

RENDERED: NOVEMBER 18, 2016; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-001184-MR

LUIS MARCANO-TANON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE OLU A. STEVENS, JUDGE  
ACTION NO. 13-CR-003409-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, THOMPSON AND VANMETER, JUDGES.

VANMETER, JUDGE: Luis Marcano-Tanon appeals from the Jefferson Circuit Court's judgment of conviction and sentence, finding him guilty of three counts of first-degree robbery and sentencing him to twelve-years' incarceration. For the following reasons, we affirm.

On December 13, 2013, two men carrying weapons and wearing face masks robbed a McAlister's Deli in Louisville. The manager and another employee testified that they each recognized the two men, despite their being completely covered, as two former co-workers, Drew Scrivener and Luis Marcano-Tanon. Luis was recognized by his Puerto Rican accent. The two men stole employee phones, wallets, and keys, as well as change and deposits from the deli, later reported to be a little over \$5,500. The incident was recorded on video-only surveillance.

Afterward, the two men counted the money at Luis's hotel room and then spent the night at Drew's apartment. The next morning, police arrived at the apartment and the two refused to open the door; they later moved to another hotel registered in a friend's name. The police were ultimately led to the two men by GPS tracking on Luis's cell phone. Luis consented to a search of his hotel room and his car. The police recovered cash and clothes matching the description of the two robbers' clothing from Luis's hotel room and Drew's apartment. The police also recovered a .45 caliber pistol, a BB gun with a clip, two cell phones, a wallet and house keys belonging to one of the McAlister's employees, a bandana with a white design on it, and a bag containing rolled coins and loose change from Luis's car. The police interrogated Drew and Luis. Drew initially denied involvement and blamed Luis for the entirety of the robbery. However, at trial, Drew admitted his involvement while still claiming that Luis had been responsible for the planning and execution of the robbery.

During his interrogation, Luis never admitted to being involved in the robbery, but rather claimed that Drew was setting him up due to money Luis owed him. Luis objected to the Commonwealth's introducing and playing for the jury the audio of Luis's police interrogation. Luis alleged that on the interrogation tape: 1) the detectives bolstered their credibility by repeatedly stating that they never locked up the wrong person, that they can prove this offense, and that they are good at what they do; 2) that the detectives on the tape bolstered the statements of the McAlister's Deli witnesses and Drew by repeatedly emphasizing their truthfulness; 3) detectives improperly characterized Luis as a guilty person lying rather than a person who makes a mistake and owns up to it; and 4) the detectives provided irrelevant and prejudicial hypotheticals regarding Luis's motivation to commit a robbery and his propensity towards violence. Luis also objected on the basis of hearsay.<sup>1</sup> The trial court allowed the interrogation tape to be introduced during the investigating detective's testimony despite the alleged commentary on the veracity of witness statements. However, the trial court did limit the detective's testimony to the evidence, not permitting him to testify as to the veracity of any of the witnesses' statements.

The jury found Luis guilty on three counts of first-degree robbery and recommended concurrent sentences of twelve years on each count. Judgment was so entered, and from that judgment, Luis appeals.

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<sup>1</sup> Luis does not raise the issue of hearsay on appeal.

In essence, Luis argues that the prejudicial value of the police's recorded statements during his interrogation outweighs the probative value provided by their inclusion for purposes of context. KRE<sup>2</sup> 403 provides trial court judges with the discretion to exclude a piece of evidence if its probative value is substantially outweighed by the risk of undue prejudice.

The balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge. The standard of review is whether there has been an abuse of that discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

*Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted).

The Kentucky Supreme Court has held that "such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique[,]” and “retaining such comments in the version of the interrogation recording played for the jury is necessary to provide a context for the answers given by the suspect.” *Lanham v. Commonwealth*, 171 S.W.3d 14, 27 (Ky. 2005). Providing context is especially important in cases in which the officers' statements serve to demonstrate the holes and inconsistencies in a defendant's changing, inconsistent story, as was the case in *Lanham*. However, “such comments are not admissible for the truth of the matter that they appear to assert, i.e., that the defendant is lying.” *Id.* In order to avoid having these comments being admitted

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<sup>2</sup> Kentucky Rules of Evidence.

to prove that a defendant is lying or to avoid the jury giving unnecessary weight to police statements concerning lying or lie detection, the Supreme Court held that a limiting admonition to the jury is the best solution. *Id.* at 28.

The admonition should be phrased so as to inform the jury that the officer's comments or statements are “offered solely to provide context to the defendant's relevant responses.” This means, however, that a trial court's failure to give such an admonition when requested by a defendant is error, though such an error is still subject to harmless error analysis.

*Id.* Hence, a properly admonished jury may hear a taped police interrogation containing police comments regarding the defendant's truthfulness. Luis contends that *Lanham* does not apply because the detectives' statements “go beyond merely calling Luis a liar” and because Luis's story remained consistent throughout his interrogation.

Here, we find it unclear whether the trial court properly admonished the jury to only consider the detectives' recorded statements regarding truthfulness as providing context for Luis's answers, or whether the detective's testifying at trial was simply instructed not to comment on the veracity of Luis, Drew, or any other witness statements. Nonetheless, any error committed by the trial court with respect to such an admonishment is subject to harmless error analysis. *Lanham*, 171 S.W.3d at 28.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise

disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The 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.

RCr<sup>3</sup> 9.24.

We believe that any error committed concerning the trial court's admonishment to the jury was harmless. Sufficient evidence supported Luis's conviction for robbery even without the detective's statements allegedly supporting the veracity of Drew's and the other witnesses' statements and undermining Luis's credibility. Absent the detective's statements on the interrogation tape, the jury still would have heard Drew testify that Luis was involved in the robbery, and the jury would have been informed of the money, clothes, guns, cellphones, and the McAlister's employee's wallet and keys found in Luis's hotel room and vehicle. The outcome of Luis's trial likely would not have been different had the contested police commentary been excluded; therefore, his substantial rights were not affected.<sup>4</sup>

For the reasons stated above, the judgment and sentence of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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<sup>3</sup> Kentucky Rules of Criminal Procedure.

<sup>4</sup> Luis's argument regarding the application of *Lanham* here is rendered irrelevant by our finding that substantial evidence supports his conviction even in the absence of the detectives' statements on the interrogation tape.

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