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RENDERED: SEPTEMBER 24, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000701-MR

JOSHUA HALL — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
NO. 10-CR-000247

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Joshua A. Hall of murder and wanton endangerment in the first degree. He was sentenced to a total of thirty-five years' imprisonment for murder and an additional two years for wanton endangerment, with the sentences running concurrently. Hall now appeals this judgment as a matter of right.[1]

Hall's appeal presents two allegations of error. First, he contends that the Commonwealth withheld evidence material to his defense in violation of *Brady v. Maryland*.[2] Second, Hall argues that the Commonwealth engaged in various acts of prosecutorial misconduct, the cumulative effect of which rendered his trial fundamentally unfair. For reasons stated below, we affirm the trial court judgment.

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[1] Ky.Const. § 110(2)(b).

[2] 373 U.S. 83 (1963).

I. FACTUAL AND PROCEDURAL BACKGROUND.

Karen Pessolano was killed by multiple gunshot wounds fired by Hall. During the evening before she was killed, Pessolano and Hall met at a bar. Hall was out celebrating that night with his mother, Tamara, and sister, Kim. While at the bar, Kim noticed that Hall carried a pistol; and she promptly instructed him to put it away.

Once Hall and Pessolano met, they immediately hit it off and began dancing and drinking together at the bar. Things escalated quickly, when dancing and drinking evolved into taking pills and smoking marijuana, with the two having sex on a picnic table outside the bar. Hall left the bar with Pessolano at 3:50 a.m., with the intention of staying the rest of the night with her at her home.

On the way to Pessolano's, they entered a nearby Speedway gas station at 3:55 a.m. While inside, Pessolano asked Hall if he would sell ten pills to a friend. Instead, Hall handed Pessolano the pills and instructed her to sell them to the friend herself and to give him the money when she returned. She then left the store alone. It is at this point that Hall's account of the evening began to fracture.

Hall initially told the police that he caught up with Pessolano shortly after they parted and confronted her, asking for his money. She informed him that she had been robbed. According to Hall's videotaped statement the day of the murder, he responded to this news stating, ". . . I'm not playing that" and shot her multiple times. Pessolano was shot at least eight times, yielding

twenty-four wounds, three of which would have independently been fatal. Hall was later arrested and indicted for Pessolano's murder, tampering with physical evidence, and wanton endangerment in the first degree.

At trial, Hall offered an alternate theory of events leading up to Pessolano's death. Under his version, he said an African-American man, seemingly working in league with Pessolano, demanded that Hall get down on his knees while Pessolano took his remaining money and pills. Hall claimed that as he was kneeling, he covertly moved the pistol from its location tucked inside his pants to between his legs. Fearing for his life, as soon as he found an opening, he said he got up and ran away, firing the gun until he was a safe distance away from Pessolano and the man. Thus, he claimed firing his pistol, and resultantly killing Pessolano, was done in self-defense. Hall did not mention this encounter to law enforcement Detective Myers in his video interview later in the day of the murder.

After five days of trial, the jury found Hall guilty of murder and wanton endangerment but not guilty of tampering with physical evidence. The trial court sentenced him to thirty-five years for murder and two years for wanton endangerment, with the sentences to run concurrently.

II. ANALYSIS.

A. The Commonwealth did not Commit a *Brady* Violation.

Officer Tim Salyer, the responding officer to the crime scene, testified at trial that during the investigation he stopped and briefly interviewed an unknown man walking down the street from the scene of Pessolano's murder.

Officer Salyer did not record his name and did not memorialize the encounter in his official report because he did not consider the man relevant to the investigation. Hall's counsel immediately moved for a mistrial on the grounds that this information was not provided to the defense through discovery. Counsel further supported the motion for mistrial by contending that this amounted to withholding material information from a criminal defendant, resulting in an unconstitutional deprivation of due process of law under *Brady*. The Commonwealth rebutted with the fact that the testimony was disclosed within another officer's report. The trial court denied Hall's request for a mistrial.

For Hall's first claim of error, he contends that a *Brady* violation occurred because he was not provided discovery of Officer Salyer's stop of the unknown person and that Salyer failed to identify the man, thus failing to preserve and disclose evidence that could have been critical to his defense. This issue was properly preserved below.

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[3] Under our precedent, the Commonwealth maintains a constitutional duty to disclose any evidence that is exculpatory in nature to either guilt or punishment.[4] But this

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[3] 373 U.S. 83, 87 (1963).

[4] *See Akers v. Commonwealth*, 172 S.W.3d 414 (Ky. 2005).

does not impose an additional duty for the prosecution to investigate or gather evidence.[5]

Two decades later in *United States v. Bagley*, the Supreme Court reprised *Brady* and presented a contemporary *Brady* analysis.[6] Among other reforms, *Bagley* set forth an updated method for determining whether to reverse for failing to disclose. Without regard to whether a criminal defendant requests information from the government, reversal is determined by whether there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[7] This standard is met when the probability of a different result "undermines [the] confidence" in the original verdict.[8] Furthermore, *Bagley* elaborated that the materiality requirement of *Brady* evidence is assessed collectively, rather than item-by-item.[9]

In terms of a conventional application of *Brady* and *Bagley*, we see no failure to disclose in this case. Although Officer Salyer's encounter with the unknown man was not memorialized in his own report, and thus not provided to the defense directly, the event was still accounted for in the

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[5] *See Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002).

[6] 473 U.S. 667 (1985).

[7] *Id.* at 668.

[8] *Id.* at 678.

[9] *See Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (endorsing Justice Blackmun's position in *Bagley* that the Constitution is not violated each time the government fails to disclose potentially helpful information). *See also Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007) (adopting a cumulative effect approach to failure to disclose potentially exculpatory information).

Commonwealth's discovery disclosures to the defense. For the remainder of discovery and pretrial, Hall was effectively on notice that Officer Salyer spoke with someone else during his investigation. Such notice is sufficient to satisfy the *Brady* analysis.[10] Defense counsel is correct in stating that a "cat and mouse game whereby the Commonwealth is permitted to withhold important information . . . cannot be countenanced."[11] But here no evidence was withheld from Hall. The extent of the Commonwealth's knowledge was disclosed and readily discoverable to defense counsel. So under a traditional *Brady* analysis, we cannot conclude that the Commonwealth failed to disclose information material to Hall's defense. This simply does not appear to be the type of invidious and prejudicial activity that *Brady* and *Bagley* were intended to prevent.

Hall's argument goes deeper, and he essentially rests his claim on attacking Officer Salyer's conclusion that the unknown man was not important to the criminal investigation. Hall's argument boils down to Officer Salyer's failure to identify the man and that the man could have aided his discovery of information. What Hall contests is not a failure to disclose evidence but, rather, an inability to dictate police investigation protocols. This goes well beyond the disclosure requirements mandated in *Brady* and constitutional requirements of due process.

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[10] *See, e.g., Nunley v. Commonwealth*, 393 S.W.3d 9 (Ky. 2013) (finding no *Brady* violation when the defendant was on notice of the allegedly withheld evidence prior to trial).

[11] *James v. Commonwealth*, 482 S.W.2d 92, 94 (Ky. 1972).

It is true that police knowledge is imputed to the government and the Commonwealth has a duty to learn of favorable evidence *known* by government agents, including police officers.[12] With that said, the Commonwealth has "no duty to disclose what it does not know and could not have reasonably discovered."[13] So the Commonwealth's duty extends only to potentially exculpable evidence in existence when conducting its own discovery.

Here, the extent of the Commonwealth's knowledge mirrors what was disclosed to Hall. When the Commonwealth conducted its discovery, the brief encounter itself is all Officer Salyer knew; and the Commonwealth could not have reasonably discovered any further information. Though Hall contends that the unknown man may have led to discoverable exculpatory evidence, the man was just that, unknown. No amount of additional diligence or investigation could have rendered information beyond what was already disclosed—the simple statement that Officer Salyer had a brief conversation with an unnamed man. Whatever inferences that could be drawn with regard to any additional evidence the man may have possessed is speculative at best. We cannot state with certainty that under these facts, the Commonwealth withheld discoverable evidence from Hall.

Even if we could conclude that the Commonwealth withheld material information from Hall, a *Brady* ruling would be improper. In *Bowling*, we held

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[12] *Kyles*, 514 U.S. at 437.

[13] *Bowling*, 80 S.W.3d at 411.

that the *Brady* rule only applies to discovery of material evidence *after trial.*[14] This was elaborated in *Nunley*, where this court held that "*Brady* does not give a defendant a second chance after trial once he becomes dissatisfied with the outcome if he had a chance at trial to address the evidence complained of."[15] In this instance, defense counsel learned of this information during trial and used the opportunity to cross-examine Officer Salyer. Perhaps the trial court may have granted Hall a continuance or recess to prepare for this late-discovered evidence, had he sought one. The mid-trial realization of this information, however, does not entitle him to a mistrial, which is available only for "a manifest necessity."[16] Here, that is not the case because Hall was provided an opportunity to make use of Officer Salyer's interview with the unknown man.

In sum, we conclude that the trial court properly overruled Hall's motion for a mistrial because there was no suppression of *Brady* evidence.

B. The Commonwealth did not Engage in Prosecutorial Misconduct.

Hall asserts three separate acts of prosecutorial misconduct at trial, the cumulative effect of which rendered his trial fundamentally unfair: counsel for the Commonwealth (1) improperly inserted its own opinion of Hall's credibility, (2) invoked inadmissible character evidence in violation of Kentucky Rules of Evidence (KRE) 404(b) when cross-examining Hall's mother, and (3) inappropriately questioned Hall on the credibility of other witnesses

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[14] *Id.* at 410.

[15] 393 S.W.3d at 13.

[16] *Id.*

contrary to our holding in *Moss v. Commonwealth.*[17] We will address each of those claims in turn below.

Before addressing the individual claims, it is important to recognize that we will review each instance of prosecutorial misconduct under one of two standards, depending on whether Hall properly preserved the issue for our review. If Hall did preserve the issue at trial, we must focus on the trial as a whole and reverse "only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings."[18] Alternatively, if Hall failed to preserve the issue below, we review the issue for palpable error. Under Kentucky Rules of Criminal Procedure (RCr) 10.26, a palpable error is one that affects the substantial rights of the party and a "manifest injustice" would result from the error.[19] In addition to palpable error, an unpreserved issue of prosecutorial misconduct must also be flagrant.[20]

1. The Commonwealth Properly Impeached Hall's Credibility.

Hall argues prosecutorial misconduct for the method in which the Commonwealth cross-examined Hall. The Commonwealth's counsel opened up the cross-examination rather dramatically with the question, "You're a liar, aren't you?" Hall contends that this question represents an inappropriate

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[17] 949 S.W.2d 579 (Ky. 1997).

[18] *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

[19] *See also Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (A manifest injustice occurs when "the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006))).

[20] *See Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002).

injection of counsel's opinion of the witness. By contrast, the Commonwealth defends the question as a statement of fact, based on Hall's testimony on direct, in which he admitted he had been known to "stretch the truth." Moreover, during the remainder of the cross-examination, the Commonwealth, after impeaching Hall on his prior inconsistent statements to the police, would follow up by asking, "So that was a lie?" after Hall confirmed making each statement. As this developed, the Commonwealth used a red marker as a "lie marker" and a purple marker as a "don't remember" marker, and underlined inconsistent components of Hall's testimony on a paper chart presented to the jury. Only one question drew an objection from Hall's counsel, on the ground that the question had been asked and answered. Today, Hall contends that the questions were an improper interjection of prosecutorial opinion and Kentucky Rules of Evidence 404(b) character evidence.

Hall claims that the Commonwealth's frequently asking him if he lied to law enforcement, including the question, "You're a liar, aren't you?" amounted to a statement of opinion presented by the prosecution. This issue is not properly preserved for our review. Though Hall's counsel did timely object to one line of questioning where this technique was used, the objection was made because the question had been asked and answered. This particular rationale is raised for the first time before this Court on appeal. As the Commonwealth correctly notes, a party claiming error on appeal may not present a different

argument from what was raised at the trial court level.[21] As such, we must review this claim under the palpable error standard for unpreserved issues of prosecutorial misconduct.

We cannot conclude that the Commonwealth's asking Hall to characterize his inconsistent statements to law enforcement as lies results in a manifest injustice. In fact, this Court has approved this practice as acceptable impeachment on cross-examination.[22] There is nothing unjust or prejudicial in allowing the Commonwealth to ask Hall if he lied to law enforcement. Hall is correct in stating that credibility is crucial when there is an alternate theory of events, and we see no reason to handicap the Commonwealth's ability to impeach Hall through his prior inconsistent statements. Asking him if he lied in making prior statements is a reasonable inference that can be drawn and is an acceptable method of attacking Hall's credibility. There was no palpable error in asking Hall to explain why he made conflicting statements to the police, *especially* because of the alternate theory he presented at trial.

As for the Commonwealth's opening volley, "You're a liar, aren't you?" we do not consider this to be the Commonwealth's subjective opinion of Hall. In Hall's testimony on direct examination, he admits and explains that he gave conflicting statements to law enforcement and that he has been characterized as someone that "stretches the truth." The Commonwealth's strategy on cross-

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[21] *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) ("[t]he appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.").

[22] *See Ernst v. Commonwealth*, 160 S.W.3d 744, 764 (Ky. 2005) ("This is clearly permissible impeachment evidence.").

examination was to highlight these inconsistencies, intending to pinpoint elements of his testimony where he lied. So while the opening question on cross-examination may appear prejudicial in a vacuum, the context of previous testimony and subsequent lines of questioning make clear to us that the question is not a mechanism for the Commonwealth to smuggle in its own opinion of Hall. Rather, the question simply asks Hall to characterize his own credibility.

It is undisputed that Hall made numerous statements to law enforcement officers that were inconsistent with the testimony he provided at trial. We cannot conclude that allowing the Commonwealth to ask Hall if he was lying results in a "manifest injustice," rendering Hall's trial fundamentally unfair.

2. There was no KRE 404(b) Character Evidence.

Hall alleges that the Commonwealth's method of cross-examining his mother, Tamara Hall, amounted to prosecutorial misconduct and improper KRE 404(b) character evidence. Tamara Hall testified on direct that she met Pessolano at the bar that night but said nothing more than "nice to meet you." The Commonwealth then attempted to impeach Mrs. Hall with the statement she made to the police that after Pessolano introduced herself, she replied, "I'm his [Hall's] mom. I tell you he's bad and he's not good." Before Mrs. Hall could respond, Hall's counsel objected and moved for a mistrial. The objection was overruled and mistrial denied; but the Commonwealth abandoned this line of questioning, and Mrs. Hall never provided an answer to the question at issue.

This issue is properly preserved for our review, and we will thus review it under the "overall fairness" standard to preserved errors.

Under KRE 404(a)(1), evidence of a person's character or particular character trait is generally inadmissible to prove conformity with that character on a particular occasion. KRE 404(b) further states that evidence of other crimes, wrongs, or acts are prohibited to prove conformity to character, with an exception in criminal cases to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Alternatively, KRE 613 provides for impeaching a witness concerning prior statements. Before offering evidence of prior statements, examining counsel must lay a proper foundation as to the time, place, and persons present at the time of the statement; and if impeaching through a prior written statement, the witness must be shown the statement and given an opportunity to explain it.[23] So while the rules do not expressly provide for impeachment by prior inconsistent statement, they "clearly and undeniably imply that the universal rule . . ." continues in Kentucky.[24]

We agree with the Commonwealth that there is no prejudicial character evidence admitted because the question was effectively withdrawn following Hall's objection. The jury never heard Mrs. Hall answer the question about whether she made that statement to Pessolano or not. Hall urges that the "bell cannot be unrung," and the question itself was lodged in the jury's mind. Hall

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[23] KRE 613.

[24] ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 4.15(1)(b) (LexisNexis Matthew Bender).

relies on a case from the Fifth Circuit Court of Appeals, concluding that "after the thrust of the saber it is difficult to say forget the wound[.]"[25] While there is merit to that assertion in instances of great prejudice, we are not persuaded in its application to this case. Moreover, it is this Court's precedent that merely asking an occasional improper question is not grounds for a reversal.[26] Absent a pattern of improper questioning, we find that merely asking Mrs. Hall if she made a prior inconsistent statement and reading the full quote she provided to law enforcement is not so prejudicial to Hall's defense to give rise to palpable error.

3. *Any* Moss *Violation was not Preserved and not Palpable Error.*

Hall argues that the Commonwealth asked him to comment on the truth of another witness in violation of this court's precedent in *Moss*.[27] The exchange centered on the existence of another firearm and Hall's alternative theory for the events culminating in Pessolano's death. After Hall's sister testified to his theory that he was robbed by an African-American man, the Commonwealth asked Hall, "So it's not just you that lies to Detective Myers, it's your sister, too?" Furthermore, the following exchange took place soon thereafter:

> Commonwealth: There was another gun involved. You did not tell any of these people there was another gun involved.

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[25] *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962).

[26] *See Slaven v. Commonwealth*, 962 S.W.2d 845, 859 (Ky. 1997) (citing *Vontrees v. Commonwealth*, 165 S.W.2d 145 (Ky. 1942).

[27] 949 S.W.2d at 583.

Hall: I told my family.

Commonwealth: So when they didn't tell Detective Myers, they were also lying?

Hall's counsel never objected to this line of questioning but contends the questioning impairs the fundamental fairness of his trial. On review, we find that the questions were improper but did not rise to palpable error.

In *Moss*, we held that "a witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying."[28] Here, we are presented not with a defendant commenting on the testimony of a police officer but, rather, a criminal defendant commenting on the statements given to police by his family members. Nevertheless, we see no reason why the *Moss* principle should not apply with equal force in this instance. The Commonwealth asked Hall to comment on whether other witnesses were lying. This to us seems to fit squarely in the class of questioning we denounced in *Moss*.

However, merely reaching error will not merit reversal in this case. Hall failed to preserve this issue at trial; and, as such, we will only reverse if we can conclude that the error resulted in a manifest injustice that is "shocking or jurisprudentially intolerable."[29] Here, we cannot say that these questions caused an overwhelming prejudicial opinion toward Hall and his case. Though asking Hall to comment on his family's truthfulness was not proper, it did not

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[28] *Id.*

[29] *Martin*, 207 S.W.3d at 4.

create such an overwhelming prejudicial effect that undermines the judgment at trial.

4. There was no Cumulative Error.

As a final argument, Hall alleges that should we find that no one error warrants reversal, we should conclude that the cumulative effect of minor errors renders his trial unfair, mandating a new trial. Because the only error we recognized at trial related to the unpreserved *Moss* question, we cannot find cumulative error below.[30]

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment for Hall's convictions of murder and wanton endangerment in the first degree.

All sitting. All concur.

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[30] *See Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010) (". . . we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice.").

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