

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000975-MR

JIMMY MASON

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 04-CR-00089

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Jimmy Mason has appealed from the judgment and sentence of the Casey Circuit Court entered on May 12, 2005, following a jury trial wherein he was found guilty of possession of a handgun by a convicted felon.¹ Having concluded that the prosecutor's closing argument during the guilt phase of the trial was not improper, we affirm.

¹ Kentucky Revised Statutes (KRS) 527.040.

On July 26, 2004, Mason was indicted by a Casey County grand jury for possession of a handgun by a convicted felon.² Mason pled not guilty and the case proceeded to a jury trial held on April 7, 2005. Prior to opening statements, the trial court allowed Mason's indictment to be amended to state that Mason "possessed or transported a handgun after having been convicted of a felony" [emphasis added].

The Commonwealth presented evidence, from Joseph Allen, who was charged along with Mason and reached a plea bargain agreement with the Commonwealth, Casey County Deputy Sheriff Dennis Allen, Wanda Allen,³ and Charles Ritter, the owner of a pawnshop, that on July 13, 2004, Mason and Joseph Allen went to Wanda Allen's home and stole a .22 caliber handgun. The two men then proceeded to a pawnshop located in Liberty, Kentucky, and pawned the stolen handgun. Following the incident, Mason, upon insistence by his mother, contacted Deputy Sheriff Allen and told him that Joseph Allen had stolen the handgun and that Mason had taken it into the pawnshop.⁴ Deputy Allen advised Mason to go to the Sheriff's office and to write out a statement of the events that had occurred, but Mason

² KRS 527.040(2) provides that "[p]ossession of a firearm by a convicted felon is a Class D felony unless the firearm possessed is a handgun in which case it is a Class C felony."

³ Wanda Allen is Joseph Allen's grandmother.

⁴ Mason admits that he drove Joseph Allen to the pawnshop while Allen had possession of the handgun, but he denies taking the handgun into the pawnshop.

refused to do so. At trial, Mason denied that he was ever in Wanda Allen's home or that he told Deputy Allen that he had taken the handgun into the pawnshop. The jury found Mason guilty as charged and recommended a sentence of seven years' imprisonment. On May 12, 2005, the trial court followed the jury's recommendation in sentencing Mason. This appeal followed.

Mason contends in his appeal that he is entitled to a new trial because the prosecutor made improper statements during his closing argument. Relying on United States v. Francis,⁵ Mason specifically challenges the following statements made by the prosecutor during his closing argument: (1) "It is my opinion from the evidence that . . . [Mason] took that firearm"; (2) "[Joseph Allen had] absolutely no reason to come up here and completely makeup a story"; (3) the prosecutor's reference to defense counsel attempting to "misguide this jury" regarding the telephone conversation between Mason and Deputy Allen; and (4) the prosecutor's indication that Mason's statement to Joseph Allen in the pawnshop that "it's hot" referred to the handgun being stolen, rather than to the weather being hot on that day.

⁵ 170 F.3d 546, 551-52 (6th Cir. 1999) (noting that it was improper for the prosecutor to call the defendant a liar in her closing argument, without basing the attacks on the evidence adduced at trial, and finding that the prosecutor should have given examples of discrepancies in the defendant's testimony and then drawn the conclusion that he lied).

In determining whether the prosecutor's conduct "was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law[,]""⁶ a reviewing court must evaluate a claim of prosecutorial misconduct by focusing "on the overall fairness of the trial, and not the culpability of the prosecutor."⁷ As our Supreme Court noted in Barnes v. Commonwealth,⁸ prosecutorial misconduct in a closing argument will result in reversal only under the following circumstances:

[I]f the misconduct is "flagrant" or if each of the following three conditions is satisfied [emphasis original]:

- (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 admonishment to the jury.⁹

Since no objection was made to the prosecutor's closing argument, Mason seeks review of this unpreserved alleged

⁶ Slaughter v. Commonwealth, 744 S.W.2d 407, 411 (Ky. 1987) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

⁷ Id. at 411-12 (citing Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)).

⁸ 91 S.W.3d 564 (Ky. 2002).

⁹ Id. at 568 (citing United States v. Carroll, 26 F.3d 1380, 1390 (6th Cir. 1994)).

"flagrant" error pursuant to RCr¹⁰ 10.26 under the palpable error standard of review.¹¹

A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.¹²

In Young v. Commonwealth,¹³ our Supreme Court set out the following factors to be considered in determining whether a prosecutor's statements constitute palpable error: (1) an "examination of both the amount of punishment fixed by the verdict and the weight of evidence supporting that punishment[;]" (2) "whether the Commonwealth's statements are supported by facts in the record[;]" (3) "whether the allegedly improper statements appeared to rebut arguments raised by

¹⁰ Kentucky Rules of Criminal Procedure.

¹¹ RCr 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

¹² Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996) (citing Jackson v. Commonwealth, 717 S.W.2d 511, 513 (Ky.App. 1986)).

¹³ 25 S.W.3d 66 (Ky. 2000).

defense counsel[;]" and (4) "these closing arguments, 'as a whole,' and . . . the wide latitude . . . allowed parties during closing arguments" [footnotes omitted].¹⁴

In the case before us, Mason testified at his trial and told the jury that he was merely a victim who had tried to do a good deed to help out his stepfather by taking Joseph Allen to cash a check. However, the Commonwealth provided testimony from Deputy Allen that Mason told him he had taken the gun into the pawnshop. Further, the fact that Joseph Allen had already pled guilty to possession of a firearm by a convicted a felon and was serving a sentence for that conviction based on this incident was disclosed to the jury, and they knew that Allen received a one-year sentence, the minimum sentence for the Class D felony of possession of a firearm by a convicted felon, when he could have faced a ten-year maximum sentence for the Class C felony of possession of a handgun by a convicted felon.

Judging the credibility of a witness lies within the province of the jury.¹⁵ Mason's guilt turned upon which testimony from the conflicting testimony the jury chose to believe. This disputed evidence provided the prosecutor with a sufficient basis to support his statements in his closing argument that Mason had been untruthful to the jury.

¹⁴ Young, 25 S.W.3d at 74-5.

¹⁵ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

A prosecutor may comment on the credibility of the defendant, like any other witness, if he or she takes the stand,¹⁶ and "may comment on tactics, . . . evidence, and . . . as to the falsity of a defense position."¹⁷ In this case, the prosecutor properly challenged Mason's claim that he was an innocent bystander, and his closing argument was consistent with the evidence presented by the Commonwealth. Additionally, Mason's attorney in his closing argument stated that Joseph Allen "was lying to you when he said that this guy [Mason] was in the house." Thus, in reviewing the closing argument as a whole, we conclude that there was no prosecutorial misconduct.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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¹⁶ Tamme v. Commonwealth, 973 S.W.2d 13, 39 (Ky. 1998).

¹⁷ Slaughter, 744 S.W.2d at 412.