IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: DECEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-8-04 Elva Graves, D.C.

2002-SC-0799-MR

REUBEN CATCHING — APPELLANT

V.

APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
01-CR-62

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Garrard Circuit Court jury convicted Appellant, Reuben Catching, of two counts of trafficking in a controlled substance in the first degree (cocaine) and sentenced him to ten years' imprisonment for each count to run consecutively for a total of twenty years. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). He contends that the trial court erred (1) by admitting largely inaudible audiotape recordings of the two drug sales corresponding to each trafficking count, and (2) by admitting a state informant's prior consistent hearsay statements. Finding no error, we affirm.

Anthony Estrada had served as a government drug informant in multiple jurisdictions inside and outside of Kentucky for several years. In December 2000, upon request of Kentucky State Police Detective Stuart Adams, Estrada relocated to Garrard County to continue his work as an informant. Estrada testified that prior to the drug

buys in question, he became acquainted with Appellant in the course of performing mechanical work on some of Appellant's motor vehicles. Appellant testified that he had not yet met Estrada when the purported drug buys occurred and that, in fact, they never occurred at all.

Estrada testified that on the evening of February 19, 2001, he met with Adams and another state policeman, Detective Jeremy Slinker. The two officers searched Estrada's person and vehicle, presumably to verify that any drugs he later delivered to them came from an actual transaction. They then gave him money to buy drugs and a small recording device. At approximately 7:20 p.m., Estrada proceeded to a home on Cardinal Circle owned by a woman referred to as "Mae-Mae." Several people had gathered there for a party of sorts, and loud music was playing in the background. Upon entering the house, Estrada announced that he "was there to get some drugs" and that he was looking for an "eightball," which Estrada testified was approximately one-fourth of an ounce of crack cocaine. He verbally counted the money that the police had given him so that any potential drug dealers would know that he had sufficient funds to pay for the drugs. Appellant, who was sitting in the kitchen, motioned to Estrada to follow him into a restroom. Once in the restroom, Appellant motioned for Estrada to remain silent (perhaps fearing that he might be equipped with a recording device). Estrada then gave Appellant $200.00, and Appellant gave him the crack cocaine. He also asked Appellant if he would have more cocaine later, and Appellant responded, "Yes."

Afterwards, Estrada rejoined Slinker and Adams at a designated location and gave them the drugs that he had just purchased along with the audiotape from his recording device. The officers then searched him again to ensure that he had not kept

any drugs for himself. Estrada's work, however, was not finished; the police equipped him with another audiotape and more money and sent him to conduct another transaction. Because Appellant had indicated he would have more drugs later, Estrada returned to Mae-Mae's residence to see if he could purchase more drugs from him. Upon reentering the house, Estrada again saw Appellant sitting in the kitchen. Again, Appellant signaled Estrada to remain silent. Estrada gave Appellant another $200.00, and Appellant gave Estrada another quantity of crack cocaine. As he left, Estrada said, "Thanks Rue." Estrada then rejoined the police.

I. AUDIOTAPES.

A. Admissibility.

From the outset of this case, Appellant has contested the admissibility and use of the audiotape recordings of the claimed drug transactions. Prior to trial, Appellant's counsel made a motion in limine to exclude the tapes on the grounds that they were virtually inaudible. After listening to the tapes, the trial judge overruled the motion to exclude them despite their poor quality, the loud music playing in the background, and the fact that Appellant's voice was not recorded at all. The judge made the following handwritten entry on the docket sheet:

> Motion [to suppress] denied. The tapes are virtually inaudible, but they shall be allowed into evidence because they are relevant and have minimal prejudicial effect. However, no witness shall be allowed to interpret the tapes, and neither attorney shall be allowed to assert the contents of the tapes on opening or closing arguments without giving adequate notice to opposing counsel and the court what counsel intends to assert. This notice requirement is meant to assure that statements by counsel are adequately supported by the evidence.

In accordance with this ruling, the prosecutor submitted notice of all potential statements from the tape that he planned to use at trial. These included:

(a) "Got an eightball."

(b) "Are you going to have some more?" (Estrada asking Appellant if he would have more drugs later on.)

(c) "20, 40, 60, 80 . . . ." (Estrada counting the money the police had given him immediately preceding the first drug sale.)

(d) "If they don't want to party, to hell with it." (A statement made by Estrada at Mae-Mae's house.)

(e) "326-ARF." (Estrada reading the license plate number of a car not belonging to Appellant parked in Mae-Mae's driveway.)

(f) "Thanks Rue." (Estrada thanking Appellant for the drugs following the second transaction.)

The tape was played twice during Estrada's testimony, first as direct evidence and the second time to refresh Estrada's recollection as to what he said to Appellant during the transaction. During deliberations, the jury sent a note to the trial judge that stated, "A written transcription of tapes." Interpreting this as a request for transcripts, the trial judge returned the note to the jury with the notation that "No transcript is available."

Appellant cites the trial judge's finding that the tapes were "virtually inaudible" and the jury's request for a transcript as proof that the tapes were too inaudible to warrant admission into evidence. We disagree. The decision whether to exclude audiotapes for inaudibleness lies within the sound discretion of the trial judge. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 540 (1988) (citing United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983)). If the recordings are "sufficiently audible to be probative," it is not an abuse of discretion to admit them. Johnson v. Commonwealth, Ky., 90 S.W.3d 39, 45 (2003) (citations omitted). This is not a rigorous standard — it does not even require that most parts of a tape be audible. In Johnson, we upheld a trial court's decision to admit tapes containing many inaudible segments. "While many

parts of the tapes are completely inaudible, some parts of the tapes . . . are sufficiently audible and probative . . . . Thus, we conclude that the tapes were not so incomprehensible as to render them wholly untrustworthy." Id. at 46 (emphasis added) (citations omitted). See also Sanborn, supra, at 540 (acknowledging the trial judge's discretion to admit an audiotape where the defense and prosecution disagreed on the interpretation of twenty-five separate statements contained therein); United States v. Jadusingh, 12 F.3d 1162, 1167 (1st Cir. 1994) (upholding admissibility of audiotape where defendants' voices were drowned out but informant's voice was understandable).

While we acknowledge that this discretion is not unbridled, Norton v. Commonwealth, Ky. App., 890 S.W.2d 632, 636 (1994), as is the case with any exercise of discretion, we conclude that the trial court did not abuse its discretion in admitting these audiotapes. Aside from the limited audibleness of the tapes, Appellant does not otherwise challenge their authenticity or trustworthiness. Even Appellant's counsel, during an in-chambers meeting, admitted that "snippets" of the tapes were audible but contested admissibility because "context" was lacking. "Snippets would be audible. I am being forthright with the Court. Certain words are audible but the context isn't surrounding it." Under Johnson, supra, the fact that context is lacking does not support a finding that the trial court abused its discretion by admitting the tapes. Id. at 46. Nor did the jury's note to the trial judge during deliberations affect admissibility. It is the trial judge, not the jury, who determines the admissibility of evidence. KRE 104(a). It is not unusual for a jury to request access to inadmissible or nonexistent evidence during deliberations. Presumably, the jurors, like the trial judge, found the audiotapes largely inaudible and were hoping for assistance. That does not render the audible portions of the tapes inadmissible.

B. Closing Argument.

Appellant next contends that given the limited audibleness of the tapes, the trial court erred in two respects by allowing the prosecutor to discuss the contents of the tapes during closing argument. First, Appellant takes issue with the following statement of the prosecutor: "[w]hen you listen to the tape you are able to hear just as Anthony described. That they clearly go into a separate room and a door is shut drowning out some of the background noise." Appellant claims that this statement violated the trial judge's handwritten entry on the docket sheet because it was not included in the prosecutor's notice of the taped statements he intended to use.

The trial court did not err in overruling the objection to this portion of the prosecutor's argument. A court is within its right to interpret its own rulings, and the court here chose to apply the notice requirement only to the spoken words. Illustrating a trial court's discretion concerning its own rulings, trial judges may reconsider and alter rulings on motions in limine. KRE 103(d) ("Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine."). The trial court's ruling also makes sense — the prosecutor was only noting a change in background noise and then arguing that it corresponded with Estrada's testimony that he and Appellant entered a restroom to complete the drug deal. The prosecutor did not speculate as to the words, if any, exchanged between Appellant and Estrada. Furthermore, had there been any error here, it would be harmless. Appellant failed to object when the prosecutor drew the same inference during his opening statement. There, the prosecutor stated, "They leave, and you can hear on the tape because the background noise gets less. They go into another room, bathroom and shut the door." Thus, even if Appellant's closing argument objection had been sustained, the jury had already been

exposed to the same interpretation during opening statement. Ward v. Martin, 285 Ky. 337, 147 S.W.2d 1027, 1029 (1941) (finding harmless error where party objected to some questions but did not object to other nearly identical ones).

Second, Appellant challenges the prosecutor's reference to the following statements that were contained in the prosecutor's notice filed in accordance with the court's ruling: (1) "Got an eightball;" (2) "Are you going to have some more?"; and (3) "Thanks Rue." Appellant likens the prosecutor's "interpretation" of the tape during closing argument to the situation in Sanborn where we held that a trial court abused its discretion in allowing the Commonwealth to furnish the jury with a transcript of partially inaudible sound recordings. In Sanborn, defense counsel made twenty-five separate challenges to the prosecution's interpretation of audiotapes. Sanborn, supra, at 540. Despite these challenges, the trial court allowed the prosecutor to submit to the jury a transcript of the tape solely as interpreted by the Commonwealth. All of the contested portions were highlighted in yellow, and the transcript was entered into evidence rather than used merely as an interpretive aid for the jury. We held that the use and admission of the transcript was impermissible because the defendant had no input into the transcript and "they [the jurors] have before them a printed transcript, which is, in fact the Commonwealth Attorney's version of the tape." Id. Appellant asserts that the prosecutor's closing argument is analogous to the use of the transcript in Sanborn because of its potential to sway the jury as to "the proper interpretation of the tapes" and to unfairly legitimize the Commonwealth's interpretation of the tapes.

The trial court committed no error here. First, Sanborn is inapposite. The central error committed by the trial court in that case was allowing only the Commonwealth to provide the jury with its interpretation of the tapes despite the defendant's extensive

disagreement with that interpretation, and then admitting it as evidence. Id. The trial court exercised no such favoritism here. Both sides had ample opportunity in closing argument to argue the credibility of the tapes. Appellant's trial counsel was permitted to challenge the credibility of the tapes and was in no way precluded from arguing their weight.

II. PRIOR CONSISTENT HEARSAY STATEMENTS.

Appellant challenges on hearsay grounds the admission of Estrada's prior consistent statements recorded on the audiotapes in which he identifies Appellant to the police as the person who sold him the cocaine. Appellant made a successful motion in limine to preclude the prosecution from playing those portions of the tapes containing the prior identifications. On direct examination, when Appellant was asked why Estrada would falsely implicate him in drug dealing, he responded that he and Estrada had argued over the quality of some repair work Estrada performed on one of Appellant's vehicles. To rebut the claim that Estrada had implicated Appellant in a drug deal as revenge for a repair deal gone bad, the prosecutor first elicited testimony from Appellant that he paid Estrada for the allegedly unfinished repair work so that he, not Estrada, had gotten "the short end of the transaction." The prosecutor also established that Estrada's statements to the police were made before the repair dispute occurred. During cross-examination, Appellant admitted that the dispute occurred during March or April of 2001, "after this accused stuff" because he did not know Estrada when the accusations were made. The prosecutor then requested permission to play the excluded portions of the audiotapes containing Estrada's prior consistent statements. Instead, the trial judge limited the prosecutor to asking Appellant on cross-examination whether he had listened to the tapes and, if so, whether Estrada had identified him (Appellant) to the officers as

the person from whom he had purchased the cocaine. "And if he says yes, then we don't need the tape. . . . If he doesn't admit that Mr. Estrada on the tape is identifying him, then we will play the tape." Appellant's counsel did not object and stated, "He will admit to that." The testimony was as follows:

Q: Mr. Catching, have you had an opportunity to listen to the whole tape?

A: Yes.

Q: And would you agree with me that on that tape after Mr. Estrada gets with the police at the end and this is after the point that we cut if off that he identifies you as the person he bought off of?

A: He tried to describe the person.

Q: Does he say that he bought off Rue-Rue?

A: I can't remember if he said Rue-Rue or Rue or Reuben or which, but it was one of them.

Appellant contends that this testimony should have been excluded as hearsay. He claims that it does not fall under the exception provided under KRE 801A(a)(2), which permits the admission of prior consistent hearsay statements to rebut charges of recent fabrication or improper influence or motive. He reasons that because the prosecutor "ridiculed" the charges of Estrada's alleged improper motive by showing that Appellant was the loser in the repair dispute, it was disingenuous of him to use the same motive to introduce Estrada's prior consistent statements. In other words, Appellant asserts that the prosecutor used the motive suggested by Appellant as a pretext to introduce the hearsay statements.

The Commonwealth argues that this issue was not properly preserved for appellate review. While Appellant made a motion in limine, that motion requested only that the prosecutor be precluded from playing the tape. Appellant's counsel stated,

"Your Honor, I have a motion to disallow the prosecution from playing the end of the tapes. . . . And I wish for you to disallow that part to be played because it is hearsay." (Emphasis added.) Of course, permitting a witness to repeat the substance of an inadmissible hearsay statement is no different than introducing the statement, itself. Nor do we interpret counsel's statement that "[h]e will admit that" as a waiver. The statement was made after the judge had ruled that the prior consistent statement would be admitted.

Nevertheless, Estrada's prior consistent statements fall squarely within the ambit of KRE 801A(a)(2). Appellant's counsel impeached Estrada on cross-examination by questioning him about the repair dispute. She also elicited from Appellant that the repair dispute was Estrada's motive for falsely implicating him in a drug transaction. Having accused Estrada of a recent fabrication and an improper motive, Appellant opened the door for the admission of Estrada's prior consistent statements made before the alleged motive arose. Cf. Noel v. Commonwealth, Ky., 76 S.W.3d 923, 928 (2002) (indicating that the prior consistent statement is admissible when made prior to alleged motive); Slaven v. Commonwealth, Ky., 962 S.W.2d 845, 858 (1997) (same); Smith v. Commonwealth, Ky., 920 S.W.2d 514, 517 (1995) (same). The fact that the prosecutor also attacked the "repair deal" motive as being absurd did not preclude him from further attacking it by showing that Appellant had made a premotive statement consistent with his trial testimony.

Accordingly, the judgment of convictions and sentences imposed by the Garrard Circuit Court are affirmed.

All concur.

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