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Supreme Court of Kentucky
2015-SC-000285-MR

RAY ANTHONY FARMER

APPELLANT

V.
ON APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
NO. 14-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Ray Anthony Farmer, appeals from a judgment of the Trigg Circuit Court convicting him of five counts of third degree burglary and sentencing him to four years' imprisonment on each charge, to be served consecutively for a total of twenty years in prison. Appellant asserts that the trial court erred by: 1) admitting evidence contrary to KRE 404(b); 2) admitting evidence in violation of KRE 503, the attorney-client privilege; 3) failing to recognize and constrain the prosecutor's improper closing argument; and 4) failing to grant directed verdicts on three of the charges. For the reasons stated below, we affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Five businesses in Cadiz, Kentucky, situated close in proximity, were burglarized on the same night. Although surveillance cameras at or near two of the businesses captured video images of the burglar, the business owners

and local law enforcement officers were unable to identify him. The Cadiz Police Department published images derived from the video and requested the public's assistance in identifying the perpetrator. A detective from the Clarksville (Tennessee) Police Department saw the images and recognized the burglar as Appellant, Ray Anthony Farmer. Based primarily upon that identification, Appellant was indicted for five counts of third degree burglary and five counts of possession of burglary tools. The latter charges were dismissed but Appellant was convicted at trial on all five burglary charges. This appeal followed.

II. ANALYSIS

A. The detective's identification of Appellant was properly admitted into evidence; the detective's reference to Appellant's prior involvement with law enforcement did not merit a mistrial.

The critical aspect of the Commonwealth's case against Appellant was proving that he was the person whose image was captured in the crime scene videos. Prior to trial, and pursuant to KRE 404(c), the Commonwealth gave notice that it intended to present testimony of the Clarksville detective who first recognized the image of the burglar as Appellant. The detective would explain that he knew Appellant because of Appellant's prior involvement with law enforcement in Tennessee and that an active warrant was pending for Appellant's arrest for a burglary in Clarksville, Tennessee, with facts similar to the Cadiz burglaries for which Appellant was charged.

The trial court granted Appellant's pretrial motion to exclude any reference to the pending Tennessee burglary charge and the detective was

instructed accordingly. Otherwise, the trial court permitted the detective to testify that he recognized Appellant in the crime scene images because of his prior involvement with Appellant. The detective was also allowed, over Appellant's objection, to identify Appellant as the person in an arrest photo taken approximately six months after the Cadiz burglaries. The photograph was carefully cropped to conceal the orange jail jump suit worn by Appellant.

During the Commonwealth's redirect examination of the detective, the following exchanged occurred:

Prosecutor: How familiar are you with Mr. Farmer?

Detective: Since about October 2012 I've been assigned some cases in which . . . [cut off by objection].

Counsel: Objection judge. This is not a "yes" or "no," we discussed this as "yes" or "no." We object and move for a mistrial.

Judge: I'm going to let the detective answer in general terms why he's familiar with Mr. Farmer and in particular in light of the cross examination questions and then I'll deal with your motion

Prosecutor: Have you had several opportunities to study instances where you have been able to determine what Mr. Farmer looks like?

Detective: Yes, ma'am.

Prosecutor: And you feel comfortable with that determination?

Detective: Yes, ma'am.

Prosecutor: And you mentioned all the way back to 2012 you have been familiar with Mr. Farmer's identity for that long or even longer?

Detective: For that long, yes ma'am.

The trial court denied Appellant's motion for a mistrial, but offered to admonish the jury. Appellant declined the offer.

When the testimony resumed, the detective was asked where Appellant was living at the time of the Cadiz burglaries. The detective responded: "I cannot say specifically where, he was a suspect in some things . . . [cut off by objection]." Appellant moved again for a mistrial, which was denied. Appellant again declined the trial court's offer to admonish the jury.

Two issues are presented here. The first issue is Appellant's general objection that the detective should not have been allowed to testify to his opinion that Appellant was the person depicted in the crime scene videos or identify Appellant in the cropped photo as the jury would have inferred prior involvement in criminal activity. The second issue is the whether the detective's brief but specific reference to Appellant as a "suspect" in other cases assigned to the officer was error.

As to the first issue, the Commonwealth argues that *Morgan v. Commonwealth*, 421 S.W.3d 388 (Ky. 2014), authorizes the detective's identification testimony. In *Morgan* we held that KRE 602¹ and KRE 701² allowed the witness with personal knowledge of the suspect's physical

¹ KRE 602 provides, in pertinent part, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

² KRE 701 provides, pertinently, that a lay witness may provide "opinions or inferences which are: (a) rationally based on the perception of the witness; [and] (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

appearance to identify the suspect as the person depicted in photographs and videos admitted into evidence. *Morgan* relied in part on *United States v. White*, explaining that under FRE 701, “[g]enerally, a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.” 639 F.3d 331, 336 (7th Cir. 2011) (internal quotations and citation omitted).

In this case, three and one-half years lapsed between the date of the burglaries during which the video images were recorded and the date of Appellant’s trial. Appellant’s physical appearance changed during that time span. Because the Clarksville detective was personally familiar with Appellant’s appearance at the time depicted in the crime scene video, and the jury was not, the detective was better able to correctly determine if Appellant was the person seen in the video. Under these circumstances, we see no error in admitting the detective’s identification testimony.

In connection with this issue, Appellant argues that the detective’s use of the photograph taken of Appellant six months after the Cadiz burglaries was also prejudicial error. He contends that despite the effort to crop the photo to conceal his orange jail garb, jurors could still perceive it as an arrest photo, suggesting once again his prior problems with law enforcement. Because Appellant denied being the person depicted in the Cadiz burglary videos, his appearance nearer to the time of those crimes was a critical point of comparison. We believe the prejudicial effect of the photograph was not great

relative to its probative value. The photo in question was taken three years before the trial but only six months after the Cadiz burglaries. His appearance during that period was highly relevant to the comparison the jury needed to make to determine if Appellant was the burglar. The trial court did not err in allowing the jury to see it or in allowing the detective to testify about it.

The second issue of concern is whether the detective's testimony that he was familiar with Appellant because of "some cases" assigned to him and that Appellant was "a suspect in some [other] things" violates KRE 404(b)'s general prohibition against admitting evidence of other crimes³ and its focus on eliminating the prejudicial effect that unavoidably ensues from such testimony. To be sure, the testimony in question was curtailed by timely objections, but enough was said to create the impression that Appellant was well known to Clarksville police because of his criminal conduct there.

KRE 404(b)(1) allows evidence of "other crimes" when it is relevant to prove identity and knowledge; and KRE 404(b)(2) allows such evidence when it is "inextricably intertwined" with other essential evidence. Appellant's identity was an issue at trial; also at issue was whether the detective had sufficient

³ KRE 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

knowledge of Appellant to credibly identify him as the Cadiz burglar.

Appellant's prior acts, at least to the extent of their minimal reference here, were inextricably intertwined with the detective's ability to identify Appellant. It would be difficult to conceive how the detective could honestly and fairly explain his familiarity with Appellant without saying something indicative of Appellant's prior brushes with the law.

We agree that on the scales of a KRE 403 analysis, under different circumstances the prejudicial effect of prior crimes evidence could readily outweigh its probative value. But the limited reference here does not tip the balance toward inadmissibility. We conclude that the challenged testimony was admissible to demonstrate the witness's knowledge of Appellant, and its prejudicial effect was sufficiently contained. Accordingly, we further conclude that the trial court correctly declined Appellant's motion for mistrial.

Shabazz v. Commonwealth holds: "It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice." 153 S.W.3d 806, 811 (Ky. 2005) (citation omitted). The prejudicial inferences that might reasonably be drawn from the detective's testimony did not impose a fundamental defect in the proceedings resulting in a manifest injustice, and thus presented no cause to declare a mistrial. The trial court offered to provide admonitions to diminish or eliminate the prejudicial effect of those statements. "The cure for accidental admission of prior bad acts is an admonition to the jury to disregard the testimony. When an admonition is

sufficient to cure an error and the defendant fails to ask for one, we will not review the error.” *Boyd v. Commonwealth*, 439 S.W.3d 126, 132–33 (Ky. 2014) (internal citations omitted). Consequently, with Appellant declining the admonitions, we conclude that the trial court did not err when making the evidentiary rulings regarding the detective’s testimony.

B. The trial court did not abuse its discretion by allowing a police officer’s testimony that he saw Appellant wearing glasses during a trial break.

The burglar shown in the video recordings of the Cadiz burglaries wore glasses. During his trial, Appellant did not wear glasses. A Cadiz police officer was permitted to testify that he saw Appellant wearing glasses during a trial break. Appellant objected to the testimony on the grounds that at the time of the officer’s observation, Appellant was conferring with counsel in the only place available to them and therefore the observation was part of a protected confidential communication. Appellant cites KRE 503(b) and KRE 503(a)(5), the rules governing the lawyer-client privilege, as authority for preventing the officer from disclosing his observation of Appellant and his counsel communicating.

KRE 503(b)(1) cloaks a lawyer’s client with the authority “to prevent any other person from disclosing a confidential communication [between the client and the client’s lawyer] made for the purpose of facilitating the rendition of professional legal services to the client.” “A communication is ‘confidential’ if [it is] not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services

to the client or those reasonably necessary for the transmission of the communication.” KRE 503(a)(5).

KRE 503 is intended and phrased to protect the *content* of the communications between a client and his lawyer. “Communications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence.” Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 5.10 at 233 (3d Ed. 1993) (quoting *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990)). See also *St. Clair v. Commonwealth*, 140 S.W.3d 510, 548 (Ky. 2004) (“[T]he Kentucky Evidence Rules Study Commission’s commentary to KRE 503 states that ‘[t]he privilege does not extend to . . . *non-communicative* acts.’ (emphasis in original)).”

We appreciate Appellant’s desire to suppress the testimony that he wore glasses so as to avoid the likely comparison with the individual depicted in the crime scene video. But the fact remains that his appearance at the time of the conference (or the conduct of wearing glasses) was not part of a lawyer-client communication, and therefore it enjoys no privilege. The testimony in question disclosed no protected communication between the lawyer and the client. Its admission was not error.⁴

⁴ We note that the Commonwealth cites a number of instances of Appellant wearing glasses at pretrial hearings, so the fact that he, like the burglar depicted in the video, wore eyeglasses, was no secret.

C. The prosecutor's closing argument does not constitute palpable error.

Appellant asserts that the prosecutor engaged in misconduct by making the following statement during closing argument.

You know, defense attorneys, they have a job to do. They've done a great job in this trial. But they like to throw in these things that I call smoke and mirrors. It's anything to distract away from the fact that their client's committing these crimes. . . . It seems like for defense attorneys nothing is ever good enough.

Appellant argues that the prosecutor's comment implies that his attorneys are dishonest, and deprived him of a fair trial. Appellant made no objection at the time of trial so he seeks palpable error review of the issue pursuant to RCr 10.26.⁵ Such review is available when an error is "easily perceptible, plain, obvious and readily noticeable" and "the defect in the proceeding was shocking or jurisprudentially intolerable." *Young v. Commonwealth*, 426 S.W.3d 577, 584 (Ky. 2014) (citations omitted).

"The parties have wide-latitude during closing statements to argue their respective cases, to comment on the evidence and draw reasonable inferences therefrom, and to draw attention to the weaknesses in the opposing party's case." *Ordway v. Commonwealth*, 391 S.W.3d 762, 796 (Ky. 2013). However, it is also recognized that the prosecutor must also "avoid abuse of defendants

⁵ As provided in RCr 10.26, "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

and their counsel.” *Caudill v. Commonwealth*, 374 S.W.3d 301, 309 (Ky. 2012) (citation omitted).

We do not regard the comments under review as falling beyond the bounds of proper closing statements. The reference to “smoke and mirrors” merely suggests an artful effort by defense counsel to divert the jury’s attention from evidence the prosecutor wants them to see. It does not impute dishonesty or deceit to the defense. Consequently, we do not find that palpable error or manifest injustice occurred.

D. The trial court did not err when denying Appellant’s motions for a directed verdict.

Appellant argues that he should have been granted a directed verdict on the three burglaries which were not captured by surveillance video and for which no forensic evidence implicated Appellant. When considering a request for a directed verdict, “the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given.”

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Upon appellate review of a directed verdict denial, it must be decided whether “under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt.”

Id. (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). If so, only then is the defendant entitled to a directed verdict of acquittal. *Id.*

Appellant argues that without photographic (or video) evidence or DNA evidence connecting him to three of the burglaries, the jury could only find him

guilty upon conjecture and suspicion. We disagree. All five business were burglarized the same night under very similar circumstances: telephone lines and security system lines at each site were severed; entry doors at each building were damaged; the interiors were ransacked; and nothing but cash was stolen. Moreover, the two burglaries which were captured on video were within close proximity (less than 100 yards) of the other three. From this circumstantial evidence it would not be unreasonable for a juror to believe beyond a reasonable doubt that the individual pictured in two of the burglaries also committed the other nearly identical break-ins, and that Appellant was that person. Accordingly, we agree with the trial court's decision to deny Appellant's motions for a directed verdict.

III. CONCLUSION

For the foregoing reasons, the judgment of the Trigg Circuit Court entered in this matter is affirmed.

All sitting. All concur.

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