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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001518-MR

AMOS WAYNE BLAKLEY — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 07-CR-00124

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Amos Wayne Blakley was convicted of fleeing/evading in the first degree, theft by unlawful taking or disposition under $300, possession of a controlled substance in the second degree, and of being a persistent felony offender in the second degree. Blakley was sentenced to a total of eight years'

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

imprisonment and now appeals this conviction. After careful review, we affirm the judgment entered by the Bell Circuit Court.

On February 23, 2007, Officer Busic of the Middlesboro Police Department was off duty and in his truck when he spotted Blakley standing outside a silver Pontiac vehicle on the side of the road. Blakley had the hood of the car raised, but did not appear to be working on the car or to be having car trouble. Officer Busic saw Blakley walk to the yard of a house, pick up a tire and rim out of the yard, and place the items into the silver Pontiac. As Blakley drove away, Officer Busic called the Middlesboro Police Department for help and followed Blakley.

Blakley stopped at a stop sign and Officer Busic got out of his truck but before he could identify himself completely, Blakley sped off. Officer Busic followed Blakley. Meanwhile, Officer Cowan also began to follow Blakley, and a chase ensued. Officer Cowan lost Blakley. Later, Officer Busic found the silver Pontiac Blakley had been driving abandoned in an area known as Polly Hollow. Officer Busic called in the license plate number and discovered that the vehicle was registered to a woman with whom Blakley had been staying. Officer Busic went to this address and arrested Blakley for theft by unlawful taking of less than $300.00 and for fleeing and evading police. A search incident to arrest uncovered a single pill which contained hydrocodone, a schedule III controlled substance.

At trial the Commonwealth presented the testimony of the two police officers and a laboratory analyst. The defense presented no testimony or witnesses

to contradict their testimony. Due to the evidence of there being a high speed chase, defense counsel in closing argument began to argue about the risks involved in a chase and not wanting her personal family members to be involved in such an event. The Commonwealth objected to defense counsel's statements, and the trial court sustained the objection.

Blakley was found guilty on all three counts and sentenced to four months in jail for the theft and one month in jail for the possession of a controlled substance. After hearing evidence of Blakley's prior felony convictions, the jury returned with sentences of five years on the fleeing/evading charge and eight years for being a persistent felony offender (PFO), second degree, and recommended that the eight years be served in lieu of the five years. Blakley was sentenced to a total of eight years by judgment dated July 25, 2008. He now appeals his convictions as a matter of right.

Blakley's only argument on appeal is that the trial court erroneously sustained the Commonwealth's objection regarding his defense counsel's statement that she would not want her daughter and her four grandchildren involved in a high speed chase. Blakley argues that the jury should have been permitted to hear this as part of trial counsel's closing argument. Blakley claims that he received a severe sentence of eight years for stealing a tire and a rim and that his defense counsel's inability to finish her closing argument contributed to the verdicts and the harsh punishment.

The Commonwealth argues the trial court properly sustained the objection to Blakley's defense counsel's personal statements about her family and argues that even if the trial court erred in sustaining the objection, any error was harmless. We agree with the Commonwealth on both counts.

Matters involving the conduct of closing argument are within the discretion of the trial judge. *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 120 (Ky. App. 1999). Such closing argument issues are to be evaluated based upon the facts and the totality of circumstances of each case. While allowed great leeway during closing argument, counsel may offer an opinion only if based upon trial evidence. *Derossett v. Commonwealth*, 867 S.W.2d 195, 198-198 (Ky. 1993). Great latitude in closing argument is permissible, and counsel may draw reasonable inferences, but "may not argue facts that are not in evidence or reasonably inferable from the evidence." *Garrett v. Commonwealth*, 48 S.W.3d 6, 16 (Ky. 2001).

In the instant case, defense counsel offered highly personal commentary on police car pursuits of criminal suspects that clearly was not based on or inferable from the evidence submitted at trial. This effort to express her assessment of the car chase in terms of her family interest was editorial in nature and not based on trial evidence, and thus fell outside the parameters established in *Derossett*, *supra,* and *Garrett*, *supra.* Accordingly, the trial court did not abuse its discretion in sustaining the Commonwealth's objection to defense counsel's editorial statements regarding her personal family and fears of police car chases.

Further, even if the trial court did err in sustaining the Commonwealth's objection, any error was harmless and therefore was not reversible error. RCr 9.24 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

Newcomb v. Commonwealth, 964 S.W.2d 228, 230 (Ky. App. 1998), articulates the standard of review for a claimed trial error:

> In determining whether an error is prejudicial or harmless 'an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.' *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983). A harmless error is 'any error or defect in the proceeding that does not affect the substantial rights of the parties.' RCr 9.24. The weight of the evidence and the amount of the punishment imposed are factors available to determine if an error was harmless. *Abernathy v. Commonwealth*, 439 S.W.2d 949, 953 (Ky. 1969).

Id.

Blakley argues that his sentence proves that this alleged error was prejudicial to him. He relies on *Niemeyer v. Commonwealth*, 533 S.W.2d 218 (Ky. 1976), which sets forth the two important factors in making a determination that an error was prejudicial: "the weight of the evidence and the degree of punishment

fixed by the verdict." *Id*. at 222. Blakley argues that he received an eight year sentence for stealing a tire and a rim, and thus the trial court's ruling on his defense counsel's statements directly affected the outcome of his trial. We disagree.

As to the first factor, the weight of the evidence, Blakley was convicted in a trial which featured uncontroverted evidence from two police officers and a laboratory analyst, with the defendant offering no evidence of his own. The evidence was compelling that Blakley stole the property of another person, unlawfully fled from police officers, and illegally possessed a controlled substance. Given the lack of any defense witnesses or evidence, there is no substantial possibility that the jury could have reached an alternate conclusion regarding Blakley's guilt for the crimes charged.

Blakley also argues that the punishment imposed is evidence of prejudice to him, but an examination of his sentence rebuts this claim. Blakley faced up to twelve months in jail and/or up to a $500 fine for each of the theft by unlawful taking and possession of a controlled substance charges. The trial court followed the jury recommendation and sentenced Blakley to four months for the theft and one month for the possession offenses. The trial court followed the jury recommendation and sentenced Blakley to five years for fleeing or evading police, for which he could have received one to five years. The trial court also followed the jury verdict and sentenced him to eight years for being a second-degree PFO, which carried a possible confinement of five to ten years. Blakley ultimately

received an eight year sentence as a second-degree PFO. This sentence falls in the mid-range of the possible time he faced on that charge.

The ultimate conclusion regarding the sentence imposed is that Blakley did not receive maximum sentences for the theft and possession charges. He did receive the maximum sentence on the fleeing charge, and ultimately he was sentenced to a mid-range punishment of eight years as a PFO. His sentence was not excessive and his guilt was determined by uncontroverted evidence. Thus, Blakley did not receive eight years for "stealing a tire and a rim," but instead received eight years' imprisonment for being a persistent felony offender and for fleeing the scene of a crime. Thus, it is clear in light of the weight of the evidence and the sentence imposed that any error the trial court made in sustaining the Commonwealth's objection was not prejudicial to Blakley. Finally, Blakley presented no arguments whatsoever that defense counsel's personal statements about her family and her fears would have affected the outcome of his trial in any way. Thus, any error by the trial court was harmless and did not substantially affect Blakley's rights.

In conclusion, we hold that the trial court did not err in sustaining the Commonwealth's objection to defense counsel statements during closing arguments. Even assuming that the trial court did err, such error was not prejudicial to Blakley and was harmless. Thus, we affirm the judgment and sentence entered by the Bell Circuit Court on July 25, 2008.

ALL CONCUR.

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