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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000479-MR

KARL ALEXANDER — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 07-CR-00209

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: The appellant, Karl Alexander ("Alexander"), appeals as a matter of right from his conviction for one count of second-degree burglary and being a persistent felony offender in the first degree ("PFO I"). On appeal, he alleges numerous constitutional violations due to errors occurring in the penalty phase of trial. Although these allegations of error were not preserved for appellate review,

Alexander has requested palpable error review under Kentucky Rules of Criminal Procedure ("RCr ") 10.26. For the reasons set forth herein, we affirm the decision of the Calloway Circuit Court.

Relevant Facts on Appeal

On the morning of September 7, 2007, Thomas Van Slambrouch ("Van Slambrouch"), a retired police officer, returned home from eating breakfast at a local restaurant. Upon arriving home, he was puzzled to find his door locked, as he usually left the door unlocked when he was only going to be away for a short period of time. After unlocking the door, his suspicions were further aroused when he noticed that the bedroom doors in the house were open. Van Slambrouch usually kept the bedroom doors closed. As he entered his bedroom to investigate, he saw a pair of feet sticking out from beneath his bed. At that point, Alexander emerged from beneath the bed and proceeded to tell Van Slambrouch that he entered his home because he was afraid Van Slambrouch's dog did not have food or water. When Alexander began to move toward him, Van Slambrouch pulled out a .38 snub revolver from beneath the mattress and told Alexander he would shoot him if he moved. Van Slambrouch telephoned emergency police while holding Alexander at gunpoint. He held Alexander at bay until police arrived.

Alexander was arrested and indicted by a Calloway County grand jury for second-degree burglary, possession of marijuana, and PFO I. The marijuana charge was dismissed before trial. Alexander was found guilty of the remaining charges and sentenced to fifteen-years' imprisonment.

Analysis

Appellant raises three allegations of error: (1) that the Commonwealth asked jurors to speculate as to what crimes he might commit in the future when fixing his penalty; (2) that the Commonwealth appealed to local prejudice during closing arguments for the sentencing phase; and (3) that jurors were given more than a general description of his prior convictions during the sentencing phase. As aforementioned, Alexander failed to preserve these issues for review, but has requested palpable error review under RCr 10.26. Under palpable error review, we ask whether the error results in a manifest injustice or is "so fundamental as to threaten [the appellant's] entitlement to due process of law." *Brooks v. Commonwealth*, 217 S.W.3d 219, 225 (Ky. 2007).

The criteria for palpable error review of prosecutorial misconduct occurring during penalty phase closing arguments was set forth by the Supreme Court in *Young v. Commonwealth*, 25 S.W.3d 66 (Ky. 2000). In *Young*, the Court stated that "[a]n appellate court's review of alleged error to determine whether it resulted in 'manifest injustice' necessarily must begin with an examination of both the amount of punishment fixed by the verdict and the weight of evidence supporting that punishment." *Id*. at 74. The Court continued, stating that other relevant factors in the analysis include "whether the Commonwealth's statements are supported by facts in the record and whether the allegedly improper statements appeared to rebut arguments raised by defense counsel." *Id*. Finally, the Court stated that appellate courts must always view closing arguments as a whole, while

keeping in mind the wide latitude afforded to counsel during closing arguments. *Id*. at 75. With these criteria in mind, we review each of Alexander's three claims of error.

Improper Arguments in the Penalty Phase

Alexander first argues that the Commonwealth made improper arguments during the penalty phase which caused the jury to impose a sentence above the minimum. As aforementioned, we review this issue for palpable error using the *Young* criteria. *Young, supra*.

Alexander alleges that it was improper for the prosecutor to state that Alexander's actions "scared him." Alexander also argues that it was improper for the prosecutor to speculate as to his future dangerousness by referencing his *carrying a concealed deadly weapon* conviction when he warned the jury: "I don't have to tell you where that could lead next time he's caught in someone's home." Alexander compares this commentary to that in the case of *Ice v. Commonwealth*, where the Supreme Court decried comments by a prosecutor that the criminal defendant "should not be turned loose to kill again." 667 S.W.2d 671, 676 (Ky. 1984).

However, we find the current case distinguishable from *Ice, supra*. To begin, the comments condemned in *Ice* occurred during the *guilt phase* of the trial. As the United States Supreme Court has stated, "[a]rguments relating to a defendant's future dangerousness [are ordinarily] inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a

future danger. . .” *Simmons v. South Carolina*, 512 U.S. 154, 163, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994). However, the comments in the present case occurred during closing arguments for the *penalty phase*. The United States Supreme Court has approved of the “jury’s consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant’s future dangerousness bears on all sentencing determinations made in our criminal justice system.” *Id*. at 162.[1] Indeed, “any sentencing authority must predict a convicted person’s probable future conduct when it engages in the process of determining what punishment to impose.” *Jurek v. Texas*, 428 U.S. 262, 275, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976). In *Woodall v. Commonwealth*, the Kentucky Supreme Court acknowledged its approval of juries’ consideration of future dangerousness. *Woodall*, 63 S.W.3d 104, 125 (Ky. 2002), *citing Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 2000).

Viewing the arguments as a whole, and keeping in mind the broad latitude afforded counsel during closing arguments, we cannot say that the inclusion of these comments affected the overall outcome or fairness of the proceedings. Rather, it was not error for the prosecutor to ask the jury to consider future dangerousness in the penalty phase, as such information is part of a jury’s determination of what punishment to impose. Moreover, the jury did not impose the maximum sentence, even while the evidence of Alexander’s guilt was overwhelming in the case. While it might have been reversible error for the

[1] Although the Supreme Court is discussing capital cases, the concern is arguably far greater in capital cases than in cases like the present one, where death is not a possible punishment.

prosecutor to opine that Alexander's behavior "scared him," and suggest that he would never want to find Alexander in his own house, the error was not preserved for review. Under palpable error review, we cannot say that this statement alone rendered the trial fundamentally unfair. *Summitt v. Bordenkircher,* 608 F.2d 247 (6th Cir. 1979).

Appeal to Local Prejudice

Alexander's next argument is that the prosecutor made an appeal to local prejudice during his closing arguments when he referenced Graves and Calloway Counties. We find no merit to this argument, as the comments by the prosecutor, when read in context, do not appeal to local prejudice. Rather, they merely mention the counties where Alexander's prior convictions arose. The prosecutor's statement referenced Graves County, as that was the location of his previous burglary conviction which was introduced into evidence. Calloway County was referenced, quite obviously, as it was the location of the current burglary charge. Moreover, our courts have typically held that appeals to local prejudice are not reversible unless properly preserved through a contemporaneous objection. *See, e.g. Perdue v. Commonwealth*, 916 S.W.2d 148 (Ky. 1996). It is also worthy of mention that most cases dealing with this issue consider statements made during the *guilt* phase of trial, where there is a possibility that a jury could be coerced into a finding of guilt because of local prejudices. Since the prosecutor's reference occurred during the penalty phase, there is no such danger here. Accordingly, we affirm on this ground.

Description of Prior Convictions

Alexander's final allegation of error is that he was prejudiced when the Commonwealth's witness during the penalty phase provided more than a general description of one of his prior convictions. Specifically, Shawna Tidwell, a probation officer, was called by the Commonwealth during the penalty phase to testify to a litany of Alexander's prior convictions, which included driving under the influence, menacing, assault fourth, burglary second, disorderly conduct, resisting arrest, alcohol intoxication, possession of drug paraphernalia, theft by unlawful taking over $300.00, carrying a concealed deadly weapon, and being a PFO I. Alexander argues that the Commonwealth improperly elicited additional testimony regarding his prior second-degree burglary charge. The Commonwealth's witness (Tidwell) was asked to read aloud from the citation for that charge. The exchange was as follows:

> Commonwealth: Would you read the underlying basis for that conviction?
>
> Tidwell: Officer Sims, Trooper Sims, received a call from the complainant that the above subject, which would be Karl Alexander, was inside his mother-in-law's residence, across the street from his house, at 5257, 1124- Highway 1124. Complainant states she saw the light on and saw the above subject in the master bedroom. When the investigating officer arrived, the back door to the house was open –appeared to have been pried open. The above subject was in the bedroom and he was placed into custody. The violator was Mirandized and said he just went into the house to look around and see if it was worth living in. The violator stated he wasn't there to take anything, but if he saw something expensive, he might have taken it since he was low on

> money. And there was a butter knife found on him and he admitted to owning it.

Alexander's prior burglary offense was again brought up during the cross-examination of his mother, Rebecca Wilder, when the Commonwealth asked her: "Does it scare you somewhat that he keeps being found in people's homes?" Alexander argues that it was improper for this information to come in during the sentencing phase because more than a general description was provided.

Kentucky's truth-in-sentencing statute, KRS 532.055, allows the introduction of the nature of a defendant's prior convictions in the penalty phase of trial. The truth-in-sentencing statute "has the overriding purpose of providing the jury with information relevant to delivering an appropriate sentence." *Cuzick v. Commonwealth*, 276 S.W.3d 260, 263 (Ky. 2009).

The purpose of allowing "the admission of the nature of prior crimes is to allow the jury to assess the proper sentence. It is not admitted, however, to allow the jury to retry the prior crimes . . . ." *Robinson v. Commonwealth*, 926 S.W.2d 853, 854-855 (Ky. 1996). For this reason, our courts have held that only a general description of the nature of prior crimes should be introduced. *Id*. at 855. *See also Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998) *and Brooks v. Commonwealth*, 114 S.W.3d 818 (Ky. 2003).

However, we do not find that the proscription in *Robinson, supra,* was violated here. To begin, *Robinson* is factually distinguishable from this case, as Robinson included the detailed testimony of a victim of a brutal beating committed

by the defendant in that case. There was no victim testimony in the present case.

Although Alexander also relies on *Hudson, supra*, the *Hudson* case never explains what specific comments or statements in the citation violated *Robinson*. As such, it is of little value beyond a reaffirmation of *Robinson*. As the Supreme Court has recently stated, *Hudson* does not "offer up a blanket prohibition of reading from warrants or citations. In fact, all that is clear from the very scant description of the offending testimony in that instance is that it 'was clearly beyond the limitation set forth in *Robinson*.'" *Cuzick v. Commonwealth*, 276 S.W.3d 260, 264 (Ky. 2009), *quoting Hudson*, 979 S.W.2d at 110.

Instead, *Robinson* points to the *Williams* case as "an example of the type of evidence that would be admissible . . . [and] would be the right type of evidence" to use in the sentencing phase. *Robinson*, 926 S.W.2d at 855. In *Williams*, the prosecutor read aloud from the complaint to the jury. The Supreme Court has held that this is "no different than . . . reading from the citation." *Cuzick*, 276 S.W.3d at 263. While no bright line rule has been established, and while there certainly would be cases where information contained in a complaint or citation would be unfairly prejudicial, this is not the case. *See, e.g. Brooks v. Commonwealth, supra,* and *Cuzick, supra.*

In the similar case of *Brooks*, the Commonwealth introduced criminal complaints associated with the defendant's prior convictions for unlawful transaction with a minor, terroristic threatening and theft by unlawful taking under $300.00. The Supreme Court stated that the information provided "was directly

relevant to the crimes for which the jury had just found [the defendant] guilty." *Brooks v. Commonwealth*, 114 S.W.3d at 825. It also noted that "the information provided . . . was relevant to arriving at an appropriate sentence for [the] particular offender." *Id. citing to Williams v. Commonwealth, supra*. We may certainly say that, in the present case, the citation concerning Alexander's prior burglary conviction showed that he was prone to breaking into people's homes and that his excuses for doing so are typically nonsensical. We can also say that the information relayed to the jury through the citation was relevant to the crime committed, as it was nearly identical to the crime referenced in the citation. In this case, it is more likely that the jury was influenced in its sentencing determination by the *sheer number* of Alexander's prior convictions, rather than the brief description read-aloud concerning his prior burglary second conviction. As in *Brooks, supra*, we do not find that the evidence was beyond the limitation set in *Robinson*.

Conclusion

For the foregoing reasons, the judgment and sentence of the Calloway Circuit Court are hereby affirmed.

ALL CONCUR.

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