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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 23, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 5/14/09 Kelley Klaber D.C.

2007-SC-000547-MR

DANNY MCGREW — APPELLANT

V.

ON APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH
CASE NO. 03-CR-00101

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

After a jury trial, Appellant Danny McGrew was convicted of manufacturing methamphetamine, first-degree trafficking in a controlled substance, and unlawful possession of a methamphetamine precursor. He raises one issue on appeal. Finding no reversible error, Appellant's conviction is affirmed.

I. Background

The Edmonson County Sheriff's Office received a tip that Appellant was engaged in the manufacture of methamphetamine. A deputy in the Sheriff's Office passed this information on to Kentucky State Trooper Scott Skaggs. On September 3, 2003, Trooper Skaggs, Trooper Todd Combs, and an Edmonson County Sheriff's Deputy went to the address given by the informant to

investigate. The property in question belonged to Appellant's sister, Dolly Dennison, who had two mobile homes on the lot.

Trooper Skaggs testified that as he pulled into the driveway, he saw Appellant standing in the hall of the mobile home mentioned in the complaint. Trooper Combs also testified that he saw Appellant inside and that he watched him exit and close the door behind him. He then testified that Appellant moved toward him, ignoring commands to stop and show his hands. When Trooper Combs asked Appellant for identification, he handed the officer various pieces of tin foil. The troopers testified that Appellant appeared confused, had slurred speech, and was unstable on his feet. They also detected a chemical odor coming from the Appellant's clothing.

Detectives from the "meth crew" arrived on the scene and discovered a working meth lab inside the dwelling. They found two packages of methamphetamine, 800 pseudoephedrine pills, six HCL bottles, Liquid Fire, coffee filters, blenders, Red Devil Lye, plastic bags, scales, glass bottles, funnels and other items used in the methamphetamine manufacturing process.

The troopers spoke with Ms. Dennison, who lived in the other mobile home on the property about fifty feet away from the meth lab. She told them that Appellant had been living in the mobile home in question for 2-3 months. Appellant denied that he had ever been inside the trailer and that he had only been investigating an open door when the police arrived.

At trial, Appellant testified that when the police arrived on the night in question, he was just returning from a visit with another sister and was heading toward Dolly Dennison's trailer. He claimed only to be passing by the

trailer containing the methamphetamine lab when the police pulled in the drive and exited their vehicles. He also denied handing the officers pieces of aluminum foil after being asked to provide identification, claiming instead that he gave them his driver's license and social security card. Appellant testified that the trailer actually belonged to Kevin Wasalowski and that he only stored clothing in it.

An Edmonson County jury found Appellant guilty of all the charges. During the penalty stage, the jury recommended a sentence of fourteen years for the manufacturing methamphetamine conviction, five years for the trafficking in a controlled substance conviction, and one year for the unlawful possession of a methamphetamine precursor conviction, all to be served consecutively for a total of twenty years.

Appellant appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant raises only one issue on appeal. He argues that his conviction should be reversed due to the prosecutor's improper cross-examination tactics at trial.

After Appellant testified as to his version of the events, the Commonwealth's attorney conducted a cross-examination, which included the following questions:

> "So, if officers testified that they didn't arrive until 11:30, they weren't telling the truth?"
>
> "Has [Trooper Combs] got any reason that you're aware of to come before this jury and tell a lie?"

"And do you know any reason why this Detective would come before this jury and say something false?"

"So, if he testified that, do you know any reason he would testify incorrectly?"

"So, are you telling this jury that he made that up?"

Appellant's counsel objected twice during the entirety of the cross-examination. The first objection was that a question pertaining to the Commonwealth's timeline had been "asked and answered." The second objection (that "there needs to be a question") was made after the prosecutor stated that Appellant had been manufacturing methamphetamine and that the trips he had made into the trailer were to check on his equipment. Neither objection was directed toward the prosecution's inappropriate questioning.

Specifically, Appellant claims that in asking these questions, the prosecutor required him to characterize another witness's testimony as untruthful, placing him in the unenviable position of suggesting that a well-respected police officer was lying. He argues that requiring such testimony placed him in an extremely unflattering light and undermined his entire testimony. Therefore, because of this inappropriate courtroom tactic, Appellant believes he did not receive a fundamentally fair trial and was denied due process of law.

Appellant claims that the issue was properly preserved by his counsel's objections at trial. In the alternative, Appellant claims that RCr 10.26 applies and this Court should reverse his conviction on the basis of palpable error.

Appellant's objections at trial were in no way related to the issue of inappropriate questions by the Commonwealth's attorney. Appellant simply did not object at trial to the questions that he now complains about. Therefore, the issue is unpreserved and further analysis by this Court must be based on whether or not a palpable error occurred at trial pursuant to RCr 10.26.

Palpable error requires a showing of "manifest injustice," which is 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). Or, as the Court stated later in Martin, to find manifest injustice, a court must examine "whether the [alleged] defect in the proceeding was shocking or jurisprudentially intolerable," id. at 4, and in so doing, "its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." Id. at 5.

It is clear under longstanding Kentucky precedent that asking a defendant to characterize another witness's testimony as lying is an "improper interrogation." Howard v. Commonwealth, 227 Ky. 142, 12 S.W.2d 324, 329 (1928). This Court has specifically stated that asking a witness to characterize the testimony of a police officer as lying is particularly inappropriate since it "places the witness in such an unflattering light as to potentially undermine his entire testimony." Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997). Like the situation in this case, the defendant in Moss was asked at trial whether an officer was lying when his testimony differed from the defendant's.[1]

[1] Specifically, the prosecutor asked: "So you think Officer Wiley is lying if he says he

Id. However, despite recognizing the impropriety of such questions, this Court held that "Appellant's failure to object and our failure to regard this as palpable error precludes relief." Id.

Other than arguing that the questioning caused him to be portrayed in a negative light, Appellant has not shown a probability of a different outcome, or that the questioning, absent objection, was jurisprudentially intolerable or threatened the integrity of the judicial process. Furthermore, this Court's holding in Moss undermines Appellant's claim that the error was so fundamental as to threaten his entitlement to due process. Because the claim of error herein stated is sufficiently similar to that claimed in Moss, and because there is insufficient evidence in this record to support a showing of manifest injustice, this Court finds that the error was not palpable and does not require reversal under RCr 10.26.

III. Conclusion

Requiring a witness to characterize the testimony of another witness as lying is an inappropriate trial tactic. Nevertheless, without a showing that the error was so fundamental as to threaten Appellant's entitlement to due process of law or that a different result would have been probable, this Court cannot find that a palpable error occurred. Therefore, the Edmonson Circuit Court is affirmed.

All sitting. All concur.

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didn't see anyone but you come out of that fence?" Moss, 949 S.W.2d at 583. When the defendant "attempted to deflect the question by referring it to Officer Wiley," the prosecutor then stated, "No, sir, I don't. I have to ask you. So you think Officer Wiley is lying if he says he didn't see anyone but you come out of that fence?" Id.

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