

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001629-MR

PHILIP RODNEY MOORMAN, III

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 07-CR-00189

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, THOMPSON, AND WINE, JUDGES.

THOMPSON, JUDGE: Philip Rodney Moorman, III, appeals from a judgment of conviction of the Henderson Circuit Court for first-degree trafficking of a controlled substance. For the reasons stated herein, we affirm.

On May 4, 2006, Kentucky State Police (KSP) Detectives Billy Braden and Matt Conley met with Dale Rose, a confidential informant (CI), to

arrange for the controlled purchase of crack cocaine from an apartment in Henderson, Kentucky. Rose was provided purchase money and outfitted with a video/audio surveillance device and transported to the apartment.

After arriving, Rose went to the apartment but encountered an unfamiliar man inside. Because his expected dealer was not present, Rose returned to Detective Braden's car where the decision was made for him to attempt to purchase drugs from the unknown man. Rose returned to the apartment and was able to purchase drugs from the unknown man who he observed for three to four minutes during the transaction. After the transaction, Detective Braden and Rose returned to the KSP post.

While still at the apartment, Detective Conley observed a man exit the apartment building where the drugs were sold and walk directly past him. Because he had not observed the transaction, he did not know the identity of the man or even if he was relevant to his drug investigation. Later, Detective Conley received information from Detective Jamie Duvall that the drug dealer was Philip Moorman. Accessing photographs from an Owensboro Police Department database, Detective Conley identified Moorman as the man he observed walk past him and from the surveillance video.

As a result of the investigation, Moorman was indicted by a Henderson County grand jury for first-degree trafficking of a controlled substance. At trial, in addition to describing the drug deal, Rose testified that he was a convicted felon and had previously assisted law enforcement in the undercover

purchasing of drugs. He testified that he normally received cash as a CI for assisting police but that he could not recall if he received money in Moorman's case. He further testified that he had assisted police so that he would receive leniency for his own crimes on one occasion but not in Moorman's case. Also, he testified that he faced criminal charges at the time of the drug purchase.

Detective Braden testified that Rose had been working for him since 2006. The detective testified that he believed that Rose was "working off" charges when he assisted in Moorman's case (i.e., expecting relief from his own criminal charges). However, the detective testified that he did not know if Rose received money for assisting because Detective Conley was in charge of the case.

Detective Conley testified that Rose was "working off" charges but did not know what charges because he was not involved in that aspect of the case. He further testified that he did not pay Rose for his participation in Moorman's case.

At the end of the trial, Moorman was found guilty of the charged offense and was sentenced to six-years' imprisonment. This appeal followed.

Moorman contends that his constitutional right to present a defense was denied because he was prevented from cross-examining Rose, the confidential informant, regarding the status of his pending charges. He contends that this preclusion prevented him from potentially impeaching Rose's credibility. Thus, he argues that his conviction should be reversed because he was denied a fair trial.

Every criminal defendant has a constitutional right to present a complete and meaningful defense against the prosecution's charges. *Beaty v.*

Commonwealth, 125 S.W.3d 196, 206 (Ky. 2003). Central to this concept, the Sixth Amendment's Confrontation Clause permits defendants to engage in cross-examination designed to reveal a witness's bias or to undermine his credibility.

Holt v. Commonwealth, 250 S.W.3d 647, 653 (Ky. 2008). However, "[w]hile it is true that the Confrontation Clause guarantees an opportunity to engage in cross-examination, it does not guarantee cross-examination in whatever manner and extent that the defense so desires." *Id.*

Rather, trial courts have discretion to set evidentiary boundaries as long as a reasonably complete picture of the witness's veracity, bias, and motivation is permitted to be established. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). Essentially, cross-examination as well as other methods to present evidence rests in the sound discretion of the trial court. *Id.* Thus, our review of a trial court's ruling regarding cross-examination is limited to abuse of discretion. *Davenport v. Commonwealth*, 177 S.W.3d 763, 772 (Ky. 2005).

In this case, Moorman was permitted to ask Rose if he had pending charges. Rose replied that he had a pending charge in Webster County. But, the trial court sustained the Commonwealth's objection to questions regarding the nature of the charge. The trial court further precluded Moorman's question to Rose if he was on any type of conditional discharge, probation, or parole. Moorman contends that the trial court's ruling prevented him from exposing the star witness's motive to lie and to avoid criminal prosecution in his own case.

After reviewing the record, we cannot conclude that the trial court abused its discretion by excluding those questions to Rose. From an examination of the record, the jury had facts before it that Rose faced a pending charge in another county; that the participating officers testified that they did not pay him cash for his involvement in Moorman's case; that Rose was a professional informant; that Rose had purchased drugs as a CI for leniency in the past; and that not one officer seemed to be keeping track of the total arrangement of the parties.

Based on these facts, the trial court permitted the jury to observe a reasonably complete picture of Rose's veracity, bias, and motivation for his involvement in Moorman's case. The trial record has sufficient facts for the jury to believe that Rose's testimony was unreliable but it chose to believe differently. Accordingly, because we believe that the trial court did not undermine Moorman's fundamental right to present a defense, we conclude that there was no error.

Moorman also contends that the trial court erred by permitting the jury to hear inadmissible and prejudicial evidence regarding his prior bad acts. He argues that Detective Conley's testimony that he found Moorman's picture on an Owensboro police database led the jury to believe that he had been arrested prior to the drug transaction. He contends that this evidence was highly prejudicial and requires reversal. Moorman did not preserve this issue for appellate review but seeks review for palpable error.

Under RCr¹ 10.26, we may review a case for palpable error which affects the substantial rights of a party even when the alleged errors were not preserved by a proper objection at trial. *Bell v. Commonwealth*, 245 S.W.3d 738, 741 (Ky. 2008). An error is palpable when it is so easily perceptible and obvious that it must be corrected to prevent “manifest injustice.” *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). Palpable error review ultimately seeks to determine if there is a substantial possibility that the defendant’s case would have resulted differently absent the error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). If not, the error cannot be considered palpable. *Id.*

Generally, a defendant's prior bad acts are inadmissible because fundamental fairness requires that the accused be tried only for the particular crime for which he is charged. *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). Essentially, “[f]undamental fairness requires that a jury's verdict be predicated on the particular crime charged in the indictment and not prior bad conduct dovetailed to the charged offense with the effect of emphasizing a general criminal disposition.” *Dillman v. Commonwealth*, 257 S.W.3d 126, 129 (Ky.App. 2008).

Moorman contends that Detective Conley’s testimony constituted inadmissible testimony of prior bad acts. However, the fact that his picture was in a police database does not mandate a belief that he has participated in prior crimes, but it could leave jurors to speculate why the police have his photo. Thus, while we cannot say that evidence of the source of the photo was not prejudicial, this

¹ Kentucky Rules of Criminal Procedure (RCr).

isolated statement does not rise to palpable error requiring reversal. Because of the other admissible evidence, we conclude that there is not a substantial possibility that this case would have resulted differently absent the admission.

Moorman next contends that the prosecution failed to comply with multiple discovery orders to notify the defense about any deals the Commonwealth may have had with Rose and how Moorman was identified to Detective Duvall. He further argues that the prosecution failed to produce Rose's criminal record. Because of the evidentiary shortcomings, Moorman contends that the prosecution committed a *Brady*² violation requiring the reversal of his conviction.

Under *Brady*, the prosecution's intentional or unintentional non-disclosure of evidence favorable to a defendant violates his procedural due process rights where the evidence is material to his guilt or punishment. *U.S. v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Furthermore, evidence is only material when there is a reasonable probability that, had the evidence been given to the defense, the outcome of the case would have been different. *Shepherd v. Commonwealth*, 251 S.W.3d 309, 323 (Ky. 2008).

A reasonable probability is a probability sufficient enough to undermine confidence in the outcome. *Id.* Thus, a *Brady* violation only justifies a reversal when a reasonable probability exists. *Id.* Our review of a *Brady* violation claim is *de novo*. *Commonwealth v. Bussell*, 226 S.W.3d 96, 100 (Ky. 2007).

² *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

From the record, there was no clear deal between the Commonwealth and Rose for his help in the undercover drug transaction. It appears that Rose routinely worked for law enforcement and normally received either money or help with his criminal charges as compensation for his assistance. This information was provided during the trial and the jury was able to see that Rose was not assisting the police for altruistic reasons but rather he expected something in return.

Next, during trial, Detective Duvall identified the individual that informed him that Moorman was selling drugs from the suspect apartment. The record is devoid of facts or allegations that made this delay prejudicial to Moorman's case. Lastly, the non-disclosure of Rose's criminal record was not a *Brady* violation because *Brady* does not require a party to disclose information available in a public record such as convictions. *Sanborn v. Commonwealth*, 892 S.W.2d 542, 556 (Ky. 1994). Thus, we conclude that no *Brady* violation occurred.

Moorman next contends that he was denied a fundamentally fair trial when Detective Conley testified that he observed Moorman open the apartment door and grant Rose entry into the apartment. Moorman contends that Detective Conley's testimony constitutes either reversible or palpable error.

During the trial, Detective Conley's testimony regarding observing Moorman was inadmissible because he only observed this event on the surveillance video which was not admitted into evidence. Thus, he was not permitted to testify to seeing Moorman open the door because he did not personally observe the event. Kentucky Rule of Evidence (KRE) 602. After

sustaining Moorman's objection to the testimony, the trial court admonished the jury to disregard evidence not based on a witness's personal observation and instructed Detective Conley to limit his testimony to his personal observations.

After the jury began its deliberations, it requested to hear some of Detective Conley's testimony again. The trial court decided it would replay all of Detective Conley's testimony. Defense counsel then informed the trial court that replaying Detective Conley's improper statement was of concern. However, no objection was made and no ruling was issued. The trial court then replayed the testimony which included the improper statement and the trial court's admonitions.

Our appellate courts presume that juries will follow the admonition of a trial court and that the admonition will cure an evidentiary error. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). Here, the trial court admonished the jury and defense counsel was satisfied with the trial court's curative action. Consequently, we have nothing to review. *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999). Although the trial court should have redacted Detective Conley's inadmissible statement instead of playing his testimony in its entirety, the admission of the testimony was not palpable error. The detective's statement was cumulative to other admissible evidence and, thus, was harmless. *Commonwealth v. McBride*, 281 S.W.3d 799, 807 (Ky. 2009).

Moorman next contends that Detective Conley and Dale Rose's in-court identification of him was impermissibly tainted and that the identifications should have been suppressed as suggestive and unreliable. Specifically, Moorman

contends that Detective Conley identified him by searching an Owensboro Police database for his name and obtained a photo of him. Moorman contends that this single picture photo lineup caused a substantial likelihood of misidentification. Moorman further contends that Rose's identification of him by observing the surveillance video created a substantial likelihood of misidentification. Moorman did not preserve this issue for appellate review but seeks review for palpable error.

When a defendant challenges an identification procedure, the preeminent issue is whether there was a very substantial likelihood of irreparable misidentification. *Parker v. Commonwealth*, 291 S.W.3d 647, 662-63 (Ky. 2009). To determine if a very substantial likelihood of an irreparable misidentification has occurred, our courts utilize a two-step process. *Id.* at 663. We first determine if the circumstances leading to the identification were “unduly suggestive.” *Id.*, quoting *Dillingham v. Commonwealth*, 995 S.W.2d 377, 383 (Ky. 1999).

“Only if the circumstances were unduly suggestive do we move on to the next step where we determine if the identification was, nevertheless, reliable.” *Id.* That is, whether the witness likely would have been able to identify the defendant even if a proper photographic identification procedure had been utilized. *Moore v. Commonwealth*, 569 S.W.2d 150, 153 (Ky. 1978). In step two, we analyze the following five factors:

- (1) the opportunity of the witness to view the criminal at the time of the crime,
- (2) the witness' degree of attention,
- (3) the accuracy of the witness' prior description of the criminal,
- (4) the level of certainty demonstrated by the

witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Id. We review a trial court's ruling regarding the admissibility of a witness's identification under the abuse of discretion standard. *Id.*

Here the evidence indicates that Detective Conley and Rose had a sufficient opportunity to observe Moorman either during or after the drug transaction. Detective Conley observed Moorman leave the apartment building where the drug transaction occurred and walk directly past him during daylight hours. Rose observed Moorman on his two visits to the apartment and observed Moorman for three to four minutes when he made the purchase. Considering that Detective Conley and Rose were conducting an undercover drug operation, the two observed Moorman with great attention and focus. Further, there is no evidence that the two witnesses were uncertain. Therefore, under the totality of the circumstances, we conclude that the witnesses' identification did not constitute palpable error. *Edmonds v. Commonwealth*, 906 S.W.2d 343 (Ky. 1995).

For the foregoing reasons, the Henderson Circuit Court's judgment of conviction is affirmed.

ALL CONCUR.

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