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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000972-MR

JOSEPH P. FANTUZZO APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 05-CR-00088

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Joseph Fantuzzo ("Fantuzzo") appeals the criminal convictions of attempted sodomy and indecent exposure. We affirm.

On December 26, 2004, Mary Shuttles ("Shuttles") was getting out of her car when a man in a pickup truck stopped and asked her for directions. He handed her a pen and paper to write the directions and invited her to get into the truck. She agreed to

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[1] 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 Kentucky Revised Statutes 21.580.

give him directions but declined his invitation to enter the truck. As Shuttles was writing the directions, the man got out of the truck with his pants pulled down. He was completely exposed. Startled, Ms. Shuttles handed him the directions, went into her home and called the police. She provided police with a general description. Two weeks later, she identified Fantuzzo from some photos the police presented to her. She also positively identified Fantuzzo in the courtroom, during his trial.

On January 9, 2005, Carrie Sexton ("Sexton") was walking when a man in a pickup truck yelled to her and asked for directions. She gave him directions and accepted his offer of a ride. She would later testify in court that he looked familiar to her. Sexton testified that as she was getting into the truck she noticed that the man's pants were pulled down to his ankles and a black bag was on his lap. She attempted to exit the vehicle, but the man pulled her back in. At this point, the vehicle was in motion. The man then placed the bag on the floorboard, exposing himself, and asked Sexton if she would like to perform oral sex on him. She replied in the negative. The man then grabbed Sexton by the head and attempted to move her head towards his exposed crotch area. The truck had almost come to a complete stop, so Sexton exited the truck, went to a nearby restaurant and phoned her mother. Sexton's mother, Sherry Keelin ("Keelin") arrived to pick-up Ms. Sexton. The two then witnessed the truck close by and recorded its license plate number. The police were notified. When the police later brought Fantuzzo to Sexton's apartment, she positively identified him as the man from the

incident. Police obtained consent to search Fantuzzo's truck and discovered a gym bag containing a pair of boxer shorts which tested positive for semen.

Initially, upon being questioned by police, Fantuzzo denied speaking to Sexton. He later admitted to asking her for directions, touching her hand and kissing her. Fantuzzo also told police that he noticed a ring on Sexton's finger, told her that he did not want to get involved with a married woman, and told her to leave the truck. Fantuzzo denied that he had attempted sexual contact with Sexton and did not want to talk about the incident involving Shuttles.

Fantuzzo was indicted by a Boyd County grand jury on one count each of indecent exposure, attempted sodomy in the first degree and persistent felony offender in the second degree. After being evaluated and found competent to stand trial, he was tried on December 1, 5, 6 and 7, 2005. Fantuzzo did not testify at his trial. However, a video recording of his statement to police was played for the jury. The jury convicted him of attempted sodomy and indecent exposure but acquitted him on the charge of persistent felony offender. The jury recommended the minimum sentence of 5 years on the attempted sodomy conviction and a concurrent thirty days on the indecent exposure conviction. The trial court accepted and imposed the recommended sentence. This appeal followed.

On appeal, Fantuzzo presents several arguments. Generally, he argues that the convictions should be reversed based on cumulative error. Specifically, he argues the following: 1) the trial court erred by denying a motion for mistrial after a juror testified

that she was pressured into her vote; 2) the trial court erred when failing to exclude the testimony of Keelin; and 3) prosecutorial misconduct resulted in prejudice to Fantuzzo.

JUROR TESTIMONY

On January 25, 2006, two days before the scheduled sentencing, the trial judge received a letter from a juror relaying certain happenings in the jury room. The juror, Teresa Carolyn Dempsey ("Dempsey"), stated that during the voting phase of the jury deliberations, she was the only person who was voting 'not guilty.' She also stated that several of the jurors were wanting to take a smoke break and getting impatient with the impasse. Dempsey would go on to testify that she had been pressured to change her vote and that one of the deciding factors for her change was another juror's insistence that Fantuzzo would only receive a 'smack on the hand.'

The court held a hearing on April 11, 2006, and Dempsey testified as to the jury room events. She reiterated the statements she had made in her letter to the court and stated that she did not believe Fantuzzo had been proven guilty beyond a reasonable doubt. She testified that she had been the only juror on the panel who felt that way and was pressured into changing her vote. She also testified that when she was finally convinced to change her vote she stated to the rest of the jurors that she was doing so based on the pressure she was receiving and not because she had changed her mind. At the conclusion of the hearing, the trial court determined that there had been no misconduct.

There is some question as to whether or not Fantuzzo properly preserved this issue for appeal. We find that he has not. Due to his failure of preservation, Fantuzzo's claims are reviewed under the palpable error standard. Under RCr 10.26,

> a palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

The United States Constitution, Sixth Amendment, grants an accused the right to trial by an impartial jury.

> Impartiality is not a technical conception but is a state of mind, and for ascertainment of such mental attitude of appropriate indifference, this amendment guaranteeing impartial jury lays down no particular test for procedure and is not chained to any ancient and artificial formula.

Dennis v. United States, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950) (quoting *United States v. Wood*, 299 U.S. 123, 145-146, 57 S.Ct. 177, 81 L.Ed. 78 (1936)). Therefore, whether or not a defendant has been tried by an impartial jury must be considered on a case by case basis.

RCr 10.04 states "a juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." "It has long been held that a juror may uphold his verdict but may not impeach it." *Grace v. Commonwealth*, 459 S.W.2d 143, 144 (Ky. 1970) (citing *Bowman v. Commonwealth*, 284 Ky. 103, 143 S.W.2d 1051 (1940); *Grider v. Commonwealth*, 398 S.W.2d 496 (Ky. 1966); and *Howard v. Commonwealth*, 240 S.W.2d 616 (Ky. 1951)). In *Grace*, the Kentucky

Supreme Court found that a juror who had agreed to the verdict and then later claimed she did so unknowingly, was not a violation of the defendant's right to an impartial jury. *Id.* We see no reason to find differently in the case at hand. Not only was Dempsey aware that she was agreeing with the verdict, she made a statement to the other jurors that she knew she was. Her later testimony confirmed that the verdict was in fact verbally made in lot by means of the final vote. Any feelings she harbored that conflicted with her vote did not prevent it from being a verdict made in lot. Unlike a situation where a juror is coerced out of fear for his or her safety, Dempsey was merely faced with fellow jurors in need of a nicotine fix. There is no palpable error present.

Fantuzzo argues that the trial court had a duty to inquire into Dempsey's claims. We do not agree.

> It is the holding of this Court that a trial court has the authority and duty to determine that its judgments are correct and accurately reflect the truth in all respects. In order to so determine, the trial court has sufficient inherent authority to conduct an investigation and a hearing to determine whether its judgments accurately reflect the truth. This right of investigation is conditioned to such circumstances where there is a reasonable basis to believe that there is a possible lack of accuracy or truth in the judgment. This inherent power goes beyond actual fraud. It encompasses bad faith, abuse of judicial process, deception of the court and lack of candor to the court. There can be no accommodation of deceit or lack of candor in any respect in the judicial process.

Potter v. Eli Lilly and Co., 926 S.W.2d 449, 454-455 (Ky. 1996).

If the trial court did in fact have a duty to inquire, that duty was not breached. The court purposefully delayed the sentencing hearing to allow Fantuzzo

adequate time to investigate Dempsey's claims and prepare and submit any motions. Furthermore, the trial court allowed Dempsey to testify and determined on its own, after considering her testimony, that there had been no misconduct.

The remainder of Fantuzzo's argument surrounding Dempsey's juror vote goes to the heart of the evidence presented at trial. Under this argument, we would consider 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, 318-319, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979)) (emphasis in original). This criterion grants broad discretion to the trial court and the findings of the jury. It is not our role to reassess the evidence presented at trial and determine its value. It is clear that, regardless of Dempsey's position, the other jurors believed the essential elements of the crime existed beyond a reasonable doubt. For this reason, Fantuzzo fails to prove the presence of palpable error.

WITNESS EXCLUSION

Fantuzzo's second argument centers on the use of Keelin as a witness. Keelin arrived after the conclusion of Sexton's testimony. She was originally not expected to testify. However, Sexton, during her testimony, had stated that there was some disagreement between she and her mother regarding the color of Fantuzzo's truck.

After Keelin arrived and spoke with the prosecutor, it was decided that she would be called as a witness.

Keelin testified that she had not been made aware of the prior testimony of her daughter. As the trial court gave credence to her testimony, so must we. Additionally, even if Keelin had been privy to her daughter's testimony, we do not believe it would have unfairly prejudiced Fantuzzo. The bulk of Keelin's testimony concerned the color of Fantuzzo's truck. The jury had already been presented with a tape of Fantuzzo admitting that he had an exchange with Sexton. His identity was no longer an issue. Instead, at issue, was whether or not he had attempted to sodomize her, an issue on which Keelin's testimony had no bearing. Therefore, we find that the use of Keelin as a witness did not amount to palpable error.

PROSECUTORIAL MISCONDUCT

Fantuzzo's final argument is that the prosecution engaged in persistent misconduct and prejudiced Fantuzzo's rights to present a defense and to confront the witnesses against him. When reviewing an issue of prosecutorial misconduct, we have found the relevant question is not whether the prosecutor engaged in misconduct as the term suggests, but whether the defendant received a fundamentally fair trial. *Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky. 2002). Fantuzzo's allegations regarding prosecutorial misconduct are numerous. They focus entirely on the prosecutions comments and questions during re-direct examination of Sexton and during the guilt phase closing arguments. "The prosecutor may comment on the trial tactics of defense

counsel and may comment on the evidence." *Caldwell v. Commonwealth*, 133 S.W.3d 445, 452 (Ky. 2004) (citing *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987)). Our review of the record fails to support an argument that the prosecution's questions and comments rise to a level that would require reversal. The prosecution's comments were appropriate and his questions were in direct response to the testimony elicited by the defense. Fantuzzo's rights to present a defense and confront witnesses were never in jeopardy.

Because we have been unable to find error in the trial court proceedings, we are thus unable to make a finding of cumulative error. For the foregoing reasons, the holding of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia K. Pearson
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky