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ACTION.

Supreme Court of Kentucky

2011-SC-000557-MR

TARELL THOMAS

APPELLANT

V.

ON APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
NO. 10-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Tarell Thomas appeals as a matter of right from a Judgment of the Hickman Circuit Court convicting him of complicity to burglary in the first degree, complicity to robbery in the first degree, and complicity to assault in the second degree. Ky. Const. § 110(2)(b). The jury recommended consecutive sentences, for an aggregate total of thirty years; and the trial court sentenced him accordingly. Thomas raises three issues on appeal: (1) the Commonwealth's misstatement of law during *voir dire* resulted in palpable error; (2) the trial court committed reversible error by denying his motion for a mistrial following a testifying officer's reference to Thomas's post-arrest silence; and (3) the Commonwealth engaged in prosecutorial misconduct during its closing argument. For the reasons stated herein, we affirm the Judgment of the Hickman Circuit Court.

RELEVANT FACTS

Hickman County resident Thomas Dublin was at home on the evening of March 10, 2010, when he answered a knock at his door. A young man with his face obscured by a dark bandana, wearing gloves and a stocking-cap, entered the residence. The man silently looked around the room, and exited through the front door. As the elderly Dublin attempted to lock the door behind the man, three other young men wearing bandanas, gloves, and stocking-caps forced the door open and entered the home. Dublin was knocked to the floor, and then instructed to sit in a chair and not move. One man stood at the door while the other two men began to search through Dublin's home. A gun was placed to Dublin's head while the men demanded to know where he kept his money. When Dublin replied that he didn't have any money, one of the intruders pulled a knife and held it to Dublin's throat. Dublin grasped for the knife and cut his finger, causing him to bleed profusely. One of the men placed the gun to Dublin's head for a second time, and Dublin told the men to take the money from his wallet. The men took \$110 from Dublin's wallet and left the residence. Dublin then reconnected his phone that had been disconnected during the incident and called the police.

Deputy Daniel Wyant with the Hickman County Sheriff's office was the first to arrive on the scene and interview Dublin. Dublin told Deputy Wyant that he believed that one of the intruders was a neighbor named Travis Smith. Although all of the intruders were wearing masks, Dublin stated that the first man to enter his home was of the same physical stature and walked in the

same manner as Smith, whom he knew because Smith had done work at Dublin's house. Dublin could not identify the other intruders. After his interview with Deputy Wyant, Dublin was transported to the hospital by ambulance to treat lacerations to his forehead and hand. Shortly thereafter, Detective Brett Miller with the Kentucky State Police arrived on the scene. Detective Miller assumed the lead role in the investigation and ordered that the telephone be collected for further analysis. Although many displaced items were observed in the residence, none of the weapons used in the robbery were found in the home.

Detective Miller canvassed the neighborhood and identified a darkly-clothed Smith standing in front of his residence. Smith was detained and interviewed, but was released later that evening. Over the course of three interviews with Detective Miller, Smith ultimately implicated Billy Joe Crumble and Tarell Thomas among the co-conspirators in the Dublin robbery. Smith's story was corroborated in a separate interview between Detective Miller and Crumble, who identified Thomas as one of the men who entered the home and attacked Dublin. Thomas was indicted on August 19, 2010 on complicity to burglary in the first degree, complicity to robbery in the first degree, complicity to assault in the second degree, and for being a participant in a criminal syndicate.¹

¹ The criminal syndicate charge was dismissed by the Commonwealth before the case went to trial.

After his first trial ended in a mistrial, Thomas was tried again on July 13, 2011. The jury heard testimony from officers Wyant and Miller, as well as Smith and Crumble. The Commonwealth also called Roederer Correctional Complex inmate Gregory O'Guinn to testify about an incident where O'Guinn heard Thomas threatening Crumble in an attempt to discourage Crumble from testifying against him. Thomas was convicted of complicity to burglary in the first degree, complicity to robbery in the first degree, and complicity to assault in the second degree and sentenced to thirty-years' imprisonment.² This appeal followed:

ANALYSIS

I. Prosecutor's Question During *Voir Dire* Did Not Result in Palpable Error.

Thomas claims that the trial court erred when it denied his motion for a mistrial after the Commonwealth commented on the credibility of a witness during *voir dire*. This error is unpreserved, and Thomas asks this court to review for palpable error. Kentucky Rule of Criminal Procedure ("RCr") 10.26. We reverse for palpable error only when the substantial rights of the defendant were affected, and manifest injustice has resulted from the error. *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011) (citing *Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002)). An error is deemed "palpable" upon the determination that, in light of the entire case, there is a substantial possibility

² Smith was convicted of complicity to robbery in the first degree, complicity to burglary in the first degree, and complicity to assault in the second degree and received a sentence of twenty-seven years. Crumble plead guilty to the same charges and received a sentence of seven years' imprisonment.

that the outcome of the case would have been different but for the error.

Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

During *voir dire*, the prosecutor referenced the forthcoming testimony of the Commonwealth's witness, Gregory O'Guinn.³ Specifically, he asked the panel: "The fact that he has a criminal history, would that bother anyone from being able to listen to someone? Would you give his testimony the same amount of credibility as you would give somebody else's?" Thomas's counsel objected immediately and moved for a mistrial on the basis that the question inferred that Thomas had a criminal history.⁴ The trial court denied the motion.

On appeal, Thomas challenges the same question posed by the prosecutor but for a different reason. He argues that the prosecutor's question during *voir dire* misstated the law by inferring that a witness's past criminal activity cannot be used to determine his or her credibility. Evidence of prior convictions, of course, may be admitted to impeach a witness's credibility under Kentucky Rule of Evidence ("KRE") 609(a); *Blair v. Commonwealth*, 144 S.W.3d 801, 808 (Ky. 2004). The rule provides: "For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public

³ O'Guinn testified to an incident where he overheard Thomas threatening Crumble in the holding cells of the Hickman County courthouse.

⁴ In his reply brief, Thomas concedes that the motion for a mistrial did not preserve the issue raised on appeal. The motion for a mistrial on other grounds deprived the trial court of the opportunity to address the issue before the Court now. See RCr 9.22; *Blanton v. Commonwealth*, 429 S.W.2d 407 (Ky. 1968).

record if denied by the witness.” KRE 609(a). Moreover, an unpreserved misstatement of law during a trial may warrant reversal when the defendant suffers manifest injustice as a result of the misstatement. *See Young v. Commonwealth*, 25 S.W.3d 66 (Ky. 2000) (a prosecutor’s alleged misstatements of law during closing arguments reviewed for palpable error).

Upon review of the record, we cannot say that the prosecutor’s question during *voir dire* affected Thomas’s substantial rights nor did it result in manifest injustice. The Commonwealth did not attempt to conceal or minimize O’Guinn’s criminal history during its own examination, but rather elicited information about the crimes committed by O’Guinn, who testified in orange prison garb. Nor did the Commonwealth object to any of Thomas’s attempts to impeach O’Guinn during his cross-examination. By the end of the trial, O’Guinn’s criminal history, which included felony convictions for check fraud, was fully presented to the jury to consider. Thomas’s cross-examination of O’Guinn effectively removed any residual impression in the jurors’ minds that a witness’s criminal history cannot be used to impeach the witness’s credibility. *See Caudill v. Commonwealth*, 120 S.W.3d 635, 676 (Ky. 2003) (no error where the trial court’s instruction referenced the correct legal standard with respect to the mitigating factor of intoxication after the Commonwealth referenced an incorrect standard during closing arguments). Any prejudice caused by the Commonwealth’s alleged misstatement of KRE 609(a) was cured by Thomas’s eventual cross-examination of O’Guinn, where Thomas attacked O’Guinn’s credibility by questioning him about his felony convictions.

Against this conclusion, Thomas cites *Polk v. Greer*, 222 S.W.3d 263 (Ky. App. 2007) to support his claim. In *Polk*, the Court of Appeals found reversible error in an appeal from an automobile collision case where one party, Greer, referred to his opponent, Polk, as a “two-time convicted persistent felon” during opening statements. 222 S.W.3d at 265. The *Polk* court found that the remark improperly exceeded the bounds of KRE 609(a). *Id.* at 266. With a verdict that turned on the credibility of Polk, the Court of Appeals concluded that the trial court’s denial of Polk’s motion for a mistrial based on Greer’s remarks constituted reversible error. *Id.* While the instant case is similar to *Polk* in the sense that witness credibility was a central element of Thomas’s defense, the challenged misstatement of law before the Court here is distinguishable. The KRE 609(a) violation in *Polk* arose when Greer impermissibly remarked on the nature of Polk’s criminal history by calling him a “two-time convicted persistent felon.” Here, the Commonwealth’s *voir dire* question did not directly violate KRE 609(a). Instead, Thomas challenges the *inference* created by the prosecutor’s question. We cannot agree with Thomas’s contention that the prosecutor’s statement was “blatantly” against what KRE 609(a) provides.⁵

⁵ Contrary to what Thomas alleges in his brief, the Commonwealth did not ask the venirepersons “if they *could agree* that they would give Gregory O’Guinn’s testimony the same credibility as other witnesses even though he had a criminal record.” (Emphasis supplied). Instead, the prosecutor asked if any potential juror would give his testimony the same weight as “anybody else’s.” Here, any inference that a witness’s credibility cannot be impeached by the admission of evidence of that witness’s criminal record is tenuous. See *Pollini v. Commonwealth*, 172 S.W.3d 418, 422-23 (Ky. 2005) (the full context of a *voir dire* question is reviewed for error where the appellant attacked the inference created by using the word “imposed” during *voir dire*).

In sum, while the prosecutor's "credibility" question was perhaps ill-advised we cannot conclude that an isolated question regarding gauging O'Guinn's credibility created a lasting impression in the potential jurors' minds sufficient to substantially affect the outcome of the trial.⁶ *See Hunt v. Commonwealth*, 304 S.W.3d 15, 54 (Ky. 2009) (no reversible error where the prosecutor's isolated usage of the word "recommend" during *voir dire* in a death penalty failed to leave an impression on jurors). In light of the entire record, the Commonwealth's question during *voir dire* simply did not result in manifest injustice sufficient to warrant reversal under our palpable error standard. Finally, we decline to address Thomas's bare assertion that this alleged error denied his rights to a fair trial and due process, as this argument lacks "ample supportive references to the record and citations of authority pertinent" in violation of Kentucky Rules of Civil Procedure ("CR") 76.12(4)(c)(v).

II. The Trial Court Properly Denied Thomas's Motion for a Mistrial as to Detective Miller's Testimony.

Next, Thomas contends that the trial court committed reversible error by denying his motion for a mistrial following a testifying officer's reference to Thomas's post-arrest silence. During its case in chief, the Commonwealth called Detective Brett Miller, the lead investigating officer, to testify. Detective Miller was asked about his interviews with the suspects during his

⁶ In any event, the effect of prior criminal convictions on a witness's credibility is an issue for each individual juror to decide. The standard admonition from the Kentucky Circuit Court Benchbook states: "The fact that the witness has been convicted of a felony may not be considered by you for any purpose in this case except insofar as it may have a bearing, *if it does so*, upon [his] truthfulness as a witness and the weight to be given to [his] testimony." (emphasis supplied).

investigation. The prosecutor asked him to describe a series of interviews with Travis Smith and Billy Joe Crumble, with his inquiry focusing on the suspects' tendencies to offer more information in later interviews. When the prosecutor began discussing Thomas's interviews, the following exchange took place:

Commonwealth's Attorney: "Did you attempt to talk to the defendant?"

Detective Miller: "Yes."

Commonwealth's Attorney: "Was he cooperative?"

Detective Miller: "He denied it. He denied any . . ."

Commonwealth's Attorney: "At some point did he refuse to allow you to talk to him?"

Detective Miller: "Yes."

Commonwealth's Attorney: "So you couldn't talk to him anymore after a certain point?"

Detective Miller: "Correct."

Thomas responded by asking to approach the bench, where he then requested a mistrial on the basis that the question elicited an impermissible reference to the fact that Thomas exercised his right to remain silent.⁷ The trial court denied his motion.

We review a trial court's denial of a mistrial for abuse of discretion.

Woodard v. Commonwealth, 147 S.W.3d 63 (Ky. 2004). A mistrial is an extreme remedy that is appropriate only when errors have "denied a fair and impartial

⁷ As an alternative basis for his motion, Thomas's counsel requested a mistrial on the grounds that the Commonwealth's question and Detective Miller's response violated a motion in limine prohibiting reference to the fact that Thomas exercised his right to remain silent.

trial and the prejudicial effect [of those errors] can be removed in no other way.” *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009). Evidentiary errors, like the one alleged here by Thomas, often fall short of meeting our mistrial standard because the prejudicial effect could have been cured by an admonition. *Major v. Commonwealth*, 275 S.W.3d 706 (Ky. 2009). With such errors, the trial court’s failure to declare a mistrial will be adjudged as reversible error only when “an overwhelming probability exists that the jury is incapable of following [an] admonition and a strong likelihood exists that the impermissible evidence would be devastating to the defendant; or . . . the [improper] question was not premised on a factual basis and was inflammatory or highly prejudicial.” *Id.* at 716; *see also Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

It is well settled that the Commonwealth may not comment “in any manner on a defendant’s silence once that defendant has been informed of his rights and taken into custody.” *Hunt v. Commonwealth*, 304 S.W.3d 15, 35 (Ky. 2009); *see also Doyle v. Ohio*, 426 U.S. 610 (1976); *Romans v. Commonwealth*, 547 S.W.2d 128 (Ky. 1977).⁸ Certainly, the prosecutor’s questions here constituted a deliberate elicitation of a reference to Thomas’s refusal to speak with Detective Miller. *But see Hunt*, 304 S.W.3d at 36 (the prosecutor’s question, “Did you attempt to interview [the defendant]?” was not

⁸ This prohibition is grounded in principles explored in the United States Supreme Court’s *Doyle v. Ohio* decision. In *Doyle*, the Supreme Court concluded that a party’s post-arrest silence may not be used to subsequently impeach the party during trial. 426 U.S. at 618.

deemed an improper elicitation of a reference to the defendant's exercise of his Constitutional rights); *Vincent v. Commonwealth*, 281 S.W.3d 785, 789 (Ky. 2009) (the prosecutor did not intentionally elicit an impermissible reference to a defendant's exercise of his right to remain silent when he asked an officer if "any further steps" were taken in an investigation). However, we are convinced that an admonition, had one been requested, would have cured the error. Further, in light of the entire record, we cannot say that the improper question was premised on inaccurate facts, nor was it inflammatory or highly prejudicial.

There is a presumption that an admonition will cure evidentiary errors like the one asserted by Thomas. *Bray v. Commonwealth*, 177 S.W.3d 741 (Ky. 2005) (mistrial was properly denied when an admonition would have cured an improper reference to a defendant's prior bad act). We are confident that an admonition would have cured the error here, as there is nothing in the record to suggest that the jury would have been incapable of following an admonition. *See Jacobsen v. Commonwealth*, 376 S.W.3d 600, 610 (Ky. 2012) (a mistrial was properly denied in a case where a prosecutor's reference to the defendant's disposal of a gun used in a robbery would have been cured by an admonition). Also, when viewed in the context of Detective Miller's direct examination, we cannot say that the impermissible reference to Thomas's silence was devastating to his defense. In fact, the questions preceding the reference were designed to countermand Thomas's argument that the police investigation was poorly conducted. Specifically, the Commonwealth asked Detective Miller to

compare his experiences with investigations to those depicted on popular television shows in order to illustrate the time intensive nature of forensic investigations, developing leads, and securing confessions. This was a calculated response to Thomas's allegation that the investigation was incomplete--not an attempt to gut Thomas's entire defense.

As for the second exception to our general rule regarding the curative nature of admonitions, the Commonwealth's question was not based on a factual inaccuracy as Thomas's refusal to speak to officers was the subject of a motion in limine. Clearly, the fact that Thomas exercised his right to remain silent was an accurate one, as his own counsel succeeded in having it excluded. Second, the fact that Thomas refused to speak to Detective Miller was unlikely to inflame the jury. The improper question arose after Detective Miller described Travis Smith and Billy Joe Crumble's initial reluctance to speak with him. In the context of Detective Miller's direct examination, Thomas's refusal to speak to officers was not surprising, nor was it calculated to inflame the jury. *See Sherroan v. Commonwealth*, 142 S.W.3d 7, 17 (Ky. 2004) (reference to a defendant's prior drug-related convictions was not inflammatory where the jury was aware the defendant was on probation for minor offenses).

Having reviewed the record, we are convinced that the trial court properly denied Thomas's motion for a mistrial. Any error caused by the Commonwealth's question could have been cured by a sufficient admonition,

had one been requested.⁹ Although Thomas failed to request an admonition, no error occurred because the Commonwealth's question was factually accurate and could not be reasonably perceived to have inflamed the jury. As such, the trial court did not abuse its discretion when it denied Thomas's motion for a mistrial.

III. The Commonwealth's Closing Argument was Proper.

For his final issue on appeal, Thomas claims that the prosecutor committed reversible error when he improperly testified during closing argument. This error is unpreserved, and Thomas again asks this court to review for palpable error pursuant to RCr 10.26. Specifically, Thomas argues that the prosecutor improperly "testified" during his closing argument by discussing Gregory O'Guinn's motivation to testify against Thomas. During closing argument, the prosecutor said, "[Witness Gregory O'Guinn] doesn't know anyone. He has no reason to come here. It's not going to help him with anything. I'm not going to make him a deal."

When prosecutorial misconduct during a closing argument is alleged on appeal, we will reverse only when the conduct 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 admonition to the jury. *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) citing *United States v. Carroll*, 26 F.3d 1380, 1390

⁹ We note that the jury instructions contained the standard "Right to Remain Silent" instruction. Although focused on the right to refuse to testify at trial, it emphasized that silence cannot be used to infer guilt.

(6th Cir. 1994). Upon review, we find that none of the above conditions were met. First, we do not agree that the Commonwealth's statement was "flagrant." During Thomas's own closing argument, defense counsel argued that O'Guinn was highly motivated to testify against Thomas, that O'Guinn would be going before the parole board himself and would "need something." The Commonwealth is permitted to comment on the defense's tactics and strategies during closing argument, and that is precisely what the prosecutor sought to accomplish here. *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411-12 (Ky. 1987). The prosecutor's statement was to disavow any deal with O'Guinn. Finally, Thomas has failed to prove that the alternative elements from *Barnes v. Commonwealth* are satisfied. 91 S.W.3d at 568. As we require that *all three elements* are present to warrant reversal, our analysis is complete upon the finding that Thomas failed to object during the Commonwealth's closing argument. This failure alone forecloses any further analysis under *Barnes*. See *Mullins v. Commonwealth*, 350 S.W.3d 434, 441 (Ky. 2011) (citing *Barnes*, 91 S.W.3d at 568 (the trial court's sufficient admonition of the jury after an objection to the Commonwealth's misstatements during closing argument was enough to prevent reversal under *Barnes*)).

To conclude, the Commonwealth's alleged misconduct during closing argument fails to meet our standard for reversal for palpable error under RCr 10.26. When taken in context of the entire closing argument, the prosecutor's statements were a permissible response to Thomas's claim that O'Guinn was motivated to testify against him. The Commonwealth's closing argument did

not result in manifest injustice to Thomas, nor did it substantially affect the trial's outcome.

CONCLUSION

In sum, Thomas was fairly tried and sentenced. The prosecutor's question during *voir dire* regarding a witness's credibility did not result in palpable error. The trial court's denial of Thomas's motion for a mistrial based on the detective's statements regarding Thomas's post-arrest silence was not reversible error. Finally, the Commonwealth's closing argument did not result in manifest injustice sufficient to warrant reversal under our palpable error standard of review. Accordingly, we affirm the Judgment of Hickman Circuit Court.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur, except Noble, J., concurs in result because the prosecutor's mention of the defendant's silence was error, but it was harmless.

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