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Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-002200-MR

ELMER SMITH, JR. APPELLANT

APPEAL FROM BREATHITT CIRCUIT COURT
v. HONORABLE W. LARRY MILLER, JUDGE
INDICTMENT NO. 04-CR-00013-003

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: TAYLOR, JUDGE; ROSENBLUM,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

ROSENBLUM, SENIOR JUDGE: Elmer Smith, Jr. appeals from his August 2004 conviction for second degree assault by a Breathitt Circuit Court jury. The trial court sentenced Elmer, Jr. to five years confinement. Finding no error, we affirm.

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[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

On October 12, 2003, Clark Waterson and Russell Pelphrey, Jr. were watching Waterson's son as he rode a four-wheeler on the family's property. Waterson allegedly observed several trespassers on his property at that time, including Elmer, Jr.'s brother, Anthony. Waterson asked the men to leave his property and all complied except Anthony. Waterson and Anthony allegedly engaged in a brief physical confrontation, ending with Anthony's departure toward the home of his father, Elmer Smith, Sr. A short while later, Anthony returned to the area by pickup truck with his father, Elmer, Sr., and brother, Elmer, Jr. Elmer, Sr. was allegedly driving while Anthony and Elmer, Jr. were on the back of the truck wielding a stick and claw hammer, respectively.

As the truck neared, the Smith clan allegedly began attacking Waterson. Elmer, Sr. allegedly struck Waterson in the back with a four-foot carpenter's level. Upon seeing his friend assaulted, Pelphrey intervened and prevented Elmer, Sr. from further striking Waterson with the level. Elmer, Sr. allegedly then struck Pelphrey with the level as well. Elmer, Jr. allegedly struck Waterson in the back of the head with the claw hammer. Elmer, Sr. ran to the truck and retrieved a gun. As Elmer, Sr. began waving the gun around, he told Anthony and Elmer, Jr. to get in the truck. Elmer, Sr. and sons then fled the scene in the pickup truck.

On February 6, 2004, a Breathitt County grand jury indicted Elmer, Jr. with second degree assault[3]. In August 2004, a jury trial was held on the charges and Elmer, Jr. was found guilty as charged. On September 24, 2004, the trial court entered its judgment of conviction and sentenced him to five years. This appeal followed.

Elmer, Jr. argues that there was insufficient evidence to convict him of second degree assault because the evidence failed to show that he used or threatened to use an instrument in a manner capable of causing death or serious physical injury to Waterson. We disagree.

KRS 508.020 defines one type of second degree assault as the intentional infliction of physical injury on another by means of a dangerous instrument. A dangerous instrument is defined as any instrument which under the circumstances in which it is used or attempted to be used or threatened to be used is readily capable of causing death or serious physical injury. See KRS 500.080(3); Commonwealth v. Potts, 884 S.W.2d 654, 656 (Ky. 1994).

Here, both Waterson and Pelphrey testified that Elmer, Jr. struck Waterson with a metal claw hammer. Regarding the injuries received, Waterson testified that he was struck in the

[3] KRS 508.020. Elmer, Jr. was originally indicted with two counts of second degree assault, but, upon the Commonwealth's motion, the trial court ordered that the second count of the indictment pertained only to Elmer, Sr.

back of the head with the hammer and suffered scarring from the attack. Such testimony, standing alone, is sufficient to support a guilty verdict for second degree assault. See Commonwealth v. Suttles, 80 S.W.3d 424, 426 (Ky. 2002)(testimony of single witness is sufficient to support guilty finding, even in the face of contrary witnesses, if after considering all the evidence, the fact finder assigns it greater weight).

Elmer, Jr. also contends that because the level was not introduced into evidence that the jury could not properly consider whether it was a “dangerous instrument” as contemplated under the statute. We disagree. Whether an instrument or object is a dangerous instrument is a question of fact to be determined by the jury. Potts, 884 S.W.2d at 656. Sufficient evidence was presented to the jury in order for it to make a “dangerous instrument” determination. Pelphrey testified that the claw hammer had a steel handle with straight, sharp claws and was of the type used for “hammering houses.” Such evidence regarding the hammer and the manner in which it was used easily satisfies the statutory definition of a “dangerous instrument.” The fact that the actual claw hammer was not presented to the jury was not prejudicial.

Elmer, Jr. also argues that the Commonwealth’s reference to the items used to attack Waterson and Pelphrey as “weapons” constituted reversible error. We disagree. At trial,

the Commonwealth referred to the stick, claw hammer and level as weapons during its examination of witnesses and during closing argument. Elmer, Jr. argues that the Commonwealth's reference to the items as weapons amounted to prosecutorial misconduct. An objection was made to the Commonwealth referring to the items as weapons during the case in chief and the Commonwealth rephrased its question, without an admonition given to the jury. However, Elmer, Jr. did not object to the Commonwealth's use of the term "weapon" during its closing argument. We note that Elmer, Jr. did not properly preserve the issue of error in the closing argument and is thus not subject to appellate review.[4] However, even if the issue had been properly preserved, we would still be unable to find reversible error under these facts.

To warrant reversal, prosecutorial misconduct "must be so serious as to render the entire trial fundamentally unfair." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). Upon review, we "must focus on the overall fairness of the trial, and not the culpability of the prosecutor." Slaughter v. Commonwealth, 744 S.W.2d 407, 411-412 (Ky. 1988). In light of the fact that no demonstrable prejudice to Elmer, Jr. was shown, we are unable to say that his trial was rendered fundamentally unfair. We therefore affirm.

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[4] See RCr 9.22.

For the foregoing reasons, we affirm the judgment of the Breathitt Circuit Court.

ALL CONCUR.

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