

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000918-MR

OCTAVIO MEDINA GARCIA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 02-CR-00401

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Octavio Medina Garcia appeals the April 1, 2003, judgment of the Fayette Circuit Court. We affirm.

On January 29, 2002, Officer David Biroshchik of the Lexington Metro Police Department responded to a disturbance at appellant's apartment. The victim told police upon arrival that appellant had induced her into his apartment to look at furniture, locked her in the apartment against her will, and raped her. Appellant was taken into custody and arrested. Appellant was subsequently indicted by the Fayette County Grand

Jury upon one count of first-degree rape, one count of kidnapping and two counts of second-degree criminal possession of a forged instrument.

After a jury trial appellant was found not guilty of rape, but guilty of first-degree unlawful imprisonment. The jury also found appellant guilty of both counts of second-degree criminal possession of a forged instrument. Appellant was sentenced to a total of eleven years' imprisonment. This appeal follows.

Appellant seeks reversal of his conviction based upon improper comments made by the Commonwealth regarding his post-Miranda silence. We construe appellant's argument as illustrating two instances of prosecutorial misconduct; the first relating to the Commonwealth's introduction, in its case-in-chief of appellant's taped invocation of his right to remain silent and the second, comments made by the prosecutor during her closing argument. These issues were not preserved for appeal.

During the Commonwealth's direct examination of Detective Biroshik, without objection by defense counsel, the prosecution played a tape of the detective's interview of appellant. This recorded conversation occurred while appellant was in custody at the police station. The tape itself was of poor condition and difficult to understand. Detective Biroshik

testified that he read appellant his Miranda rights and appellant responded that he understood those rights.

In the course of the taped interview, appellant stated he wished to remain silent and requested a lawyer. At this point the detective told appellant he could not ask him any more questions because he had requested an attorney. The detective went on to say he had reason to believe a crime had been committed and he was going to charge appellant accordingly. Despite the detective informing appellant that the interview was concluded, appellant continued to make statements concerning the events related to his arrest.

Appellant's testimony at trial differed greatly from the statements he made at the scene and those he made to Detective Biroshik at the police station. At the scene, and later to Detective Biroshik, appellant maintained that the alleged victim had come to his doorway, offered sex in exchange for money and that he had told her to leave. In contrast, at trial appellant stated he had paid for consensual sex with the alleged victim and later caught her attempting to steal his wallet.

Pursuant to Ky. R. Crim. P. (RCr) 10.26, a palpable error is one which affects the substantial rights of a party. Although insufficiently preserved, such error may be considered on appeal and appropriate relief granted upon a determination

that manifest injustice has occurred as a result of the error. Manifest injustice is found where the court "believes there may have been miscarriage of justice." Commonwealth v. M.G., Ky. App., 75 S.W.3d 714, 719 (2002). As appellant's allegations of error were not properly preserved for appeal we will review them pursuant to the palpable error standard in RCr 10.26.

Appellant's argument is premised upon the Supreme Court's holding in Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L.E.2d 91 (1976). In Doyle, the Supreme Court held that breaching the implied assurances of the Miranda warnings violated the Due Process Clause of the Fourteenth Amendment. The Court stated that Miranda warnings carry an implicit assurance that silence will not carry a penalty. Id. The Doyle rule operates to prevent the prosecution from utilizing a defendant's silence to impeach a subsequent explanation offered at trial. We note that alleged Doyle infractions require a case-by-case analysis and allow for a determination of harmless error.

In Wallen v. Commonwealth, Ky., 657 S.W.2d 232 (1983), the Kentucky Supreme Court reviewed a situation where a prosecutor introduced evidence about a defendant's post-arrest silence. The Court stated as follows:

Doyle and subsequent cases make it clear that not every isolated instance referring to post-arrest silence will be reversible

error. 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. The usual situation where reversal occurs is where the prosecutor has repeated and emphasized post-arrest silence as a prosecutorial tool. . . .

Id. at 233 citing United States v. Davis, 546 F.2d 583 (5th Cir. 1977).

In this instance, we believe the prosecution's introduction of appellant's taped invocation of his right to remain silent was not deliberate and did not have a prejudicial effect on the outcome of the trial. At trial the tape of Detective Biroschik's interview of appellant was admitted into evidence and played without objection from defense counsel. The record reveals the prosecution's questioning of Detective Biroschik pursued the appropriate subject matter of the statement appellant made at the time of his arrest. Although the prosecution could have introduced the appellant's statement to Detective Biroschik with greater care, this Court believes the brief nature of the reference and the contemporaneous prosecutorial dialogue for impeachment purposes, demonstrates a lack of manifest intent on behalf of the Commonwealth to focus on appellant's silence. See Bowling v. Commonwealth, Ky., 873 S.W.2d 175 (1993).

Furthermore, we do not believe appellant suffered any prejudicial effect from the introduction of the taped statement in the Commonwealth's case-in-chief. The evidence against appellant was sufficient for a jury to reasonably conclude he was guilty. Likewise, any statements voluntarily made after invoking one's right to remain silent are clearly admissible. In this case, there is no reasonable possibility that the verdict would have been different, absent the alleged error. Accordingly, the error, if any, was harmless. Marshall v. Commonwealth, Ky., 60 S.W.3d 513 (2001).

Appellant's final argument is that the Commonwealth's comments during closing argument improperly directed the jury's attention to the invocation of his right to remain silent. During its closing argument, the Commonwealth made the following statements: (1) The victim "didn't have the luxury of waiting a year to figure out what facts were going to come about and change her story as the facts changed. She told her story immediately." (2) Appellant "gets interviewed by Detective Biroshchik and he didn't tell him any of this "

Appellant argues these statements were an indirect comment on his decision to remain silent and thus were not appropriate. To determine whether an indirect comment is inappropriate, we must determine "whether the comment is reasonably certain to direct the jury's attention to the

defendant's exercise of his right to remain silent." Scholler v. Commonwealth, Ky., 969 S.W.2d 706, 711 (1998)(citations omitted).

In this instance, given the brief nature of the reference to appellant's silence, and that it was directly followed by appellant's admissible statement of events to Detective Biroshik, we do not feel the comments were reasonably certain to direct the jury's attention to appellant's exercise of his right to remain silent.

When viewed in its entirety and in the context made, we do not believe the comments were directed at appellant's invocation of his right to remain silent. A prosecutor's statements must be viewed in the context of the entire trial. Bowling v. Commonwealth, Ky., 873 S.W.2d 175 (1993). Appellant has not sufficiently demonstrated that the prosecutor's comments made during closing argument created undue prejudice sufficient to set aside his conviction.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alicia A. Sneed
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

N. Susan Roncarti
Assistant Attorney General
Frankfort, Kentucky