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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002145-MR

WILBURN DAY

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
INDICTMENT NO. 98-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, Chief Judge; McANULTY, Judge; and HUDDLESTON, Senior Judge.¹

HUDDLESTON, Senior Judge. Wilburn Day appeals from the denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion, in which he claimed that his trial counsel was ineffective for

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

failing to object to allegedly improper remarks made by the prosecutor in his closing argument. We affirm because Day's attorney had already made unsuccessful motions in limine to exclude the matters raised in the prosecutor's remarks, and his decision not to object at that point in the proceedings could be seen as sound trial strategy.

Following a jury trial in July 1999, Day was convicted of assault in the second degree, resisting arrest and public intoxication. The assault involved striking the victim, his wife, with his fists and kicking her. He was sentenced to respective terms of ten years, twelve months and ninety days, with the latter sentences to run concurrently with the first. On December 27, 2000, Day filed a pro se RCr 11.42 motion claiming, among other things, prosecutorial misconduct and ineffective assistance of counsel. Day asserted that, although there was no evidence presented at trial to show that he had kicked his wife in the head during the course of the assault, the prosecutor improperly characterized Day's shoes as a dangerous instrument in his closing remarks in order to secure a conviction for second degree assault.² Day also insisted that his counsel was ineffective for failing to object to the prosecutor's remarks about the shoes.

² See Ky. Rev. Stat (KRS) 508.020.

The circuit court denied Day's RCr 11.42 motion without conducting an evidentiary hearing. It also denied on the grounds of untimeliness a subsequent supplemental RCr 11.42 motion that repeated the allegations of prosecutorial misconduct and ineffective assistance of counsel. Day appealed. The case was remanded by this Court to the circuit court for an evidentiary hearing on an alleged uncommunicated plea agreement offer which is not pertinent to the present appeal. The opinion also directed the circuit court to address on the merits the issues raised in Day's supplemental RCr 11.42 motion.

The circuit court considered the supplemental motion as directed and found that the claim of prosecutorial misconduct was precluded because it could have been raised on direct appeal. The court noted that Day had in fact filed an appeal, but had then dismissed it as part of a plea agreement in another case. The court also found that, based on the record, the jury instructions regarding second degree assault were supported by law and that the prosecutor's reference to those instructions in his closing argument was therefore not erroneous. It is this latter part of the order that Day is challenging in the present appeal.

The underlying issue in this case is Day's allegation of prosecutorial misconduct. The appropriateness of a

prosecutor's closing remarks is an issue for direct appeal.³ As was the case in Taylor v. Commonwealth,⁴ Day has attempted to circumvent the rule that issues which could have been raised on direct appeal cannot be raised in an RCr 11.42 proceeding, by reformulating his claim as one of ineffective assistance of counsel.⁵

Day insists, however, that he would have been unfairly disadvantaged had he pursued the issue of prosecutorial misconduct on direct appeal. Because of his attorney's failure to preserve the issue for appeal, the prosecutor's remarks would have been assessed under the substantial or palpable error standard of RCr 10.26. Day contends that the palpable error standard is much higher than the standard governing ineffective assistance of counsel so that his chances of success on appeal would have been much lower than under an RCr 11.42 motion.

We do not agree that the standard for finding ineffective assistance of counsel is less stringent than the palpable error standard under RCr 10.26. Furthermore, Day dismissed his appeal in this case as part of a plea bargain in

³ See Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 160 (2001), cert. denied, 536 U.S. 945, 122 S.Ct. 2632, 153 L.Ed.2d 813 (2002). See also Bronston v. Commonwealth, Ky., S.W.2d 666, 667 (1972).

⁴ Id.

⁵ See Taylor, id. at 160.

another case. The constitutionality of a waiver of the right to appeal as part of a plea agreement has recently been confirmed by the Kentucky Supreme Court.⁶ Day's arguments regarding the potential drawbacks of an appeal are therefore moot. Day cannot bargain away his right to an appeal and then use its alleged disadvantages to justify an RCr 11.42 motion.

Our examination of the record also reveals that on June 18, 1998, Day's trial counsel made unsuccessful motions in limine to exclude testimony concerning a dangerous instrument and to declare as a matter of law that a shoe is not a dangerous instrument. The denial of a motion in limine is appealable pursuant to Kentucky Rules of Evidence (KRE) 103(d) which provides in part that "[a] motion in limine resolved by order of record is sufficient to preserve error for appellate review." Day's counsel's action in filing these motions thus preserved for appeal the issue of the characterization of his offense as a second degree assault.

Nonetheless, we recognize that claims of prosecutorial misconduct and ineffective assistance of counsel may be closely related, and in the interest of resolving this issue, we will consider Day's specific allegations.

⁶ See Johnson v. Commonwealth, Ky., __ S.W.3d __, 2003 Ky. LEXIS 159 *4, 2003 WL 21993512 *2 (Rendered August 21, 2003).

The standards for assessing ineffective assistance of counsel are set out in Strickland v. Washington.⁷ This two-pronged test requires Day to show that his counsel's performance was deficient and that the deficient performance prejudiced the defense.⁸ An attorney's performance is evaluated "by the degree of its departure from the quality of conduct customarily provided by the legal profession."⁹ In addition, courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."¹⁰

Day's counsel failed to object to the following comments by the prosecutor:

There's one difference between second degree assault and fourth degree assault, and that is in second degree assault, you not only find that he intentionally caused the physical injury by striking or kicking her but you find in part B that the shoes worn by the defendant were dangerous instruments as defined under instruction 2. . . . A dangerous, you see the difference between assault fourth is there's

⁷ 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

⁸ Id. at 687; accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

⁹ Henderson v. Commonwealth, Ky., 636 S.W.2d 649, 650 (1982).

¹⁰ Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999), citing Strickland, supra, n.7.

no dangerous instrument involved. In assault second there is one. The dangerous instrument means any instrument, article, or substance which, under the circumstances in which it is used, and that's key, 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. Now the question then, is a shoe under the circumstances in which it is used, readily capable of causing death or physical injury. It depends, as it says here, on the circumstances. If I took a shoe, and say, lobbed it like a football at somebody sitting back there in the audience, I would not argue to you that the circumstances of my use of that shoe causes it be a dangerous instrument. What's the worst thing that could happen to somebody that got hit by it, they might get bounced on the head or somewhere on their body, wouldn't be a long way, not a very hard throw, not likely to cause somebody death or serious physical injury. In the, in the same vein if I walked up to somebody and just kicked them, say in the leg or on the rear, I wouldn't argue to you that that is the use of an article in a circumstance that is likely to cause death or serious physical injury. So ladies and

gentlemen, that's not what you've got here. What you have heard is that this defendant had this woman down in the ground and was kicking her. And where did he kick her? Where are her injuries? Right there in the face. Now what is the head? Think about it. It's the most sensitive, delicate part of the body. What can a shoe do to your head when you're being kicked with a shoe in those circumstances? Shattered jaw, knock out teeth, crush or seriously dislocate the nose, as actually happened here. Could puncture an eye. If it hit the side of a temple, a soft spot in the head, it could shatter bones, drive it into the brain. We are talking about a very serious thing here. To kick somebody repeatedly in the head. . . . And if you notice on back to the, the definition of a dangerous instrument, the dangerous instrument does not have to be, you do not have to find that it actually causes serious physical injury, all you have to find is that it is readily capable of causing death or serious physical injury in the circumstances in which it is used. I'm sorry these are complicated, that's the way the law is. But if you look at it, think about what I've told you, I think you will see that he is clearly guilty by the act of kicking that woman in the head

repeatedly with his shoe, or a boot. We don't know what she had, he had on for certain, but she says he was dressed up, he often wore snakeskin cowboy boots and everybody, both of the witnesses who saw him, said he was obviously wearing shoes, it's February. I think you should find him, you can find and you should find him guilty of second degree assault because this is a vicious crime and deserves that kind of punishment.

Although we are not reviewing the prosecutor's remarks for potential misconduct, the evidence in the record does not support Day's contention that there was no testimony and that no reasonable inference could be drawn that the victim was kicked in the head by Day. The victim testified as follows:

He caught me in the median, he got me down, and was beating me furiously with his fists, and kicking me, and he got a hold of my arms and pulled them up and he was on top of me and he was standing right there [points down to each side of lap] and he was kicking [indicates abdomen] and he had my arms pulled up in the air as he was kicking me.

The victim also testified that her face went numb during the assault, that she was choking on blood and that blood was coming from her nose and mouth. And she said that as a result of the beating administered by Day she suffered a fractured and lacerated nose and a fractured cheek.

It is well established that even ordinary shoes can constitute a dangerous instrument, depending on how they are used.¹¹

On the basis of the victim's testimony, counsel's decision not to object to the prosecutor's closing remarks did not amount to a deficient performance, nor did it fatally prejudice the defense. Sufficient evidence was offered at trial to show that Day kicked the victim and that she suffered facial injuries. The prosecutor is permitted to draw reasonable inferences from the evidence.¹² Moreover, even if the prosecutor's remarks had been improper, an objection at that point in the proceedings might have served only to highlight the details of the attack. As the Strickland court noted "the defendant must overcome the presumption that, under the

¹¹ See Jones v. Commonwealth, Ky., 256 S.W.2d 520, 522 (1953) (shoes on defendant's feet constituted a deadly weapon when used to stamp on and kick victim). See also Commonwealth v. Potts, Ky., 884 S.W.2d 520, 522 (1953).

¹² See Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 39 (1998); Bills v. Commonwealth, Ky., 851 S.W.2d 166 (1993).

circumstances, the challenged action 'might be considered sound trial strategy.'" ¹³ Furthermore, the "effective assistance of counsel does not guarantee error-free representation nor does it deny to counsel freedom of discretion in determining the means of presenting his client's case."¹⁴ "A reviewing court, in determining whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance. The tendency and temptation to second guess is strong and should be avoided."¹⁵ Counsel's decision not to object to the prosecutor's remarks falls well within the range of reasonable professional assistance. His decision to stay silent in the face of the prosecutor's remarks did not mean that "defeat was snatched from the jaws of probable victory."¹⁶

For the foregoing reasons, the order denying Day's RCr 11.42 motion is affirmed.

ALL CONCUR.

¹³ Supra, n.7, 466 U.S. at 689 (citations omitted).

¹⁴ Ramsey v. Commonwealth, Ky., 399 S.W.2d 473, 475 (1966).

¹⁵ Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998).

¹⁶ United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992), cited in Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000).

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