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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001161-MR

MONICA WILSON

APPELLANT

v. APPEAL FROM BRECKENRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 06-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, KELLER, WINE, JUDGES.

CAPERTON, JUDGE: Monica Wilson (Wilson) appeals as a matter of right her conviction of one count of second degree burglary in the Breckinridge Circuit Court. On appeal, Wilson argues that she was entitled to a directed verdict, that the Commonwealth improperly introduced prior consistent statements, and that she was denied a fair trial due to prosecutorial misconduct. We reverse and remand for

a new trial because (1) the prosecutor's closing argument violated Appellant's right to a fair trial and (2) prior consistent statements were erroneously admitted into evidence.

Wilson was convicted of second degree burglary for the incident that occurred on April 26, 2006, at the home of Kent Webb (Webb) and Lori Herron (Herron). The evidence presented at Wilson's trial indicated that the home of Herron and Webb had been subjected to a forcible entry and the contents of a bedroom had been disturbed.¹ The Commonwealth's witness Jim Olze (Olze) testified that he arrived at the Herron and Webb residence and that he saw a Ford Taurus which he identified as belonging to Wilson's mother. Olze went to the front door and it was locked. He went then to the side door and found it forced open. He then heard someone leave through the front door and saw the Ford Taurus drive off. Olze acknowledged that he did not see Wilson there at the time, only the rear of the car pulling away. Herron testified that Wilson did not have permission to come and go from the residence as she pleased and that she did not have permission to be in the residence on April 26, 2006.

Wilson testified that she and her mother had ventured to Webb's residence earlier that day to check on him.² When Webb appeared not to be at home, Wilson's mother requested Wilson to come back later. Webb suffered from health problems.³ Wilson did not deny being at the residence by herself that day.

¹ Evidence was not presented of theft.

² Wilson claimed that she and her mother went over to check on Webb because he had undergone a heart procedure the preceding day.

³ Webb was deceased at the time of the trial.

Her version was that she arrived at the Webb residence and found Shawn Cook's car in the driveway. She knocked on the front door and then opened it and went inside. Finding no one, she came back outside, saw Cook, spoke with him, and then drove off. She denied going into the bedroom.

Evidence from multiple witnesses was presented which indicated that Wilson and Webb were family friends and that she had been over to his residence numerous times in the past. Wilson claimed to have permission to go into Webb's residence when he was not there and that no one had ever told her otherwise.

On appeal, Wilson argues that she was entitled to a directed verdict as the Commonwealth failed to produce sufficient evidence that Wilson either committed a crime within the residence or intended to commit a crime therein.

KRS 511.030 requires that "with an intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling" before a person can be convicted of second degree burglary. Wilson's attorney moved for a directed verdict at the close of the Commonwealth's case, the close of Wilson's case, and after rebuttal evidence presented by the Commonwealth. All three motions for a directed verdict were denied.

A motion for directed verdict requires the trial court to:

[D]raw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to

the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187(Ky. 1991).

On appeal, “the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” *Id.* and *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

The testimony at trial essentially came down to a question of credibility for the jury to determine whether Wilson had permission to enter the dwelling and whether the evidence presented showed an intent to commit a crime. Given the evidence at trial, it was not error to deny Wilson’s motions for directed verdict, as it is not clearly unreasonable for a jury to find guilt.

Wilson’s second claim of error is that the Commonwealth improperly introduced prior consistent statements of its witnesses. As this issue is unpreserved for appellate review, we will address the matter under an RCr 10.26 analysis, where a palpable error will be corrected if the error affects the substantial rights of a party and manifest injustice resulted from it. RCr 10.26. Palpable error is an error which is obvious. *Nichols v. Commonwealth*, 142 S.W.3d 683 (Ky. 2004). As explained in *Partin v. Commonwealth*, 918 S.W.2d 219, (Ky. 1996), “the requirement of ‘manifest injustice’ as used in RCr 10.26...mean[s] that the error must have prejudiced the substantial rights of the defendant, i.e., a substantial

possibility exists that the result of the trial would have been different.” *Id.* at 224 (internal citations omitted).

The Commonwealth at trial questioned Deputy Sheriff Rich Knight about the investigation at the Webb and Herron residence. The Commonwealth further questioned whether Olze and Herron had given a written statement to the officer which was consistent with their testimony in court. The officer indicated that this was true. The officer further testified that since Webb could not write, Webb dictated his statement to Herron who wrote it down.⁴ The next questions indicated that these statements furthered the deputy’s investigation and led to the arrest of Wilson. Deputy Knight then read Wilson’s statement to the jury, which stated that she left the residence of Webb and Herron waiving to Olze on the way out.

Kentucky’s rule on prior consistent statements is that:

[A] witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony. Where, however, a witness has been assailed on the ground that his story is a recent fabrication, or that he has some motive for testifying falsely, proof that he gave a similar account of the matter when the motive did not exist, before the effect of such an account could be foreseen, or when motive or interest would have induced a different statement, is admissible.

Smith v. Commonwealth, 920 S.W.2d 514, 516-517 (Ky. 1995).

⁴ Note that the trial judge had previously ruled this statement as inadmissible. Wilson claims that this statement is favorable to her and that the characterization of it as being unfavorable was misleading to the jury.

In the case sub judice the deputy's testimony that the prior statements were consistent with those given at trial was highly prejudicial in that it only served to bolster the Commonwealth's witnesses, as was the case in *Smith*. In *Smith*, the Kentucky Supreme Court held that such bolstering constituted reversible error. However, in *Smith*, the officer testified extensively and reiterated the same testimony given by the victim. We disagree with the Commonwealth that *Smith* is limited to testimony from social workers, medical doctors, police officers, or other adults which improperly bolster a child's testimony in a sexual abuse case. We further disagree with the Commonwealth that Deputy Knight's testimony was harmless. Not only did the deputy bolster the Commonwealth's witnesses, but the implication was that Webb's inadmissible statement also corroborated the statements of Herron and Olze. While no objection was made by Wilson, the admission of a prior consistent statement for the purpose of bolstering the Commonwealth's⁵ witnesses resulted in a palpable error under RCr 10.26. It was obvious that a manifest injustice resulted from such an admission. Therefore, we find reversible error.

Wilson's last argument is that the Commonwealth's actions and comments constituted prosecutorial misconduct that mandates a new trial. Wilson directs this Court's attention to the aforementioned prior consistent statements in addition to counsel's closing argument. In closing argument the Commonwealth

⁵ We note that no citation to the record showing an attack on the Commonwealth's witnesses, justifying the Commonwealth's rehabilitation of their witnesses by an admission of a prior consistent statement, was indicated.

pointed at the defense counsel and said to the jury that “[h]ere’s how I’m different from my counterpart over there...his job is to get his client acquitted if he can do it and to stand up here and *manufacture*....”⁶ (emphasis added). Needless to say defense counsel sprang up with an objection. The trial judge properly instructed the Commonwealth that there was nothing in the evidence to support such a statement and that she should move on. At the beginning of the trial the judge informed the jury that statements of counsel did not constitute evidence. The judge did not, however, admonish the jury concerning the Commonwealth’s characterization of defense counsel in closing argument. We strongly disagree with the Commonwealth that the statement made by the prosecutor did not amount to misconduct. The record clearly shows that the improper statement was said before the jury, not uttered during the objection.⁷ Further, this accusation against counsel is outside the wide latitude permitted in closing arguments.

The law in Kentucky is clear that

[W]e 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).

⁶ This is in stark contrast to the Commonwealth’s portrayal of her role as that of upholding the law and insuring that Wilson received a fair trial in her closing argument.

⁷ The record shows that the Commonwealth’s statement ending with the word “manufactured” was immediately followed by the objection of defense counsel.

Here the evidence against Wilson is not overwhelming, defense counsel did indeed object, and the trial court failed to cure the error in that there was no admonishment to the jury. However, a failure to request an admonition to the jury results in an unpreserved error. *Taylor v. Commonwealth*, 449 S.W.2d 208 (Ky. 1969). Regardless, given the magnitude of the statement made by the Commonwealth in closing, we find palpable error under RCr 10.26.

Accordingly, the judgment of conviction and the sentence imposed are reversed and this case is remanded to the Breckinridge Circuit Court for a new trial.

KELLER, JUDGE CONCURS.

WINE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

WINE, JUDGE, CONCURRING: I concur with the majority opinion that even though the evidence was scant, the trial court properly denied the motion for a directed verdict. Regrettably, the Appellant's trial counsel did not request an instruction for the offense of criminal trespass, which the evidence clearly supports.

Fortunately for the Commonwealth, our case law clearly holds that retrial upon reversal due to prosecutorial misconduct is not barred by double jeopardy:

In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a

determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair re-adjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Hobbs v. Commonwealth, 655 S.W.2d 472, 474 (Ky. 1983), *cert. denied*, [465 U.S. 1067](#), 104 S. Ct. 1419, 79 L. Ed. 2d 745 (1984) (internal citations and emphasis omitted).

I have no doubt that the prosecutorial misconduct referenced in *Hobbs* embraces the alleged acts of bad faith by the prosecutor in the case at bar. Not only did she make disparaging remarks about trial counsel, the comments clearly misstated the law. Further, it is clear that the statement given by Webb to the investigating officer exculpated the Appellant.

As stated in *Couch v. Miracle*, 998 S.W.2d 469, 471-72 (Ky. 1999):

Further, the policy reasons behind allowing retrial to correct trial error support retrial upon reversal of a conviction for prosecutorial misconduct. “It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.”

Quoting [United States v. Tateo](#), 377 U.S. 463, 466, 84 S. Ct. 1587, 1589, 12 L. Ed. 2d 448 (1964).

This overzealous prosecutor intentionally engaged in improper argument in the presence of the jury. Our courts have defined the role of the

prosecutor and the duty of her position. *Bailey v. Commonwealth*, 193 Ky. 687, 237 S.W. 415 (1922). She may strike hard blows but she may not strike foul ones. She should constantly be mindful and protective of the rights of the accused, whether guilty or innocent. She may not testify. She is limited to fair argument on matters in the record and legitimate deductions there from. *Martin v. Commonwealth*, 255 Ky. 529, 75 S.W.2d 13 (1934); e.g., *Baker v. Commonwealth*, 184 Ky. 207, 211 S.W. 566 (1919).

This prosecutor would do well to remember and heed the words of Justice John Palmore:

One of the finest offices the public can give to a member of the legal profession in this state is that of Commonwealth's Attorney. Its very status becomes a mantle of power and respect to the wearer. Though few are apt to wear it lightly, some forget, or apparently never learn, to wear it humbly. No one except for the judge himself is under a stricter obligation to see that every defendant receives a fair trial, a trial in accordance with the law, which means the law as laid down by the duly constituted authorities, and not as the prosecuting attorney may think it ought to be.

Niemeyer v. Commonwealth, 533 S.W.2d 218, 222 (Ky. 1976).

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