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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MARCH 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0345-MR

FRANKLIN COUCH — APPELLANT

V.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
01-CR-110

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

A Knox Circuit Court jury found Appellant, Franklin Couch, guilty of First-Degree Robbery and also found him to be a First-Degree Persistent Felony Offender (PFO). In accordance with the jury's sentencing-phase recommendation, the trial court imposed a PFO-enhanced sentence of fifty (50) years. Appellant appeals to this Court as a matter of right,[1] and contends (1) that the Commonwealth's Attorney's closing argument denied him a fair trial, and (2) that the trial court erred in refusing to instruct the jury on the lesser-included offense of Second-Degree Robbery.[2] Finding no merit in Appellant's allegations of error, we affirm the judgment of the Knox Circuit Court.

---

[1] KY. CONST. § 110(2)(b).

[2] Appellant originally asserted an additional argument that the evidence was not sufficient to convict him of First-Degree Robbery because under the instructions the Commonwealth had to prove that Appellant caused physical injury during the robbery. But he withdrew this claim of error upon realizing that the jury found Appellant guilty under an instruction not requiring physical injury.

II. FACTS

On the evening of September 6, 2001, Irene Mills was working alone at her family-owned grocery store, Mills Grocery. Appellant entered the store alone and waited near the back of the store until the only other customer left. He then approached Mills, asked for cigarettes, and as she turned to retrieve them, grabbed her and held a knife to her neck. Mills testified that she screamed, Appellant cut her neck, demanded money, and then left with the entire cash register drawer and two (2) cartons of cigarettes. Mills phoned the police and, when they arrived, provided a description of Appellant and the blue mini-van in which he fled. Officer Vince Kersey testified that when he arrived at the store, he found Mills bleeding from a wound on her neck.

A short time later, police discovered the blue mini-van and Appellant. He was apprehended in clothing that matched Mills's description. A search of the van revealed two (2) cartons of cigarettes and Officer Kersey testified at trial that a knife and cash were also found on Appellant's person. Mills identified Appellant shortly after he was apprehended and also identified him at trial.

Appellant was convicted of First-Degree Robbery, found to be a First-Degree Persistent Felony Offender, and received an enhanced sentence of fifty (50) years. He appeals to this Court as a matter of right.

III. ANALYSIS

A. CLOSING ARGUMENT

Based on the evidence, the trial court gave an intoxication instruction. Appellant claims that he was denied a fair trial when the Commonwealth's Attorney stated during his closing argument that intoxication was "only a defense." Defense counsel did not object to this statement at trial; thus, it was not properly preserved for our review.

Appellant, however, seeks review of this contention as palpable error. RCr 10.26 permits such review when, as we stated in Schoenbachler v. Commonwealth:

> A palpable error is one . . . that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court, and "[w]hat it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial."[3]

"[W]e reverse for prosecutorial misconduct in a closing argument 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."[4]

Because those conditions are not present in the present case, we must determine if the Commonwealth's Attorney's statement was improper argument, and if so, we would then determine if it was flagrant and would result in "manifest injustice" if not reviewed by this Court.

Appellant asserts that the prosecutor's statement was improper because "[c]learly, this was more than 'only' a defense, it was a defense that would negate the level of intent and require the jury to find him not guilty of first-degree robbery." We disagree. Prosecutors are allowed wide latitude during closing arguments,[5] and in this case, we do not believe that the prosecutor exceeded the permissible limits. Intoxication is "only" a defense, and we do not find that the prosecutor implied by his

---

[3] Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836 (2003) (citations omitted).

[4] Barnes v. Commonwealth, Ky., 91 S.W.3d 564, 568 (2002) (citations omitted).

[5] Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 866 (2002).

statement that the jury "could find [Appellant] guilty, even if the jury believed that he was intoxicated because he still did the acts." Rather, it appears that the Commonwealth's Attorney's statement was nothing more than a rebuttal to Appellant's intoxication argument. Regardless, even if we assume that the statement was improper, when we consider the whole case, we do not believe there was a substantial possibility that the result would have been any different. The evidence of Appellant's guilt was overwhelming. Thus, the statement, even if improper, was nonprejudicial. For these reasons, we find no merit in Appellant's contention of prosecutorial misconduct.

B. INSTRUCTIONS

The trial court instructed the jury only as to the indicted offense of First-Degree Robbery.[6] Appellant, however, claims that the trial court erred in refusing his request to instruct the jury on the lesser-included offense of Second-Degree Robbery.[7] We disagree. "An instruction on a lesser included offense is required only if, considering

---

[6] KRS 515.020, the First-Degree Robbery statute, reads as follows:

> (1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
> (a) Causes physical injury to any person who is not a participant in the crime; or
> (b) Is armed with a deadly weapon; or
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.
> (2) Robbery in the first degree is a Class B felony.

[7] KRS 515.030, the Second-Degree Robbery statute, reads as follows:

> (1) A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.
> (2) Robbery in the second degree is a Class C felony.

the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense."[8]

Here, the evidence was overwhelming, actually undisputed, that Appellant committed the robbery and used a knife in so doing. Irene Mills's testimony that Appellant utilized a knife in committing the robbery was uncontested. Additionally, in Appellant's recorded confession that was played during the trial, he admitted to using the knife to accomplish the robbery. For the jury to find Appellant guilty of Second-Degree Robbery, it would have to believe that he committed the robbery, yet did not use a knife in committing the robbery. No jury could reasonably reach such a conclusion. Accordingly, the trial court properly refused Appellant's request for a Second-Degree Robbery instruction.

IV. CONCLUSION

For the above reasons, we affirm the judgment of the Knox Circuit Court.

All concur.

[8] Houston v. Commonwealth, Ky., 975 S.W.2d 925, 929 (1998).

COUNSEL FOR APPELLANT:

John Palombi
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Anitria M. Alo
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204