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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000759-MR

FLOYD WRIGHT — APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NO. 10-CR-00076

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Floyd Wright appeals from the final judgment of the Pendleton Circuit Court sentencing him to ten years' imprisonment for his conviction of complicity to first-degree trafficking in a controlled substance (cocaine) and second-degree persistent felony offender ("PFO2"). For the following reasons, we reverse and remand this case to the Pendleton Circuit Court for a new trial.

On or about August 6, 2008, police secretly recorded an undercover informant purchasing crack cocaine from Sean Records at Records's apartment. Wright was present during this transaction and was charged with complicity to first-degree trafficking in a controlled substance (cocaine) and PFO2. Records later pled guilty and agreed to testify at Wright's trial as part of his plea agreement.

After close of all the evidence at trial, the jury was instructed to find Wright guilty of complicity if it believed beyond a reasonable doubt that Wright "with the intention of promoting or facilitating the commission of [Sean Records's unlawful sale of crack cocaine] aided Sean Records in the commission of the offense." *See* KRS[1] 218A.1412; KRS 502.020. The jury returned a verdict finding Wright guilty of complicity and PFO2, and recommended ten years' imprisonment, which the trial court imposed. Wright appealed and now presents various claims of error and requests that his conviction be vacated or, in the alternative, that this case be reversed and remanded for a new trial.

We first address Wright's claim that the trial court abused its discretion by allowing the jury to take the prosecutor's laptop into the deliberation room with them to listen to the audio recording of the drug deal. We agree the trial court abused its discretion in doing so, and reverse on this basis alone.

RCr[2] 9.72 provides that "[u]pon retiring for deliberation the jury may take all papers and other things received as evidence in the case." The trial court has

[1] Kentucky Revised Statutes.
[2] Kentucky Rules of Criminal Procedure.

discretion to send exhibits with the jury during its deliberation. *Johnson v. Commonwealth*, 134 S.W.3d 563, 567 (Ky. 2004). RCr 9.74 further provides:

> No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.

In this case, the audio recording of the drug transaction was admitted into evidence as Commonwealth's Exhibit #2 and was played for the jury during trial. After the case was submitted to the jury, the jury sent a note requesting to hear the tape again. The trial court played the tape numerous times in open court for the jury to hear. The jury then sent another note requesting to have the tape played in the deliberation room to determine whether two male voices could be heard because the tape was inaudible when played in open court.

The trial court and counsel for both parties discussed the jury's request, and Wright objected to the tape being played in the deliberation room outside of his presence, citing RCr 9.74 in support. In response, the Commonwealth emphasized that the jury had already heard the audio recording in open court during trial and no information was submitted to the jury for consideration outside of Wright's presence which had not already been submitted to the jury in his presence. The Commonwealth noted that the audiotape had been admitted into evidence as an exhibit, and that a jury is permitted to take exhibits into the deliberation room. The Commonwealth candidly acknowledged that it was unsure what other information

was on the laptop, and that the jury might be able to access inadmissible evidence. Over Wright's objection, the trial court permitted the prosecutor's laptop to be taken into the deliberation room for the jury to play the tape again. During a brief recess, the laptop was set up in the deliberation room and the jury was then instructed to insert the disk and play the tape using Windows Media Player.

Allowing the jury to take the prosecutor's laptop into the deliberation room with unfettered access to the laptop's files, as well as possible internet connection, was an abuse of the trial court's discretion. This situation is not as straightforward as sending a paper exhibit or tape cassette into the deliberation room, perhaps with portable speakers or another type of listening device. Here, the Commonwealth's laptop, which likely contained a sea of inadmissible and irrelevant evidence, was given to the jury to access in the privacy of the deliberation room with not even an admonishment not to access any other files or the internet. Giving jurors unrestricted and unmonitored access to a party's laptop, outside of the defendant's presence, is highly improper and the likelihood of prejudice very high. *See McGuire v. Commonwealth*, 368 S.W.3d 100, 115 (Ky. 2012) (trial court's replaying of witness' trial testimony outside of defendant's presence was clearly erroneous, but did not amount to palpable error). Here, counsel for Wright objected and properly preserved this error for our review. Accordingly, we find the trial court abused its discretion by overruling the objection. On remand and in general, we stress that counsel should anticipate these situations arising during a

trial, particularly when a defendant's statement on an audio recording is critical to the outcome of the case, and plan accordingly.

While Wright's other claims of error do not require reversal, we will nevertheless address them since they may arise again on remand. Wright claims that the trial court erred by denying his motion for a directed verdict of acquittal, which he made after close of the Commonwealth's case-in-chief. We disagree.

Upon consideration of a motion for a directed verdict,

> the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe . . . that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted); *accord Banks v. Commonwealth*, 313 S.W.3d 567, 570 (Ky. 2010).

During the Commonwealth's case-in-chief, the informant testified that after asking Records to sell her drugs, Records and Wright left the living room and entered the kitchen together while she remained in the living room, and though she could not see into the kitchen because a curtain covered the kitchen doorway, she thought she heard Records and Wright talking to each other in the kitchen,

handling baggies, and opening a refrigerator or freezer door. She stated that Records and Wright then returned to the living room with the crack cocaine, and that when she asked why the crack cocaine felt cold, Records stated that he had put it down his pants earlier that day during the drive back from Cincinnati, where he had purchased the drugs, and Wright stated that *they* had put it in the freezer. The informant perceived Wright to be observing and monitoring the transaction. The informant then gave Records money to purchase the drugs.

After close of the Commonwealth's case-in-chief, Wright moved for a directed verdict of acquittal, arguing that the Commonwealth failed to prove that he aided Records in the commission of the crime with the intent of promoting or facilitating the drug deal. The trial court denied his motion for a directed verdict. Under Kentucky law, intent may be inferred from the defendant's actions and the surrounding circumstances. *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999). In the present case, viewing the evidence in a light most favorable to the Commonwealth, it would not be clearly unreasonable for a jury to infer from the circumstances that Wright aided Records with the intent to sell crack cocaine based on the informant's testimony that Wright provided information as to why the crack cocaine was a cold temperature and may have assisted Records in retrieving the crack cocaine while in the kitchen together. Accordingly, the trial court did not err by denying Wright's motion for a directed verdict.[3]

[3] Wright's focus on Records's testimony at trial to the effect that Wright had nothing to do with the drug transaction is misplaced; the record shows that Records's testimony was presented by the defense after the Commonwealth rested its case. Because Wright's motion for a directed verdict was made at the close of the Commonwealth's case-in-chief, and before Records

Next, Wright maintains that the trial court erred by not striking certain testimony from Officer Arnsperger, a witness for the Commonwealth. Wright maintains that Officer Arnsperger improperly interpreted the audiotape for the jury and that his testimony was especially prejudicial because an officer's testimony carries a special aura of reliability. This claim was not preserved and we do not believe it rose to the level of palpable error so as to require reversal;[4] however, we will nevertheless address the issue since it may arise again on retrial.

Wright argues that by interpreting the audiotape of the drug transaction, Officer Arnsperger's testimony invaded the province of the jury. The record shows that Officer Arnsperger testified before the audiotape was played for the jury. During his testimony, the Commonwealth asked him whether he was familiar with Records's and Wright's voices, to which he responded in the affirmative. The Commonwealth then asked him at what point during the audio recording did he hear Wright's voice, to which Officer Arnsperger responded that he clearly heard Wright explain to the informant that they had put the drugs in the

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testified, Records's testimony was not on record for the trial court to consider at the time of Wright's motion. As a result, Records's testimony is not relevant to our consideration of whether the trial court erred by denying Wright's motion for a directed verdict.

[4] Under RCr 10.26, an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." An error is "palpable," we have explained, only if it is clear or plain under current law and in general a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (internal citations omitted).

freezer. Wright objected on hearsay grounds. The trial court sustained the objection and held that Officer Arnsperger was not permitted to testify as to what Wright said. Later in his testimony, Officer Arnsperger implied that Wright oversaw the drug transaction by making certain comments, as heard on the tape. Wright did not object to this testimony.

The Kentucky Supreme Court has distinguished between narrative and interpretive testimony and has held that "[w]hile a witness may proffer narrative testimony within the permissible confines of the rules of evidence . . . he may not 'interpret' audio or video evidence, as such testimony invades the province of the jury, whose job is to make determinations of fact based on the evidence." *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265-66 (Ky. 2009) (citing *Gordon v. Commonwealth*, 916 S.W.2d 176, 180 (Ky. 1995) (finding error when witness was allowed to offer testimony interpreting a poor quality audiotape of an undercover drug buy that was substantially inaudible, rather than simply testifying as to his recollection)). KRE[5] 701 limits lay opinion testimony to matters "(a) [r]ationally based on the perception of the witness[,]" and "(b) [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue[.]" KRE 602 further limits lay opinion testimony to matters of which the witness has personal knowledge.

The propriety of Officer Arnsperger's testimony turns on whether he "testified from personal knowledge and rational observation of events perceived

[5] Kentucky Rules of Evidence.

and whether such information is helpful to the jury." *Cuzick*, 276 S.W.3d at 265. A review of the record shows that Officer Arnsperger was not present in Records's apartment during the drug transaction and did not provide narrative testimony from personal knowledge and recollection which may have aided the jury's understanding of the situation. Instead, Officer Arnsperger improperly interpreted the audiotape for the jury. On retrial, Officer Arnsperger should not provide interpretive testimony.

Next, Wright contends that the trial court erred by admitting certain testimony of Officer Arnsperger which Wright claims impermissibly bolstered the testimony of the informant. Again, Wright failed to preserve this claim of error but since it may arise on retrial, we will address the argument.

Wright challenges the portion of Officer Arnsperger's testimony in which he stated that informants need to be honest and credible and that is why undercover operations are usually audio and/or video recorded so that any charges which may result from the undercover buys are based on credible information. Officer Arnsperger further testified that he had worked with the informant in this case on a number of occasions and that on this particular occasion, he had searched the informant and her vehicle prior to the transaction, had equipped her with an audio recorder, and had kept visual contact with her during the controlled buy to ensure her credibility and the credibility of the transaction.

Under KRE 404(a), evidence of a witness' "character or a trait of character is not admissible for the purpose of proving action in conformity

therewith on a particular occasion[,]" except as provided in KRE 607, 608, and 609. Since KRE 607 and 609 are irrelevant to the case at hand, we turn to KRE 608(a), which provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence[.]

In other words, the credibility of a witness may be attacked or supported by opinion or reputation evidence of truthful character only if the evidence refers to character for truthfulness, and only after the character of the witness for truthfulness has been attacked. Simply put, "'a witness's credibility may not be bolstered until it has been attacked.'" *Harp v. Commonwealth*, 266 S.W.3d 813, 824 (Ky. 2008) (citation omitted). KRE 608(b) further provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence."

In the present case, Officer Arnsperger's testimony amounted to a declaration that the informant was credible and reliable. This testimony is inadmissible character evidence under KRE 404. Further, the testimony was not admissible under KRE 608 because the testimony was elicited during direct examination of the officer, not during cross-examination of the informant, and the credibility of the informant had not been attacked and was not subsequently attacked during trial. *See Bell v. Commonwealth*, 245 S.W. 3d 738, 745 (Ky.

2008) ("a witness may not vouch for the credibility of another witness[]") (*overruled on other grounds by Harp*, 266 S.W.3d 813). Kentucky law is clear that "the credibility of the witnesses must be determined by the jury." *Davis v. Commonwealth*, 271 Ky. 180, 192, 111 S.W.2d 640, 647 (1937). On retrial, Officer Arnsperger should not improperly bolster the testimony of the informant.

Next, Wright argues that the informant gave improper opinion testimony that drew legal conclusions. Namely, the informant testified that she purchased the drugs from Records and Wright, that Wright tried to induce her into purchasing the drugs when he said that they had placed the drugs in the freezer so as to resolve her concerns about the physical state of the drugs, and that Wright monitored the transaction. Again, this claim of error was not preserved but we will address it since it may arise on retrial.

As we stated previously, lay opinion testimony is limited to matters "(a) [r]ationally based on the perception of the witness[,]" and "(b) [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue[.]" KRE 701. *See also Cuzick*, 276 S.W.3d at 265. Further, the witness must have personal knowledge of the matter. KRE 602.

Here, the record shows that the informant properly testified as to her observations. The difference between the informant's testimony and Officer Arnsperger's interpretation of the audiotape, discussed above, is that the informant was present during the transaction and testified from her personal knowledge and observations. Additionally, we do not agree that the informant expressly stated

that Wright was guilty; rather, the record shows that the informant simply testified about her observations as to what occurred during the transaction. *Cf. Nugent v. Commonwealth*, 639 S.W.2d 761, 764 (Ky. 1982) (a witness' explicit opinion that defendant is guilty is inadmissible at trial). In this case, the informant was permitted to testify that in her opinion, Wright sold her drugs, that Wright's comment about the drugs being in the freezer was meant to ease her concerns, and that Wright monitored the transaction. Such testimony was rationally based upon her perceptions of the drug transaction of which she had personal knowledge, and was properly admitted.

Next, Wright asserts that the prosecutor engaged in prosecutorial misconduct during closing argument. At trial, Records took the stand and assumed full responsibility for the crime. During closing argument, the prosecutor commented on the falsity of Wright's defense theory. Specifically, the prosecutor stated as follows:

> Don't put the justice in the hands of the perpetrators folks. Because what these people do when a bunch of them get busted all at once, they figure out who's got the best case against them, who screwed up the most. Okay, I'll take the rap and come in and lie for you. And that's what you've seen today. Sean Records sat up there and lied to you about what happened to save his buddy Floyd. If we'd have had Floyd on the tape it'd be the other way around. That's the way they do. So are we gonna let them beat out the justice when they find out who gets caught and when it comes down and hits the fan? Or we gonna say let them sit down and say, well, okay, you're in the most heat here, I'll take the rap and get you out of it by coming in court and lying? Would Sean lie? Heck yes he'd lie, he'd sell cocaine. That's what happened

> here folks. You've got two dope dealers. We got one of them. We're asking you to convict the other one today for complicity for direct involvement in this sell. The evidence is there beyond a reasonable doubt. Even more so, it's obvious. If you had any human experience at all you know what's going on here. Anything else is what we lawyers would call a jury pardon, where the jury just ignores the evidence and lets somebody go, a cocaine dealer . . . . He needs to be convicted of this. What is the old saying, evil prospers when good men do nothing? Please do something.

Wright argues that the prosecutor told the jury alleged facts which were not introduced into evidence regarding what happens when multiple people are arrested, and improperly told the jury that Records lied to them. Wright claims that these statements implied that the prosecutor had knowledge that the jurors did not have. Wright further maintains that the prosecutor improperly told the jury that an acquittal would be a "jury pardon" and that "evil prospers when good men do nothing." In support he cites *Cantrell v. Commonwealth*, 288 S.W.3d 291, 299 (Ky. 2009), for the proposition that "[a]ny effort by the prosecutor in his closing argument to shame jurors or attempt to put community pressure on jurors' decisions is strictly prohibited."

We find the prosecutor's conduct was within the permissible bounds of advocacy. *See Tamme v. Commonwealth*, 973 S.W.2d 13, 39 (Ky. 1998) (in closing argument, "a prosecutor may draw all reasonable inferences from the evidence and propound his explanation of the evidence and why it supports a finding of guilt[]") (citation omitted). The prosecutor's statement that Records had a motive to lie was a proper comment on his credibility as a witness and on the

evidence presented. *See id.* at 38-39 (prosecutor's comment during closing argument that defendant had motive to lie did not contravene presumption of innocence when defendant testified on his own behalf, thereby subjecting himself to same rules as ordinary witnesses). Furthermore, we do not believe that the prosecutor's comments "shamed" the jurors or otherwise constituted "send-a-message" speech prohibited by Kentucky law. *See Cantrell*, 288 S.W.3d at 299 ("[p]rosecutors may not argue that a lighter sentence will 'send a message' to the community which will hold the jurors accountable or in a bad light[]"). Given the broad leeway afforded to counsel during closing argument, the prosecutor properly commented on the evidence before the court and inferences drawn thereon, and encouraged jurors to find Wright guilty based on the evidence. *See Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987) (during trial, "[g]reat leeway is allowed to *both* counsel in a closing argument. It is just that – *an argument*. A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position[]").

We hereby reverse and remand this case to the Pendleton Circuit Court for a new trial.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky