

RENDERED: October 31, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3044-MR

WILLARD CUMMINS

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 96-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: GUDGEL, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment convicting appellant of first-degree robbery. Upon reviewing appellant's arguments, the record herein and the applicable law, we affirm.

The evidence established that on November 26, 1995, appellant, Willard Cummins, arrived at Ralph's Food Mart with his friends, McClayne Troxtell, Phillip Greer and Eddie Adams. Troxtell was driving as they pulled into the food mart to talk to Chris Adams. Appellant jumped out of the red Geo Tracker and entered Ralph's Food Mart wearing a toboggan and holding a knife. The time was approximately 5:10 - 5:15 p.m. and Andrea Ridner,

the cashier, had two register drawers open as she was doing the "countdown" to get ready for the 6:00 p.m. shift. Appellant brandished the knife and threatened to cut Ridner if she didn't give him the money from the registers. Appellant put the money into a plastic bag and then quickly ran out the front door of the food mart. Ridner then called her manager and 911 to report the robbery.

After appellant exited the food mart, Chris Adams chased after him. At some point, appellant turned around to face his pursuer, threw the money down and ran away. Chris Adams returned to the food mart with the money.

Shortly thereafter, the police arrived at Ralph's Food Mart to investigate the robbery. Sam Catron, the Pulaski County Sheriff, brought in a canine to track appellant's scent. The canine tracked appellant's scent to a dental office parking lot which was directly across the street from appellant's residence.

On January 23, 1996, appellant was indicted on one count of first-degree robbery. Pursuant to a jury trial on October 2, 1996, appellant was found guilty of first-degree robbery and was sentenced to ten (10) years' imprisonment. This appeal followed.

Appellant's first assignment of error is with regard to a remark made by a prospective juror in response to a question on voir dire, which appellant maintains tainted the jury panel. During voir dire, the following exchange occurred between the court and the prospective juror in question, Marcus Baker:

THE COURT

And how have you - in what way were you acquainted or are you acquainted with Mr. Cummins?

PROSPECTIVE JUROR BAKER

Through work.

THE COURT

Through work?

PROSPECTIVE JUROR BAKER

Yes.

THE COURT

Do you all work at the same place or does he . . .

PROSPECTIVE JUROR BAKER

He did.

THE COURT

Okay. How long has it been since you've worked in the same place with him?

PROSPECTIVE JUROR BAKER

It was about a month or two before he done this, I'd say.

THE COURT

About a month or two before this came up?

PROSPECTIVE JUROR BAKER

Yeah.

THE COURT

Were you friends or acquaintances with him during that time?

PROSPECTIVE JUROR BAKER

Yeah, we was good friends.

Baker was dismissed for cause. Thereafter, appellant moved for a mistrial contending that Baker's comment that appellant had worked with Baker "about a month or two before he done this" raised the idea in the jury's mind that appellant had talked to Baker and had told Baker he had committed the robbery. The court offered to give an admonition, but appellant's counsel declined the offer, stating he felt that would just make things worse. The court then denied the motion for mistrial, reasoning that he could give a direct admonition that would cure any taint and that the jury would be indirectly admonished when they are instructed to only consider the evidence presented at trial.

A mistrial should be granted only where manifest, urgent or real necessity for such action is shown. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985), cert. denied by 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986). A trial court has discretion in deciding whether or not to grant a mistrial and its decision will not be disturbed absent an abuse of that discretion. Jones v. Commonwealth, Ky. App., 662 S.W.2d 483 (1983).

In the present case, appellant's counsel refused the court's offer of an admonition as a matter of trial strategy because he did not want further attention to be drawn to the comment. That decision was certainly appellant's prerogative.

See Hall v. Commonwealth, Ky., 817 S.W.2d 228 (1991), overruled on other grounds by Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996). However, we believe that such an admonition in this case could have minimized any possible prejudice from the prospective juror's utterance. Thus, appellant cannot now complain that he was prejudiced by the comment. Stoker v. Commonwealth, Ky., 828 S.W.2d 619 (1992).

In any event, we do not see that the remark in question, although in no way favorable to appellant, rose to the level that it warranted a mistrial. In reviewing the record, we see that the court immediately attempted to rephrase the remark for the prospective juror by stating, "About a month or two before this came up?" (Emphasis added.) We believe this helped to clarify the statement and minimize any prejudice. As the trial court also noted in denying the motion for mistrial, the jurors were given the standard instruction that they must only consider the evidence presented at trial. There is nothing in the record to suggest that they did otherwise. Accordingly, the court did not abuse its discretion in denying the motion for mistrial.

Appellant next argues that the trial court erred when it failed to grant appellant's motion to strike another juror for cause when there was evidence that said juror was biased. During voir dire, the prospective juror in question, Michael Simpson, explained that he had been a victim of a theft and of an attempted burglary. He further stated that he had some bitter

feelings and "wasn't a hundred percent sure he could be unbiased." The following exchange then occurred between the court and Mr. Simpson:

THE COURT: Well, the question is would you be able to separate your feelings about the people who committed those offenses and judge the evidence in this case.

PROSPECTIVE JUROR SIMPSON: I think I can. I just wanted to bring it all out. I've got some bitter feelings that lay back in there. I'd like to think I could keep them down, you know.

THE COURT: Well, it would be your duty as a juror to consider only the evidence that's presented, and obviously, you know, everybody is opposed to crime or should be.

PROSPECTIVE JUROR SIMPSON: I'll do my best.

THE COURT: That's why robbery is illegal. But you have to be able to separate that opposition to crime from the question of whether Mr. Cummins committed this particular offense or whether he didn't commit it. As you say, it may pose a special burden to you because you have feelings about being robbed or being burglarized. I don't remember what your experience exactly was, but are your feelings about that so strong that it would prevent you from . . .

PROSPECTIVE JUROR SIMPSON: I believe I can make it. You know, I'll work hard and make a decision and pay a lot of attention. I just wanted to make everybody aware that it had happened to me in the past.

Simpson then went on to say that the crimes of which he was a victim happened long enough ago that he didn't really think about them anymore. When appellant's counsel asked Simpson if his problem was strong, Simpson responded:

No, it's not. It wouldn't be a problem or anything. Like I say, I'll give it a hundred

percent of my attention. I just wanted everybody to be aware of it, that it happened to me and everything. I believe I can separate it.

The trial court is allowed considerable discretion in excusing prospective jurors. Harman v. Commonwealth, Ky., 898 S.W.2d 486 (1995). In reviewing the record, we cannot say the trial court abused its discretion in refusing to strike juror Simpson for cause. The court impressed upon the juror the need to be able to separate his feelings regarding the crime of which he was a victim from those regarding the crime in the case at hand. The juror ultimately indicated that he could so separate those feelings. Nevertheless, any possible error attributable to the failure to strike Simpson was harmless since Simpson was eventually struck from the panel with one of appellant's peremptory challenges.

Appellant's final argument is that the trial court erred when it overruled appellant's objection to a certain statement made by the Commonwealth in its closing argument. During the trial, Sheriff Sam Catron testified that his police dog followed a scent from outside the crime scene to the parking lot of a dental office which was directly across the street from appellant's residence, where appellant allegedly fled after committing the robbery. During the Commonwealth's closing, the prosecutor stated that the robber came out of the store and was tracked directly to his house. Appellant objected on grounds that it was a misstatement of fact as the Sheriff had testified

that the scent was lost at the dental office parking lot across the street from appellant's house, and not at appellant's house.

The prosecution should confine its argument to the facts and evidence and reasonable inferences which can be derived therefrom. Caretenders, Inc. v. Commonwealth, Ky., 821 S.W.2d 83 (1991). An appellate review of alleged prosecutorial misconduct must center on the overall fairness of the entire trial. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). "In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." Partin, supra at 224, citing Summitt v. Bordenkircher, 608 F. 2d 247 (6th Cir. 1979).

We do not view the statement of the prosecutor in question as rising to the level of prosecutorial misconduct. While it may have been a slight exaggeration to say that the trail ended at appellant's house rather than at the parking lot directly across the street from appellant's house, the jury heard the actual evidence on which the comment was based. Thus, the slight misstatement was not so serious as to render the entire trial fundamentally unfair.

For the reasons stated above, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

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