RENDERED: SEPTEMBER 24, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001536-MR

TIMOTHY DALE RUSSELL — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 08-CR-00111

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; HARRIS,[1] SENIOR JUDGE.

KELLER, JUDGE: Timothy Dale Russell (Russell) appeals from a final judgment of the Christian Circuit Court entered upon a jury verdict convicting him of possession of a controlled substance in the first degree, second offense, and possession of drug paraphernalia, subsequent offense, sentencing him to a total of fifteen years' imprisonment. Russell contends that the trial court erred in

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

overruling his counsel's objection to the prosecutor's alleged misstatement of the law during closing arguments. For the following reasons, we affirm.

FACTS

On December 28, 2007, Officer Caesar Sierra of the Hopkinsville Police Department was on patrol and observed Russell driving without wearing a seatbelt. As Officer Sierra pulled behind Russell's vehicle, he also noticed that Russell's license plate was expired. Officer Sierra then stopped Russell. Upon approaching Russell, Officer Sierra noted that Russell's speech was slurred, that he was shaking, and that he was fumbling with the paperwork for his vehicle. Suspecting that Russell was driving under the influence, Officer Sierra asked Russell to perform pre-exit sobriety tests. After Russell did poorly on these tests, Officer Sierra asked Russell to exit his vehicle

After Russell exited his vehicle, Officer Sierra conducted a *Terry*[2] pat-down of Russell and found a pill bottle containing a solid white substance and a razor blade inside Russell's upper left coat pocket. In the same pocket, Officer Sierra found a small metal pipe with burn marks and residue on it. The white substance from the pill bottle field-tested positive for cocaine. Officer Sierra then had Russell perform some field sobriety tests, which Russell failed. Russell was subsequently arrested.

On March 7, 2008, Russell was indicted by a Christian County Grand Jury for possession of a controlled substance in the first degree, driving under the

[2] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

influence (DUI), possession of drug paraphernalia, and failure of owner to maintain required insurance (no insurance). The DUI charge was later dismissed after the Kentucky State Police lab returned results which indicated that Russell had neither drugs nor alcohol in his system at the time his blood and urine were collected. Likewise, the no insurance charge was ultimately dismissed.

On May 27, 2009, a jury convicted Russell of possession of a controlled substance in the first degree, second offense, and possession of drug paraphernalia, subsequent offense. Russell was sentenced to a total of fifteen years' imprisonment. Additional facts are set forth below.

ANALYSIS

Russell argues that the prosecutor misled the jury by misstating the law during closing arguments. We disagree.

Counsel may, during closing arguments, discuss the law applicable to the case as instructed by the court. Counsel may not, however, misstate the law or make comments on the law inconsistent with the court's instructions. *East v. Commonwealth*, 249 Ky. 46, 60 S.W.2d 137, 139 (1933). The Supreme Court of Kentucky recently explained that reversal for prosecutorial misconduct during closing arguments is required "only if the misconduct is 'flagrant' *or if each of the following are satisfied*: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment." *Miller v. Commonwealth*, 283 S.W.3d 690, 704 (Ky. 2009) (quoting *Barnes v. Commonwealth,* 91 S.W.3d 564, 568 (Ky. 2002))

(emphasis in original). Additionally, this Court "must always consider these closing arguments 'as a whole.'" *Id.* (quoting *Young v. Commonwealth,* 25 S.W.3d 66, 74-75 (Ky. 2000)).

During his closing argument, the prosecutor read the definition of "Possession" directly from Jury Instruction No. 4, which stated that possession "[m]eans to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object." After reading that definition, the prosecutor argued the following:

> Ladies and gentleman, if you've got a crack pipe and a pill bottle of cocaine in your pocket, guess what you are doing? You have actual physical possession and you are certainly exercising dominion and control over those two items that are in your pocket.

Defense counsel objected arguing that the prosecutor's comments were misleading because possession of a controlled substance in the first degree and possession of drug paraphernalia require the possession to be "knowing." *See* Kentucky Revised Statutes (KRS) 218A.1415(1) and KRS 218A.500(2). However, the trial court overruled defense counsel's objection reasoning that the jury was instructed with regard to the law and that the jury could follow those instructions. After the trial court made its ruling, the prosecutor continued with his closing argument and stated that he was only reading Jury Instruction No. 4 in reference to the definition of possession.

Russell contends that the trial court erred in overruling the objection made by his counsel because the prosecutor misstated the law when he talked

about possession without stating that Russell had to "knowingly" possess the cocaine and drug paraphernalia. However, a careful review of the prosecutor's closing argument reflects that he did not misstate the law. In this case, Officer Sierra testified that Russell admitted that the jacket he was wearing belonged to him. However, Russell testified that the jacket did not belong to him and that he never told Officer Sierra that it belonged to him. Based on this evidence, the prosecutor was allowed to argue that by wearing the jacket, Russell "possessed" the cocaine and metal pipe because he had physical possession of them and was exercising dominion and control over them. Thus, because the prosecutor was only referencing the possession element, we do not believe that the prosecutor misstated the law.

Furthermore, a jury is presumed to follow a trial court's instructions. *Matheny v. Commonwealth*, 191 S.W.3d 599, 606 (Ky. 2006). Jury Instruction Nos. 5 and 6 provided the instructions for possession of a controlled substance in the first degree and possession of drug paraphernalia. Specifically Jury Instruction No. 5 stated that:

> You will find the Defendant guilty of Possession of a Controlled Substance, First Degree, under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about December 28, 2007, and before the finding of the Indictment herein, he *knowingly* had in his possession a quantity of cocaine;
>
> AND

B. That he *knew* the substance so possessed by him was cocaine.

(Emphasis added).

Similarly, Jury Instruction No. 6 provided that:

> You will find the Defendant guilty of Possession of Drug Paraphernalia, under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county, on or about December 28, 2007, and within 12 months before the finding of the Indictment herein, the Defendant *knowingly* had in his possession a razor blade and/or a metallic pipe;
>
> AND
>
> B. That he did so with the intent to use these items to inhale or ingest cocaine into his body.

(Emphasis added).

While the prosecutor did not mention that Russell had to knowingly possess the cocaine and drug paraphernalia, the jury was properly instructed on the knowing requirement for both charges. Accordingly, the trial court did not err in overruling defense counsel's objection to the statements made by the prosecutor during his closing argument.

For the foregoing reasons, we affirm the judgment of the Christian Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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