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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000070-MR

CHARLES O. WILLIAMS,
A/K/A CHARLES D. WILLIAMS — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 07-CR-00097

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Following a jury trial, Charles D. Williams was convicted in the Mason Circuit Court of burglary in the second degree and assault under extreme emotional disturbance. He now brings this direct appeal in which

[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 Kentucky Revised Statutes (KRS) 21.580.

he raises three arguments. The first two relate to remarks made by the prosecutor in his closing argument. Williams claims that the remarks: a) drew the jury's attention to the fact that he had not testified, thereby violating his right to remain silent, and b) improperly directed the jury to "send a message" by convicting Williams. He additionally argues that he was entitled to a directed verdict on the burglary charge because the Commonwealth failed to prove the element of intent.

The charges against Williams stemmed from an episode in which he attacked his longtime girlfriend, Sherri Marshall, after discovering her in bed with one of his friends. Marshall and Williams, who had been in an "on again, off again" relationship for sixteen to seventeen years and had three children, were estranged at the time. Williams had moved out of Marshall's apartment to stay with his childhood friend, Benjamin Chambers.

Williams became suspicious that something was going on between Marshall and his friend Chambers. Williams walked the four miles from Chamber's residence to Marshall's apartment in the early morning hours of June 1, 2007. According to Chambers, he and Marshall were in bed when Williams arrived. Williams banged on the door and living room window. He screamed and shouted, wanting to know if Chambers was inside. Marshall did not open the door; instead she went to the bedroom and called the police. Meanwhile, Williams broke the living room window and crawled into the apartment. He then tried to force open the bedroom door, but Chambers pushed back on the door and prevented his entry. As Williams pushed on the door, he claimed that he wanted to get his

billfold although Marshall noted that the billfold was not there. After he failed to get into the bedroom, Williams began to destroy various items in the living room. He turned over the television, broke the coffee table and pulled down the mini-blinds and curtains. Marshall emerged from the bedroom to try to stop him. He began calling her names and struck her in the face with his fists. He also struck her twice in the face with a broken window frame. Marshall ran from the apartment pursued by Williams who continued to strike her. She eventually returned to the apartment where Williams tried to strike her again with the window frame. At that point, the police arrived, ordered Williams to drop the frame and took him into custody. Marshall suffered injuries to her arms, left hand and legs.

A one-day trial was held, at which Williams did not testify. The jury did listen to an audiotape of an interview Williams gave to police after his arrest. Testifying on behalf of the Commonwealth were Sherri Marshall, and the arresting and investigating police officers. Testifying on behalf of the defense were Williams' sister Rose, and Benjamin Chambers. Williams was convicted of assault under extreme emotional disturbance and burglary in the second degree. He was sentenced to serve three and five years respectively on these charges, to be run consecutively for a total of eight years. This appeal followed.

Williams argues that the prosecutor's closing remarks during the guilt-phase closing argument impermissibly drew attention to the fact that he had not testified in his own defense. The remarks in question related primarily to how

Williams got to Marshall's apartment, and what he heard upon his arrival. The prosecutor stated as follows:

> I don't know how Mr. Williams got here in town, over on the east end where this residence is located. There's no testimony about that. There's no testimony about what he saw when he arrived at that location, only the argument of counsel. And really there was no testimony about how –

Defense counsel objected on the ground that a prosecutor may not comment on a defendant's silence. At the ensuing bench conference, the trial court ruled that the Commonwealth was allowed to comment on what defense counsel had presented in her opening statement, and that the Commonwealth was also entitled to say that there had not been any testimony about certain things. The Commonwealth's attorney then resumed his closing remarks and made the following statement:

> There was no testimony that you heard about the defendant hearing anything from outside the bedroom window. What you heard was argument from defense counsel about that. That's all.

To determine if a prosecutor's arguments implicated a criminal defendant's right to remain silent, a reviewing court must consider whether the remarks were "manifestly intended to reflect on the accused's silence or [were] of such a character that the jury would naturally and necessarily take [them] as such." *Bowling v. Commonwealth*, 873 S.W.2d 175, 178 (Ky. 1993).

Upon reviewing the prosecutor's remarks in the context of the entire trial, we agree with the Commonwealth that the remarks were directly responsive to statements by Williams' defense counsel. In her opening remarks, defense

counsel stated that Williams had walked the four miles to Marshall's apartment after he became suspicious when Chambers had not returned home. She stated that Williams thought "I wonder if he [Chambers] is there now with Sherri." She stated that when he arrived at the apartment he saw Chambers' truck parked outside.

> He [Williams] stands by the window [of Marshall's apartment]. He can hear from outside what's going on in the bedroom. He'll describe to it, he'll describe it to you. He yells to them and knocks on the window "get out of there," "come on out here" but gets no response. He then goes to the front door.

Similarly, in her closing arguments, defense counsel gave a first person account of the events, including Williams' purported thoughts and actions, making statements such as "when I saw his truck outside the apartment" and "I knocked on the window, and I knocked so hard the window broke and I went through the window."

The prosecutor's remarks drew attention to the fact that no actual evidence had been offered to substantiate these remarks by defense counsel. The issue is whether the remarks went too far in also drawing attention to the fact that Williams had not testified. The statements in this case are very similar to those which were subject to review in *Ragland v. Commonwealth*, 191 S.W.3d 569 (Ky. 2006). Ragland was accused of shooting an acquaintance. The jury viewed a videotaped interrogation of the defendant by police, but he did not testify at trial. During the guilt-phase closing argument, defense counsel made the following argument:

> They don't know the location of the shot. . . . They don't know where the shot was fired from. They picked out five locations that they thought might be best, but they're just speculating. They don't know where this shot was fired from.

Id. at 588. During his closing argument, the prosecutor made the following statement:

> We're not saying that the shot was fired from underneath that bush. You've never heard us say the shot was fired from underneath that bush. . . . That is a place the shot could have been fired from. It's a place that has a line of sight to the porch. It happens to be a place that lines up very well with the idea that Trent [the victim] is sitting in this chair kind of angled to the center or maybe looking over at his friends and gets shot straight across. So it matches that very well. And it's a place where it has those two marks in the ground. But we're not saying that's where it's fired from. We don't know where that shot was fired from. The only person who knows where that shot was fired from exactly is the person sitting in that chair over there [indicating Appellant] and he hasn't seen fit to tell us.

Id.

On appeal, Ragland argued that the prosecutor's remarks impermissibly drew the jury's attention to his decision not to testify. The Supreme Court analyzed the remarks at length and concluded that "the prosecutor said nothing that could be construed as a request that the jury should infer guilt from the fact that Appellant failed to take the witness stand and assert his innocence, and that it is only in the most remote sense that the statement could be characterized as a comment upon Appellant's failure to testify at trial." *Id*. at 590. The Court instead characterized the statement as "a concession about and an explanation for

uncertainty as to one aspect of the Commonwealth's theory of the case and that it was made in response to defense counsel's closing argument." *Id.* (citations omitted.) Similarly, in this case, the prosecutor's remarks drew attention to the uncertainty surrounding how Williams got to Marshall's apartment and what he saw when he arrived. The remarks were also directly responsive to defense counsel's closing argument.

The Kentucky and United States Constitutions preserve a criminal defendant's right to remain silent. Those documents establish no right of a defendant to have his lawyer lay out a factual scenario to the jury in the opening statement, present no proof, and then argue the unproven scenario to the jury in summation while the prosecutor stands mute. In light of their similarity to the remarks in *Ragland*, we conclude that the prosecutor's remarks in this case did not impermissibly implicate Williams' right not to testify.

Williams next argues that the prosecutor made remarks which constituted misconduct because they violated the prohibition against asking the jury to "send a message." In his closing remarks, the prosecutor cast doubt on the contention that Williams had acted under extreme emotional disturbance, noting that he laughed and joked during his taped interview with the police after his arrest. He further told the jury that the evidence did not support defense counsel's request for a verdict of not guilty on the burglary charge nor a verdict of guilty for fourth-degree assault. He then made the following statement:

> By returning this verdict, you are going to tell this defendant . . . [objection by defense counsel] . . . Again, tell this defendant that he committed a wrong, and the wrong he committed was burglary in the second degree and assault in the second degree.

The trial court overruled defense counsel's objection on the ground that while it has been held that a prosecutor may not ask the jury to send a message to the community, this holding did not apply when the jury was asked to send a message only to the defendant.

Williams relies primarily on a series of cases which hold that "send a message to the community" comments are improper. *See e.g. Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006); *McMahan v. Commonwealth*, 242 S.W.3d 348 (Ky. App. 2007). It should be noted, however, that even "send a message to the community" statements have not been deemed to be palpable error. *See Peyton v. Commonwealth*, 253 S.W.3d 504, 518 (Ky. 2008) (citing *Commonwealth v. Mitchell*, 165 S.W.3d 131-133 (Ky. 2005) (holding that urging the jury to make an example out of defendant to help fight the spread of Oxycontin related crimes was not palpable error), *Brewer*, 206 S.W.3d at 349-50 (holding that closing statement urging the jury to show that Owen County has the "backbone" to stand up to crime and to increase the sentence so that the community can keep "a hammer" over the heads of defendants does not constitute palpable error).

Williams has also drawn our attention to an unpublished case in which the Kentucky Supreme Court implied that a "send a message to the defendant"

remark by a prosecutor might have been reversible error had it been preserved (as it was in Williams' case).

> The Commonwealth asserts that the comments were proper because the jury was asked to send a message only to Appellant, not to the community. We do not believe that this distinction renders the "send a message" mantra acceptable. Nonetheless, we cannot say that the comments constituted an error so fundamental as to threaten Appellant's entitlement to due process of law, as is required to demonstrate manifest injustice. However, had the issue been preserved, a more rigorous analysis would have been required. Thus, while such comments do not constitute manifest error in the instant case, we note that, generally, any benefit the Commonwealth perceives in utilizing such an argument is far outweighed by the risk of reversal on appeal.

Scott v. Commonwealth, 2006 WL 3751391 (Ky. 2006) (2005-SC-000100-MR).

"'Send a message' statements are impermissible because they 'tend to cajole or coerce a jury to reach a verdict that would meet the public favor' or suggests 'that a jury convict on grounds not reasonably inferred from the evidence.'" *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005) (citations omitted.) On the other hand, prosecutors have wide latitude in their closing arguments and may attempt to convince jurors that the matter before them should not be dealt with lightly. *Brewer*, 206 S.W.3d at 350.

The prosecutor's remark in this case did not constitute reversible error. It had neither the effect of pressuring the jury to reach a verdict to meet public favor, nor did it urge a conviction on grounds other than the evidence. This conclusion is fully in keeping with the holding of a recent case, *Benjamin v.*

Commonwealth, 266 S.W.3d 775, 792 (Ky. 2008), in which the Kentucky Supreme Court reviewed the statement of a prosecutor who told the jury: "we have to think about the message that we need to send to this defendant [to] prohibit, to prevent this type of unlawful activity." The Court held that the remark did not constitute reversible error, stating that

> [i]t is true that this Court has repeatedly indicated that "send a message" statements are improper in the Commonwealth and prosecutors should not engage in such argument . . . . We reiterate this admonition here, but note that this isolated statement was hardly egregious.

Benjamin, 266 S.W.3d at 792. The prosecutor's remark is similarly isolated, and firmly rooted in his argument that based on the evidence, the jury should not accept defendant's theory that his behavior was excusable because he was acting under extreme emotional disturbance – a theory which the jury did ultimately accept.

Thirdly and finally, Williams argues that the trial court erred in denying his motion for a directed verdict on the charge of burglary in the second degree.

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.
>
> . . . [T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Commonwealth v. Benham, 816 S.W.2d 186, 187-88 (Ky. 1991).

According to Williams, the Commonwealth failed to prove the intent element of burglary in the second degree. The pertinent statute, KRS 511.030, provides that "[a] person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling." Williams argues that there was insufficient evidence that he intended to commit a crime before he entered the apartment. He contends that while he was suspicious that Chambers was in Marshall's apartment, he was not certain that he was present. Furthermore, Marshall, as the only testifying eyewitness, stated that Williams attempted to enter the bedroom in order to retrieve his billfold. He only struck Marshall after Chambers prevented him from entering the bedroom and Marshall tried to prevent him from throwing things around the living room. At that point, he contends, he was already inside the dwelling and had been provoked.

Our review of the trial record shows that there was ample evidence to support the trial court's denial of the motion for a directed verdict. Williams admits that he was motivated to go to Marshall's apartment by his suspicion that she was conducting a secret relationship with Chambers. Indeed, his feelings of jealousy and sense of betrayal formed a key element of his claim that he acted under extreme emotional disturbance. He does not dispute that he shouted when he was refused access to the apartment, that he beat on the door and window, and then forced his way into the home. This conduct was more than sufficient to support the jury's finding that he had entered the apartment with the intent to commit a crime.

The judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

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