RENDERED: FEBRUARY 2, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002482-MR

JAMES L. PERRY — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 05-CR-00129

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: James Perry appeals from a judgment of the Pulaski Circuit Court which sentenced him to serve ten years following a jury verdict of guilty of fleeing and evading police in the first degree and of being a persistent felony offender in the second degree. We affirm.

On December 6, 2004, Deputy Robert Lee Stevens was on routine patrol when he observed Perry driving in the opposite direction. Believing that Perry's driver's

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

license had been suspended, Deputy Stevens turned his patrol car around in order to make a routine traffic stop. Instead of pulling over, Perry speeded up. Stevens activated his flashing blue lights and siren to pursue Perry. Perry sped down Edgewater Road, which is a twisting, two-lane country road that terminates in a dead end near a lake. When he reached the end of the road, Perry jumped out of his car and ran toward the lake. Perry had a passenger in the car, John Gregory, who immediately surrendered to Deputy Stevens. Gregory handed over a bag of methamphetamine having a street value of approximately one thousand dollars ($1,000.00). Perry was later placed under arrest.

Perry and Gregory were both charged with trafficking in a controlled substance in the first degree; Perry was also charged with the offense of fleeing and evading police in the first degree and of being a persistent felony offender in the second degree. Perry entered a plea of not guilty and proceeded to trial. Gregory entered into a plea agreement with the Commonwealth in which he agreed to testify against Perry.

The jury acquitted Perry of the trafficking charge but found him guilty of the other two charges. He was sentenced to a period of five-years' imprisonment on the fleeing and evading charge -- enhanced to ten years for being a persistent felony offender.

Perry argues on appeal that the trial court erred in failing to grant a directed verdict on the charge of fleeing and evading. In examining the sufficiency of evidence to support a criminal conviction, we are governed by a standard of review that scrutinizes whether:

> after viewing the evidence in the light most favorable to the prosecution, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Potts v. Commonwealth, 172 S.W.3d 345, 349 (Ky. 2005) citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979).

> KRS 520.095 provides in pertinent part as follows:
>
> (1) A person is guilty of fleeing or evading police in the first degree:
>
> (a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists:
>
> . . .
>
> 4. **By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property**. . . . (Emphasis added.)

Perry contends that the Commonwealth failed to produce sufficient evidence to prove that his conduct created a substantial risk of injury or death.

Our state Supreme Court has provided the following general guidelines for determining when a defendant's conduct in fleeing creates a "substantial risk:"

> Whether a defendant's act of fleeing or eluding police creates "a substantial risk of death or serious physical injury" will, of course, turn on the unique circumstances of an individual case. Generally speaking, however, we would observe that a *substantial* risk is a risk that is "[a]mple," "[c]onsiderable in ··· degree ··· or extent," and "[t]rue or real; not imaginary." Accordingly, it is clear that not all risks are substantial-hence the phrase "low risk"-and not every hypothetical scenario of "what might have happened" represents a substantial risk. In any trial, the issue of whether a defendant's conduct creates a substantial risk of death or serious physical injury "depends upon proof" and reasonable inferences that can be drawn from the evidence.

Bell v. Commonwealth, 122 S.W.3d 490, 497 (Ky. 2003) (citations omitted).

Although no evidence was introduced as to the speed limit on Edgewater Road, Deputy Stevens testified that it was unsafe to proceed at faster than twenty-five miles per hour. He described the road as a narrow country road, barely two lanes wide, a road that is not safe at high speeds. He testified that "[Perry's] car was driving at a very high rate of speed, actually faster than what I would drive the road to even try to keep up with him. Of course, the road is a curvy road and I was on either side of him."

Perry argues that this trial testimony was inconsistent with earlier testimony that Deputy Stevens had provided before the grand jury in which he stated that he "could pretty much keep [Perry] in sight the whole way" down the road. In order to attempt to impeach Deputy Stevens, Perry did not provide a citation to the record to indicate that the grand jury testimony was ever presented at trial. The record does reveal that a transcript of the pertinent section of the grand jury transcript was entered into the record on November 28, 2005 -- well **after** the trial. It appears, therefore, that the jury was never made aware of the alleged inconsistency in Stevens's accounts of the pursuit.

Nonetheless, we are not persuaded that there is a substantial inconsistency between the deputy's statements. Whether Stevens was able to keep Perry in sight at all times during the entire pursuit does not necessarily contradict the significance of his testimony: that Perry proceeded down the winding, two-lane country road at a speed that was unsafe.

Perry also argues that if Stevens did lose sight of his vehicle, he did so because of the curvy nature of the road rather than excessive speed on his part. He also argues that the sporty type of automobile that he was driving was more suited to proceeding quickly (and presumably more safely) under the conditions than the more cumbersome police cruiser. These are speculative, hypothetical arguments that do not detract from the sufficiency of the evidence underlying the verdict of the jury.

Perry argues that the testimony of John Gregory, his passenger, was inconsistent and unreliable. At trial, Gregory testified that Perry exclaimed "Oh ----!" when he saw Deputy Stevens, and then "took off flying." Gregory explained that he was "pretty scared" because Perry was driving quickly down a "really curvy road" and that he was "worried about getting hit head on."

In a taped statement given shortly after he and Perry were apprehended, Gregory stated that Perry, upon spotting the police officer, had merely "hit on the gas a little bit." Perry claims that Gregory changed his story exaggerating Perry's speed in order to obtain a more favorable plea agreement from the Commonwealth.

The jury was informed of Gregory's plea agreement with the Commonwealth, and it heard the tape of his earlier statement. The members of the jury were, therefore, fully aware that Gregory may have had an incentive to change his testimony. They nonetheless chose to believe his testimony at trial. The "credibility and weight of the evidence are matters within the exclusive province of the jury." *Rice v. Commonwealth*, 199 S.W.3d 732, 735 (Ky. 2006)(citations omitted). "[T]he assessment of the credibility of witnesses is generally beyond the scope of [appellate] review." *Potts*,

172 S.W.3d at 349 citing *Schlup v. Delo*, 513 U.S. 298, 330, 115 S.Ct. 851, 868, 130 L.Ed.2d 808 (1995).

Perry also challenges the verdict by claiming that no one tries to escape down a dead-end street and that he could not, therefore, have been fleeing the police. This contention was contradicted by the fact that he jumped out of the car at the end of the road and tried to escape on foot.

He also argues that his conduct posed no risk to anyone. No evidence was presented that there was any automobile or pedestrian traffic in the road, that the road was populated, that he had disregarded any traffic signals or stop signs, or that he was driving under the influence of drugs or alcohol. However, he drove at a speed that was described as excessive by two eyewitnesses along a narrow, two-lane twisting country road. There was sufficient evidence for a reasonable juror to find that Perry's conduct created a substantial risk of serious physical injury to himself, to his passenger, to Deputy Stevens, or to any drivers or pedestrians who might have come along the roadway.

Perry's second argument focuses on comments made by the prosecutor in his closing argument when he referred to Perry as a "devil." Perry contends that the statement constituted prosecutorial misconduct that rendered the trial unfair.

In any consideration of alleged prosecutorial misconduct, "[i]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986). Rather, the question is "whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id*. The analysis

by an appellate court must focus on the overall fairness of the trial rather than a particularized act of alleged misconduct by a prosecutor. *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411-12 (Ky. 1987) (citation omitted) partially rev'd on other grounds, 450 F.3d 224 (6th Cir. 2006).

The objectionable comments were made by the prosecutor in reference to Gregory's incriminating testimony against Perry. The prosecutor acknowledged that "I agree it is a shame that we had to make a deal [with Gregory]." He then told the jury that in "the meth trade, sometimes you have to go to hell to catch the devil" and reiterated that "we [the prosecution] went to hell cutting a deal with Gregory to catch the devil." The prosecutor then pointed at Perry.

Perry has suggested that the jury in this case was especially susceptible to these remarks because Kentucky is the "buckle of the Bible belt" where "church folk" take their religion seriously and do not think of the devil as a mythological creature. We are persuaded that the remarks were rhetorical rather than literal and that they were not calculated to persuade the jury that Perry was in fact a devil or one of his actual minions. The prosecutor's remarks constituted hyperbole intended to explain in figurative terms why the Commonwealth entered into a plea agreement with Gregory. *See State v. Bell*, 603 S.E.2d 93, 107-108 (N.C. 2004) (prosecutor's statement that "[i]f you are going to try the devil [the defendant], you have to go to hell to get your witnesses" was held not to be improper characterization or name-calling). We hold that the prosecutor's metaphorical comments comparing Perry to the devil were not egregious enough to taint the overall fairness of the trial.

The judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

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