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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002653-MR

SCOTT BAILEY APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
INDICTMENT NO. 04-CR-00056

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

HENRY, JUDGE: Scott Bailey appeals from a jury verdict and judgment of the Pike Circuit Court convicting him of second-degree burglary and theft by unlawful taking. Upon review, we affirm.

The facts of the case, as provided at trial, are as follows: On the evening of December 18, 2003, Charles and Kristi Edmonds left their residence on Brushy Road in Pike County to go to the funeral home. When they returned home, they found that

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[1] Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the door to their bathroom was locked and they could see broken glass under the door. Mrs. Edmonds went outside and discovered that someone had broken into their house through the bathroom window. Once they gained access to the bathroom, the Edmonds found that a red bucket in which Mr. Edmonds had been keeping hundreds of dollars in new state quarters was gone. They also found that Mrs. Edmonds’ jewelry box, which contained about 50 pieces of jewelry – including her engagement ring – was missing.

Approximately six weeks prior to this incident, Mr. Edmonds had Bailey and his brother Duane come to his residence to give him an estimate for remodeling that same bathroom. The Baileys had previously done similar work for Edmonds’ brother. While looking at the bathroom, the Baileys commented about the bucket of quarters. They also drew a floor plan of the house in a work sketch book that was alleged to have later been stolen from Duane’s van.

On December 20, 2003, two days after the subject incident, Bailey gave his girlfriend Gail McPeek a pair of gold hoop earrings. According to her, he later also gave her over $100.00 in quarters during the course of the following week; Scott, however, denied this, and testified that he had instead given her a $50.00 bill. McPeek’s cousin, Linda Justice, was also given several items of jewelry by Duane Bailey, including a necklace with a heart pendant, two pairs of earrings, a

bracelet, and a ring. She also verified that Bailey gave quarters to McPeek. By all accounts, the jewelry items were among the same ones that were taken from the Edmonds' home. Mr. Edmonds recovered these items from McPeek and Justice on January 1, 2004.

On January 2, 2004, after receiving evidence of the stolen jewelry that had been received by McPeek and Justice, local police arrived at Bailey's home to arrest him and Duane; however, Bailey was not on the premises. Duane subsequently called Mary Borders, Bailey's former mother-in-law, to pick up Bailey's children. When Borders arrived, she found Edmonds, his wife, and Bailey's landlord rummaging through the apartment. Borders ultimately found some more of the stolen jewelry and returned it to Edmonds, along with a receipt for jewelry cleaner purchased a day after the burglary; she signed a statement confirming that this occurred. Edmonds admitted to conducting his own search of Bailey's apartment with the landlord's permission, but testified that he never personally removed anything from it. Bailey later turned himself in to the police.

On January 3, 2004, Edmonds recovered additional jewelry from Billy Shannon Robinson, Bailey's neighbor. Robinson indicated that he purchased two gold rope chains from Bailey approximately one week before Christmas. He also noted that he had observed Bailey keeping other jewelry in a sandwich

bag that was hidden in a pillow case in his bedroom. On January 7, 2004, Edmonds recovered more jewelry from Melida Scee, Bailey's mother, including his wife's engagement ring and a pair of gold hoop earrings.

At trial, both Baileys denied having anything to do with the burglary in question. Scott Bailey maintained that he had purchased the jewelry in question from Arthur Canaday, Gail McPeek's former foster child, and denied ever giving any quarters to McPeek. Duane Bailey also testified that he had been told by Canaday that Donovan Fink, McPeek's brother, had thrown the remainder of the jewelry in a ditch by the side of the road. This jewelry was eventually located and returned to the Edmonds by Marvin Montgomery, a criminal investigator for the Pike County public defenders' office, after the Baileys told him where it could be found. Billy Shannon Robinson testified that the baggie in which the missing jewelry was found was the same baggie that he had seen in the Baileys' apartment, as it had an identifiable tear.

On February 18, 2004, the Pike County Grand Jury indicted Bailey and his brother on charges of second-degree burglary and theft by unlawful taking over $300.00. On February 27, 2004, Bailey appeared before the trial court and entered a plea of "not guilty." He was tried on the foregoing charges along with his brother in October 2004. The jury found Bailey

guilty on both counts of the indictment and recommended a total sentence of five years' imprisonment. On December 23, 2004, the trial court entered a "Final Judgment and Order of Imprisonment" consistent with the jury's verdict and sentencing recommendation. This appeal followed.

On appeal, Bailey argues that he is entitled to relief on the following grounds: (1) the trial court erred in failing to give a jury instruction on receiving stolen property; (2) the trial court erred in allowing Charles Edmonds to give lay opinion testimony in violation of KRE[2] 701; (3) that he suffered substantial prejudice due to prosecutorial misconduct during the Commonwealth's closing argument; and (4) that he suffered substantial prejudice due to the Commonwealth being allowed to introduce evidence obtained during a purportedly illegal search of his home. We address each of these contentions in turn.

I. "RECEIVING STOLEN PROPERTY" JURY INSTRUCTION

Bailey first contends that the trial erred to his substantial prejudice in failing to give a jury instruction on "receiving stolen property." He argues that such an instruction was merited because of the testimony from the Bailey brothers indicating that Scott purchased the allegedly stolen jewelry from Arthur Canaday, Gail McPeek's former foster child. We disagree.

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[2] Kentucky Rules of Evidence.

"It is well settled that a defendant is entitled to have his theory of the case submitted to the jury." Mondie v. Commonwealth, 158 S.W.3d 203, 207 (Ky. 2005). "In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999). "A defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions." Id.

We also note that our Supreme Court has specifically held that "[a] defendant is entitled to an instruction on any lawful defense which he has. Although a lesser included offense is not a defense within the technical meaning of those terms as used in the penal code, it is, in fact and principle, a defense against the higher charge." Slaven v. Commonwealth, 962 S.W.2d 845, 856 (Ky. 1997). Therefore, an instruction on a lesser-included offense is required if the evidence would permit the jury to find the defendant not guilty of the primary offense, but guilty of the lesser offense. Commonwealth v. Wolford, 4 S.W.3d 534, 539 (Ky. 1999). However, with this said, the Supreme Court has recently held that a defendant is not entitled to an instruction on a separate, "lesser" uncharged offense -

even when the evidence would support a guilty verdict - when said offense does not constitute a "lesser-included offense" as that term is understood. Hudson v. Commonwealth, 202 S.W.3d 17, 21 (Ky. 2006); see also Kotila v. Commonwealth, 114 S.W.3d 226, 242 n. 3 (Ky. 2003), overruled on other grounds by Matheney v. Commonwealth, 191 S.W.3d 599 (Ky. 2006).

In reaching this decision, the Court explicitly rejected the defendant's reliance on Taylor v. Commonwealth, supra, Sanborn v. Commonwealth, supra, and Mishler v. Commonwealth, 556 S.W.2d 676 (Ky. 1977), for the proposition that a requested instruction is required for each theory of the case supported by the testimony to any extent; such rejection is notable in that all are cases heavily relied upon by Bailey here. The Court found that Taylor and Mishler were inapplicable to the question of whether a jury should be instructed on a "lesser" offense because "both involve the erroneous refusal to instruct the jury on a defendant's statutory defenses to the charged crimes, no matter how improbable under the facts." Hudson, 202 S.W.3d at 21.[3] Moreover, although the Court acknowledged that Sanborn v. Commonwealth "does contain language suggesting an instruction on a separate, uncharged, but 'lesser' offense is required whenever the evidence could conceivably support the charge," Id., it rejected that decision as "a

[3] Specifically, Taylor and Mishler involved the statutory defenses of duress (KRS 501.090) and intoxication (KRS 501.080).

plurality opinion of limited precedential value." Id. In doing so, the Court noted: "[A] minority opinion has no binding precedential value ... [and] if a majority of the court agreed on a decision in the case, but less than a majority could agree on the reasoning for that decision, the decision has no stare decisis effect." Id. at 21-22.

The offense of receiving stolen property is not a lesser-included offense of theft or burglary. See Roark v. Commonwealth, 90 S.W.3d 24, 38 (Ky. 2002); Macklin v. Commonwealth, 687 S.W.2d 540, 542 (Ky.App. 1984). Accordingly, per Hudson, we conclude that the trial court did not err in failing to give Bailey a "receiving stolen property" instruction.

II. LAY OPINION TESTIMONY

Bailey next argues that the trial court erred in allowing Charles Edmonds to give opinion and inference testimony in violation of KRE 701. That provision, entitled "Opinion testimony by lay witnesses," provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
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> (a) Rationally based on the perception of the witness; and
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> (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Bailey specifically contends that Edmonds was erroneously allowed to offer his opinion that a "Saws-all," or reciprocating saw, appeared to have been used to cut the aluminum window frame leading into his bathroom. There was testimony at trial that Bailey owned such a saw, and Charles Edmonds testified that he saw it in Bailey's vehicle. The Commonwealth offers in rebuttal that the issue is not properly reserved for review and that Edmonds' testimony satisfies the requirements of KRE 701.

We first address the Commonwealth's position that this issue is unpreserved for review. As noted by the Commonwealth, during Edmonds' testimony on the first day of trial, Bailey's defense counsel asked for permission to approach the bench. At the ensuing bench conference, defense counsel complained that the Commonwealth was attempting to elicit testimony from Edmonds that the bathroom's window frame was cut with a "Saws-all." Defense counsel specifically stated that he did not think that there had been any forensic determination that the frame was cut by such equipment, so he objected to any testimony on that issue unless the Commonwealth produced a report stating that a "Saws-all" was used to make the cut. He further contended that the anticipated testimony in question would be speculative. The trial court decided not to make any specific ruling regarding

the objection, instead choosing to wait and see what Edmonds' testimony would actually be.

The trial court's failure to make an immediate ruling as to the aforementioned objections is of particular importance, as no further objections or requests for a ruling were made even after Edmonds gave testimony that it appeared to him as if someone had used a "Saws-all" to cut into the bathroom window's aluminum frame; moreover, the trial court ultimately never issued a ruling as to its admissibility. Our case law is well-established that a failure to insist on a ruling or admonition from a trial court when an objection is made as to a particular matter operates as a waiver of that issue for purposes of appellate review. Hayes v. Commonwealth, 175 S.W.3d 574, 596 (Ky. 2005); Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002); Bell v. Commonwealth, 473 S.W.2d 820, 821 (Ky. 1971). Accordingly, as the trial court failed to rule on the testimony in question here, the issue is waived.

Nevertheless, Bailey asks us to review the issue under RCr 10.26, the "palpable error" rule.[4] As the issue pertains to a purported evidentiary error, however, KRE 103(a) is more directly applicable. This rule provides that

[4] 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."

> [a] palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered by a trial 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.

Under KRE 103(e), "[a] finding of palpable error must involve prejudice more egregious than that occurring in reversible error ... and the error must have resulted in 'manifest injustice.'" Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005). "Authorities discussing palpable error consider it to be composed of two elements: obviousness and seriousness, the latter of which is present when a failure to notice and correct such an error would seriously affect the fairness, integrity, and public reputation of the judicial proceeding." Id. (Internal quotation marks omitted). "A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily dependent upon the facts of each case." Id.

Our Supreme Court has held that "[a] nonexpert witness may express an opinion which is rationally based on the perception of the witness and helpful to a determination of a fact in issue." Clifford v. Commonwealth, 7 S.W.3d 371, 374 (Ky. 1999).

Edmonds testified that he had familiarity with carpentry tools and home construction. Assuming for the sake of argument that allowing this testimony to come into evidence was erroneous, we cannot conclude as a matter of law that any such error was so "obvious" and "serious" that manifest injustice occurred and a finding of palpable error is required. See Ernst, 160 S.W.3d at 758. Consequently, Bailey's arguments in this context must be rejected.

III. PROSECUTORIAL MISCONDUCT

Bailey next argues that he suffered substantial prejudice due to a number of inappropriate and inflammatory comments made in the Commonwealth's closing argument. "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." Young v. Commonwealth, 129 S.W.3d 343, 345 (Ky. 2004). Reversal is only merited when the alleged misconduct is so serious that it renders the trial fundamentally unfair. Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). Moreover, in considering a claim of prosecutorial misconduct during closing argument, we must be mindful that "prosecutors are allowed wide latitude during closing arguments and may comment upon the evidence presented." Maxie v. Commonwealth, 82 S.W.3d 860, 866 (Ky. 2002).

Bailey first complains that the Commonwealth Attorney improperly made repeated references to "the Edmonds' good qualities" in his closing argument. He specifically points to statements by the Commonwealth Attorney that he "was glad [the Edmonds] did the work they did," and that they "work hard for their money" and did not deserve to be robbed. According to Bailey, by these statements, "the Commonwealth went beyond portraying the victims as more than mere statistics into glorifying the Edmonds in order to evoke passion and prejudice." However, as the Commonwealth points out, Bailey failed to make a contemporaneous objection to either of these statements. Accordingly, the issue is not preserved for our review. Weaver v. Commonwealth, 955 S.W.2d 722, 728 (Ky. 1997); see also RCr 9.22. Moreover, we do not believe that Bailey is entitled to relief under RCr 10.26, as the Commonwealth introduced substantial evidence of his guilt for the crimes charged. See Grundy v. Commonwealth, 25 S.W.3d 76, 81-82 (Ky. 2000).

For the same reasons, we must reject Bailey's complaints about the following additional statements made by the Commonwealth in closing: (1) that the prosecutor felt sorry for the Baileys' mother because "she raised two fellas that are burglars" and (2) that if the Baileys "would give stolen jewelry to their dying mother, then they would lie." "As there were no objections made, the trial court was not given the opportunity

to pass upon the merits of these allegations which are not properly preserved for review. We must therefore decline to consider this challenge." Gray v. Commonwealth, 979 S.W.2d 454, 457 (Ky. 1998), overruled on other grounds by Morrow v. Commonwealth, 77 S.W.3d 558 (Ky. 2002); see also Charash v. Johnson, 43 S.W.3d 274, 278 (Ky.App. 2000).

Bailey also complains that he was unfairly prejudiced when the Commonwealth Attorney – referring to the Baileys - told the jury that the natural instinct for thieves is to lie. However, upon reviewing the record, we find that, upon Bailey's objection to this statement, the Commonwealth Attorney agreed to rephrase its point, and Bailey raised no further objection to what was then stated. "Merely voicing an objection, without a request for a mistrial or at least for an admonition, is not sufficient to establish error once the objection is sustained." Hayes v. Commonwealth, 698 S.W.2d 827, 829 (Ky. 1985). As Bailey requested no additional relief from the trial court here, this issue is unpreserved for our review. Taylor v. Commonwealth, 449 S.W.2d 208, 209 (Ky. 1969).

For similar reasons, we also reject Bailey's complaints about the Commonwealth Attorney's statement that there were no other "thieves" looking at the inside of the Edmonds' home. Bailey's objection to this statement was sustained by the trial court, and the jury was subsequently

admonished. "[I]t has long been the law in Kentucky that an admonition to the jury to disregard an improper argument cures the error unless it appears the argument was so prejudicial, under the circumstances of the case, that an admonition could not cure it." Price v. Commonwealth, 59 S.W.3d 878, 881 (Ky. 2001). In "consider[ing] the Commonwealth's conduct in context and in light of the trial as a whole ... we see nothing in the statement at issue which would warrant reversal" and believe that the trial court's admonition was sufficient to cure any possible error that might have occurred here. Brown v. Commonwealth, 934 S.W.2d 242, 248 (Ky. 1996) (Internal quotation marks omitted).

Bailey next complains about the Commonwealth Attorney's characterization of him as a "burglar" during closing argument. Our Supreme Court has deemed it permissible to refer to a defendant as a "bit of evil," Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987), a "beast," Ferguson v. Commonwealth, 401 S.W.2d 225, 228 (Ky. 1965), and as a "desperado," Holbrook v. Commonwealth, 249 Ky. 795, 61 S.W.2d 644, 645 (1933). Given these prior holdings, along with the fact that Bailey was actually being tried for burglary and that there was substantial evidence linking him to the crime, we cannot say that any error occurred here. See Russell v. Commonwealth, 403 S.W.2d 694, 697 (Ky. 1966).

Bailey also argues that the Commonwealth Attorney improperly vouched for the credibility of witnesses Gail McPeek and Linda Justice during its closing argument, stating that he "did not see a reason why those girls would lie." However, upon reviewing the record, we find that Bailey did not object to this statement, but instead objected to the Commonwealth Attorney's comment that Bailey "didn't show any reason why [the witnesses] were lying." While it is true that it is improper for counsel to bolster a witness' credibility during closing argument with his own personal opinion, Armstrong v. Commonwealth, 517 S.W.2d 233, 236 (Ky. 1974), we do not believe that such inappropriate bolstering occurred here. Our case law holds that a prosecutor may offer his interpretation of the evidence to a jury. Hamilton v. Commonwealth, 401 S.W.2d 80, 88 (Ky. 1966). A prosecutor may also draw reasonable inferences from the evidence and may make reasonable comments upon the evidence. Hunt v. Commonwealth, 466 S.W.2d 957, 959 (Ky. 1971). We believe that the comment in question fits within these bounds, and – accordingly – no error occurred here.

Bailey finally complains that the Commonwealth introduced evidence in its closing argument that was not presented at trial. He specifically refers to the Commonwealth Attorney's statement to the jury that Duane Bailey asked Charles Edmonds about an alarm system when confronted about the

burglary. From the record, it appears as if this fact was never put into evidence. Although Bailey contends that he objected to the statement when it was made, we do not agree. Instead, the record reflects that Bailey raised the issue and moved for a mistrial only after the case had been submitted to the jury and the jury had retired to deliberate. At that point, any objection was too late and the error was waived. Bowers v. Commonwealth, 555 S.W.2d 241, 243 (Ky. 1977).

IV. ILLEGAL SEARCH

Bailey finally argues that he was denied his right to a fair trial and due process when the Commonwealth was allowed to introduce evidence purportedly obtained through an illegal search of his home. Specifically, he complains that Charles Edmonds was acting as an agent of the police when he entered his home following his arrest and conducted his own search of the premises.

It is a well-established principle that the exclusionary rule barring the introduction of evidence obtained by an illegal search extends only to "state action" by public officers and does not apply to searches conducted by private individuals acting on their own initiative. See Stone v. Commonwealth, 418 S.W.2d 646, 650 (Ky. 1967). After reviewing the record, we can find no indication that Edmonds was somehow acting on behalf of the police when he conducted his own search

of Bailey's home. His testimony indicates that he was at the home of Bailey's neighbor, Billy Shannon Robinson, recovering some of the stolen jewelry at the same time that Mary Borders was at Bailey's residence removing his belongings following Bailey's arrest the day before. Edmonds asked Bailey's landlord if he could search the apartment, and he agreed. Whether he had the authority to allow such a search is ultimately irrelevant, as Edmonds was not accompanied by any law enforcement officers, and – as noted – there is no indication that he was acting on behalf of the police. Accordingly, even if we were to assume that the search was unlawful, any evidence resulting from said search was admissible at trial, as it did not result from "state action." Therefore, Bailey's argument must be rejected.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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