

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000755-ME

MARK JACKSON

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN HORNE, JUDGE
ACTION NO. 05-CR-00498

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: Mark Jackson appeals from a judgment of conviction by the Boone Circuit Court finding him guilty of complicity to commit second-degree robbery and for being a first-degree persistent felony offender (PFO I). He argues that his trial was tainted by numerous instances of prosecutorial misconduct, and

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

that he was entitled to a directed verdict on the PFO I charge. However, most of his claims of prosecutorial misconduct are not preserved, and we find that none of them, either individually or collectively, rise to the level of palpable error. We also find that there was sufficient evidence for the trial court to submit the PFO I charge to the jury. Hence, we affirm.

The underlying facts of this action are not in dispute. During the early morning hours of July 5, 2005, Susan Neal was working at the front desk of the Ivy Lodge hotel in Boone County. Around 1:45 a.m., two men wearing camouflage pants and ball caps entered the lobby. One of the men walked behind the counter and told Neal, "I want everything." The other man remained in front of the counter and brandished a knife. The man behind the counter then took the cash drawer, which contained approximately \$300.00. Before leaving, one of the men warned Neal not to call the police.

Despite the warning, Neal immediately called the police to report the robbery. While talking on the phone, she stated that she saw a dark blue, four-door sedan that looked like a Cadillac pull out of the parking lot. She also told the operator that she saw the vehicle go under the I-75 overpass.

While responding to the call, Lt. Jim Wermeling reported that he saw a vehicle matching that description on the northbound ramp to I-75. Since he was on the other side of the interstate, he radioed ahead with the location and description of the vehicle. Shortly thereafter, Deputy Roger Nelms saw the vehicle

traveling north on I-75. Deputy Nelms stated that both occupants were wearing ball caps.

When other officers arrived, Deputy Nelms stopped the vehicle. There were two occupants in the vehicle: the driver, Phillip Cain, and a passenger, Jackson. Police recovered a knife from Cain, and the cash drawer and money from the Ivy Lodge were found in the back seat. The police then took Cain and Jackson back to the Ivy Lodge. Neal identified Jackson as the man who came behind the counter, and Cain as the one in front of the counter holding the knife.

On August 2, 2005, a Boone County grand jury returned an indictment charging Jackson with complicity to commit first-degree robbery and for being a first-degree persistent felony offender. Cain was also charged in a separate indictment. The matter proceeded to trial on January 18, 2007.² At trial, Jackson admitted that he had been in the vehicle at the time of the robbery. But he asserted that he had been asleep in the back seat at the time. He also alleged that Cain committed the robbery with another man, who fled in another vehicle.

Nevertheless, the jury found Jackson guilty of complicity to second-degree robbery and being a PFO I. The jury fixed his sentence at ten years'

² Although not relevant to this appeal, the delay is attributable to a number of pre-trial motions. Jackson initially filed a motion to suppress the evidence seized from the stop and search of the vehicle. Following a hearing, the trial court denied the motion. Thereafter, the court conducted a competency evaluation, after which the court found Jackson competent to stand trial. Later, Jackson asked that his appointed counsel withdraw due to a conflict. In May 2006, Jackson accepted the Commonwealth's offer on a plea of guilty. However, the trial court allowed him to withdraw the plea in July of 2006. The scheduled trial was delayed several more times due to the unavailability of witnesses.

imprisonment, enhanced to fifteen years by virtue of his status as a PFO I. The trial court imposed the jury's sentence, and this appeal followed.

Jackson first argues that his trial was tainted by prosecutorial misconduct on a number of grounds. But for the most part, Jackson failed to preserve these issues by contemporaneous objections. Consequently, we must review these claims under the palpable error rule of Kentucky Rules of Criminal Procedure (RCr) 10.26. To prevail on an unpreserved claim under palpable error, one must show that the error resulted in manifest injustice. *Martin v. Commonwealth*, 207 S.W.3d 1, 3, (Ky. 2006). We find that the majority of the claims did not amount to error, and none rise to the level of palpable error.

Jackson first argues that the Commonwealth made an improper reference to an uncharged collateral bad act. During opening statements, the prosecutor told the jury that Jackson and Cain had driven to the Ivy Lodge hotel in a stolen vehicle. Jackson did not object to the statement at that time. However, he did object when the Commonwealth attempted to call the vehicle's owner to testify that it had been stolen. The trial court sustained the objection and excluded the testimony. However, the court denied Jackson's request for an admonition to disregard the Commonwealth's statement during opening statements.

Jackson maintains that the prosecutor's statements during opening statements were improper because they referred to facts not in evidence, and because they referred to evidence of prior bad acts in violation of Kentucky Rules of Evidence (KRE) 404(b). We find no indication that the prosecutor engaged in

deliberate misconduct. The purpose of an opening statement “is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole[.]” *United States v. Dinitz*, 424 U.S. 600, 612, 96 S. Ct. 1075, 1082, 47 L. Ed. 2d 267 (1976) (*Burger, C.J., concurring*). In this case, the prosecutor intended to introduce evidence that the vehicle had been reported as stolen, but the trial court excluded the evidence after he mentioned it in his opening statement. Consequently, we cannot find that the prosecutor deliberately attempted to inform the jury of facts which were not placed into evidence.

And as previously noted, Jackson did not make a contemporaneous objection to the prosecutor’s statement. Furthermore, Jackson’s only objection to the evidence was that it was not relevant to the charged crimes, or that its prejudicial effect outweighed its probative value. The trial court sustained this objection, but he did not assert that the evidence also amounted to evidence of collateral bad acts. Nor does Jackson argue on appeal that the trial court erred by denying his request for a limiting instruction. Under the circumstances, we cannot find that the prosecutor’s reference amounted to error, palpable or otherwise.

Jackson next argues that the prosecutor made improper comments about his defense counsel. During closing argument, the prosecutor stated that the defense’s argument implied that the police were lying. The prosecutor also argued that Jackson’s counsel was attempting to distract the jury by “throw[ing] up red herrings, to make you ignore the big picture.” The prosecutor also asserted that the

defense's attempts to highlight inconsistencies in the testimony amounted to making "a mountain out of a molehill." Jackson contends that these statements went beyond fair comment on defense strategy and amounted to personal attacks on defense counsel. We disagree.

First, Jackson concedes that this issue is not preserved for appeal. Thus, we review the issue under the palpable error standard. Moreover, the prosecutor fairly commented on the defense's strategy and theory of the case. *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987), *overruled on other grounds by Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006). When considered in context, we cannot find that the remarks were inflammatory, nor were they personally directed against Jackson's counsel. Consequently, the prosecutor's comments fell well within the bounds of permissible argument. *See also Stopher v. Commonwealth*, 57 S.W.3d 787, 805-06 (Ky. 2001).

Similarly, Jackson raises an unpreserved argument that the prosecutor improperly attempted to define reasonable doubt for the jury. During his *voir dire* statement, the prosecutor told the jury that reasonable doubt did not mean proof beyond a shadow of a doubt. The prosecutor repeated this comment during his opening statement. In *Johnson v. Commonwealth*, 184 S.W.3d 544, 548 (Ky. 2005), the Kentucky Supreme Court held the statement "[n]obody has to prove anything beyond a shadow of a doubt" did not violate the prohibition against defining "proof beyond a reasonable doubt." Further, the Commonwealth did not engage in a lengthy discussion of the standard of proof. Thus, even if the

prosecutor's statement was improper, it did not rise to the level of manifest injustice constituting reversible error. *Brooks v. Commonwealth*, 217 S.W.3d 219, 225 (Ky. 2007).

In his last unpreserved claim of prosecutorial misconduct, Jackson argues that he was unfairly prejudiced by the Commonwealth's reference to his co-defendant's guilty plea. During *voir dire*, the prosecutor informed the jury panel that Cain had also been charged in this crime, that he had pled guilty, and that he may testify at trial.³ Generally, it is improper for the Commonwealth to show, during its case-in-chief, that a co-indictee has already been convicted under the indictment. See *Tipton v. Commonwealth*, 640 S.W.2d 818, 820 (Ky. 1982), and *Parido v. Commonwealth*, 547 S.W.2d 125, 127 (Ky. 1977). However, Jackson failed to object to the prosecutor's statement during *voir dire*. Moreover, his counsel cross-examined a police witness about Cain's guilty plea, and brought it to the jury's attention during closing argument. When a defendant permits the introduction of such evidence for purposes of trial strategy, he will not be heard to complain after the strategy failed. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 544-45 (Ky. 2004).

Jackson also contends that he was denied a fair trial due to the cumulative effect of the alleged prosecutorial misconduct. We have reviewed the individual allegations and find no misconduct except for a possible error involving an attempt to define reasonable doubt. Since this single issue does not rise to the

³ Cain did not testify at trial.

level of reversible error, there can be no cumulative error. *Simmons v.*

Commonwealth, 191 S.W.3d 557, 568 (Ky. 2006).

Finally, Jackson argues that he was entitled to a directed verdict on the PFO I charge. To support a conviction for PFO I, the Commonwealth must prove that the defendant was previously convicted of two or more felony offenses; that the defendant received sentences of one or more years on these convictions; that the defendant was over the age of 18 at the time the offenses were committed; and that the defendant:

1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted; or
2. Was on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or
3. Was discharged from probation, parole, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted; or
4. Was in custody from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or
5. Had escaped from custody while serving any of the previous felony convictions at the time of commission of the felony for which he now stands convicted.

KRS 532.080(3)(c).

Specifically, Jackson contends that the Commonwealth failed to introduce documentary evidence showing that he had either completed his service of the sentence or was discharged on probation or parole on one or more of the prior convictions, within five years of committing the current offense. Jackson raised this issue on a motion for directed verdict at the close of the Commonwealth's case, and the trial court *sua sponte* renewed the motion at the close of all evidence. Therefore, we conclude that this issue is properly preserved for appeal.

Nevertheless, we find that the trial court properly denied the motion for a directed verdict. The Commonwealth introduced evidence showing that Jackson had been convicted of two eligible felonies in Ohio – one in 1983 and the other in 1996.⁴ On the 1996 conviction, Jackson received a minimum sentence of eight years' imprisonment. The Commonwealth failed to produce any documentary evidence showing when Jackson completed service of that sentence. However, Jackson testified on cross-examination that he had been in prison from 1996 until eighteen months before he was arrested on the current charges. While Jackson's testimony was not entirely clear on this point, and clearly was not the best evidence, we conclude that it was sufficient to support the jury's finding of

⁴ The Commonwealth also introduced evidence that Jackson was convicted in 1983 of another felony in Ohio, for which he received a sentence of six months to five years. The Commonwealth did not introduce any evidence of the actual amount of time which he served on this sentence, but Jackson testified that he served only six months on this offense. Given the other 1983 conviction and Jackson's failure to appeal from the PFO instruction, the remaining evidence was sufficient to support the jury's finding of guilt on the PFO I charge.

guilt on the PFO I charge. Given the length of Jackson's sentence and about when he was released, the jury could make a reasonable inference that Jackson completed service on his 1996 felony within five years of committing the instant offense. *Shabazz v. Commonwealth*, 153 S.W.3d 806, 813-14 (Ky. 2005). Under these circumstances, the trial court properly submitted the issue to the jury.

Accordingly, the judgment of conviction by the Boone Circuit Court is affirmed.

ALL CONCUR.

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