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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000072-MR

PATRICK BAKER — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE DAVID L. WILLIAMS, JUDGE
ACTION NO. 14-CR-00082-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, J. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Patrick Baker appeals from the judgment and sentence of nineteen years' imprisonment entered by the Knox Circuit Court on December 17, 2017, following his conviction at a jury trial of reckless homicide,[1] robbery in the

[1] Kentucky Revised Statutes (KRS) 507.050, a Class D felony.

first degree,[2] impersonating a peace officer,[3] and tampering with physical evidence.[4] Baker challenges one of the trial court's evidentiary rulings and contends he was deprived of a fair trial because the prosecutor engaged in improper speculation during closing argument. Following a careful review, we affirm.

In the early morning hours of May 9, 2014, two armed men wearing masks and dark clothing kicked down the door of a mobile home belonging to Donald Mills, a known drug dealer. The two men announced they were law enforcement officers and subsequently attempted to rob Mills of drugs and cash they believed to be located in the residence. During the attempted robbery, Mills was shot and killed. His wife, two young children, and a friend of the children were present in the mobile home when the incident occurred.

Approximately one week later, detectives from the Kentucky State Police interviewed Christopher Wagner who informed them he and Baker were the men responsible for the break-in at the Mills residence. Wagner informed the detectives other individuals had assisted in planning the heist. Officers recovered a pistol based on information from Wagner as to where he and Baker had buried it.

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[2] KRS 515.020, a Class B felony.

[3] KRS 519.055, a Class D felony.

[4] KRS 524.100, a Class D felony.

Baker and four co-conspirators were subsequently arrested and indicted for their roles in Mills' robbery and death.

Following a four-day jury trial, Baker was convicted of reckless homicide, robbery, impersonating a peace officer, and tampering with physical evidence. The jury recommended concurrent sentences of five years, twelve years, one year, and one year, respectively. On December 17, 2017, the trial court sentenced Baker to a term of nineteen years' imprisonment after rejecting the jury's recommendation for concurrent sentences. This appeal followed.

Baker raises two allegations of error in seeking reversal. First, he contends the prosecutor engaged in improper speculation about missing evidence during his closing argument. Next, he asserts the trial court erred in admitting two photographs recovered from an Apple iPad seized from his residence on the date of his arrest. We disagree with Baker's first assertion and conclude his second assignment of error is not properly before us for consideration.

During the pretrial proceedings, Baker moved for a missing evidence instruction related to the Commonwealth's destruction of user-created data contained on his Apple iPhone 5s. It is undisputed the phone was seized from Baker's person at his arrest, the Commonwealth attempted to conduct a forensic examination of the contents of the phone, and the attempted data extraction resulted in a complete loss of data contained on the phone. Following an

evidentiary hearing, the trial court agreed to give the requested instruction which was ultimately read to the jury as follows:

> [t]he Commonwealth has lost evidence involved in this case, specifically information contained on an iPhone 5s. In your deliberations, you may infer, but you are not required to infer, that this evidence, if available now, would be favorable to the defendant's case.

During closing arguments, Baker's counsel made no mention of the missing evidence instruction. However, the Commonwealth did reference the instruction, stating to the jury:

> I submit to you if this, trust me, I wish we had this. I wish we had the contents of this iPhone. Because I can assure you, based upon what we know from the iPad, the photostreaming, it would not have been beneficial to the defendant, but would have been beneficial . . .

Baker immediately objected and a bench conference ensued. Baker argued no one could know what was on the phone since the Commonwealth had destroyed the evidence and the Commonwealth was now commenting on facts not in evidence and asking the jury to "imply" what was on the phone. The Commonwealth noted defense counsel spent several minutes in closing telling a story of a wrongfully convicted man from Chicago which was not in evidence. The trial court told the parties to "just move on." No admonition was requested nor given.

Baker now asserts the Commonwealth's speculative statements deprived him of a fair trial and constituted reversible error. He contends the

actions of the Commonwealth negated the effectiveness and purpose of the missing evidence instruction and permitted the Commonwealth to enjoy an unfair advantage. Baker asserts the holdings in *Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993), *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982), and *Nolan v. Commonwealth*, 261 Ky. 384, 87 S.W.2d 946 (1935), condemned similar inappropriate commentary by the Commonwealth during closing argument regarding evidence not in the record and mandate reversal in this case. We disagree.

Moore and *Nolan* are clearly distinguishable from the instant case and are inapposite. In each of those cases, the prosecutor commented not on evidence simply not in the record, but evidence which had previously and unequivocally been excluded by the trial court. Clearly, discussing excluded evidence is improper and should be absolutely avoided. Nothing of the sort happened in this case. There was no comment on excluded evidence; the evidence being discussed had been destroyed and was unavailable. While we agree with the basic holdings in *Moore* and *Nolan*, their fundamental factual distinctions reveal they plainly have no application here.

We are likewise unconvinced *Mack* requires a finding of reversible error. There, in a criminal case charging Mack with sodomy and sexual abuse of a child under the age of 9, the prosecutor informed jurors they had only heard "the

tip of the iceberg" and did not have the full story because "rules of evidence" and "legal proceedings" required some evidence not be presented. The prosecution urged jurors to consider what happened "all the rest of the nights? Do you think his needs stopped? Do you think he wasn't abusing somebody?" The Supreme Court of Kentucky condemned these statements as unfairly telling the jury "there exists a vast store of incriminating evidence" which was obscured from presentation, thereby enticing jurors "to override due process of law as a baneful impediment to justice[.]" *Mack*, 860 S.W.2d at 276-77. Although Baker asserts there "is virtually no difference between the prosecutor's comments in *Mack*" and his case, we cannot agree.

The *Mack* prosecutor urged jurors to consider uncharged criminal acts for which there was absolutely no proof in making its determination of guilt, and further indicated much more to the story existed. The prosecutor's actions were clearly intended to persuade the jury of the existence of hidden incriminating evidence of Mack's guilt. *Mack* stands for the proposition it is wholly improper for the Commonwealth to suggest to the jury the existence of relevant evidence that has been kept from them. That did not happen in this case. Here, the prosecutor made a fleeting remark about his wish the evidence contained on the iPhone had not been destroyed and his belief the data, if recovered, would likely not have benefitted Baker. The Commonwealth did not indicate any evidence had

been purposely kept from the jury, and in fact, freely admitted its own role in the destruction of the iPhone data. Nevertheless, Baker believes the prosecutor engaged in misconduct and he is entitled to a new trial.

When a claim of prosecutorial misconduct is raised, the relevant inquiry on appeal should always center around the overall fairness of the trial, not the culpability of the prosecutor. *Commonwealth v. Petrey*, 945 S.W.2d 417 (Ky. 1997); *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987), *cert. denied*, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989). "In any consideration of alleged prosecutorial misconduct, particularly, as here, when the conduct occurred during closing argument, we must determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." *Slaughter*, 744 S.W.2d at 411. Prosecutors are allowed wide latitude during closing arguments and may comment on the evidence presented. *Derossett v. Commonwealth*, 867 S.W.2d 195 (Ky. 1993); *Houston v. Commonwealth*, 641 S.W.2d 42 (Ky. App. 1982). "Closing remarks are clearly in the category of argument rather than evidence." *White v. Commonwealth*, 611 S.W.2d 529, 531 (Ky. App. 1980). Here, we do not believe the overall fairness of the trial was compromised in any manner by the prosecutor's extremely brief comment in summation.

Reversal for prosecutorial misconduct in closing argument is warranted only "if the misconduct is 'flagrant' *or* if each of the following three conditions is 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 a sufficient admonishment to the jury.

United States v. Carroll, 26 F.3d 1380, 1390 (6th Cir. 1994); *United States v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979)." *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (emphasis in original). We have reviewed the record and discern no flagrant misconduct, nor the existence of all three other conditions set forth in *Barnes*.

Our Supreme Court adopted the Sixth Circuit's holding in *Carroll* that determination of whether a prosecutor's statement is "flagrant" requires examination of four factors: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010) (citations omitted). We cannot conclude the prosecutor's isolated statements here misled the jury or unduly prejudiced Baker. While the statements were arguably intentionally placed before the jury, there can

be no doubt, on review of the proof as a whole, evidence of Baker's guilt was overwhelming. Thus, we cannot say the prosecutor's comments were "flagrant."

Baker finds no solace in the *Barnes* factors either. As stated, proof of his guilt was overwhelming. This alone is sufficient to reject his assertion. Although counsel did object, the objection was overruled, thereby eliminating the necessity of an admonition. Baker has simply not shown prejudicial and reversible prosecutorial misconduct.

Next, Baker contends the trial court abused its discretion in admitting several of the Commonwealth's exhibits because they were unduly prejudicial, misleading and confused the jury. However, our review of the record reveals the basis Baker asserts regarding this allegation of error is wholly different from that argued to the trial court. Thus, we do not believe this argument was properly preserved for our review.

Below, Baker strenuously opposed admission of Commonwealth's Exhibits 2a, 2b and 4 on grounds of relevance[5] and lack of foundation. Conversely, before this Court, Baker contends the trial court erred in failing to

[5] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Kentucky Rules of Evidence (KRE) 401. For evidence to be relevant, it need only be minimally probative of a fact of consequence. *E.g.*, *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999).

exclude these exhibits pursuant to KRE 403.[6] These two positions are incompatible with one another as KRE 403 plainly presupposes the proposed evidence is relevant, whereas Baker argued previously the exhibits were irrelevant and admission should be denied on that basis.

Therefore, because Baker's present attack was neither pursued nor presented to the trial court for a ruling, it will not be considered for the first time on appeal. "Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court. *See Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (citing *Kennedy* [*v. Commonwealth*], 544 S.W.2d [219, 222 (Ky. 1976)]." *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (footnote omitted). Only issues fairly brought to the attention of the trial court are adequately preserved for appellate review. *Elery*, 368 S.W.3d at 97 (citing *Richardson v. Commonwealth*, 483 S.W.2d 105, 106 (Ky. 1972); *Springer*, 998 S.W.2d at 446; and *Young v. Commonwealth*, 50 S.W.3d 148, 168 (Ky. 2001)).

For the foregoing reasons, the judgment of the Knox Circuit Court is AFFIRMED.

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[6] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

ALL CONCUR.

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