

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000251-MR

DONOVAN KORNEGAY

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 08-CR-00508

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: VANMETER, ACTING CHIEF JUDGE; COMBS AND KELLER,
JUDGES.

COMBS, JUDGE: Donovan Kornegay appeals from his conviction in Kenton
Circuit Court for second-degree possession of a forged instrument. After our
review of the record and the law, we affirm.

Mary Billings was the manager of Wetlands, Inc., a business in
Cincinnati, Ohio. On May 18, 2008, she obtained two checks from her employer

in order to pay rent and to order supplies the next day. The rent check was completely filled in, but the check for supplies was blank except for the business owner's signature. That evening, Billings lost her wallet, which contained the two Wetlands checks. After discovering unauthorized charges on her debit card, she reported to the Covington Police Department that her wallet and its contents were stolen.

On May 27, 2008, Kornegay went to Check Smart in Erlanger, Kentucky, and submitted a Wetlands check to be cashed. It was the blank check that had been signed by the owner. It was made out to Kornegay for the amount of two hundred dollars. Kornegay filled out an application in which he provided his name, address, Social Security number, phone number, and references; he also submitted his driver's license. When the cashier called Wetlands, she was asked not to cash the check. She then contacted the Erlanger Police Department to report a possible forged check; she asked Kornegay to wait in the lobby.

When officers from the Erlanger Police Department arrived, Kornegay was still waiting in the lobby of Check Smart. During questioning, Kornegay told the officers that he had received the check in exchange for performing some clean-up work. However, he was unable to provide the name, phone number, or address of the person for whom he had worked. The police then arrested Kornegay. In July 2008, he was indicted on one count of possession of a forged instrument in the second degree.

A jury trial was conducted in December 2008. The jury found Kornegay guilty of second-degree possession of a forged instrument. This appeal follows.

Kornegay's sole argument is that the Commonwealth improperly referred to the unauthorized charges on Billings's debit card during opening and closing arguments. Kornegay had not been charged with any offense related to the debit card.

Our courts have given prosecutors considerable leeway in conducting closing arguments. *Berry v. Commonwealth*, 84 S.W.3d 82, 90 (Ky. App. 2001). This latitude generally pertains to the manner in which they may comment on the evidence that was presented. Kornegay correctly asserts that a prosecutor is not permitted to introduce facts that were not submitted to the jury as evidence. *Bowling v. Commonwealth*, 279 S.W.2d 23, 24 (Ky. 1955). *Maxie v. Commonwealth*, 82 S.W.3d 860, 866 (Ky. 2002). We may reverse only if the "alleged prosecutorial misconduct is so egregious as to render the trial fundamentally unfair." *Berry, supra.* (quoting *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996)). Our standard of review is based on the overall fairness of the trial. *Commonwealth v. Petrey*, 945 S.W.2d 417, 419 (Ky. 1997) (quoting *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1988)).

The Kentucky Supreme Court has provided a three-pronged test to determine if prosecutorial conduct during closing arguments results in an unfair trial:

- 1) proof of defendant's guilt is not overwhelming;
- 2) defense counsel objected; and
- 3) the trial court failed to cure the error with a sufficient admonition to the jury.

All three conditions must be satisfied. *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002). (citing *U.S. v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994) and *U.S. v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979)).

During the opening statement in this case, the Commonwealth observed that Billings discovered unauthorized charges of six hundred dollars (\$600) on her debit card. It made reference again to those charges during closing argument. In her testimony, Billings did not mention the unauthorized debit card charges. Therefore, the charges were never submitted to the jury as evidence.

However, despite the unnecessary and inappropriate reference to the charges during opening statement and closing argument, we are persuaded that Kornegay received a fair trial. The court engaged the jury in a very thorough and easily understood discussion concerning what constitutes evidence. More than once, it instructed the jury that opening and closing arguments are not evidence and are not to be included as a factor in deliberations. Furthermore, the reference to the debit card charges was very brief and fleeting, consisting of one sentence presented to establish the context of how Billings had discovered the theft of her wallet and its contents. The Commonwealth's closing argument lasted for a total of seventeen minutes. It focused on the evidence relating to the check. The Commonwealth never suggested that Kornegay had made the debit card charges.

Furthermore, Kornegay did not object to the reference to the debit card during the Commonwealth's opening argument. If the objecting party has failed to object to an earlier, similar statement made during the course of the trial, his subsequent objection to a statement during closing argument is deemed waived and cannot be sustained. *Ward v. Martin*, 147 S.W.2d 1027 (Ky. 1941), long ago held that consistency in raising such an objection is required. Any error is deemed to be harmless.

Additionally, we are persuaded that Kornegay fails to meet the first prong of the *Barnes* test. The evidence of guilt was overwhelming in this case. Kornegay filled out an application and presented his ID to the cashier at Check Smart. He was still on the Check Smart premises when the police arrived. Kornegay never produced the person who allegedly had paid him; nor did he ever provide any specific information about that alleged employer. He established no connection with Wetlands to suggest that he had been authorized either to be in possession of or to cash one of their checks. All prongs of the *Barnes* test must be satisfied in order for prosecutorial misconduct to be deemed sufficient to have rendered a trial unfair. As the first is clearly missing, we need not discuss the other two prongs.

We are satisfied that the record reflects the overall fairness of Kornegay's trial. We do not conclude that any trial error substantially affected his rights. Therefore, we affirm the Kenton Circuit Court.

ALL CONCUR.

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