-wife and C.C.'s mother put in C.C.'s head.

C.C. was eleven years old at the time of trial and testified as follows. Asked to describe the event at issue, C.C. recalled that she did not want to go to the store because she did not want to walk that far. After Devon and J.C. left for the store, Appellant told her to follow him to the bathroom. Appellant got a "paper towel or a tissue or something" and a bar of soap, and told her to follow him to the bedroom. She followed him to his bedroom, and he told her to pull her pants down and lean over the bed. She did as Appellant said. She heard him unbuckling his pants, and then he stuck something in her "butt." It hurt, and she screamed and cried. Appellant said it was almost over. When it was over, she went in Devon's room and sat in a chair. When asked by the prosecutor what Appellant put in her "butt," C.C. said his "private." C.C. testified that she did not know what else it could be. C.C. testified that she did not know what Appellant was doing at the time, but that after all of this happened, her mother talked to her and explained about sex.

C.C. also testified as to the alleged incident in the bathroom of Appellant's trailer. She testified that this happened after the incident in the bedroom. She recalled going over to Appellant's trailer to take a bath, and that

Devon helped her turn the water on and then went to go take his bath. C.C. testified that Appellant came in the bathroom and that she was naked in the bathtub. She could not recall him doing anything or saying anything while he was in there. When asked if Appellant touched her in any way, C.C. said no. C.C. could not remember what she did after Appellant left and she had dressed. Asked if she talked to anyone afterwards about what Appellant had done, C.C. did not remember, but thought that might have been the day she told "what happened."

Over objection on KRE 404(b) grounds, C.C. also testified that there was another incident during this same visit when Appellant rubbed suntan lotion on her "butt."

Dale Shaffer, who was 21 years old at the time of trial, testified regarding the time that C.C., J.C., and Devon went to the store. Dale testified that he was in bed at the time, and when he came out of his room, Appellant was surprised to see him because he thought Dale was at work. Dale did not recall seeing C.C. Appellant told him that J.C. and Devon were at the store. Dale then went back into his room.

Kathy Shaffer, Appellant's mother, testified that during the time Appellant lived with her, she would take him to and from work. She acknowledged that there were a couple days while Appellant was living with her during C.C. and J.C.'s visit when she was at work and Appellant did not go to work and would have been in the house with the children, Devon, and Dale. Kathy testified that she notified the police the day after she learned of the

alleged incident in the bathroom of Appellant's trailer - as she was too upset to do anything the same day. Kathy thereafter returned the children to their mother Corina in Louisville. When asked by the prosecutor if C.C. ever said that her mother and Appellant's ex-wife told her (C.C.) to say these things, Kathy testified that one time she heard J.C. - not C.C. - tell Appellant that he was "nothing like Aunt Diane saying about you."[3]

Detective George Atwood of the Kentucky State Police conducted the investigation. Atwood testified that the police were notified of the allegations on July 23, 2005, by Kathy Shaffer. Atwood interviewed Appellant on August 25, 2005. The tape recording of the interview, in which Appellant denied the allegations, was played for the jury. When asked by Atwood why C.C. would say these things, Appellant said he did not know, but speculated it may have to do with the children's mother Corina, who hates him, or his ex-wife.

Susan Elrod, a nurse practitioner who examined C.C. on July 29, 2005, testified as to having performed a cursory examination upon C.C., and finding physical symptoms which could have been caused by sexual touching of C.C.'s vaginal area. Elrod did not perform a rectal examination, but admitted that C.C. had not reported any bleeding. Appellant testified in his own defense and denied the allegations.

Appellant tendered instructions on first-degree sexual abuse and sexual misconduct as lesser included offenses of first-degree sodomy. The trial court

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[3] Apparently referring to Appellant's ex-wife.

denied Appellant's request for said instructions, and instructed the jury on first-degree sodomy only. The jury found Appellant guilty of first-degree sodomy, and being a second-degree persistent felony offender. Appellant was ultimately sentenced to life imprisonment. He appeals to this Court as a matter of right, alleging a number of trial errors.

Testimony of Nurse Practitioner

The Commonwealth presented the testimony of Susan Elrod, a nurse practitioner who examined C.C. on July 29, 2005, at the Family Health Center in Louisville. Elrod testified that C.C. was brought in by her mother, complaining of frequent and difficult urination. Elrod testified that she asked C.C., who was then seven years old, about sexual abuse. C.C. told her that when she was left alone with Appellant, he touched her in her "privates" and stuck something hard in her "butt."[4] Elrod testified that her physical examination of C.C.'s genital area showed inflamed labia and a vaginal infection, but that she did not see any bleeding. When asked by the prosecutor what could have caused the symptoms, defense counsel objected to Elrod's being able to offer an opinion, based on her lack of qualifications. The trial court held a brief hearing on the matter outside the presence of the jury. Elrod testified that she had taken courses in pediatrics and had done over 200 clinical hours in pediatrics. While she did not take a specific course on sexual abuse, sexual abuse was covered in the pediatric coursework. Following the

[4] Defense counsel raised no objection at trial to this hearsay testimony identifying Appellant as the alleged perpetrator, nor is it raised as an issue on appeal.

hearing, the trial court ruled Elrod was qualified to offer an opinion as to the cause of what she observed, and that she would be permitted to testify as to whether the history given by C.C. was consistent with what she observed.

Elrod then testified that C.C.'s symptoms could have been caused by sexual activity. She further testified that the history C.C. gave her was consistent with what she observed, if C.C. had been touched in her private area multiple times. On cross-examination, defense counsel reminded Elrod that C.C. had alleged anal penetration. Elrod testified that she could not examine C.C.'s rectal area, because C.C. was crying and resistant. Elrod admitted that C.C. had not said anything to her about bleeding. Defense counsel then attempted to ask Elrod whether, based on her experience and education, an erect adult penis would cause tearing of a small child's rectum. The Commonwealth objected on grounds that Elrod did not know what size Appellant's penis was, and that she had not examined C.C.'s rectum. The court sustained the objection.

Subsequently, defense counsel asked if having something put in the rectum, as C.C. alleged, was consistent with a vaginal infection. Elrod admitted that it was not. Elrod speculated that it was possible that C.C., being seven years old, confused her "butt" and vagina. Elrod acknowledged that a vaginal infection, and the inflammation she had observed, could have causes other than sexual activity, and admitted that she could not say that C.C.'s symptoms were, in fact, caused by sexual trauma.

On appeal, Appellant first contends that Elrod's testimony that C.C.'s physical symptoms could have been caused by sexual activity, and that C.C.'s story was consistent with her symptoms, was inadmissible on grounds that it was irrelevant - because the symptoms Elrod observed all involved C.C.'s vaginal area whereas the crime charged (and C.C.'s allegation) was anal penetration. In support, Appellant points to Elrod's own testimony that C.C.'s symptoms were not consistent with anal penetration. In the alternative, Appellant argues that should this Court see some relevance in this testimony, that it should have been excluded under KRE 403, as its minimal probative value was substantially outweighed by the danger of undue prejudice.

At trial, defense counsel specifically stated that she had no objection to Elrod's testimony as to the physical symptoms she observed. Defense counsel objected, however, to Elrod's being permitted to offer an opinion that the symptoms could have been caused by sexual activity, and that C.C.'s story was consistent with the symptoms. However, defense counsel's objection to this testimony *was not based on lack of relevance or KRE 403*, but rather that Elrod *was not qualified* to offer an opinion on causation. Appellant does not raise the issue of Elrod's qualifications on appeal. Accordingly, any argument as to relevancy or KRE 403 is unpreserved. An appellant is "not . . . permitted to feed one can of worms to the trial judge and another to the appellate court." *Neal v. Commonwealth*, 95 S.W.3d 843, 848 (Ky. 2003). Regardless, any danger of undue prejudice was alleviated by defense counsel's successful cross-examination of Elrod, wherein she admitted that the symptoms she

observed were not consistent with anal penetration. Accordingly, error, if any, did not rise to the level of manifest injustice. RCr 10.26.

Appellant next argues that the trial court erred in sustaining the Commonwealth's objection to defense counsel's asking Elrod whether an adult man's penis would cause tearing of a small child's anus. This question was not out of the blue, but was in response to the Commonwealth's putting the consistency of C.C.'s story with her symptoms at issue. The Commonwealth, over defense objections, had qualified Elrod as an expert on sexual abuse and then asked general questions, such as whether C.C.'s symptoms were consistent with sexual activity. After answering "yes," Elrod was asked whether the history given by C.C. was consistent with her symptoms. Elrod answered that it was, "if she was touched in her private area multiple times."

On cross-examination, Elrod was reminded that C.C. also said something was put in her "butt." Defense counsel then asked if she saw any tearing in the rectal area. Elrod said she was not able to do a rectal examination. Elrod admitted that C.C. had not reported bleeding. It was at this point that Elrod was asked, whether, based on her experience and education, an erect adult penis introduced in a small child's anus would cause tearing. The Commonwealth's objection was sustained and the question not answered.

We agree that Elrod should have been allowed to answer the question. She qualified as an expert on sexual abuse and the Commonwealth was allowed to ask her opinion on whether C.C.'s symptoms were consistent with sexual activity. The Commonwealth put the consistency of C.C.'s story with

her physical symptoms in issue. Kentucky, pursuant to KRE 611(b), allows "wide open" cross examination. The question was highly relevant in light of the charge (sodomy, not rape) and the fact that C.C. reported no bleeding. Under these circumstances, we opine it was error not to allow the question be answered.

We next determine whether the error requires reversal. An error will be deemed harmless if there is no likelihood that the verdict was substantially swayed by the error. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009). Because Elrod did not examine C.C.'s rectal area, even had Elrod answered in the affirmative, she would not have been able to offer an opinion as to whether C.C. had any such tearing. Elrod did, however, admit that C.C. had not reported bleeding. Accordingly, we deem the error harmless.

Prior Bad Acts Evidence

Pursuant to KRE 404(b), the Commonwealth sought to introduce testimony from C.C. that Appellant had placed suntan lotion on her in an inappropriate way. Appellant objected, contending that this testimony did not establish a course of conduct, and was more prejudicial than probative. The trial court noted (erroneously) that KRE 404(b) is a rule of "inclusion" rather than "exclusion," and concluded the incident was relevant to establish opportunity and modus operandi, and was not unduly prejudicial.

Accordingly, C.C. testified that one day during the July 2005 visit, they were all going to go outside, and she was going to put suntan lotion on. Appellant said that he would do it, so she and Appellant went into the

bathroom. Appellant told her to pull down her pants and to put a towel over her face. He then rubbed the suntan lotion on her "butt." C.C. said that this occurred after the "bedroom" and "bathroom" incidents. Appellant testified that this incident did not happen.

Appellant contends that the trial court erred in admitting this testimony. Although evidence of a defendant's prior bad acts is inadmissible to prove that the defendant acted in conformity with his bad character, such evidence can be introduced if it is "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ." and if its probative value outweighs its prejudicial effect on the defendant. KRE 404(b); KRE 403.

"KRE 404(b) has always been interpreted as *exclusionary* in nature." *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). Accordingly, the trial court's statement to the contrary was error. However, "'evidence of similar acts perpetrated against the *same victim* are almost always admissible.'" *Harp v. Commonwealth*, 266 S.W.3d 813, 822 (Ky. 2008) (quoting *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002)) (emphasis added). In *Noel*, this court held that pursuant to KRE 404(b), a child-victim's testimony that she had been sexually abused by the defendant on more than one occasion was properly admitted "to prove intent, plan, or absence of mistake or accident." 76 S.W.3d at 931. *See also Harp*, 266 S.W.3d at 822 ("[T]he Commonwealth was required to offer proof of Harp's intent. Accordingly, the evidence of other

sexual contact between Harp and B.B. . . . was both highly relevant and probative.").

We believe that C.C.'s testimony that Appellant had perpetrated another sexual act upon her during the same visit – inappropriately placing suntan lotion on her - was admissible to prove Appellant's intent or plan with regard to the sodomy charge.[5] Therefore, albeit on different grounds, we cannot say the trial court abused its discretion in admitting this testimony.

Transcript of Appellant's Interview

The Commonwealth introduced Appellant's taped interview with Detective Atwood through said detective's testimony. Prior to doing so, the Commonwealth informed the court that it wished to provide the jury a transcript of the tape (which it had prepared) for the jurors to follow along. Defense counsel had gone over the transcript, and the prosecutor and defense counsel had agreed on certain portions of the interview to be redacted. Defense counsel objected to the jury's being given the transcript of the interview, on grounds that the transcript "makes it more important than it is." The court asked defense counsel if she questioned the *accuracy* of the transcript, and she said she did not. The trial court clarified several more times with defense counsel that she had no objection to the transcript's *accuracy*, only to its use, and that she had no objection to the playing of the tape recording of the interview. The trial court then overruled the objection, noting that, because there was no question as to the transcript's accuracy and defense counsel had

[5] Kathy testified that the children were there about three weeks.

no objection to the playing of the tape, it believed the transcript would be an aid to the jurors.

On appeal, Appellant now argues that the transcript was inadmissible pursuant to this Court's holding in *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), *overruled on other grounds by Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006). In *Sanborn*, this Court held that when portions of a tape recording are inaudible or indistinct, "it is not within the discretion of the court to provide the jury with the prosecutor's version of the inaudible or indistinct portions." *Id.* at 540. Having failed to state these grounds to the trial court, however, this argument is not preserved for review. Again, an appellant is "not . . . permitted to feed one can of worms to the trial judge and another to the appellate court." *Neal*, 95 S.W.3d at 848.

In any event, *Sanborn* is not applicable here, as it was not alleged at trial, or in this appeal, that the transcript contained any inaccuracies. In fact, it was not alleged that there were any inaudible or indistinct portions of the tape recording. *Cf. Sanborn*, 754 S.W.2d at 540 (defense disagreed with approximately 25 instances in Commonwealth's transcribed interpretation of the defendant's recorded statement). To the contrary, at trial, defense counsel stated several times that she had no objection to the transcript's accuracy. Nor on appeal does Appellant allege that the transcript contains any inaccuracies. The transcript was not introduced as an exhibit, and the jurors were not permitted to take it to the jury room. *See Norton v. Commonwealth*, 890 S.W.2d 632 (Ky. App. 1994) (trial court did not abuse its discretion in allowing jurors

to follow along with transcript prepared by the Commonwealth of tape recorded drug buy, where the defense alleged no inaccuracies in the transcript and the transcript was not made an exhibit, nor taken into jury room during deliberations). We see no abuse of discretion, and hence, no palpable error. RCr 10.26.

Refusal to give instruction on lesser included offense of first-degree sexual abuse

Appellant contends that the trial court erred in refusing to instruct the jury on the lesser included offense of first-degree sexual abuse.[6] Appellant contends that such an instruction was supported by C.C.'s statement to Elrod that she was touched in her "privates," and Elrod's testimony that anal penetration would not cause a vaginal infection; that C.C. did not complain of rectal bleeding or discomfort; and that a seven year old might be confused about her anatomy. Appellant contends that taking this evidence together, a jury could reasonably conclude that Appellant used his hands to touch C.C. in her vagina while she was bending over the bed. Appellant contends that this would be sexual contact which supports a first-degree sexual abuse instruction.

KRS 510.070 defines first-degree sodomy as follows:

> (1) A person is guilty of sodomy in the first degree when:

[6] Defense counsel had also requested an instruction on sexual misconduct, which was refused by the trial court as well. Appellant concedes on appeal that sexual misconduct covers a narrow age range that does not fit the facts of this case. *See Deno v. Commonwealth*, 177 S.W.3d 753, 762-63 (Ky. 2005); KRS 510.140.

> (a) He engages in deviate sexual intercourse with another person by forcible compulsion; or
>
> (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:
>
> 1. Is physically helpless; or
>
> 2. Is less than twelve (12) years old.

KRS 510.010(1) defines "deviate sexual intercourse" as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another . . . ." KRS 510.110(1), provides, in pertinent part, that a person is guilty of sexual abuse in the first degree when " (a) [h]e . . . subjects another person to sexual contact by forcible compulsion; or (b) [h]e . . . subjects another person to sexual contact who is incapable of consent because . . . she . . . [i]s less than twelve (12) years old[.]"

An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense and, yet, believe beyond a reasonable doubt that he is guilty of the lesser offense. *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). The trial court has no duty to instruct on a theory not supported by the evidence. *Payne v. Commonwealth*, 656 S.W.2d 719, 721 (Ky. 1983). As to the incident for which Appellant was being tried, the incident of sodomy which allegedly occurred in the bedroom, C.C. was unequivocal that Appellant put something, which she believed to be his penis, in her "butt." She did not allege any other sexual

contact, including touching, related to this incident.[7] Appellant's defense was a complete denial. Accordingly, the evidence did not support a first-degree sexual abuse instruction, and hence, the trial court did not abuse its discretion in denying the instruction.

Alleged Error in Guilt Phase Closing Argument

Appellant contends that the trial court erred in allowing the Commonwealth, in its guilt phase closing argument, to argue the jury had a duty to protect the victim. At issue is the following:

> Commonwealth: The duty to protect a kid goes from the time that they first report it, ever how that innocent child first reported it, goes with the police, goes with any child protective services that might come in, and eventually winds up in the court system, the judicial system, but ultimately that duty to protect that child, that duty to make sure that something's done when a child is harmed, when a child is molested, when a child is sodomized, rests with twelve people.

At this point, defense counsel objected, and the trial court overruled the objection on grounds that this was closing argument.

On appeal, Appellant contends that the trial court erred in overruling his objection, on grounds that the Commonwealth was improperly attempting to shame the jury into convicting him. In *Cantrell v. Commonwealth*, 288 S.W.3d 291, 299 (Ky. 2009), this Court recognized that "[a]ny effort by the prosecutor in his closing argument to shame jurors or attempt to put community pressure

[7] As to Elrod's statement that C.C. told her that she was touched in her "privates," this comment was never attached to any specific incident. At trial, C.C. did not allege Appellant touched her sexually with his hands, other than the suntan lotion incident.

on jurors' decisions is strictly prohibited." We disagree, however, that the argument in this case was such an improper shaming or community pressure argument. Rather, the argument made by the prosecutor herein is similar to what we held not to be error in *Slaughter v. Commonwealth*, wherein the prosecutor told the jury in closing argument "that he had done all he could do, that the police had done all they could do, that the judge had been fair and impartial, and '. . . now it's going to come your time to deal with justice in this particular case.'" 744 S.W.2d 407, 412 (Ky. 1987). Similarly, we see no error here.

Alleged Error in Penalty Phase Closing Argument

Finally, Appellant contends that the trial court erroneously limited defense counsel's closing argument in the penalty phase. Having been convicted of first-degree sodomy, a Class A felony, Appellant was facing a sentence of twenty years to life. Defense counsel made the following argument in the penalty phase:

> Defense Counsel: Now, you know, I'm always amazed at the people that say, "Oh well, he got what he deserved. Five years isn't a very long time. Ten years, 20 years is not a long time." I want you to think about where you were 20 years ago. I want you to think about the person that you were 20 years ago.
>
> Commonwealth: Objection.
>
> Trial Court: I believe that's improper Ms. Downs. The jury will disregard the last remark.

Appellant contends that defense counsel was properly seeking leniency for him, as she is entitled to do, by making an argument that even the minimum

sentence, twenty years, was lengthy, and that the trial court erred in sustaining the Commonwealth's objection.

We see nothing improper in defense counsel's argument, and agree with Appellant that the trial court erred in sustaining the objection. However, we believe the error was harmless. Defense counsel's entire closing argument was basically one of asking for leniency, by attempting to impress upon the jury that even if they gave Appellant the minimum sentence of twenty years, that he would be imprisoned for a long time. Following the improperly sustained objection, defense counsel continued her closing and was able to get the point across.

The jury was told that even with the minimum twenty-year sentence, Appellant would have to serve 18 1/2 years before he was eligible for parole. They were also informed that a life sentence would require he serve 20 years before he was eligible for parole - a mere one-and-a-half year difference. To justify the extra year-and-a-half to serve, the prosecutor revealed Appellant's prior record - a previous conviction for sexual abuse, probated and revoked, and two prior convictions (in 2002 and 2005) for failure to comply with the sex offender registration requirements.

We realize that Appellant received the maximum sentence, life imprisonment. However, in light of Appellant's prior record, and our conclusion that defense counsel had an adequate opportunity to make her leniency argument, we do not believe there is a substantial possibility that the error affected the jury's recommendation.

For the aforementioned reasons, the judgment of the Adair Circuit Court is affirmed.

All sitting. All concur.

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