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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000702-MR

RICHIE ELZANDER MAYES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 12-CR-01376

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Richie Mayes appeals the judgment and sentence of the Fayette Circuit Court. Mayes was found guilty of receiving stolen property under \$500 and sentenced to 12 months incarceration. He argues that the trial court erred by permitting the prosecutor to ask Mayes to comment on the truthfulness of police officers testifying against him. After reviewing the record, we reverse.

On November 7, 2012, a Fayette county grand jury indicted Mayes for receiving stolen property and for being a persistent felony offender. A BMW vehicle valued at approximately \$7,000 was stolen from a hauler, a semi-truck that holds multiple cars, in Bowling Green, Kentucky. According to the testimony at trial, the car was unlocked and its keys were either in the ignition or in its center console at the time of the theft, as was the hauler company's standard practice. Police officers used GPS to determine the vehicle's location, and the vehicle was tracked to an apartment complex in Lexington. Mayes was discovered sitting in a chair near the vehicle and was arrested shortly thereafter.

At trial, various officers involved in the arrest testified regarding the arrest. Officer Jason Newman, the first officer to arrive on the scene and discover the vehicle, testified that Mayes was sitting alone in a chair with a set of keys in his lap, one of which was the key to the nearby BMW. Officer Newman claimed that as he approached Mayes, he attempted to put the keys in his pocket. Officer Newman was unable to remember how he obtained the keys from Mayes, but he believed that Mayes handed them over voluntarily. Officer Newman did not interview any of the people who gathered outside to discover if they observed whether Mayes had ever entered the car, believing that the people in the apartment complex would be uncooperative. Officer Newman also testified that he did not take pictures of the keys or the scene, as these actions were not his standard practice. Officer Newman stated that he was certain the keys were not on the ground.

Officer Ben Walker, who arrested Mayes, testified that Mayes admitted wanting to steal the BMW but deciding against that course of action. Officer Walker stated that Mayes obtained the keys from the BMW because he did not want anyone else to get in trouble for stealing it. Officer Walker also testified that at some point after his arrest, Mayes requested that the set of keys, excluding the stolen BMW key, be returned to him, and Officer Walker believed this to be an admission that the keys belonged to Mayes. Officer Walker testified that Mayes later claimed the keys were not his; however, the keys were eventually returned to Mayes.

At the trial, Mayes also testified on his own behalf. He stated he had visited the apartment complex to borrow money from his cousin's boyfriend. He had a conversation with his cousin in her apartment, which eventually moved outside in front of the BMW. Mayes testified he was sitting in a chair and noticed the keys on the ground near him. Mayes claimed he was there with his cousin and another friend, and they were present with him the entire time.

Mayes testified that when he tried to walk away from the officers during the encounter, one of them told him that he forgot his keys, referring to the keys on the ground. He informed the officers the keys were not his, at which point the officer picked up the keys and verified that they belonged to the BMW. Mayes requested that the officers fingerprint the car, testifying that he knew this would exonerate him. Three fingerprints were obtained from the vehicle, but were not viable for comparison.

On cross-examination, the prosecutor asked Mayes if the officers who testified were lying. Mayes's trial counsel objected, and the trial judge allowed the prosecutor to rephrase the question. The prosecutor asked Mayes, "So you're saying the other officers that were here today aren't truthful, is that what you're saying?" Mayes answered that the officers were not being honest.

The jury acquitted Mayes of receiving stolen property under \$10,000 for the BMW, but convicted Mayes of receiving stolen property under \$500 for the BMW key. The trial court sentenced Mayes to 12 months incarceration. This appeal followed.

Mayes alleges, and the Commonwealth concedes in its brief, that the trial court erred by allowing the Commonwealth's line of cross-examination over the objection of defense counsel. The prosecutor asked Mayes to characterize the officers' testimony as lies. The Kentucky Supreme Court has deemed such lines of questioning as "improper," stating that "[a] witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying." *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). We agree with both the Commonwealth and Mayes that the line of questioning allowed by the trial court violated the rule as stated in *Moss*.

The Commonwealth argues, however, that the error did not affect the outcome of Mayes's trial and should be deemed harmless. The harmless error rule states that "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties."

RCr¹ 9.24. The test for harmless error is “whether on the whole case there is a substantial possibility that the result would have been any different.”

Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

The Commonwealth characterizes Mayes’s defense as self-serving and not credible without supporting evidence. However, beyond the testimony and photos of the BMW and the trailer, neither party had supporting evidence. Just as no supporting evidence of Mayes’s claim that he did not steal the vehicle was presented, no evidence was offered supporting the Commonwealth’s case other than the officers’ testimony. The jury was only presented with testimony portraying two differing sides of a story, and in such instances, the issue of witness credibility becomes a crucial factor.

The purpose of the rule outlined in *Moss* is to prevent a defendant taking the stand from being in the position of making a “characterization [that] places the [defendant] in such an unflattering light as to potentially undermine his entire testimony.” *Moss*, 949 S.W.2d at 583. In this instance, no evidence was presented beyond Mayes’s testimony and the testimony of the police officers. Witness credibility was crucial, and the error affected Mayes’s substantial rights.

Furthermore, the Commonwealth’s claim that Mayes’s defense was not credible without supporting evidence is undermined by the fact that the jury was willing to acquit Mayes of receiving stolen property under \$10,000 for the BMW but convict him of receiving stolen property under \$500 for the key. The only

¹ Kentucky Rules of Criminal Procedure.

evidence heard by the jury was testimony from Mayes and the officers, which was, in the jury's eyes, enough to acquit Mayes of a felony charge. Had Mayes not been forced to undermine his testimony with the improper line of questioning, a substantial possibility exists that the result might have been different. Witness credibility was a determining factor in this case, and by requiring Mayes to characterize the officers' testimony as untruthful, the trial court committed error that affected Mayes's substantial rights.

Based on the foregoing, the judgment of the Fayette Circuit Court is reversed and remanded for a new trial.

ALL CONCUR.

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