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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000586-MR

ROBERT W. SHIELDS

APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 02-CR-00202

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a judgment entered by the Harlan Circuit Court after a jury found appellant Robert W. Shields guilty of trafficking in controlled substances in the first, second, and third degrees, and trafficking in less than eight ounces of marijuana. Appellant alleges that the trial court erred by instructing the jury on misdemeanor penalties during the guilt phase of the trial, and that the prosecutor's

remarks during the sentencing phase were so prejudicial as to require reversal. For the reasons stated hereafter, we affirm.

On April 24, 2002, Rachel Ledford's Department for Juvenile Justice (DJJ) worker contacted Rachel's mother, Connie Ledford, to inform her that Rachel had failed a drug test at school. Connie responded that she had found marijuana and xanax in Rachel's room earlier that day, but that she had burned them in her fireplace to avoid police involvement. When the DJJ worker and Harlan Deputy Sheriff Marcus Williams questioned Rachel at home later the same day, she informed them that she had obtained the drugs from appellant as payment for selling drugs for him.

Williams subsequently obtained warrants to arrest appellant and to search his trailer. After appellant was arrested on April 29, he consented to a search of his trailer which yielded two marijuana cigarettes and marijuana seeds found in the living room, 9 hydrocodone and 14 oxycodone pills found in a kitchen cabinet, 393 xanax pills, several bags of marijuana, and scales found in a cookie tin in a wall cabinet in appellant's bedroom, and a police radio. According to the Commonwealth, while being transported to jail, appellant told Williams that the only reason the Ledford family reported him was to "eliminate the competition." Further, appellant allegedly stated during fingerprinting that although he would be

suspicious if someone asked to buy one pill from him, he would not be suspicious if he asked to buy a few pills.

On September 16, appellant was indicted and charged with trafficking in controlled substances in the first, second, and third degrees, trafficking in less than eight ounces of marijuana, unlawful transaction with a minor in the first and second degrees, and possession of a police radio. Appellant was arraigned and pled not guilty to all of the charges on October 11.

At appellant's jury trial, evidence was adduced to show the facts set forth above and, further, that animosity existed between appellant's family and the Ledford family. More specifically, a property dispute between Rachel's father and appellant's mother had resulted in a lawsuit. Further, appellant's previous cohabitation with Connie's sister, Gwen Ledford, had increased animosity between the families.

Evidence was also adduced to show that appellant had no Harlan County income, his mother paid his bills, and she owned and allowed him to live in the trailer rent free. Appellant testified, however, that he sometimes stayed in Lexington, where he worked for friends for ten dollars per hour one or two weeks every few months. Appellant ultimately claimed that he did not know that the hydrocodone and oxycodone were in the trailer, and that the pills belonged to his mother.

Appellant also testified that the xanax pills belonged to Gwen, and that he had hidden them from her in order to keep her from committing suicide.¹ Finally, although appellant conceded that he possessed the marijuana cigarettes for his personal use, he asserted that he was unaware of the marijuana hidden in the tin, he had never given drugs to Rachel, and he had never made any incriminating statements to law enforcement officials.

At the close of appellant's trial, the court instructed the jury on the elements of the pending charges. Included in the instruction for Count Two, second-degree trafficking in a controlled substance (a Class D felony), was the statutory penalty range for the lesser included misdemeanor of second-degree possession of a controlled substance. The trial court's instructions also included the penalties for the Class A misdemeanors set out in Counts Three and Four, pertaining to third-degree trafficking in a controlled substance and trafficking in less than eight ounces of marijuana. Each of the three misdemeanor instructions directed the jury to sentence appellant for those misdemeanors if he was found guilty of them. The jury thereafter returned a verdict finding appellant guilty of trafficking in controlled substances in the first, second,

¹ In her testimony, Gwen denied that the pills were hers or that she was going to commit suicide. She further stated that she had not lived with appellant for some nine months prior to the date of his arrest.

and third degrees, as well as trafficking in less than eight ounces of marijuana.

During the sentencing phase, counsel discussed parole eligibility and asked the jury to sentence appellant to the minimum penalty, because he looked after his elderly mother, there was no evidence that he had actually sold any drugs, and he had no prior felony drug convictions.² The prosecutor urged the jury to sentence appellant to the maximum penalty because:

Drug dealers are such a threat to the community and because they are causing so much damage to Harlan County. And because . . . they know the risks, they run the risks, and when they get caught they should get the maximum penalty.

In accordance with the jury's recommendation, the court sentenced appellant to consecutively serve the maximum penalties of ten years and five years for trafficking in controlled substances in the first and second degrees, respectively, as well as twelve months each on the charges of third-degree trafficking in a controlled substance and trafficking in marijuana. This appeal followed.

First, appellant argues that the trial court committed reversible error during the guilt phase of his trial by instructing the jury on the penalties for three misdemeanor offenses. Although the issue was not preserved for appellate

² Appellant admitted that he had been convicted of possession of marijuana some years before.

review, it is clear that the trial court erred since Kentucky's bifurcated trial system mandates that "in the trial of a 'felony case' . . . the jury shall not be instructed on the penalty ranges of any offense, whether the primary or a lesser included offense." *Commonwealth v. Philpott*, Ky., 75 S.W.3d 209, 213 (2002). However, because the error is unpreserved, relief will be denied on appeal unless the error is palpable, *i.e.*, an error which "'affects the substantial rights of a party' and will result in 'manifest injustice' if not considered by the court." *Schoenbachler v. Commonwealth*, Ky., 95 S.W.3d 830, 836 (2003) (footnotes omitted). Further, "if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." *Id.* at 836 (footnotes omitted).

Upon consideration of the whole case, we believe that there is no substantial possibility that the result would have been any different if the trial court had instructed the jury without including the misdemeanor penalty ranges. There was overwhelming evidence that appellant possessed marijuana, scales, xanax, hydrocodone, and oxycodone. Further, there was evidence that he made incriminating statements which supported the charges against him. A jury certainly could infer from the substantial testimony, including appellant's lack of employment

in Harlan County, that he intended to sell the drugs in question. Hence, we conclude that the court's error was not prejudicial.

Next, appellant argues that the prosecutor's closing remarks during the sentencing phase amounted to prosecutorial misconduct and constituted reversible error. Again, appellant concedes that the issue was not preserved for appellate review, but he argues that the prosecutor's closing remarks constituted palpable error under RCr 10.26. We disagree.

First, it must be noted that a "prosecutor is given wide latitude in closing argument." *Bowling v. Commonwealth*, Ky., 873 S.W.2d 175, 178 (1993). Moreover, "[a]ny consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the entire trial. In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." *Partin v. Commonwealth*, Ky., 918 S.W.2d 219, 224 (1996) (internal citations omitted).

Recently, the Kentucky Supreme Court found that statements very similar to those made by the prosecutor below did not amount to palpable error under RCr 10.26. *Young v. Commonwealth*, Ky., 25 S.W.3d 66 (2000), involved a prosecution for the manufacture of methamphetamine. While making a closing

argument during the sentencing phase, the prosecutor urged the jury:

"[T]o set a community standard," "to send a message throughout this community [that if] you start manufacturing methamphetamine in Muhlenberg County . . . you're gonna receive the maximum punishment that we can give you," and "[t]o send a message to these people to discontinue this type of activity."

Id. at 73. The Supreme Court rejected Young's argument that these statements required reversal under RCr 10.26, recognizing that "[w]hile the jury did recommend the maximum sentence . . . the Commonwealth introduced overwhelming evidence that Young manufactured methamphetamine on a relatively large scale." *Id.* at 75. Moreover, "the prosecutor's statements [were] reasonably supported by the trial record and responsive to defense counsel's contention that the jury should recommend the minimum sentence." *Id.* at 75. Finally, the court noted that the trial court, not the jury, makes the final determination on sentencing.³ *Id.* at 75.

Contrary to appellant's assertion, the matter now before us is indistinguishable from *Young*. The jury's recommendation to sentence appellant to the maximum penalty was made in the face of overwhelming evidence of appellant's guilt.

³ Appellant's argument, that this authority forecloses the possibility that future prosecutorial misconduct during a sentencing closing could be declared reversible, is without merit. This is merely one factor to consider when determining whether a prosecutor's remarks constitute error.

Moreover, the prosecutor's statements placing appellant "in the drug trafficking stream of commerce" constituted a reasonable attempt to refute appellant's argument that he should be given the minimum sentence. *Id.* at 75. Accordingly, after examining the record, we hold that appellant did not suffer "manifest injustice" as a result of the prosecution's sentencing phase closing argument.

Contrary to appellant's contention, *Harrison v. Commonwealth*, Ky. App., 368 S.W.2d 171 (1963), does not compel a different conclusion. In that case the defendant's bootlegging conviction, which was based on sparse evidence, was reversed due to the prosecutor's extraneous comments that:

"The people of Jackson County know what sorrow drinking and bootlegging cause in Jackson County." He further said: "Most of the murder cases that are tried are caused by liquor." He further said to the jury: "You have a right to use what knowledge you have in trying these cases."

Id. at 171. However, like "the vast majority of these cases" analyzing prosecutors' comments, *Harrison* "predated bifurcated sentencing procedures, address[ed] properly preserved errors, and analyze[d] prejudice with the defendant's presumption of innocence as unspoken context." *Young*, 25 S.W.3d at 74 (footnotes omitted). Thus, *Harrison* is not controlling of the issue now before us. Having reviewed the substantial evidence

supporting appellant's conviction we conclude, as in *Young*, that appellant is not entitled to RCr 10.26 relief.

Accordingly, the court's judgment is affirmed.

ALL CONCUR.

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