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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001853-MR

JENNIFER KELLER — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE KELLY MARK EASTON, SPECIAL JUDGE
ACTION NO. 16-CR-00061

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Jennifer Keller appeals from her conviction of second-degree assault.[1] She argues that the Commonwealth erred in introducing a witness to the potential jury panel during *voir dire*, that the Commonwealth misstated the law on self-defense, that the Commonwealth erred when it told the jury that she

[1] Kentucky Revised Statutes (KRS) 508.020.

would only serve one or two years of her sentence, and that the trial court erred in ordering her to pay jail fees. We find that the cumulative errors which occurred in this case rendered the trial fundamentally unfair; therefore, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On December 4, 2015, Appellant and her husband, Steven Keller, got into a domestic dispute at their residence. During the altercation, Appellant shot Mr. Keller. Appellant also received injuries from being hit by Mr. Keller and she was also accidentally shot during a struggle for the firearm. The Commonwealth believed Appellant intentionally shot Mr. Keller and Appellant argued she shot Mr. Keller in self-defense. Appellant was indicted for first-degree assault,[2] but was convicted of second-degree assault. This appeal followed. Further facts will be discussed as they become pertinent to our analysis.

ANALYSIS

Appellant's first argument on appeal is that she suffered undue prejudice when the Commonwealth introduced probation and parole officers to the jury panel during *voir dire*. During *voir dire*, the Commonwealth introduced the jury pool to potential witnesses and noted that there were witnesses from probation and parole. One probation and parole officer, Mick Dyer, stood before the jury pool and introduced himself. The Commonwealth then inquired as to whether any

[2] KRS 508.010.

member of the pool knew Mr. Dyer. The Commonwealth also indicated that Eric Franklin, another probation and parole officer, might testify instead of Mr. Dyer. Mr. Franklin was not present in court, but the Commonwealth asked if anyone knew Mr. Franklin.

Appellant argues that informing the jury pool that members of probation and parole would testify was a serious error as it allowed the jury to hear sentencing information before the sentencing phase of the trial. This issue was not preserved; therefore, we review for palpable error.

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Kentucky Rule of Criminal Procedure (RCr) 10.26. "[I]f upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial." *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986) (citation omitted). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Here, we find no palpable error. We believe it was permissible for the Commonwealth to introduce the jury to the two potential witnesses because a juror who has a relationship with a potential witness could have a bias toward that witness. *Dunlap v. Commonwealth*, 435 S.W.3d 537, 585 (Ky. 2013), *as modified* (Feb. 20, 2014). On the other hand, we also believe that it was error for the Commonwealth to indicate that the potential witnesses were from probation and parole. Indicating that members of probation and parole would testify before the penalty phase could have prejudiced the jury against Appellant. The jury could have believed that Appellant was already under the supervision of probation and parole when the underlying crime was committed. While the Commonwealth committed some error, it does not rise to the level of palpable error.

Appellant's next argument on appeal is that the Commonwealth engaged in prosecutorial misconduct by misstating the law of self-defense during its cross-examination of her and during its closing argument. During Appellant's cross-examination, the Commonwealth asked Appellant why she did not leave the house, inferring she had a duty to retreat before using deadly force against Mr. Keller. During closing argument, the Commonwealth stated that when Appellant was holding a loaded gun, she was "not acting in self-defense." Appellant argues that self-defense does not require a duty to retreat and that protecting oneself with

a gun is the definition of self-defense; therefore, the Commonwealth's statements were incorrect and require a new trial.

This error is also not preserved. Appellant is correct that a person does not have a duty to retreat prior to the use of deadly physical force. KRS 503.050. Appellant is also correct that the prosecution cannot make comments on the law that are inconsistent with the jury instructions. *Padgett v. Commonwealth*, 312 S.W.3d 336, 351 (Ky. 2010).

> [P]rosecutorial misconduct can assume many forms, including improper questioning and improper closing argument. If the misconduct is objected to, we will reverse on that ground if proof of the defendant's guilt was not such as to render the misconduct harmless, and if the trial court failed to cure the misconduct with a sufficient admonition to the jury. Where there was no objection, we will reverse only where the misconduct was flagrant and was such as to render the trial fundamentally unfair.

Duncan v. Commonwealth, 322 S.W.3d 81, 87 (Ky. 2010) (citations omitted).

> We employ a four-part test to determine whether a prosecutor's improper comments amount to flagrant misconduct. The four factors to be considered are: "(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."

Murphy v. Commonwealth, 509 S.W.3d 34, 54 (Ky. 2017) (citations omitted).

Here, we do not believe the Commonwealth's actions were palpable error. As to the cross-examination, it was likely improper for the Commonwealth to suggest that Appellant had a duty to retreat once the fight began and before using deadly force. This could have misled the jury; however, the jury was given instructions which indicated Appellant had no duty to retreat when acting in self-defense and the questioning was brief. As to whether this line of questioning was brief or extensive, it consisted of a brief exchange in the overall testimony of Appellant. It is also clear that the prosecution intentionally broached this line of questioning. As for the strength of the evidence against Appellant, this factor weighs slightly in favor of the Commonwealth. Appellant claimed she acted in self-defense and Mr. Keller testified that he tried to deescalate the altercation multiple times by going to bed, but that Appellant refused to do so. The Commonwealth also produced testimony from a family friend that Appellant had once stated that she would shoot Mr. Keller. When considering all four of the above factors, they weigh in favor of the Commonwealth, but only because we must look at this alleged prosecutorial misconduct through the palpable-error lens.

As for the statement made in closing argument, we find that the statement was erroneous, but did not amount to palpable error. It was error because it could easily mislead the jury and was intentionally stated by the Commonwealth. A person defending herself with a gun is a textbook example of

self-defense. On the other hand, it was an isolated statement. The Commonwealth's closing argument lasted over forty-five minutes and the alleged erroneous statement was only spoken once. Finally, as also previously stated, the Commonwealth had sufficient evidence to prove the charges leveled before Appellant. Any errors made by the Commonwealth did not amount to palpable error.

Appellant also argues on appeal that the Commonwealth committed palpable error when it stated Appellant would only serve one to two years of her sentence. During the sentencing phase, the Commonwealth stated:

> Five to ten years. That's what the sentence would be. However, you heard probation and parole, in one to two years she'll be on the streets. She'll be driving in a car next to yours at a stoplight. She will be amongst your children. Wouldn't you feel safer knowing she had the proper amount of time to think of what she did?

Appellant argues this was an improper statement. This argument was not preserved.

In *Ruppee v. Commonwealth*, 754 S.W.2d 852 (Ky. 1988), a similar situation occurred. Keith Ruppee was convicted of robbery and of being a persistent felony offender in the first-degree and was sentenced to life in prison. During the penalty phase argument, the Commonwealth stated that whether he be sentenced to twenty years, eighty years, or life imprisonment, he would only serve seven and a half years. The Commonwealth was commenting on the fact that

Ruppee would be eligible for parole after seven and a half years; however, the Kentucky Supreme Court found that the Commonwealth misstated the law because there was no guarantee Ruppee would be paroled after seven and a half years. In addition, the Court stated that even if Ruppee was paroled at his earliest possible date, he would remain under the sentence given to him and could be reincarcerated. The Court held that "[t]he jury was left with the impression that if it imposed a life sentence the appellant would not serve longer than 7½ years and that, in his case, a life sentence would constitute no greater punishment than did a sentence of 20 years." *Id*. at 853. The Court found this was a misstatement of the law and required reversal.

In *Ruppee*, defense counsel objected to the Commonwealth's statements. Unfortunately, the trial court did not rule on the objection and did not admonish the jury. This was one reason the Court reversed and remanded. The Court in *Ruppee* did not have a palpable-error situation as we do here.

In *Evans v. Commonwealth*, 544 S.W.3d 166 (Ky. App. 2018), we have a similar situation that was reviewed for palpable error. In *Evans*, Garfield Evans was convicted of three counts of third-degree assault. During the sentencing phase, a probation and parole officer testified that if the jury sentenced him to the maximum, five years on each count to run consecutively, he would be eligible for parole in three years. During its closing argument, however, the Commonwealth

stated that if the jury gave Evans the maximum penalty of fifteen years, "he's only looking at three years to serve[.]" *Id*. at 168.

This misstatement was then further complicated by a question the jury asked the court during its deliberation.

> [T]he jury had questions pertaining to whether their decision had to be unanimous and how much time Evans would have to serve if they came back with four years for each count. The trial court was unable to answer their question pertaining to time served and the jury ultimately recommended four years for each count. The jury recommended that those sentences be run consecutively.

Id.

The Court in *Evans* acknowledged *Ruppee* and held that the Commonwealth's statements were a misstatement of the law. The Court further held:

> The jury was clearly affected by the statement because they asked how much time Evans would actually serve if they gave him four years on each count. This question was unable to be answered by the court. The jury ultimately did sentence Evans to four consecutive years on each count, almost the maximum. A substantial possibility exists, therefore, that the result would have different had the Commonwealth Attorney not misstated the law. Therefore, the misstatement caused a manifest injustice and was palpable.

Id. at 170.

Here, we believe that there was no palpable error in the Commonwealth's statements to the jury. It was clearly error for the

Commonwealth to make the statement as shown by the Court in *Ruppee*; however, we do not believe there is a substantial possibility that Appellant's sentence would have been different. Appellant was convicted of second-degree assault, which is a Class C felony. KRS 508.020(2). For Class C felonies, the sentencing range is five to ten years. KRS 532.060(2)(c). Appellant received a seven-year term of imprisonment. This is in the middle of the sentencing range. In addition, we have no evidence that the jury actually took under consideration the Commonwealth's erroneous statement. There was no note from the jury like in *Evans*. We do not believe there is a substantial possibility that the outcome of this case would have been different absent the Commonwealth's statement.

While we have found that the above claims of error did not rise to palpable error, we believe we must still reverse and remand due to cumulative error. "Cumulative error is the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair. We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Mason v. Commonwealth*, 559 S.W.3d 337, 344-45 (Ky. 2018) (footnotes, citations, and quotation marks omitted).

Here, the Commonwealth erred in identifying potential witnesses as probation and parole officers, erred in twice misstating the law of self-defense, and

erred in telling the jury Appellant would only serve one to two years of her sentence. While it was undisputed that Appellant shot her husband, the verdict hinged on her claim of self-defense. Each of the errors unfairly prejudiced that defense by either casting doubt on her credibility or misstating the law. These errors should have been raised at trial, as they would likely have warranted either an admonition or perhaps a mistrial. But even as unpreserved errors, we must conclude that their cumulative effect was to render the trial fundamentally unfair; therefore, we must reverse and remand.

Appellant raises one final argument on appeal. Appellant claims that the trial court erroneously ordered her to pay jail fees. This issue is moot seeing as we are reversing and remanding, but since it may occur again should she be convicted on remand, we will address it. KRS 441.265(1) states that "[a] prisoner in a county jail shall be required by the sentencing court to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, except for good cause shown." In the case at hand, the trial judge orally stated that he would waive court costs and fines. The court also stated that "there are certain other costs and fees, but also because of the fact that she has been incarcerated for a period of time and I've sentenced her to a period of time, those will also be waived." Appellant claims that she believed the court was waiving the

KRS 441.265(1) jail fees when it made this statement; however, when the written order of sentence was entered, it ordered her to pay these jail fees.

We believe the trial court's oral announcement and written order were contradictory. On remand, if Appellant is again convicted, the trial court should make it clear whether it is requiring Appellant to pay jail fees. This will give Appellant an opportunity to argue against paying them, an opportunity she was not given during the first trial.

CONCLUSION

Based on the foregoing, reverse and remand for a new trial.

ALL CONCUR.

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