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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002132-MR

RONALD DWYER — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 12-CR-00940

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; D. LAMBERT AND MAZE, JUDGES.

LAMBERT, D., JUDGE: A Kenton County jury convicted Ronald Dwyer ("Dwyer") of third-degree burglary and found him to be a first-degree persistent felony offender. On the jury's recommendation, the Kenton Circuit Court sentenced Dwyer to eighteen years and entered a final judgment to that effect. After reviewing Dwyer's evidentiary and procedural challenges, we affirm the circuit court in part and reverse in part.

On August 31, 2012, Sergeant Ben Wilson of the Kenton County Police received a call to investigate a vacant residence (the "Residence") at 10428 Locust Pike in Ryland Heights, Kentucky. Suspicious activity was reported at the Residence, but when Sergeant Wilson arrived, he did not see anyone. Upon examining the entrances, Sergeant Wilson found that the back door was unlocked. He entered the unlocked door and noticed a large number of free-standing kitchen cabinets inside. Sergeant Wilson left after noting these observations.

Later that day, Veronica Douglass ("Mrs. Douglass"), a neighbor, noticed a red truck parked in the driveway of the Residence while on her way home from work. Mrs. Douglass saw a man by the red truck and a man on the Residence's porch. The man on the porch had cabinets. Mrs. Douglass called 911 and notified the operator that these men were loading the cabinets. Mrs. Douglass' husband, who was home at the time Mrs. Douglass returned from work, followed the men in the red truck as they drove away from the Residence.

Officer Tim Bailey of the Taylor Mill Police received a call that a possible burglary had occurred. Shortly thereafter, Officer Bailey located the two men in the red truck and pulled it over; Dwyer was driving. When asked about the cabinets in the truck bed, Dwyer told Officer Bailey he had purchased them off of Craigslist.

After the stop, Officer Robert Fultz arrived at the scene and informed Dwyer that he was a suspect in a burglary. Officer Fultz also read Dwyer his

Miranda[1] rights and placed Dwyer in his police cruiser. After Officer Fultz *Mirandized* him, Dwyer initially declared that he did not want to say anything. However, Dwyer later stated he had purchased the cabinets on Craigslist from someone named Tom or Tommy with no last name and no phone number. Dwyer also admitted he had visited the Residence earlier that day, picked up the cabinets and did not know the homeowner or otherwise have permission to enter the premises. Officer Fultz then drove Dwyer to the police station, where Dwyer asked for an attorney before ceasing any further communication.

At trial, the Commonwealth called Mrs. Douglass as a witness. On cross-examination, Dwyer's counsel asked Mrs. Douglass if she had ever seen either Dwyer or his co-defendant, Leonard Soard ("Soard"), *inside* the Residence. Mrs. Douglass responded that she had not. Mrs. Douglass only confirmed that, at best, she saw one on the porch and one at the truck. Moreover, she admitted that she had told someone that she had never seen the defendants inside the Residence.

After calling Mrs. Douglass as a witness, the Commonwealth called Officer Fultz to testify. According to Officer Fultz, Mrs. Douglass told Officer Jeff Price, an investigating police officer, that she had seen the men inside the Residence.[2] Officer Fultz added that Dwyer later refused to say anything and requested his attorney at the police station. Officer Price was not a witness at trial.[3]

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] Officer Price later told Officer Fultz what Mrs. Douglass had said.

[3] Before Mrs. Douglass was called as a witness, Sergeant Wilson testified that Mrs. Douglass had told the 911 operator on the phone that the men were inside the Residence. The 911 call was played for the jury and contained no statements to that effect.

In his defense, Dwyer called one witness and attempted to call a second, albeit after concluding his proof. The testifying witness provided information concerning the origin of the red truck. The circuit court did not allow the additional witness to testify, citing that Dwyer had rested.

A little more than an hour into their deliberations, the jury asked the trial court whether the Residence's covered, wrap-around porch was a part of the Residence. The circuit court relied on *Johnson v. Commonwealth*, 875 S.W.2d 105 (Ky. App. 1994), and ruled, "[I]f a porch constitutes . . . a dwelling under burglary in the second degree, it certainly is sufficient to be found part of a building for burglary in the third degree . . . ." The jury later found Dwyer guilty of third-degree burglary.

After the jury convicted him, Dwyer filed a motion for a new trial based on two alleged irregularities with the jury. Dwyer first claimed a social relationship existed between one of his jurors and the family of the victim of one of Dwyer's previous crimes, and that the juror failed to disclose this relationship during *voir dire*. Dwyer further supplied a number of Facebook photos to establish the existence of this social relationship. Dwyer also claimed that a bailiff had informed the jury about Dwyer's involvement in this previous crime. The circuit court denied Dwyer's motion for a new trial and sentenced him. The circuit court's final order and judgment contained a blanket statement directing Dwyer to "pay restitution, if any, in an amount to be set."

On appeal, Dwyer presents seven arguments. Two were raised at the trial level, and five were not. Dwyer now requests we review his five unpreserved arguments for palpable error pursuant to RCr[4] 10.26. Under that rule, "palpable error occurs when the substantial rights of a defendant are violated and a manifest injustice results." *Johnson v. Commonwealth*, 405 S.W.3d 439, 457 (Ky. 2013). The required showing under this standard is that there existed a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). And the reviewing court "[has] to plumb the depths of the proceeding to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Id.*

For his first argument, Dwyer claims the circuit court improperly allowed Officer Fultz to testify as to what Mrs. Douglass told Officer Price on the day of the incident. Dwyer asserts that this testimony was both a violation of his rights under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and a violation of KRE 801A(a)(1). According to Dwyer, he should have had the opportunity to cross-examine Officer Price as the intermediate hearsay declarant because Mrs. Douglass' statements to Officer Price were testimonial. Furthermore, Dwyer insists the Commonwealth failed to lay a proper foundation before Officer Fultz offered Mrs. Douglass' prior inconsistent statement.

[4] Kentucky Rules of Criminal Procedure.

In response, the Commonwealth emphasizes that Dwyer did not preserve this challenge. The Commonwealth argues, pursuant to *James v. Commonwealth*, 360 S.W.3d 189, 203 (Ky. 2012), that no Confrontation Clause violation occurred because Mrs. Douglass, not Officer Price, was cross-examined. The Commonwealth also counters Dwyer's hearsay claims by arguing (1) that Mrs. Douglass' prior inconsistent statement was already admitted through the testimony of a previous witness and (2) that the foundation requirement did not apply because Officer Fultz only referenced Mrs. Douglass' prior statement in an unresponsive answer to a question.

The Confrontation Clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821(2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)). The U.S. Supreme Court offered the following guidance when determining whether a statement is testimonial:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

Additionally, KRE[5] 801A provides an exception to the general rule against the admission of hearsay evidence when a party seeks to introduce a witness' prior inconsistent statements. *McAtee v. Com.*, 413 S.W.3d 608, 618 (Ky. 2013). Under that provision,

> A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613[6], and the statement is:
>
> (1) Inconsistent with the declarant's testimony[.]

KRE 801A(a)(1). In Kentucky, it is well-settled that prior inconsistent statements may be introduced for both impeachment and substantive purposes "regardless of whether the witness whose out-of-court statement is to be proved appears as a witness for the party who intends to prove it or as a witness for the adversary party." *Jett v. Commonwealth*, 436 S.W.2d 788, 792 (Ky. 1969). Moreover, when introducing such a statement for substantive purposes,

> *the same type of foundation must be laid as required by CR 43.08*[7] in order that the witness whose testimony is

[5] Kentucky Rules of Evidence.

[6] KRE 613 dictates that a party seeking to introduce evidence of witness' inconsistent statement must ask the witness about the inconsistency "with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it."

[7] Effective January 1, 2005, the Kentucky Supreme Court repealed CR 43.08. Its successor, KRE 613, is identical to the former rule except the more recent edition expressly provides that it does not apply to admissions by a party-opponent as defined in KRE 801A. *See* 7 Ky. Prac. R. Civ. Proc. Ann. Rule 43.08.

> to be contradicted, supplemented, or otherwise affected by the out-of-court statement may have a proper and timely opportunity to give his version or explanation of it.

Id. (emphasis added).

Here, Officer Fultz testified that Mrs. Douglass gave Officer Price her account of the incident. There was no ongoing emergency at the time of this account, and from Officer Fultz's testimony, the only reason Officer Price asked where the men stood during the incident was to establish an element of a crime for a future criminal prosecution. Accordingly, the statements Mrs. Douglass made to Officer Price were testimonial. And since Officer Price was available to testify at trial, Dwyer normally should have had the opportunity to cross-examine him. Furthermore, the Commonwealth did not lay any foundation whatsoever regarding Mrs. Douglass' previous statement that she had seen the men inside the Residence, even though the Commonwealth had every opportunity to ask her if she had ever told a police officer that she had seen the men inside the Residence. As such, Officer Fultz's unresponsive answer contained statements that are generally inadmissible.

Notwithstanding their general inadmissibility, Dwyer did not object to the introduction of these statements at trial, and no palpable error occurred as a result of their admission. Additional evidence properly before the jury, including several admissions from Dwyer and further testimony by Mrs. Douglass, her

husband and the investigating police officers, indicated that Dwyer had unlawfully entered the Residence and removed the cabinets.

As a second challenge, Dwyer claims the circuit court erred in determining as a matter of law that a porch that qualifies as a "dwelling" under KRS 511.030[8] is also a part of a "building" under KRS 511.040,[9] even though the residence to which the porch is attached is uninhabited.

Both briefs cite to the same line of *Colwell v. Commonwealth*, 37 S.W.3d 721, 726 (Ky. 2000), which provides that "every dwelling is a building, but every building is not a dwelling." Moreover, *Johnson v. Commonwealth*, 875 S.W.2d 105 (Ky. App. 1994), held a porch attached to a residence constitutes a dwelling under Kentucky's burglary statute. Hence, a porch attached to a residence is a building, as a species of a larger genus. And because a defendant may still be found guilty of a lesser degree of burglary whether the dwelling is uninhabited or uninhabitable (*see Shackelford v. Commonwealth*, 757 S.W.2d 193, 194 (Ky. App. 1988)), the circuit court's jury instructions were proper.

In his third argument on appeal, Dwyer once again takes issue with Officer Fultz's testimony. According to Dwyer, palpable error occurred when Officer Fultz testified that Dwyer invoked his *Miranda* rights. We disagree.

The Kentucky Supreme Court has recognized that "[t]he Commonwealth is prohibited from introducing evidence or commenting in any

[8] Burglary in the second degree.

[9] Burglary in the third degree.

manner on a defendant's silence once that defendant has been informed of his rights and taken into custody." *Hunt v. Commonwealth*, 304 S.W.3d 15, 35 (Ky. 2009). "The idea is that because *Miranda* warnings implicitly assure their recipient that his silence will not be used against him, it would be fundamentally unfair to allow a defendant's post-*Miranda* silence to be used for impeachment." *Hunt*, 304 S.W.3d at 36. However,

> it is clear that not every isolated instance referring to post-arrest silence will be reversible error. It is only reversible error where post-arrest silence is deliberately used to impeach an explanation subsequently offered at trial or where there is a similar reason to believe the defendant has been prejudiced by reference to the exercise of his constitutional right. The usual situation where reversal occurs is where the prosecutor has repeated and emphasized post-arrest silence as a prosecutorial tool.

Wallen v. Commonwealth, 657 S.W.2d 232, 233 (Ky. 1983).

Here, Soard's counsel cross-examined Officer Fultz over the consistency of Soard's statements provided to the police on the day of the incident. Officer Fultz stated that Soard's story remained the same throughout the investigation, save for his opinion that Soard lied about the presence of a third individual at the Residence during the incident. Soard's counsel then pointed out that Dwyer, a man Officer Fultz also accused of lying, claimed that no other person was at the Residence.

On redirect, the Commonwealth asked Officer Fultz whether either of the defendants said anything about a third individual or another car being at the

Residence after arriving at the police station. Officer Fultz replied, "[Dwyer] refused to say anything else at all and requested his attorney. So once invoking his Fifth Amendment . . . that stopped immediately with him. He did speak with [a detective], but I'm not privy to everything that was there."

Although this was the only reference to Dwyer's invocation of his constitutional rights, the Commonwealth knew before asking this question that Dwyer invoked his Fifth Amendment right to counsel and remained silent at the police station. Furthermore, the questions leading up to this question indicated that the Commonwealth intended to (1) elicit testimony from Officer Fultz to impeach both Dwyer and Soard with their conflicting stories and (2) establish that Dwyer had a chilling effect on Soard. Taken together, we find the Commonwealth's line of questioning smuggled Dwyer's post-*Miranda* silence into evidence via a prosecutorial tool. However, when compared to the overwhelming evidence in the record, we cannot find palpable error resulted.

Dwyer's fourth argument contends the circuit court erred in denying his request to call a second witness after resting his case-in-chief. Such a determination is left to the trial court and will not be disturbed absent a showing of arbitrariness or an abuse of discretion. *See* RCr 9.42; *see also Pilon v. Commonwealth*, 544 S.W.2d 228, 231 (Ky. 1976).

Here, the witness at issue was not present at the start of the trial on June 26, 2014, and did not appear until after all parties announced that they had rested their case. Dwyer did not elaborate as to the subject of the witness'

testimony and did not argue that any injustice would result if the witness was not allowed to testify. Accordingly, the circuit court did not abuse its discretion by not allowing the additional witness.

Dwyer presents a fifth argument challenging the circuit court's denial of his motion for a new trial. Dwyer argues that the circuit court erred by not holding an evidentiary hearing to further investigate the two alleged jury irregularities. This issue was preserved.

In order to obtain a new trial because of juror mendacity, a party must demonstrate (1) that the juror failed to honestly answer a material question on *voir dire* and (2) that an honest answer would have supported a challenge for cause. *Brown v. Commonwealth*, 174 S.W.3d 421, 430 (Ky. 2005). Moreover, hearsay testimony or an affidavit containing hearsay statements is generally inadmissible when offered to support a motion for a new trial. *Brown v. Commonwealth*, 490 S.W.2d 731, 732 (Ky. 1973). And a trial court's decision not to hold a hearing when presented with a motion for a new trial is reviewed for an abuse of discretion. *Id.*

Regarding the first irregularity, the defense asked the jurors on *voir dire* if any of them were "related to Mr. Dwyer by blood or by marriage, close friends with him; work together, belong to social or fraternal organization together or anything of that nature?" The defense also posed the following: "Is there anything I may have failed to inquire of you that needs to be asked, and if you'd like to approach Judge Sheehan would allow that. Any concerns you may have?"

The circuit court examined these questions and evaluated them in light of the affidavits Dwyer's family tendered to the court as well as the juror's sworn statement that she was oblivious to Dwyer's criminal past and did not know the victim of one of Dwyer's previous crimes. The circuit court then found that this evidence did not show that the juror had a reason to answer either of the defense's questions. Because we find the circuit court reasonably arrived at this conclusion based on the evidence, no abuse of discretion occurred.

Furthermore, no abuse of discretion occurred when the trial court declined to grant a new trial based on a recording of the same juror's husband saying that he had heard, from an unknown person, that an unidentified bailiff notified the jury of Dwyer's previous crime by saying, "Before y'all decide what you're going to do, he's already killed a kid, keep that in mind." Although the statement itself is nonhearsay since the matter asserted for its truth is that Dwyer previously "killed a kid," the recording did not reveal that the juror's husband would be able to contribute anything more than hearsay evidence at a potential hearing. The circuit court found that nothing in the record established how the juror's husband acquired this information, whether directly or from an indeterminate chain of individuals, and further determined the information was unreliable because nothing identified which bailiff made the comment or even if any of the jurors actually heard it. Therefore, the circuit court properly found that the recording did not present enough evidence to trigger further inquiry.

Dwyer's sixth argument concerns the sentencing phase of his trial. Dwyer claims that he was unduly prejudiced, *i.e.,* sentenced to serve eighteen out of a maximum twenty years, because the jury was given a record that contained his original, not amended, criminal charges. In support of this position, Dwyer cites *Blane v. Commonwealth*, 364 S.W.3d 140 (Ky. 2013),[10] and specifically argues the following additional charges of which Dwyer was not convicted accompanied the jury back to the jury room: unlawful transaction with a minor, persistent felony offender (on two different occasions), first-degree trafficking in a controlled substance (two counts), engaging in organized crime, assault in the second degree (this was amended to assault under extreme emotional disturbance), and attempted burglary.

As the Kentucky Supreme Court held in *Blane*, a jury is only permitted, during the penalty phase, to hear evidence of "the nature of the prior offenses for which [the defendant] was *convicted*." *Blane*, 364 S.W.3d at 152 (citing KRS 532.055(2)(a) 2) (emphasis added)). Furthermore, the Commonwealth generally "cannot introduce evidence of charges that have been dismissed or set aside." *Id.* (quoting *Cook v. Commonwealth,* 129 S.W.3d 351, 365 (Ky. 2004)). However, in cases where this evidence is admitted without challenge at the trial level, the palpable error standard still applies. *See Chavies v. Commonwealth*, 354

[10] In *Blane*, the Commonwealth elicited direct testimony about several original charges of which the defendant was not convicted and highlighted them in closing argument. The Kentucky Supreme Court found this embellishment resulted in palpable error.

S.W.3d 103, 115 (Ky. 2011). In *Chavies*, the Court concluded no palpable error resulted even though an indictment showing the defendant's dismissed and amended charges was introduced during the penalty phase of his trial. To support its decision, the Court emphasized that the defendant did not receive the maximum sentence and that "the dismissed and amended offenses were never pointed out to the jury by the trial judge, the Commonwealth, or the Commonwealth's witness." *Chavies*, 354 S.W.3d at 115 (Ky. 2011).

Here, Dwyer did not receive the maximum sentence. He also had multiple prior felony convictions similar to the defendant in *Martin v. Commonwealth*, 409 S.W.3d 340 (Ky. 2013).[11] Therefore, even though the circuit clerk who testified for the Commonwealth at one point mentioned one of Dwyer's dismissed charges, it is doubtful the additional information influenced the jury's recommendation. Dwyer's extensive criminal history combined with the evidence properly before the jury provided a sufficient basis for the enhanced sentence, and a sanitized criminal record on remand does not guarantee a lesser sentence. As such, no palpable error resulted.

Dwyer, in his final argument, asserts that the language of the circuit court's judgment relating to restitution violates both KRS 532.032 and 532.033 and should be vacated. The Commonwealth concedes this argument, as it did not find

[11] No palpable error occurred in *Martin*, when the defendant had six prior felony convictions and received the maximum allowable sentence. Dwyer has eight prior felony convictions, including convictions of criminal facilitation to first-degree manslaughter, tampering with physical evidence, first-degree promoting contraband, first-degree fleeing and evading, possession of a firearm by a convicted felon, receiving stolen property over $100, assault under extreme emotional disturbance, and breaking and entering.

an order in the record that specifically stated the amount of restitution to be paid. The Commonwealth thus agreed that the circuit court's order was deficient under KRS 532.032 and 532.033. Accordingly, we AFFIRM the judgment of the Kenton Circuit Court, except we REVERSE the portion of the judgment ordering restitution and REMAND for the circuit court to make the required statutory findings.

ALL CONCUR.

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