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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001146-MR

ERIC LEWIS

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 14-CR-00139

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Eric Lewis appeals the judgment of conviction and sentence of ten years' incarceration imposed by the Knox Circuit Court after a trial by jury. We affirm.

The facts leading to the arrest and indictment are not in dispute, and will only be recited as is necessary to the understanding of this opinion. On

November 11, 2014, Lewis was arrested for Theft by Unlawful Taking Over \$500 (two counts) for his involvement in the theft of a utility trailer and a riding lawn mower. After the matter was waived to the grand jury, Lewis was indicted as charged with an additional count of the status offense of Persistent Felony Offender (PFO) in the First Degree. Kentucky Revised Statutes (KRS) 514.030(2)(d) and 532.080(3), respectively.

Trial was held on July 1, 2015. The defense theory was that Lewis often loaned the van to others and was not driving the van when the trailer was seen hitched to it. The Knox Circuit Court directed a verdict of acquittal on the theft charge relating to the lawn mower. The jury convicted Lewis of the trailer theft and recommended a sentence of five years. The sentence was enhanced to ten years after the jury found Lewis guilty of the amended charge of PFO in the second degree. KRS 532.080(2).

On appeal, Lewis argues that there were instances during trial where impermissible comments were made. By his own admission the alleged errors were largely unpreserved: the first alleged error pertaining to questions and comments directed to a defense witness contained no objection, and the second alleged error only received a limited objection by trial counsel. We thus examine the allegations under a palpable error standard, namely:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a

new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Kentucky Rule of Criminal Procedure (RCr) 10.26.

The first alleged error concerns the prosecutor's cross-examination of Cassandra Faircloth, the girlfriend of Lewis (who was with him when he was arrested). In an attempt to impeach Faircloth, the assistant Commonwealth Attorney questioned her about statements she had made during an interview with him immediately preceding trial. According to Lewis, these questions (and similar ones asked during the sentencing phase) as well as the prosecutor's comments during closing argument, contained improper "assertions of fact from counsel" and had "the effect of making a witness of the lawyer and allowing his . . . credibility to be substituted for that of the witness." *Holt v. Commonwealth*, 219 S.W.3d 731, 737 (Ky. 2007).

Lewis contends that the prosecutor's actions cannot be deemed harmless, that together the questions and comments completely undermined the defense.

While we cannot condone the prosecutor's behavior, we nevertheless hold the errors harmless.

That the error is obvious, however, is not the end of the palpable-error inquiry. Reversal for such an error will not be granted unless "it can be determined that

manifest injustice, i.e., a repugnant and intolerable outcome, resulted from that error.” *McCleery [v. Com.]*, 410 S.W.3d [597,] 606 [(Ky. 2013)]. We have described this as 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). Alternatively, we have described such errors as those that are “shocking or jurisprudentially intolerable.” *Id.* at 4.

This Court concludes that the error did not create a manifest injustice. Saulsberry's testimony was confusing at best. The prosecutor's attempt to impeach him, though erroneous in form, had little substantive effect in this case. We cannot say that it caused a repugnant and intolerable outcome or a probability of a different result, or that it was an error so fundamental as to threaten Dillon's entitlement to due process of law. The error, therefore, was not palpable.

Dillon v. Commonwealth, 475 S.W.3d 1, 21-22 (Ky. 2015).

Unlike the errors in *Holt, supra*, the witness (Faircloth) in this case agreed with the prosecutor when he questioned her. Moreover, a third party (namely, Kentucky State Trooper Chad Gregory) was present during the pre-trial interview and could have been called to testify had Lewis objected to that line of questioning. *See Dillon, supra* at 20-21. Additionally, the uncontradicted eyewitness testimony identifying Lewis as the driver of the van with the trailer attached on the date of the theft supports the Commonwealth's response that there was no likelihood of a different outcome. RCr 10.26; *Dillon, supra*; *McCleery, supra*. *See also Torrence v. Com.*, 269 S.W.3d 842, 844 (Ky. 2008).

We likewise hold harmless the comments regarding Lewis’s pre-trial, pre-*Miranda*¹ silence. Not only had Lewis opened the door to this line of testimony during defense counsel’s opening statement, and again during cross-examination of Trooper Gregory (thus effectively waiving the error)², but also neither instance was prejudicial to Lewis. “[W]e cannot say that the admission of the statements would require reversal on this record. Their admission was harmless beyond a reasonable doubt.” *Dillon, supra* at 15; RCr 10.26.

The judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

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¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² *See, e.g., Metcalf v. Commonwealth*, 158 S.W.3d 740, 746 (Ky. 2005).