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RENDERED: JANUARY 20, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000400-MR

ROBERT LACY STAMPER — APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
NO. 08-CR-00397

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant Robert Stamper was convicted of first-degree robbery and of being a first-degree persistent felony offender. Though he did not object at trial, he now complains that the trial court erred in allowing the Commonwealth to ask him to characterize the testimony of witnesses against him as false and in allowing evidence of his prior drug use to be admitted. Because neither alleged error rises to the level of palpable error, Appellant's conviction is affirmed.

I. Background

Appellant was convicted of robbing Walter White. Appellant and White met through their next door neighbor, Larry Bickett. Appellant and White had known each other for a couple weeks before the crime. On the night of the crime, four people were in White's apartment: Clarence Arthur Hill, Jr., Valada

Crowley Layson, Appellant, and White. What occurred inside the apartment was disputed at trial.

According to White, Appellant and Layson came to his apartment, where they began playing pool. White testified that Appellant and Layson acted suspiciously: they whispered to each other, tried to close the blinds, and tried to convince White to go to a bar with them to get drunk. Hill arrived later in the evening; Appellant went to the door and let him in.

White became concerned that there were so many people in his apartment whom he did not know well. He asked them to leave and went to his bedroom. White claimed that Layson followed him and tried to convince him to go to a bar. Appellant then came into the bedroom and attacked White by hitting him in the head with a pool cue. A struggle ensued. Hill joined the struggle, wrestling White to the floor. According to White, Appellant then pulled out a knife and held it to White's throat, and then asked for White's wallet. Without waiting, Appellant stuck his hand in White's pocket and took out the wallet. Appellant then instructed Hill to get some cords in order to tie up White. Hill returned with cord that had been pulled out of the wall and proceeded to tie White's hands and feet behind his back. Appellant directed Layson to find and take White's cell phones. Appellant also asked for the keys to White's truck and threatened to kill him.

Some time later, White heard the police knocking at the door. When they asked that he come to the door, Hill cut the cords binding his wrists and

ankles. White answered the door, told the police that three people were inside his apartment, and then fled to his neighbor's apartment.

Appellant denied that a robbery occurred and admitted only to taking money from White's wallet. He claimed that while White and Layson were playing pool, he sneaked into White's bedroom and took money out of his wallet, having observed White hide the wallet under the mattress earlier in the evening. According to Appellant, when he returned to the living room, White and Layson went into the bedroom.

Appellant then went outside on the balcony, where he saw Hill show up at the apartment. Appellant presumed that Hill, who was Layson's boyfriend, had overheard that Appellant and Layson were going to rendezvous at White's house. Appellant claimed that Hill suspected Layson was about to cheat on him.

Appellant testified that he entered the apartment to warn Layson about Hill's arrival, and that Hill followed him. When Hill saw Layson and White sitting on the bed, he attacked White. Appellant intervened to break up the fight, and Layson, Hill, and Appellant prepared to leave. At that point, White discovered his wallet was missing and grabbed Layson. Appellant and Hill intervened on Layson's behalf and another struggle ensued. Appellant claims he did not hit White with a pool cue, hold a knife to his throat, or tie him up. He also claims no one else tied White up.

Neither party disputes that Bickett, the next-door neighbor, called the police after hearing the commotion next door and seeing his coaxial cable,

through which he illegally shared cable television service with White, pulled so violently through the wall that his television almost tipped over.

The police arrived shortly after the call and entered the apartment. White met them at the door and said that the three people in his apartment were robbing him. They found Hill lying on the bed, and Layson and Appellant in the bathroom. Appellant tried to escape; he struggled with and knocked down one of the officers. In the bedroom, police found some cut cables and cords and a pool cue. Police also discovered cuts on White's arms and marks on his wrists and ankles. Two knives were also found on Appellant. Two other knives were found in White's bedroom.

A police officer also testified that in an interview right after the incident, Appellant admitted to trying to rob White. Specifically, he admitted that he held a knife on White, that White had been tied up, and that he was there to get money from White.

The jury convicted Appellant of first-degree robbery and of being a first-degree persistent felony offender. The court sentenced Appellant to twenty years in prison. His appeal to this Court, therefore, is as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant claims the trial court erred by allowing the Commonwealth to ask him to characterize both White and the police as liars on cross examination. He also claims error occurred when his prior drug use was

introduced during the Commonwealth's case in chief. Neither line of questions was objected to at trial.

Because neither error was properly preserved for appellate review, they can only be reviewed if they rise to the level of palpable error. *See* RCr 10.26; *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Such an error is essentially forfeited, *see Martin*, 207 S.W.3d at 3, and an appellate court may consider it only if it "affects the substantial rights of a party" and "manifest injustice has resulted from the error," RCr 10.26. This Court has read RCr 10.26 to require an appellant to show a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin*, 207 S.W.3d at 3. The focus of palpable error review is on the rule's requirement of manifest injustice. "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Id.* at 4; *see also id.* at 5 ("When an appellate court engages in a palpable error review, 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."). This is a "stringent standard." *Id.* at 5.

Thus, an appellant seeking review of a forfeited error—that is, an unpreserved or insufficiently raised error, as described in RCr 10.26—must meet a substantial burden before an appellate court will exercise its discretion to notice the error. With this standard in mind, we will take up each alleged error in turn.

A. Asking Appellant to Characterize Other Witnesses as Liars

Appellant took the stand in his own defense. On cross examination, the prosecutor, in four separate exchanges, asked whether statements by White and the police were false or incorrect. In some instances, Appellant answered the question directly. For example, when the prosecutor asked Appellant, "And the statement that he [White] was hit in the head by you, that's a false statement too?", Appellant answered, "Yes, sir." In other instances, the Appellant evaded answering the question directly and did not characterize the other witnesses' testimony as true or false. For example, when the prosecutor asked, "So if the police indicate that they removed that knife from your pocket, the police are lying? Is that right?", Appellant answered, "I don't remember having it on me, sir, no. The only knife I remember on me is the camouflage knife and I always carry it with me." Appellant did not object to these questions at trial.

This Court has repeatedly condemned the practice of asking a witness to comment on the truth or falsity of another witness's testimony. *See Ernst v. Commonwealth*, 160 S.W.3d 744, 764 (Ky. 2005); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 553-54 (Ky. 2004); *Caudill v. Commonwealth*, 120 S.W.3d 635, 662 (Ky. 2003); *Tamme v. Commonwealth*, 973 S.W.2d 13, 28-29 (Ky. 1998); *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). The rule on this type of questioning was laid out in *Moss*:

> [W]e believe such a line of questioning to be improper. 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. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force.

Moss, 949 S.W.2d at 583.

Yet, in each of these cases, the defendants' lawyers failed to object to the questions, and on appeal, the erroneous questions were held not to rise to the level of palpable error. In some cases, the Court simply concluded that the error was not palpable without further explanation, *e.g., id.*; in other cases, the Court concluded that the error was not palpable because the result would have been the same absent the error, *e.g., Caudill*, 120 S.W.3d at 662. The latter cases come closest to applying the palpable error standard articulated in *Martin*, which includes a "probability of a different result" as one way of showing palpability.

Appellant attempts to distinguish his case from these cases by arguing that the result in his case would have been different had the prosecutor not been allowed to ask him to characterize the testimony of other witnesses as lies. In so arguing, Appellant characterizes this case as a swearing contest, with the evidence turning largely on the credibility of the witnesses, who essentially described two versions of the events on the night of the crime. Appellant argues that the Commonwealth's improper questions undermined his version of the events and thus made it more likely that the jury would believe the prosecution witnesses. Appellant also notes some inconsistencies in the physical evidence—e.g., that there was no evidence of a mark on or injury

to White's head, which would corroborate his claim of being hit there—that highlighted the importance of the witnesses' testimony.

If this case turned solely on the competing accounts of the people in the apartment about what happened, Appellant's case for palpable error would be much stronger. Since both stories are plausible, sitting by themselves in equipoise, the prosecution's questions could have tipped the scales, leading the jury to disregard Appellant's story. But the evidence did not consist only of the stories of the people in the apartment that night.

This Court in plumbing the depths of the entire record, as commanded by *Martin*, has to contend with all of the evidence presented to determine the gravity of the improper questions. The prosecution independently impeached Appellant by introducing evidence from a police officer that on the night of the arrest Appellant admitted to the robbery attempt, a different story than he told at trial. This could provide support for a reasonable jury to weigh against the credibility of Appellant's testimony. A police officer also testified to seeing marks and cuts on White's wrists, which is consistent with his claim that he was tied up and that those bonds were later cut by Hill. Finally, Appellant's neighbor, Bickett, testified that his coaxial cable was pulled violently through the wall, which is consistent with White's claim that he was bound by cables that Hill brought from another room.

This evidence was independent of testimony of Hill, White, and Appellant, and corroborated White's version of events. In light of this corroborating evidence, this Court concludes that the result likely would have been the same

absent the erroneous questions by the Commonwealth. Though this Court must reiterate—again—that questions like these are improper, we cannot say that the error was "so fundamental as to threaten a defendant's entitlement to due process of law," *Martin*, 207 S.W.3d at 3, or "so manifest, fundamental and unambiguous that it threatened the integrity of the judicial process," *id.* at 5. As such, the questions, while error, were not palpable error.

B. The Introduction of Prior Drug Use by the Appellant

Appellant also complains of evidence of his prior drug use, which was elicited during the prosecution's re-direct examination of Bickett.

On cross examination, Appellant's counsel asked Bickett if White was ever known to take drugs. Bickett responded in the affirmative and continued to say that White would take pills, crack, or anything he could get his hands on. When defense counsel asked a follow-up question about White's drug use, Bickett corrected himself, stating that he thought counsel had asked him about somebody else, not White. Bickett went on to state that White never took drugs and rarely drank alcohol.

On redirect, the prosecutor asked Bickett to clarify that he had not been talking about White when he mentioned drug use. Bickett agreed that he had not been talking about White. Without further prompting or questioning, however, Bickett also stated that it was the Appellant to whom he had referred to as a drug addict.

Appellant claims this testimony violated KRE 404(b), because it was evidence of other bad acts, and KRE 404(c), because the prosecution had given

no notice of its intention to admit such evidence. Again, Appellant did not object to this evidence at trial.

Though such testimony would likely be error if elicited directly by the Commonwealth on direct examination, this Court perceives no error—or at least no palpable error—in the prosecution's questioning in this case. The defense's own line of questioning led to the need for clarification. Though Bickett stated during cross-examination that he had been mistaken, it was not improper for the Commonwealth to follow-up during re-direct to confirm that Bickett did not mean that White was a drug user. Just as important is the fact that the Commonwealth did not elicit Bickett's statement that Appellant was a heavy drug user. The Commonwealth asked only whether Bickett had been referring to White; Bickett spontaneously went on to identify Appellant as the drug user. Such a scenario, where the Commonwealth asks a legitimate question that inadvertently leads to improper evidence, underscores the importance of a timely objection (and motion to strike) by counsel.

The implication that the Commonwealth violated KRE 404(b) when it was Appellant's own line of questioning that led to the error is misguided. That the evidence was elicited as it was also demonstrates a lack of intent by the prosecution to violate the notice requirement of KRE 404(c). This Court sees no substantial possibility that the outcome of the trial would have been different absent the error. Nor can we say that the error was "so fundamental as to threaten a defendant's entitlement to due process of law." Thus, no palpable error occurred as a result of Bickett's testimony.

III. Conclusion

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

All sitting. All concur.

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