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RENDERED: SEPTEMBER 18, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000786-MR

BOBBY JOE LEWELLEN — APPELLANT

V.

ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 13-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Around 9 p.m. on January 5, 2013, Appellant, Bobby Joe Lewellen, was arrested on suspicion of driving under the influence. Kentucky State Police Trooper John McGee had observed Lewellen's truck parked and blocking the public road with a door open and dome light on. Due to Lewellen's physical appearance and reaction to Trooper McGee's questions, the trooper suspected that narcotics were involved. Lewellen was physically unable to perform a field sobriety test. Also, Trooper McGee searched Lewellen's vehicle but did not discover any contraband. Before placing Lewellen in the police cruiser, Trooper McGee advised him that taking contraband into jail was a class D felony. Lewellen asserted that he did not have any contraband on his person. He was taken to a local hospital for a blood test and then to the Muhlenberg County Detention Center ("Detention Center").

At the Detention Center, Lewellen was escorted into a changing room by Deputy Jailer Stewart McPherson. Because Lewellen had a prosthetic right leg, Deputy McPherson assisted him in removing his right shoe which was attached to the limb. During this process, a paper towel wrapped in duct tape fell out of the shoe. Lewellen asked Deputy McPherson to throw the object away and also offered the Deputy several thousand dollars if he would do so. Instead, Deputy McPherson gave the unknown object to Trooper McGee, who identified the substance that was wrapped inside the paper towel as suspected methamphetamine. Accordingly, Trooper McGee informed Lewellen of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Soon thereafter, Lewellen admitted to Trooper McGee that he had purchased 3.8 grams of pure methamphetamine, some of which he consumed and some he gave away. Lewellen claimed that he attempted to get rid of the contraband prior to arriving at the Detention Center but was unable to access his shoe.

Lewellen was subsequently indicted by a Muhlenberg County grand jury for first-degree promoting contraband and being a first-degree persistent felony offender ("PFO"). A Muhlenberg Circuit Court jury found Lewellen guilty of both charges following a one day trial and recommended a total sentence of twenty years imprisonment. The trial court sentenced him in accord with the jury's recommendation. Lewellen now appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Four issues are raised and addressed as follows.

State of Mind Testimony

Lewellen argues that the trial court erred by precluding Trooper McGee from testifying as to Lewellen's state of mind. He contends that this error denied him the right to present a complete defense in violation of his right of confrontation and due process, and that a new trial is warranted. We disagree.

During cross examination by defense counsel, Trooper McGee testified that, from his experience, methamphetamine consumption would impair all cognitive functions of the brain. He further opined that Lewellen had difficulty following his instructions and was clearly intoxicated. Lewellen's trial counsel then asked Trooper McGee whether a person who had ingested methamphetamine would be able to understand the officer's directions. The Commonwealth objected to this line of inquiry which was sustained by the trial court.

KRE 103 provides the standard for preserving objections to evidence being introduced or excluded. If the objection concerns evidence that has been excluded, the substance of the evidence must have been "made known to the court by offer or was apparent from the context within which questions were asked." KRE 103(a)(2). However, this rule "does not require the presentation of avowal testimony to preserve the issue . . . ." *Weaver v. Commonwealth,* 298 S.W.3d 851, 856 fn. 12 (Ky. 2009); *see also Slone v. Commonwealth,* 382 S.W.3d 851, 856–57 fn. 2 (Ky. 2012) (noting that the trial court may exercise its discretion and require that the offer be presented by avowal). Here, the trial court did not require an avowal.

Lewellen contends that his trial counsel sought to elicit testimony from Trooper McGee demonstrating that Lewellen lacked the requisite mental state to commit the crime charged. *See* KRS 520.050(1)(a) (a person is guilty of first-degree promoting contraband when "he *knowingly* introduces dangerous contraband into a detention facility.") (Emphasis added). Nevertheless, evidence was presented to the jury that Lewellen admitted to taking methamphetamine into the Detention Center. *See also* Leslie W. Abramson, Kentucky Practice, *Substantive Criminal Law* § 2:12 (2013) ("A person acts knowingly with respect to conduct when he is aware that his conduct is of that nature.") In any event, we review a trial court's decision concerning whether to exclude evidence for abuse of discretion. *Brewer v. Commonwealth,* 206 S.W.3d 313, 320 (Ky. 2006).

It is difficult to discern from the record what Trooper McGee's actual testimony would have been had defense counsel been allowed to continue his line of inquiry. The trooper's responses to counsel's attempted questioning may not have been the precise responses allegedly anticipated by Lewellen. *Slone,* 382 S.W.3d at 857 ("While we have some idea what defense counsel's questions would have been, without the avowal responses of the victim, it is difficult to fully determine how the trial court's ruling prejudiced Appellant."); *Rock v. Commonwealth,* No. 2005–SC–000290–MR, 2006 WL 2987092, at * 3 (Ky. Oct. 19, 2006) (holding that without physician's testimony, it could not be known if physician could have indicated the likelihood that defendant's medical condition could impact a person's state of mind). Because counsel did not

inform the court as to what the expected testimony would be, we cannot say the trial court abused its discretion. Lastly, any error would otherwise be harmless because Lewellen admitted to attempting to remove contraband before arriving at the jail. This demonstrates that he "knowingly" brought the drugs into the jail.

The Commonwealth's Closing Argument

Lewellen next complains that he is entitled to a new trial because the Commonwealth Attorney engaged in prosecutorial misconduct during the penalty phase closing argument. This argument is unpreserved and will be reviewed for palpable error. RCr 10.26. "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." *Martin v. Commonwealth,* 207 S.W.3d 1, 5 (Ky. 2006).

We will reverse for prosecutorial misconduct in a closing argument only if the misconduct is flagrant *or if each of the following is satisfied:* (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment. *Barnes v. Commonwealth,* 91 S.W.3d 564, 568 (Ky. 2002) (emphasis added). Because Lewellen failed to object at trial, we will reverse only if the conduct alleged was flagrant. *Mayo v. Commonwealth,* 322 S.W.3d 41, 56 (Ky. 2010) ("We use a four-part test to determine if a prosecutor's improper comments rise to the level of flagrant misconduct."). The four flagrancy factors are as follows: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2)

whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Hannah v. Commonwealth,* 306 S.W.3d 509, 518 (Ky. 2010) (quotation marks and citation omitted).

Lewellen cites three examples of improper conduct. First, he states that the Commonwealth Attorney erroneously referred to the 1.411 grams of methamphetamine found on Lewellen's person at the Detention Center as a "large amount of methamphetamine." Lewellen argues that 1.411 grams is actually a moderate quantity, not a large amount possibly indicating intent to distribute. *See* 28A C.J.S. *Drugs and Narcotics* § 384 (2014) ("An intent to distribute, deliver, or sell controlled substances may be inferred from the possession of a large quantity of a controlled substance."). However, it is well-settled that "counsel may comment and make all legitimate inferences that can reasonably be drawn from the evidence presented at trial." *Mullins v. Commonwealth,* 350 S.W.3d 434, 439 (Ky. 2011) (citing *East v. Commonwealth,* 60 S.W.2d 137, 139 (Ky. 1933)). In the present case, the prosecutor's statement concerning the quantity of methamphetamine discovered was legitimate and certainly not flagrant.

Next, the Commonwealth Attorney characterized the crime of promoting contraband as consisting of "two crimes in one." He reasoned that it is first illegal to possess methamphetamine anywhere in Kentucky, especially such a "large amount." In addition, Lewellen took the contraband inside the Detention Center. Although the prosecutor's description was not the most apt

characterization of the crime charged, we do not believe that it was deliberate or that it misled the jury. *See Hannah,* 306 S.W.3d at 518. Furthermore, the Commonwealth presented undisputed evidence supporting a PFO conviction. Thus, the prosecutor's statements cannot be considered flagrant in this instance.

Lastly, Lewellen takes issue with the following statements presented to the jury during the Commonwealth's closing argument:

> "Kentucky does not have third strike and you're out, because if we did, Mr. Lewellen is out—he has committed two felonies within a period of time required by law that makes him a persistent felony offender . . . ."

Lewllen specifically contends that the Commonwealth Attorney was arguing that the maximum sentence allowed in the present case was not enough, thus urging nullification of Kentucky law. *See Medley v. Commonwealth,* 704 S.W.2d 190, 191 (Ky. 1985) (holding that a jury has "the right to disbelieve the evidence, [but] not to disregard the law."). In the present case, we are unconvinced that the prosecutor was urging the jury to disregard the law.

Although these statements may have been unnecessary, we have consistently recognized that counsel has significant latitude during closing arguments. *E.g., Brewer v. Commonwealth,* 206 S.W.3d 343, 350 (Ky. 2006); *Stopher v. Commonwealth,* 57 S.W.3d 787, 805–06 (Ky. 2001). Moreover, we must consider the totality of the closing argument at issue. *Bowling v. Commonwealth,* 873 S.W.2d 175, 178 (Ky. 1993). Reviewing the Commonwealth's closing arguments as a whole and considering the

undisputed evidence supporting a PFO conviction in this case, we conclude that none of the alleged instances of prosecutorial misconduct were flagrant and, therefore, did not constitute palpable error.

Failure to Administer Oath

Lewellen further contends that the trial court committed reversible error when it failed to administer the requisite oath to the bailiff. The Commonwealth concedes that the record does not contain evidence demonstrating that the bailiff was sworn in this case. This issue is unpreserved and will be reviewed for palpable error. RCr 10.26.

RCr 9.68 requires that officers in charge of a jury "must be sworn to keep the jurors together, and to suffer no person to speak to, or communicate with, them on any subject connected with the trial, and not to do so themselves." However, we have held that "[i]t is not reversible error in failing to administer the oath to the officer having charge of the jury where that officer actually performs his duties." *Cole v. Commonwealth*, 553 S.W.2d 468, 471 (Ky. 1977).

Lewellen cites two examples in support of the argument that the bailiff failed to perform his duties required by oath. First, he states that a juror, identified as A.S., overheard Trooper McGee engaged in a conversation outside of the courtroom. Second, Lewellen claims that an unnamed juror had a conversation with Deputy Jailer McPherson about a car at some point prior to closing arguments. Thus, both incidents involved witnesses for the prosecution.

During a bench conference, defense counsel informed the trial court that he did not wish to strike the unnamed juror due to the conversation she had with Deputy McPherson. Furthermore, A.S. was an alternate juror and did not deliberate with the jury. Lastly, the trial court admonished the jury immediately prior to deliberations not to speak with any non-juror regarding the trial and not to consider any outside sources during deliberations. It is well-settled that a jury is presumed to follow an admonition and that an "admonition cures any error." *Combs v. Commonwealth,* 198 S.W.3d 574, 581 (Ky. 2006) (citing *Mills v. Commonwealth,* 996 S.W.2d 473, 485 (Ky. 1999). As such, Lewellen has failed to demonstrate any prejudice that resulted from the trial court's failure to administer the requisite oath to bailiff. Accordingly, there was no palpable error.

Court Costs

Lastly, Lewellen argues that the court costs totaling $155 should be vacated because he is poor, unemployed, and serving a twenty-year sentence. This issue is unpreserved. We review the trial court's imposition of fines for clear error. *Travis v. Commonwealth,* 327 S.W.3d 456, 459 (Ky. 2010); *Roberts v. Commonwealth,* 410 S.W.3d. 606, 611 (Ky. 2013).

Pursuant to KRS 23A.205(2), the trial court shall impose court costs "unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." "[A] person may qualify as 'needy' under KRS 31.110 because he cannot afford the services of an attorney

yet not be 'poor' under KRS 23A.205." *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012).

The final judgment and sentencing order required Lewellen to pay the $155 in costs within sixty days from release from incarceration. Thus, the court provided him with a sufficient time period within which to pay the costs that was not encumbered by his incarceration. *See Maynes* 361 S.W.3d at 922 (holding that a defendant could foreseeably pay court costs that were due within six months of release from incarceration.) Also, the record reflects that Lewellen was not a "poor person" under KRS 23A.205(2). First, he was represented by private counsel during the trial court proceedings. Further, the presentence investigation report filed four days prior to sentencing demonstrates that Lewellen received $7,800 per month from insurance arising from the work related injury that resulted in the loss of his right leg. That same report indicated that Lewellen owned five homes totaling $500,000 in value. Thus, there was no error in assessing court costs.

Conclusion

For the foregoing reasons, we hereby affirm the judgment of the Muhlenberg Circuit Court.

All sitting. All concur.

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