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RENDERED: AUGUST 24, 2006

NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2005-SC-0086-MR

DATE 9-14-06 *Ena Groun, D.C.*

ORVILLE E. ROARK

APPELLANT

V.

APPEAL FROM MENIFEE CIRCUIT COURT
HON. BETH LEWIS MAZE, JUDGE
03-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, Orville E. Roark, was convicted of second-degree robbery and first-degree persistent felony offender status. He was sentenced to twenty-two years in prison. He now contends that the trial court erred (1) by allowing law enforcement officers to testify about prior consistent statements made by the victim, and (2) by allowing the admission of prior statements made by his co-defendant without adequate foundation. Neither claim of error was preserved. Because the first claim did not rise to the level of palpable error and a proper foundation was laid for admission of the co-defendant's statements, we affirm Appellant's conviction.

II. BACKGROUND

On the evening of February 3, 2003, Appellant and his friend Lonnie Clemons went to the home of Curtis Fields. Fields operated a small flea market out of his home. At the time, Fields was incarcerated, and the flea market was being run by Michael

Kelly, who also lived in the house. Some time after Appellant and Clemons arrived at the flea market, Kelly shot them. Two conflicting versions of the incident leading up to the shooting were developed at trial.

In the prosecutor's version, which grew mainly out of Kelly's testimony (which, in turn, was corroborated by statements made by Clemons), the violence stemmed from Appellant and Clemons robbing the flea market. Kelly described the following series of events: Appellant and Clemons entered the flea market, threatened Kelly with a knife, and stole several bags of items from the flea market. As Appellant and Clemons went outside, Kelly locked the door behind them. When Appellant realized this, he began banging on the door and screaming in anger. Kelly was so frightened that he ran upstairs to the bedroom to get a gun. Appellant broke down the front door and followed Kelly up the stairs with the knife. As Appellant entered the bedroom, he screamed, "I'll kill you." But when Appellant saw Kelly with the gun, he turned the knife around (holding it by the blade) and offered it to Kelly. Kelly told Appellant to "just leave." Appellant retreated down the stairs and told Clemons they should leave because Kelly had a gun. Clemons left the house, but Appellant remained in the kitchen and put his hand into his pocket. Kelly feared that Appellant was reaching for a weapon, so he began shooting. He continued shooting as Appellant ran outside to his car. Appellant backed his car out of the driveway, getting shot in the process, and drove away. Clemons, who had been running across the street and away from the house, was also shot.

Appellant's version of the incident was that he was shot without provocation while trying to return items his son had stolen from the flea market earlier in the day. Though Appellant did not testify at trial, other testimony supported this theory of the case. For

example, Kentucky State Police Detective Paul Lemaster testified that Appellant said he was shot just after arriving at the flea market, as he was getting out of his truck.

Appellant's son, James Roark, confirmed that he and Clemons had stolen some items from the flea market earlier that day. He also claimed that Appellant told him to return the stolen items, but that he refused to do so. A neighbor, Tony Givens, testified that James Roark told him that Appellant said the stolen items needed to be returned to the flea market before Fields, the owner, returned home from prison. Appellant argued that the implication of this testimony is that he was simply returning stolen items to the flea market, not committing a robbery, when Kelly shot him.

The jury convicted Appellant of first-degree robbery and found that he was a first-degree persistent felony offender. Appellant was sentenced to twenty-two years in prison. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

III. ANALYSIS

A. Police Testimony

Appellant first challenges the testimony of two Kentucky State Police officers, Detective Lemaster and Sergeant Bowling. Sergeant Bowling was sent to secure the scene and was the first officer to speak with Kelly. He testified that Kelly told him briefly what had happened, after which he went into the house to investigate. Sergeant Bowling also said that it was his job to try to corroborate Kelly's story, and that what he saw in the house was consistent with what Kelly told him. Moreover, he testified that Kelly seemed sincere when describing the incident. Detective Lemaster, the primary investigator in the case, testified that he arrived at the flea market after Sergeant Bowling, and that he talked to Kelly, who walked him through the residence and explained what happened. Detective Lemaster said Kelly's explanation was consistent

with what he saw at the scene and with what Kelly had told Sergeant Bowling earlier that night.

Appellant claims the admission of the officers' testimony was erroneous in two ways. First, he argues that their testimony about Kelly's statements to them was inadmissible hearsay under KRE 803, and did not fall under any hearsay exception, including the prior consistent statement exception under KRE 801A. Second, he argues that the officers' testimony was improper bolstering of Kelly's testimony later in the trial.

Appellant raised no objection to the police officers' testimony at trial and admits that the issue was not properly preserved. However, he now asks us to review his claim under RCr 10.26. In order to review an unpreserved error, we must find that it is "[a] palpable error which affects the substantial rights of a party . . . [and] that manifest injustice has resulted from the error." RCr 10.26; see also Johnson v. Commonwealth, 184 S.W.3d 544, 552 (Ky. 2005); Nichols v. Commonwealth, 142 S.W.3d 683, 691 (Ky. 2004).

We first note that Appellant's attorney had ample opportunity to object during the examination of the police officers, but that, for whatever reason, she chose not to do so. In fact, on cross-examination, she continued to pursue the issue, in effect, asking both officers whether the evidence they found at the scene was truly consistent with Kelly's statements.

Ultimately, while we agree that some of the officers' testimony was inadmissible hearsay evidence and that some of their testimony improperly bolstered Kelly's testimony, we cannot say these errors affected the substantial rights of the defendant or constituted "manifest injustice" so as to rise to the level of palpable error. As we noted in Nichols v. Commonwealth, "a palpable error is an error this is easily perceived or

obvious. Manifest injustice means an error in the trial court that is direct, obvious, and observable, such as a defendant's guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds." 142 S.W.3d at 691 (internal quotation marks, brackets indicating alteration, and citation omitted). The questionable part of the police officers' testimony in this case simply was not a "direct, obvious, and observable" error. Rather, the police officers' testimony came across as simply a description of what they did upon arriving at the scene and what they saw once they were there. Therefore, we conclude that the hearsay and bolstering testimony were not palpable error.

Furthermore, even if the error had been preserved, there was extensive additional incriminating evidence presented at trial. Kelly testified regarding his version of events leading up to the shooting, as did Clemons, who admitted that he and Appellant had robbed the flea market and threatened Kelly. Both police officers testified regarding evidence they discovered at the scene of the incident. A silent video-tape of Detective Lemaster's walk-through of the premises was shown to the jury, thus presenting the jury with a visual representation of the scene as the officers encountered it. Many photographs of the evidence were also presented to the jury, with descriptions and identification provided by both police officers. Ultimately, the jurors heard Kelly's version of events when he testified and could see for themselves that his account, which was corroborated by Clemons's statements, was consistent with the evidence found at the crime scene, regardless of whether the officers also told them it was. Considering all the additional testimony presented, there is no possibility that the result would have been different if the officers' hearsay and vouching testimony had not been admitted.

B. Prior Statements Of Co-Defendant

Appellant next claims the trial court erred in allowing the admission of the tape-recorded interview between Detective Lemaster and the co-defendant, Lonnie Clemons. Specifically, Appellant argues that the prosecutor failed to lay a proper foundation for admission of the recording as a prior inconsistent statement, thus its admission was error.

Clemons testified about the events leading to the robbery and the shooting, but he had difficulty remembering many of the details. He recalled that he and Appellant's son had gone to the flea market earlier that evening to buy sodas. He also admitted that he and Appellant later returned to the flea market and that there was a confrontation with Kelly, which ended with the shooting. When pressed about other details, specifically about the content of his interview with Detective Lemaster, he claimed that he could not remember much. As a result, the trial court allowed the prosecutor to play an audio recording of the interview, which implicated Appellant and included details of the events at the flea market that Clemons could not remember on the stand.

We begin by noting that this error was not preserved for our review. Before the tape was admitted, Appellant's attorney was allowed to listen to the entire tape outside the hearing of the jury. The trial judge gave her an express opportunity to object to any and all of the tape, and she, in fact, did object to several hearsay statements at the end of the tape. The tape was then redacted, with the offending hearsay statements omitted. Before the newly redacted tape was admitted, the judge asked Appellant's attorney if she had any further objections, but she declined to raise any more. Appellant

concedes this issue was not preserved, but urges us to review the alleged error pursuant to RCr 10.26.

However, we need not address whether admission of the recording was palpable error because we conclude that it was not error at all, since the prosecutor laid an adequate foundation. A witness's prior inconsistent statements are admissible if "the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613" KRE 801A(a)(1). In turn, KRE 613 requires that, "[b]efore other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them"

The prosecutor examined Clemons about his prior statements to Detective Lemaster in accordance with the requirements of KRE 613. He asked Clemons if he remembered talking with Detective Lemaster at the jail on March 19, 2003. Clemons replied that he did remember the interview, but he was uncertain about the details. The prosecutor continued questioning Clemons about the interview. Specifically, he asked Clemons a series of questions about the substance of his statements to Detective Lemaster during the interview. Though Clemons begrudgingly admitted to remembering some of the statements, he seemed generally reticent on the stand. Several times he told the prosecutor that he did not have a good recollection about what took place because the robbery was a long time ago and he was drunk at the time. Even though Clemons admitted remembering some of what he said to Detective Lemaster, his overall demeanor was so uncertain that it made it impossible to distinguish between what he actually remembered and what he thought he remembered. The trial judge

took express notice of this when, just before the tape was played for the jury, she stated, "As I recall, yesterday Mr. Clemons was having some difficulty recalling what had occurred."

Appellant argues that only the statements Clemons said he did not remember should have been played, whereas the entire tape, including parts of the interview he claimed to be able to remember, was actually played. In light of Clemons's reticence on the stand, however, it was proper to play the entire tape. Our review of his testimony reveals that it simply was not clear which aspects of his earlier statement he could remember. Thus, it likely would have been impossible, or at least extremely difficult, to separate the statements he claimed not to remember from the statements he claimed to remember. Moreover, playing the whole tape provided context for those statements that Clemons clearly could not remember having made. The interview relayed a story of events that would not have made sense unless played as a whole. In light of these circumstances, we hold that the prosecutor laid a sufficient foundation to allow admission of the whole tape.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Menifee Circuit Court.

All concur.

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