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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: SEPTEMBER 23, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000423-MR

RUSSELL GLENN FARMER — APPELLANT

V.

ON APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
NO. 08-CR-00204

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In July 2007, A.F. applied for a job as a police officer with the Russellville Police Department. During the job application process, Officer Kenneth Edmonds conducted a routine background check interview. During a series of questions relating to sexual abuse or molestation, A.F. fell silent. Then she revealed that she had suffered a long history of sexual abuse at the hands of her biological father, Russell Glenn Farmer. Initially, A.F. told Officer Edmonds that she did not want to press charges, but one year later, she changed her mind.

According to A.F.'s testimony, the incidents giving rise to the present charges began when she was approximately ten or eleven years old. The first incident occurred in a camper on Franklin Street, where Appellant and his then wife, Cindy Moore, lived. Appellant and A.F. were lying in bed when he

touched her vagina through her clothes. Appellant then penetrated A.F.'s vagina with his fingers. A.F. also testified that Appellant forced her to perform oral sex on him four to five times on different days in the camper.

Later that year, A.F. lived in an apartment on John Paul Avenue with her mother and two brothers. On one occasion, while A.F. was riding in a van with Appellant, he drove the van onto a gravel road and parked. While in the back of the van, Appellant grabbed A.F.'s face, started kissing her, and made her perform oral sex. Appellant also forced A.F. to masturbate him. During this incident, A.F. threatened to tell her mother. Appellant responded by stating that if she did this, A.F. would find her mother "floating in the Adairville River." Appellant also told A.F. that no one would believe her, and that it was as much her fault as it was his.

When A.F. was approximately eleven or twelve years old, Appellant and Cindy moved their camper to Logan Estates Trailer Park. On one occasion, while A.F. was visiting, Appellant woke her up and asked her to "make him hard." Appellant grabbed A.F.'s face and made her perform oral sex on him. The following morning, while A.F. was taking a shower, Appellant took her to his room. Appellant proceeded to put his fingers in her vagina "really hard" to the point where she almost cried in pain. He then performed oral sex on her while making her perform oral sex on him. A.F. testified that this was just one of many instances of oral sex and digital penetration that occurred at Appellant's Logan Estates residence.

At the age of twelve or thirteen, A.F. moved to a residence on Rhea Boulevard. A.F. testified that she lived there for approximately two to three years, and that Appellant would molest her "every chance he got." She estimated at least 200 instances occurred during this period. At some point during this time, Appellant resided with a friend at Robin Wood Apartments. On one occasion, A.F. went to the apartment and was watching television with Appellant. Appellant said he was going to the store, but before leaving he placed a pink dildo on a coffee table. When Appellant returned, he forced A.F. to perform oral sex on him while he ran the dildo up the leg of her shorts. Additionally, A.F. testified that, on multiple occasions, Appellant would buy her alcohol and then time her to see how fast she could drink a beer. After having passed out from drinking, A.F. testified that she always woke up feeling sore.

One night, while spending the night at the Robin Wood apartment, Appellant woke A.F. and told her to be "real quiet." He forced open her legs and rubbed his penis against her vagina "over and over." A.F. testified that Appellant attempted to place his penis inside her vagina and then removed it. Appellant tried a second time. In tears, A.F. told him to stop. A.F. testified that approximately 40-50 incidents of oral sex and digital penetration occurred at the Robin Wood apartment.

The last incidence of abuse took place in a residence on Russell Street when A.F. was fourteen years old. A.F. and Appellant were wrestling in the living room. When A.F. tried to get up, Appellant held her down and left a

"hickey" on her neck. After pulling down her shorts and panties, Appellant forced open A.F.'s legs, inserted his penis, and raped her. A.F. testified that it was the worst pain she had ever felt. When Appellant finished, A.F. told her father that it would not happen again or she would tell – "no matter what."

Appellant was indicted by the Logan County Grand Jury on two counts of rape in the first degree, one count of incest, 104 counts of sodomy in the first degree, and 104 counts of sexual abuse in the first degree. At the close of all evidence, the jury was instructed on eight counts of sodomy, six counts of sexual abuse, two counts of rape, and two counts of incest. The jury found Appellant guilty of one count of rape in the first degree, one count of sodomy in the first degree, one count of incest, and one count of sexual abuse in the first degree. The jury returned a not guilty verdict on all other counts. At the penalty phase, the jury recommended sentences of 20 years for the rape conviction, 20 years for the sodomy conviction, 10 years for the incest conviction, and 5 years for the sexual abuse conviction. The jury further recommended that the sentences for the rape, sodomy and sexual abuse convictions run concurrently with one another, and consecutively with the sentence for the incest conviction, for a total of 30 years. The trial court did not follow the jury's recommendation and instead ordered that the sentences for the rape, sodomy and sexual abuse convictions run consecutively, and that the sentence for the sexual abuse conviction run concurrently, for a total sentence of 50 years. Appellant now appeals the final judgment entered as a

matter of right. Ky. Const. § 110(2)(b).

Appellant raises three allegations of error on appeal: (1) he was denied due process by two references that A.F. had taken a polygraph test; (2) he was substantially prejudiced and denied due process when the Commonwealth failed to provide a witness's statement in a timely manner; and (3) the Commonwealth made an impermissible "send a message" closing argument to the jury.

References to polygraph test

On direct examination, A.F. testified in part as follows:

> Q: Did you ever tell law enforcement?
>
> A: Not until I had to when I got hired.
>
> Q: When was that?
>
> A: '07, July of '07.
>
> Q: Who did you tell?
>
> A: Detective Edmonds
>
> Q: And why did you tell him?
>
> A: The hiring process, you have to go through a polygraph test. They give you this real big packet with all kinds of questions about your whole life, like financial, and abuse and everything else. The packet was really easy except there was a question on there "Have you ever been involved in a molestation or any kind of sexual abuse by a family member?" I didn't know what to say because I wanted my job, I wanted to be a police officer since I was a kid and I didn't want to jeopardize it. So when Detective Edmonds called me in for my background to go over the questions with

> me, he got to that question and he asked me about it. I just sat there and he told me he needed to know because it was part of the process.

Later, during the Commonwealth's closing argument, a second reference to the polygraph examination was made:

> So why and when did [A.F.] finally tell the truth? How did we come to be here after all these years? Why? Because she had always wanted to be a police officer. And in the summer of 2007, that dream was coming true. And she met with Detective Ken Edmonds, and as part of getting that job he was doing a background check on her. And he was asking a lot of questions. And one of those questions was "Have you ever been involved in child sexual abuse or molestation?"
>
> And Detective Edmonds told you how they had just been going through the questions until they got to that one and there was silence. And he finally looked up and [A.F] told him, "I didn't do it." And then she went on and told him what had happened? Why then? Because [A.F.] told you, she knew she had to pass a polygraph test to get this job. And she was afraid if she didn't tell them, she would not get this job.
>
> Ladies and Gentlemen, we don't have a motive to lie. We have a motive to tell the truth—why the truth came out when it did. But she still didn't press charges. Detective Edmonds told you that [A.F.] didn't know that question was on there. He told you that nobody knows what questions are on his background checks. She didn't know that question was coming. She was forced to tell the truth to get the job she always wanted. Detective Edmonds has no reason to lie to you.

Appellant now claims that the two references to the polygraph examination violated his right to due process. However, Appellant concedes

that this issue is unpreserved for our review, but asks this Court to review the matter pursuant to RCr 10.26.

RCr 10.26 provides: "A palpable error which affects the substantial rights of a party may be considered . . . and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." The basic palpable error review, where an unpreserved error requires reversal, is "if a manifest injustice has resulted from the error," which means there "is [a] probability of a different result or [the] error [is] so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). The alleged error must be "so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

This Court has long said that evidence of polygraph examinations is not admissible because they are neither scientific nor reliable. *Henderson v. Commonwealth*, 507 S.W.2d 454 (Ky. 1974); *Stallings v. Commonwealth*, 556 S.W.2d 4 (Ky. 1977); *Baril v. Commonwealth*, 612 S.W.2d 739 (Ky. 1981). Additionally, this Court has gone so far as to "exclude[] mention of the taking of a polygraph, the purpose of which is to bolster the claim of credibility or lack of credibility of a particular witness or defendant." *Ice v. Commonwealth*, 667 S.W.2d 671, 675 (Ky. 1984) (citing *Perry v. Commonwealth*, 652 S.W.2d 655 (Ky. 1983)). However, not every mention of a polygraph examination is grounds for reversible error. Instead, "[t]here must arise a clear inference that there

was a result and that the result was favorable, or some other manner in which the inference could be deemed prejudicial." *McQueen v. Commonwealth*, 669 S.W.2d 519, 523 (Ky. 1984).

In the context of this case, we find that neither the testimony of A.F. nor the comments made by the Commonwealth amounted to palpable error. With regards to A.F.'s testimony, the mention of a polygraph examination was not made in an effort to bolster her own credibility. Instead, the reference was made in order to explain the surrounding circumstances of when and why A.F. came forward with her allegations against Appellant. The polygraph examination was not conducted to test the validity of her claims. A.F.'s comments merely gave the context in which the allegations first came to light.

The comments made by the Commonwealth during closing arguments were made much in the same vein. We do not believe they were "so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer,* 206 S.W.3d at 349. Opening and closing statements are not evidence and wide latitude is allowed in both. *Slaughter v. Commonwealth,* 744 S.W.2d 407 (Ky. 1987). Counsel may draw reasonable inferences from the evidence and propound their explanations of the evidence and why the evidence supports their particular theory of the case. *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998).

At all times during the trial, Appellant maintained his innocence. The Commonwealth was thus entitled to provide an explanation for A.F.'s late

reporting. Unfortunately, within that explanation A.F. referred to an anticipated polygraph exam. Such unsolicited mention was unfortunate, but not fatal. We do not believe that there is a substantial possibility that the result would have been different without reference to the polygraph examination. *Brewer*, 206 S.W.3d at 349. As noted earlier, Appellant was indicted on two counts of rape in the first degree, one count of incest, 104 counts of sodomy in the first degree, and 104 counts of sexual abuse in the first degree. The jury was instructed on only eight counts of sodomy, six counts of sexual abuse, two counts of rape, and two counts of incest. The jury found Appellant guilty of one count of rape in the first degree, one count of sodomy in the first degree, one count of incest, and one count of sexual abuse in the first degree. Appellant was acquitted on all other charges. More importantly, each count of which Appellant was convicted was related to events transpiring at the Robin Wood apartment. These allegations by A.F. were corroborated in part by Melissa Owens, who acknowledged ownership of the pink dildo used by Appellant and who testified that she never showed it to A.F., nor had any knowledge of A.F. being in the apartment. Furthermore, A.F. had confided in one of her close friends and a boyfriend about these acts committed by Appellant. Thus, there was additional circumstantial evidence linking Appellant to the allegations for which he was convicted.

Simply stated, even if the references to the polygraph examination were error, we do not believe that Appellant was either prejudiced or denied due

process as a result.

RCr 7.26

Kayla Coursey, a close friend of A.F., was called as a witness for the Commonwealth on Tuesday February 24, 2005. The Commonwealth provided defense counsel with Kayla's video statement on Friday February 20, 2005. Appellant maintains that this disclosure was late, in violation of RCr 7.26, and that as a result, he was denied due process and his trial counsel was substantially prejudiced. Regardless of whether the issue was preserved, any error would be harmless.

RCr 7.26(1) provides:

> Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

In conjunction with RCr 1.10(a), it is clear that the Commonwealth technically violated the rule. ("When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."). However, "even if the forty-eight hour rule is violated, automatic reversal is not required. Some prejudice must be found, or the error, if any, is harmless." *Gosser v. Commonwealth*, 31 S.W.3d

897, 905 (Ky. 2000) (citing *McRay v. Commonwealth*, 675 S.W.2d 397, 400 (Ky. App. 1984)).

Having reviewed the record, we do not believe Appellant has sufficiently demonstrated that his trial counsel was prejudiced by the delay. According to Appellant, the delay prevented defense counsel from effectively cross-examining Kayla, forcing him to do so "somewhat off-the-cuff." A defendant is prejudiced by a violation of RCr 7.26(1) if, "as a result of the error, he was denied access to information which, had he possessed it, would have enabled him to contradict or impeach the witness or establish some other fact which might reasonably have altered the verdict." *Hicks v. Commonwealth*, 805 S.W.2d 144, 149 (Ky.App. 1990). Here, defense counsel never moved the court for a continuance, which would have afforded time for the further investigation which Appellant now argues was needed. Neither did defense counsel object to the Commonwealth's delay. Moreover, Appellant was given Kayla's statement approximately four days before she took the stand, certainly sufficient time for defense counsel to prepare for her testimony.

For these reasons, we cannot conclude that the Commonwealth's tardiness denied defense counsel an opportunity to further investigate Kayla's statement and, therefore, Appellant was not prejudiced.

Commonwealth's closing argument

Finally, Appellant argues that the Commonwealth made an impermissible "send a message" argument to the jury. Appellant concedes that

this allegation or error is unpreserved, but nevertheless requests palpable error review. RCr 10.26.

The comments to which Appellant takes issue are the following:

> "Go in there and punish this man for what he's done to his daughter, what he subjected her to. And punish him so that he can't do this again. Twenty years is the most you can do, but let Mr. Farmer know that the citizens of Logan County do not accept fathers doing this to their children. They do not allow Mr. Farmer to do this."

When reviewing claims of prosecutorial misconduct, we must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was such that it undermined the overall fairness of the proceedings. "Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial. In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004). However, prosecutors still have wide latitude in their closing arguments and may attempt to convince jurors that the matter before them should not be dealt with lightly. *Brewer*, 206 S.W.3d at 350.

After reviewing the Commonwealth's closing argument in its entirety, we find that Appellant suffered no manifest injustice. First of all, the "message" requested by the Commonwealth in this case was to Appellant himself. There has never been anything wrong with a prosecutor asking a jury to individualize the punishment so as to teach a defendant a lesson. *See Cantrell v.*

Commonwealth, 288 S.W. 3d 291 (Ky. 2009). At no point during this closing message did the Commonwealth "cajole or coerce a jury to reach a verdict that would meet the public favor" or suggest "that [the] jury convict on grounds not reasonably inferred from the evidence." *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005). To the contrary, the Commonwealth simply asked the jury to send a message to Appellant *directly*. Further, "the Commonwealth's exhortation to the jury to recommend that Appellant be sentenced to the maximum allowable sentence is neither surprising nor improper." *Brewer*, 206 S.W.3d at 350. Defense counsel, in his closing remarks, asked the jury for leniency. Certainly, prosecutors are entitled as well to respond to matters raised by the defense. *Lynem v. Commonwealth*, 565 S.W.2d 141 (Ky. 1978); *Hunt v. Commonwealth*, 466 S.W.2d 957 (Ky. 1971).

Upon a consideration of the overall trial and the context in which the comments in question were made, we do not find that there is a substantial possibility that the Commonwealth's closing argument seriously affected the overall fairness of the proceedings. We believe that the comments neither prejudiced Appellant's right to a fair trial, nor unduly pressured the jury to punish him. Any error in the closing argument, if indeed one does exist, certainly does not rise to the level of being palpable. *See Carver v. Commonwealth*, 303 S.W.3d 110 (Ky. 2010).

Accordingly, we hereby affirm the judgment of the Logan Circuit Court.

All sitting. All concur.

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