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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001333-MR

ANTHONY MARTINEZ MERRIMAN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 13-CR-01142-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Anthony Martinez Merriman appeals from a judgment of the Fayette Circuit Court convicting him of one count of third-degree burglary, one count of theft by unlawful taking, under $500, and one count of first-degree persistent felony offender and sentencing him to twelve-years' imprisonment. He alleges the following errors: (1) the trial court erred by allowing a compilation

video of multiple security videos to be played for the jury; (2) the trial court improperly denied his request for a second-degree criminal trespass instruction; and (3) the prosecutor improperly vouched for the truthfulness of a Commonwealth's witness. We conclude there was no error and affirm.

The events leading to Merriman's arrest, indictment and conviction occurred on September 5, 2013, on the premises of the Rio Grande Fencing Company, located off Forbes Road in Lexington. Rio Grande president, Mitchell Blumenfeld, testified that there are two entrances to the property, one going to a parking area and office area and the other to a warehouse in the back. The driveway to the warehouse is fenced with razor wire and a gate, but the gate was open at the time in question. A sign is located by the entrance stating "Rio Grande Fencing Company" and a sign stating "Authorized Persons Only Visitors Apply at Main Office."

At trial, Blumenfeld testified that batteries were sitting inside the warehouse near what he referred to as junk. After speaking with a Rio Grande employee, Patrick Douglas, and watching video recordings from cameras on the property, he discovered the batteries were missing. Blumenfeld testified that he did not know Merriman, Merriman had never been an employee of Rio Grande and Merriman did not have permission to be on warehouse premises or to take the batteries.

Initially, the Commonwealth sought to introduce at trial original security videos recorded at the time of the alleged theft and a compilation of those

videos. Merriman objected on the basis that the compilation would be cumulative if shown in addition to the complete individual security videos. He also argued the original videos were the best evidence. The Commonwealth agreed to introduce only the compilation which the trial court ruled it would allow to be introduced into evidence if it was authenticated as a fair and accurate depiction of the videos.

The video depicts the events at the time the batteries were removed from the warehouse. First, it shows a vehicle operated by a female drive through an open gate into a parking area adjacent to the warehouse. The video then shows the vehicle approach the warehouse door, a male exit the vehicle from the passenger side, enter the warehouse multiple times, and take several batteries to the vehicle. The compilation video then shows the couple exiting the premises. Blumenfeld testified that the compilation video fairly and accurately depicted the premises at the time and date in question.

Patrick Douglas testified that he was working on September 5, 2013, and saw a vehicle driven by a female and containing a male passenger on the property who he initially believed may have been customers or friends of another employee. Eventually, he investigated the reason for their presence in the warehouse area. He testified that he saw the male passenger taking batteries from the warehouse and approached him. Because the male was bleeding, Douglas walked to the office to get a Band-Aid. At that point, the couple drove away. Douglas informed Blumenfeld about the couple's presence on the property.

Mindy Helton testified that on the date of the theft, she and Merriman were driving around looking for discarded property. She testified that Merriman instructed her to enter the Rio Grande premises. She drove through an open gate where a man waved to them as they drove toward the warehouse. Behind a building, the couple saw a battery outside and Merriman then instructed her to stop. After Helton stopped the vehicle, Merriman exited the vehicle and went inside the warehouse.

Merriman returned and opened the back door to the vehicle. He informed Helton someone gave him permission to take some batteries. Merriman then entered the warehouse several times and returned to the vehicle with batteries. Helton testified that a man approached and asked if Merriman needed a Band-Aid, Merriman responded that he did not, and the couple left the premises. She testified that the batteries were old and corroded and were sold at a recycling business for approximately $65. Helton testified that she did not see a sign indicating they could not be in the warehouse area and that Merriman never indicated he believed he had committed a crime by taking the batteries. Finally, Helton testified that she pled guilty to facilitation, a misdemeanor, and agreed to testify truthfully at Merriman's trial.

Sergeant Scott May and Officer Marvin Washington testified they investigated the theft. The officers went to a local scrapping company and discovered where the batteries were sold. Helton's identification card was used to sell the batteries. After interviewing Merriman and Helton, they were arrested.

The defense called one witness, an employee at the scrapping company where the batteries were sold. No witnesses were called to support Merriman's defense that he had permission to take the batteries.

Merriman's first argument pertains to the introduction of the compilation video. He argues the trial court erred in permitting the video to be introduced because under the best evidence rule, the original videos should have been introduced.

We begin with the recognized standard of review. Absent an abuse of discretion, a trial court's evidentiary ruling will not be disturbed. *Kerr v. Commonwealth,* 400 S.W.3d 250, 261 (Ky. 2013). Therefore, the proper appellate inquiry 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).

Kentucky Rules of Evidence (KRE) 1001 provides:

> (1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
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> (2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.
>
> (3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

> (4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

The best evidence rule contained in KRE 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute." "That rule requires a party to introduce the most authentic evidence which is within the power of one to produce[.]" *Marcum v. Commonwealth,* 390 S.W.2d 884, 886 (Ky. 1965). However, the best evidence rule does not preclude the admission of a duplicate unless:

> (1) A genuine question is raised as to the authenticity of the original; or
>
> (2) In the circumstances it would be unfair to admit the duplicate in lieu of the original.

KRE 1003.

Blumenfeld testified the compilation video, duplicated from Rio Grande's security cameras, fairly and accurately depicted the premises on the date and time in question. The compilation merely placed the relevant events in chronological order in a concise manner for the jury to view. The trial court did not abuse its discretion in admitting the compilation video into evidence.

Merriman next contends that he was entitled to an instruction on second-degree criminal trespass as a lesser-included offense of third-degree burglary. He argues the jury could have reasonably believed he entered the premises unlawfully but did not have the intent to commit a crime.

Second-degree criminal trespass is defined in Kentucky Revised Statutes (KRS) 511.070(1) as follows: "A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a building or upon premises as to which notice against trespass is given by fencing or other enclosure." Third-degree burglary is defined in KRS 511.040(1) as follows: "A person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." As pertinent to Merriman's argument, third-degree burglary requires that the defendant have the intent to commit a crime. The trespass statute does not require such intent.

In determining whether to give a jury instruction on a lesser-included offense "[a] trial court is required to instruct the jury on every theory of the case reasonably deducible from the evidence." *Fredline v. Commonwealth,* 241 S.W.3d 793, 797 (Ky. 2007). Instructing the jury on a lesser included offense is required where "considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." *Swan v. Commonwealth,* 384 S.W.3d 77, 99 (Ky. 2012) (quoting *Caudill v. Commonwealth,* 120 S.W.3d 635, 668 (Ky. 2003)). Where there is no evidence to

support a lesser included offense instruction, the instruction is not required. *Houston v. Commonwealth,* 975 S.W.2d 925, 929 (Ky. 1998).

Merriman was entitled to an instruction on second-degree criminal trespass only if the jury could have reasonably believed he was not guilty on the burglary charge but believe beyond a reasonable doubt that he was guilty of second-degree criminal trespass. He relies on Helton's testimony that she and Merriman were driving around looking for items disposed of as trash, that the couple was waved at by Douglas when they entered the property, and he believed the batteries were trash.

Even if, as Merriman contends, he entered the Rio Grande property with no intent to commit a crime, there is overwhelming evidence he formed that intent while in the warehouse and repeatedly took batteries from the warehouse and placed them in Helton's vehicle. The undisputed evidence is that the batteries were located inside the warehouse and not abandoned by a dumpster or other trash reciprocal. Whatever the physical condition of the batteries or their continued usefulness, it remains that at the time the batteries were taken, they were in the warehouse and were Rio Grande's property. There was no testimony from any witness that Merriman was given permission to enter the warehouse and take the batteries.

A trial court is not required to place before the jury "speculative theories . . . merely because the testimony includes some basis for the speculation." *Lackey v. Commonwealth*, 468 S.W.3d 348, 355 (Ky. 2015) (quoting *Brown v.*

Commonwealth, 313 S.W.3d 577, 626 (Ky. 2010)). While there may have been a factual issue about whether Merriman entered the area surrounding the warehouse without intent to commit a crime, the video and testimony at trial are overwhelming evidence that once inside the warehouse, he took the batteries without permission. The trial court did not err in denying Merriman's request for an instruction on second-degree criminal trespass.

Merriman concedes his final allegation of error that the prosecutor improperly vouched for Helton's truthfulness is unpreserved and requests review under the palpable error standard found in Kentucky Rules of Criminal Procedure (RCr) 10.26. As explained in *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (internal quotations and footnotes omitted):

> A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error. If not, the error cannot be palpable.

Additionally, even when properly preserved, "when reviewing claims of prosecutorial misconduct, we must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Id*.

In its closing argument, the defense argued Helton received the benefit of a plea deal in exchange for her testimony. Merriman contends that the following

portion of the Commonwealth's closing argument regarding Helton's plea deal and in response to defense counsel's comments warrants palpable error relief:

> Mindy got a deal, because Mindy never got out of the car. Mindy never stole anything. That guy got out of the car. He decided to go into the warehouse and just take whatever he, he wanted. And you saw it on video, and heard the evidence here, she didn't steal anything. She didn't burglarize anything. She just provided the means or opportunity for this man to commit the crime of theft in the Rio Grande warehouse. And, that's why she got a deal, and why she testified, and I submit to you that she told you the truth as she perceived it today.

"[C]ounsel has wide latitude in making opening and closing arguments." *McMahan v. Commonwealth*, 242 S.W.3d 348, 350 (Ky.App. 2007). That latitude includes responding to defense counsel's comments made during closing arguments. *Ordway v. Commonwealth,* 391 S.W.3d 762, 795-96 (Ky. 2013). However, it is not so wide as to permit the prosecution to vouch for his or her own witness by expressing a personal belief that a witness is truthful and "thereby placing the prestige of the [prosecutor's] office . . . behind that witness." *United States v. Francis,* 170 F.3d 546, 550 (6th Cir. 1999). Improper vouching generally involves direct statements of personal belief that suggest that the prosecutor has knowledge of facts not presented to the jury which bear on the witness's credibility. *Id*.

The prosecutor's statement regarding Helton's truthfulness was based on the evidence, not on his personal opinion, and in response to Merriman's suggestion in closing that Helton testified untruthfully in exchange for a plea bargain. Moreover, the evidence against Merriman weighed heavily against his

innocence. The prosecutor's comments were not such that there was palpable error rendering Merriman's trial manifestly unjust.

Based on the foregoing, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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