

RENDERED: DECEMBER 7, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002291-MR

MARCUS D. EGGLESTON

APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 10-CR-00123

COMMONWEALTH OF KENTUCKY

APPELLEE

and

NO. 2011-CA-000021-MR

JUSTIN J. MAYES

APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 10-CR-00123

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Appellant, Marcus D. Eggleston, was convicted of first-degree robbery and received a sentence of ten years' imprisonment. In appeal number 2010-CA-002291-MR, he argues that: (1) he was denied the right to "wide open" cross-examination; (2) he was impermissibly required to testify regarding the credibility of another witness; and (3) he was unduly prejudiced by statements made by the Commonwealth during closing argument. The Court will also hear the appeal of Justin J. Mayes, a co-defendant of Eggleston, in number 2011-CA-000021-MR combined with the current case. Mayes was also convicted of first-degree robbery and received a sentence of ten years' imprisonment. Maynes argues that: (1) he was also denied the right to "wide open" cross-examination; (2) the trial court should have, *sua sponte*, granted a mistrial when a witness commented on his right to remain silent; and (3) he was unduly prejudiced by statements made by the Commonwealth during closing argument. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

On January 19, 2010, Eggleston and Mayes borrowed a car from Eggleston's girlfriend, Lindsey Clapp, to go purchase marijuana from Michael Cownie. At some point during the transaction, either Eggleston or Mayes struck Cownie on the head and took one ounce of marijuana, a food stamp card, and approximately one hundred dollars in cash. Cownie testified that he did not know who hit him. Eggleston and Mayes returned to meet Clapp at Mayes's apartment.

Eggleston and Mayes were eventually arrested and tried together in McCracken Circuit Court. The jury found that Eggleston and Mayes were both guilty of first-degree robbery and sentenced each man to ten years' imprisonment. These appeals followed.

Eggleston and Mayes both argue that the trial court erred by limiting their cross-examination of the victim, Cownie. Specifically, they argue that they should have been permitted to cross-examine Cownie about his probationary status at the time of the robbery.

It is well-settled that, "The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge. This broad rule applies to both criminal and civil cases." *Moore v. Commonwealth*, 771 S.W.2d 34, 38 (Ky. 1988). Moreover, under Kentucky Rules of Evidence (KRE) 611, a trial court is vested with sound judicial discretion as to the scope and duration of cross-examination and may limit such examination when "limitations become necessary to further the search for truth, avoid a waste of time, or protect witnesses against unfair and unnecessary attack." *Derossett v. Commonwealth*, 867 S.W.2d 195, 198 (Ky. 1993).

The right to cross-examination is not absolute and the trial court retains the discretion to set limitations on the scope and subject: "The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Capshaw v. Commonwealth*, 253 S.W.3d 557, 566-67 (Ky. App. 2007). Trial

courts “retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’s safety, or interrogation that is repetitive or only marginally relevant.” *Id.* at 567. In *Davenport v. Commonwealth*, 177 S.W.3d 763, 768 (Ky. 2005), our Supreme Court affirmed a limitation on the cross-examination of a witness’s probationary status when other evidence provided “a reasonably complete picture of the witness’s veracity, bias and motivation.”

There was no deal between Cownie and the Commonwealth in exchange for his testimony against Eggleston and Mayes. Eggleston and Mayes were permitted to introduce evidence that Cownie was a convicted felon, had sold marijuana, had psychiatric issues, and had a felony charge pending against him at the time of trial. Under the authority cited above, we cannot conclude that the trial court abused its discretion by limiting cross-examination concerning Cownie’s probationary status.

Eggleston argues that he was impermissibly required to testify about the credibility of another witness in violation of *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997). In *Moss*, our Supreme Court reaffirmed the longstanding rule that it is improper to require a witness to comment upon the credibility of another witness:

With few exceptions, it is improper to require a witness to comment on the credibility of another witness. A witness's opinion about the truth of the testimony of another witness is not permitted. Neither 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.

Id. at 583 (quoting *State v. James*, 557 A.2d 471, 473 (R.I. 1989)). In the absence of a contemporaneous objection, the Court found that such an improper line of questioning did not amount to palpable error. *Id.*

The questioning at issue began with Eggleston denying that he had ever owned brass knuckles.

Commonwealth: Lindsey Clapp made that up?

Eggleston: I am assuming so.

Commonwealth: Do you know a reason why Lindsey Clapp would have to lie about it?

Eggleston: Possibly.

Commonwealth: Share it with us. Why would Lindsey Clapp come into court and tell lies about you under oath and commit perjury to this jury?

Eggleston: Maybe it's because of Justin.

Commonwealth: Maybe it's because of Justin. Well, let's just follow this where it goes. Why do you think she would come into court, take an oath, commit perjury, testify that you had brass knuckles with you every day? Why would she do that on account of Justin?

Eggleston: Cause that's her friend, cause that's her friend, she knew him longer than me, and I have no idea.

Commonwealth: Lindsey Clapp has conspired with Justin to get you convicted by this jury, is that what you're telling us?

Eggleston: Yes.

No objection was raised to this line of questioning. Later, the Commonwealth asked if Marcus thought that Clapp's testimony was consistent with her statement to the police. Defense counsel objected and the trial court sustained the objection.

No further relief was requested. The Commonwealth continued:

Can you tell this jury why you believe Lindsey Clapp may have had a motive to lie about you when she went to talk to Detective Wentworth on January 21, 2010?

Eggleston: No, sir.

Commonwealth: And even though she said the same thing in court she said in the interview?

Defense counsel: Objection!

Trial court: I will sustain the objection.

Defense counsel requested no further relief. The Commonwealth continued questioning Eggleston about his demeanor following the robbery:

Can you explain why when you got to Mora Mia [apartment complex], you were acting cool like nothing ever happened?

Eggleston: I wasn't. That's why I left, sir.

Commonwealth: Another time Lindsey's lying?

Defense counsel: Objection, that's an improper question.

Trial court: I'll overrule the objection.

Commonwealth: That's all.

We conclude that this argument is unpreserved for our review. Defense counsel did not object to the first line of questioning regarding Clapp's credibility.

When defense counsel did object, the trial court sustained the objection and no further relief was requested. Once the trial court sustains an objection, the objecting party must request an admonition in order to preserve any error for our review. *See Allen v. Commonwealth*, 286 S.W.3d 221, 225 (Ky. 2009).

As to the final question about Clapp's credibility where the trial court overruled the objection, it appears that the trial court misstated or the Commonwealth abandoned the question because Eggleston was not required to answer and did not answer. Again, no further relief was requested. We conclude that questioning Eggleston about the credibility of Clapp was improper, but that such error does not rise to the level of manifest injustice under Kentucky Rules of Criminal Procedure (RCr) 10.26.

Next, Eggleston and Mayes argue that they were unduly prejudiced by statements of the Commonwealth during closing argument. The Commonwealth stated, "What we ask you as good jurors to do, is to bring your good common sense and make these two accountable for what they did," to the victim, the victim's family, and the peace and dignity of the Commonwealth. Defense counsel requested an admonition, which the trial court denied.

It is well settled that the prosecutor is granted wide latitude during closing arguments. *Lynem v. Commonwealth*, 565 S.W.2d 141, 144 (Ky. 1978). A prosecutor can emphasize the jury's role and can call upon it to do its duty. *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). We conclude that

the statements of the Commonwealth were within the boundaries of proper argument.

Finally, Mayes argues that the trial court erred by failing, *sua sponte*, to declare a mistrial when a witness commented on Mayes's right to remain silent. Defense counsel asked Detective Wentworth if he ever asked whether Mayes was left-handed or right-handed. Detective Wentworth responded that he was not given the opportunity to ask that question. Mayes did not object to the answer. On cross-examination, defense counsel for Eggleston asked Detective Wentworth whether Eggleston had told the detective his version of events. Detective Wentworth stated that "he spoke with me extensively." The Commonwealth and counsel for Mayes objected. The trial court sustained the objection and admonished the jury to disregard the question and answer. Mayes requested no further relief.

This Court has held that, "The failure to move for a mistrial following an objection and admonition indicates satisfactory relief." *Boone v. Commonwealth*, 155 S.W.3d 727, 729 (Ky. App. 2004). Mayes did not request a mistrial, therefore, this issue is unpreserved. *Id.* He requests review for palpable error. This Court stated:

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.”

Id.

Regarding the statement that Detective Wentworth was not given the opportunity to ask Mayes if he was right or left-handed, Mayes can hardly complain because he elicited the response. “One who asks questions which call for an answer has waived any objection to the answer if it is responsive.” *Hodge v. Commonwealth*, 17 S.W.3d 824, 845 (Ky. 2000) (quoting *Mills v. Commonwealth*, Ky., 996 S.W.2d 473, 485 (Ky. 1999)). Further, Mayes has failed to demonstrate that the jury would be unable to follow the court’s admonition and that the evidence was devastating. The question was based in fact and was not highly inflammatory. Mayes received all the relief that he requested. We cannot conclude that the trial court’s failure, *sua sponte*, to declare a mistrial resulted in manifest injustice.

Accordingly, the judgments of the McCracken Circuit Court are affirmed in their entirety.

ALL CONCUR.

BRIEFS FOR APPELLANT
EGGLESTON:

Erin Hoffman Yang
Assistant Public Advocate
Dept. Public Advocacy
Frankfort, Kentucky

BRIEFS FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

BRIEFS FOR APPELLANT MAYES:

Karen Shuff Mauer
Assistant Public Advocate
Dept. Public Advocacy
Frankfort, Kentucky