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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000626-MR

ELISSA THACKER — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 04-CR-00237

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON[1] AND HOWARD, JUDGES; GUIDUGLI,[2] SENIOR JUDGE.

ABRAMSON, JUDGE: Elissa Thacker appeals from a Pike Circuit Court judgment entered on March 17, 2006, convicting her of Second-Degree Robbery, in accord with a jury verdict, and sentencing her to eight years in prison. Thacker contends that the trial court erred by denying her motion for a directed verdict. Thacker further argues that the

[1] Judge Lisabeth H. Abramson completed this opinion prior to her appointment to the Supreme Court effective September 10, 2007. Release of this opinion was delayed by administrative handling.

[2] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

prosecutor engaged in prosecutorial misconduct thereby substantially impairing her right to due process and a fair trial. The Commonwealth maintains that sufficient evidence was presented to withstand the motion for a directed verdict, the allegations of misconduct were not preserved for appeal, and in the alternative, the prosecutor's conduct throughout the trial was proper. Finding that the trial court did not err in denying Thacker's motion for a directed verdict and that Thacker's right to a fair trial was not impaired by prosecutorial misconduct, we affirm.

I. MOTION FOR A DIRECTED VERDICT

On the evening of February 20, 2003, Deanna Michelle Keene and another woman robbed Archie Goble in his Pike County home. Keene was arrested and charged with First-Degree Robbery soon after the offense was committed. In March 2004, Keene pled guilty to the charge of Second-Degree Robbery and in April 2004, was sentenced to eight years in prison. In July 2004, Keene gave a written statement to Officer Hunt, the investigating officer in the case, naming Elissa Thacker as the other woman who participated in the robbery. Thacker was indicted for First-Degree Robbery on September 22, 2004, and her trial began in February 2006. At trial, Thacker claimed that she had nothing to do with the robbery and was with her parents when the offense occurred. The prosecution offered the testimony of Keene, Officer Hunt, and Keene's attorney to show that Thacker was the unidentified woman who robbed Goble with Keene. The first issue on appeal is whether this evidence was sufficient to withstand Thacker's motion for a directed verdict.

The majority of the evidence in this case linking Thacker to the robbery comes from Deanna Michelle Keene. Keene testified that she and Thacker had spent the whole day together on February 20, 2003, riding around, taking pills, and getting high. Once they returned to Keene's house, they walked across the street to Archie Goble's residence so they could use his phone. According to Keene, after using the phone, Thacker told her she was going to rob Goble. Keene agreed to rob him, but denied knowing that Thacker intended to use violence. Then, Keene saw Thacker strike Goble in the head with a hammer and search his pockets for money. After finding nothing, the two women left and drove to Thacker's aunt's house.

Keene's statements are confirmed by the testimony of Officer Hunt, the investigating officer in this robbery, and Robert Wright, Keene's attorney. Officer Hunt testified that after an initial investigation, he learned that Goble had been struck on the back of the head and taken to the hospital. Goble later told Officer Hunt that "Michelle" (Deanna Michelle Keene) and another girl, who he thought was Michelle's roommate, had come over to use his phone, but while they were inside, the other girl hit him in the head. Officer Hunt also stated that after Keene pled guilty and was sentenced, she told him that Thacker was the other woman who robbed Goble. In order to refute Thacker's claim that Keene was lying, the prosecution called Keene's attorney, Robert Wright. Wright testified that he had known about Thacker all along because when Keene was charged in February 2003, she had told him that Thacker was the other woman involved in the robbery.

To refute this evidence, Thacker offered the testimony of her mother, Patsy Thacker; her father, Gregg Thacker; her aunt, Marie Lowe; as well as her own testimony. Her mother testified that earlier in the evening on February 20, 2003, Thacker's husband, Robert Smith, had called her from an Ohio jail, but she was not in. Her father testified that he went to pick up Thacker around 7:30 or 8:00 p.m. so that she would be at their house when her husband called back. According to the parents' testimony, Smith called back around 9:15 p.m., and he talked with Thacker till around 9:45 p.m. When Thacker's father took her home, Keene was waiting for Thacker at her house. Keene then gave Thacker a ride to her aunt's house where Thacker spent the night.

In this trial, the parties presented two different versions of the events of February 20, 2003. Deciding whose version to believe and weighing witness credibility is entirely within the jury's discretion. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 269 (Ky. 2006). A reviewing court cannot disturb the fact finder's verdict unless it was clearly unreasonable for the jury to reach that conclusion. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In this case, for a reasonable jury to find Thacker guilty, the prosecution had to prove that Thacker violated KRS 515.030, which states that

> A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.

Officer Hunt, the investigating officer, confirmed that Goble was struck on the head by the girl who came into his house with Keene. The prosecution's key witness, Deanna Keene, described how Thacker entered Goble's residence, expressed an intent to rob him,

and then hit him on the head with a hammer. The truthfulness of Keene's statement was bolstered by her lawyer's testimony. He stated that Keene had told him about Thacker's involvement when Keene herself was originally charged. With this evidence, the prosecution showed that Thacker used force against Goble in order to commit a theft. Even though Thacker put forth her own version of what happened that night, the jury chose to believe Keene. As stated above, assigning greater weight to the testimony of one witness over others is within the jury's discretion. *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002). Because the prosecution put forth sufficient evidence to show that Thacker violated KRS 515.030, a reasonable jury could find her guilty beyond a reasonable doubt. The trial court did not err in denying Thacker's motion for a directed verdict.

II. PROSECUTORIAL MISCONDUCT

Thacker also alleges several instances of prosecutorial misconduct. However, the only objection raised at trial was in response to one part of the prosecutor's closing argument. A party who desires an issue to be reviewed by an appellate court, must make a timely objection during trial noting the error and requesting relief. *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989); RCr 9.22. Failure to abide by this rule results in the issue not being preserved for appellate review. *Bowers v. Commonwealth*, 555 S.W.2d 241, 243 (Ky. 1977). Although allegations of error not objected to at trial may still be reviewed for palpable error under RCr 10.26, we will first address the issue

of whether overruling Thacker's objection to the prosecutor's closing argument was reversible error.

A court will reverse for "prosecutorial misconduct in a closing argument only if the misconduct is flagrant *or* if each of the following three conditions is satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with a sufficient admonishment to the jury." *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (emphasis in text) (citing references omitted). In this case, there is no need to discuss whether the prosecutor's misconduct was flagrant because after a thorough review of the trial record, it is clear that there was no misconduct on the part of the prosecutor.

Thacker's preserved allegation of flagrant misconduct is that during the Commonwealth's closing argument, the prosecutor implied that Thacker's witnesses were lying because they had not told anyone about Thacker's alibi until the day of trial. The prosecutor compared Thacker's witnesses to so-called "squirrel hunters" who appear for the first time at trial, come forward, and say they saw everything. It is well-established that a prosecutor may criticize the defense's theory of the case, point out its flaws, and "comment as to the falsity of a defense position." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). In addition, the United States Court of Appeals for the Sixth Circuit has held that under certain circumstances, a "witness' delay in providing an alibi" for the defendant "is an appropriate subject of inquiry." *United States v. Aguwa*, 123 F.3d 418, 420-21 (6th Cir. 1997). The circumstances of the current case match those

described in *Aguwa*: as Thacker's family, her witnesses would have known of the charges against her; they would have known the importance of Thacker having an alibi; Thacker never gave the prosecution formal notice of her alibi; and since Thacker never gave an explanation for the delay, there was no risk that the prosecution's statements would be misleading or prejudicial. *Id*. at 421. Thus, since it was proper in this case to comment on the witness' delay in coming forward, there was no prosecutorial misconduct and the trial court did not err in overruling Thacker's objection.

Thacker asks that her other, unpreserved allegations of prosecutorial misconduct be reviewed for palpable error. RCr 10.26 allows an appellate court to grant relief for an unpreserved error if "manifest injustice has resulted from the error." Thacker argues that the Commonwealth engaged in prosecutorial misconduct by: 1) giving personal opinions about witness credibility; 2) asking the jury to "take a stand" in its closing argument; 3) implying that Thacker was represented by a public defender; 4) improperly cross-examining defense witnesses; 5) cross-examining Thacker about her pre-arrest and post-arrest silence; and 6) introducing evidence of a co-indictee's guilty plea. Thacker's first five allegations are without merit because no error was committed by the prosecutor. Although we agree that her sixth accusation did constitute actual error, the error was mitigated by defense counsel's conduct, making it clear that Thacker was not prejudiced and did not suffer manifest injustice. Thus, reversal is not justified.

Thacker argues that in the prosecutor's closing argument, he improperly gave personal opinions about the credibility of witnesses in violation of Kentucky law.

Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002); *United States v. Carroll*, 26 F.3d 1380, 1388-1389 (6th Cir. 1994). Although the prosecutor asked the jury to judge witness credibility in this case by reading between the lines, he never asserted personal opinions about the witnesses and never engaged in improper vouching. Thus, no error was committed on this basis.

Thacker also urges that the prosecutor's "take a stand" message in his closing argument went beyond what is permitted. The prosecutor asked the jury to "step out and do what jurors that have good common sense do" and to "look at the evidence and take a stand . . . and say one of them accepted responsibility, you're going to have to also." Thacker's argument is again without merit. It has been held that a prosecutor can tell a jury that it is their "time to deal with justice." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). A prosecutor can ask the jury not to "let the officer down," *Johnson v. Commonwealth*, 446 S.W.2d 561, 562 (Ky1969), and can tell the jury that since all the other officers of the court have done their jobs, "that it was now the jury's turn." *Dean v. Commonwealth*, 844 S.W.2d 417, 421 (Ky. 1993). The prosecutor's comments in this case are well-within the acceptable parameters. Asking the jury to "take a stand" is similar to telling them that it is now their time to deal with justice or their turn to fulfill their duty. The prosecutor did not commit error in this instance.

Thacker alleges that it was improper for the prosecutor to reference that Thacker was represented by a public defender in his closing argument. On cross-examination, Keene's private attorney stated that he had not written in his file Keene's

statement that Thacker was the other woman involved in the robbery. When arguing why it was unlikely that Keene's attorney would lie for her on the stand, the prosecutor stated

> Why would he [Wright] come in here and commit perjury. No, he don't write down everything. He's not a public defender, don't work for the state. He can run his office anyway he wants to. If he don't want to write down anything in his file, he don't have to.

After reviewing the record, it is clear that the prosecutor's statement was made to enhance his witness' credibility, not to prejudice Thacker in any way by suggesting that she was represented by a public defender. This statement simply was not unfairly prejudicial towards Thacker.

Thacker contends that the prosecutor also erred when he cross-examined her witnesses regarding their failure to report Thacker's alibi to the authorities. As stated earlier, it was appropriate for the prosecution to question a witness about a previously undisclosed alibi under the circumstances of this case. *United States v. Aguwa*, 123 F.3d 418, 420-421 (6th Cir. 1997).

Thacker additionally stresses that her own cross-examination was improper because it violated her constitutionally-protected right to remain silent. In cross-examining Thacker, the prosecution asked her why she had not made her alibi known to the police after the robbery occurred. She responded that she "didn't see the need to" since there was not a warrant out for her arrest and she was not hiding herself when she came to Pike County for the holidays. The prosecution then asked if she ever made her alibi known after becoming a suspect and having an arrest warrant issued. Thacker

replied that she did not and agreed that the first time she had brought it up was while testifying.

The Supreme Court has stated that the prosecution may use a defendant's pre-arrest silence in certain circumstances for impeachment. *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980). The Sixth Circuit has also held that a defendant's pre-arrest silence may be used for impeachment purposes but not as substantive evidence of guilt. *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *Seymour v. Walker*, 224 F.3d 542, 560 (6th Cir. 2000). In this case, the prosecution clearly used Thacker's pre-arrest silence to undermine her testimony that she was with her parents on the night of the robbery. Since the prosecution used Thacker's prior silence to impeach her alibi and not as substantive evidence of her guilt, these questions were proper.

Concerning the use of a defendant's post-arrest silence, the Supreme Court has held that if this evidence is used against a defendant, his Fifth Amendment rights are infringed only when the government, through the *Miranda* warnings, has induced silence by assuring him that his silence will not be used against him. *Fletcher v. Weir*, 455 U.S. 603, 606-607 (1982). In Thacker's case, however, there was no mention in the record of when or if Thacker received *Miranda* warnings and no indication that the government had induced her silence. Similarly, Thacker's silence is distinguishable from that in *Niemeyer v. Commonwealth*, 533 S.W.2d 218 (Ky. 1976), because in Thacker's case, the prosecutor's questions and evidence did not involve Thacker's silence at the time of her arrest after having been given *Miranda* warnings. Rather, the prosecutor merely

questioned Thacker as to whether at any point leading up to the trial, she had made her alibi known. Thus, it was proper for the prosecution to cross-examine Thacker as to her post-arrest silence in not disclosing her alibi.

Lastly, Thacker argues that it was reversible error for the prosecution to introduce evidence of Keene's guilty plea. In his opening statement, the prosecutor stated that Keene had pled guilty to Second-Degree Robbery and noted that she "pled guilty with no promises . . . she's accepted responsibility for what she's done and she just wants the other person to accept her responsibility." The prosecution also elicited from Keene on direct examination that she had previously entered a guilty plea. In his closing argument, the prosecutor discussed Keene's guilty plea again, stating that "I pled her and recommended eight years because I felt, and still do, that she was less culpable." It is well-established in Kentucky that introducing a co-indictee's guilty plea against a defendant is improper and may justify a reversal. *Martin v. Commonwealth*, 477 S.W.2d 506, 508 (Ky. 1972); *Parido v. Commonwealth*, 547 S.W.2d 125, 127 (Ky. 1977). Thus, the prosecutor erred when he introduced Keene's guilty plea. However, if defense counsel fails to object to this evidence due to a trial strategy, he cannot later claim that the introduction of a co-indictee's guilty plea constitutes reversible error. *Brock v. Commonwealth*, 627 S.W.2d 42, 44 (Ky. App. 1982).

In this case, not only did Thacker's counsel never object to the introduction of Keene's guilty plea, but also, he discussed this evidence as much as, if not more than the prosecution. In his opening statement, defense counsel challenged Keene's credibility

by reminding the jury that it took her over a year after she was charged to give her statement implicating Thacker in the robbery. Thacker's attorney stated

> the fact is that she [Keene] pled guilty, she was sentenced in April, and she didn't tell the police then, she didn't tell them in May, she didn't tell them in June. Finally in July, after about four months in prison, she decided Oh well, they've come to talk to me and now I'll tell them that Elissa Thacker is the one who did this.

He also argued that Keene's testimony boiled down to her alleging that

> "I [Keene] was just there [during the robbery], it wasn't me who did it, but I'm gonna plead guilty and I'm gonna take eight years in prison. That's awful convenient for her [Keene] to now come back and say well, I'm gonna go before my parole board, I got other things that may happen . . . that I need to make up some kind of story and tell these people that someone else did it."

On his cross-examination of Keene, defense counsel asked, "Now, you pled guilty, do you recall when that was?" After Keene stated the specific day, he asked "And did you tell the judge or the court . . . did you tell Officer Hunt that Elissa Thacker was with you that night?" Lastly, in emphasizing again Keene's delay in telling the police about Thacker, defense counsel stated in his closing argument that "when she [Keene] got caught . . . she came in and pled guilty in March of '04 . . . but the first time Officer Hunt took a statement from Keene was July of '04."

Clearly, it was defense counsel's strategy to use Keene's then two-year old guilty plea to further the defense's theory that she only recently fabricated her story implicating Thacker. Although it was error for the prosecution to introduce this evidence initially, since Thacker's attorney failed to object and actually used the plea to his client's

advantage, it certainly was not prejudicial to Thacker and did not result in a violation of her right to a fair trial. Because defense counsel cannot use a co-indictee's guilty plea as an integral part of his argument then expect to get a reversal based on its introduction, we find that the prosecutor's error did not result in manifest injustice. *Brock,* 627 S.W.2d at 44.

Of the seven total instances of misconduct alleged by Thacker, the only one that constituted an error was the prosecution's introduction of Keene's guilty plea. However, this error did not prejudice Thacker and did not create manifest injustice. In sum, because no reversible error occurred and the limited prosecutorial misconduct that did occur did not result in manifest injustice, the Pike Circuit Court's judgment of March 17, 2006, is affirmed.

ALL CONCUR.

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