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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000811-MR

JOSEPH EARL RATLIFF — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 11-CR-00115

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Joseph Earl Ratliff (Ratliff) appeals from a final judgment entered by the Pike Circuit Court sentencing him to sixteen years in prison after a jury convicted him of burglary in the first degree[1] and theft by unlawful taking

[1] Kentucky Revised Statutes (KRS) 511.020, a Class B felony.

(TBUT) in the second degree.[2] He was acquitted of second-degree arson.[3] Having reviewed the briefs, the record and the law, we affirm.

FACTS

In 2011, Ratliff was indicted on charges of arson, burglary, felony TBUT, and being a second-degree persistent felony offender.[4] The charges stemmed from a 2006 event when a dwelling owned by an unrelated neighbor named Ishmal Ratliff (Ishmal) was entered; property—including guns, power tools and other items totaling more than $500.00—was removed from the home; and the home was burned to the ground. Ratliff was indicted as both principal and accomplice.[5]

The case was originally prosecuted by Assistant Commonwealth Attorney Ronald Burchett and resulted in a jury convicting Ratliff of three charges in February 2012. Two months later, he was sentenced to a maximum term of fifteen years. Ratliff appealed to this Court, alleging four errors—one of which was deemed harmless—and three of which required reversal and remand for a new trial. In *Ratliff v. Commonwealth*, 2012-CA-000705-MR, 2013 WL 4710382 (Ky. App. Aug. 30, 2013, unpublished), a panel of this Court concluded a mistrial should have been declared when two witnesses without personal knowledge of a

[2] KRS 514.030, a Class D felony.

[3] KRS 513.030, a Class B felony.

[4] KRS 532.080. This count was dismissed on the Commonwealth's own motion.

[5] KRS 502.020.

gun sale were allowed to testify Ratliff had sold guns stolen from Ishmal's home to Howard Conn, Sr. Conn being deceased at the time of trial, Ratliff had no opportunity to cross-examine him, meaning the conviction may have impermissibly rested on testimonial hearsay from Conn's son and widow in violation of *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and its progeny. This Court further concluded jurors should have been instructed on the lesser-included offense of second-degree burglary. Finally, the Court held Burchett wrongly became a witness in the case and bolstered testimony from other Commonwealth witnesses by eliciting from Ishmal that Burchett had advised him not to reveal a complete inventory of items missing from the destroyed home.

In preparation for retrial, defense counsel orally moved the trial court to recuse Burchett as prosecutor. When the oral motion was made, the Commonwealth asked that a written motion be filed giving specific reasons supporting recusal. The matter was continued and the court directed defense counsel to file a written motion.

The next time the case was called, new defense counsel entered an appearance in the case and handed the court and Burchett a memorandum of law seeking to disqualify not only Burchett, but the entire Pike County Commonwealth Attorney's Office. Burchett requested time to digest and respond to the new memorandum in which Ratliff argued Burchett had an ethical obligation to recuse because he might be called as a material witness on retrial; Elizabeth Burchett

(Elizabeth), Burchett's wife and also an Assistant Commonwealth Attorney, was statutorily disqualified from handling the case by operation of KRS 15.733(2)(d);[6] and, with half of the four-person office being statutorily disqualified, the two remaining attorneys should also be disqualified and a special prosecutor appointed. As an alternative to disqualifying the entire office, defense counsel asked that Burchett be prevented "from interjecting his opinions in trial."

Due to the late filing of the written defense memorandum, the motion to disqualify was not heard until December 18, 2013. After the case was called that afternoon, the Commonwealth handed defense counsel its written response arguing the motion to disqualify him was based on erroneous assumptions and was designed to cast doubt on Ishmal's credibility by preventing him from explaining why he had not immediately disclosed all the items stolen from his home. Burchett's response also admitted he had erred during the first trial by eliciting testimony from Ishmal that Burchett had agreed[7] with Ishmal's decision not to disclose all the stolen items—but *only after* Ishmal had already withheld the full

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[6] (2) Any prosecuting attorney shall disqualify himself in any proceeding in which he or his spouse, . . . :

d) Is to the prosecuting attorney's knowledge likely to be a material witness in the proceeding[.]

[7] Investigation in this case lasted six years. Due to the unavailability of an arson detective, Ishmal did much of the legwork himself. Ishmal chose not to disclose all the missing property, believing if he alone knew all that had been taken, when items were mentioned or reappeared, he would have evidence to catch the culprit. During his investigation, Ishmal—acting like law enforcement—sought legal advice from Burchett, the prosecutor, as police officers often do. During a conversation with Burchett, Ishmal revealed he had not disclosed everything that had been taken. Ishmal's tactic appeared to work as confidential informants came forward from the community to tell him where to locate his missing property.

list from his insurance company. Burchett explained withholding the complete list was Ishmal's decision alone, but he had agreed with Ishmal it was a good strategy. Burchett further explained he quickly realized his mistake during the first trial, and the improper testimony would have been heard by jurors only once—but for defense counsel repeatedly mentioning it. In opposing the motion to disqualify him, Burchett stated he would not ask the improper question on retrial—thus avoiding repetition of the mistake—but stated his view that:

> it is relevant, crucial to the prosecution and entirely admissible for [Ishmal] to explain why he did not immediately disclose all items that had been stolen, when he actually did disclose that information and to whom.

Burchett drew a distinction between erroneously offering testimony about a prosecutor's advice to a witness, and properly exploring a witness's comments to the prosecutor about circumstances surrounding the crime being tried. Burchett asked that on retrial Ishmal be allowed to say: (1) he did not initially reveal the complete list of stolen items; (2) his rationale for not revealing all the missing items; and (3) he told the Commonwealth Attorney's office he deliberately withheld details.

In response, defense counsel stated Burchett could be "a potential rebuttal or impeachment witness" *if* Ishmal's testimony strayed outside permissible bounds. Defense counsel admitted he could not guarantee Burchett would be called as a defense witness, only that, "we think he might be a witness." In contrast, Burchett was confident Ishmal's testimony on retrial would parrot his

testimony at the first trial, and argued defense counsel had not provided specifics to explain how Burchett could become a witness. When argument concluded, the trial court took the matter under advisement.

On January 14, 2014, a defense subpoena was served on Burchett. The next day, Burchett moved to quash the subpoena, noting the trial court had not found him "to be a legitimate witness" and Ratliff had not explained how he would be a witness—only that he "could" be "a witness to what items were stolen." Burchett argued Ishmal had revealed no stolen items to him beyond those included in the list from which Ishmal had testified to the grand jury. Burchett further argued subpoenaing him was just a defense ploy to gain an unfair advantage by ousting Burchett from the case—a case he had been developing for six years. In a written response opposing the motion to quash, Ratliff stated Burchett might be "necessary as a potential material witness and/or a potential rebuttal witness in this case" and "Burchett cannot control the testimony of Mr. Ishmal Ratliff[.]"

At a hearing on February 5, 2014, in the interest of justice, the trial court disqualified Burchett from prosecuting the case, but disqualified no one else from the Pike County Commonwealth Attorney's Office. Elizabeth assumed representation of the Commonwealth at a pretrial hearing on February 7, 2014.[8] A motion to recuse her was overruled.

A final pretrial hearing was scheduled for March 27, 2014, at which

[8] Elizabeth signed her first pleading in the case on February 24, 2014. It was a response to a defense motion *in limine* to preclude "inadmissible hearsay" and was filed on February 26, 2014.

Elizabeth represented the Commonwealth. Burchett was present, but said nothing.

Discussed at the hearing were Ratliff's motion *in limine* to exclude statements made by Conn about purchasing, trading or otherwise obtaining guns from Ratliff, as well as statements made by attorney Larry Webster, Conn's son, and Conn's widow saying Ratliff had sold or traded Ishmal's guns to Conn and those items had been returned to Ishmal. Defense counsel sought to exclude such testimony arguing it was hearsay based on material learned from Conn who was deceased at the time of trial and unavailable for cross-examination. Just days before trial, Ratliff also moved to quash a subpoena the Commonwealth had served on Webster, again arguing his testimony would violate the confrontation clause and *Crawford.* Defense counsel argued the only fact Webster could add to the trial was he facilitated a transfer of guns (from Conn to Ishmal)—a fact Ratliff offered to stipulate. We reversed the first conviction[9] for admission of testimonial hearsay. At the close of the hearing in advance of the retrial, the trial court denied the

[9] At the first trial, Ishmal had testified he learned some of his missing guns were at Conn's home. This information was provided by Ratliff's stepmother and his ex-brother-in-law. Trooper Melissa Hampton accompanied Ishmal to the Conn home and after confronting Conn outside, Trooper Hampton and Conn's son entered the dwelling and returned with several guns, one of which Ishmal identified as his and stated had been inside his home before the fire. Ishmal testified about a year after the encounter at the Conn home, he received more of his guns "from the Conns in an arranged transaction at the law office of Larry Webster." *Ratliff,* at *4. Ishmal was followed to the witness stand by Conn's son and widow. Conn's son testified his father had purchased from Ratliff the gun Ishmal identified as his. *Id.* Conn's widow testified both she and her late husband had signed affidavits in Webster's office stating the guns in question had come from Ratliff. *Id.* Webster then took the stand and confirmed both Conns had signed affidavits. *Id.* at *5. We reversed the original conviction on appeal due in part to the admission of testimonial hearsay from Conn's son and widow—neither of whom had independent knowledge of the origin of the guns. Furthermore, because Conn was deceased at the time of trial, he was unavailable for cross-examination. *Id.* at *5-6. Webster testified during the retrial; Conn's son and widow did not.

motion to quash, and prohibited the Commonwealth from introducing statements attributable to the late Conn.

Retrial commenced March 31, 2014, with Elizabeth at the helm for the Commonwealth. Again, Burchett sat at the Commonwealth's table, said nothing, engaged in no bench conferences, and was not called to testify. At the conclusion of the guilt phase, jurors convicted Ratliff of first-degree burglary and felony TBUT. At the conclusion of the penalty phase, jurors fixed punishment on the burglary count at sixteen years and three years on the TBUT, both terms to run concurrently for a total sentence of sixteen years. Final judgment in conformity with the jury's verdict was entered on May 14, 2014. Ratliff now appeals his most recent conviction as a matter of right.

ANALYSIS

Ratliff raises four allegations of error on appeal. Citing KRS 17.533(2)(d), he claims Elizabeth should have recused from prosecuting the case because her husband was likely to be a material witness. We disagree.

KRS 15.733(2)(d) requires a prosecutor to recuse when he or she *knows* his or her spouse is "likely to be a material witness in the proceeding[.]"[10]

[10] In both his original and reply briefs, Ratliff argues Elizabeth should have also recused under KRS 15.733(2)(b) because Burchett continued "acting as a lawyer in the proceeding" after being disqualified by the trial court. As proof, we are cited to (VR 4/1/14; 9:52:02) at which Elizabeth purportedly refers to Burchett as "lead counsel" and indicates Burchett had sent exhibits to the defense. We viewed the cited portion of the record, as well as segments both before and after, but found no support for the claim. Furthermore, we have not been cited to a point at which Ratliff made this precise argument to the trial court. Burchett continuing to act as counsel after being disqualified from the case—if it happened—certainly was not the thrust of the argument made to the trial court, nor was it the basis upon which the trial court issued its ruling. An argument cannot be raised for the first time in the appellate court. "We have long held in Kentucky that an issue not raised in the circuit court may not be presented for the first time on

Despite being given numerous opportunities[11] to explain how Burchett would be a material witness on retrial, defense counsel candidly admitted he *could not guarantee* Burchett would be a witness at all—the most he could say was, "we think he might be a witness." Since the Commonwealth had no intention of calling Burchett as a witness, to trigger KRS 15.733(2)(d), Ratliff had to demonstrate Burchett would probably be a material witness. This he never did.

As Ratliff acknowledged in his brief, no case explores facts in which a prosecutor's spouse has been subpoenaed to testify at trial so as to require a prosecutor to step aside. Mere issuance of a subpoena does not automatically make the recipient a material witness. Were this an accurate view of the law, wily defendants would simply subpoena the prosecutor's spouse to change the entire landscape of a case. Suggesting a spouse *might* be called as a witness is simply too nebulous and equivocal to require a prosecuting attorney to disqualify from a case.

There must be more—at least some showing of the spouse having specialized information unknown to anyone else. A material witness is one

> who can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about those matters.

Black's Law Dictionary (7th ed. 1999), p. 1597. Defense counsel suggested no detail known only to Burchett, relying instead on Ishmal's words during the first

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appeal." *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky. App. 2008) (internal citations omitted). Hence we say no more about this new alternative theory of error.

[11] The motion to recuse was mentioned on at least five separate dates.

trial that Burchett was "the only man who knew exactly what was taken from the house. . . ." That may have been a true statement in the midst of the investigation, but Burchett stated he ultimately knew nothing more than the list from which Ishmal testified to the grand jury. We cannot agree that this knowledge transformed Burchett into a material witness, and our view is supported by subsequent events. As retrial unfolded, Burchett was not called to the witness stand by either party, confirming he was not a material witness. We, therefore, affirm the trial court's decision to disqualify Burchett but to allow Elizabeth to prosecute the case.

Ratliff's second claim is Webster should not have been permitted to testify at trial for two reasons—first, Ratliff did not have the opportunity to cross-examine the late Conn—whom Webster represented as a lawyer; and two, the bulk of the Commonwealth's proof came from "witnesses with substantial credibility problems." In his brief, Ratliff alleges during retrial Webster "began to discuss the affidavit" the Conns had signed and told jurors Ratliff had sold guns stolen from Ishmal to Conn even though Webster had no personal knowledge of such a sale. We disagree with Ratliff's rendition of the facts.

From our review of Webster's testimony, he mentioned only items of which he had personal knowledge and did not attempt to convey hearsay which would violate KRE[12] 801. While on the stand, Webster stated he represented the Conns in 2007, and perhaps in 2006. On March 28, 2007, Conn and his widow

[12] Kentucky Rules of Evidence.

brought three guns to Webster's office which Webster briefly stored. Later that day, Ishmal came to Webster's office and retrieved those same guns.

Webster was then asked whether he had negotiated a deal with the Commonwealth on behalf of Conn and his widow. Before Webster answered, defense counsel asked to approached the bench, where he objected, saying he feared hearsay was about to be admitted—apparently anticipating the negotiations involved the affidavit that resulted in reversal of the original trial. The Commonwealth responded it was trying to elicit from Webster only that he had negotiated a deal with the Commonwealth to enable the Conns to avoid being prosecuted for receiving stolen property—the question had nothing to do with the affidavit. The trial court overruled the objection and the affidavit was never mentioned.

As Webster's direct testimony resumed, he acknowledged he and another attorney in his office had negotiated a deal between the Conns and the Commonwealth to allow the Conns to avoid being prosecuted for receiving stolen guns in return for returning the guns and providing information about the source of the guns—a bargain the Conns kept and for which they were not prosecuted. As a result of Webster's testimony, jurors knew the Conns at least suspected they possessed stolen guns, but there was no explanation of how they received those guns nor from whom. Despite Ratliff's statement to the contrary in his reply brief, without pinpoint citation to the record, Webster did not divulge during retrial the

contents of the affidavit he prepared for the Conns, nor did he testify Conn bought from Ratliff any guns taken from Ishmal's home.

During the *original* trial, jurors heard about the affidavit Webster had drafted and both Conn and his widow had signed, even though Conn's widow had no personal knowledge of the facts detailed within that affidavit. That affidavit contained the late Conn's personal knowledge about which he could not be cross-examined and therefore, constituted testimonial hearsay that was erroneously admitted. However, that mistake was not repeated on retrial and none of Conn's statements were admitted.

As for Ratliff's claim that the Commonwealth's proof was based in large measure on untrustworthy witnesses, the jury heard each of those witnesses divulge their legal and marital woes. Jurors determine witness credibility and the appropriate weight to give their testimony. *Commonwealth v. Smith,* 5 S.W.3d 126, 129 (Ky. 1999); *Estep v. Commonwealth,* 957 S.W.2d 191, 193 (Ky. 1997). Here, the Commonwealth developed ample evidence from which reasonable jurors concluded Ratliff was guilty beyond a reasonable doubt. We discern no error.

Ratliff's next claim is two Commonwealth witnesses—his stepmother, Brooke, and his ex-brother-in-law, Jeffrey McCoy—impermissibly introduced Ratliff's drug use and trading of guns for drugs into a trial charging him with only arson, burglary and TBUT. He claims this testimony violated KRE 404(c) since the Commonwealth did not provide advance notice of its intention to offer proof of bad acts. The Commonwealth argues the challenged testimony was

so "inexplicably intertwined" with relevant testimony it fell within KRE 404(b)(2)—one of two exceptions to the prohibition on using "other crimes, wrongs or acts" to prove one's character and action "in conformity therewith."

Brooke testified Ratliff had come to her home with another man about a week after fire destroyed Ishmal's home; Ratliff appeared to be "high." Knowing Ratliff was unemployed, she asked him how he got money for drugs. Ratliff responded by telling her he had sold some of Ishmal's guns after breaking into Ishmal's home and then burning the home in retaliation for Ratliff's brother—Todd—being incarcerated for previously robbing Ishmal. Brooke relayed this information to Ishmal.

During trial, defense counsel did not specifically argue KRE 404(c) had been violated, only that Ratliff had not been charged with using drugs or being high, and requested a mistrial or an admonition to avoid jury confusion. Neither form of relief was given.

Trial courts have great leeway in admitting and excluding evidence. *Commonwealth v. Bell,* 400 S.W.3d 278, 283 (Ky. 2013). We review the trial court's evidentiary rulings for an abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). In other words, we will reverse only if a ruling was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

In reviewing the trial court's denial of relief during Brooke's testimony, we agree with the Commonwealth. Brooke's mention of Ratliff being

high explained why she asked her stepson about how he acquired money to get drugs. Before Ratliff bared his soul to her, Brooke knew nothing about Ishmal's guns having been taken, only that his home had been destroyed by fire. Thus, Brooke's mention of Ratliff being high was "inexplicably intertwined" with the rest of her testimony and separating the two would have seriously and adversely impacted the Commonwealth's case. Thus, under the exception expressed in KRE(b)(2), no error occurred in the admission of Brooke's testimony.

Similarly, McCoy testified to a conversation he had with Ratliff in late June 2006 when Ratliff came to McCoy's home asking whether he had roosters for sale. Ratliff was invited inside the home, and during the ensuing conversation, said "he had got that SOB Ishmal back." McCoy asked Ratliff to explain what he meant and Ratliff said he had gone down the road to a holler, walked behind Ishmal's house, entered Ishmal's house and took his guns. Ratliff said he later became scared there were cameras inside Ishmal's home, so he returned to the home and set it ablaze. McCoy—who grew up with Ishmal—then twice asked Ratliff what he had done with Ishmal's guns, and Ratliff finally stated he took "the guns to Howard Conn's and traded them to dope." Prior to Ratliff's comments, McCoy was unaware guns had been taken from Ishmal's house; he knew only there had been a fire. On June 29, 2006, McCoy shared this information with Ishmal.

In the midst of McCoy's testimony, he was asked about Ratliff's demeanor during their conversation. McCoy responded Ratliff "acted like he was

high on something that day." The trial court overruled a defense objection, noting a layperson may give an opinion on intoxication. KRE 701 allows a lay witness to give an opinion based on personal perception that will clarify the witness' testimony or help determine a fact. Kentucky courts have specifically upheld lay opinion that a person was intoxicated at a particular time. *Motorists Mut. Ins. Co. v. Glass,* 996 S.W.2d 437, 446 (Ky. 1997), as modified (Feb. 18, 1999) (citing *Johnson v. Vaughn*, 370 S.W.2d 591, 593 (Ky. 1963); *Howard v. Kentucky Alcoholic Beverage Control Board*, 294 Ky. 429, 172 S.W.2d 46 (1943); R. Lawson, *The Kentucky Evidence Law Handbook*, § 6.10, p. 281 (3rd ed. Michie 1993)).

Just as Brooke's testimony about details Ratliff had personally told her explained how she learned information that had not been made public, the same was true of McCoy's testimony. Both of them then shared these details with Ishmal which led him to focus on Ratliff, whose brother was incarcerated at the time of the fire on prior robbery charges involving Ishmal's property. Thus, testimony from these two witnesses clarified how Ratliff became a suspect. Furthermore, McCoy's testimony was no surprise to Ratliff since the statement attributed to Ratliff was provided to him during discovery years before the retrial.

While McCoy's testimony that Ratliff appeared to be high may have been unnecessary, we do not deem it so prejudicial as to warrant reversal. McCoy's words echoed Brooke's testimony and were, therefore, cumulative and

harmless at most. We cannot say the trial court abused its discretion in denying a mistrial or admonition.

Ratliff's fourth and final assertion concerns closing argument, wherein he claims the trial court erroneously allowed the Commonwealth to shift the burden and comment on Ratliff's right to remain silent. Ratliff admits the claim is unpreserved and seeks palpable error review under RCr[13] 10.26 which authorizes reversal for an unpreserved error only when it affects a party's substantial rights such that there exists 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).

In viewing both closing arguments, the defense and the Commonwealth each suggested this was a long-standing feud between neighbors that escalated. The defense suggested Ishmal did not "play" well with his neighbors, and as examples stated he had tried to take property from Ratliff's grandfather, had prosecuted Todd for robbing him, and had now focused his sights on eliminating the last remaining Ratliff from the neighborhood, because he would "do whatever it takes to make sure they're not his neighbors." The Commonwealth acknowledged problems existed between Ishmal and Ratliff, but suggested Ratliff was the instigator seeking revenge for his brother's incarceration for previously robbing Ishmal. At the end of closing arguments, one side or the other had portrayed most of the witnesses as liars, or at the very least, people

[13] Kentucky Rules of Criminal Procedure.

motivated to lie. In particular, the defense portrayed Ishmal as having been duped by people telling him what he wanted to hear; suggested the Conns lied to Webster so he would negotiate a deal with the Commonwealth whereby they avoided prosecution for receiving stolen property; and painted Brooke as a jilted woman without custody of some of her children who testified only after being arrested the previous night and told she would be jailed for 180 days if she failed to appear.

The prosecutor's argument Ratliff now claims was so caustic and egregious—but which drew no objection at trial—went as follows:

> But you ignore all of the witnesses who said they heard [the accused] say he caused the fire; that he did the burglary; that he stole the property. When all the fact witnesses tell statements that corroborate independent from one another, all you've got left is to just call them a bunch of liars and say they don't like your client. Ladies and gentlemen, the defense has at its disposal the same power and authority of this court as I do to compel the attendance of witnesses by subpoena and if a subpoena isn't enough, by the court's arrest authority. And they could have brought into this court any of the defendant's own family members—people that were there at the scene—to refute what Ishmal Ratliff and his sister heard [the accused] say at the scene of the fire. Could have brought his Aunt Retha in here to say he was not crying frantically, or to say that he was crying tears of sympathy —heartbreak—to deny the admissions [the accused] made at Jeffrey McCoy's house to the folks there. But they didn't do it. And the only explanation they have offered you for why Ishmal Ratliff would launch such a plot scheme against [the accused] and bring all of these people in to conspire with him, and involve a prosecutor's office, is because he doesn't want that man for his neighbor.

It is against this backdrop the Commonwealth gave its parting comments. A prosecutor enjoys wide latitude in closing argument. *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987), cert. denied, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989). In summation,

> a Commonwealth's Attorney is entitled to draw reasonable inferences from the evidence, to make reasonable comment upon the evidence and to make a reasonable argument in response to matters brought up by the defendant and it does not appear to the court that the argument complained of exceeded the bounds of propriety in any regard.

Hunt v. Commonwealth, 466 S.W.2d 957, 959 (Ky. 1971). Here, the prosecutor simply responded to the arguments made by the defense.

Additionally, a prosecutor does

> not "shift the burden of proof" by arguing during the guilt phase that the defendant failed to rebut the Commonwealth's evidence. "A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of the defense position." *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407, 411–12 (1987), cert. denied, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989); *see also Bowling v. Commonwealth, supra*, 873 S.W.2d at 178–79 (1993); *Haynes v. Commonwealth*, Ky., 657 S.W.2d 948, 953 (1983).

Tamme v. Commonwealth, 973 S.W.2d 13, 38 (Ky. 1998), *as modified on denial of reh'g* (Sept. 3, 1998). We discern nothing impermissible in the Commonwealth's summation.

In considering the overall fairness of the trial, we cannot say the Commonwealth's closing argument rendered the retrial—which lasted more than

three days—"fundamentally unfair." *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996) *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). Following a careful review of the record, we are unwilling to say the Commonwealth's closing argument substantially affected the verdict. Therefore, the alleged error does not constitute palpable error under RCr 10.26.

For the foregoing reasons, we affirm the judgment entered by the Pike Circuit Court.

ALL CONCUR.

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