RENDERED: FEBRUARY 14, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000741-MR

DAVID WARSOW — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 09-CI-00629

DON MOHLER AND
KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: The question presented for our review is whether certain statements made by the defendant's attorney during his closing argument impermissibly introduced information outside the record, thereby prejudicing the

jury and resulting in an unfavorable verdict for the plaintiff. Finding they did not, we affirm.

David Warsow was injured in November 2007 when his vehicle left the road and crashed in Graves County, Kentucky. He claimed another driver, Don Mohler, had caused his injuries when his vehicle crossed the center line.

During a jury trial, Warsow presented the testimony of an examining physician, Dr. Emily Rayes-Prince, as evidence of the nature and extent of some of his injuries. Mohler's attorney conducted cross-examination of Dr. Rayes-Prince, the following portion of which is relevant to the issue on appeal:

> Q. Over the course of your practice in Paducah, do you have any idea how many – on how many occasions you've evaluated patients on behalf of [the] law firm [representing Warsow]?
>
> A. Oh, I may do three in a year, three or four in a year.
>
> Q. Okay. And you've practiced here for approximately 10 years or so?
>
> A. No. No, not quite that long. And in my own practice, it's been 7 years.
>
> Q. Seven years?
>
> A. Yeah.
>
> Q. But over the course of those 7 years or so, you'd estimate that you evaluate someone on behalf of [the] firm [representing Warsow] maybe as many as three times per year?
>
> A. Yeah. Not much more than that.

Q. Okay, is there a way to describe for the jury how much or what proportion of your practice consists of performing medical evaluations?

A. Oh, less than 20 percent. Probably 10 or 15 percent.

Q. Okay. And of that 10 or 15 percent, is there a way to describe for the jury what percentage of the people you see are on behalf of plaintiffs in litigation versus defendants in litigation?

A. It's probably about 60/40.

Q. And 60 for plaintiff?

A. Yes.

During his closing argument, counsel for Mohler represented to the jury that Dr. Rayes-Prince's testimony was unreliable because she was biased. He stated:

> There, in my opinion, there are serious issues with Dr. Rayes-Prince's credibility, not the least of which is that she – I won't say she's on staff with [the law firm representing Warsow], but her testimony is that she evaluates people . . . that [the] firm is representing three times a year, not much more than that, she testified, and has done so for the last seven years. [The law firm representing Warsow] uses Dr. Rayes-Prince a lot. . . .

At that point, counsel for Mohler objected, claiming, "There is no evidence of that. It's not in the record."[1]

The objection was overruled, and the jury returned a verdict which apportioned seventy-five percent of the fault to Warsow and twenty-five percent to

[1] It is defense counsel's characterization of the frequency of appellant's counsel's use of Dr. Rayes-Prince as "a lot" that the appellant based his objection at trial and as grounds for this appeal. The appellant did not object to counsel's subsequent statement in closing argument that "She [Dr. Rayes-Prince] charges $1,200 to evaluate . . . ." nor does appellant argue before this Court that such a statement, in this case, was improper. Consequently, our discussion will not address whether the reference to the fee was appropriate.

Mohler. The jury did not award Warsow damages for permanent impairment of his earning power, but estimated his future medical expenses to be $30,000, well below the $250,000 to which Warsow believed he was entitled. Mohler was ordered to pay $17,356.19 in apportioned damages.

Warsow appealed. He contends that by delivering the above-recited passage during the closing argument, defense counsel impermissibly inserted his opinion that Dr. Rayes-Prince lacked credibility, which was based on matters outside the record. He believes this caused the jury to doubt many of his injuries and to diminish the amount of his damages.

When delivering a closing argument, an attorney is not permitted to testify or to impeach witness credibility by reference to matters not in the record. *Jones v. Commonwealth,* 233 S.W.2d 1007, 1010 (Ky. 1950). In fact, where an attorney "deliberately go[es] outside the record in the jury argument and make[s] statements, directly or inferentially, which are calculated to improperly influence the jury," the reviewing court will presume the statements were prejudicial and will reverse the judgment. *Smith v. McMillan,* 841 S.W.2d 172, 175 (Ky. 1992) (quoting *Louisville & N.R. Co. v. Gregory,* 144 S.W.2d 519 (Ky. 1940)).

However, "[i]t is not improper for counsel to ask the jury to assess the other side's case critically." *Baston v. County of Kenton ex rel. Kenton County Airport Bd.,* 319 S.W.3d 401, 412 (Ky. 2010). To that end, counsel is permitted to recall the evidence and characterize it in a light favorable to his or her client. *See id.*; *see also Padgett v. Commonwealth,* 312 S.W.3d 336, 352 (Ky. 2010) (noting "the

general rule that in closing arguments counsel may make reasonable inferences based on the evidence").

Mohler's closing argument did not incorporate matters beyond the record to impeach Warsow's witness. Defense counsel invited the jury to critically assess Warsow's case and, specifically, to find the testimony of Dr. Rayes-Prince suspect because of "the relationship between a party and [the] witness which might lead the witness to slant, unconsciously or otherwise, [her] testimony in favor of or against a party . . . [due to the] witness' . . . self-interest." Robert G. Lawson, *The Kentucky Evidence Law Handbook*, §4.10[1] (5th ed. 2013). Evidence of that relationship had been presented to the jury upon cross-examination of Dr. Rayes-Prince, *i.e.*, that over the previous seven years, she had evaluated three to four cases per year for the law firm representing Warsow. It is to this evidence alone that defense counsel referred when asking the jury to consider the doctor's testimony less than credible.

As part of his argument, Defense counsel characterized the number of times Dr. Rayes-Prince testified as "a lot." Being a relative term, it is no less reasonable an inference to draw from the evidence of record than that the frequency of the doctor's testimony was "not a lot." We conclude that defense counsel's statement "was merely a reference, whereby [he] was attempting to characterize the conduct of the [witness] according to the evidence. As here, the [attorney] is allowed to draw inferences from the evidence and to argue them to the jury." *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010), *superseded on other grounds by*

statute, as recognized in Commonwealth v. Hasch, --- S.W.3d ----, 2013 WL 5406600, NO. 2010-SC-000494-DG, 2011-SC-000232-DG (Ky. Sep 26, 2013) (finality pending).[2]

"Jurors are presumed to be intelligent people[.]" *CSX Transp., Inc. v. Moody*, 313 S.W.3d 72, 88 (Ky. 2010) (quoting *Baynum v. Chesapeake and Ohio Ry. Co.*, 456 F.2d 658, 661 (6th Cir. 1972)). We presume them to be entirely capable of rejecting defense counsel's argument in this regard, or to accept it, but to do so based on their own assessment of the evidence from which the defense counsel's argument was drawn.

We find no error and affirm.

ALL CONCUR.

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[2] During closing argument, the prosecutor in *Hannah* characterized evidence of conduct engaged in both by the criminal defendant and the defendant's decedent victim. The prosecutor said the victim "followed the 'code of the street,' a notion that one confronts those who wrong him in order to regain their respect, asserting that this was not a deadly code of conduct[.]" *Hannah*, 306 S.W.3d at 518. However, he also said the criminal defendant

> followed a tougher, meaner "code of the street" where one kills without much thought, if someone challenges his authority. Appellant objected to these statements on the ground that there was no evidence in the record of any "code of conduct" or "code of the street." The Commonwealth responded that it was an argument based upon reasonable inferences from the evidence. The trial court overruled the objection, noting it was an argument and that the prosecutor was merely characterizing the evidence.

Id. The evidence supported the prosecutor's inference or characterization; the Supreme Court held that the prosecutor's "remarks were well within the bounds of proper argument. The comments did not infringe upon the jury's ability to judge the facts of the case." *Id.*

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BRIEF FOR APPELLEE, DON MOHLER:

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NO BRIEF FOR KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY