RENDERED: May 6, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000208-MR

LONNIE MICHAEL EPPERSON — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 01-CR-00080

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Lonnie Michael Epperson (Epperson) appeals his judgment of conviction for first-degree sexual abuse arguing that the victim advocate's behavior at trial resulted in error necessitating a new trial and that the circuit court erred by considering more than one victim impact statement at sentencing. We affirm.

Epperson was convicted of first-degree sexual abuse of a minor that occurred while he was babysitting the child. At his trial the victim's advocate accompanied the victim into the courtroom. The victim's advocate was asked to sit further back in the courtroom pursuant to the appellant's inquiry. Epperson also states that although the victim's advocate moved about half-way back in the courtroom, she remained within the line of sight of the victim-witness. Epperson maintains in this appeal that the presence of the victim's advocate and her behavior in the courtroom unfairly bolstered the child's testimony and made him seem more credible to the jury.

KRS 421.575 allows a victim's advocate to accompany the victim during any court proceeding "to provide moral and emotional support." It also allows the victim's advocate to confer with the victim if it is reasonable. Therefore, the mere presence of the victim's advocate in the courtroom in this case is not grounds for a mistrial or reversal of Epperson's conviction.

Epperson contends though that the actions of the victim's advocate reflected on the credibility of the victim-witness similar to the case of Sharp v. Commonwealth, 849 S.W.2d 542 (Ky. 1993). In Sharp, the Kentucky Supreme Court considered a situation where a friend of the victim's family gave comfort and encouragement to a child witness during her testimony

regarding sexual offenses Sharp had committed. The friend mouthed statements to the child such as, "You're doing fine," and made approving gestures such as winking and displaying a thumbs-up sign. Id. at 546-547. The Court held that the trial court should have granted a mistrial when this was brought to its attention. Id. at 547.

In setting forth the standard the Court in Sharp noted that when determining whether a mistrial should be granted the circuit court is faced with the question of "whether the impropriety would likely influence the jury." Id. In the case at hand there is no evidence that the victim's advocate made any gestures to the victim-witness during his testimony or otherwise encouraged or communicated with him in any way. The similarity to Sharp is slight at best and all but disappears when KRS 421.575 is considered.

Epperson also argues that the court erred when it considered victim impact statements from four different individuals. He points out that KRS 421.520(1) allows the "victim" as defined in KRS 421.500(1) to submit a statement for consideration by the court at sentencing. The statutory references are to a singular victim, thus, Epperson maintains that consideration of more than one victim impact statement by the court is reversible error.

This argument is not preserved for review and so must be analyzed under the palpable error rule requiring this Court to believe that there is a substantial possibility that the result would have been different had the complained of error not been committed. Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

We do not believe that there is any substantial likelihood that the outcome would have changed in Epperson's case had the circuit court only considered one victim impact statement. Like Brown v. Commonwealth, 780 S.W.2d 627, 630 (Ky. 1989), the jury that recommended the sentence in Epperson's case did not see the victim impact statements, and therefore, could not have been influenced by their submission. Further, the court imposed the sentence recommended by the jury.

Even had Epperson properly preserved this argument it is clear that a circuit court has the discretion to consider written victim impact statements from more than one "victim." Hoskins v. Maricle, 150 S.W.3d 1, 26 (Ky. 2004); Sherroan v. Commonwealth, 142 S.W.3d 7, 24 (Ky. 2004); Brand v. Commonwealth, 939 S.W.2d 358, 360 (Ky.App. 1997). The only time there appears to be a limitation on the circuit court's ability to hear such evidence is if the Commonwealth chooses to present victim impact evidence through live testimony during the

sentencing phase of a defendant's trial. See Terry v. Commonwealth, 153 S.W.3d 794, 805 (Ky. 2005).

The judgment against Epperson is affirmed.

ALL CONCUR.

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