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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000658-MR

DANIEL B. HANCOCK APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 17-CR-00138

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KRAMER, AND L. THOMPSON, JUDGES.

COMBS, JUDGE: Daniel B. Hancock appeals from the judgment of the Fulton Circuit Court entered on April 5, 2018, following his conviction for first-degree robbery. After our review, we affirm the judgment.

The facts in this case are largely undisputed. In the early morning hours of October 6, 2017, Hancock and his friend, Dalton Haney, drove to Hickman, Kentucky, to visit one of Haney's friends. They parked in an alley and,

for unknown reasons, decided to hide an Altoids[1] tin containing Xanax pills. As the two men were hiding the pills, David Kimmons came upon them and told them to leave because they were on his family's property. Haney and Hancock left, but shortly afterward they realized that they had forgotten the pills.

Hancock and Haney drove back to the alley to look for the Xanax pills but could not find them. Hancock questioned Kimmons about the pills, but he did not know where they were. Hancock pleaded with Kimmons to return the pills, but Kimmons insisted he did not have them. The argument escalated into a physical altercation, culminating in Hancock's striking Kimmons in the head with a two-inch by two-inch landscaping stake.[2] While Kimmons was on the ground, Hancock took his tennis shoes and his wallet. Hancock and Haney then drove away. Several miles from the scene, Hancock removed ten dollars from Kimmons's wallet and then discarded the wallet along with the shoes.

Sergeant Scott McKnight of the Hickman Police Department was on duty that morning when he received a call dispatching him to Kimmons's residence. Upon arriving, he saw Kimmons lying on a couch with injuries to his

[1] Altoids are breath mints marketed as "curiously strong." They are sold in distinctive aluminum containers. Mars Wrigley Confectionery, https://productcentral.mars.com/altoids (last visited Jul. 6, 2020).

[2] Haney's role in the altercation is disputed. Haney claimed that he returned to the vehicle during the argument and watched the fight as it happened. Kimmons asserted that Haney was an active participant. As noted below, Haney eventually pleaded guilty to second-degree assault.

head and hands. Kimmons told Sergeant McKnight about the incident with Haney and Hancock. An ambulance arrived and took Kimmons to the hospital, where he was diagnosed as having a concussion. Sergeant McKnight interviewed Haney and Hancock about the incident, but each invoked his right to counsel and declined to make a statement.

Eventually, Haney entered a negotiated guilty plea to a charge of complicity to second-degree assault,[3] and the grand jury indicted Hancock for first-degree robbery.[4] Haney agreed to testify about the incident at Hancock's trial and received a sentence of eight-years' imprisonment. At trial, the jury heard testimony from Sergeant McKnight, Kimmons, and Haney. No witnesses testified in Hancock's defense. The jury returned a guilty verdict and recommended a sentence of ten-years' imprisonment. The trial court entered final judgment on April 5, 2018, sentencing Hancock in accordance with the jury's recommendation. This appeal followed.

On appeal, Hancock presents seven allegations of prosecutorial misconduct -- along with a separate, additional allegation of cumulative error. "Prosecutorial misconduct is 'a prosecutor's improper or illegal act involving an attempt to persuade the jury to wrongly convict a defendant or assess an unjustified

[3] KRS (Kentucky Revised Statutes) 508.020, a Class C felony.

[4] KRS 515.020, a Class B felony.

punishment.'" *Dickerson v. Commonwealth*, 485 S.W.3d 310, 329 (Ky. 2016) (quoting *Noakes v. Commonwealth*, 354 S.W.3d 116, 121 (Ky. 2011)). None of the alleged instances of prosecutorial misconduct is preserved, and Hancock has requested review for palpable error pursuant to RCr[5] 10.26.

> Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error.

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014) (internal quotation marks omitted).

In the context of alleged prosecutorial misconduct, unpreserved errors are reversible only when they are "'flagrant' so as to have 'render[ed] the trial fundamentally unfair.'" *Dickerson*, 485 S.W.3d at 329 (quoting *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010)). If the prosecutor's conduct was improper, we use the following four-factor test to determine if such conduct was flagrant:

> (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused.

[5] Kentucky Rules of Criminal Procedure.

Id. (quoting *Mayo v. Commonwealth*, 322 S.W.3d 41, 56 (Ky. 2010)). "In the end, our review must center on the essential fairness of the trial as a whole, with reversal being justified only if the prosecutor's misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Id*. (citations and internal quotation marks omitted).

For his first issue, Hancock contends that the prosecutor improperly defined reasonable doubt in his *voir dire* of the jury panel. According to Hancock, the prosecutor stated as follows:

> Talk about reasonable doubt for just a second. Reasonable doubt, we can't define. As smart as Judge Langford is, and as talented as [defense counsel] is . . . . In fact, I have had all these years as a prosecutor, we can't define reasonable doubt to you. Why? Because the Court says we can't. All I can do is tell you – it's not all doubt. It's not the old *Perry Mason* "beyond a shadow of a doubt." All it is is beyond what you believe as a reasonable person is doubt in your mind. That's all you have to accept is beyond a reasonable doubt.

Appellant's Brief at 7.

The Kentucky Supreme Court has repeatedly held that the concept of reasonable doubt may not be defined for the jury in the trial court's instructions or by counsel. *See*, *e.g.*, *Commonwealth v. Callahan*, 675 S.W.2d 391, 393 (Ky. 1984); RCr 9.56(2). However, a close examination of the above statement indicates no attempt to define reasonable doubt. On the contrary, the prosecutor attempted to define what reasonable doubt is **not**, stating that it is not "beyond a

shadow of a doubt." The Kentucky Supreme Court has considered this very question and explicitly held such statements "were not an impermissible definition of reasonable doubt." *Johnson v. Commonwealth*, 184 S.W.3d 544, 550 (Ky. 2005). Leaving aside the attempt to define what reasonable doubt is not, the prosecutor correctly left the jurors to determine for themselves what reasonable doubt means. There was no misconduct on this issue.

For his second issue on appeal, Hancock alleges that the prosecutor committed misconduct by presenting evidence of uncharged crimes in his closing argument:

> The defendant had pills in an Altoid can. And I'm assuming Xanax is a prescription medicine, and if he had them in an Altoid can, that means probably he either had them in an improper container, or he bought them on the streets. I don't know. We don't know this.
>
> . . . .
>
> [Kimmons] was on property he has a right to be on. His family's property. He told them to leave. They did. They came back. He's still on property he has a right to be on – they don't.

Appellant's Brief at 8-9. Hancock alleges that these remarks were tantamount to an accusation of uncharged offenses[6] and that, therefore, they were unfair and

[6] Specifically, Hancock claims that he was accused of not keeping controlled substances in their original containers (KRS 218A.210), third-degree possession of a controlled substance (KRS 218A.1417), and criminal trespass (KRS 511.080).

prejudicial. Hancock relies on *Clark v. Commonwealth*, 223 S.W.3d 90 (Ky. 2007), and KRE[7] 404(b) for the principle that evidence should be confined to charged offenses.

We cannot agree that these remarks constituted reversible error. First, both the prosecutor and defense counsel discussed the pills and the site of the incident in their arguments, and such discussions were unavoidable because these facts formed the background of the incident. *See Kerr v. Commonwealth*, 400 S.W.3d 250, 259-60 (Ky. 2013). Second, and more significantly, "[o]pening and closing statements are not evidence and wide latitude is allowed in both." *Pauly v. Chang*, 498 S.W.3d 394, 412 (Ky. App. 2015) (quoting *Wheeler v. Commonwealth*, 121 S.W.3d 173, 180 (Ky. 2003)). "A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of the defense position." *Stopher v. Commonwealth*, 57 S.W.3d 787, 806 (Ky. 2001) (quoting *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987)). We cannot agree that the comments were improper -- much less flagrant. *Dickerson*, 485 S.W.3d at 329.

For his third issue on appeal, Hancock argues that the prosecutor improperly shifted the burden of proof to the defense. In his closing argument, the prosecutor stated, "There is no proof anywhere here today that anyone other than

[7] Kentucky Rules of Evidence.

the defendant took a wooden stake and hit that man at least twice. Nowhere." Hancock now contends this statement shifted the burden to him of proving his innocence -- contrary to the requirements of KRS 500.070.

The Commonwealth denies that this statement amounted to burden-shifting but contends rather that it was a comment on the strength of the prosecutor's case. We agree. The prosecutor's statement here regarding "no proof anywhere" resembles a similar statement made by the prosecutor in *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013). In *Ordway*, the prosecutor argued in closing about how there was "[n]othing to prove" the appellant's claim regarding a firearm other than his own statement. *Id*. at 796. In response to Ordway's burden-shifting argument, the Kentucky Supreme Court held that the prosecutor's statement was permissible under the principle that:

> [t]he parties have wide-latitude during closing statements to argue their respective cases, to comment on the evidence and draw reasonable inferences therefrom, and to draw attention to the weaknesses in the opposing party's case.

Id. The reasoning in *Ordway* is equally applicable here. We find no error.

Hancock's last four claims of prosecutorial misconduct are not cognizable as such because they are actually alleged evidentiary errors. "[T]here has developed a recent tendency in criminal appeals to characterize unpreserved issues as 'prosecutorial misconduct' for the purpose of raising them on appeal."

Noakes v. Commonwealth, 354 S.W.3d 116, 122 (Ky. 2011) (quoting *Davis v. Commonwealth*, 967 S.W.2d 574, 579 (Ky. 1998)). "[U]npreserved claims of error cannot be resuscitated by labeling them cumulatively as 'prosecutorial misconduct.'" *Id*. (citation omitted).

Hancock's four alleged errors may be summarized as follows: (1) the prosecutor improperly elicited comments from Sergeant McKnight concerning Hancock's invocation of his right to remain silent; (2) the prosecutor improperly bolstered Haney's testimony by asking if he was being truthful; (3) the prosecutor improperly discussed Haney's plea agreement resulting from the incident in this case; and (4) the prosecutor engaged in improper vouching in its *voir dire* discussion by asserting that "[w]e found certain things" during the investigation which led to Hancock's indictment. Although these alleged errors were not properly characterized in the appellant's brief, we will nonetheless review them for palpable error pursuant to RCr 10.26.

First, Hancock contends that Sergeant McKnight improperly testified that he invoked his right to remain silent in response to questioning. The Kentucky Supreme Court has held that this issue -- when unpreserved -- does not amount to palpable error. In commenting on the earlier case of *Salisbury v. Commonwealth*, 556 S.W.2d 922 (Ky. App. 1977), the Supreme Court stated as follows:

> Observing that the record failed to reveal the reason for counsel's failure to object, whether tactical, deliberate, or

> inadvertent, to the comment upon the defendant's post-arrest silence, the Court held that palpable error had not been demonstrated.

West v. Commonwealth, 780 S.W.2d 600, 602-03 (Ky. 1989). Similarly, the record in the case before us does not reveal why Hancock's counsel chose not to object, and Hancock has not demonstrated why the testimony resulted in manifest injustice amounting to palpable error.

Second, Hancock contends that the prosecutor improperly bolstered Haney's testimony by asking if he was testifying truthfully. The question was not proper because a witness may not "bolster his or her own testimony unless and until it has been attacked in some way." *Brown v. Commonwealth*, 313 S.W.3d 577, 628 (Ky. 2010). Nonetheless, the question does not amount to palpable error because the jury had already heard Haney swear that he was going to tell the truth. When Haney did so again in response to the prosecutor's question, it "posed little risk of short-circuiting the jury's credibility determination." *Tackett v. Commonwealth*, 445 S.W.3d 20, 33 (Ky. 2014) (citation and internal quotation marks omitted). There was no error on this point.

Third, Hancock contends that the prosecutor improperly elicited testimony regarding Haney's plea agreement with the Commonwealth. "It has long been the rule in this Commonwealth that it is improper to show that a co-indictee has already been convicted under the indictment." *Tipton v.*

Commonwealth, 640 S.W.2d 818, 820 (Ky. 1982) (citation omitted). However, the exception to this rule is "when the defendant permits the introduction of such evidence without objection for the purpose of trial strategy." *St. Clair v. Commonwealth*, 140 S.W.3d 510, 545 (Ky. 2004) (quoting *Tamme v. Commonwealth*, 973 S.W.2d 13, 33 (Ky. 1998)). Hancock's defense counsel concentrated on Haney's plea agreement, asserting in his closing argument how unfair it was that Haney was "rewarded with assault second" in exchange for his testimony. "Having employed that strategy, Appellant cannot be heard to complain after the strategy failed." *Id*. (quoting *Tamme*, 973 S.W.2d at 33). Accordingly, we find no error.

Fourth, Hancock contends that the prosecutor vouched for Haney during his *voir dire* when he stated the following:

> There was a codefendant in this case. His name is Dalton Haney. He's already pled guilty to a charge lesser than what Mr. Hancock is charged with, and that was caused based on our investigations. We found certain things.

Appellant's Brief at 16. Hancock takes issue with the use of the phrase "certain things[,]" asserting that it was improper because it "conveyed the impression that there was evidence not presented to the jury, but known to him, which supported the charge." In addition, Hancock contends the "statement carried with it the imprimatur of the Government and induced the jury to 'trust the Government's

judgment rather than its own view of the evidence.'" *Id*. at 16-17 (quoting *United States v. Young*, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 1048, 84 L. Ed. 2d 1 (1985)).

We disagree with Hancock's interpretation of the prosecutor's phrasing. The prosecutor's usage of "certain things" in this context is similar to a situation which arose in *Kiper v. Commonwealth*, 399 S.W.3d 736 (Ky. 2012). In *Kiper*, the Kentucky Supreme Court held a "rhetorical flourish" in the prosecutor's opening statement "simply informed the jury of a factual controversy coming its way" and did not amount to vouching. *Id*. at 748. The reasoning in *Kiper* is equally applicable in this case. As in *Kiper*, the prosecutor's phrasing did not amount to vouching and is not palpably erroneous.

Hancock last argues that he suffered cumulative error from the combined weight of the preceding issues, rendering his trial fundamentally unfair. As previously discussed, however, the unpreserved errors did not rise to the level of prejudice required to find palpable error. Therefore, Hancock cannot demonstrate that his trial was fundamentally unfair as a result of cumulative error. "Where . . . none of the errors individually raised any real question of prejudice, we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010) (citing *Furnish v. Commonwealth*, 95 S.W.3d 34 (Ky. 2002)).

We affirm the Fulton Circuit Court's judgment of conviction entered on April 5, 2018.

ALL CONCUR.

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