

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000802-MR

DOROTHY M. SLATON

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 01-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Dorothy Slaton appeals from a judgment of the Henderson Circuit Court sentencing her to ten years in prison after she was convicted by a jury of complicity to commit manslaughter in the second degree. On appeal, she argues that several trial errors warrant the reversal of her conviction. We disagree and thus affirm.

During the fall of 2000, the appellant moved from her home in Illinois to Henderson, Kentucky. There, she took up

residence in a single room at the Holiday Motel with her five children: Ashley, Patricia, Nathan, Larry, and Amber.¹ Patricia, age 13, was mentally handicapped, and there was evidence that Larry, age 5, also had some mental difficulties. Her eldest daughter, Ashley, had a boyfriend, Michael Anderson, who also lived with the appellant and her children. During the time Anderson lived with them, he was considered to be a member of the family and it was not unusual for the appellant to leave her children with him while she would run errands.

While shopping for Christmas presents with Ashley and Amber in late December, the appellant left Patricia, Nathan, and Larry with Anderson. When she returned later that afternoon, the appellant found Anderson very upset because Patricia had eaten the last piece of bread. As punishment for her actions, Anderson placed Patricia "on the wall". In other words, she was forced to sit against the hotel room wall "military style" without a chair beneath her to support her body weight.

Patricia was on the wall for more than five hours that evening. Eventually, she grew weary from Anderson's punishment and fell asleep. In order to wake her, Anderson "bodyslammed" Patricia into a bag of clothing lying on the floor. A short time later, however, Patricia again drifted to sleep and fell

¹Amber was born on December 2, 2000, after the move to the Holiday Motel.

into Anderson's Playstation video game system. Furious, Anderson picked Patricia up for another bodyslam. Crying, Patricia pleaded with Anderson to stop. Despite her pleas, however, Anderson kicked the bag of clothing out of the way and slammed Patricia onto the floor. Her head struck the floor, and she immediately lost consciousness. Patricia was transported to the hospital where she died several days later.

During the subsequent investigation of Patricia's death, the appellant spoke with the police several times. Initially, she told police that Patricia had been injured while playing with Ashley and Nathan. However, the appellant eventually recanted her original account of Patricia's death and told police that her daughter's injuries were inflicted when Anderson bodyslammed her to the hotel room floor. During her confession, the appellant further stated that she did nothing to stop Anderson from slamming Patricia, that she had purchased drugs and alcohol for Anderson that evening, and that she was awake during the entire incident. The appellant's confession was recorded on audiotape, and the contents were later transcribed by police.

After making her confession, the appellant was charged by a Henderson County grand jury with murder. The indictment charged that the appellant committed the offense by failing to

make proper efforts to prevent Patricia's murder. Subsequently, the appellant was convicted of the lesser-included offense of complicity to commit manslaughter in the second degree and was sentenced to ten years in prison. This appeal followed.

The appellant first contends that the trial court should not have allowed Detective John Nevels to testify as to the contents of her statement to the police. More specifically, she claims that the audiotape of her statement constituted the "best evidence" of the admissions she had made. While on the stand, Detective Nevels could not remember portions of the appellant's statements. Therefore, he referred to and read from portions of a transcript of the appellant's taped confession. Despite her claim of error on appeal, the appellant failed to raise an objection to Detective Nevels' use of the transcript at trial.

RCr² 9.22 provides that a litigant must contemporaneously object to an alleged error in order to preserve the issue for appeal. Tucker v. Commonwealth, Ky., 916 S.W.2d 181, 183 (1996). Absent special circumstances, this court may not review those errors that are not preserved for appellate review. Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 796 (1995). The record shows that the appellant failed to raise

²Kentucky Rules of Criminal Procedure.

any objection to Detective Nevels' use of the transcript at trial. Thus, the appellant's first claim of error is not a proper subject for appellate review.

However, this court may consider the merit of the appellant's claim pursuant to RCr 10.26. RCr 10.26 provides that an unpreserved error may be reviewed and appropriate relief granted where a *manifest injustice* has resulted from the claimed error. West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989). (Emphasis added.) However, the rigors of RCr 10.26 are met only when "the error . . . seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997), citing U.S. v. Filani, 74 F.3d 378 (2nd Cir. 1996).

The crux of the appellant's first argument rests with the holding of Arthur v. Commonwealth, Ky., 307 S.W.2d 182 (1957). In Arthur, the accused signed a written confession prior to trial. This statement was subsequently used by the Commonwealth in the questioning at trial of a detective who had been present during Arthur's confession. Arthur's counsel had no prior knowledge of his client's confession and when counsel moved for its production the Commonwealth refused. The Commonwealth's refusal was later sustained by the trial court. Ultimately, the court reversed by reaffirming the well established rule that "courts will not receive oral testimony of

a particular fact where there is a written record or evidentiary document which is in possession of the party offering the evidence or which is otherwise available." Id. at 186, citing Louisville & N. R. Co. v. McCoy, Ky., 197 S.W. 801, 805 (1917).

The court's holding in Arthur was later clarified in Hopper v. Commonwealth, Ky., 516 S.W.2d 855 (1974), which involved similar facts. After being arrested, Hopper was interrogated twice by police officers. During the second interrogation, a stenographer transcribed a summary of relevant facts elicited from Hopper during the session. This summary was signed by the accused and was considered to be a confession by all parties involved. At trial, counsel for both the Commonwealth and Hopper used the statement when examining a police detective who had been present during the confession. After being convicted of manslaughter, Hopper appealed arguing that the police detective's testimony should have been excluded under Arthur.

The court disagreed. In its opinion, the court stated that "Arthur simply stands for the proposition that a written statement by a defendant in a criminal action must be introduced into the evidence if it is to be used at the trial, and to permit a witness to testify as to the contents of the statement is a violation of the best evidence rule." Hopper, 516 S.W.2d at 858. However, the court further explained that the factual

circumstances surrounding the written statement therein were entirely different than those giving rise to the court's holding in Arthur. Most notably, the court distinguished the two cases because Hopper's counsel had been provided with a copy of the confession prior to trial and had used the transcript during cross-examination of the police detective. 516 S.W.2d at 858. Moreover, the court also found no reason why Hopper's counsel himself could not have introduced the statement into evidence. Id.

For the same reasons articulated by the court in Hopper, Arthur has no application in the present case. The record clearly shows that the appellant was provided with both a taped and transcribed copy of her confession before trial. At trial, the transcript was used by the appellant to extensively cross-examine Detective Nevels regarding the content of her confession. Although the tape of the appellant's confession was introduced into evidence, the appellant chose never to use the tape at trial. As such, the appellant has not shown that the error supporting the court's decision in Arthur is applicable. Thus, her claim in this regard is without merit.

The appellant's second argument is that seven separate instances of prosecutorial misconduct by the Commonwealth

resulted in a fundamentally unfair trial.³ In considering alleged claims of prosecutorial misconduct, this court "must determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right to a fair trial." Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411 (1987), citing Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Moreover, "when prosecutorial misconduct is claimed, the relevant inquiry on appeal should always center around the overall fairness of the trial, not the culpability of the prosecutor." Maxie v. Commonwealth, 82 S.W.23d 860, 866 (2002), citing Commonwealth v. Petrey, Ky., 945 S.W.2d 417 (1997); Slaughter, supra.

The appellant first claims that the Commonwealth improperly commented on her silence when it posed the following question to the prospective jurors during voir dire:

Do you understand that the defendant has a right to testify or not to testify, depending upon what she wants to do, based upon her advice from counsel? Do you understand that if the defendant does not testify, she is presumed innocent, but she is not presumed truthful?

The appellant argues that implicit within the Commonwealth's question is the assertion that a defendant is presumptively guilty if she fails to testify on her own behalf.

³Of the seven alleged instances, only the first was preserved for appellate review by the making of a contemporaneous objection.

In order to constitute error, "[a] prosecutor's comment on the failure of a defendant to testify must be manifestly intended to reflect on the accused's silence or of such a character that the jury would naturally and necessarily take it as such to constitute prejudice." Byrd v. Commonwealth, Ky., 825 S.W.2d 272 (1992), overruled on other grounds by Shadowen v. Commonwealth, Ky., 82 S.W.3d 896 (2002), citing Bagby v. Sowders, 894 F.2d 792 (6th Cir. 1990). Moreover, "[t]he court will not find manifest intent if some other explanation for the prosecutor's remarks is equally plausible." Lent v. Wells, 861 F.2d 972, 975 (6th Cir. 1988).

The appellant's argument on this issue is unconvincing. It cannot be said that the Commonwealth's comment was manifestly intended to convince jurors that the appellant's presumption of innocence was conditioned upon her taking the stand. Indeed, other purposes for the Commonwealth's comment are equally plausible. Thus, the appellant's first claim of prosecutorial misconduct is without merit.

The appellant further claims that the Commonwealth improperly characterized itself as representing the victim during its closing argument.⁴ The appellant is correct in her assertion that the Commonwealth's Attorney does not represent the victim. An indictment is brought in the name of the Commonwealth for

⁴ The appellant's claim of error lies with the following statement made by the Commonwealth during its closing argument: "Ladies and Gentlemen of the jury, on behalf of the Commonwealth of Kentucky, the citizens of Henderson County, and those who knew and loved Patricia Gordon, I want to thank you for your time, your attention - being involved in this particular case." Later in its argument, the Commonwealth referenced that fact that it had been "fighting for Patricia Gordon" during trial.

offenses "against the peace and dignity" of the Commonwealth. Abramson, KENTUCKY PRACTICE, § 12.5 (1997). Indeed, the "peace and dignity" violated by the alleged acts of an accused is that of all the citizens of the Commonwealth. Pillersdorf v. Dep't of Pub. Advocacy, Ky., 890 S.W.2d 616, 626 (1994). As such, the Commonwealth's Attorney prosecutes a case on behalf of the entire state.

Despite her correct assertion of the law, the facts of the present case do not support the appellant's claim. Although he referenced Patricia Gordon throughout his closing argument, the record clearly indicates that the Commonwealth's Attorney was representing the interests of the citizens of Kentucky at trial. Thus, the appellant's claim is without merit.

The appellant further claims that the Commonwealth improperly appealed to the community at large during its closing argument. More specifically, the appellant claims that she was prejudiced when the Commonwealth urged the jury to "[l]et's do our duty" during its closing argument. A prosecutor may call on a jury to do its duty. Woodall v. Commonwealth, Ky., 63 S.W.3d 104, 124 (2002). Thus, the appellant's claim is without merit.

The appellant further contends that the Commonwealth improperly defined "reasonable doubt" during voir dire.⁵ It is

⁵ During voir dire, the Commonwealth posed the following question to the prospective jurors: "Do each of you all understand that a defendant is presumed innocent until proven guilty, beyond a reasonable doubt? Do each of you all agree that's the proper standard and understand that to be the case? Do each of you all understand and agree that the Commonwealth does not have to prove that the defendant is guilty beyond all doubt? You understand that

well established that "trial courts shall prohibit counsel from any definition of 'reasonable doubt' at any point in the trial". Commonwealth v. Callahan, Ky., 675 S.W.2d 391, 393 (1984).

(Emphasis added.) However, it is permissible for the Commonwealth to clarify for the jury that it should not hold the Commonwealth to a higher standard. Simpson v. Commonwealth, Ky., 759 S.W.2d 224, 226 (1988). The Commonwealth explains that its comments were intended to do just that. As this is a plausible explanation, it cannot be said that the Commonwealth acted improperly just because it used the term "reasonable doubt" in its question.

The appellant further claims that the Commonwealth used sensationalizing tactics similar to those found to constitute error in Dean v. Commonwealth, Ky., 777 S.W.2d 900 (1989), during its closing argument.⁶ It is well established

as well? We do not have to prove that Ms. Slaton is 100%, for sure, beyond a doubt, guilty, beyond all doubt. Understand that and agree with that? Is there anyone here who could not return a verdict of guilty, unless they were 100% sure?"

⁶ The appellant claims error in the following statement made by the Commonwealth: "'I remember when I first read about this case, when I was first given the file - and it has always haunted me, reading it, the proof that you heard here these last two days - not just as a prosecutor, but as a parent of three boys. And the thing that I haven't been able to get out of my mind, from the day I first got this case, is this thoughts - this picture - of Patricia Gordon, in a hotel room crowded with junk, crowded with her family as well. Patricia Gordon being picked up by somebody who shouldn't even have been in her life - that her mother should have kicked out of her home - being picked up, being taken off of her feet and falling back, and as she's falling back, looking at for the last time - glancing at her world, which was basically Room 148 of the Holiday Motel - and as she's falling back, looking at that for the last time, thinking to herself, 'why won't anyone help me?' and 'where's my mom?'"

that "[t]he remarks of a Commonwealth's Attorney to cajole or coerce a jury to reach a verdict is error." Lycans v. Commonwealth, Ky., 562 S.W.2d 303, 306 (1978). Moreover, the Kentucky Supreme Court has "disapproved sensationalizing tactics which tend to pressure the jury to a verdict on considerations apart from evidence of the defendant's culpability." Clark v. Commonwealth, Ky., 833 S.W.2d 793, 797 (1991), citing Dean, 777 S.W.2d 900 (1989). In Dean, the Commonwealth Attorney's "impermissible glorification of the victim" coupled with the "sensationaliz[ation] of the victim's suffering" unduly prejudiced the defendant's right to a fair trial. 777 S.W.2d at 904. However, the record does not indicate the use of any such tactics in the present case.

As the Kentucky Supreme Court noted in Slaughter, supra, "[g]reat leeway is allowed to both counsel in a closing argument. It is just that - *an argument*. A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Id. at 412. The Commonwealth's statement did little to pressure the jury to decide the appellant's culpability on considerations apart from those formally introduced into evidence. As such, the Commonwealth's remarks were well within the bounds of a proper closing argument. Thus, the appellant's claim is without merit.

The appellant also claims that the Commonwealth improperly placed her in a bad light when it stated that she was not working and was living off of Social Security Disability funds provided for two of her children. It is true that "[c]ounsel should avoid saying anything designed as, or having the effect of, an appeal to the social class, or sectional prejudices of the jury." Taulbee v. Commonwealth, Ky., 438 S.W.2d 777, 779 (1969). Such was not the purpose of the Commonwealth's comments. Indeed, evidence of the appellant's financial situation was introduced during trial. Thus, it was clearly proper for the Commonwealth to comment on the evidence. The appellant's claim is without merit.

Next, the appellant claims that the Commonwealth improperly encouraged the jury to consider sentencing her to the maximum punishment available. "The Commonwealth's Attorney is allowed reasonable latitude in argument to persuade the jurors that the matter should not be dealt with lightly." Lynem v. Commonwealth, Ky., 565 S.W.2d 141, 145 (1978), citing Harness v. Commonwealth, Ky., 475 S.W.2d 485 (1972); Richards v. Commonwealth, Ky., 517 S.W.2d 237 (1974). Moreover, it is not improper for a prosecutor to provide the jury with his interpretation of the evidence and subsequently recommend a punishment. Woodall, 63 S.W.3d at 124. In the present case, the Commonwealth's comments regarding sentencing were within the

realm of proper argument. Thus, the appellant's claim is without merit.

In her final argument, the appellant claims that the Commonwealth violated RCr 7.24 when it failed to notify her that a page was missing from the transcript previously provided to her before trial. Under RCr 7.24 the obligation to disclose evidence rests squarely upon the shoulders of the attorney for the Commonwealth. Jefferson County Commonwealth Attorney's Office v. Kaplan, Ky., 65 S.W.3d 916 (2001). Indeed, where additional material previously requested is discovered prior to or during trial, the plain language of RCr 7.24(8) requires the discoveror to promptly notify the opposing party, counsel for the opposing party, or the court. RCr 7.24(8). The record clearly indicates that the Commonwealth produced both an audiotape and typed transcript of the appellant's confession before trial. The fact that a single page was missing from the transcript is a minor oversight that failed to harm the appellant as the audiotape contained a complete account of the appellant's confession.

Despite the weight of the record, however, the appellant argues that Anderson v. Commonwealth, Ky., 864 S.W.2d 909 (1993), requires that she be afforded a new trial. Anderson stands for the proposition that where discoverable material

exists, the Commonwealth is obligated to produce the material regardless of whether the prosecuting attorney has personal knowledge that the material exists. Id. at 912. As the court noted in Anderson, “[i]t is no answer to say the Commonwealth Attorney is ‘unaware’ of a statement, if the statement was taken by the investigating officer in charge of the case. In such circumstances the knowledge of the detective is the knowledge of the Commonwealth.” Id.

However, the appellant’s application of Anderson is misplaced. The record indicates that the appellant was timely provided with both an audiotape and a transcript of her confession. Although the transcript was missing a small portion of her statement, the audiotape contained a record of her confession in its entirety. It cannot be said that the appellant was prejudiced in any way by the Commonwealth’s failure to notify her that the transcript was incomplete. Thus, the appellant’s final argument is without merit.

For the foregoing reasons, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia K. Pearson
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Carlton S. Shier, IV

Assistant Attorney General
Frankfort, Kentucky