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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001235-MR

CORINTHIAN ALLEN GAY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 13-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Corinthian Allen Gay appeals the Fayette Circuit Court judgment and sentence entered on July 17, 2014, wherein he was convicted of being a felon in possession of a handgun and received a five-year sentence. After careful review, we affirm.

BACKGROUND

On the evening of November 19, 2012, Lexington police initiated a traffic stop of a vehicle on suspicion that the owner of the vehicle was driving on a suspended driver's license. Lindsay Wethington was the owner and the driver of the vehicle. Gay was sitting in the front passenger seat, and Joshua Davis was sitting in the rear seat. Shawn Stafford, the police officer, asked the occupants of the vehicle to step outside for further investigation, and Wethington gave the officer consent to search the vehicle.

Officer Jervis Middleton arrived on the scene to assist in the traffic stop. Middleton asked Wethington, Gay, and Davis whether there was anything in the vehicle that the police should know about prior to searching it. Gay pulled him to the side and told him that there was a gun in a bag under the front passenger seat. Middleton located the gun on the floorboard underneath the front passenger seat. Gay was arrested and charged with being a convicted felon in possession of a handgun.

During the trial Stafford, Middleton, and Gay testified. Middleton said that Gay told him about the gun and where it was located. Middleton then discovered it. Further, Middleton said that Gay had told him that he personally had a gun on the night of the arrest. Nonetheless, Middleton did not record Gay's statement on the night of the arrest. After the gun was confiscated, the police examined the weapon for fingerprints but did not discover any conclusive evidence. The gun itself was traced to a woman named Beverly Young, who had

purchased it in Dayton, Ohio, in 1990. Stafford stated that the gun was loaded with a magazine, which was separately taken into evidence for safety reasons.

Gay said that the gun belonged to Davis, the passenger in the rear seat of the car. Further, he maintained that he heard Davis remove the clip from the gun while they were driving. This statement contradicts that the gun had a magazine when it was found. At the time of the traffic stop, Gay had an outstanding warrant for contempt for failure to appear in court. Additionally, he claimed that at the time of the traffic stop, he knew the officers would discover the gun. Furthermore, he did not want his girlfriend, Wethington, to get in trouble. Gay stated that these were the reasons that he told the officer about the gun in the vehicle. He also maintained that he did not touch the gun or know how it got into the vehicle.

At the conclusion of the jury trial, Gay was found guilty of being a felon in possession of a handgun and received a five-year sentence. He now appeals the judgment. Gay maintains on appeal that he was denied a fair trial because the prosecutor, during cross-examination, asked him to characterize Middleton as a liar. The Commonwealth counters that the Commonwealth's cross-examination leading Gay to characterize the officer as a liar was not an error, much less a palpable one. Instead, the Commonwealth maintains that the prosecutor highlighted a discrepancy in Gay's statements rather than making him comment on the testimony of another witness.

STANDARD OF REVIEW

Both Gay and the Commonwealth note that the specific issue on appeal was not preserved. Having conceded that the alleged error was not preserved, Gay requests palpable error review. Indeed, unpreserved claims of error on direct appeal are only reviewed for palpable error. To prevail, one must show that the error resulted in “manifest injustice.” Under Kentucky Rules of Criminal Procedure (RCr) 10.26, a defendant must show either the probability of a different result or an error so fundamental as to threaten a defendant’s entitlement to due process of law. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), as modified (May 23, 2006). With this standard in mind, we turn to the case at hand.

ANALYSIS

Gay analogizes the situation herein to the one found in *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), wherein a prosecutor’s cross-examination of a defendant resulted in the defendant stating that the police officer was lying. But here, as in *Moss*, the defendant failed to preserve the error, and thus the review is for palpable error.

A review of the record indicates that Gay testified that he told Middleton that there was a gun under the seat; whereas, Middleton proclaimed that Gay said he had a gun under the seat. The discrepancy between the parties’ testimony was highlighted during Gay’s cross-examination and commented about during the Commonwealth’s closing argument. During the cross-examination, the question to Gay about Middleton’s testimony was “So, he’s lying?” and Gay’s answer is “Yes.”

The situation in *Moss* is very similar to the one herein. The Kentucky Supreme Court, in deciding *Moss*, cautioned against asking a witness to remark on another witness's testimony. *Id.* at 583. But even though the Court observed that such a line of questioning is improper, it held that "Appellant's failure to object and our failure to regard this as palpable error precludes relief." *Moss* is dispositive.

Here, while it does not appear that the prosecutor "badgered" the witness, as was the case in *Moss*, the line of questioning under the proviso of *Moss* and other case law may be improper. Regardless, the prosecutor's questioning, did not rise to the level of palpable error. The Court of Appeals, relying on *McDaniel v. Commonwealth*, 415 S.W.3d 643 (Ky. 2013), commented that "a palpable error analysis 'boils down to'... whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error." *King v. Commonwealth*, 465 S.W.3d 38, 42 (Ky. App. 2015) (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citations omitted)).

In light of this standard, we do not believe that the prosecutor's actions, error or not, would have resulted in a different result or hampered Gay's due process rights. Therefore, the prosecutor's actions did not rise to the level of manifest injustice, which is necessary for reversal under the palpable error standard. RCr 10.26.

CONCLUSION

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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