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ACTION.

Supreme Court of Kentucky

2011-SC-000721-MR

RICHARD H. TOWNSEND, II

APPELLANT

V. ON APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS, III, JUDGE
NO. 10-CR-000366-001

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Richard H. Townsend, II, of three counts of first-degree trafficking in a controlled substance, first offense, for conducting three separate drug transactions with a confidential informant, Justin Tate. The trial court sentenced Townsend to twenty years' imprisonment,¹ and he appeals from the resulting judgment as a matter of right.²

Townsend contends (1) that the trial court erred in allowing Tate to testify why Townsend told him not to mention money during the drug transactions and (2) that the Commonwealth committed prosecutorial

¹ Townsend was sentenced to the maximum penalty of ten years' imprisonment on each of the three charges, to be served consecutively, not to exceed a total of twenty years.

² Ky. Const. § 110(2)(b).

misconduct by arguing to the jury that Townsend would commit more crime if he was acquitted.

Finding no error, we affirm the conviction.

I. FACTUAL AND PROCEDURAL HISTORY.

Justin Tate, a confidential informant for the Kentucky State Police, worked with Detective Phil Clark on three controlled drug transactions involving Townsend. In each of the transactions, Tate purchased Oxycodone from Townsend in exchange for cash. Tate wore a recording device during each of the three transactions, and Detective Clark accompanied him during two of the transactions.

At trial, the Commonwealth played the audio recordings of each of the drug transactions for the jury. The content of the recordings was buttressed by the testimony of both Tate and Detective Clark, who explained their processes and their understanding of the illicit transactions that they were a part of.

The jury convicted Townsend on all three counts of first-degree trafficking in a controlled substance, first offense, and recommended the maximum penalty of ten years on each count. The trial court accepted the jury's recommendation, sentencing Townsend to serve each sentence consecutively, not to exceed twenty years. This appeal followed.

II. ANALYSIS.

A. Tate's Testimony Regarding why Townsend did not Want him to Mention Money was Neither Irrelevant nor Speculative.

Townsend first argues that the trial court erred in allowing Tate to testify about why Townsend told him not to mention money during the first drug transaction. Townsend argues that allowing Tate's testimony on this topic is both irrelevant and speculative. He argues that the testimony is irrelevant because it does not make the existence of any fact of consequence to the jury's determination of whether or not Townsend sold drugs any more or less probable. Further, he alleges that Tate's testimony explaining Townsend's request not to mention money is an improper topic of testimony because it required speculation. We disagree.

After the jury heard the audio recording of the first transaction between Townsend and Tate, in which Townsend can be heard asking Tate to refrain from mentioning money, the Commonwealth asked Tate to explain to the jury why Townsend requested he refrain from discussing money. Over Townsend's objection, Tate responded that it would make recording the transaction more difficult and that Townsend requested that hand signals be used instead of verbal articulations of money.

It is the most elementary of all evidence rules that "[a]ll relevant evidence is admissible" unless otherwise provided for by law.³ *Relevant evidence* means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

³ Kentucky Rules of Evidence (KRE) 402.

than it would be without the evidence.”⁴ A “fact that is of consequence to the determination of the action includes not only a fact tending to prove an element of the offense, but also a fact tending to disprove a defense.”⁵ The burden to establish relevancy is not a high one; in fact, “[r]elevancy is established by any showing of probativeness, however slight.”⁶ Determinations of admissibility are subject to the trial court’s discretion and, therefore, are reviewed for an abuse of discretion.⁷

Here, Townsend argues that Tate’s testimony regarding why Townsend did not want to mention money during the first recorded transaction was not relevant under the Kentucky Rules of Evidence because the testimony would not make the existence of any fact relevant to the jury’s determination of whether or not Townsend sold drugs to Tate more or less probable. We find no credence in this argument. Tate’s testimony as to why Townsend did not want him to discuss money was directly aimed at disproving the contention that none of the three recordings of the transactions has an easily identifiable expression of the terms of the illicit drug transaction that was taking place. Townsend further clarifies the Commonwealth’s need for this type of explanatory evidence by noting in his brief before this Court that “[t]here is not a clear mention of a buy taking place on any of the tapes.” Surely, in instances

⁴ Kentucky Rules of Evidence (KRE) 401.

⁵ *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999) (internal quotation marks omitted).

⁶ *Id.*

⁷ *Cuzick v. Commonwealth*, 276 S.W.3d 260, 266 (Ky. 2009) (citing *Commonwealth v. English*, 979 S.W.2d 98 (Ky. 1999)).

such as this, the Commonwealth is entitled to proffer evidence tending to explain why the drug transactions took place the way they did and why the contents of the recording may not include specific descriptions of the terms of the exchange taking place. We find that Tate's testimony regarding why Townsend did not want to discuss money during the deal was relevant under KRE 401; and, therefore, the trial court did not abuse its discretion in admitting the testimony.

Townsend secondarily argues that Tate's testimony about why Townsend did not want to discuss money audibly was improper because it was speculative. Although Townsend frames this argument in terms of speculation, it appears to truly be charging that Tate's testimony was violative of the mandate in KRE 602 that a witness must have personal knowledge of the matters to which he will testify. Under KRE 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."⁸ Professor Lawson states that when assessing evidence under KRE 602, "[t]he authority of the judge is limited to rejecting testimony 'if it could not reasonably be believed, that is, as a matter of law no trier of fact could find that the witness actually perceived the event about which he or she is testifying.'"⁹ Again, because this is an issue

⁸ KRE 602

⁹ ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 3.00[3], p. 221 (4th ed. 2003) (citing 2 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 658 (CHADBURN rev. 1979)).

pertaining to the admissibility of evidence at trial, we review for abuse of discretion.¹⁰

It is true that KRE 602 will often present a viable argument for barring testimony that requires a witness to explain what a defendant was thinking when he made a specific statement. But that is not the case here. The evidence introduced at trial showed that Townsend had previously explained to Tate why he did not want to use words to describe the transaction taking place and, more specifically the money changing hands, because he was fearful of being caught. Tate's personal knowledge on this subject is most notably shown by the audio recording of the second transaction that contains Townsend's explanation of why their transactions should not include discussion of money and should be "finger deals." Perhaps most damning to Townsend's argument on this issue is that his attorney conceded to the trial court that Townsend had articulated to Tate why he did not want money to be discussed and further admitted that it was contained on the tape of the second drug transaction. Accordingly, we hold that Tate had sufficient personal knowledge to testify about why Townsend did not want to money to be mentioned; and the trial court did not abuse its discretion in allowing Tate's testimony.

B. The Commonwealth did not Commit Prosecutorial Error During the Guilt or Penalty Phase.

As his second assignment of error, Townsend argues that the Commonwealth committed prosecutorial misconduct in its closing arguments

¹⁰ *Cuzick*, 276 S.W.3d at 266.

in both the guilt and penalty phase. Townsend concedes this issue is not preserved for review, so we review for palpable error.¹¹ An error is palpable only if “it is ‘shocking or jurisprudentially intolerable’”¹² and Townsend can show a “probability of a different result or [an] error so fundamental as to threaten [his] entitlement to due process of law.”¹³

Townsend contends that two similar comments by the Commonwealth amount to prosecutorial misconduct. The first statement took place during the guilt phase when the prosecutor remarked that if Townsend is found not guilty, “he’ll just go back and push more pills into Boyd County.” The second statement took place during the penalty phase when the prosecutor again remarked that if Townsend were released too soon, he “will do this in Boyd County again.” Townsend argues that both statements are improper comments on the consequences of a verdict in violation of *Payne v. Commonwealth*¹⁴ and that both amount to an impermissible “send a message” argument. We do not agree.

This Court has previously faced a similar argument regarding a violation of *Payne* in *Barth v. Commonwealth*.¹⁵ In *Barth*, the prosecutor similarly remarked in his closing argument that if the defendant were not found guilty

¹¹ Kentucky Rules of Criminal Procedure (RCr) 10.26.

¹² *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

¹³ *Martin*, 207 S.W.3d at 3.

¹⁴ 623 S.W.2d 867 (Ky. 1981).

¹⁵ 80 S.W.3d 390, 403 (Ky. 2001).

he would commit more crime.¹⁶ In response to the defendant's argument that this statement was an impermissible comment on a verdict, this Court held that "a statement by the prosecutor that if acquitted, a defendant might commit other crimes, does not violate *Payne*."¹⁷ We see no reason to deviate from this holding and Townsend has provided us with no conflicting authority, so we find that the Commonwealth's statements did not violate *Payne*.

This Court has also often disfavored "send a message" type arguments during the guilt phase.¹⁸ "Send a message" arguments typically involve a prosecutor's plea to the jury to "throw the book" at or make an "example" of a defendant in an attempt to deter others in the community from committing similar crimes. While we do not believe that the prosecutor's statements here fit this mold, they nonetheless pale in comparison to other cases involving "send a message" arguments in which we have found no palpable error.¹⁹

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., *Ordway v. Commonwealth*, 391 S.W.3d 762, 797 (Ky. 2013); *Carver v. Commonwealth*, 303 S.W.3d 110, 120 (Ky. 2010); *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006).

¹⁹ See *Carver*, 303 S.W.3d at 110 (citing *Brewer*, 206 S.W.3d at 349 (finding prosecutor's comments not to be palpable error, including: "And, they're going to hear about the way an Owen County jury views all of this, and so that's important. The community's going to know about it. They're going to know whether or not we have the backbone to stand up to it. And, so there is a message with your sentence and you've got to consider that."); *Commonwealth v. Mitchell*, 165 S.W.3d 129, 131 (Ky. 2005) (finding not to be palpable error the statement, "if we are ever to make a dent in a terrible drug problem, we've got, prescription drugs with Oxycontin, it's time to send a message to this defendant and to this community that we're going to punish drug dealers for doing what they're doing. It's time we send a message."); *Young v. Commonwealth*, 25 S.W.3d 66, 73 (Ky. 2000) (finding not to be palpable error comment that defendant's sentence would "send a message throughout this community [that if] you start manufacturing methamphetamine in Muhlenberg

Further, this Court has recently held that “send a message” arguments aimed at deterrence are permissible during the penalty phase. Accordingly, in line with our precedent, we must hold that there was no prosecutorial misconduct resulting in palpable error during the guilt or penalty phase of Townsend’s trial.

III. CONCLUSION.

For the foregoing reasons, we find no error in Townsend’s trial and affirm his conviction.

All sitting. All concur.

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County . . . you’re gonna receive the maximum punishment that we can give you,” and “[t]o send a message to these people to discontinue this type of activity.”)).