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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000092-MR

JOSHUA AMBURGEY — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 18-CR-00070

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; NICKELL AND L. THOMPSON, JUDGES.

NICKELL, JUDGE: Joshua Amburgey appeals from the Perry Circuit Court's December 18, 2018, judgment of conviction and sentence entered following a jury trial, asserting the trial court abused its discretion in striking a juror for cause and

alleging prosecutorial misconduct occurred during closing statements. After a careful review of the record, we affirm.

Amburgey was indicted on one count of attempted murder[1] and two counts of criminal mischief in the first degree[2] following an incident with his neighbor, Nathan Hurt, on April 7, 2018. Although the stories of the two men differ, at the end of the fracas, Hurt had been shot in the leg and bullet holes peppered the exterior of his home[3] as well as that of the home next door owned by Hurt's uncle, David Turner. Kentucky State Police Trooper Daniel Smoot was dispatched to the scene. Amburgey admitted shooting several rounds at Hurt after catching him stealing items from his house. He showed the responding Trooper Smoot a .38 special pistol and a 12-gauge pump action shotgun. Amburgey was placed in the back of Trooper Smoot's cruiser where an audio and videotaped interview was conducted. Hurt and Turner were also interviewed. Photographs were taken of the damage to the exterior of the two homes. Although subsequently untested, Trooper Smoot swabbed Amburgey's hands for gunshot residue ("GSR").

[1] Kentucky Revised Statutes ("KRS") 507.020 and KRS 506.010, a Class B felony.

[2] KRS 512.020, a Class D felony.

[3] The home was owned by Hurt's grandfather who allowed Hurt to reside there.

A jury trial was conducted on November 13, 14, and 16, 2018. The jury convicted Amburgey of the lesser-included offense of assault in the second degree,[4] acquitted him on all remaining charges, and fixed his punishment at six years' imprisonment. A final judgment conforming to the jury's verdict was entered on December 18, 2018, and this appeal followed.

Amburgey presents two allegations of error in seeking reversal of his conviction. First, he contends the trial court abused its discretion in granting the Commonwealth's motion to strike a potential juror for cause. Second, he asserts the prosecutor engaged in improper and prejudicial arguments during his closing summation. Amburgey contends the former issue is properly preserved, but admits the latter is unpreserved and requests palpable error review of that issue pursuant to RCr[5] 10.26.

Amburgey first argues the trial court's decision to grant the Commonwealth's motion to strike Juror #639 constituted an abuse of discretion. During *voir dire*, the trial court and counsel spoke with Juror #639 who was a substitute teacher who had taught both Amburgey and Hurt. The juror stated she would try to go by the evidence in making her decision but knowledge of the two

[4] KRS 508.020, a Class C felony.

[5] Kentucky Rules of Criminal Procedure.

as children might enter her mind. She indicated she would be uncomfortable sending Amburgey to jail on Hurt's word. The Commonwealth moved to strike the juror for cause, which the trial court granted.

> A trial court's decision on whether to strike a juror is reviewed for a clear abuse of discretion. *See Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004) ("A determination whether to excuse a juror for cause lies within the sound discretion of the trial court and is reviewed only for a clear abuse of discretion."). Generally, appellants complain that trial courts *fail* to strike jurors for cause when they should, which can then cause them to have to use a peremptory strike and/or end up with a biased juror on the jury. *See, e.g.*, *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2008). The abuse of discretion standard can be more easily applied to this scenario.
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> But when a trial court *strikes* a juror for cause, there is little for a defendant to complain about except that, as here, the juror possibly held views favorable to an acquittal. This clearly denotes bias *for* a defendant, and is equally as unfair as seating a juror biased *against* the defendant. Consequently, striking a juror for cause would have to be an abuse of discretion tantamount to some kind of systematic exclusion, such as for race, in order to be reversible. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). There is simply no prejudice to a defendant from striking any juror for cause unless the fairness of the entire jury process is undermined.
>
> We have repeatedly encouraged trial courts to strike a juror when a reasonable person would question whether the juror would be fair, because a fair juror is at the heart of a fair and impartial trial. We have made it clear that "when there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror

> should be stricken." *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013). "[T]hat is, if a juror falls in a gray area, he should be stricken." *Id*. Further driving home the point, "[w]e reiterate[d] that trial courts should tend toward exclusion of a conflicted juror rather than inclusion, and where questions about the impartiality of a juror cannot be resolved with certainty, or in marginal cases, the questionable juror should be excused." *Id*. Though framed in cases where the trial court failed to strike a juror claimed to be biased against a defendant, the analysis is the same when a juror is biased for a defendant.

Basham v. Commonwealth, 455 S.W.3d 415, 420-21 (Ky. 2014).

Although Amburgey now claims he objected to striking Juror #639 and argued "she would make a very unbiased effort in the jury," our review of the record does not bear out his contention. During the bench conference regarding the strike, defense counsel stated his belief Juror #639 had informed the court of her opinions and "would have carried a bias in with her to the jury." Thus, it appears defense counsel acquiesced in dismissing the juror for cause. As such, Amburgey cannot now be heard to complain as he has waived any challenge to the trial court's ruling and his current challenge was plainly not made below. "Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court. An appellant preserves for appellate review only those issues fairly brought to the attention of the trial court." *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (citations, internal quotation marks, and alterations omitted). "It goes without saying that errors to be

considered for appellate review must be precisely preserved and identified in the lower court." *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (citation omitted). Nevertheless, by striking Juror #639, the trial court preserved the integrity of Amburgey's trial. There was no systematic exclusion. There was no abuse of discretion.

Amburgey next seeks palpable error review of alleged prosecutorial misconduct during closing summation. Pursuant to RCr 10.26, a palpable error occurs if a defendant's substantial rights are affected and a manifest injustice occurs. *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). Such injustice occurs only when the alleged error seriously affected the "fairness, integrity or public reputation of judicial proceedings." *Id*. at 4 (citation omitted); *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

In *Brewer*, the Supreme Court of Kentucky stated:

> [f]or an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error. If not, the error cannot be palpable.

Id. at 349 (footnote omitted). The Supreme Court later strengthened the *Brewer* holding, requiring the probability "of a different result or error so fundamental as to threaten [an appellant's] entitlement to due process of law[]" must exist. *Martin*, 207 S.W.3d at 3. With these standards in mind, we turn to Amburgey's allegations of misconduct.

Amburgey argues the Commonwealth acted improperly by: 1) distorting whether Amburgey told Trooper Smoot that Hurt shot first; 2) misstating Amburgey's age and comparing him as a grown man to Hurt being a kid; 3) describing Amburgey as someone who does not work, piddles around, and sells pop cans; 4) saying Trooper Smoot was saving money by not having the GSR swab tested; 5) asserting Trooper Smoot would be recalled on rebuttal but not doing so; and 6) telling the jury defense counsel did not follow through on what he promised in opening statements. Amburgey cites to no specific prejudice from any of these statements, asserting only that "the prosecutor struck foul blows" and "this trial hinged on the prosecutor's statements against [him]." We discern no prosecutorial misconduct and thus, no palpable error.

> "Prosecutorial misconduct is 'a prosecutor's improper or illegal act involving an attempt to persuade the jury to wrongly convict a defendant or assess an unjustified punishment.'" *Commonwealth v. McGorman*, 489 S.W.3d 731, 741-742 (Ky. 2016) (quoting *Noakes v. Commonwealth*, 354 S.W.3d 116, 121 (Ky. 2011)). The misconduct can occur in a variety of forms, including improper closing argument. *Dickerson v.*

Commonwealth, 485 S.W.3d 310, 329 (Ky. 2016) (citing *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010)). In considering an allegation of prosecutorial misconduct, the Court must view that allegation in the context of the overall fairness of the trial. *McGorman*, 489 S.W.3d at 742. To justify reversal, the Commonwealth's misconduct must be "so serious as to render the entire trial fundamentally unfair." *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004) (quoting *Stopher v. Commonwealth*, 57 S.W.3d 787, 805 (Ky. 2001)).

"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." *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010) (citing *Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky. 2002); *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996)). If the defendant failed to object, however, the Court "will reverse only where the misconduct was flagrant and was such as to render the trial fundamentally unfair." *Ordway v. Commonwealth*, 391 S.W.3d 762, 789 (Ky. 2013) (quoting *Duncan*, 322 S.W.3d at 87).

In considering an allegation of prosecutorial misconduct in closing argument, the Court considers the arguments "as a whole" while remembering that counsel is granted wide latitude during closing argument. *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006) (quoting *Young v. Commonwealth*, 25 S.W.3d 66, 74-75 (Ky. 2000)). "The longstanding rule is that counsel may comment on the evidence and make all legitimate inferences that can be reasonably drawn therefrom." *Padgett v. Commonwealth*, 312 S.W.3d 336, 350 (Ky. 2010) (citing *East v. Commonwealth*, 249 Ky. 46, 60 S.W.2d 137, 139 (1933)).

Murphy v. Commonwealth, 509 S.W.3d 34, 49-50 (Ky. 2017).

We have reviewed the record. When challenged, the Commonwealth rephrased its comments regarding whether Amburgey told Trooper Smoot that Hurt fired the first shots. The incorrect reference to Amburgey's age was fleeting and was not critical to the point the Commonwealth was making. Amburgey himself testified he did not have a job, piddled around on little things trying to earn some money, and picked up cans, scrap, and junk; the Commonwealth simply paraphrased Amburgey's own testimony. Amburgey admitted to firing guns and provided his firearms to Trooper Smoot, negating the necessity for forensic testing of the GSR swabs; thus, the Commonwealth's comments regarding saving taxpayer money was a fair inference from the evidence. The Commonwealth's assertion it would recall Trooper Smoot on rebuttal was made during a bench conference, was not heard by jurors, had no relation to closing summation, and the failure to recall the officer was permissible trial strategy. Finally, the Commonwealth's comment that defense counsel had not delivered on his promises made during opening statements was not improper as prosecutors are permitted to comment on tactics, evidence, and the falsity of a defense position. *See Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). Considering the closing argument as a whole and given the wide latitude granted to counsel in summations, we cannot say the challenged statements were flagrant or rendered the entire trial unfair. *Murphy*, 509 S.W.3d at 50. We discern no palpable error.

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

ALL CONCUR.

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