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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002124-MR

MICHAEL SCOTT DEAN — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 03-CR-00125

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Michael Dean appeals his conviction and sentence for two counts of second-degree criminal possession of a forged instrument and being a second-degree persistent felony offender. We affirm.

The convictions arise from two forged checks which were passed at the Shopwise grocery store in Monticello, Kentucky. In May, 2003, Felicia Hicks stole nine checks from her neighbor, Arthur Tewell. Hicks filled out three of the checks as payable to appellant, Michael Dean. Two of these

checks were passed at Shopwise, and the third was passed at the K&P grocery, also in Monticello. In a June, 2003, statement to Deputy Ralph Miniard of the Wayne County Sheriff's Department, Hicks admitted to the above, and told Miniard that she had offered Dean half the money to help her cash the checks. Hicks told Miniard that the checks made payable to Dean were endorsed by Dean, and that Dean cashed two of the checks at the Shopwise grocery, and that Dean and a friend in a green S-10 pickup took the third check to the K&P grocery. On June 23, 2003, a Wayne County Grand Jury returned an indictment charging Dean with three counts of second-degree criminal possession of a forged instrument. Count 1 alleged that Dean passed Check No. 1663 for $250 at Shopwise; Count 2 alleged that Dean passed Check No. 1670 for $420 at K&P; Count 3 alleged that Dean passed Check No. 1669 for $250 at Shopwise. The indictment also charged Dean with being a second-degree persistent felony offender (PFO II).

A jury trial was held on July 26, 2004. Before the jury was selected, the Commonwealth moved to dismiss Count 2, which involved the check cashed at the K&P. The trial court granted the motion, and the trial proceeded as to Counts 1 and 3, which involved the checks passed at Shopwise. The Commonwealth called as witnesses Felicia Hicks, Arthur Tewell, Deputy Miniard, and Robert Taylor. Taylor, the co-owner and manager of the Shopwise, personally knew Dean, and identified

him as the person having presented Check No. 1663 (Count 1) to him. Taylor testified that the cashier who had accepted Check No. 1669 (Count 3) was deceased. Dean's driver's license and social security numbers were written on Check No. 1669. Taylor testified that it was standard procedure for a cashier to write the driver's license number on a check if the cashier does not know the customer. The jury returned a verdict finding Dean guilty of both counts of second-degree criminal possession of a forged instrument. The jury additionally found Dean to be a second-degree persistent felony offender (PFO II). The jury fixed Dean's punishment at five years for each count of second-degree criminal possession of a forged instrument, and enhanced one of the counts to ten years for the PFO II. The jury recommended that the sentences be served concurrently. In its judgment and sentence entered September 9, 2004, however, the trial court ordered the sentences to be served consecutively, for a total of fifteen years' imprisonment. This appeal followed.

On appeal, Dean initially raised the argument that the maximum aggregate term he could receive was ten years, per KRS 532.110(1)(c) and 532.080(5), and that the trial court erred, therefore, in sentencing him to fifteen years. In his reply brief, however, Dean acknowledged that he had overlooked Commonwealth v. Durham, 908 S.W.2d 119 (Ky. 1995), which holds

that KRS 532.080(6)(b) controls the maximum aggregate sentence which he could receive. Although he believes Durham was wrongly decided, Dean concedes that under Durham, the trial court's sentence was proper. This court is bound by the Supreme Court's decision in Durham. However, as Dean recognized, it was necessary to bring the argument up before this court in order to pursue his appeal to the Supreme Court.

Dean additionally argues that improper remarks by the prosecutor deprived him of a fair trial. The first instance involves remarks made by the prosecutor in responding to testimony of Felicia Hicks, who was called as a Commonwealth's witness. In her testimony, Hicks admitted to taking checks from Arthur Tewell when she was in his house using the phone, and that she filled out three of these checks as payable to Michael Dean. Contrary to her June, 2003, statement to Deputy Miniard, however, at trial, Hicks testified that she gave Dean only one of the checks, which he cashed at Shopwise. Hicks testified that she gave the second check to a "Doug McGuire", and that it was Doug McGuire, not Dean, who cashed this check at Shopwise by pretending to be Dean. Hicks was reminded by the prosecutor of her June, 2003, statement to Deputy Miniard, wherein she said that it was Dean who had passed both checks at Shopwise, and had not mentioned a Doug McGuire. Hicks agreed that she had made the statement, but that it was not true. Hicks testified that

she had lied because she was mad at Dean at the time and did not want to get Doug in trouble. In the course of the prosecutor commenting that neither he nor the police had ever heard of "Doug McGuire" until today, the following exchange occurred, which is a subject of this appeal:

> Commonwealth: Have you ever mentioned Doug McGuire's name to anybody prior to today?
>
> Hicks: Yes, I have.
>
> Commonwealth: Who?
>
> Hicks: . . . I've talked to people . . .
>
> Commonwealth: You've never told anybody in law enforcement, have you?
>
> Hicks: No.
>
> Commonwealth: You've never told anybody with the Commonwealth's Attorney's office, have you?
>
> Hicks: Yes, I have.
>
> Commonwealth: Who?
>
> Hicks: Yourself.
>
> Commonwealth: When?
>
> Hicks: Thursday.
>
> Commonwealth: Thursday of last week? You never told me about a Doug McGuire.
>
> Hicks: Yes, I did, and you wrote it down.
>
> Commonwealth: No, I did not.

Defense counsel entered an objection which the trial court sustained. On cross-examination, Hicks further testified that it was also Doug McGuire who had passed the third check (No. 1670), at K&P, by pretending to be Dean. During a bench conference at the conclusion of Hicks's testimony, the prosecutor told the court "Your honor, I'm in an odd situation. I almost have to call myself as a witness to testify that she never gave me a name. She told me everything else, but no name." Defense counsel appears to respond, "Don't believe we can do that, judge." The trial court stated, "I think the jury has already heard enough on that point."

On appeal, Dean argues that the prosecutor's personally contradicting the testimony of Felicia Hicks that she had previously told him about Doug McGuire and that he had written this information down was improper and violated his right to a fair trial. Dean contends that the prosecutor's comment undermined the credibility of Hicks, whose testimony exonerated him, and was essentially unsworn testimony against him. Hence, Dean contends that the failure of the prosecutor to call himself as a witness deprived him of his right to confront a witness against him.

"Merely voicing an objection, without a request for a mistrial or at least for an admonition, is not sufficient to establish error once the objection is sustained." Hayes v.

Commonwealth, 698 S.W.2d 827, 829 (Ky. 1985)(citing Ferguson v. Commonwealth, 512 S.W.2d 501 (Ky. 1974)). When no further relief is requested, the error is unpreserved for appellate review. Taylor v. Commonwealth, 449 S.W.2d 208, 209 (Ky. 1969). In the present case, Dean's objection was sustained, and he requested no additional relief. Hence, this issue is unpreserved and our review is limited to one for palpable error. Id.; RCr 10.26.

Dean's objection to the prosecutor's remarks was sustained. Subsequently, on cross-examination, Hicks testified, without objection, that she had told the prosecutor about Doug McGuire last Thursday. Further, on re-direct, the prosecutor acknowledged that Hicks had given him the new version of the facts the past Thursday, and restated his earlier remarks as a question, asking Hicks if she "for sure" had given him Doug McGuire's name because he didn't "remember" her giving him one. Hicks responded that she had given him the name and that he had written it down. The prosecutor accepted, and did not contradict, Hicks's answer. We see no prejudice that rises to the level of manifest injustice. RCr 10.26.

The second instance of alleged prosecutorial misconduct occurred during the prosecutor's closing argument. Dean takes issue with the following statements by the prosecutor: "I am not going to waste your time unless I can

prove who did something . . . I'm not going to ruin my credibility. When I bring a case here [sic] I think there is something there." Dean contends that even if the prosecutor's earlier statement contradicting Hicks was not reversible error, that it became so when he bolstered his own credibility by this closing argument. Dean further argues that the statements in the closing, standing alone, constitute reversible error, in that the statements suggest Dean is guilty merely because he is being prosecuted, and are an expression of the prosecutor's personal belief or opinion as well. Dean concedes that his attorney did not object to the statements, but requests that this court reverse on grounds of palpable error.

"[I]t is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted or has been indicted." United States v. Bess, 593 F.2d 749, 754 (6th Cir. 1979) (citations omitted). "[T]he personal opinion of counsel has no place at trial." Id. "[E]xpressions of personal belief of the innocence or guilt of an accused are error[.]" Id. at 755. We agree that the prosecutor's comments were improper. Bess, 593 F.2d 749. However, as the error was unpreserved, our review becomes one for manifest injustice. RCr 10.26.

Although Dean was being tried for only the two checks passed at Shopwise, the jury heard evidence throughout the trial

that Hicks had actually forged three checks payable to Dean, the third one having been passed at the K&P. The jury heard that Dean had originally been charged with passing this check as well, but that the prosecutor had moved to dismiss this charge because K&P witnesses, when shown a photo lineup, indicated that Dean was not the person who passed the check. The closing statements at issue were made in reference to this dismissed charge, as follows:

> A lot has come up about this check number 1670 at K&P. Ummm . . . at the time that this went to the Grand Jury, Ralph Miniard felt like he had enough evidence to go forward with it. Ralph Miniard didn't know that I, when I worked this case up, I moved to dismiss that one. Folks, I'm not going to waste your time unless I can prove who did something. I may know in my heart who did it, but if I don't have the witnesses that I can bring in here from K&P, if I don't have the witnesses to sit up here on this witness stand and prove it to you, I'm not going to waste your time, I'm not going to ruin my credibility. When I bring a case to you, I think there's something there. And there's another problem with that case, with that check, that I felt like I couldn't go forward with it, it wouldn't be right. If you look and think about it, Miss Felicia Hicks, when she testified regarding the K&P check, she said that she gave the check and that Michael Dean and a third party in his green S-10 pickup, who at that time she didn't know who he was, they went to K&P. So I didn't have her prior statement to tie Michael Dean to cashing that check. Now a lot of times you may know what happens, but proving it without her prior statement, without a witness from K&P that can say yes, that's the person, I decided it was only

> proper to dismiss that indictment and move on to the ones that I could prove and I feel like I have.

Viewing the statements in context, and having reviewed the record, we again do not see any prejudice to Dean which rises to the level of manifest injustice.

For the aforementioned reasons, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

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