RENDERED: DECEMBER 13, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001653-MR

JAMES ARIN MOORE APPELLANT

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 18-CR-00034

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, K. THOMPSON, JUDGES.

GOODWINE, JUDGE: James Moore appeals, as a matter of right, his judgment of conviction in the Martin Circuit Court for trafficking in a controlled substance and being a second-degree persistent felony offender. Moore argues the trial court incorrectly: (1) admitted an audio recording into evidence that was not properly authenticated; (2) allowed the Commonwealth to improperly interpret audio

recordings to the jury; and (3) allowed the Commonwealth to improperly bolster witnesses' testimony during closing argument. Finding no error, we affirm.

BACKGROUND

Richard Maynard was a confidential informant for the Martin County Sheriff's Department ("Department"). Maynard acted as an informant for a drug trafficking investigation involving Moore. Department Sheriff John Kirk headed the investigation. Maynard was to approach Moore and attempt to have him agree to a drug buy. In preparation for the attempted buy, Deputy Chris Todd and Sheriff Kirk concealed an electronic recording device inside Maynard's shirt pocket.[1]

On August 17, 2017, Maynard approached Moore's mobile home and knocked on the door until Moore answered. The two men engaged in conversation, Maynard initiated the buy, and the two men drove to an undisclosed location, where Maynard purchased two oxycodone pills from Moore. After the drug buy occurred, Maynard returned to Sheriff Kirk and Deputy Todd, giving them the pills and the recording device.

On February 1, 2018, the Martin County Grand Jury indicted Moore for two offenses: (1) trafficking in a controlled substance, first degree, first offense; and (2) persistent felony offender, second degree. Four days later, an

---

[1] The recording device captured one hour and four minutes of audio.

arrest warrant was issued, and Moore turned himself in to the Department. The trial court ordered Moore's trial to be held on September 12, 2018.

During the trial, the Commonwealth called Sheriff Kirk, Deputy Todd, and Maynard as witnesses. The Commonwealth's examination of Sheriff Kirk consisted of him recounting how the Department made a deal with Maynard to be an informant and detailed the remainder of the investigation. Sheriff Kirk further testified that his knowledge of the buy came from listening to the audio recording, as well as conversations with Maynard regarding what occurred on scene.

While examining Sheriff Kirk, the Commonwealth questioned him about the audio recording. Sheriff Kirk testified that: (1) he gave the recording device to Maynard; (2) Maynard kept the recording device in his pocket through the entirety of the buy and did not turn it off; (3) he turned off the recording device once Maynard returned it; (4) he listened to the recording in its entirety; (5) he recognized and could identify the CD to which the audio recording had been copied; and (6) he identified Maynard's, Moore's, and his own voices on the audio recording.

Once Sherriff Kirk made these statements, the Commonwealth introduced the audio recording into evidence through the CD containing a copy of the recording. At that point, Moore objected to the audio recording's admission

into evidence, arguing that Sheriff Kirk could not authenticate the recording. The trial court overruled the objection. Once admitted into evidence, the Commonwealth played the recording for the jury.

The Commonwealth also called Maynard to testify. On the stand, Maynard recounted the drug buy from start to finish, including his conversation with Moore. His testimony mirrored the audio recording's findings. The Commonwealth did not ask him to authenticate the audio recording.

When the Commonwealth rested its case-in-chief, Moore moved for a directed verdict, citing the lack of sufficient evidence to convict. In arguing the motion, Moore maintained that the Commonwealth had not established the drug buy in fact occurred. The trial court denied the motion. Following arguments by counsel, the case proceeded to deliberation, and the jury found Moore guilty on both counts. On November 5, 2018, the trial court sentenced Moore to eight years and entered its judgment of conviction. This appeal followed.

ANALYSIS

"We review the issues raised by the parties using . . . different standards. Therefore, as we analyze each issue, we set forth the appropriate standards as necessary." *Banker v. Univ. of Louisville Athletic Ass'n, Inc.*, 466 S.W.3d 456, 460 (Ky. 2015).

This is an appeal of a criminal conviction. In our review, we must address three issues regarding whether the trial court: (1) abused its discretion in admitting the audio recording into evidence; (2) allowed the Commonwealth to improperly interpret audio recordings to the jury; and (3) allowed the Commonwealth to improperly bolster witness testimony during closing argument.

We first address whether the trial court incorrectly admitted the audio recording into evidence. On appeal, we review the trial court's finding of authentication under an abuse of discretion standard. *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004); s*ee United States v. Jones*, 107 F.3d 1147, 1150 (6th Cir. 1997) (addressing the authentication, under FRE 901, of a card purported to have been written by the defendant).

Per the Kentucky Rules of Evidence ("KRE"), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." KRE 901(a). Further, KRE 901(b) illustrates examples of appropriate methods of authentication or identification. Of particular relevance here is KRE 901(b)(5), which states "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."

Our Supreme Court has interpreted this section of the rule to mean that the witness who recognizes the voices on an audio recording does not have to be involved in production of the recording. *Campbell v. Commonwealth*, 788 S.W.2d 260, 264 (Ky. 1990) (quoting R. Lawson, *The Kentucky Evidence Law Handbook*, Sec. 7.10(III) (2nd. ed. 1976)) ("'[T]estimony sufficient to support a finding that tape recordings are what they are purported to be is sufficient evidence of authenticity for introduction of the recordings into evidence.'"). In *Campbell*, the Supreme Court expounded on its prior holding in *Poteet v. Commonwealth*, finding "a less rigorous approach to the laying of a proper foundation, reasoning that tape recordings are like photographs, in that it is not necessary to produce the photographer for verification of the photos 'if it could have been provided by anyone with sufficient knowledge to assure the trial court of the accuracy of the photographs.'" *Id*. (quoting *Poteet v. Commonwealth*, 556 S.W.2d 893 (Ky. 1977)).

Here, there are no breaks in the chain of custody of the audio recording. Sheriff Kirk testified at trial that he turned the recording device on and placed it in Maynard's pocket, Maynard testified that he never altered or turned off the recording device during the entirety of the drug buy, and once the buy was completed, Maynard reported back to Sheriff Kirk, who testified he retrieved the device and turned it off. As the Supreme Court has held, "'[p]art of the

identification of evidence is a demonstration of its integrity, that it is in fact what its proponent claims it to be.' The text of KRE 901 'essentially codifies the old common law identification rule. . . .'" *Geary v. Commonwealth*, 490 S.W.3d 354, 357 (Ky. 2016) (citations omitted).

Therefore, under *Geary*, "when identifying or authenticating evidence, trial courts should consider whether the matter in question is sufficiently connected by time, place, and circumstance to the underlying charge to prove the matter asserted by the proponent of the evidence." *Id*. In this case, Sheriff Kirk gave the recording device to Maynard, Maynard kept the recording device in his pocket through the entirety of the buy and did not turn it off, Sheriff Kirk turned off the recording device once Maynard returned it, he listened to the recording in its entirety, and he discussed with Maynard what transpired during the drug buy. Given these facts, the Commonwealth established a proper foundation for authenticity of the audio recording. Thus, the trial court did not abuse its discretion.

We note briefly, as the Commonwealth highlights, "the recording was repetitive of the testimony of Sheriff Kirk and [Maynard]. [Maynard] testified about his interaction with Moore. Sheriff Kirk testified about the preparation for the controlled buy. Nothing was revealed on the recording which was not brought up in testimony." Brief of Appellee, p. 2. From our review of the record, this

assertion is correct. Under this analysis, even if the audio recording had not been properly authenticated, the testimony from the witnesses alone would constitute enough for the Commonwealth to meet its burden to convict. Thus, if the trial court incorrectly admitted the audio recording into evidence, based on lack of foundation, it would have been harmless error.

Second, we address whether the Commonwealth improperly interpreted the audio recording to the jury during trial. From our review, Moore did not object to the Commonwealth's comments during any portion of the trial. Therefore, the issue was not preserved for appellate review. But, RCr[2] 10.26 provides that "[a] palpable error which affects the substantial rights of a party may be considered . . . 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." "To find manifest injustice, the reviewing court must conclude that the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Conrad v. Commonwealth*, 534 S.W.3d 779, 783 (Ky. 2017) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)). An error is "palpable" when it would have been easily perceptible, plain, obvious and readily noticeable to the trial court. *Gaither v. Commonwealth*,

---

[2] Rules of Criminal Procedure.

521 S.W.3d 199, 205 (Ky. 2017). After reviewing the video record of the trial, we find no palpable error.

In his brief, Moore incorrectly analogizes the facts of *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), to the facts of this case. *Sanborn* dealt with prosecutorial misconduct, and the facts are wholly inapplicable to the case before us. In *Sanborn*, four witnesses to a crime each gave tape-recorded statements to the police. *Id*. at 539. After giving the recorded statements, the prosecutor intentionally erased the tape-recorded statements of each witness, three of whom testified at trial against the defendant. *Id*. In this process, the prosecutor took notes that would assist him in using these persons as witnesses for the prosecution, and then destroyed the tapes, so that these verbatim statements were not available for the defense at any point. *Id*. The prosecutor admitted that he erased the tapes "in anticipation of the Court's rulings" and that "[he got] what [he] want[ed] off of them, ma[de] [his] notes, and erase[d] them." *Id*. The Kentucky Supreme Court ruled this was "misconduct of constitutional proportions" and a summary made by the prosecutor regarding the substance of the recordings before he destroyed them does not fulfill the best evidence rule. *Id*. at 539-40.

In this case, Moore argues "the Commonwealth inserted its own interpretation of the recordings [*sic*] statements and offered its own version of the audio recording to the jury." Brief of Appellant, p. 9. He notes three separate

instances, spanning one minute and forty-eight seconds, where they assert the prosecutor was providing "the jury with the prosecutor's version of the inaudible or indistinct portions of the tape." *Id*. at 10. We disagree. Unlike *Sanborn*, the Commonwealth was not summarizing any unavailable portions of the audio recording to the jury. In fact, the Commonwealth Attorney directed the jury's attention to some of the only discernable sentences in the recording. Also, Maynard took the stand afterward and discussed the conversation with Moore. These statements did not prejudice Moore in any way. Therefore, we find no reversible or palpable error.

Third, and finally, we address the Moore's claim that the court impermissibly allowed the Commonwealth to bolster witness testimony during closing argument. As with the previous argument, Moore did not preserve this argument for appeal. Thus, we review for only manifest injustice.

In asserting "the Commonwealth made multiple statements which could be seen as vouching for its law enforcement officers[,]" Moore confines his argument to one statement:

> Mr. Runyon (Commonwealth):
>
> That's why I love this system. You don't just get to stand up here and say whatever you want. You've got to back it up. And that's exactly what this case is. *It's backed up by solid police work* and solid evidence.

(VR. No. 1: 09/12/18, 14:27:24) (emphasis added). As emphasized, Moore takes issue with seven words in the entirety of the Commonwealth's closing argument. This argument grasps at proverbial straws.

Moore likens this case to the recent opinion released by the United States Court of Appeals for the Sixth Circuit, *United States v. Acosta*, 924 F.3d 288 (6th Cir. 2019). At first glance, the two cases seem to have striking resemblances. But a deeper look into *Acosta* shows a deep, divergent, divide between it and the case at hand. In *Acosta*, the Sixth Circuit took issue with a prosecutor bolstering the testimony of a State witness. These comments included:

> [(1)] Detective Bowles who was here, *he's testified very well, he understood and remembered everything he did*. Mr. Barnes told you that [the methamphetamine] was wrapped in clothes. No, it wasn't. As Detective Bowles testified, it was there, he picked it up and he brought it back down. . . .
>
> [(2)] It was [another law-enforcement officer, who had interviewed Barnes after his arrest] that came in that said, he told me it was wrapped in clothes. Detective Bowles, *a fine young man*, picked it up and there it was. . . .
>
> [(3)] Based upon the *fine work of Detective Evans*, based upon the search warrants that were executed, the interviews that were done, the two pounds of methamphetamine worth $20,000 is off the street.

Acosta, 924 F.3d at 299-300 (citations omitted) (emphasis in original).

In finding these comments constituted improper bolstering of a witness, the Sixth Circuit held "[a]lthough these comments were not direct

comments on the detectives' truthfulness, saying a witness is a 'fine young man' implies that the speaker has a favorable view of the witness's truthfulness." *Id.* at 300. It went on to say, though:

> We do not mean to suggest that every favorable comment on a government witness constitutes prosecutorial misconduct, but in each case, the effect of such comments must be considered in the context of the prosecutor's other statements, the defense arguments, and the evidence presented at trial. *See United States v. Young*, 470 U.S. 1, 16, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) ("[E]ach case necessarily turns on its own facts." (citation omitted)). *Here, the positive description of Bowles strikingly differed from the prosecutor's negative portrayals of the defense witnesses, as detailed later.*

Id. (emphasis added).

The Sixth Circuit noted the unsavory descriptions used by the prosecutor regarding the defense witnesses:

> [(1)] In between the time [Barnes] said he was called by [Robert Griffett, who Barnes claimed warned him against law-enforcement officers] and the time he got arrested, he got yet another package of methamphetamine to the same address where he received the three previous packages. If he was such a smart drug dealer and trying to avoid the police, why would he still have methamphetamine coming to his place? *Because he's lying. He is lying about taking that stuff over [to the apartment]. . . .*
>
> [(2)] Is he a huge drug dealer? Yes, he is. Huge. Is he a weapons trafficker? Yes. Is he a money launderer? Yes. *Should he be entitled to any credibility whatsoever? Not at all. Zero. . . .*

> [(3)] The only people ever seen going into Apartment 172 as seen by Detective Evans, one and two [i.e., Morales-Montanez and Acosta]. And that's it. There is not a shred of evidence that allows the sight of anybody else to go in there. *Brian Barnes is a proven liar, don't believe anything he had to say. . . .*
>
> [(4)] Luis Morales [sic], the worshiper of a deity of a drug trafficking entity who prays for protection from police, prosecutors, court systems and juries. *Is he entitled to any credibility for what he said? No, not at all.*

Id. at 301 (citations omitted) (emphasis in original).

Thus, looking at these statements as a whole, *Acosta*'s ruling was fact specific and hinged on the interplay between the prosecutor's statements about the witnesses on both sides. We do not have that issue in the case before us. To reiterate *Acosta*'s holding, "[w]e do not mean to suggest that every favorable comment on a government witness constitutes prosecutorial misconduct, but in each case, the effect of such comments must be considered in the context of the prosecutor's other statements, the defense arguments, and the evidence presented at trial." *Id*. at 300. We also take note that while this case originates from the Sixth Circuit, it is a federal case and, therefore, not binding, but rather persuasive, authority.

Statements during closing arguments "must be viewed through the lens of the wide latitude counsel is afforded" [*Dickerson v. Commonwealth*, 485 S.W.3d 310, 332 (Ky. 2016)] and "must be viewed in context; only by so doing

can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985). We do not find any palpable error for the trial court allowing the Commonwealth's statement "You don't just get to stand up here and say whatever you want. You've got to back it up. And that's exactly what this case is. It's backed up by solid police work and solid evidence." Thus, we affirm.

CONCLUSION

In sum, we hold: (1) the trial court did not abuse its discretion by allowing the audio recording into evidence; and (2) no manifest injustice occurred when the trial court allowed the Commonwealth to explain portions of the audio recording to the jury nor when it allowed the Commonwealth's certain statements during closing argument. Thus, we affirm the judgment and sentence of the Martin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ned Pillersdorf
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Emily B. Lucas
Assistant Attorney General
Frankfort, Kentucky