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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000773-MR

JUDY K. JUDE (NOW RUNYON)[1] APPELLANT

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 05-CR-00012

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,[2] SENIOR JUDGE.

[1] Even though the record below contains conflicting spellings of the Appellant's name, for purposes of this appeal we will use the spelling "Runyon." This is the spelling Appellant used when signing her name on the conditions of bail form in the circuit court record.

[2] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes ("KRS") 21.580.

WINE, JUDGE: Judy K. Jude (now Runyon) ("Runyon") appeals from her jury conviction in the Martin Circuit Court for trafficking in a controlled substance in the second degree. She was sentenced to five years in prison. Finding error, we reverse Runyon's conviction and remand the case for a new trial.

There are two versions of the facts in this case. The Commonwealth's account is that, in 2004, the police utilized Christina Hall ("Hall") as a confidential informant to make purchases of illegal drugs as part of Operation Unite, a drug enforcement agency. According to the prosecution, on September 21, 2004, Officer Neal Adams ("Officer Adams") and Detective Keith Wireman ("Det. Wireman") drove Hall to the parking lot of a Save Rite Pharmacy in Kermit, West Virginia. Hall walked to a car occupied by Runyon and got in. Runyon told Hall to meet her later at the Trinity Freewill Baptist Church ("Trinity Church") in Lovely, Kentucky. Officer Adams then drove, along with Det. Wireman and Hall, to Trinity Church where they waited approximately ten minutes. Runyon arrived in a 1995 blue Monte Carlo and pulled up alongside Officer Adams' car. Runyon then proceeded to sell Officer Adams seven Loricets for fifty dollars cash.

As Runyon left the parking lot, Officer Adams noted the license plate number of her car and then traced the number to her. The officers did not immediately arrest Runyon because they were in the process of utilizing Hall for more controlled drug buys.

In her account, Runyon claims that she and her then-boyfriend, Greg Marcum ("Marcum"), had been issued valid prescriptions from their physical

therapist. Runyon asserts she filled her prescription at the Save Rite, called her brother from the Save Rite payphone, and made arrangements with him to pick up her son at Trinity Church – a midpoint location between her and her brother. Runyon claims that while she was waiting for her brother in the Trinity Church parking lot, a car pulled in alongside of her car. Runyon testified that a woman she did not know (Hall) got out of the car and approached her vehicle to talk. Marcum testified that Runyon and Hall discussed their children and other small talk. Runyon claims Hall asked if Runyon had any medication to sell her. Runyon stated she did not, so Hall got back into her vehicle with the other two passengers and left the parking lot. Runyon testified that her brother dropped off her son shortly after Hall and the other passengers left. She and Marcum then left the parking lot.

Officer Adams used an audio recording device to record the transaction. However, the recording was not submitted to the jury because it malfunctioned while the transaction with Runyon was in progress and the tape was destroyed. The pills Officer Adams purchased were later determined by a forensic specialist to be hydrocodone, a schedule III narcotic and controlled substance.

Runyon was subsequently indicted on February 24, 2005, by the Martin County grand jury for trafficking in a controlled substance in the second degree. On February 13, 2006, the jury found Runyon guilty of the charge and she was sentenced to a total of five years' imprisonment. This appeal followed.

On appeal, Runyon first argues the trial court erred when it allowed the Commonwealth to compel her to comment on the credibility of each of the Commonwealth's witnesses: Officer Adams, Det. Wireman, Judy Bailey (Kentucky State Police forensic specialist), Scott Barker (former FBI agent) and Lee Weddington (retired state police). This issue was preserved for review by defense counsel's objection. During cross-examination of Runyon by the Commonwealth, the prosecutor asked why she believed the officers were lying. The questioning of Runyon went as follows:

> Prosecutor – But for your version of this to be correct, they (Officer Adams and Det. Wireman) would have to have just come in and lied about it, right?
>
> Defense Counsel – Objection your Honor. Asking a witness whether another witness is truthful is impermissible for opinion.
>
> Judge – Overruled.
>
> Prosecutor – They would have just had to have made it all up.
>
> Runyon – They would have had to have told a different story than I did which I'm telling the truth. I don't want to call nobody a liar, but I'm telling the truth is the only thing I'm saying.
>
> Prosecutor – Would they have any reason to have anything against you that would cause them to come in here and just make this up?
>
> Runyon – Not that I'm aware of, no.
>
> Prosecutor – Do you know Judy Bailey who testified here today?

Runyon – No ma'am.

Prosecutor – Would she have had any reason to come in here and make this up against you?

Defense Counsel – Your Honor I renew the same objection.

Judge – Overruled.

Runyon – Not that I know of, no.

Prosecutor – And what about Scott Barker who used to be an FBI agent?

Runyon – I have the slightest idea why, but no.

Prosecutor – And Lee Weddington, retired state police . . . does he have anything against you?

Runyon – Not that I'm aware of, no.

The former Court of Appeals set forth the standard for cross-examination in *Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324, 329 (1928):

> Although to aid in the discovery of the truth reasonable latitude is allowed in the cross-examination of witnesses, and the method and extent must from the necessity of the case depend very largely upon the discretion of the trial judge, yet, where the cross-examination proceeds beyond proper bounds or is being conducted in a manner which is unfair, insulting, intimidating, or abusive, or is inconsistent with the decorum of the courtroom, the court should interfere with or without objection from counsel. The court not only should have sustained the objections to this character of examination, but should have admonished counsel against such improper interrogation.

In *Howard*, the questions at issue involved the Commonwealth's Attorney asking the defendant about the testimony of other witnesses, in one instance asking, "I am asking you if what Maud Denton swore is a lie." *Id*. The Court in *Howard* concluded that the lower court "not only should have sustained the objections to this character of examination, but should have admonished counsel against such improper interrogation." *Id*. at 329. The Kentucky Supreme Court reaffirmed this holding in *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997), stating:

> A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force.

But in *Moss*, the Court declined to reverse, noting that "Appellant's failure to object and our failure to regard this as palpable error precludes relief." *Id*. However, in this case, Runyon was repeatedly asked to comment on the truthfulness of other witnesses by being asked whether the witnesses were lying or what motivation they might have had to lie. And unlike *Moss*, which reviewed the issue under a palpable error standard, defense counsel made repeated and timely objections of the improper questioning, properly preserving it for our review.

In the present case, Runyon was asked whether Officer Adams and Det. Wireman lied in order for her version of the facts to be accurate. The prosecutor further questioned her whether the officers or forensic specialist had

any reason to "make up" the allegations against her. The Commonwealth contends that Runyon opened the door to this line of questioning by denying that she sold the drugs. The Commonwealth also points out that the *Moss* Court was not asked to explore whether there is an exception to the rule when the defendant opens the door to this line of questioning by suggesting that police officers set her up or fabricated the entire ordeal.

However, we agree with Runyon that applying this logic to criminal proceedings would render the holding in *Moss* meaningless. Generally, every criminal defendant who takes the stand is in one way or another denying the charges against them. The *Moss* Court recognized that "[n]either expert nor lay witnesses may testify that another witness or a defendant is lying or faking. That determination is within the exclusive province of the jury." *Moss*, 949 S.W.2d at 579, *citing State v. James*, 557 A.2d 471, 473 (R.I. 1989).

This case turned on the credibility of the witnesses. The tape recording of the transaction was destroyed, leaving the trial to a "he said/she said" between the witnesses. The clear holding of *Moss* provides that the Commonwealth may not force a witness such as Runyon to comment on the truthfulness of another witness. This line of questioning tended unfairly to cast Runyon in such an unflattering light that it prejudiced her and undermined her testimony. And since Runyon's trial counsel preserved the error, we are compelled to reverse her conviction under the dictates of *Moss*.

Though not necessary given the above determination, we will also address Runyon's other claims of error which may be presented at a new trial. Runyon argues that the trial court erred in failing to grant a mistrial when the prosecutor improperly inquired as to Marcum's prior felony conviction. While cross-examining Marcum, the prosecutor asked, "Isn't it true that you are the same person who was convicted of a felony?" Marcum replied, "Yea." The prosecutor then asked, "And that felony was receiving stolen property?" At this point defense counsel objected and moved for a mistrial, which the trial court denied.

The prosecutor's additional questioning of Marcum clearly violates Kentucky Rules of Evidence (KRE) 609(a), which provides:

> For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

The Kentucky Supreme Court in *Hodge v. Commonwealth*, 17 S.W.3d 824, 848 (Ky. 2000), recognized that the procedure for impeaching a witness with a prior felony conviction was established in *Commonwealth v. Richardson,* 674 S.W.2d 515 (1984), as follows:

> [A] witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions, and to the extent that *Cowan [v. Commonwealth,* Ky., 407 S.W.2d 695 (1966)] limits such evidence to *one* prior conviction, it is overruled. After impeachment, the proper admonition shall be given by the court.

Id. at 517-18.

In this case, the prosecutor clearly violated KRE 609 by asking Marcum about the nature of his conviction after he admitted to having a prior felony. However, the trial court sustained Runyon's objection and admonished the jury to disregard the Commonwealth's reference to Marcum's prior felony being for receiving stolen property. "A jury is presumed to follow an admonition to disregard evidence, and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003), *citing Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999).

> There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

Johnson, 105 S.W.3d at 441 (internal citations omitted). Runyon fails to make either showing. Moreover, given our holding on the primary issue, we presume that this error will not be repeated at a new trial.

Accordingly, we reverse the conviction and remand the case to the Martin Circuit Court for a new trial consistent with this opinion.

ALL CONCUR.

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