

RENDERED: AUGUST 8, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000404-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 10-CR-00054

LIBRADA ROSARIO-RAMIREZ

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: The Commonwealth of Kentucky appeals an order of the Bourbon Circuit Court granting the motion of Librada Rosario-Ramirez (hereinafter “Ramirez”) for a new trial. After our review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 13, 2010, Ramirez was indicted on two counts of complicity to kidnapping, victim death; two counts of murder; and one count of tampering with physical evidence. The charges stemmed from the 2005 murder of two men in rural Bourbon County. The men had been shot and their bodies found on a farm. Later, the indictment was amended and the two counts of murder were dismissed. Multiple defendants were implicated in the murder, and most of them pled guilty to the charges resulting from the incident.

Before the trial, the trial judge listened, in chambers, to the police detectives' taped interview with Ramirez and issued an order to redact, as unduly prejudicial, a portion of the interview tape, which contained information about Ramirez's prior incarceration. A jury trial was held between March 30, 2012, and April 12, 2012. On the third day of the trial, Ramirez tendered a motion asking the trial court to redact from the interrogation tape the detectives' statements and questions. The motion was proffered immediately preceding the testimony of the detective through which Ramirez's statements would be introduced.

The trial court held a hearing on the motion. Ramirez argued that the detectives' questions and statements included hearsay and were more prejudicial than probative. Further, Ramirez suggested that if the jury needed context for the answers on the tape, the detective could provide it from the witness stand.

In response, the Commonwealth argued that it did not characterize the taped interview as confessional because Ramirez denied involvement in the crime.

Further, it maintained that the interview was a typical police interview including the interviewer making up lies to get information from a defendant. The Commonwealth asserted that this tactic is allowed under the law.

The trial judge denied the motion, and the jury was permitted to hear the entire taped interview including the police detectives' questions and statements. Additionally, although Ramirez requested an admonition before the interrogation tape was shown that the detectives' statements were not to be considered evidence, the trial court did not provide one.

The trial concluded on April 11, 2012. The first item requested by the jury as it began its deliberation was the interrogation tape. Ultimately, the jury found Ramirez guilty of one count of complicity to commit kidnapping and determined that a sentence of twenty years' imprisonment was appropriate.

On April 19, 2012, Ramirez moved for a new trial on three grounds: certain evidence should have been excluded; the tape of the police interview should not have been played; and the trial tape of several witnesses' testimony should not have been played for the jury. With regards to the interrogation tape, Ramirez alleged that the statements made during the police interview allowed the Commonwealth, through the detectives' statements, to taint his character.

After reviewing the supporting memorandums of the parties and conducting a hearing, the trial court granted the motion for a new trial. In its order, the trial court observed that the Commonwealth cited *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), for the proposition that a tape of a defendant's

interview can be played to a jury when the underlying objection is that the police accused the defendant of lying. But the trial court noted that the detectives' comments and questions went beyond merely commenting on Ramirez's truthfulness.

Continuing, the trial court wrote that besides the commentary on Ramirez's truthfulness, the police detectives also confronted him about his girlfriend's statements that he fights, cheats on her, and drinks too much. Further, the detectives told Ramirez that several people said that he was at the scene of the crime when the victims were killed. Even more troubling to the trial court, however, was that the detectives bolstered the credibility of certain Commonwealth's witnesses when they asked Ramirez why the other witnesses would lie about his role in the murders, since they, too, were facing significant jail time.

As noted by the trial court, the practice of allowing one witness to give credit to the testimony of another witness has been denounced by appellate courts. *See Bussey v. Commonwealth*, 797 S.W.2d 483, 484-485 (Ky. 1990), and *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). In the case at bar, the trial court concluded that the police detectives not only bolstered the testimony of one of their witnesses but also that each of the co-defendants testified against Ramirez as part of their plea deals.

Therefore, the trial court concluded that several of the detectives' statements and questions violated not only Kentucky Rules of Evidence (KRE) 404

but also KRE 403, since their probative value was substantially outweighed by the danger of undue prejudice. Consequently, the trial court granted a new trial. It did not consider Ramirez's other two grounds for requesting a new trial since these issues were rendered moot. The Commonwealth appeals from this order.

STANDARD OF REVIEW

Under Kentucky Rules of Criminal Procedure (RCr) 10.02, the appellate standard of review of an order granting a new trial is whether the trial court abused its discretion. *Commonwealth v. Bailey*, 71 S.W.3d 73, 80 (Ky. 2002). 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) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

ANALYSIS

The Commonwealth argues that there was no error in the admission of the taped interview, and therefore, the trial court abused its discretion in granting a new trial. Further even if the admission of the taped interview was in error, the error itself was harmless.

First, the Commonwealth outlines the reason that each statement cited by the trial court was not problematic. Second, it contends that the police detectives' reference to other witnesses did not and was not to bolster the other

witnesses' testimony. Instead, these questions were merely to entice Ramirez to answer questions about the crime. Without doing this, it argues, the detectives would not have been able to demonstrate inconsistencies in Ramirez's statements. Furthermore, the Commonwealth claims that when Ramirez took the stand, his version of the events was only impeached by his statements during the interview and not with the detectives' statements. Lastly, any possible harm was mitigated since Ramirez was afforded the opportunity to cross-examine the witnesses.

Moreover, the Commonwealth contends that *Walker v. Commonwealth*, 349 S.W.3d 307 (Ky. 2011), supports its position. That case also involved the admission of an interrogation tape, which the defendant therein asserted should have been excluded. In *Walker*, the Supreme Court observed that juries are not naive and can understand the nuances of such interview.

Finally, the Commonwealth asserts that even if error occurred in the admission of the police interview, the error was harmless. Relying on RCr 9.24, which discusses the exclusion rather than the admission of evidence, the Commonwealth stresses the language that “[t]he 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.” It then concludes summarily that because the errors were evidentiary rather than constitutional, the error is not substantial. Furthermore, it declares that a court must disregard any error that does not affect the substantial rights of the party.

We begin our analysis by observing that according to RCr 10.02, a trial court is permitted to grant a new trial for any cause that prevents a defendant from having a fair trial, or if required, in the interest of justice. *Collins v. Commonwealth*, 951 S.W.2d 569, 576 (Ky. 1997).

Next, we agree with the trial court's reasoning that *Lanham* limited its application to statements where police accuse a defendant of lying during an interview. In *Lanham*, the Kentucky Supreme Court faced the issue whether the admission of an interrogation tape, in which the police interrogator, as is commonly done, accused the suspect of lying, was proper. In a 4-3 decision, the Court held that:

We agree that such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect's story shifts and changes. We also agree that 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, 171 S.W.3d at 27. Nonetheless, the Court in *Lanham* limited the admission of an interrogation tape to accusations by an officer that a defendant is not telling the truth. *Id.* at 29.

The Court continued its analysis in *Lanham* and articulated that allowing police statements that accuse the defendant of lying could confuse jurors. It provided a remedy to possible adverse inference by the jury by suggesting that a court give a limiting admonition to the jury before playing the recording. *Id.* at 28. In the case at bar, Ramirez requested an admonition but the trial court did not give

one. While the *Lanham* Court advised that such a failure would be harmless error, its reasoning applied only to interrogation tapes wherein police merely challenged a defendant's veracity. In this case, the detectives' statements go beyond merely challenging Ramirez's veracity.

In fact, the Commonwealth's lengthy explanation in its brief about the reasons why the detectives' statements on the tape were not improper supports the trial court's decision that these remarks implicated Ramirez's character, were more prejudicial than probative, and bolstered other witnesses' credibility. Certainly, the reasons provided by the Commonwealth for the efficacy of these statements went beyond the detectives only accusing Ramirez of lying. Further, characterizing the three statements as minimal is self-serving. Indeed, the Commonwealth cannot establish that these statements were without impact and created no confusion for the jury. Nor can it weaken the fact that the first item requested by the deliberating jury was the interrogation tape.

Notably, the holding in *Lanham* limits the admission of interrogation tapes to cases where the only tactic used by the police is to suggest that a defendant is lying. The Court said "the rule that it establishes, is limited to the types of comments in this case, i.e., accusations by an officer that a defendant is not telling the truth. The rule does not address the types of comments that some of the other courts have dealt with and were not present in this case." *Id.* at 29.

The Commonwealth's reliance on *Walker* can be distinguished. The

challenged statements in that case consisted of police statements that the defendant was lying, comments about other evidence, and remarks about the police interviewer's personal life. The defendant, however, had not preserved the issue for review. On appeal, he only offered the admission of one statement as palpable error. The purported palpable error involved a statement by the interviewer about the difference between the child witnesses' account and Walker's account. In its decision, the Court commented that juries are not naive and can understand the difference between children's testimony and police-interrogation tactics. *Walker*, 349 S.W.3d 313.

There are two obvious differences between the situation in *Walker* and the case herein. First, as noted above, the Court's review in *Walker* was based on KRE 103(e) or RCr 10.26. Thus, to exclude the admission of the interrogation tape in Walker's case would have required the police interviewers' comments to have been palpably erroneous and result in manifest injustice, which the Court determined did not happen. Here, our review is based on an abuse of discretion standard since Ramirez preserved the issue.

Second, the statements under critical review here include the detectives' comments about Ramirez's character (fighting, drinking, and cheating) and witnesses seeing him at the scene of the crime. Further, some statements made by the detectives bolstered the witnesses' credibility. Thus, the statements made by the detectives in Ramirez's tape are more serious than the challenged statement in *Walker*.

Finally, we address the Commonwealth's contention that if an error occurred it was harmless and that the trial court abused its discretion in vacating the jury verdict. The Commonwealth quotes RCr 9.24, which says:

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.

Because the rules relied on by the trial court to make its decision were evidentiary rather than constitutional, the Commonwealth asserts that pursuant to RCr 9.24, the error must be disregarded as it does not affect Ramirez's substantial rights. The Commonwealth posits that notwithstanding the statements on the interrogation tape, the judgment was not substantially swayed by the error. Hence, the error was harmless and the conviction must stand.

Conversely, the trial judge reconsidered the impact of the tape and determined that it significantly influenced Ramirez's rights and that denial of the motion for a new trial would be inconsistent with substantial justice. The trial judge, too, was at the entire trial. He saw the interrogation tape, listened to the eyewitnesses, saw the cross-examination, and still concluded that a new trial was required based on the impact of the interrogation tape. His thoughtful order explains that he believes that Ramirez's character was impugned, that certain

statements were more prejudicial than probative, and that witnesses' credibility was bolstered by the police statements on the tape. We do not disagree with the trial judge's interpretation of the impact of these statements. Their impact is not inconsequential and denies substantial justice for Ramirez. Consequently, we cannot say that his decision was an abuse of discretion.

CONCLUSION

Having reviewed the trial court's decision, we determine that the trial court did not abuse its discretion in ordering a new trial. After a careful and thoughtful review, it ascertained that the statements by the police detectives on the interrogation tape went beyond merely challenging the defendant's veracity. Also, the Commonwealth has not shown that the court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945. We affirm the decision of the Bourbon Circuit Court.

JONES, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

Jeanne Anderson
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

William D. Elkins
Winchester, Kentucky