

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002137-MR

FELIPE OLIVAS SANCHEZ

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 02-CR-00396

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

BUCKINGHAM, JUDGE: Felipe Olivas Sanchez shot and killed Jose Hernandez-Beltran during a drug deal that went bad. Following a trial by jury in which Sanchez was found guilty of first-degree manslaughter, the Fayette Circuit Court sentenced Sanchez to ten years in prison. Alleging errors by the prosecutor during closing argument and errors by the court, Sanchez filed this direct appeal. We find no reversible errors and thus affirm.

Beginning on October 8, 2000, Sanchez worked with a federal Drug Enforcement Administration (DEA) agent as a drug

informant. On May 4, 2001, Sanchez informed the agent that Jose Hernandez-Beltran desired to sell him a large quantity of cocaine. The agent directed Sanchez not to make any deals or participate in any illegal drug activity without involvement by the DEA. Nevertheless, three days later Sanchez informed the agent that he had been with Hernandez-Beltran and had observed a large amount of money and a large quantity of marijuana.

On May 16, 2001, a motorist observed a dead body lying on the side of the road. The motorist notified law enforcement officials, and it was determined that the victim, Hernandez-Beltran, had been killed as a result of two gunshot wounds to the back. Sanchez gave a voluntary statement to law enforcement officials, admitting that he had set up the sale of 35 pounds of marijuana from Hernandez-Beltran to Miguel Villa. Sanchez also admitted that he shot and killed Hernandez-Beltran while Hernandez-Beltran and Manuel Villa (Miguel's brother) sat in the front seat of a car and he sat in the backseat.¹

Sanchez claimed that there was a struggle over the money and that he took the gun from the victim and shot him through the seat of the car. The physical evidence indicated that Hernandez-Beltran had been shot in the back through the back of the front passenger's seat. Sanchez's girlfriend later

¹ The marijuana was to be purchased ultimately by Miguel Villa. However, Miguel Villa apparently was not present in the car when the shooting occurred, although his brother, Manuel Villa, was.

gave a statement to law enforcement officials, wherein she revealed that Sanchez had confessed killing Hernandez-Beltran to her and that he had never mentioned a fight or a claim of self-defense.

Sanchez was indicted on a charge of murder. At the conclusion of the trial, the jury returned a verdict finding him guilty of first-degree manslaughter. Pursuant to the jury's recommendation, the court sentenced Sanchez to ten years in prison. His appeal herein followed.

Sanchez's first argument is that the trial court erred by not granting his motion for a mistrial due to alleged material misstatements made by the prosecutor during her closing argument.² Sanchez's argument involves two statements made by the prosecutor during her closing argument. First, the prosecutor stated that "[h]e told the detective that he was going to sell those drugs to Miguel. He's the one that's admitting that." The second statement made by the prosecutor to which Sanchez objected was "[t]here is no testimony from the witness stand that he was acting in protection of himself."

Following the first statement by the prosecutor, Sanchez's counsel objected and counsel for both parties approached the bench for a short conference. Sanchez's counsel

² Sanchez actually argues in his brief that the court should have granted him a new trial. However, he did not make a motion for a new trial pursuant to RCr 10.02 following his trial. Therefore, we assume that Sanchez means that the court should have granted his motion for a mistrial.

moved for a mistrial and argued to the court that Sanchez never told the police detective that he was going to sell drugs to Miguel Villa. The court concluded that Sanchez did not specifically make such an admission, but it permitted the prosecutor to clarify the argument by stating that the facts could lead the jury to infer that that was why he was present during the drug transaction. Following the bench conference, the Commonwealth restated its argument and related that Sanchez admitted setting up the drug deal with Hernandez-Beltran and by further stating that "they" were going to sell the drugs. Following the statement by the prosecutor, Sanchez's attorney made no further objection.

Sanchez argues that the prosecutor resumed her closing argument following the bench conference as though no error had occurred. We disagree. The record indicates that the prosecutor attempted to clarify her previous statement. Also, no objection was made to the latter statement.

A mistrial is an extreme remedy and is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity." Skaggs v. Commonwealth, 694 S.W.2d 672 (Ky. 1985). In order for a motion for a mistrial to be granted, "the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." Maxie v.

Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002), citing Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996). A trial court has "broad discretion" in determining whether a mistrial is necessary. Gosser v. Commonwealth, 31 S.W.3d 897, 906 (Ky. 2000). A trial court's decision regarding whether a mistrial is warranted will not be disturbed absent an abuse of that discretion. Neale v. Commonwealth, 95 S.W.3d 843, 852 (Ky. 2003).

The Commonwealth acknowledges in its brief that the prosecutor failed to carefully choose her words when she made the initial statement to the jury. The court essentially sustained the objection, denied the motion for mistrial, and allowed the prosecutor to clarify her initial statement. No admonition was requested, and the prosecutor clarified her statement, apparently in an appropriate manner since no further objection was made. Under these circumstances, we conclude that the trial court did not abuse its discretion in denying the mistrial motion.

As we have noted, the second statement made by the prosecutor during closing statement to which Sanchez objected was the statement that there had been no testimony during the trial that Sanchez was acting in self-defense when he shot

Hernandez-Beltran.³ Following the objection, the trial court again gave the prosecutor an opportunity to clarify or correct the statement. No mistrial was requested. Sanchez argues that the prosecutor resumed her closing argument with no acknowledgment of the misstatement or acknowledgement that any error had occurred. However, no further objection was made.

It appears from the record that the court effectively sustained the objection when it suggested that the prosecutor clarify her argument. We assume that the prosecutor did so to the satisfaction of defense counsel because no further objection was made. Further, as the objection was sustained and no admonition was requested, there is no error preserved for our review. See Taylor v. Commonwealth, 449 S.W.2d 208, 209 (Ky. 1969). Also, to the extent there may have been some error, we conclude that it was harmless.⁴ See RCr 9.24.

Sanchez's second argument is that the trial court erred by not granting his motion for a mistrial due to two alleged improper comments on Sanchez's right to remain silent made by the prosecutor during her closing argument. First, the prosecutor stated, "What happened to the gun? We don't know.

³ Concerning this statement by the prosecutor, the Commonwealth again acknowledges in its brief that the prosecutor failed to carefully choose her words.

⁴ Sanchez argues that the prosecutor's statements in this case are analogous to those of the prosecutor in Blackburn v. Commonwealth, 314 Ky. 22, 234 S.W.2d 178 (1950). We disagree.

There's no way for us to know. Only he knows." Second, the prosecutor stated, "only one person in this courtroom knows where that money is. And it's him!" While making both statements, the prosecutor raised her voice and pointed at Sanchez. Sanchez now argues that these two statements violated his right to remain silent and that the court erred in not denying his motion for a mistrial.⁵

"A prosecutor's comment on the failure of a defendant to testify must be manifestly intended to reflect on the accused's silence or of such a character that the jury would naturally and necessarily take it as such to constitute prejudice." Byrd v. Commonwealth, 825 S.W.2d 272, 275 (Ky. 1992), overruled on other grounds by Shadowen v. Commonwealth, 82 S.W.3d 896 (Ky. 2002). We conclude that the prosecutor's statements in this case were not intended to reflect on Sanchez's silence or of such a character that the jury would necessarily take it as such. Rather, the statements are similar to that of the prosecutor in U.S. v. Beverly, 369 F.3d 516 (6th Cir. 2004), wherein the prosecutor stated that "why Mr. Crockett did what he did, only he can answer." The court therein noted that the prosecutor's statement was not an impermissible comment on the defendant's right to remain silent because the prosecutor

⁵ Sanchez's counsel did not contemporaneously object to either of these two statements. See Kentucky Rules of Evidence (KRE) 103(a)(1). He did so, however, at a later point in the prosecutor's argument.

was responding and countering arguments raised by defense counsel. Id. at 543-44.

Likewise, in this case the prosecutor was merely responding to arguments raised by Sanchez's counsel in closing argument. The issue involved what happened to the gun and to the money. As the trial court noted when it ruled on Sanchez's motion for a mistrial, it is obvious that Sanchez likely would be the only person who knew where the gun and money were located. Since Sanchez did not deny being at the scene and did not deny shooting and killing Hernandez-Beltran, we fail to see how he is prejudiced by the prosecutor's statement. In short, we conclude that the trial court did not abuse its discretion in denying the mistrial motion.

Sanchez's third argument is that the trial court erred by intentionally destroying his *pro se* motions rather than preserving them and making them a part of the record. He contends that such error warrants the granting of a new trial pursuant to CR⁶ 60.02(f).

Sanchez apparently filed several *pro se* motions that were written in Spanish and sent them directly to the judge. The judge apparently threw the motions away rather than filing them with the record. Sanchez argues that "it seems extraordinarily unfair that the Appellant was not afforded

⁶ Kentucky Rules of Civil Procedure.

opportunity to have the legal concerns that he wanted to raise with the judge be read by the judge, or preserved in the record of his criminal case, simply because he happened to write in Spanish, his primary language."

Sanchez does not state in his brief what those motions were or how he was denied the opportunity to raise those motions through his attorney before or during the trial. Surely, if there were important matters for the court to consider in the *pro se* motions, Sanchez would have related the matters to his attorney and they would have been brought before the court in an appropriate manner. Under the circumstances, we find no error.

Finally, Sanchez argues that the cumulative effect of the actions by the prosecutor and the trial judge constituted palpable error pursuant to RCr 10.26 and is grounds for reversal. Because we have found no error, there can be no cumulative effect. Thus, the argument is without merit.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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