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RENDERED: FEBRUARY 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000042-MR

DATE 3-15-07 E.A.G. D.C.

MARTINE L. WALLACE — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NO. 04-CR-000126-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant contends that the trial court should have suppressed his identification from a photo pack display; that an investigating police officer's testimony improperly bolstered the testimony of his co-defendant, a witness who testified on behalf of the Commonwealth; and that the Commonwealth impermissibly shifted the burden of proof in its closing argument.

Appellant, Martine L. Wallace, was convicted of one count of burglary in the first degree and seven counts of first-degree robbery after he and his co-defendant broke into Victor Horton's apartment and robbed Horton and six of Horton's party guests. The two perpetrators, armed with a gun and wearing ski masks, entered the apartment and demanded that everyone present empty their pockets and relinquish all of their money. One of the men grabbed a guest by the hair, threw her to the ground and threatened to

kill her if he discovered that anyone had not surrendered all of their money. The two men continued their tirade, threatening to kill everyone, and hitting two other guests with a gun. However, Horton and another guest ambushed the men when they became distracted, a struggle ensued and the two perpetrators were subdued.

After removing the perpetrators' ski masks, one of the guests recognized one of the perpetrators as "Joe Joe," a friend of her cousin, Corey, who was to be the guest of honor at the party, but who had not arrived. In response to Horton's interrogation, one of the perpetrators admitted that "Ra Ra," which Horton knew to be Corey's nickname, had sent them. The police were called to the scene, but "Joe Joe" managed to escape by jumping out of a second-story window before the police arrived. The police arrested the other perpetrator, who was subsequently identified as Enta Durflinger.

Upon obtaining information that Appellant's nickname was "Joe" and that he was a friend of Corey's, the lead police officer, Sergeant James Hellinger, compiled a photo pack that included a photo of Appellant. All three of the witnesses who viewed the photo pack identified Appellant as the perpetrator who had fled from the scene. Consequently, a warrant was issued for Appellant's arrest, but he could not be located. A couple of weeks later, Appellant and Durflinger were indicted. More than five months later, Appellant turned himself in to the police. Durflinger entered into a plea agreement and testified against Appellant at trial. Upon a jury verdict, Appellant was convicted on all counts and sentenced to ten years on each count, all sentences to run concurrently for a total of ten years which was enhanced to twenty years by his status as a persistent felony offender in the second degree. He appeals to this court as a matter of right.[1]

[1] Ky. Const. § 110(2)(b).

We first consider the propriety of the trial court's ruling admitting the out-of-court photo pack identifications. This issue was preserved for our review by Appellant's motion to suppress the identifications. To determine whether identification testimony violates a defendant's due process rights, Kentucky courts utilize the two-prong test delineated by the United States Supreme Court in Neil v. Biggers.[2] Though concerns about misidentification resulting from suggestive procedures commonly arise from "show-up" identifications wherein a victim is personally confronted with only one suspect,[3] in-person line-ups and photo arrays may also be suggestive or may be presented in a suggestive manner.[4] Thus, the first inquiry under Neil is whether the identification procedure was suggestive. If it was not, there is no need to examine the second prong of the test and the inquiry is at an end.[5]

The trial court concluded that the photo pack identification procedure was not suggestive. The procedure began when Sergeant Hellinger identified Appellant as a suspect and utilized Appellant's picture in generating a photo pack from a computer program. Each of the three witnesses were separated when the identifications took place. Appellant acknowledges that the five other photographs in the pack were randomly selected by the computer based on the parameters Sergeant Hellinger established, but he asserts that Sergeant Hellinger did not establish sufficiently specific parameters. However, Sergeant Hellinger's parameters included race, age, height and weight.

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[2] 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).
[3] See, e.g., Savage v. Commonwealth, 920 S.W.2d 512 (Ky. 1995).
[4] See, e.g., King v. Commonwealth, 142 S.W.3d 645 (Ky. 2004).
[5] Neil, 409 U.S. 188.

Nonetheless, Appellant asserts that there were prominent disparities between his photo and the others in the pack. Specifically, he points out that he was sitting further back than the others and that he had a thinner face, more facial hair and a darker skin tone than four of the other men in the photos. The trial court acknowledged that there were minor deviations, but concluded that the photo pack was not suggestive.

The "clearly erroneous" standard applies to a trial court's factual findings on a motion to suppress evidence, and the ultimate decision on the admissibility of evidence is subject to an abuse of discretion standard.[6] Our review of the photo pack confirms that the trial court's characterization of the dissimilarities as minor deviations was not clearly erroneous. Thus, the trial court was within its discretion when it concluded that the photo pack was not suggestive and admitted the identification testimony.

Next, Appellant contends that Sergeant Hellinger recounted details of Durflinger's pre-trial statement and, in so doing, improperly bolstered Durflinger's testimony through prior consistent statements. Testifying for the Commonwealth at trial, Durflinger recounted the events that occurred the night of the crime. Thereafter, Sergeant Hellinger gave testimony in which he referred to Durflinger's pre-trial statement. KRE 801A (a)(2) permits the admission of a witness's prior consistent statement only if it is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

Initially, we observe that this issue is not preserved for our review. However, Appellant requests that we review the issue for palpable error under RCr 10.26. "When an appellate court engages in a palpable error review, its focus is on what happened

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[6] King, 142 S.W.3d 645.

and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process."[7]

Appellant relies principally upon the case of Smith v. Commonwealth[8] to support his argument that reversal is required. However, Smith is clearly distinguishable from the instant case. Foremost, the issue of improper bolstering in Smith was preserved for review. Furthermore, Smith and the cases cited therein dealt with improper bolstering of testimony given by child victims regarding sexual abuse. In such cases, the sexual abuse is rarely witnessed by another person and medical findings may not corroborate the abuse without some level of equivocality. Consequently, testimony of social workers or other adults which improperly bolsters the child's testimony through prior consistent statements has often been held to be prejudicial.[9]

After reviewing the testimony of both witnesses in the instant case, we cannot say that admission of the portions of Sergeant Hellinger's testimony referring to Durflinger's prior statement gets close to palpable error. Sergeant Hellinger initially referenced Durflinger's prior statement when he was asked about efforts made to locate Appellant as Durflinger had provided information including addresses to aid in apprehension.

Moreover, while it is true that Sergeant Hellinger gave some details of Durflinger's statement, most were details that had not been elicited from Durflinger or

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[7] Martin v. Commonwealth, 207 S.W.3d 1, 5 (Ky. 2006).
[8] 920 S.W.2d 514 (Ky. 1996).
[9] See id. (citing Sharp v. Commonwealth, 849 S.W.2d 542, (Ky. 1993); Brown v. Commonwealth, 812 S.W.2d 502 (Ky. 1991); Mitchell v. Commonwealth, 777 S.W.2d 930 (Ky. 1989); Reed v. Commonwealth, 738 S.W.2d 818 (Ky. 1987); Hester v. Commonwealth, 734 S.W.2d 457 (Ky. 1987); Bussey v. Commonwealth, 697 S.W.2d 139, 141 (Ky. 1985)).

that Durflinger did not recall during his testimony. For example, Sergeant Hellinger testified that Durflinger identified his own girlfriend as having driven them to the residence and that on the way they had stopped at a convenience store to purchase ski masks and gloves, details that had not been elicited from Durflinger during his testimony. Additionally, Hellinger testified that Durflinger told him that Appellant brought the gun, but when they entered the residence Durflinger was the one in possession and that the two had passed the gun back and forth between them during the robberies. However, the only prior consistent statement Durflinger had made was that he was in possession of the gun when they entered. At trial, he testified that he did not recall where the gun came from. Nor did he testify as to whether the gun was passed back and forth. The only other testimony Sergeant Hellinger recounted from Durflinger's statement was that some sexual comments about one of the victims were made during the incident and that Durflinger and Appellant had been friends for a significant period of time. Admittedly, these were prior consistent statements, as Durflinger had testified to them. However, Appellant waived any error in the admission of Sergeant Hellinger's testimony by failing to object, and the introduction of the prior consistent statements did not constitute manifest injustice.[10]

Further, Appellant asserts that the Commonwealth violated his right to due process and a fair trial by shifting the burden of proof during closing argument. Specifically, the prosecutor commented that no evidence had been introduced that Appellant was not at the scene. Appellant contends that this impermissibly shifted the burden of proof because it was not Appellant's burden to prove that he was not there.

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[10] See Griffin v. Commonwealth, 576 S.W.2d 514 (Ky. 1978).

However, Appellant's counsel initially raised the issue in closing argument and pointed out that no "credible" evidence placed Appellant at the scene. The Commonwealth was entitled to respond to this argument. "This Court 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."[11] However, in addition to pointing out evidence contrary to defense counsel's argument, the prosecutor stated, "And where is there, where is there in any of the testimony and evidence that came in that says Martine Wallace was not there? I did not hear one shred of evidence that said . . . There is no evidence that came in that said he was not there." As defense counsel pointed out to the trial court, it was not the defense's burden to present evidence that Appellant was not there. We agree that the prosecutor impermissibly attempted to shift the burden of proof. But Appellant sought no relief other than a promise that the prosecutor would clear up the matter. In any event, however, given the substantial amount of evidence identifying Appellant as the perpetrator, the error, if any, was harmless.

Finally, Appellant makes a limited argument that the Commonwealth commented on his failure to testify with its "there is no evidence" that he was not there argument. This claim is unpreserved – the objection went to burden-shifting – and our review is for palpable error under RCr. 10.26. There was abundant evidence that Appellant was at the crime scene. To the extent the Commonwealth commented on Appellant's failure to present contrary evidence and thereby commented on his silence, the improper

[11] Commonwealth v. Mitchell, 165 S.W.3d 129, 132 (Ky. 2005) (citing Lynem v. Commonwealth, 565 S.W.2d 141 (Ky.1978) and Hunt v. Commonwealth, 466 S.W.2d 957 (Ky.1971)).

argument does not rise to the level of palpable error. By a timely objection, the error could have been cured. Appellant objected on the grounds he chose and our review is limited to those grounds.

For the foregoing reasons, Appellant's convictions are affirmed.

Lambert, C.J., and Cunningham, McAnulty, Minton, Noble, Schroder, and Scott, JJ., concur.

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