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RENDERED: AUGUST 25, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000647-MR

CHARLES WAYNE BUSSELL — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
NO. 91-CR-00111

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On December 2, 1990, Shirley Castle and his wife, Beth, became worried when his sister, Sue Lail, did not arrive at Sunday church services, as was her custom. Later that day, the Castles went to Lail's house and found no one home, though her car was parked in the driveway. A copy of the Saturday, December 1, 1990, Courier-Journal and a breakfast plate were found lying on a table. When she didn't appear the following day, the Castles called police.

In Lail's living room trash can, officers found a torn check in the amount of $50 partially made out to "Charles." They also noticed that the Saturday mail had not been collected. Lail's housekeeper, Mary Dudley, identified several items that were missing from the home, including Lail's robe and slippers, a vacuum cleaner, two rings, and sterling silver flatware. Neighbors

told officers that they had seen Lail's handyman, Charles Bussell, working at the home on Saturday morning around 11:00 a.m.

Officers interviewed Bussell in the days following Lail's disappearance and learned of his long relationship with her family. Bussell's father had worked for Lail's father as a handyman. Bussell himself continued the relationship after his father died and had worked for Sue Lail directly for about six years at the time of her disappearance. Bussell regularly performed yard work and repair jobs around Lail's home.

Bussell told officers that he did some painting and yard work for Lail on the morning of Saturday, December 1, 1990. When he was finished, at about 12:30 p.m., he went to the house to be paid. Lail wrote him a $200 check, which accounted for 28 hours worked and the cost of two bags of manure to finish a compost pile. As she wrote the check, according to Bussell, Lail asked him to paint a rental property she owned. He agreed to do the job for $350, but asked for an advance on that work. Lail consented and began to write a $50 check when Bussell interrupted her, requesting a larger advance. Lail handed him the check to tear up and throw in the trash can, then wrote a second check in the amount of $200. As was her custom, Lail wrote all of the information regarding the checks in her book. Finally, Bussell asked if he could borrow her vacuum cleaner, which he had occasionally done in the past. Lail agreed and Bussell left, placing the vacuum in the back seat of his vehicle. He then took it to the home of Bertha Chambers, his girlfriend, and left it on

her front porch.

About a week later, police received a call from Kay Bobbett. Bobbett told officers that Robert Joiner, a friend, had given her a ring that she believed belonged to Sue Lail. When police questioned Joiner, he confirmed that he had purchased the ring from Bussell for $25 on the evening of December 1, 1990. He gave it to Bobbett the same day.

Bussell was arrested on December 14, 1990. Police continued to investigate Lail's disappearance, searching and taking fiber samples from Bussell's vehicle. It had a dent on the passenger fender and pieces of bark under the damaged portion. Police also recovered Lail's vacuum cleaner from Chambers. Chambers related to police that Bussell had given her the vacuum as an "early Christmas present" and that he had found it at a flea market.

On February 23, 1991, two juveniles discovered Lail's body in a remote area of the Western Kentucky Fairgrounds. An autopsy revealed that Lail had been beaten and strangled. She was found wearing a pink robe and slippers. Police also discovered that a tree near Lail's body had been recently damaged.

In 1994, Bussell was tried, found guilty of robbery and murder, and sentenced to death. This Court affirmed the conviction on direct appeal. *Bussell v. Commonwealth*, 882 S.W.2d 111 (Ky. 1994), *cert. denied*, 513 U.S. 1174 (1995). In 2005, the Christian Circuit Court granted Bussell's RCr 11.42 motion, concluding that he had received ineffective assistance of counsel and that the Commonwealth had failed to disclose exculpatory evidence. This

Court unanimously upheld that order in *Commonwealth v. Bussell*, 226 S.W.3d 96, 105 (Ky. 2007).

Bussell was retried in Christian County in 2008. That trial ended in a mistrial following a hung jury. He was retried again in 2009 and convicted of robbery and murder. He was sentenced to life without the possibility of parole for twenty-five years. Bussell now appeals that conviction as a matter of right. Ky. Const. § 110(b). He raises five issues for appellate review. For the reasons set forth herein, we affirm.

Admission of Prior Testimony

Bussell first claims that the trial court improperly admitted the 1991 trial testimony of Joiner and Bobbett at the 2009 retrial, in violation of his Sixth Amendment right to confrontation. To fully understand the issue surrounding this testimony, further background is necessary.

In 2005, the Christian Circuit Court conducted a hearing on Bussell's RCr 11.42 motion, alleging ineffective assistance for, in part, his counsel's failure to adequately investigate and cross-examine Joiner and Bobbett. At that hearing, Bussell called both as witnesses. The trial court granted Bussell's RCr 11.42 motion and this Court affirmed that judgment.

Thereafter, the Commonwealth brought new charges and the case proceeded to retrial in 2008. However, by that time, both Joiner and Bobbett had died. Accordingly, the Commonwealth sought to introduce their videotaped testimony at the 1991 trial. Defense counsel vigorously objected,

arguing that the admission of the testimony was a clear violation of Bussell's confrontation rights because no adequate cross-examination had occurred.

The issue of the testimony of Joiner and Bobbett was debated for nearly a year during pre-trial hearings. Multiple motions and memoranda of law were submitted and two lengthy hearings held. Ultimately, the trial court ruled that testimony from both the 1991 trial and the RCr 11.42 hearing would be admitted. The trial judge opined that the 1991 trial testimony alone would not be admissible because the cross-examination had been deemed ineffective. Though defense counsel disagreed, the trial court believed that the RCr 11.42 testimony would sufficiently augment the 1991 cross-examinations so as to cure this deficiency. Accordingly, the 2008 jury heard both the 1991 trial and RCr 11.42 testimony of both Joiner and Bobbett.

After the 2008 trial ended in mistrial, the Commonwealth retried Bussell for a second time in 2009. Following the 2008 mistrial, defense counsel for Bussell changed. At the 2009 trial, the Commonwealth again introduced the 1991 trial testimony of both Joiner and Bobbett. However, neither party introduced the RCr 11.42 hearing testimony.

Thus, we are presented with the issue of Bussell's right to confront the witnesses brought against him. He argues that it was prejudicial error to admit the 1991 testimony of Joiner and Bobbett, where counsel failed to conduct an effective cross-examination. Our analysis must begin with a determination as to whether the issue is preserved for appellate review.

Preservation

There is no doubt that defense counsel objected to the admission of any of the 1991 testimony at the 2008 retrial. However, there is no record of Bussell's DPA counsel renewing the objection prior to the 2009 retrial; nor did defense counsel object when the Commonwealth introduced Joiner's and Bobbett's 1991 trial testimony. A review of the pretrial conferences reveals no discussion of the issue either. Oddly, though, the only entries into the record between an October 23, 2008 hearing on venue and the commencement of voir dire on June 22, 2009 were for defense expense requests.

Of course, it is an appellant's burden to designate the record and to establish that an error is preserved for our review. *See Bingham v. Davis*, 444 S.W.2d 123, 124 (Ky.App. 1969). We cannot rely solely on defense counsel's objection to this testimony at the 2008 retrial to declare that the issue is preserved at the 2009 retrial. A mistrial operates to conclude all proceedings and the legal effect is that no trial occurred. *See* C.J.S. TRIAL § 92 (2011). Thus, it was defense counsel's burden to renew the objection or motion at the 2009 retrial, and there is no record of any such renewal.

If unpreserved, Bussell requests palpable error review. Again, due to the seemingly incomplete appellate record, it is unclear if the trial court even made a ruling that can be deemed erroneous. While it is possible that the trial court shifted its prior position and excluded the RCr 11.42 testimony, it seems more likely that defense counsel made a decision to impeach Joiner's and Bobbett's

1991 testimony through other means. Nonetheless, in light of the very unusual background and circumstances of this case, we will assume that error occurred and undertake a palpable error analysis. To do so, it is necessary to fully understand the nature of Joiner's and Bobbett's testimony in 1991 and 2005.

Joiner's testimony

At the 1991 trial, Joiner relayed that Bussell came to his house on the evening of December 1, 1990, and that he had a ring to sell. Joiner purchased the ring for $25, paying with a personal check. The following day, December 2, Joiner asked Bussell if the ring was stolen and Bussell said it was "hot." Then, on December 3rd, Bussell came back to tell Joiner that the ring was not, in fact, stolen. At this time, Bussell asked where the ring was and Joiner informed him that he had given it to Bobbett. Joiner testified that Bussell "reacted kind of funny" and "nervous" to learn this news.

Joiner then testified that Bussell appeared on his front porch later that evening (December 3). He demanded return of the ring. Joiner testified that Bussell said, "You son of a bitch, I ought to kill you," and tried to enter the locked front door. Bobbett, who was on the phone with Joiner during this interaction, hung up and called police at Joiner's behest.

As the trial court concluded in 2005, defense counsel's cross-examination of Joiner was entirely ineffectual. He asked numerous non-leading questions about Joiner's occupation, why he bought the ring, and why

he gave it to Bobbett. He asked several irrelevant questions about Joiner's relationship with three persons unrelated to the crimes and the fact that Bussell had previously borrowed a pistol from Joiner for target practice. None of these questions elicited any information pertinent to Bussell's defense.

Defense counsel did manage to elicit two valuable pieces of information on cross-examination. Joiner admitted that he had written Bussell checks before as loans. Joiner also admitted, when questioned by police detectives, that he believed he was in "just a little bit of trouble" because of the ring.

At the RCr 11.42 hearing, a more complete picture of Joiner was presented. Counsel challenged Joiner about numerous inconsistent statements he had given on the stand at the 1991 trial and to police. These inconsistent statements concerned how he had met Bussell, how long he had known Bobbett, the fact that he was romantically interested in Bobbett in 1991, and the fact that Bobbett had never repaid a $200 loan.

More specifically related to the crimes, Joiner was confronted with the differing stories that he had told police detectives about the ring. When asked if he knew where Bussell had gotten the ring, Joiner told detectives three different versions of the story: that Bussell found it in a box somewhere; that Lail had sold the ring to Bussell; and that Bussell found it when he was cleaning out a closet. Joiner provided no explanation for these inconsistencies, other than his belief that he was in trouble with the police for possessing the ring.

At the 11.42 hearing, Joiner was also questioned about the confrontation at his home on December 3rd when Bussell appeared on his front porch. Joiner had testified at the 1991 trial that Bussell had threatened to kill him. At the 11.42 hearing, Joiner admitted that he had a pistol in his hand during this confrontation. He was also confronted with his statement to police at the time in which he expressly stated that Bussell never made any verbal threats at all.

In addition, Joiner's mental limitations came to light during the RCr 11.42 hearing. At the 1991 trial, Joiner stated on cross-examination that he was on disability for a knee injury. In fact, Joiner was on disability for mental retardation, a fact which the court took judicial notice of at the hearing. Also, through several other witnesses at the 11.42 hearing, it was established that Joiner had a terrible reputation for truthfulness and was known to "tell stories." It should be noted that Joiner's mental limitations were not plainly evident at the 1991 trial, particularly because he was never challenged or confronted with his inconsistent statements.

Bobbett's testimony

At the 1991 trial, Bobbett testified that she had known Joiner for about three months when he gave her the ring. She did not know Bussell, but had called him after she received the ring from Joiner. Bussell told her that he did not give or sell the ring to Joiner. Nonetheless, she remained suspicious because the ring appeared to be valuable, a belief that prompted her call to the police.

Bobbett corroborated Joiner's testimony about the altercation on December 3rd. Bobbett said that she was on the phone with Joiner when Bussell arrived and that she could hear Bussell "cursing and hollering." Joiner asked her to hang up and call police, which she did.

Defense counsel conducted an extremely brief cross-examination of Bobbett at the 1991 trial. Through non-leading questions, Bobbett answered again that she received the ring from Joiner. She added that, when she called Bussell about the ring, he speculated that some drug dealers may have given it to Joiner. Little new information was elicited from Bobbett on cross-examination.

At the RCr 11.42 hearing, Bobbett provided testimony that both contradicted Joiner's previous statements and damaged her own credibility. She was confronted with a supposed lie she had told Joiner about being in jail because of the ring, which she denied. Bobbett was also questioned about her testimony that she had only known Joiner for three months when he gave her the ring. In fact, Joiner had become Bobbett's neighbor some five years earlier. Bobbett also directly contradicted several aspects of Joiner's testimony, including Joiner's claim that Bobbett owed him $200 and his claim that they were romantically involved.

Most importantly, Bobbett testified at the 11.42 hearing that Joiner told her that he knew where Lail's body was located, though he never identified an exact location. He supposedly told Bobbett this before Lail's body was

discovered in February of 1991. Joiner denied ever making this statement to Bobbett.

Palpable Error Analysis

There is nothing in the record to indicate that the trial judge ever had the opportunity to rule on any objection to the presentation of the 1991 trial testimony of Joiner and Bobbett. Out of an abundance of caution, however, and for the sake of judicial economy, we will assume *arguendo* that it was error to replay Joiner's and Bobbett's 1991 trial testimony due to the ineffective cross-examination conducted, and that Bussell's confrontation rights were violated. Accordingly, we now consider whether this assumed error was palpable. A palpable error is one which affects the substantial rights of the defendant and results in manifest injustice. RCr 10.26. To effectively establish that an error was palpable, the party must show a "probability of a different result or [an] 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).

Upon an extensive review of the record, we are able to conclude that no manifest injustice has occurred in this case. Admittedly, Joiner's testimony was critical to the prosecution's case. Joiner was the only witness to place Lail's diamond and sapphire ring in Bussell's hand after her disappearance, which served as the basis for the robbery charge as well as damning evidence of the murder. Bobbett's testimony, to a certain extent, corroborated Joiner's, insofar as she testified that Joiner obtained the ring from Bussell.

However, Joiner's testimony was very strongly corroborated by the personal check that he wrote to Bussell on December 1st. That check was endorsed by Bussell. When confronted on the stand with that check, Bussell confirmed that the endorsement was his signature, but offered no credible explanation or reason why Joiner would write him a check.

More importantly, the damaging potential of the cross-examination of Joiner and Bobbett was fully realized through other means. In his brief before this Court, Bussell explains that the RCr 11.42 examination of Joiner and Bobbett approximates the cross-examination that *should* have been conducted at the 1991 trial. The thrust of the RCr 11.42 examination of Joiner and Bobbett concerned their reputations for truthfulness and their credibility. Even without the admission of the RCr 11.42 testimony, defense counsel was able to seriously attack both Joiner's and Bobbett's credibility through the testimony of Audrey Canterbury and Mame Bobbett, Kay Bobbett's mother.

Audrey Canterbury testified at the RCr 11.42 hearing and her testimony was admitted at the 2009 retrial. Days before Joiner's mother died, Canterbury made a promise to her that she would look after Joiner. Canterbury explained that Joiner was mentally handicapped, that he was unable to manage his own affairs, and that he lacked any critical thinking skills. She related that Joiner was often untruthful and that he made up stories. For this reason, he was often taken advantage of by his neighbors and, particularly, by Bobbett. Canterbury was aware that Joiner had purchased

jewelry for Bobbett in the past, and it was Canterbury's opinion that Bobbett was "rotten to the core" for having accepted expensive gifts from him. Canterbury even opined that Joiner would lie for Bobbett, if she asked, because he was infatuated with her.

Bobbett's mother, Mame Bobbett, also testified at the RCr 11.42 hearing and her testimony was replayed for the 2009 jury. The bulk of her testimony concerned Joiner's character for untruthfulness and his history of "telling stories." Like Canterbury, it was Mame Bobbett's stated opinion that Joiner would lie for her daughter because he was in love with her.

We also consider the overall strength of the prosecution's case. In addition to the compelling circumstantial evidence of Bussell's guilt, the Commonwealth presented strong physical evidence. Fibers matching Lail's carpeting and robe were found in Bussell's car, though he denied that she was ever in the vehicle. A damaged tree located near Lail's body contained paint chips forensically similar to paint samples taken from Bussell's vehicle. Both the car and the tree showed recent damage, which Bussell could not explain.

Though Bussell took the stand in his own defense, the Commonwealth was able to highlight key inconsistencies in his story. Bussell was adamant that Lail wrote him one check for his hours worked and that she started to write him a second check, but tore it up and then wrote him a third check as an advance. However, the check numbers do not substantiate this story – the torn up check was, sequentially, the first check. And, as stated above, Bussell

was unable to explain why he endorsed and cashed a check from Joiner dated the same day as Lail's disappearance.

Taking all of the circumstances of this case into consideration, we can conclude that no manifest injustice has occurred. Through the introduction of the testimony of Mame Bobbett and Canterbury, the defense was able to seriously damage the credibility of Bobbett and Joiner. Even had the RCr 11.42 testimony been admitted at the trial, we do not believe the jury would have been left with a significantly different impression of their credibility. Moreover, in light of the compelling case presented by the Commonwealth, we do not believe that there exists any probability that the jury would have acquitted Bussell, even if Joiner's and Bobbett's RCr 11.42 testimony had been admitted. There was no palpable error.

Recusal

Bussell claims that the trial court should have recused from the matter. This argument rests on the fact that the Chief Judge of the circuit had been the Commonwealth's Attorney at Bussell's first trial. In granting Bussell's RCr 11.42 motion, the trial court found that the Commonwealth withheld exculpatory information from defense counsel in 1991. This Court upheld that ruling.

Much like the preceding allegation of error, Bussell cites exclusively to arguments made by defense counsel prior to his 2008 retrial. There is no evidence in the record that the motion to recuse was renewed before the 2009

retrial. For this reason, the issue is not preserved for appellate review and we decline to address it.

Venue

Bussell argues that the trial court improperly changed venue from Christian County to Hopkins County. He claims that the Commonwealth failed to satisfy the requirements of KRS 452.210, because it did not make the requisite showing that a fair trial could not be held in Christian County. The decision to change venue rests within the sound discretion of the trial court and will be reviewed for an abuse of discretion. *Grooms v. Commonwealth*, 756 S.W.2d 131, 133 (Ky. 1988).

The Commonwealth's motion to change venue was based on the difficulty in seating a jury for the 2008 retrial, over which the same trial judge presided. In discussing the motion, the trial court explained to defense counsel that most potential jurors had been exposed to an inordinate amount of pretrial publicity about the case, that it was one of the most highly publicized cases in Christian County history, and that even pretrial conferences had garnered a significant amount of media coverage. The trial court also noted that nearly every piece of media coverage referenced the fact that Bussell had previously been convicted and sentenced to death for Lail's murder. Finally, the trial court explained to defense counsel that, pursuant to RCr 9.30(1)(c), the prior jury panel had been expanded, yet still the panel was nearly exhausted by valid excusals for cause.

KRS 452.210 does not require a certain type or quantity of proof to

justify a change of venue, as Bussell alleges. Here, it appears the trial court rested its decision largely on the experience of the prior retrial, which had concluded a mere three months before. *See Nickell v. Commonwealth*, 371 S.W.2d 849, 850 (Ky. 1963) ("In the making of such determination the trial judge has wide discretion in granting or refusing change of venue and his discretion is given great weight because he is present in the county and presumed to know the situation."). In light of these circumstances, we find no abuse of discretion in the trial court's determination that a change of venue would best ensure a fair and impartial trial.

Batson Challenge

Bussell argues that the trial court erred in allowing the Commonwealth to use a peremptory challenge to exclude Juror K, who is African-American. He claims that the challenge constituted purposeful discrimination within the meaning of *Batson v. Kentucky*, 476 U.S. 79 (1986). We disagree.

After both parties made peremptory challenges, defense counsel asked the Commonwealth to state its reasoning in striking Juror K, one of two African-Americans on the venire. The Commonwealth answered that he struck Juror K because she was looking down during questioning and that he felt she was inattentive and scowling. Defense counsel objected, citing *Batson*. The trial court overruled the objection. After the trial, defense counsel filed a motion for a new trial based on Juror K. He attached an affidavit from Juror K, in which she stated that she was paying attention to the proceedings. The

motion was denied.

We address possible race-based peremptory challenges by the prosecution under a three-part analysis:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Clay v. Commonwealth, 291 S.W.3d 210, 214 (Ky. 2008) (quoting *Snyder v. Louisiana*, 552 U.S. 472 (2008)). The trial court's decision is reviewed for an abuse of discretion. *Id.*

Because the Commonwealth offered an explanation for the strike, which the trial court ruled upon, we move to the second prong of the *Batson* analysis. *See Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992). Therefore, we must consider the reason provided by the Commonwealth. Here, the Commonwealth's explanation was neutral on its face. "Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (citation and internal quotation marks omitted).

Thus, we turn to the third prong of the *Batson* analysis. In discussing

the motion for a new trial, the trial court correctly explained that strikes based on a juror's demeanor are allowable. *See Thomas v. Commonwealth*, 153 S.W.3d 772, 777 (Ky. 2004) (demeanor is not "categorically inadequate as a race-neutral explanation for a peremptory strike"). Further, the trial court did not rely solely on the Commonwealth's assertions, but on his own personal observations of Juror K, which he specifically stated were "not inconsistent" with that of the Commonwealth's Attorney. Given the trial court's unique ability to evaluate the demeanor of both the jurors and the prosecutor, its ruling stands unless clearly erroneous. *Washington v. Commonwealth*, 34 S.W.3d 376, 379-80 (Ky. 2000). There is nothing in the record to establish that the Commonwealth was acting dishonestly or that the trial court's observations were erroneous. There was no error.

Cross-Examination of Bussell

Finally, Bussell argues that the Commonwealth was improperly permitted to ask him, on cross-examination, if he "knew a reason that Bertha Chambers would say anything that isn't correct." This question arose during a line of questioning regarding Lail's vacuum cleaner. Chambers testified that Bussell told her the vacuum cleaner was a gift he had purchased for her at a flea market. Bussell later denied this statement, explaining that Lail lent him the vacuum cleaner and that he left it on Chambers porch for later use. No objection was made and, therefore, the issue is unpreserved for appellate review. Bussell requests palpable error review under RCr 10.26.

"A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization 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). However, the Commonwealth is certainly permitted to bring out the fact that the defendant's testimony contradicts that of other witnesses. We do not believe the Commonwealth's questions in this case rise to the level of badgering or the type of "blunt force" condemned in *Moss*. Furthermore, this Court, in *Moss*, made clear that this type of questioning does not rise to the level of palpable error. *Id.* ("Appellant's failure to object and our failure to regard this as palpable error precludes relief.").

Conclusion

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Schroder and Venters, JJ., concur. Scott, J., not sitting.

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