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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001260-MR

JOSEPH D. SOLOMON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 00-CR-002288

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Joseph D. Solomon has appealed from the final judgment and sentence entered by the Jefferson Circuit Court on May 25, 2001, which convicted him of burglary in the first degree,[1] assault in the fourth degree,[2] and violation of a protective order.[3] Having concluded (1) that the evidence introduced at trial was sufficient to support Solomon's

[1] Kentucky Revised Statutes (KRS) 511.020.

[2] KRS 508.030.

[3] KRS 403.763

conviction for burglary in the first degree under both theories submitted to the jury; (2) that the Commonwealth's use of Solomon's post-arrest silence at trial did not result in a manifest injustice; (3) that the trial court did not err in accepting the Commonwealth's race-neutral explanation for exercising one of its peremptory challenges against a prospective African-American juror; and (4) that Solomon received a fundamentally fair trial, we affirm.

On October 20, 2000, Solomon was indicted by a Jefferson County grand jury and charged with burglary in the first degree, assault in the fourth degree, and violation of a protective order. The charges stemmed from an incident that took place on August 18, 2000, at 4620 Beachbrook Road in Louisville, Jefferson County, Kentucky. Solomon was arraigned on October 23, 2000, at which time he entered a plea of not guilty. Solomon's case was tried before a Jefferson County jury on April 19-20, 2001.

Several witnesses testified on behalf of the Commonwealth. Pamela Thompkins testified that at approximately 8:00 p.m. on August 18, 2000, she was having dinner with a friend, Bobby Wright, when Solomon approached her residence and began pounding on the front door. Thompkins explained that Solomon was her ex-boyfriend and that she had lived with him during the summer and fall of 1998, but that they had separated.

Thompkins stated that Solomon was upset because another man was present in her residence. Thompkins testified that Solomon continued pounding on the door until he managed to kick in part of the door panel. Thompkins stated that Solomon reached through the opening in the door and unlocked the dead bolt. Thompkins explained that Solomon then entered her home and slammed her against a wall in the hallway. Thompkins testified that she felt a hard object hit her in the back of the head as she was slammed against the wall, but she never saw the object. Thompkins testified that after Solomon saw Wright, Solomon stated that he was going to kill them both and he then fled the scene.

Wright also testified on behalf of the Commonwealth. Wright explained that when Solomon began beating on the front door, Thompkins asked him to call 911. Wright testified that while he was attempting to call the police, Solomon kicked a hole in the bottom of the door and managed to gain entry into the home. Wright stated that after Solomon entered the residence, Soloman pushed Thompkins against the wall and struck her in the head with a beer can. Wright testified that he immediately approached Solomon, and that as Solomon fled the scene Solomon stated that he was going to kill them both.

Sergeant Glen Minor of the Jefferson County Police Department testified that he located Solomon late in the evening

on August 18, 2000, and placed him under arrest. Sergeant Minor explained that he advised Solomon of his Miranda[4] rights and transported him to the Baker Police Station. Detective Diana Ditto, who is also employed by the Jefferson County Police Department, testified that she approached Solomon at the Baker Station and had a brief conversation with him. Todd Early, an emergency medical technician, testified that he treated Thompkins for a head injury on August 18, 2000. Shirley Allen, a Jefferson Family Court clerk, testified that a domestic violence order (DVO) had been issued against Solomon on June 29, 2000. Allen explained the process for obtaining a DVO and she testified that the DVO issued against Solomon prohibited him from, inter alia, "committing further acts of domestic violence and abuse" against Thompkins. Solomon did not testify.

The jury convicted Solomon of burglary in the first degree, assault in the fourth degree, and violation of a protective order. On May 25, 2001, the trial court entered its final judgment and sentence. The trial court sentenced Solomon to ten years' imprisonment on the conviction for burglary in the first degree, 60 days in jail on the conviction for assault in the fourth degree, and a fine of $250.00 on the conviction for violation of a protective order. The trial court ordered the sentences to run concurrently for a total sentence of ten years,

[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

however, the court placed Solomon on probation for a period of five years. This appeal followed.

Solomon raises several issues on appeal: (1) that the jury instruction on burglary violated his right to a unanimous jury verdict; (2) that his Fifth Amendment right against self-incrimination and his right to due process of law were violated when Det. Ditto commented upon his post-arrest silence at trial; (3) that the Commonwealth improperly exercised a peremptory challenge to exclude a prospective African-American juror in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution; and (4) that he was denied his right to a fair trial due to various instances of alleged prosecutorial misconduct. We will address the arguments advanced by Solomon seriatim.

I. BURGLARY INSTRUCTION

Solomon first contends that the jury was improperly instructed on the charge of burglary in the first degree. The particular instruction under which Solomon was convicted provided as follows:

> INSTRUCTION NO. 1 BURGLARY IN THE FIRST DEGREE
>
> You will find the defendant, Joseph D. Solomon, guilty under this Instruction if, and only if, you believe from the evidence

beyond a reasonable doubt, all of the following:

(a) That in this county, on or about the 18th day of August, 2000, he knowingly entered or remained unlawfully in a building located at 4620 Beechbrook Drive, without the permission of Pamela Thompkins or any other person authorized to give permission;

AND

(b) That the defendant did so with the intention of committing a crime therein;

AND

(c) (i) That when effecting entry or while in the building or immediate flight therefrom, the defendant caused physical injury to Pamela Thompkins;

OR

(ii) That when effecting entry or while in the building or immediate flight therefrom, the defendant used or threatened the use of a dangerous instrument against Pamela Thompkins.[5]

The instructions defined "[d]angerous [i]nstrument" as:

[A]ny instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be

[5] This instruction tracks the model instruction for KRS 511.020 set forth in 1 Cooper, Kentucky Instructions to Juries, § 5.07 (4th ed. 1999).

used, is readily capable of causing death or serious physical injury.[6]

Solomon contends the above instruction was not supported by the evidence because the Commonwealth failed to introduce any evidence proving that he "used or threatened the use of a dangerous instrument against Pamela Thompkins" during the commission of the offense.[7] Consequently, Solomon claims the instruction for burglary in the first degree violated his right to a unanimous jury verdict as set forth in KRS 29A.280(3), RCr[8] 9.82(1), and Section 7 of the Kentucky Constitution.

We begin our analysis by noting that Solomon has a major hurdle to overcome since he failed to preserve this issue for appellate review. While Solomon did object to the jury instructions proffered by the Commonwealth, he failed "to specifically object to that portion of the instruction of which he now complains[.]"[9] Solomon simply objected to the giving of any jury instructions on the ground that he should be granted a directed verdict of acquittal as to all counts. It is well-established that "[n]o party may assign as error the giving or the failure to give an instruction unless the party's position

[6] The definition of dangerous instrument used by the trial court is identical to the one contained in KRS 500.080(3).

[7] Solomon concedes that the evidence was sufficient to support a conviction under the theory that he "caused physical injury to Pamela Thompkins" during the commission of the offense.

[8] Kentucky Rules of Criminal Procedure.

[9] Davis v. Commonwealth, Ky., 967 S.W.2d 574, 581 (1998).

has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection" [emphasis added].[10] Nevertheless, Solomon urges us to review this issue for palpable error pursuant to RCr 10.26.

"A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error."[11] For an error to be palpable, it must have been "easily perceptible, plain, obvious and readily noticeable."[12] Moreover, "the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief."[13]

The question of unanimity arises when the jury is instructed that it can find a defendant guilty under alternative theories. If the evidence supports a conviction under each theory presented to the jury, the requirement of unanimity is satisfied. If the evidence is insufficient to support a

[10] RCr 9.54(2). See also Johnson v. Commonwealth, Ky., 105 S.W.3d 430, 435-36 (2003).

[11] Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

[12] Burns v. Level, Ky., 957 S.W.2d 218, 222 (1998)(citing Black's Law Dictionary (6th ed. 1995)).

[13] Partin, supra at 224.

conviction under one or more of the alternative theories presented to the jury, the requirement of unanimity is violated.[14] After a thorough review of the record, we are satisfied that the evidence introduced at trial was sufficient to support Solomon's burglary conviction under each theory submitted to the jury.

As previously discussed, Thompkins testified that Solomon struck her in the back of the head with a hard object and Wright stated the he saw Solomon strike Thompkins in the back of the head with a beer can. "Ordinary objects have been found to constitute dangerous instruments when used in certain circumstances."[15] Pursuant to KRS 500.080(3), a dangerous instrument is defined as "any instrument . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury." In Binion, supra, the Supreme Court of Kentucky found a glass ashtray to be a dangerous instrument when it was thrown at the victim. Although the ashtray apparently did not hit the victim, the Court noted that it "crashed into the wall and shattered . . . [thereby] plac[ing] the victim in danger of suffering a serious physical injury if

[14] See, e.g., Davis, 967 S.W.2d at 582.

[15] Binion v. Commonwealth, Ky., 891 S.W.2d 383, 387 (1995).

it had struck her head or a glass fragment had become embedded in an eye."[16]

In considering whether an object is a dangerous instrument, it must be determined whether the object, no matter how innocuous it may appear to be when used for its legitimate purpose, is "readily capable of causing death or serious physical injury" under the circumstances in which it was used.[17] Whether the victim actually suffered a serious physical injury is irrelevant. While a beer can is ordinarily a harmless object, it is certainly "readily capable of causing death or serious physical injury" when used to strike another human being in the head. Thus, we are persuaded that the evidence introduced at trial was sufficient to allow a reasonable juror to conclude that the manner in which Solomon used the beer can, i.e., to strike the victim in the head, rendered it a dangerous instrument under the circumstances.[18]

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[16] Id. at 387. Consistent with this line of reasoning, courts in several other jurisdictions have concluded that ordinary objects may be deemed dangerous instruments under certain circumstances. See People v. Ludwig, 547 N.Y.S.2d 414, 415 (N.Y.App.Div. 1989)(stick); Austin v. State, 555 So.2d 324, 328 (Ala.Crim.App. 1989)(piece of lumber); State v. Terrell, 751 S.W.2d 394, 395-96 (Mo.Ct.App. 1988)(beer bottle); State v. Ortiz, 542 A.2d 734, 740 (Conn.App.Ct. 1988)(stick); People v. Rollins, 503 N.Y.S.2d 166, 167 (N.Y.App.Div. 1986)(metal belt buckle); and People v. Naylor, 502 N.Y.S.2d 856, 857 (N.Y.App.Div. 1986)(pool cue).

[17] Binion, 891 S.W.2d at 387.

[18] "Whether or not a device has been used in a manner that rendered it readily capable of causing death or serious [physical] injury (and thus a 'dangerous instrument') is usually an issue for the jury" [footnote omitted]. Robert G. Lawson & William H. Fortune, Kentucky Criminal Law, § 9-2(a)(3) (1998). Cf., Commonwealth v. Potts, Ky., 884 S.W.2d 654, 656 (1994)("[i]t is true that

II. COMMONWEALTH'S USE OF SOLOMON'S POST-ARREST SILENCE AT TRIAL

Solomon next contends that his Fifth Amendment right against self-incrimination and his right to due process of law were violated when Det. Ditto commented upon his post-arrest silence at trial. The following colloquy took place during the prosecutor's direct examination of Det. Ditto:

> Prosecutor: Did you go to the Baker Station?
>
> Det. Ditto: Yes, I did.
>
> Prosecutor: What was the purpose of doing that.
>
> Det. Ditto: To speak with Joseph Solomon.
>
> Prosecutor: When you got there where was [ ] Solomon.
>
> Det. Ditto: He was in a holdover at the Baker Station.
>
> Prosecutor: What did you go do?
>
> Det. Ditto: I asked him some questions.[19]
>
> Prosecutor: Tell us about that.

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ordinarily the question of whether an instrument or object is a 'dangerous instrument' is a question of fact for the jury to determine, depending upon the manner and circumstances in which it is used. . . . If, however, it is undisputed from the evidence that the instrument employed on the occasion in question is . . . [readily] capable [of causing death or serious physical injury] and that it was in fact used or attempted or threatened to be used in such a manner, then the question becomes one of law for the court to determine").

[19] As previously discussed, Solomon had already been placed under arrest at this point.

> Det. Ditto: [Solomon] told me that [ ] Pamela Thompkins had called him and he knew that he had a domestic violence order but he didn't know anything about the burglary and then I asked him if I could take a taped statement and he refused, he said no [emphasis added].
>
> . . .
>
> Prosecutor: You say he refused to go on and give a taped statement [emphasis added].[20]

It is well-established that the substantive use of a defendant's post-arrest silence during the Commonwealth's case-in-chief is prohibited in Kentucky courts.[21] "[S]ilence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted."[22] Det. Ditto's testimony that Solomon refused to provide a taped statement clearly violated his privilege against self-incrimination as did the prosecutor's subsequent comment that "he refused to go on and give a taped statement."

However, Solomon failed to preserve this issue for appellate review. While Solomon did object to the

[20] Solomon objected at this point. Although it is difficult to hear the trial court's ruling on the videotape of the proceedings, it appears that the trial court sustained Solomon's objection.

[21] See, e.g., Hall v. Commonwealth, Ky., 862 S.W.2d 321, 323 (1993). The prohibition against the use of a defendant's post-arrest silence at trial as substantive evidence of guilt is grounded in the Fifth Amendment, which guarantees that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S.Const. amend. V.

[22] Wainwright v. Greenfield, 474 U.S. 284, 295 n.13, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986).

Commonwealth's use of his post-arrest silence at trial, he failed to request a curative admonition or a mistrial. RCr 9.22 imposes upon a party the duty to "make known to the court the action he desires the court to take or his objection to the action of the court[.]" "If a party claims entitlement to a mistrial, he must timely ask the court to grant him such relief. . . . Otherwise, the issue may not be raised on appeal" [citations omitted].[23] Moreover, "nothing contained in RCr 10.26 precludes the wavier of palpable error or even waiver of a constitutional right[,]"[24] such as the privilege against self-incrimination. As our Supreme Court stated in Brown v. Commonwealth:[25]

> Substantive rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive. There is a simple and easy procedural avenue for the enforcement and protection of every right and principle of substantive law at an appropriate time and point during the course of any litigation, civil or criminal.[26]

"Inasmuch as [Solomon] did not seek relief in the form of a mistrial, we must conclude that submission of the case to

[23] West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989).

[24] Id.

[25] Ky., 551 S.W.2d 557 (1977).

[26] Id. at 559. See also Salisbury v. Commonwealth, Ky.App., 556 S.W.2d 922, 926-27 (1977)(Commonwealth's comment on the defendant's post-arrest silence at trial did not result in palpable error).

the jury as impaneled was a part of his trial strategy."[27] Assuming, arguendo, that Solomon's failure to request a mistrial was not part of his trial strategy, we are unpersuaded that the Commonwealth's use of Solomon's post-arrest silence at trial resulted in a manifest injustice. While not overwhelming, the evidence presented against Solomon at trial was significant.

III. BATSON CHALLENGE

Solomon further contends that the Commonwealth improperly exercised a peremptory challenge to exclude a prospective African-American juror in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. During voir dire, the prosecutor asked the members of the venire if any of them believed that 20 years was too long of a sentence for the crime of burglary. Juror No. 79, who is African-American, responded that she was concerned about the possibility of a 20-year sentence for the crime of burglary; and the prosecutor exercised a peremptory challenge against Juror No. 79. The trial court accepted the prosecutor's explanation as race-neutral on the basis that Juror No. 79 had "expressed doubt and concern about a penalty of 20 years" for the crime of burglary.

[27] West, 780 S.W.2d at 601.

In Washington v. Commonwealth,[28] our Supreme Court recently summarized the three-step process set forth by the United States Supreme Court in Batson v. Kentucky,[29] for evaluating a claim that a prospective juror had been stricken on the basis of race in violation of the Equal Protection Clause.

> First, the defendant must make a prima facie showing of racial bias for the peremptory challenge. Second, if the requisite showing has been made, the burden shifts to the Commonwealth to articulate "clear and reasonably specific" race-neutral reasons for its use of a peremptory challenge. . . . Finally, the trial court has the duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination [citations omitted].[30]

A trial court's ruling on a Batson challenge will not be disturbed on appeal unless it is determined to be clearly erroneous.[31] The trial court may accept the Commonwealth's explanation for the peremptory challenge at face value depending upon the demeanor and credibility of the prosecutor.[32] As our Supreme Court stated in Snodgrass, supra, "'the best evidence often will be the demeanor of the attorney who exercised the challenge. As with the state of mind of a juror, evaluation of

[28] Ky., 34 S.W.3d 376 (2000).

[29] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[30] Washington, supra at 379.

[31] Id. at 380.

[32] Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176 (1992).

the prosecutor's state of mind based on demeanor and credibility lies "peculiarly" within a trial judge's province.'"[33]

As previously discussed, during voir dire, Juror No. 79 expressed concern about the possibility of a 20-year sentence for the crime of burglary. The prosecutor cited Juror No. 79's concern about the potential sentence as his explanation for exercising a peremptory challenge against her. "[A] venireman who cannot fairly and conscientiously consider the entire range of statutory penalties, in compliance with his oath and the instructions of the court, is not impartial, and should be excluded from the jury as not qualified to serve."[34] Consequently, since there were grounds to argue that Juror No. 79 could have been struck by the trial court for cause, we cannot conclude that the trial court erred by accepting the prosecutor's explanation for exercising a peremptory challenge against Juror No. 79 as race-neutral.

IV. PROSECUTORIAL MISCONDUCT

Finally, Solomon contends that he was denied his right to a fair trial due to various instances of prosecutorial misconduct. Specifically, Solomon claims the prosecutor in his opening statement improperly drew attention to certain threats Solomon made against Thompkins, and that the prosecutor

[33] Id. at 179 (quoting Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)).

[34] Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 672 (1990).

improperly threatened the jury and misstated evidence in his closing argument.

The prosecutor's opening statement included the following:

> Now . . . as he's running out, after he's done what he's done, he turns towards Bobby Wright, who is the boyfriend who is there, he says something to the effect of I'll kill you and I'll kill you too.[35]

In his closing argument, he stated:

> When you are deliberating in this case . . . tell us as police and prosecutors if this isn't a burglary then we won't bring these cases, if this isn't a burglary and you go home and somebody busts in your door and corks you on the head, see if that case gets prosecuted.
>
> If you don't think we've proven the physical injury you don't need that to find burglary in the first degree. Under [subsection] c(ii) [of the burglary instruction] while effecting entry or while on flight therefrom, if you use or threaten the use of a dangerous instrument against someone, your guilty of a burglary in the first degree. What did Bobby Wright say that [Solomon] said as he was running out? He said I'm gonna shoot you, I'm gonna shoot you too. . . . If your gonna shoot somebody your gonna use a gun. That's a threat, ok. That's a threat that [Solomon] made with a dangerous instrument, something that you use to shoot somebody and that's enough even if you don't want to find physical injury, which I think we've got here [emphasis added].

[35] Solomon fails to specify which portion of the prosecutor's opening statement he considers improper. Since this is the only portion of the prosecutor's opening statement in which he refers to any threats made by Solomon, we will assume that Solomon's allegation concerns these comments.

Solomon concedes that he failed to preserve this issue for appellate review by way of a contemporaneous objection. It is well-established that "an objection to improper statements made during [opening or] closing arguments must be contemporaneous."[36] Nevertheless, Solomon urges us to review this issue for palpable error pursuant to RCr 10.26. When analyzing claims of improper argument, we must "'determine whether the conduct was of such an "egregious" nature as to deny the accused his constitutional right of due process of law.'"[37] "'The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor.'"[38]

As for the prosecutor's opening statement, Solomon's allegation of prosecutorial misconduct is entirely without merit. "Opening and closing statements are not evidence, and counsel is allowed wide latitude during both."[39] The purpose of an opening statement "is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony

[36] Weaver v. Commonwealth, Ky., 955 S.W.2d 722, 728 (1997).

[37] Foley v. Commonwealth, Ky., 953 S.W.2d 924, 939 (1997)(quoting Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411 (1987), cert. denied, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989)).

[38] Foley, supra at 939 (quoting Slaughter, supra at 411-12).

[39] Garland v. Commonwealth, Ky., 127 S.W.3d 529, 542-43 (2004).

to the whole[.]"[40] As previously discussed, Thompkins and Wright both testified at trial that Solomon threatened to kill them as he fled Thompkins's residence. Consequently, the remarks made by the prosecutor during his opening statement were not improper.

The prosecutor's closing argument is more problematic. Counsel's statements concerning "somebody bust[ing] in [the juror's] door and cork[ing] [them] on the head" and threatening not to prosecute such a case was totally improper. Furthermore, the prosecutor clearly misrepresented the evidence. Thompkins and Wright both testified that Solomon stated that he was going to kill them; not that he was going to shoot them. Moreover, no evidence of a gun or any other firearm was ever introduced at trial. Nonetheless, we cannot conclude that the remarks made by the prosecutor during his closing argument were so egregious as to render Solomon's trial fundamentally unfair. Simply put, Solomon has failed to demonstrate that "a substantial possibility exists that the result would have been different"[41] had the statements not been made.

Solomon further argues that the prosecutor improperly questioned Thompkins about a statement that Solomon made concerning the burglary charges. Thompkins testified at trial

[40] United States v. Dinitz, 424 U.S. 600, 612, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976)(Burger, C.J., concurring).

[41] Partin, supra at 224.

that sometime after May 2000 Solomon flagged her down in the street and told her that he wanted her "to drop the burglary charges." Thompkins further explained, however, that she was unable to remember exactly when this conversation took place and whether it concerned the burglary charge or a DVO she had obtained against Solomon in June 2000.[42] We are of the opinion that even if it were error for the trial court to allow this testimony, such error was clearly harmless. Thompkins's testimony on this point was ambiguous at best as she was unable to remember when the conversation took place and whether it even concerned the burglary charge which arose out of an incident occurring on August 18, 2000.

Solomon next complains that the prosecutor improperly "managed to put in the record underlying facts about the [domestic violence order issued against him]." As previously discussed, Allen testified at trial that a domestic violence ordered was issued against Solomon on June 29, 2000. Allen further testified that the domestic violence order prohibited Solomon from, inter alia, "committing further acts of domestic violence and abuse" against Thompkins. Solomon contends this amounted to inadmissible evidence of "prior bad acts."

[42] Although the trial court initially entered a pre-trial ruling prohibiting the Commonwealth from introducing any statements indicating that Solomon asked Thompkins to drop the burglary charges, it permitted the Commonwealth, over Solomon's objection, to proceed with this line of questioning at trial.

This argument is flawed since Solomon fails to acknowledge that he was charged with violating a protective order. Pursuant to KRS 403.763, "[a] person is guilty of a violation of a protective order when he intentionally violates the provisions of an order issued pursuant to KRS 403.715 to 403.785 with which he has been served or has been given notice." In order to secure a conviction for this particular offense, the Commonwealth was required to prove that Solomon intentionally violated the provisions of the domestic violence order issued against him on June 29, 2000. Thus, the evidence concerning the domestic violence order constituted an essential element of the charged offense. Consequently, Solomon's contention that the prosecutor improperly "managed to put [this evidence] in the record" is without merit. In sum, we are satisfied that Solomon received a fundamentally fair trial, despite his numerous allegations of prosecutorial misconduct.

Based on the foregoing reasons, the final judgment and sentence of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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