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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001401-MR

MARVIN LEE YOUNG, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 12-CR-01342

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Marvin Lee Young, Jr. appeals from his conviction and sentencing following a jury trial.

Young was tried for third-degree burglary, theft and being a second-degree persistent felony offender (PFO II) based on his entry into a closed maintenance building and removal of a chain saw and weed eater. The trial

revolved around whether eyewitness James Waller's account or Young's account of the events should be believed.

Waller testified about observing Young exiting the maintenance building with Waller's tools and Waller's subsequent chase and apprehension of Young. Waller was performing repairs to an apartment in a building he owned using items he stored in his maintenance building. Waller did not lock the maintenance building when he left. He "dummy locked" it by leaving the open lock hanging from the latch because he would be returning shortly.

When Waller returned to the building, he saw a man exiting through the door, holding Waller's chainsaw and weed eater. He yelled at the man to stop. The man threw down the tools and fled.

Waller chased him for about a quarter of a mile. He never lost sight of the man and was never more than ten to fifteen feet away from him. While Waller was chasing the man, he called for help and others, including Chris, his tenant, joined the pursuit. They tackled the man and held him down until the police arrived. Waller identified Young as the man he saw coming out of his maintenance building.

Officer Terry testified that after he was flagged down by the men holding Young, he received two different accounts of what had occurred. Waller told him the man they were holding had taken his chainsaw and weed eater out of his maintenance building, Waller had pursued him, and bystanders joined in the pursuit and caught him. Neither Waller nor the people who helped pursue and

catch Young saw anyone else. Young denied taking the items and told him Kevin Johnson was the one who ran. Officer Terry testified suspects often lie and, based on his investigation, he saw no need to look for anyone else.

Young testified he was not involved in any burglary or theft but was an innocent bystander who was confused with another man. He saw a man running at him, tried to run away and then was tackled by a group of men and held on the ground until the police arrived. He denied going to the maintenance building or having taken tools.

During the cross-examination of Young, the Commonwealth asked whether Waller and Officer Terry were lying. Defense counsel objected to the question regarding Officer Terry but the objection was overruled. During closing argument, the Commonwealth repeatedly stressed that Waller had no reason to lie and Young had every reason to lie. The jury convicted Young of third-degree burglary and theft.

The case then proceeded on the PFO II charge and the sentencing phase. After defense counsel finished closing argument, the Commonwealth brought it to the trial court's attention that Young had been talking during the closing argument and defense counsel said he would talk to him. After the jury was dismissed, Young asked the trial court if he could talk to the jury. The trial court denied his request because the jury was deliberating.

The jury convicted Young of PFO II and recommended a sentence of five-years' incarceration, enhanced to eight. Young was sentenced in accordance with this recommendation.

Young argues the trial court erred by allowing the Commonwealth to repeatedly ask Young to characterize the testimony of Officer Terry and Waller as a lie and by denying Young the right to testify during the PFO phase of the trial.

Pursuant to *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997), the Commonwealth is prohibited from cross-examining a defendant about whether other witnesses, particularly police officers, are lying. "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." *Id.*

During the cross-examination of Young, the following exchange formed the basis for this claim of error:

Commonwealth: So Waller's lying, he came in here and lied to these people, right?

Young: I have to say if he's saying I did, he is, yeah.

Commonwealth: And the officer is lying because he, he arrested you and he should have arrested Kevin, that's what you're telling this jury today?

Defense: Objection to that question Judge.

Commonwealth: I think it's my time with the cross.

Trial Court: Yes, objection overruled.

Commonwealth: So you're, you're telling the jury that, that Officer Terry lied, he arrested the wrong person, you want them to believe that too?

Young: The point is, I didn't have anything now. I didn't do anything, so . . . I mean, the thing of it is, if somebody says . . .

Commonwealth: Why don't you just answer the question.

Young: Uh, by law.

Commonwealth: Pretty simple, yes or no.

Young: No, he did what he was supposed to do.

Commonwealth: You heard Mr. Waller come in and testify, he said you were it. Nobody ever saw . . . there was, no, nobody else, there was no other commotion; you're just making it up, aren't you?

Young: My whole point of it is, if I'd done it, wouldn't I try to hide from the man? I was coming back toward him.

Young argues this error was preserved as to both the question regarding Officer Terry and questions regarding Waller. We agree this error was preserved as to the question regarding Officer Terry because the ground for the objection was obvious and the trial court failed to request clarification of the grounds for the objection. *Brewer v. Commonwealth*, 206 S.W.3d 313, 320 (Ky. 2006); *Dickerson v. Commonwealth*, 174 S.W.3d 451, 467 (Ky. 2005). While the error is clear, we review whether it was harmless. RCr 9.24.

We determine the question and answer relating to Officer Terry was harmless for three related reasons: (1) although the question was asked in terms of lying, the question was actually asking whether Officer Terry erred in arresting Young; (2) Officer Terry was not a witness to the crime and Young did not dispute the circumstances of his arrest, so there was nothing for Officer Terry to be lying about; and (3) Young never characterized Officer Terry as lying, so Young's testimony did not have the result of placing Young in an unflattering light.

Unlike the situation in *Moss*, 949 S.W.2d at 583, in which the officer was a direct eyewitness to the defendant fleeing the burglary crime scene through a fence and the absence of anyone else being present, Officer Terry was not an eyewitness to any aspect of the crime. When Officer Terry arrived, Young was being restrained on the ground. Young's testimony about what happened after he was tackled is consistent with the other witnesses' accounts. It is unclear what Officer Terry could be lying about; his testimony did not differ from Young's except in terms of believing Young was the perpetrator based on his investigation.

Even if the question could be construed asking Young to testify that Officer Terry was lying, Young never made any such characterization. Young's final response to the question was: "No, he did what he was supposed to do." While the Commonwealth's question may have attempted to place Young in an unflattering light so as to undermine his testimony, Young's answer did not place him in this trap. Therefore, this error could not have substantially influenced the jury's

verdict. Accordingly, the trial court's failure to sustain Young's objection to this question is harmless.

The issue is not preserved as to the questions asking Young to characterize Waller as lying because Young failed to object. Therefore, we review whether these errors are palpable. RCr 10.26; KRE 103(e).

In order for jurors to believe Young's account, they had to believe Waller was lying because the two versions of the events could not be reconciled. Because "the accusation [of lying] was, in a sense, already before the jury . . . the mere verbalization of the defense theory by the prosecutor, although improper, did not rise to the level of palpable error under the facts of this case." *Newman v. Commonwealth*, 366 S.W.3d 435, 442 (Ky. 2012).

Young argues the trial court erred by denying him the right to testify during the PFO phase of the trial. Following the defense's closing argument on the PFO II charge and sentencing, the Commonwealth asked leave to approach the bench and the following exchange took place:

Commonwealth: I get the impression that the defendant is gonna start talking and I don't think that's appropriate, so I just wanted to bring it to your attention.

Defense counsel: What happened?

Commonwealth: He just started talking.

Trial court: He started talking.

Defense counsel: I'll talk to him.

Counsel returned to their tables and the Commonwealth proceeded to give its closing argument. After the jury retired to the jury room, defense counsel informed the trial court that Young wanted to put something in the record and the following exchange occurred between Young and the trial court:

Young: I guess I missed my chance, if any at all, of talking to this jury, right, before they deliberate of anything.

Trial court: Yes sir.

Young: I guess they won't get . . . there's no way they can hear my opinion about anything on the record, is there, or is there any chance your Honor?

Trial court: No sir, not at this stage, obviously they heard your prior testimony.

Young: Besides that even if they came back and rendered a verdict I still couldn't give them my take.

Trial court: No sir.

Young: Okay, so I guess I have to just use this time right now to present my feelings, right?

Trial court: Well I don't know, if it's just presenting your feelings . . .

Young: Well, it's not . . .

Trial court: I don't know that that's appropriate.

Young: Okay.

Trial court: I mean obviously I respect the fact that you're unhappy about the jury verdict.

Young: Yeah, I don't know how this stuff works.

Trial court: Well, you certainly will have an opportunity, a right, to appeal the jury verdict at the appropriate time.

Young: Okay.

Trial court: All evidence has now been presented to the jury and they're in final deliberations and that's pretty much the close of it at this point until they render their verdict.

Young: Okay.

Young argues his speaking during defense counsel's closing argument and remarks to the trial court after the jury began deliberating indicated he wanted to testify and the trial court erred by failing to ask him whether he wished to testify.

The right of a defendant to testify on his own behalf is established by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Section 11 of the Kentucky Constitution and KRS 421.225. *Quarels v. Commonwealth*, 142 S.W.3d 73, 79 (Ky. 2004); *Crawley v. Commonwealth*, 107 S.W.3d 197, 199 (Ky. 2003). This right cannot be waived by counsel and any waiver by the defendant must be knowing and intelligent. *Riley v. Commonwealth*, 91 S.W.3d 560, 562 (Ky. 2002).

A defendant who wants to testify despite counsel's advice to the contrary needs to:

“alert the trial court” that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand. When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant's conduct.

United States v. Webber, 208 F.3d 545, 551 (6th Cir. 2000) (internal citations omitted). Therefore, assuming when defense counsel spoke to Young about his talking during closing argument Young communicated a desire to testify and was rebuffed, the trial court had no duty to inquire further before the jury retired without Young making any conflict known. “[The defendant’s] present allegations that he wanted to testify and was prevented from doing so do not suffice to overcome the presumption that he assented to the tactical decision that he not testify.” *Hodge v. Haeberlin*, 579 F.3d 627, 639 (6th Cir. 2009).

We agree if Young’s exchange with the trial court had taken place before the closing of proof in the PFO phase, it would be incumbent upon the trial court to determine whether Young was waiving his right to testify. However, once the jury began deliberating, it was clearly reasonable for the trial court to deny any request to testify. The rules relating to jury deliberations preclude recalling the jury to the courtroom to hear new testimony. *See* RCr 9.66; RCr 9.74; KRS 29A.320(1). The right to testify is properly limited to appropriate times in accordance with reasonable trial procedure rules. *See Rock v. Arkansas*, 483 U.S. 44, 55-56, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987); *Quarels*, 142 S.W.3d at 83; *United States v. Orozco*, 764 F.3d 997, 1001-1002 (9th Cir. 2014). Young’s belated attempt to assert his right to testify after the jury retired to deliberate was simply too late.

Additionally, the trial court’s denial of Young’s request to testify is subject to a harmless error analysis. *Quarels*, 142 S.W.3d at 82. Young exercised his right to testify during the guilt phase of the trial. He failed to establish what he

could add to that testimony and only expressed a desire to share his opinion and feelings with the jury. Such testimony would not negate the elements of the PFO charge or provide a basis for a reduced sentence where the jury previously determined his testimony was not credible.

Accordingly we affirm the Fayette Circuit Court's final judgment and sentence.

STUMBO, JUDGE, CONCURS.

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