

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001412-MR

JOHN MORTON HARRIS, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 15-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: John Morton Harris, Jr. appeals from a final judgment of the Fayette Circuit Court convicting him of flagrant nonsupport and being a persistent felony offender in the second degree. We affirm.

Harris and Shannon Napier had a romantic relationship that produced three children. After they separated, on June 22, 2004, Harris was ordered to pay

child support of \$300 per month, but his payments were sporadic. In January 2015, Harris was indicted for flagrant nonsupport for the period after December 2011, and for being a persistent felony offender in the second degree. After a jury trial, Harris was convicted of both offenses and sentenced to three years for flagrant nonsupport enhanced to seven years for being a persistent felony offender in the second degree, probated for a period of five years. This appeal followed.

During the jury trial, an employee of the child support division of the County Attorney's Office testified that she had audited Harris's child support payments for December 1, 2011 to June 30, 2016. She stated that for that time period, he owed \$16,500, but had made only approximately fifteen payments totaling \$1,480. When she subtracted the payments he made during that time, the balance was \$15,020. An attorney in the County Attorney's Office testified that during a two-year period and two six-month periods, Harris did not pay any support.

Harris testified in his own defense. In describing his work history, he stated that he had difficulty finding employment in Lexington and decided to move to North Carolina in May 2012. When he first moved, he was not covering his own expenses and his fiancée helped support him. He got food stamps and took what odd jobs he could, but could not find work his first two years in North Carolina. He ended up going to many work programs offered by Goodwill. He lost his driver's license shortly after moving to North Carolina, so his fiancée had to provide transportation for him. Harris testified he had served in the military in

the Marines from 1989-1993. He also stated that he had difficulty obtaining employment because he had been diagnosed with Post Traumatic Stress Disorder (PTSD). He speculated that the fact that he was a convicted felon may also have affected his ability to secure employment. He testified that he had applied for disability based on his PTSD in 2014 but had not received a final decision on whether he would be granted disability assistance.

In opening statement, defense counsel stated to the jury that Harris was a combat veteran and suffered from PTSD. The Commonwealth called Shannon Napier, the mother of Mr. Harris' children, as its first witness. Before she testified, counsel approached the bench. The prosecutor told the court that Napier had told him Harris had been a Marine and saw combat but was dishonorably discharged, and that he had made a statement to her that he was going to claim PTSD to get benefits. Defense counsel objected that no proof existed to support the assertion that he had been dishonorably discharged. The prosecutor responded that the statement by Harris constituted an admission that he had been dishonorably discharged. The prosecutor indicated he was concerned the defense was trying to claim Harris was trying to get a job but was not working because of PTSD. Defense counsel stated the point in bringing up his service with the Marines was merely to explain his PTSD. The court speculated on whether Harris would be entitled to disability if he was dishonorably discharged. The prosecutor said if Harris testified about being in the Marines and applying for disability, he wanted to cross-examine Harris on whether he had been

dishonorably discharged. The court asked the prosecutor to hold off asking Napier about the issue at that time. The Commonwealth never presented proof or brought up the military discharge in its case-in-chief.

Before cross-examination of Harris, the prosecutor approached the bench and again asked the court to allow it to ask Harris whether he had been dishonorable discharged. If Harris denied it, he proposed calling Napier to say Harris told her he was going to say he had PTSD so he could get benefits, and this went to his credibility. While defense counsel said she would not argue about whether the prosecutor could ask Harris about it, she argued the prosecution could not call Napier. The court indicated he would allow the question to be asked because his unofficial research suggested Harris might not be eligible for benefits and there was no proof of his diagnosis of PTSD other than his testimony. The prosecutor asked Harris if he was dishonorably discharged from the Marines and Harris responded that that was not true. During this portion of the cross-examination, Harris admitted he still had the ability to work despite any disability based on PTSD.

During deliberations before rendering their verdict, the jury submitted a question stating: “Is he (Mr. Harris) being treated for PTSD and where?” Upon agreement by both parties, the circuit court responded by telling them to “Please rely upon the evidence.”

Harris contends the prosecutor violated several Kentucky Rules of Evidence (KRE) by asking him if he had been dishonorably discharged from the

Marines. He argues that the kind of discharge he received from the Marines was irrelevant and prejudicial in violation of KRE 402 and 403, and constituted improper use of specific instances of bad conduct in violation of KRE 404(a) and (b). Generally, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” KRE 401. All relevant evidence is admissible; however, relevant evidence may, nonetheless, be excluded “if its probative value is substantially outweighed by the danger of undue prejudice” KRE 403. “A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” KRE 611(b).

Determinations as to the relevance and admissibility of evidence are left to the sound discretion of the trial court, so the trial court’s decision to admit or exclude evidence should only be reversed if it abused its discretion. *Hammond v.*

Commonwealth, 504 S.W.3d 44, 57 (Ky. 2016). The trial court has a substantial amount of discretion in its performance of this KRE 403 balancing test. *Doneghy v. Commonwealth*, 410 S.W.3d 95, 109 (Ky. 2013). Similarly, the trial court’s rulings concerning the scope on cross-examination are reviewed for abuse of discretion. *Davenport v. Commonwealth*, 177 S.W.3d 763, 771 (Ky. 2005).

Moreover, in *Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010), the Supreme Court held that a trial court may permit impeachment of a witness on collateral issues subject to the abuse of discretion standard of review. The test for an abuse of discretion “is whether the trial judge’s decision was arbitrary, unreasonable,

unfair, or unsupported by sound legal principles.” *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007).

An initial matter that affects the type of review in this case involves the failure of Harris to adequately preserve this issue. After the prosecution had presented its case-in-chief but before it began its cross-examination of Harris, a bench conference was held concerning the questioning of Harris on whether he had been dishonorably discharged and his alleged statements to Napier about his claim of having PTSD. When the prosecutor indicated he wanted to question Harris on those issues, defense counsel stated that she was not going to argue whether or not the prosecutor could question Harris about whether he had been dishonorably discharged, but she opposed any questioning on any PTSD admissions. This action constituted a forfeiture of the right to review any alleged error in the cross-examination of Harris on the dishonorable discharge issue.

Generally, a party is estopped from asserting an invited error on appeal. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006). Noting the United States Supreme Court's distinction, in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), between forfeited errors, which are subject to plain error review, and waived errors, which are not, the Ninth Circuit Court of Appeals has held that invited errors that amount to a waiver, i.e., invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review. *United States v. Perez*, 116 F.3d 840 (9th Cir.1997).

Quisenberry v. Commonwealth, 336 S.W.3d 19, 37-38 (Ky. 2011). In *Olano*, the Court stated: “Waiver is different from forfeiture. Whereas forfeiture is the failure

to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” 507 U.S. at 733, 113 S. Ct. at 1777 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)). In cases involving a mere failure to object or to appreciate the need to object, the objection is instead deemed merely forfeited and the unpreserved error may be reviewed for palpable error. *Tackett v. Commonwealth*, 445 S.W.3d 20, 28-29 (Ky. 2011) (involving failure to object to the admission of evidence); *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013) (involving failure to object to errors in instructions). Defense counsel had an opportunity to present an argument and object to the prosecution’s questioning of Harris on the dishonorable discharge, but failed to do so. In his appellate brief, Harris requests that this Court review the issue under Kentucky Rule of Criminal Procedure (RCr) 10.26, palpable error, if we find it was not properly preserved for review. While defense counsel’s actions arguably constituted a waiver of the issue, we need not decide that issue and will treat it as a forfeiture subject to palpable error review.

Under RCr 10.26, an unpreserved error may only be corrected on appeal if the error is both “palpable” and “affects the substantial rights of a party” to such a degree that it can be determined “manifest injustice . . . resulted from the error.” For error to be palpable, “it must be ‘easily perceptible, plain, obvious and readily noticeable.’” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (quoting *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997)). The rule’s requirement of manifest injustice requires showing 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). *Young v. Commonwealth*, 426 S.W.3d 577, 584 (Ky. 2014).

In this case, the circuit court indicated that it was allowing the prosecution to question Harris on whether he had received a dishonorable discharge from the military because his research indicated that Harris would not be eligible for disability benefits if he had been dishonorably discharged. In fact, under federal law, Harris would not be entitled to veteran's disability benefits if he had been dishonorably discharged. *See, e.g., Hayes v. Brown*, 7 Vet. App. 420 (1995); 38 U.S.C.¹ § 1101; 38 U.S.C. § 1131; 38 C.F.R.² § 3.12. Harris had injected the issue of his possible receipt of disability benefits based on his alleged PTSD, so the inquiry as to his possible dishonorable discharge was relevant. Since the question was not intended to attack Harris's credibility, but rather the substantive issue of his eligibility for disability, KRE 608 is not implicated. Even if this is considered a collateral issue, the circuit court did not abuse its discretion in allowing the prosecution to cross-examine him on this issue relevant to his eligibility for disability benefits. The court's decision to allow the prosecution to pose the single question on whether Harris was dishonorably discharged does not constitute a plain, obvious error.

In addition, Harris has not shown that he suffered "manifest

¹ United States Code.

² Code of Federal Regulations.

injustice” based on this situation. The evidence clearly demonstrated that Harris had violated the flagrant nonsupport statute by failing to pay his child support for a period exceeding six months with an arrearage over \$1,000.00, which Harris did not dispute. The cross-examination on this issue consisted of one question with Harris responding that it was not true that he had been dishonorably discharged. Therefore, any prejudicial effect was minimal at best. Harris’s argument that the jury’s question submitted during deliberations indicates prejudice from the questioning is unpersuasive. The jury’s inquiry involved the fact that the only evidence on PTSD involved Harris’s statement that he suffered from PTSD, and it did not mention the issue of a dishonorable discharge. He presented no objective evidence, such as medical evidence, or specific situations showing he could not obtain or was released from employment because of symptoms of PTSD. On the contrary, Harris testified that he was able to work and did so when he was able to secure a job. Consequently, Harris has not shown a probability of a different result or error so fundamental as to threaten his entitlement to due process of law as to be shocking or jurisprudentially intolerable.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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