

RENDERED: November 8, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 95-CA-0393-MR

CARLTON D. DARNELL

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DANIEL A. SCHNEIDER, JUDGE
ACTION NO. 93-CR-0021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, GARDNER, and HOWERTON¹, Judges.

COMBS, JUDGE. Appellant, Carlton Darnell, appeals from his conviction in Jefferson Circuit Court for second-degree assault. After reviewing Darnell's arguments and the record below, we affirm.

Darnell's conviction resulted from events occurring on November 14, 1992. On that night, as alleged by the indictment, James Goodin had been verbally harassed and threatened and then

¹ Judge Howerton concurred in this opinion prior to his retirement effective October 1, 1996.

was later struck by Appellant's car as he attempted to leave a Louisville bar.

At trial, the Commonwealth presented testimony from the victim and several eyewitnesses as to the events of that evening. The testimony indicated that Appellant screamed obscenities at Goodin, threatened to run him down, then actually struck Goodin with his car, pinning him against another vehicle. After he was struck, the victim fell against appellant's windshield and then onto the pavement where he rolled under a truck. At that point, Appellant fled the scene, only to be apprehended by police minutes later. Goodin was transported by ambulance to Humana Hospital University where he was examined. The victim suffered from an injured left knee, a broken pelvis, bruised kidneys, a bruised spine, a concussion, and assorted cuts and abrasions. Goodin has since undergone five surgeries to his left knee and suffers a permanent limp as a consequence.

The defense maintained that Goodin was the aggressor and that Appellant had fled the scene hurriedly in order to avoid further conflict. Appellant testified that he did not believe that he had actually struck Goodin. Nonetheless, the jury found Appellant guilty of second-degree assault, and he was sentenced to ten years' imprisonment.

In his first argument to this court, Appellant contends that he was improperly denied the opportunity to impeach Commonwealth witnesses with the prior statements which they had given to representatives of Appellant's insurance carrier. He

maintains that this alleged error requires reversal of his conviction. We disagree.

Initially, we note that the defense never made an offer of proof with respect to the use of the prior statements. As a result, there is absolutely nothing in the record as to the content of the previous statements of the witnesses -- much less any indication that the statements were in any manner inconsistent with the testimony presented by those witnesses to the jury. We are not now in a position on review to assess whether impeachment along these lines might have been proper. Moreover, it does not appear that the defense was able to establish the proper foundation necessary to make use of the prior statements. The statements were unsworn, and only a summary of the statements rather than the statements themselves was available. At any rate, the defense was permitted to question Goodin with respect to a civil action he had filed against Appellant for damages and to argue in summation that the witnesses' versions of events had been concocted in order that Goodin might collect against Appellant's automobile insurance policy. Appellant has failed to persuade us that he was prejudiced in any way. The trial court's decision to disallow reference to the prior statements does not constitute reversible error.

In a second argument, Appellant contends that the Commonwealth Attorney's closing argument was inflammatory and improper. He maintains that the summation went far beyond

drawing reasonable inferences from the evidence and instead encouraged the jury to return a verdict based upon passion or prejudice. We disagree.

After reviewing the entirety of the prosecutor's comments, we are unable to say that any of her remarks fell outside the wide latitude permitted during closing argument. Lynem v. Commonwealth, Ky., 565 S.W.2d 141 (1978). See also Byrd v. Commonwealth, Ky., 825 S.W.2d 272 (1992). "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context. . . ." United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 84 L.ED.1 (1985). The statements made during the Commonwealth's closing argument were not impermissible. The remarks did not render the trial fundamentally unfair nor did they deny Appellant his constitutional right of due process. See, Slaughter v. Commonwealth, Ky., 744 s.W.2d 407 (1988). Therefore, Appellant's second argument also fails.

Finally, Appellant argues that the trial court erred by denying his motion to allow the jury to view the scene. Again, we disagree. Appellant has failed to show that the trial court abused its discretion or that he suffered any prejudice as a result of the court's refusal to allow a jury viewing. As the Commonwealth aptly notes, the Appellant had requested before trial that the jury be permitted to view the scene as it appeared to him at the time the events occurred. The trial court took the

motion under submission. Near the completion of Appellant's case, counsel stated that he wanted either to show a videotape of the scene or to renew his motion for a jury viewing. Appellant's counsel showed the videotape to the jury and made no further request for the jury to be allowed to visit the scene. Appellant received no ruling on the pre-trial motion as to the jury viewing and apparently abandoned that request by electing to show a videotape of the scene instead. He did not preserve this alleged error for appellate review. As a result, we cannot say that the issue is appealable. Todd v. Commonwealth, Ky., 716 S.W.2d 242 (1986).

For the foregoing reasons, Appellant's conviction is affirmed.

ALL CONCUR.

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