

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001476-MR

JASON WESLEY OWEN

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 01-CR-00236-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

DYCHE, JUDGE: Jason Wesley Owen appeals from a judgment and sentence of imprisonment entered by the McCracken Circuit Court after a jury found him guilty of criminal facilitation to fraudulent use of a credit card over \$100.00 and receiving stolen property over \$300.00. Owen was sentenced to a total of five years' imprisonment for these charges. We affirm.

On September 14, 2001, the McCracken County grand jury returned an indictment against Owen and Robert Murphy. Murphy was charged with fraudulent use of a credit card, receiving

stolen property over \$300.00, and being a persistent felony offender in the second degree. The grand jury charged Owen with complicity to fraudulent use of a credit card and receiving stolen property over \$300.00. This indictment stemmed from events occurring around July 19, 2001, wherein Murphy and Owen came into possession of rings and credit cards belonging to Scott and Carol Aycock that were taken from Carol's vehicle. The credit cards were eventually used at Wal-Mart stores in the Paducah area. After the grand jury returned this indictment, Murphy entered into a plea agreement with the Commonwealth agreeing to testify against Owen. Owen pled not guilty to the charges against him and proceeded to a jury trial.

Owen's trial commenced on March 13, 2002. At trial, two witnesses provided the most significant evidence against Owen. First, Carol Aycock testified that, on July 19, 2001, she discovered that her purse, which contained \$700.00 in cash, three rings, and several credit cards that belonged to both her and her husband, had been stolen from her vehicle. Carol immediately notified her husband, a sergeant for the Paducah Police Department, who immediately launched an investigation into this theft.

Fulfilling the terms of his plea agreement, Murphy testified on behalf of the Commonwealth during Owen's trial. Murphy stated that Owen picked him up at Murphy's residence on

July 19, 2001. After picking Murphy up, Owen informed Murphy that he was in possession of some rings and numerous credit cards belonging to the Aycocks. According to Murphy, Owen advised that he had obtained permission from the Aycocks to use these credit cards. Based upon Owen's assurances, Murphy traveled with Owen to a Wal-Mart store where Murphy purchased a \$200.00 Wal-Mart gift card and two drinks with one of the credit cards. After completing this transaction, Owen and Murphy left Wal-Mart and went to an apartment complex called SDA Apartments. While at SDA Apartments, Owen sold the gift card to a resident.

Murphy further testified that he returned to Wal-Mart with Owen later that evening. During this visit to Wal-Mart, Murphy used another credit card to purchase a \$250.00 gift card and some clothing for himself. Owen eventually sold this gift card as well. Murphy also testified that, after the Paducah police apprehended him during another visit to Wal-Mart, he led the officers to a dumpster where they found most of the stolen credit cards. Murphy acknowledged that, during the commission of these crimes, he was under the influence of cocaine.

Murphy also provided testimony concerning the rings. Owen informed Murphy that he wanted to dispose of the rings and asked Murphy if he knew anyone who would be interested in these items. Murphy suggested that they go see Christian Clemmons, more commonly known as Gomez. At this point, Owen called Gomez

and arranged a meeting at Happy's Chili Parlor. During this meeting, Murphy saw Owen give the rings to Gomez, but did not observe what Gomez gave to Owen in exchange. After being apprehended, Murphy called his wife and asked her to retrieve the rings from Gomez. Murphy's wife successfully retrieved the rings from Gomez and gave them to the police.

Based primarily upon Murphy's testimony, the jury found Owen guilty of the lesser-included charge of criminal facilitation to fraudulent use of a credit card, as well as the original charge of receiving stolen property over \$300.00. The trial court sentenced Owen to a total of five years' imprisonment pursuant to the jury's recommendations. This appeal followed.

On appeal, Owen presents six assertions of error for our review. First, Owen argues that reversible error occurred because the prosecutor misstated evidence and made inflammatory comments during closing arguments. Specifically, Owen objects to the prosecutor's statements that "if something is going to be done about the criminal underworld, juries have to do it" and that society is divided "between people who know the law, and respect it and obey it" and the "criminal underworld."

We note that there was no contemporaneous objection to the prosecutor's closing argument. As such, this issue is not properly preserved for our review. Absent contemporaneous

objections, prosecutorial misconduct is not grounds for reversal unless the acts complained of rise to palpable error. Justice v. Commonwealth, Ky., 987 S.W.2d 306, 316 (1998); Davis v. Commonwealth, Ky., 967 S.W.2d 574 (1998). Thus, we review this issue pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26 under the standards for palpable and substantial error.

The requirement of manifest injustice as used in RCr 10.26 means that the error must have prejudiced the substantial rights of the defendant in that, as a result of the error, a substantial possibility exists that the result of the trial would have been different. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996); Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981); Castle v. Commonwealth, Ky. App., 44 S.W.3d 790, 793-794 (2000).

Attorneys are granted wide latitude during closing argument. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 39 (1998), cert. denied, 525 U.S. 1153 (1999). A prosecutor may comment on the evidence, tactics, and on the falsity of a defense position. Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 854 (1999), cert. denied, 531 U.S. 1018 (2000); Tamme, 973 S.W.2d at 38. A prosecutor also may express an opinion based on the evidence. Derossett v. Commonwealth, Ky., 867 S.W.2d 195, 198 (1993); Slaven v. Commonwealth, Ky., 962 S.W.2d 845, 859 (1997). While a prosecutor may not encourage a verdict based on passion or

prejudice, Bush v. Commonwealth, Ky., 839 S.W.2d 550, 557 (1992), a prosecutor may make arguments related to deterrence based on grounds or reasons reasonably inferred from the evidence. See Caretenders, Inc. v. Commonwealth, Ky., 821 S.W.2d 83, 89 (1991) (citing Wallen v. Commonwealth, Ky., 657 S.W.2d 232, 234 (1983)). In order to justify reversal based on prosecutorial misconduct, the comments must be so serious as to render the entire trial fundamentally unfair. Partin, 918 S.W.2d at 224; Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411-412 (1987), cert. denied, 490 U.S. 1113 (1989). Generally, improper remarks by a prosecutor in closing argument will not render a trial fundamentally unfair if they would not have affected the outcome of the trial. See Slaughter, supra; Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 205 (1993).

We are not convinced that the comments by the prosecutor herein were improper or rendered Owen's trial to be fundamentally unfair. The evidence presented at trial, mainly Murphy's testimony implicating Owen in the events surrounding the unauthorized use and possession of the Aycocks' credit cards and rings, was sufficient for the jury to conclude that Owen was guilty of facilitating the fraudulent use of a credit card and receiving stolen property. The Commonwealth also introduced a videotape made by Wal-Mart's surveillance system which placed Owen and Murphy at the store prior to Murphy's use of the stolen

credit cards. Moreover, we believe that the prosecutor's statement that only juries could do something about the "criminal underworld" is proper in light of the Supreme Court's decision in Slaughter:

Appellant urges that the prosecutor coerced the jury to reach a verdict of guilty. He stated to the jury that he had done all he could do, that the police had done all they could do, that the judge had been fair and impartial, and "... now it's going to come your time to deal with justice in this particular case." This argument of appellant is little short of being specious. A prosecutor can ask the jury not to "let the officer down." Johnson v. Commonwealth, Ky., 446 S.W.2d 561 (1969). A prosecutor may call on the jury to do its duty. McPeak v. Commonwealth, 308 Ky. 29, 213 S.W.2d 447 (1948). A prosecutor may tell a jury that one way to stop murder is "for all of us to do our job...." Wallen v. Commonwealth, Ky., 657 S.W.2d 232 (1983). Under the parameters of these cases, it is obvious that the statement was proper.

Slaughter, 744 S.W.2d at 412.

Hence, we conclude that the prosecutor's closing argument did not render Owen's trial fundamentally unfair because there is no reasonable possibility that, but for those comments, the outcome of the trial would have been different.

Next, Owen asserts that the trial court erred by allowing the prosecutor to comment on Owen's failure to testify in his own behalf. Owen's primary trial strategy was to discredit Murphy and imply that Murphy committed the crimes

alone. Toward this end, Owen's counsel asked Murphy on cross-examination whether he drove Owen's car alone. Murphy replied that he did not use Owen's car on July 19, 2001. At this point, Owen's counsel asked Murphy, "No matter what anybody else says, you didn't use that car?" Murphy replied, "No matter what anybody else says." During closing argument, the prosecutor pointed out that Owen failed to call any witnesses to impeach or otherwise dispute Murphy's testimony.

We believe that the prosecutor's statements concerning Owen's inability to call witnesses to impeach Murphy's testimony did not directly address Owen's silence. The prosecutor's remarks only address Owen's failure to refute Murphy's testimony by any means. "A prosecutor may properly comment on the defendant's failure to introduce witnesses on a defensive matter.'" Weaver v. Commonwealth, Ky., 955 S.W.2d 722, 728 (1997)(citation omitted). Therefore, we reject Owen's argument as to this issue.

Third, Owen argues that the trial court improperly admitted Murphy's admission that he was under the influence of cocaine on the night of the crimes. Owen contends that Murphy's admission violated the trial court's prior ruling excluding proof that Owen traded the rings for drugs. We disagree.

Kentucky Rules of Evidence (KRE) 403 provides the trial court with the discretion to admit relevant evidence so

long as the prejudicial effect of the evidence does not outweigh its probative value. Here, since Murphy's credibility was a central issue, evidence relating to the truthfulness of Murphy's testimony is highly relevant. Accordingly, evidence of Murphy's cocaine use on the night of the crimes was relevant to explain Murphy's inability to recall certain details of the crimes.¹ Moreover, the trial court's ruling on Owen's motion in limine did not categorically exclude all drug-related evidence. The trial court's ruling merely prohibited the Commonwealth from introducing evidence that Owen traded the rings for drugs. Thus, we find no error in the trial court's decision to permit the Commonwealth to introduce evidence concerning Murphy's use of cocaine on July 19, 2001.

Next, Owen argues that the trial court erred by not allowing him to introduce an out-of-court statement made by Gomez wherein Gomez informed the Paducah police department that Murphy, not Owen, gave him the rings on July 19, 2001. At trial, Owen argued that Gomez's statement was admissible for impeachment purposes under an exception to the hearsay rule. On appeal, Owen asserts that the trial court's refusal to allow the introduction of Gomez's statement violated the confrontation clauses of the United States and Kentucky Constitutions. Since

¹ On cross-examination, Murphy was unable to recall the number of clothing items he purchased with the credit cards, where Owen sold the \$250.00 gift card, Murphy's exact location when he observed Owen giving Gomez the rings, or even what type of clothing Owen and Murphy wore on the night in question.

Owen has changed his grounds for appeal as to this issue, we need not address this argument. A party cannot present a new theory of error on appeal after specifying a different reason for his objection at trial. Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 75 (2000).

Fifth, Owen asserts that the trial court erred by refusing to permit his trial counsel to make an additional closing argument following the Commonwealth's closing argument. Owen's trial counsel desired to address the jury again in order to correct an error he made during his first closing argument. RCr 9.42(f) mandates that the Commonwealth address the jury last during closing arguments. Accordingly, Owen's argument is without merit because permitting him to address the jury again following the Commonwealth's closing argument would clearly violate RCr 9.42(f).

Finally, Owen contends that the trial court erred by ordering him to pay restitution in the amount of \$1,300.00 to Carol Aycock and by apportioning the restitution liability jointly and severally between Owen and co-defendant Murphy. Owen concedes that this issue is unpreserved. As such, we review this issue pursuant to RCr 10.26 for palpable and substantial error.

KRS 533.030(3) requires a court to order a defendant to make restitution to a crime victim when the victim has

"suffered monetary damage as a result of the crime due to his property having been converted, stolen or unlawfully obtained." Here, the jury found that Owen unlawfully received the Aycocks' credit cards and facilitated in Murphy's fraudulent use of those credit cards. Based upon the jury's findings, there is no question that KRS 533.030(3) requires the trial court to order restitution. KRS 533.030(3) also addresses the issue of apportionment of restitution between multiple defendants. According to this statute, "[w]here there is more than one (1) defendant . . . restitution may be apportioned." Thus, the apportionment of this restitution obligation jointly and severally between Owen and Murphy appears to be within the discretion of the trial court. Hence, we find no error.

The judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rebecca Ballard DiLoreto
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Matthew D. Nelson
Assistant Attorney General
Frankfort, Kentucky