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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001569-MR

DESMOND BAILEY — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 16-CR-00645

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Desmond Bailey brings this appeal from a September 11, 2017, final judgment of the McCracken Circuit Court upon a jury trial finding him guilty of fourth-degree assault (wanton) and sentencing him to twelve-months' incarceration in the county jail. We affirm.

The relevant facts are undisputed. In September 2016, Alexandria Vance went to an emergency room in Paducah and testing showed she had a broken jaw, medically described as a left anterior mandible fracture, right mandibular ramus fracture and right temporomandibular joint dislocation. Vance stated in the emergency room that she hurt herself falling on a baby swing. She was given morphine and transferred to Vanderbilt Hospital in Nashville, Tennessee, where she had surgery. Based upon statements Vance made to a sheriff's deputy after returning from Vanderbilt, Bailey, the father of one of Vance's children, was charged with first-degree assault and being a persistent felony offender in the first degree.

The case proceeded to a two-day jury trial which began on July 26, 2017. Vance testified she could not remember how she got her injuries or what statements she had made to hospital or law enforcement personnel. The deputy sheriff who investigated Vance's injuries testified Vance had told him that Bailey broke her jaw. Vance's mother also testified that Vance had said Bailey broke her jaw but that she (the mother) had heard many different stories.

The trial court gave an instruction on first-degree assault, second-degree assault and fourth-degree assault (one for intentional assault and one for wanton assault). The jury convicted Bailey of fourth-degree assault (wanton), a

Class A misdemeanor,[1] and recommended he serve twelve months in jail and pay a $500 fine. On September 11, 2017, the trial court sentenced Bailey to twelve months in the county jail but declined to impose the fine due to Bailey's financial status. Bailey then filed this appeal.

Bailey raises four primary arguments on appeal. First, he contends the trial court "let the prosecutor testify" during his examination of Vance. Second, he contends the prosecuting attorney committed prosecutorial misconduct in his closing argument. Third, he contends the trial court erred by refusing his request to take judicial notice of a court order. And finally, he contends he should receive a new trial under the cumulative error doctrine. We will review each argument.

Bailey initially argues that three exchanges during Vance's testimony resulted in the prosecutor *de facto* testifying.[2] First, shortly after Vance testified she did not recall going to Vanderbilt, the prosecutor asked if she gave anyone there a history of how her jaw was broken. Vance somewhat nonresponsively replied that she did not recall being asked any questions at Vanderbilt. The prosecutor then asked Vance if she "present[ed] to the Vanderbilt Emergency

[1] *See* Kentucky Revised Statutes (KRS) 508.030(1)(a).

[2] The trial testimony references for Alexandria Vance can be found in the Trial Video beginning on July 26, 2017, at 2:10:08 *et seq.*

Room for being assaulted?" Bailey's counsel objected, and at an ensuing bench conference argued the question was leading, was based upon hearsay and was an attempt to "smuggle in evidence." After the prosecutor said he would rephrase the question, Bailey's counsel asked the trial court to admonish the jury because the prosecutor had used the word assault in the question. The trial court replied that it sustained Bailey's objection but declined to issue an admonishment.[3]

Immediately thereafter, the prosecutor asked Vance if she knew what "assault" meant, and Vance responded "[h]it." The prosecutor then again asked Vance if upon her arrival at Vanderbilt she had told anyone she had been assaulted. Bailey's counsel objected, but the trial court overruled the objection and directed Vance to answer the question. The prosecutor repeated the question and Vance responded "[n]o, sir." When asked what she had told Vanderbilt employees, Vance responded that she was on morphine and had not said "nothing to nobody." Shortly thereafter, Bailey's counsel objected again and requested a bench conference in which he again stated the prosecutor was improperly leading Vance and added that the prosecutor was testifying for the witness. The trial court overruled the objection and *sua sponte* noted that it was granting Bailey a continuing objection to that line of questioning.

[3] The trial court gave no explanation for refusing to admonish the jury, but Desmond Bailey does not directly claim prejudice from that refusal.

The third exchange involving alleged error by the prosecution occurred roughly an hour later during the prosecutor's redirect examination of Vance. The prosecutor asked Vance if she recalled going to the prosecutor's office and saying she wanted the charges against Bailey dropped because she wanted to forgive and forget. Vance eventually responded that she asked an unnamed woman in the prosecutor's office to drop the charges due to Vance's lack of memory. The prosecutor interrupted Vance to ask: "You didn't come to the Commonwealth's office and say 'Drop the charges because Desmond didn't do it,' did you?" Vance shook her head to indicate no and muttered "uh huh." Bailey, however, does not address that question and response on cross-examination of Vance. Rather, Bailey's counsel asked Vance if she recalled meeting with the prosecutor's office before trial. Vance acknowledged that she did. Bailey's counsel then asked her what happened at that meeting. Vance responded that she asked the prosecutors to drop the charges against Bailey. *Id.*

Bailey does not allege the improper questioning of Vance constitutes prosecutorial misconduct. Instead, he only contends the prosecutor's questioning violates the holding in *Holt v. Commonwealth*, 219 S.W.3d 731 (Ky. 2007).

In *Holt*, the Kentucky Supreme Court was concerned with "the propriety of what appears to be a practice common among some lawyers where a witness has made extra-judicial statements *to the lawyer* prior to trial." *Holt*, 219

S.W.3d at 733 (emphasis added). At trial, when the witness does not give testimony consistent with prior statements, the lawyer then takes liberty in the examination to effectively give testimony for the witness. Thus, *Holt* is not directly applicable to the prosecutor's questions to Vance regarding statements she allegedly made to personnel at Vanderbilt.

However, the colloquy regarding Vance's pretrial discussions with the prosecutor is within the ambit of *Holt*. In *Holt*, the prosecutor called a witness who had been in jail with the defendant and asked a series of leading questions, including "assert[ing] on at least four occasions that [the witness] told her that Appellant had admitted the crime." *Id.* at 734. Thus, the Court found that the prosecutor "put the very words [the witness] refused to say in his mouth" and had "firmly represented" to the jury that the witness had told the prosecutor the defendant had admitted committing the crime. *Id*. The Supreme Court held that allowing the prosecutor to assert facts from counsel "as to the content of prior conversations with witnesses" violates a defendant's Fifth Amendment right to a fair trial because it has "the effect of making a witness of the lawyer and allowing his or her credibility to be substituted for that of the witness." *Id.* at 737. Such errors may be deemed harmless, provided a court concludes they are harmless

beyond a reasonable doubt. *Id.* at 738. *See Chapman v. California*, 386 U.S. 18, 24 (1967).[4]

The situation in our case is different. Instead of implicating Bailey for the commission of a crime, the substance of the questions asked of Vance highlighted her desire to have the charges against Bailey dismissed. Those pretrial statements by Vance do not facially incriminate Bailey. And, moreover, Bailey's counsel also asked Vance on cross-examination about her pretrial conversation with the prosecutor's office.[5] Thus, taking all the relevant facts and circumstances into account, we find any alleged errors to be harmless beyond a reasonable doubt.

Bailey next argues the prosecutor committed prosecutorial misconduct via a series of three statements made in his closing argument. First, the prosecutor stated Vance had testified at family court that Bailey had not broken her jaw

[4] We disagree with the Commonwealth's argument that this portion of the issue is unpreserved. Though Bailey did not object contemporaneously to the questions on redirect regarding Vance's prior discussions with the prosecutor, Bailey had previously objected to the prosecutor's leading Vance and to the prosecutor "testifying for" Vance. The trial court granted a continuing objection, at least as to the leading questions. That was sufficient to preserve the issue, especially considering *Holt*'s focus on how a trial court could stop attorneys from essentially testifying as to out-of-court conversations with witnesses by sustaining objections to leading questions. *See Holt v. Commonwealth*, 219 S.W.3d 731, 739 (Ky. 2007).

[5] Though only mentioned in passing in Bailey's reply brief and not relied upon as grounds for relief, the prosecutor also asked similar questions on direct examination. Trial Video, July 26, 2017 at 2:05:52 *et seq*. Bailey lodged no objection to those questions. Any errors stemming therefrom are thus waived.

because Vance's "agenda" was keeping Bailey from going to jail.[6] Bailey did not object. About two minutes later, the prosecutor stated that Vance had a "child support agenda" because she would lose child support payments if Bailey went to jail. Again, Bailey did not object.[7]

The second closing argument statement Bailey cites as prosecutorial misconduct occurred shortly thereafter, when the prosecutor referred to social media messages from Vance to Bailey's mother about a fight between Vance and Bailey's girlfriend as "street talk" and "street talk among street talkers." Bailey did not object. The prosecutor then stated that a rule of the street was that "you don't snitch, you don't testify. You don't come down to court and testify for the man." Bailey's counsel objected, stating only "not in evidence" and the trial court overruled the objection without comment.

The third, and most troubling, statement by the prosecutor argued by Bailey as error occurred later in the closing argument. After the prosecutor stated that Vance had no "agenda" to lie to her mother (based upon Vance telling her mother that Bailey had hit her), the prosecutor then remarkably began to accuse defense counsel of fabricating matters, stating: "Not even [defense counsel], who

[6] The closing argument references can be found on the Trial Video, beginning on July 27, 2017, at 9:34:23, *et seq.*

[7] Indeed, the prosecutor referred multiple times to what it termed Vance's agenda(s) in his closing argument, to which Bailey's counsel often did not object.

makes up a lot of agendas, makes up a lot of things[,]" at which point Bailey objected. At a bench conference, Bailey's counsel protested that the prosecutor was not allowed to attack opposing counsel. Surprisingly, the trial court overruled the objection, commenting that counsel had wide latitude in closing arguments. Once the bench conference concluded, the prosecutor again said that "not even" defense counsel had offered an explanation or agenda about why Vance would have lied to her mother about her injuries.

We may reverse for prosecutorial misconduct if an improper statement is made and it is flagrant, or if all three of the following factors are present: 1) there is not overwhelming evidence of guilt, 2) an objection was made, and 3) the trial court sustained the objection but failed to admonish the jury. *Mayo v. Commonwealth*, 322 S.W.3d 41, 55 (Ky. 2010). Prosecutorial misconduct is flagrant if: 1) the remarks tended to mislead the jury or prejudice the defendant, 2) the comments were extensive, not isolated, 3) the comments were deliberately made in front of the jury, and 4) the evidence against the defendant was not overwhelming. *Id.* at 56. We must view allegations of prosecutorial misconduct "in the context of the overall fairness of the trial" and will reverse only when the misconduct is so egregious that it undermined the fundamental fairness of the trial. *Murphy v. Commonwealth*, 509 S.W.3d 34, 49 (Ky. 2017).

Bailey did not object to the "child support agenda" comments. Moreover, we are not convinced the remarks were inherently improper. During redirect examination of Vance's mother,[8] the prosecutor asked if she and Vance wanted to keep Bailey out of jail so he could pay child support. Bailey's counsel objected, and the trial court sustained the objection because there was no evidence Bailey supported the child. Shortly thereafter, the prosecutor asked Vance's mother if it would be in her or Vance's financial best interest to have Bailey stay out of jail so he could help support the child. The mother agreed that it would benefit Vance, but added that she had not discussed the matter with her daughter. Bailey did not object. Thus, there was evidence presented during trial that it was in Vance's and her family's financial best interest for Bailey to remain out of jail. The prosecutor was thus permitted to comment on that evidence during closing argument and to draw reasonable inferences therefrom. *See, e.g.*, *Ordway v. Commonwealth*, 391 S.W.3d 762, 796 (Ky. 2013).

We likewise are not convinced the "don't snitch" comments made by the prosecutor during closing argument were improper. Vance's poor memory and conflicting stories were confusing. The prosecutor was permitted to present reasonable arguments and inferences regarding Vance's demeanor, changing

[8] Bailey's brief mistakenly states these questions were asked during the redirect of Vance.

versions of events and lack of memory. To the extent the comments were improper, they were harmless error at best.

The comments directed at Bailey's counsel by the prosecutor are significantly more concerning. Simply put, counsel should not make derogatory personal comments about opposing counsel during trial. *Murphy*, 509 S.W.3d at 51-52. However, our Supreme Court upheld similar comments by a prosecutor in closing that questioned defense counsel's intelligence and accused counsel of "pulling a 'scam.'" *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987); s*ee also Murphy*, 509 S.W.3d at 51-52 (not reversible error for prosecutor to criticize defense counsel during closing argument).

While we disapprove of the prosecutor's attack on defense counsel, we cannot conclude it affected the outcome of the trial. Considering the relevant factors (such as the Supreme Court holding regarding similar comments in *Slaughter*, and the brief nature of the comments given the overall evidence presented at trial), the comments did not render Bailey's trial fundamentally unfair and were harmless error at most.[9] However, we would note that under different facts, such attacks on opposing counsel could constitute reversible error.

[9] Our conclusion is reinforced by the fact that the jury acquitted Bailey of the felony offenses and instead convicted him only of a misdemeanor. *See Brewer v. Commonwealth*, 206 S.W.3d 343, 351 (Ky. 2006) (holding that a jury "could not have been completely antagonized" by the prosecutor's improper statements due to its sentencing recommendation).

Bailey's third argument on appeal is that the trial court erred by declining to take judicial notice under Kentucky Rule of Evidence (KRE) 201 of a docket sheet/order. Bailey wanted the court to take notice of the order because it contained some type of a notation that Vance denied under oath that Bailey had broken her jaw.

Our review of this issue is greatly hampered by the fact that Bailey has not pointed to where the order or docket sheet is contained in the record on appeal or from which case this order was taken.[10] It is difficult for this Court to take judicial notice of a document whose precise contents are unknown to the Court. *Commonwealth v. Ferrell*, 17 S.W.3d 520, 525 (Ky. 2000) (noting that "[a]n appellate court simply cannot address admissibility and prejudice issues in a vacuum . . . .").

To the extent we can review the issue on the merits, we find no error. First, as the trial court noted, Vance admitted that she testified previously that Bailey had not broken her jaw. Thus, the court order at best contained duplicative evidence. Second, and more importantly, a court may take judicial notice under KRE 201 of court records for incontrovertible purposes, such as noting the date a hearing was held, but may not take judicial notice of court records to recognize the

[10] For example, it is even unclear from which court the order stems. Bailey makes reference to both a "district court order" and a "McCracken Family Court" order in his argument.

truth of the allegations contained therein—the very reason Bailey wanted the court here to take judicial notice. *See, e.g.*, *Rogers v. Commonwealth*, 366 S.W.3d 446, 451 (Ky. 2012). Thus, the trial court did not err on this issue.

Finally, Bailey argues he should receive a new trial for cumulative error if his prior substantive allegations of error do not merit relief on appeal. *See, e.g.*, *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010) (explaining cumulative error doctrine). Because Bailey has not shown multiple individual errors which "were themselves substantial, bordering, at least, on the prejudicial[,]" he is not entitled to cumulative error relief. *See id*.

For the foregoing reasons, the Final Judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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