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RENDERED: OCTOBER 1, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000579-MR

PAUL DUNN — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 07-CR-00056-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In the early morning hours of November 16, 2006, after a night of heavy drinking and some cocaine use, Appellant, Paul Dunn, along with two others, robbed the Mad Mushroom Pizza Restaurant located at 370 South Limestone in Lexington, Kentucky. At trial, Appellant did not contest that he was involved in the robbery. Instead, he raised the defense of voluntary intoxication, claiming that he was too drunk to have formulated the intent to commit the robbery, and that he had been unwittingly manipulated by his son, Tyson. Considering this and the issues raised on appeal, the following summary of the crime should be sufficient.

On that evening, Appellant and his wife, Donna, had been at the home of their daughter, Arekia. Arekia's boyfriend, Jessie Warren, and Appellant's son, Tyson, were also there. They all drank a substantial amount of alcohol,

including beer and wine coolers. Appellant also went out of the house on several occasions and smoked crack cocaine. The only significant conversation of the evening later recalled concerned money. Appellant and his wife argued over their car payments and who was going to pay them.

The evidence reveals that sometime between 2 a.m. and 4 a.m., Appellant asked Jessie to take him to get something to eat. Tyson joined them. Appellant wanted pizza, so they parked at a McDonald's parking lot near the Mad Mushroom restaurant. Several weeks before, Tyson had told his father how he had robbed the same pizza place.

While the evidence conflicted somewhat as to what transpired at the site of the robbery, the Commonwealth presented, and the jury apparently believed, the following scenario.

Appellant stated that he went into the restaurant to get money. Armed with a knife, he and Tyson entered through the back door. They each wore dark bandanas across their faces. Inside, they encountered the night manager, Brett Hetzell, and a pizza delivery driver, Dan Murphy. At knife point, they stole money from the office, the cash register, and the safe. Jessie drove Appellant and Tyson away from the scene.

Officer A.C. Alexander heard the description of the fleeing car on his police radio and spotted it turning from Harrodsburg Road onto Mason Headley road. Officer Alexander made a u-turn and followed the car, and shortly afterward, activated the emergency lights on his cruiser. After seeing the police

lights, the vehicle momentarily came to a stop. Officer Alexander approached the vehicle on its passenger side and observed Appellant open the door and run into a brush line, fleeing towards Headley Green Golf Course and ultimately eluding capture. Tyson Dunn was later captured hiding under a back porch, and Jessie Warren was apprehended at his residence a few days later.

Based on this evidence, Appellant was convicted by jury trial of robbery in the first degree, fleeing and evading police in the second degree, and of being a persistent felony offender (PFO) in the first degree. His 20-year sentence on the first-degree robbery conviction was enhanced by the jury to 40 years based on the first-degree PFO conviction, and he received 12 months on the second-degree fleeing and evading police conviction. The trial court sentenced him accordingly. He now appeals the final judgment entered as a matter of right, Ky. Const. § 110(2)(b).

Appellant raises four issues on appeal: (1) the use of the videotaped deposition of Officer Bobby Hall at trial; (2) the identification of Appellant's son as the victim of a prior sexual abuse conviction during the penalty phase of the trial; (3) evidence elicited by the Commonwealth that Appellant did not give a statement to the police after his arrest; and (4) the trial court's failure to give a directed verdict on the fleeing and evading police in the second degree charge.

Each shall be addressed in turn.

The use of the video deposition of Officer Bobby Hall

In its RCr 7.10 motion, the Commonwealth stated that Officer Bobby Hall

was unavailable because: "He is in the military and has been called to serve. He has been ordered to report to Ft. Knox, Kentucky at the end of February where he will be deployed for one year." The Commonwealth argues that an agreement was made to allow the videotaped deposition testimony of Officer Hall to be played at trial. Appellant, however, claims that no such agreement was made and that the prosecution did not make a "good faith effort" to obtain the presence of Officer Hall at trial. Appellant, therefore, maintains that the introduction of the videotaped deposition violated his Sixth and Fourteenth Amendment right to confront the witnesses against him face to face, as well as Section Eleven of the Kentucky Constitution.

The Commonwealth explicitly stated in its RCr 7.10 motion that it "proposes to take [Officer Hall's] deposition and play his testimony to the Jury at the trial." According to statements made by the Commonwealth to the trial judge, this was standard procedure for attorneys in the area. Additionally, when this motion was tendered, Appellant levied no objections. In fact, Appellant's first objection was not until the first day of trial when the Commonwealth sought to introduce the deposition testimony. We considered a similar issue in Parson v. Commonwealth, 144 S.W.3d 775 (Ky. 2004).

In Parson, the Commonwealth and defense counsel agreed to present some of the medical testimony by videotaped deposition. When the Commonwealth sought to introduce the videotaped deposition of Dr. Timothy Nichol, defense counsel objected, claiming Nichol was not "unavailable" for

confrontation purposes. This Court ruled that Parson waived his constitutional right to confrontation, and that the testimony was admissible. Id. at 785. Specifically, this Court stated:

> There is no provision in our criminal rules that would have allowed Appellant to take a discovery deposition of a witness for the Commonwealth. Rigsby v. Commonwealth, 495 S.W.2d 795, 798 (Ky. 1973), *overruled on other grounds by* Pendleton v. Commonwealth, 685 S.W.2d 549, 552 (Ky. 1985). Here, Appellant would accomplish what he otherwise could not have accomplished were he permitted to agree to a deposition, RCr 7.10(3), then welsh on the agreement after the deposition was concluded and thereby obtain discovery of the nature of the witness's testimony.

Id.

In this case, Appellant did not object to the Commonwealth's initial request to introduce Officer Hall's videotaped testimony and play it for the jury. It was not until the first day of trial that any objection was made, and this point was referenced by the trial judge when allowing the testimony:

> TRIAL JUDGE: But I think under the circumstances, I'm going to allow the deposition and note [defense counsel's] position on this, but I am going to allow the deposition. I'm going to declare he's unavailable in the sense—somebody on active military, they don't let those folks in and out at, you know, on a regular basis. So I do think he's unavailable. *And, if, you know, this had been raised before and some opportunity had been given to check it out a little further, that would be one thing,* but I'm not prepared to exclude at this time. So I'll overrule your objection at this time. (Emphasis added).

Here, by agreeing to the deposition, or at least by not making a timely objection, defense counsel acquired pretrial discovery to which he otherwise was not entitled. Defense counsel's own statement to the trial court emphasizes this point: "I don't ever object to the taking of a deposition, primarily because it's a free shot at discovery." Principles of estoppel and fundamental fairness now preclude Appellant from claiming a denial of his right of confrontation under these circumstances. As Appellant waived any objection to the playing of the videotaped deposition at trial, we need not determine whether Officer Hall was "unavailable" for confrontation purposes. Accordingly, we hold that the trial court did not err in allowing the jury to view the videotaped deposition of Officer Hall.

The identification of Appellant's son as the victim of a prior sexual abuse conviction during the penalty phase

During the penalty phase of the trial, the prosecutor introduced Fayette Circuit Court Indictment No. 88-CR-00334, whereby Appellant had been charged with and ultimately found guilty of sexual abuse in the first degree. The prosecutor also informed the jury that the victim in this 20-year old case was Appellant's son and co-defendant, Tyson. Appellant argues that while KRS 532.055(2)(a) permits the introduction into evidence of "the nature of prior offenses for which he was convicted," the Commonwealth went too far in this case. According to Appellant, the statement by the prosecutor identifying the victim by name denied him his right to a fair trial under the due process

clause. Additionally, Appellant claims that having his son identified as the victim of the sexual abuse charge outweighed the probative value of the 20-year old conviction. KRE 403. Appellant concedes that this was not preserved for review, but nevertheless requests review pursuant to RCr 10.26.

RCr 10.26 provides: "A palpable error which affects the substantial rights of a party may be considered . . . and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." The necessary showing is an error "so fundamental as to threaten a defendant's entitlement to due process of law." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

"Kentucky's Truth-in-Sentencing statute is geared toward providing the jury with information relevant to arriving at an appropriate sentence for the particular offender." Williams v. Commonwealth, 810 S.W.2d 511, 513 (Ky. 1991). This Court has previously held that "all that is admissible as to the nature of a prior conviction is a general description of the crime." Robinson v. Commonwealth, 926 S.W.2d 853, 855 (Ky. 1996).

In the instant case, the prosecutor read to the jury the name of the victim, his age at the time, and the date of the offense. In fact, it appears that the prosecutor read the indictment verbatim. No additional testimony was given, nor were any of the more specific facts and circumstances surrounding the offense offered to the jury. The concerns in Robinson that the jury would hear extraneous facts about the conviction or, in essence, "retry" prior crimes,

are simply not present in this instance. Id. We do not believe the statements by the prosecutor fundamentally threatened Appellant's entitlement to due process of law. Martin, 207 S.W.3d at 3.

Nor do we believe that the reading of the name from the indictment, or the prosecutor's statements during the closing argument of the penalty phase, were so prejudicial as to outweigh their probative value. It is well-settled that closing arguments are not evidence in the case and prosecutors are given considerable leeway. Stopher v. Commonwealth, 57 S.W.3d 787, 805-806 (Ky. 2001). Moreover, this Court has stated that "a prosecutor may use his closing argument to attempt to 'persuade the jurors [that] the matter should not be dealt with lightly.'" Brewer v. Commonwealth, 206 S.W.3d 343, 350 (Ky. 2006), quoting Harness v. Commonwealth, 475 S.W.2d 485, 490 (Ky. 1971). KRS 532.080(3), by its terms, imposes no requirement that prior felony offenses be committed within a certain period of time. Contrary to the assertion of Appellant, he did not receive a 40-year sentence "because he was a bad father." Even if the Commonwealth had not introduced the prior sexual abuse charge, there was, as the trial court stated, "more than sufficient evidence" to find that Appellant was a persistent felony offender in the first degree.

We find no palpable error in this instance.

Evidence elicited by the Commonwealth about Appellant's failure to give a statement to the police following his arrest

Appellant maintains that the Commonwealth improperly elicited evidence

and made comments about the fact that he did not give the police a statement upon arrest. Appellant concedes that this issue is unpreserved, but asks this Court for palpable error review. RCr 10.26. Appellant asks us to reverse because of allegedly improper statements made predominantly during the penalty phase of his trial after the jury had already determined his guilt, and to which he made no objection at the time.

Specifically, Appellant points to several different statements. First, in the deposition of Officer Hall, the prosecutor asked if Appellant had made a statement. Another was made by the prosecutor during the Commonwealth's closing argument of the penalty phase. During her closing argument, the prosecutor discussed how Tyson Dunn had cooperated and had immediately given a statement to the police. Additionally, Appellant notes the Commonwealth's cross-examination of him during the penalty phase, where the prosecutor stated: "You did not talk to the police."

Due process prohibits the Commonwealth from introducing evidence or commenting in any manner on the defendant's silence once the defendant has been informed of his rights and taken into custody. Romans v. Commonwealth, 547 S.W.2d 128, 130 (Ky. 1977). However, not every instance will give rise to reversible error. Wallen v. Commonwealth, 657 S.W.2d 232, 233 (Ky. 1983). "It is only reversible error where post-arrest silence is deliberately used to impeach an explanation subsequently offered at trial or where there is a similar reason to believe the defendant has been prejudiced by

reference to the exercise of his constitutional right." Id., citing Doyle v. Ohio, 426 U.S. 610 (1976).

A careful review of the record indicates that no fundamental unfairness occurred from Officer Hall's statement. The statement to which Appellant takes issue was the following:

> PROSECUTOR: Did he give you any type of statement?
>
> OFFICER HALL: No ma'am. I wasn't present. I was not present for his interview.

This reference to the post-arrest silence of Appellant is not reversible error. Officer Hall's statement was a fleeting comment that could be read in a multitude of ways. A jury could reasonably believe that this statement meant that Appellant did, in fact, give a statement, but that Officer Hall was simply not present at the time it was given. It is ambiguous at best. Furthermore, no other mention of Appellant's failure to give a statement was made by the Commonwealth during this phase of the trial. It was Appellant who first made reference to the fact that he gave no statement to the police. On direct examination during the penalty phase, the following exchange took place:

> DEFENSE COUNSEL: Were you ever taken down to police headquarters and interviewed?
>
> APPELLANT: No, not at all. They never asked me nothing. They didn't want to know the truth. They didn't want to know. All they believed was Tyson and Jessie. You're going to with two statements against one. You're going to.

This theme of "wanting to get the truth out" was repeated on multiple occasions by Appellant during questioning by both his own counsel and the Commonwealth. It was also an important cog in defense counsel's summarization of his strategy during closing arguments of the penalty phase:

> DEFENSE COUNSEL: Probably the reason he [did not take a plea deal] was that he felt like some other people got some deals they shouldn't have got, because they sold some stories he didn't think were true . . . . He wanted to make sure the truth came out . . . . I would remind you again that he produced himself at the jail and waited for three and a half hours. He wasn't given an opportunity to make a statement. They didn't need one from him at that time.

As noted earlier, a criminal defendant's silence cannot be used to impeach his testimony at trial. Romans, 547 S.W.2d at 130. However, "the attorney's failure to object may constitute a waiver of an error having constitutional implications. In the absence of exceptional circumstances, a defendant is bound by the trial strategy adopted by his counsel . . . ." Salisbury v. Commonwealth, 556 S.W.2d 922, 927 (Ky.App. 1977). In this case, the jury was confronted with evidence that the police had interviewed Jessie Warren and Tyson Dunn. Both men told police that it was Appellant who formulated the plan to rob the Mad Mushroom Pizza Restaurant. These statements were in direct opposition to Appellant's suggestion that he was merely a participant in a scheme concocted by Tyson Dunn. Defense counsel sought to highlight the fact that Appellant made no statement to the police,

and that the police made no effort to obtain one. It was part of a reasonable trial strategy to send the message to the jury that Appellant simply wanted to get the truth out. In light of the foregoing, we see no exceptional circumstances in this case warranting reversal. Id.

Trial court's failure to give a directed verdict on the charge of fleeing and evading in the second degree

A defendant is entitled to a directed verdict on a criminal charge if, after all inferences being weighed in favor of the Commonwealth, and "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]" Commonwealth v. Benham, 816 S.W. 2d 186, 187 (Ky. 1991).

KRS 520.100 states as follows:

> (1) A person is guilty of fleeing or evading police in the second degree when:
>
> (a) As a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop, given by a person recognized to be a peace officer who has an articulable reasonable suspicion that a crime has been committed by the person fleeing, and in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person[.]

There is no question raised in this case that Appellant intentionally fled from a known police officer or disobeyed a command to stop. Instead, Appellant submits that the Commonwealth failed to prove the necessary element that his actions created a "substantial risk of physical injury to any person."

Appellant's argument is anchored primarily in the case of Bell v. Commonwealth, 122 S.W.3d 490, 498 (Ky. 2003). That case is clearly distinguishable. Bell involved a charge of *first*-degree fleeing and evading, where the danger of serious physical injury or death must be posed. There, this Court held that the mere discarding of a loaded weapon, while in flight, did not constitute enough of a risk to justify a first-degree fleeing or evading conviction. Obviously, the burden of proof for a showing of *second*-degree fleeing and evading is much less, as no proof of risk of serious physical injury or death is required.

Here, as Officer Alexander explained, the flight was at night through dark and uncertain terrain, consisting of rain-slick roads, fences, and brush line. Furthermore, while fleeing in and of itself may not create a risk of physical injury, it does establish a likelihood that one who flees is likely to fight or resist upon being caught. Common sense deems it so. Some kind of physical injury is not only probable, but likely. Thus, even though no physical injury actually occurred as a result of Appellant's flight, a jury still could have drawn the reasonable conclusion from the proof that, by running away from a police officer in the dark along uncertain terrain and on rain-slick roads, Appellant created a situation fraught with danger to both himself and to the police officer. Considering the evidence as a whole, it was not unreasonable for a jury to find Appellant guilty of fleeing and evading in the second degree.

For the reasons set forth herein, the judgment of the Fayette Circuit

Court is hereby affirmed.

Cunningham, Schroder, Scott and Venters, JJ., concur. Minton, C.J., and Abramson and Noble, JJ., concur in result only.

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