

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JANUARY 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0203-MR

DATE 2-12-04 EJA/Grouitt, DC.

OBIDENE JOHNSON

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
2002-CR-1076

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Johnson of first-degree burglary, two counts of fourth-degree assault, third-degree criminal mischief and being a first-degree persistent felony offender. He was sentenced to a total of twenty-four years in prison.

The questions presented are whether Johnson was entitled to a directed verdict on the first-degree burglary charge; whether prosecutorial misconduct occurred during the Commonwealth's closing arguments, and whether bad act evidence was improperly introduced into evidence.

Johnson went to the day care facility where his former girlfriend was employed and demanded entry. When he was refused admission, he violently banged on the front door. Undeterred, he proceeded to the rear of the facility and smashed his hand through a windowpane in the back door. Johnson then reached in and unlocked the door. Once inside, Johnson assaulted an employee by striking her in the face and

kicking her down a stairway. The employee suffered a black eye and bruising on the right side of her body. Before leaving the facility, Johnson assaulted a second employee by striking her in the face. This employee suffered lacerations on her lip and bruising on her nose and face.

The jury convicted Johnson of first-degree burglary, two counts of fourth-degree assault, third-degree criminal mischief and being a first-degree persistent felony offender. The prior felony offenses were for house burglary and the sale of marijuana. Johnson was sentenced to twelve years enhanced to twenty-four years on the burglary charge, six months on each assault count and ninety days on the criminal mischief charge. The sentences were run concurrently for a total of twenty-four years in prison. This appeal followed.

I. Burglary

Johnson argues that he was entitled to a directed verdict of acquittal on the charge of first-degree burglary because the Commonwealth failed to prove that he entered the day care with intent to commit a crime. He concedes that he did not have permission to be in the facility and that he injured two employees, but he disputes that he entered or remained in the day care with the intent to commit a crime. Johnson relies upon his testimony that his sole purpose in entering the facility was to talk to his former girlfriend and to attempt to reconcile.

After Johnson was denied entry to the day care, he smashed the windowpane in the back door, reached in, and unlocked it. Once inside he assaulted two employees, who both suffered injury. His criminal intent can be inferred from the circumstances.

McClellan v. Commonwealth, Ky., 715 S.W.2d 464 (1986).

It is clear from our review of the record that the jury could have found beyond a reasonable doubt that Johnson entered or remained unlawfully in the day care with intent to commit a crime. McClellan, *supra*. We must observe that the jury was properly instructed on second-degree criminal trespass. *Cf.* McClellan. The trial judge properly denied the motion by Johnson for a directed verdict of acquittal on the first-degree burglary charge.

Johnson also claims that the Commonwealth misstated the law concerning first-degree burglary during its closing argument. Our review of the record demonstrates that defense counsel made no contemporaneous objection to this portion of the argument. He only objected after the jury had left the courtroom to begin its deliberations. In order to preserve error for appeal with regard to a claimed improper argument, it is necessary to make a contemporaneous objection to the alleged improper remark. Sizemore v. Commonwealth, Ky., 844 S.W.2d 397 (1992) *overruled on other grounds by* McGinnis v. Commonwealth, Ky., 875 S.W.2d 518 (1994), *overruled by* Elliott v. Commonwealth, Ky., 976 S.W.2d 416 (1995). In any event, there was no palpable error. RCr 10.26.

II. Prosecutorial Misconduct

Next, Johnson contends that he was substantially prejudiced and denied due process of law by the prosecutor's pattern of prosecutorial misconduct in the closing arguments in both the guilt and penalty phases. We disagree and will address each allegation separately.

First, Johnson complains about the references to him being a convicted felon and implying he had concocted his testimony. The record shows that the Commonwealth mentioned Johnson's status as a convicted felon during its cross-

examination, and that the trial judge gave an admonition at that time. The prosecutor is permitted reasonable latitude in making his closing argument. Ruppee v. Commonwealth, Ky., 821 S.W.2d 484 (1991). Statements related to the testimony already before the court, and inferences thereon, are permissible. Lucas v. Commonwealth, Ky.App., 840 S.W.2d 212 (1992). A defendant must show that the statements made in the closing statement had the potential to inflict manifest injustice in order to be entitled to reversal of his conviction. Grundy v. Commonwealth, Ky., 25 S.W.3d 76 (2000). Johnson has made no such showing.

Second, Johnson asserts that the Commonwealth inaccurately stated the law of first-degree burglary. As noted previously in this opinion, this issue was not properly preserved for review because defense counsel did not make a contemporaneous objection. Regardless of preservation, we have reviewed the arguments in their entirety and find no palpable error. RCr 10.26.

Third, Johnson claims that the Commonwealth improperly referred to him as being a danger to society and misstated that he had “done this before.” These statements did not cross the line between legitimate argument for a severe penalty and prosecutorial misconduct. See Young v. Commonwealth, Ky., 50 S.W.3d 148 (2001).

Prosecutors are given wide latitude during closing arguments and may comment upon the evidence presented. Maxie v. Commonwealth, Ky., 82 S.W.3d 860 (2002). Consequently, when viewed in light of the fairness of the entire trial, the prosecutor's comments did not deny Johnson a fair trial.

III. Bad Acts

Johnson argues that he was substantially prejudiced and denied due process of law by the introduction of evidence of other bad acts when he was not given notice of

them. The Commonwealth failed to respond to this issue. Nevertheless, we disagree with the argument presented by Johnson.

Johnson's former girlfriend testified that when she exited from her hiding place, Johnson hit her supervisor and then hit her. Johnson was not charged with assault on his former girlfriend because she apparently failed to honor a subpoena to appear before the grand jury. Defense counsel objected to her testimony and moved for a mistrial. The trial judge denied the motion, but admonished the jury to disregard the evidence.

Later, when Johnson took the stand and testified, the Commonwealth asked him about the fight that precipitated the couple's break-up. The Commonwealth asked if the dispute got physical and defense counsel objected before Johnson could answer the question. Defense counsel renewed his motion for a mistrial, noting that the Commonwealth was again attempting to suggest domestic violence between the couple and drawing attention to the fight the night before the crimes occurred. The trial judge instructed the Commonwealth to rephrase the line of questioning.

With respect to the former girlfriend's testimony, the trial judge properly admonished the jury to disregard the evidence. A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error. Johnson v. Commonwealth, Ky., 105 S.W.3d 430 (2003). As to the cross-examination of Johnson, defense counsel objected to the question posed before it was answered. The trial judge instructed the Commonwealth to rephrase its question and it did so. No bad act evidence was introduced. Accordingly, there is no error to review.

Neither the federal nor the state due process rights of Johnson were violated.

The judgment of conviction and sentence is affirmed.

All concur.

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