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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002007-MR

DANNY GOOSEY — APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 05-CR-00017-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; WHITE,[1] SENIOR JUDGE.

WHITE, SENIOR JUDGE: Danny Goosey appeals from a Lee Circuit Court conviction on the charges of complicity to third-degree burglary, complicity to theft by unlawful taking, and being a first-degree persistent felony offender. He was sentenced to a total of ten years' imprisonment. Goosey claims that the trial

[1] Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

court: (1) improperly qualified a witness as an expert; (2) failed to correct, *sua sponte*, an error concerning parole eligibility; and (3) failed to correct the prosecutor's questioning of Goosey on cross-examination. We shall discuss each claim in turn.

Charles Purdue owned a water treatment facility in Lee County. On October 8, 2008, Purdue found that the building had burned down. The electrical box was removed. The building's aluminum roof was missing. Several of the electrical poles were cut down and missing. Copper wire had been chopped out with an axe and removed. At the scene, Purdue and the police who later investigated found a chain saw oil can and three jersey work gloves.

Due to previous criminal activity on his property, Purdue decided to partake in the investigation. Purdue found a tire track on the property and made two plaster casts of the track. Purdue took the casts to David Ross, the owner of a local tire business. Ross recognized the tire track as having been made by a Mastercraft A/T tire and recalled selling that type of tire to ten or eleven individuals, including Goosey.[2] Based upon this information, Purdue decided to go to Goosey's house. Kentucky State Trooper John Allen accompanied Purdue.

On October 13, 2004, Trooper Allen and Purdue arrived at Goosey's residence. They saw that Goosey had begun building a pole barn. Pieces of aluminum roofing were stacked up. The barn's rafters were made of redwood, as previously found in the water treatment building. Purdue identified a chemical

[2] At trial, the Commonwealth introduced evidence to show that the actual tires on Goosey's truck matched the plaster casts that Ross identified.

pump, a roll of aluminum wire, an axe with copper remnants on the blade, and a chain saw with redwood shavings on it. Trooper Allen found a jersey work glove in the backseat of Allen's truck and another near the pile of aluminum. He also found remnants of burnt wire in Goosey's truck bed and a chemical pump that had been taken from Purdue's building.

Goosey and codefendant Chris Spencer were arrested. Spencer pled guilty to a lesser charge. A jury found Goosey guilty of the aforementioned charges. This appeal follows.

I. Expert Testimony

First, Goosey claims that the trial court should not have admitted Ross as an expert witness to testify about the tire treads because Ross was not qualified to do so. Kentucky Rules of Evidence (KRE) 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Factors that may be used in determining the admissibility of an expert's proffered testimony were established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and later adopted by the Kentucky Supreme Court in *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), *overruled in part on other grounds by Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999). Those factors include, but are not

limited to: (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community. *Daubert*, 509 U.S. at 593-94, 113 S.Ct. at 2796-97.

In his brief, Goosey argues:

> Prior to this trial, Ross had never testified in court regarding tires. He has no resume or CV or "degree." He does not rely on any "studies" when analyzing tires treads, "just the tire itself". He has no specialized training identifying the make or model of a tire from a plaster cast. He was unaware of the names of any experts who specialize in tire tread analysis. Prior to this trial Ross had never been qualified as an expert in the field of tire impression identification. [Internal citations omitted.]

Ross did not receive formal training in tire identification. Ross did not perform any scientific tests on the tires. Ross, however, sold tires for seventeen years. The application of the *Daubert* factors must be a flexible test; otherwise we risk alienating those with life and practical experience. Our Supreme Court in *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000), provided,

> We also conclude that a trial court may consider one or more of the more specific factors that *Daubert* [and *Mitchell*] mention [] when doing so will help determine that testimony's reliability. But . . . the test of reliability

> is "flexible," and *Daubert's* [and *Mitchell*'s] list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants [the trial] court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.

Id. at 577, *quoting General Electric Co. v. Joiner*, 552 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). There is no requirement that scientifically accepted tests and methods must be used in expert analysis. In light of the flexibility required in the *Daubert* analysis and Ross's many years of experience with tires, we find no error in the trial court's designation of Ross as an expert witness. Any weakness in Ross's credibility could certainly have been discussed on cross-examination.

Further, we disagree with Goosey's argument that the plaster casts were the only pieces of evidence to link Goosey to the crime scene. Evidence from the scene was found on Goosey's property, in his truck, and in his truck bed.

II. Parole Eligibility

Second, Goosey claims that the trial court should have *sua sponte* corrected a prosecutorial error during the penalty phase. The prosecutor told jurors that Goosey would be eligible for parole after serving 15% of his sentence. In reality, Goosey was eligible for parole after he served 20% of his sentence. Although defense counsel did not object to the statement, Goosey claims the mistake constitutes palpable error. We agree.

Kentucky Rules of Criminal Procedure (RCr) 10.26 provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Palpable error only exists if there is a substantial possibility that the result would have been different without the error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

We will not undertake the impossible task of determining the intent of Goosey's jury. Nonetheless, it is certainly possible that the jury wanted Goosey to spend a specific number of months or years imprisoned before becoming eligible for parole. Had the jury only recommended the minimum sentence, we could ascertain that the mistake did not influence their decision. The jury, however, recommended the maximum penalty for each charge and recommended that sentences be run consecutively. We conclude that a substantial possibility exists that Goosey's sentence could have been different without the prosecutor's mistake. Therefore, we vacate his sentence.

III. Other Prosecutorial Errors

Finally, Goosey claims that the trial court should have *sua sponte* corrected the prosecutor's assertions that he had the burden to call witnesses and proclaim his innocence. In the cross-examination of Goosey, the prosecutor asked him why he did not tell the state trooper that he was innocent and subpoena a

witness to his alibi. While Goosey admits that these errors were not properly preserved, he argues that they should be reviewed as palpable error.

Clearly, Commonwealth bears the burden to present evidence. Our review of the record, however, does not indicate that the burden was shifted to the defendant. Instead, Goosey waived his Fifth Amendment rights when he chose to take the stand and testify in his own defense. When he did so, Goosey subjected himself to the rigors of cross-examination, including why he did not call an alibi witness. Therefore, we conclude that no palpable error existed.

Accordingly, we affirm Goosey's conviction but vacate his sentence and remand to the trial court for a new penalty phase.

CAPERTON, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Jamesa J. Drake
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky