RENDERED: APRIL 12, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-002030-MR

NICOLE S. FAISON — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 16-CR-00856

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

JONES, JUDGE: This appeal arises out of a judgment of conviction entered by the Hardin Circuit Court wherein Appellant, Nicole S. Faison, was convicted of first-degree trafficking in a controlled substance and being a first-degree persistent felony offender. For the reasons more fully explained below, we affirm.

I. BACKGROUND

On January 25, 2016, Faison sold approximately 1.4 grams of crack cocaine to Roxanna Bradley, a confidential informant (C.I.) for the Greater Hardin County Narcotics Task Force ("Task Force"). Ms. Bradley had worked for the Task Force on numerous occasions over the course of twenty years. On this occasion, Ms. Bradley contacted the Task Force and offered to make a drug buy from Rosilind Tyndall in Radcliff. Officers on the Task Force agreed to set up a controlled buy, and Ms. Bradley met with Detective Clayton Ellis of the Radcliff Police Department and two other officers. The officers searched Ms. Bradley and her vehicle, attached a hidden camera to her shirt, provided her with $220.00 to purchase crack cocaine, and followed her to the buy location.

At trial, the Commonwealth played a video of the controlled buy recorded by the hidden camera attached to Ms. Bradley's shirt, which begins when Ms. Bradley donned the shirt with a hidden camera and ends when she met with the detectives after the alleged buy. Ms. Bradley drove to an apartment complex in Radcliff where Ms. Tyndall lived, at which point Ms. Tyndall met Ms. Bradley outside and invited her upstairs into her second-story apartment. When Ms. Bradley entered the apartment, there were two other people inside whom she did not know. Detective Ellis later identified Faison as one of the other persons in the apartment. After Ms. Bradley gave Ms. Tyndall a twenty-dollar finder's fee,

Faison took the remaining $200.00 from Ms. Bradley and went outside. Faison returned a few minutes later and said, "He ain't gonna do it." Then, Faison put her fist in Ms. Bradley's palm and, either gave her crack cocaine, as Ms. Bradley claimed, or returned her $200.00, as Faison claimed. Ms. Bradley met with Detective Ellis following the buy and gave him 1.408 grams of crack cocaine. The detectives searched Ms. Bradley's person and her car and took her report of what happened.

The jury found Faison guilty of first-degree trafficking in a controlled substance and being a first-degree persistent felony offender. The trial court sentenced Faison to a total of ten years' imprisonment for her crimes. This appeal followed.

II. ANALYSIS

Faison raises four issues on appeal: (1) the trial court erred when it permitted Detective Ellis to testify about prior encounters with Faison; (2) the trial court erred when it permitted Detective Ellis to testify regarding the informant's reliability; (3) reversible error occurred when the Commonwealth explained during closing argument why the other detectives were not called as witnesses; and (4) these errors amounted to cumulative error.

First, Faison argues reversible error occurred when Detective Ellis testified about having prior encounters with her. Faison concedes this issue is unpreserved and requests review for palpable error under RCr[1] 10.26.

> Under Criminal Rule 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. 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.

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014) (internal quotation marks and citations omitted). "For an error to be palpable, it must . . . involve prejudice more egregious than that occurring in reversible error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (internal quotation marks and citation omitted). There must be a "'substantial possibility' that the result in the case would have been different without the error. If not, the error cannot be palpable." *Id.* Additionally, "[a]n error is palpable only if it is shocking or jurisprudentially intolerable." *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (internal quotation marks and citation omitted).

[1] Kentucky Rules of Criminal Procedure.

During trial, Detective Ellis testified that when he reviewed the video recording of the controlled drug buy, he recognized Faison as the person taking the money in exchange for drugs. The detective testified he had previous encounters with Faison and stated, "I was familiar with Ms. Faison. I immediately recognized her." Faison did not object below but now argues this statement constitutes evidence of other bad acts, which is prohibited by the Kentucky Rules of Evidence (KRE). KRE 404(b) precludes "evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith" unless one of the two following exceptions applies:

> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

Id. We take caution when applying an exception to the general rule because of the risk of "prejudicial consequences." *Huddleston v. Commonwealth*, 542 S.W.3d 237, 243 (Ky. 2018).

At no point during his testimony did Detective Ellis mention other crimes or specific interactions. Instead, Detective Ellis made a general statement about his familiarity with Faison. The Supreme Court of Kentucky has held that an officer's vague statement that he had dealt with a defendant "on many different

occasions does not fall under KRE 404(b)." *Peyton v. Commonwealth*, 253 S.W.3d 504, 517 (Ky. 2008). Because Detective Ellis's statement does not fall under KRE 404(b), we cannot say the admission of this testimony rose to the level of manifest injustice. Thus, the trial court did not palpably err.

Second, Faison argues reversible error occurred when Detective Ellis vouched for Ms. Bradley's proven reliability as a C.I. Faison did not preserve this issue by objection and requests review for palpable error under RCr 10.26. KRE 608(a) allows a party to attack or support a witness's credibility through "evidence in the form of opinion or reputation." However, "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." KRE 608(a)(2). In *Fairrow v. Commonwealth*, 175 S.W.3d 601 (Ky. 2005), the detective was the first witness called, and he attempted to bolster the C.I.'s credibility before the C.I. testified. *Id.* at 606. The Supreme Court of Kentucky held the detective's testimony was inadmissible character evidence under KRE 608(a) because the detective attempted to bolster the C.I.'s credibility before it had been attacked but further held the unpreserved error did not constitute "manifest injustice so as to require reversal as palpable error." *Id.* at 607; *see also Commonwealth v. Wright*, 467 S.W.3d 238 (Ky. 2015).

Here, the C.I. was the first witness called by the Commonwealth, Faison attacked her credibility on cross-examination, and then Detective Ellis testified regarding the C.I.'s credibility. Unlike the circumstances in *Fairrow*, KRE 608(a)(2) applies because the C.I.'s credibility was attacked before the Commonwealth questioned Detective Ellis regarding her reliability. As such, there was no error.

Third, Faison argues reversible error occurred when the Commonwealth explained during closing argument why it did not provide the testimony of the other two detectives. During closing argument, Faison argued the C.I. was not truthful with Detective Ellis, and the Commonwealth could have called two other detectives who were involved with the controlled buy to provide more detail. In response to Faison's argument, the Commonwealth argued during closing that it did not call the two other detectives because all the detectives involved "saw pretty much the same thing." Faison objected in the presence of the jury, arguing the Commonwealth "doesn't get to bring into evidence thing's [it] didn't bring in." The trial court overruled Faison's objection in the jury's presence based on the following reasoning: "The argument has been made as to why witnesses were not called. He can comment on why they weren't called. It is not testimony. It is argument."

Faison informed the jury there were other detectives that could have been called during her closing argument. Although Faison objected to the Commonwealth's explanation of its decision not to call the other detectives to testify, she prompted the Commonwealth to respond. Faison's argument invited the Commonwealth to make the comment she complains of, and "invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review." *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011) (citing *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997)). Because Faison invited the Commonwealth's error, she waived her right to appeal this issue. *Id.*

Even if Faison had not invited the statement she now complains of, any prosecutorial misconduct was harmless error because it "does not affect the substantial rights of the parties." RCr 9.24. "[W]hen 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." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citing *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004)). The Supreme Court of Kentucky "has repeatedly held that a prosecutor is permitted wide latitude during closing arguments and is entitled to draw reasonable inferences from the evidence . . . as well as respond to matters raised by the defense." *Commonwealth v.*

Mitchell, 165 S.W.3d 129, 132 (Ky. 2005) (citation omitted). The Commonwealth's statement did not result in an unfair trial. The jury viewed the entire video of the controlled buy, heard the C.I.'s testimony, and heard Detective Ellis's testimony. There was sufficient evidence of Faison's guilt, and the Commonwealth's comment was fleeting. The trial court informed the jury the statement was argument and not testimony. "The comments neither prejudiced [the appellant's] right to a fair trial, nor unduly pressured the jury to punish her. As such, any error must be deemed harmless." *Id.* at 133 (citing RCr 9.24).

Finally, Faison argues the errors complained of amount to cumulative error. "[M]ultiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair. We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010) (citing *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992)). "If the errors have not individually raised any real question of prejudice, then cumulative error is not implicated." *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012) (citation and internal quotation marks omitted). "Where . . . none of the errors individually raised any real question of prejudice, we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice." *Brown*, 313 S.W.3d at 631 (citing

Furnish v. Commonwealth, 95 S.W.3d 34 (Ky. 2002)). Throughout our review, we have held no single error was so egregious as to require reversal. Likewise, considering the record as a whole, it is clear Faison received a fair trial, and there was no cumulative error requiring reversal.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Hardin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven J. Buck
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Joseph A. Beckett
Assistant Attorney General
Frankfort, Kentucky