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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000694-MR

JEFFREY CONRAD — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HON. TIMOTHY KALTENBACH, JUDGE
ACTION NO. 15-CR-00257

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND STUMBO,[1] JUDGES.

ACREE, JUDGE: Jeffrey Conrad appeals from the McCracken Circuit Court's judgment and sentence of seven and one-half years' imprisonment, entered May 12, 2016, following Conrad's conviction at jury trial of second-degree manslaughter.[2] We affirm.

[1] Judge Janet Stumbo concurred in this opinion prior to retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed by administrative handling.

[2] Kentucky Revised Statutes (KRS) 507.040, a Class C felony.

At approximately 6:10 a.m. on June 8, 2015, Conrad traveled to AAA Storage in Reidland, Kentucky, with his friend, Missy McKendree. Conrad was in the process of moving, so the two traveled in separate vehicles to move some of Conrad's belongings into his storage unit. When Conrad arrived, however, he discovered an unknown pickup truck was already there, and he recognized some of his previously-stored items in the bed of the truck. Two men, later identified as Brandon York and Casey Cox, were burglarizing Conrad's storage unit.

Conrad, who at the time possessed a license to carry a concealed weapon, got out of his truck and confronted York and Cox. York was standing near the door of Conrad's storage unit, while Cox was in the driver's seat of his pickup truck. Conrad drew his handgun and ordered the two men to get on the ground. Cox exited the truck and acted as though he would comply. York opted to flee. He ran past McKendree, who had arrived on the scene and was standing approximately fifty feet behind Cox's pickup truck. In the meantime, Cox disregarded Conrad's repeated orders to halt and reentered the cab of his pickup truck. Cox started the vehicle, and had backed up about six inches, when Conrad fired through the passenger window, striking Cox in the head. The bullet passed through Cox's left temple and transected his brainstem. Cox died instantly. Cox's pickup truck continued to travel, coasting in reverse and coming to rest when it struck another storage unit.

McKendree telephoned 911, and Conrad informed the dispatcher that there had been two men stealing from his unit and one of them was now dead. He

told the dispatcher the decedent "was attempting to back up and he was kind of reaching down in the seat like, you know, wait a minute, wait a minute . . . I feared for my life." (VR No. 1: 3/16/2016; 4:19:20).

Law enforcement officers from the McCracken County Sheriff's Department arrived on the scene to investigate. Within Cox's truck, officers found a plastic bag containing a quantity of lorazepam, glass pipes which appeared to be used for smoking methamphetamine, and a set of lock picking tools. Paramedics arrived and transported Cox's body to the hospital. An autopsy later revealed Cox had methamphetamine, amphetamine, and lorazepam in his system. Conrad gave a description of York, who was apprehended by police several hours later. While at the scene, Conrad relayed his narrative to McCracken County Sheriff Hayden as follows:

> Conrad: When he come out of the truck, I said, stop, get out. He's like what. I said that's my unit. I said get on the ground, get on the ground. At this point, the guy, the driver, was by the bed of the truck, back—back where the wheel is. He flinched for a second like he was fixing to get down, but that—and that's when the other guy took off, and I sort of focused my attention on him, and—and then I see him start moving out of the corner of my eye. He gets in the truck. I said you better stop, you better stop. Missy's standing here about where Bruce is there, the owner, and I said stop, stop, stop, and then I fired.
>
> Sheriff: Was—he was in the truck?
>
> Conrad: He was in motion. He was in motion.

Sheriff: Moving forward or backward?

Conrad: Backwards.

Sheriff: And where were you standing?

Conrad: It was approximately—at the storage truck. I was about across from him the—on this side of his truck where the wheel was. He started to get in the truck. I said freeze, freeze, freeze, you know, stop, stop, stop. And I—I followed them as he got in, and I said you better stop, and then, you know, he kind of—he—for a second he reached down in the seat like he was—you know, I didn't know what he was doing or looking for, and then as he started to move, you know, then I fired.

(VR No. 4: 3/17/2016; 10:02:58-10:04:21). Conrad and McKendree then proceeded to the sheriff's department to make official statements. Conrad invoked his right to counsel, but asserted he was in fear for McKendree's safety when Cox's truck began backing in her direction. Detective Captain Matt Carter would later testify that he believed this assertion to be inconsistent with Conrad's earlier 911 call as well as the narrative provided at the scene to Sheriff Hayden. In each of his earlier statements, Conrad seemed to allege he felt *personally* threatened when Cox reached down in his truck. McKendree herself would later testify she did not feel afraid during the encounter with Cox. She further testified the truck only moved at about the speed of a slow walk before Conrad fired his weapon.

One day after this incident, a special session of the McCracken County grand jury indicted Conrad on one count of murder,[3] and he was placed under arrest. Following his arraignment, while confined to the detention center, Conrad gave an interview to a local television station, WPSD. In the interview, wearing an orange prisoner jumpsuit, Conrad stressed that Cox ignored his orders to stop and repeated his claim that he was acting to defend McKendree. He also took issue with being indicted for murder, but admitted he "kind of half expected maybe manslaughter or reckless homicide."

During Conrad's four-day trial, the Commonwealth presented substantial testimony, including that of investigating officers from the sheriff's department, emergency medical personnel, and the medical examiner. The Commonwealth also played various audio and video recordings for the jury, including Conrad's statements to Sheriff Hayden at the crime scene, the televised interview Conrad gave to WPSD, and a telephone conversation between Conrad and McKendree recorded at the detention center. The Commonwealth's theory of the case was that Conrad shot Cox for burglarizing his storage unit. Conrad testified in his own defense. He also presented testimony from Dr. Jonathan Lipman, a neuropharmacologist, on the effects of the drugs found in Cox's system. Ultimately, the jury found Conrad guilty of second-degree manslaughter and fixed his sentence at seven and one-half years' imprisonment. On May 12, 2016, the

[3] KRS 507.020. Murder is a capital offense.

trial court entered its final judgment and sentence in accord with the jury's recommendation. This appeal followed.

As a preliminary matter, we note Conrad filed his notice of appeal on May 11, 2016, based upon the trial court's May 6, 2016 *oral* judgment and sentence. The court's *written* judgment and sentence was entered on May 12, 2016, one day *after* entry of the notice of appeal. This is procedurally improper under Kentucky Rules of Civil Procedure (CR) 73.02(1)(a): "The notice of appeal shall be filed within 30 days *after* the date of notation of service of the judgment or order under Rule 77.04(2)." (Emphasis added). "Circuit courts speak only through written orders entered upon the official record." *Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky. App. 2012) (citation and internal quotation marks omitted). Pursuant to *Oakley*, the notice of appeal should have been taken from the written judgment; otherwise, Conrad should have amended the notice to include the written order. *Id*.

However, in *Wright v. Ecolab, Inc.*, 461 S.W.3d 753 (Ky. 2015), the Kentucky Supreme Court held the "relation forward" doctrine allows "a premature notice of appeal from [a] bench ruling to relate forward to judgment and serve as an effective notice of appeal from the final judgment." *Id*. at 759 (quoting *FirsTier Mortg.. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991)) (emphasis omitted). We apply *Wright* to cure the procedural defect here.

Conrad presents five main issues on appeal, the first four of which relate to evidentiary rulings. "[W]e review a trial court's evidentiary rulings for an

abuse of discretion." *Dunlap v. Commonwealth*, 435 S.W.3d 537, 553 (Ky. 2013). "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. at 554 (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

First, Conrad argues the trial court erroneously permitted the Commonwealth to introduce: (1) Conrad's video interview with WPSD while wearing an orange jumpsuit, and (2) a recording of Conrad's telephone call to McKendree from the detention center. Because both recordings demonstrate the fact of his incarceration, Conrad contends the introduction of the recordings to the jury violated his presumption of innocence and therefore his right to a fair trial. He quotes *Stacy v. Commonwealth*, 396 S.W.3d 787 (Ky. 2013) for the proposition that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Id*. at 800 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct 1340, 89 L.Ed.2d 525 (1986)).

Although it is unfortunate the jury was able to perceive signs of Conrad's incarceration before trial, the introduction of such evidence does not mandate reversal. "[I]t would be impossible as a practical matter to conduct a trial without the jury seeing some sign that the defendant [is] not entirely free to come and go as [he] please[s]." *Shegog v. Commonwealth*, 142 S.W.3d 101, 109 (Ky. 2004) (citations and internal quotation marks omitted). The Kentucky Supreme

Court has considered this issue on multiple occasions and found no reversible error. *See*, *e.g.*, *Hill v. Commonwealth*, 125 S.W.3d 221, 236 (Ky. 2004), *overruled on other grounds by Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009) (defendant ordered to wear leg shackles during trial due to security concerns); *Davis v. Commonwealth*, 899 S.W.2d 487, 490-91 (Ky. 1995), *overruled on other grounds by Merriweather v. Commonwealth*, 99 S.W.3d 448 (Ky. 2003) (defendant entered courtroom in handcuffs, escorted by the sheriff); *Estep v. Commonwealth*, 663 S.W.2d 213, 216 (Ky. 1983) (photograph of defendant at time of arrest in handcuffs).

Despite Conrad's contention that the detention center telephone call and the WPSD interview showed him in "continued custody" to the jury, the evidence presented only shows Conrad was, *at one point in time*, confined to the detention center. The recordings themselves do not indicate custody was continued to trial. In addition, Conrad did not appear before the jury in prison garb, shackled, or handcuffed—practices which are certainly more prejudicial to an individual's presumption of innocence than the recordings at issue here. We discern no abuse of discretion.

Conrad also asserts the telephone conversation between himself and McKendree was without sufficient probative value to outweigh its unduly prejudicial effect, and thus should have been excluded under Kentucky Rule of Evidence (KRE) 403. The prosecution offered the recording into evidence, over Conrad's objection, to bolster its theory that Conrad's motive for shooting Casey

Cox was that Cox was burglarizing Conrad's storage unit. The recording captured Conrad saying: "Hey, I mean f*** the dumb s***s, you know the son of a b**** was, you know, high, and I mean committing burglary, and then he gets in a f***ing vehicle, I mean, for f***'s sake, put a little common sense back." (VR No. 2: 3/18/2016; 11:50:31-11:51:56). Conrad objected to the testimony as prejudicial and without probative value. He objected before the trial court that the recording did not start at the point the Commonwealth said it would, where Conrad prefaced the above by stating, "I understand wanting to hold someone accountable because a life was taken, but . . . ." The court offered to let Conrad play any part of the recording he wished for the jury, but Conrad declined to do so.

Conrad now argues the recording's profane tirade against the decedent amounted to undue prejudice, without adding any probative value. We disagree. We believe the substance of the statements Conrad made were probative of the Commonwealth's theory as to motive; furthermore, despite the vulgarity, the recording was not so derogatory as to inflame the prejudices of an ordinary juror. Accordingly, we find the trial court did not abuse its discretion by admitting the recordings.

Next, Conrad argues the court erred by permitting the Commonwealth to introduce a single autopsy photograph showing half of Cox's skull removed and without the brain, with a dowel rod showing the trajectory of the fatal bullet. Conrad asserts this photograph was unnecessary, because the jury had already heard the medical examiner's testimony during which she used a skull model to

demonstrate the bullet's trajectory. He relies heavily upon *Hall v. Commonwealth*, 468 S.W.3d 814 (Ky. 2015), for the contention that gruesome photographic evidence should be disallowed when it is cumulative or unnecessary.

"Because the Commonwealth must prove the *corpus delicti*, photographs that are probative of the nature of the injuries inflicted are not excluded unless they are so inflammatory that their probative value is substantially outweighed by their prejudicial effect." *Adkins v. Commonwealth*, 96 S.W.3d 779, 794 (Ky. 2003) (citing KRE 403). "[A] photograph . . . 'does not become inadmissible simply because it is gruesome and the crime is heinous.'" *Id*. (quoting *Funk v. Commonwealth*, 842 S.W.2d 476, 479 (Ky. 1992)). Furthermore, in *Baumia v. Commonwealth*, 402 S.W.3d 530 (Ky. 2013), the Kentucky Supreme Court held video of a gruesome crime scene was not needlessly cumulative, despite testimony regarding the occurrence by other witnesses. *Id*. at 542-43.

Hall v. Commonwealth is relevant, but distinguishable. The trial court in *Hall* had admitted all twenty-eight autopsy and crime scene photographs proffered by the Commonwealth, some of which had low probative value. *Hall*, 468 S.W.3d at 825. In *Hall*, the Supreme Court emphasized how increasing the number of admitted graphic photographs correspondingly decreases each photograph's probative value, which increases the danger of undue prejudice. *Id*. at 826. Here, the court admitted a single autopsy photograph showing the trajectory of the bullet, which supported the small skull model exhibit used by the medical examiner. The *Hall* court's warning about the dangers of prejudice from

cumulative gruesome photographs does not apply here. Thus, the trial court did not abuse its discretion in admitting the photograph.

Conrad next contends he was denied the right to present a defense when the trial court limited testimony by his expert witness. Dr. Jonathan Lipman, a neuropharmacologist, testified on behalf of the defense regarding the effects of methamphetamine and lorazepam upon users. The court allowed this testimony because it was relevant; methamphetamine and lorazepam were found within Cox's system during his autopsy. However, the court did not permit Dr. Lipman to testify regarding how methamphetamine users have a propensity to be both victims and perpetrators of homicide, and how Cox's act of backing up the truck could be construed as a "violent gesture" even though no violent act was performed. The court excluded the testimony as irrelevant.

> In addition to requiring that an expert's testimony be reliable, KRE 702 also requires that it "assist the trier of fact to understand the evidence or to determine a fact in issue." The testimony, that is, must be relevant, it must relate to a material issue in the case and it must "fit" the case in the sense that there must be "a valid scientific connection" between the expert's specialized knowledge and the pertinent inquiry confronting the trier of fact.

Futrell v. Commonwealth, 471 S.W.3d 258, 285 (Ky. 2015) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-92, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

We agree with the trial court that the excluded testimony lacked relevance. Dr. Lipman's offered propensity testimony, regarding how violence

follows a methamphetamine user and how users tend to be perpetrators and victims of homicide, was not material to the case. The fact that Cox was a methamphetamine user and a victim of homicide was never in question, and thus, expert testimony on that point would not have assisted the jury. The court also determined that Dr. Lipman's offered "violent gesture" testimony was not relevant because there was no evidence of violent behavior by the victim. Despite Conrad's argument that Cox backing up the truck was a violent act, the evidence does not support such an assertion. Testimony and evidence in the case indicated the following: (1) Cox's truck backed up about six inches before Conrad fired the fatal shot; (2) the speed of the truck was a "slow walk" at the time of the shot; (3) McKendree was approximately fifty feet behind the truck; and (4) McKendree did not feel afraid during the encounter. Because there is nothing to signify Cox acted violently at the time he was killed, the trial court did not err in excluding this testimony.

Conrad's fourth argument is that the trial court erroneously permitted four separate incidents of improper testimony by Detective Captain Carter and Sheriff Hayden. We briefly elaborate on each below.

First, Captain Carter testified regarding the type of ammunition used in the shooting, stating that hollow point bullets are "more lethal." Conrad objected on relevance grounds at trial, but abandons this argument on appeal, instead attacking the testimony as improper opinion evidence.

Second, Captain Carter testified regarding what he perceived to be inconsistent statements by Conrad regarding his motive to shoot Cox. Captain Carter believed Conrad's 911 call and his statement on the scene emphasized self-defense, whereas his statement at the sheriff's office was oriented toward protection of McKendree. Conrad did not object to this testimony at trial.

Third, Sheriff Hayden was asked if Conrad said anything about being in fear for McKendree's life. Sheriff Hayden did not explicitly answer the question, but focused instead upon his impressions of Conrad's statement: Conrad stressed his command for Cox to stop, but Cox did not stop, and so he shot him. Sheriff Hayden testified how he found this "a little alarming." Conrad did not object to this testimony at trial.

Fourth, Sheriff Hayden was asked for his interpretation of Conrad's statement regarding McKendree's location: "Was he referencing where Ms. McKendree was because he was explaining to you that he was in fear for her life, or was he referencing that just as a reference to where the people on the scene were?" (VR No. 4: 3/17/2016; 2:12:54). Conrad objected to the question as speculation. The objection was sustained, and the court instructed the sheriff to testify only as to what was said. Sheriff Hayden then resumed his testimony, the substance of which was to reiterate Conrad's emphasis as to how Cox did not follow his orders to stop. Conrad made no further objections to this line of enquiry.

Conrad now contends the above errors constitute improper opinion evidence. These allegations of error were not properly preserved for appellate review. Conrad therefore requests palpable error review under Kentucky Rule of Criminal Procedure (RCr) 10.26:

> Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule's requirement of manifest injustice requires showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014) (citations and internal quotation marks omitted). Conrad believes the testimony amounted to a denial of due process because Captain Carter was not qualified as a firearms expert and the two officers gave testimony suggesting they did not believe Conrad's account of the shooting.

After careful consideration, we find the foregoing portions of testimony do not constitute palpable error. "For an error to be palpable, it must . . . involve prejudice more egregious than that occurring in reversible error[.]" *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citation and internal quotation marks omitted). In addition, "[a]n error is palpable only if it is shocking or jurisprudentially intolerable." *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (citation and internal quotation marks omitted). The testimony in

question does not rise to the level of egregious or shocking. Even without being qualified as a firearms expert, Captain Carter is sufficiently educated about the characteristics of a hollow point bullet from his training as an experienced member of law enforcement.

The essence of Conrad's argument regarding the officers' testimony about his inconsistent statement is that the officers characterize him as dishonest. However, none of the above-mentioned testimony explicitly states the officers thought Conrad was lying; they merely pointed out how his statements appeared, at least to the investigators, to be inconsistent with one another. Witnesses should not be permitted to refer to other witnesses as lying, but illuminating inconsistencies is acceptable. *See Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). Further, our case law indicates a *Moss* violation has never risen to the level of palpable error. *Parker v. Commonwealth*, 482 S.W.3d 394, 406 (Ky. 2016) (citing *Luna v. Commonwealth*, 460 S.W.3d 851 (Ky. 2015)). Accordingly, we find no palpable error on this issue.

For his fifth and final argument, Conrad asserts the court abused its discretion by denying his statutory claim of immunity from prosecution for the justifiable use of self-defense or defense of others. "KRS 503.085(2) . . . provides that immunity must be granted pre-arrest by the law enforcement agency investigating the crime unless there is 'probable cause that the force used was unlawful.'" *Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky. 2009). "The burden is on the Commonwealth to establish probable cause and it may do so by

directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record." *Id*. at 755. A court must only find "a substantial basis for denying . . . [the] motion to dismiss. Probable cause has . . . been defined as reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion." *Commonwealth v. Lemons*, 437 S.W.3d 708, 715 (Ky. 2014) (citations and internal quotation marks omitted).

In Conrad's pretrial immunity hearing, the trial court considered exhibits presented by the Commonwealth and the defense and ultimately denied the motion. In so doing, the court found as follows:

> (i) there is no evidence that Cox attempted to run over Conrad with his pick-up truck; (ii) only Conrad's assertion that Cox tried to run over McKendree with his pick-up truck; and (iii) probable cause to believe that Conrad killed Cox because Cox tried to drive away from Conrad's storage unit after stealing his property. Because Kentucky law does not permit an individual to use deadly force to recover stolen property or to apprehend the alleged thief, Conrad's motion to dismiss the indictment will be denied.

(R. 127). In this case, the trial court heard significant evidence and found a reasonable belief that Conrad shot Cox for reasons other than those covered by KRS 503.085. Furthermore,

> [w]hen the defendant has been tried and convicted by a properly instructed jury in a trial with no reversible error, this Court has held that questions raising the propriety of the trial court's immunity determination become purely academic. Under such circumstances, the defendant's self-defense claim has been thoroughly examined by both

> the trial judge under the directed-verdict standard and the jury under the court's instructions and his entitlement to self-defense has been rejected. In such cases, when a jury has already convicted the defendant—and, thus, found that his use of physical force in fact was unlawful beyond a reasonable doubt—and that conviction has not been shown to be flawed, the appellate court will not revisit whether there was probable cause to believe that a defendant's use of force was unlawful to allow prosecution under KRS 503.085.

Ragland v. Commonwealth, 476 S.W.3d 236, 246 (Ky. 2015) (citations, internal quotation marks, and footnote omitted). Accordingly, because Conrad's jury convicted him at trial, we will not revisit the probable cause determination for immunity from prosecution.

For the foregoing reasons, we affirm the judgment and sentence of the McCracken Circuit Court.

ALL CONCUR.

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