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RENDERED: JUNE 16, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000064-MR

ISAIAH TYLER — APPELLANT

V.

ON APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
CASE NO. 14-CR-00034-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant, Isaiah Tyler, was convicted of complicity to first-degree robbery and of being a second-degree persistent felony offender and was sentenced to forty years in prison. On appeal, he claims that (1) the trial court erred in prohibiting him from cross-examining a co-defendant about the length of the sentence recommended by the Commonwealth in exchange for his guilty plea and agreement to testify against Tyler, (2) the trial court erred in refusing to grant a mistrial, and (3) his forty-year sentence violated his Eighth Amendment right against cruel and unusual punishment. Finding no merit to these claims, this Court affirms.

I. Background

At around 4:40 a.m. on the morning of December 4, 2013, Erin Floyd, manager of the EZ Shop in Henderson, was training an employee, LaStar

McGuire, when three black men wearing hooded sweatshirts and masks entered the store. One of the assailants was armed with a hatchet, and the other two were armed with knives.

The women were ordered to lie on the floor. Floyd was then grabbed by her hair and escorted to one of the store's safes by two of the robbers, including the hatchet-wielding man. The robbers demanded that Floyd open the safe, threatening her with the hatchet, and she complied. The robbers then ordered her to lie on floor, removed the safe's contents, and fled the store, taking Floyd's keys with them. McGuire was unable to observe their car or any other identifying information.

Neither Floyd nor McGuire recognized the three robbers or were able to identify them by sight. Floyd, however, believed she recognized the voice of one of the assailants as belonging to Jeremy Raggs, who was the boyfriend of Monica Green, a former employee of the EZ Shop who had recently been terminated. And Floyd indicated that the robbers had exhibited knowledge about the store, such as the location of its two safes, that would not have been known to the general public.

Thus suspecting Raggs and Green of involvement in the robbery, police located them at Green's apartment as the two were getting into Green's tan Cadillac. Green drove off with Raggs as her passenger, fleeing the officer when he attempted to stop them. The officer pursued the couple in his squad car, and both were eventually arrested after Raggs jumped from Green's car and attempted to escape on foot.

Once in custody, Raggs admitted his involvement in the crime. He explained that Green had provided to him information about the EZ Shop and that he had recruited the Appellant, Isaiah Tyler, and Tyler's half-brother, Josh Ervin, to help pull off the robbery. Raggs told police that he had driven the three of them to the EZ Shop in Green's Cadillac and, after completing the robbery, to the house Tyler and Ervin had shared (which had belonged to their recently deceased mother), where they split the proceeds of their crime.

Based on this information, police obtained and executed search warrants at Green's apartment and Tyler's and Ervin's house.

In Green's apartment, police found the $200 Raggs admitted receiving from the robbery. They also found Floyd's keys in Green's car.

Tyler was home alone when the police executed the warrant at the brothers' house. In the front bedroom of the house, police discovered coins and paper money, coin wrappers, a coin box, bank bags labeled "EZ Shop No. 3," and a piece of a cut-up black shirt. Also in that bedroom, police reportedly found a photo identification card. (For some unknown reason, the actual card was not preserved as physical evidence and there was conflicting evidence whether it belonged to Tyler or Ervin.) Police also discovered elsewhere in the house a knife, brass knuckles, a hatchet, hooded sweatshirts and sweatpants, and additional pieces of the cut-up black shirt.

Later, while in jail, Raggs prepared a notarized statement indicating that he had falsely implicated Tyler in the robbery in his statements to police. But he retracted that statement in his testimony at Tyler's trial, explaining that he had only written it because he felt bad and at fault for Tyler's arrest. (Tyler also

reportedly paid him for writing the statement, although Raggs testified that he was going to write it anyway and that Tyler had only offered to pay him after he had already decided to do so.) Instead, Raggs testified that his initial statements about the robbery and Tyler's involvement were true and that he had accepted a plea offer from the Commonwealth contingent upon his testifying at Tyler's trial.

Ultimately, Tyler was convicted of complicity to first-degree robbery and of being a second-degree persistent felony offender (PFO). The jury recommended a prison sentence of forty years, and he was sentenced accordingly.

Tyler now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b). Additional facts will be developed as needed below.

II. Analysis

A. The trial court did not abuse its discretion in barring cross-examination of co-defendant on specific length of recommended sentence under plea agreement.

Tyler first argues that the trial court erred and denied him the right to present a defense by limiting the scope of his cross-examination of co-defendant Raggs—specifically, by prohibiting questioning on the actual length of the sentence agreed to by the Commonwealth in its plea deal with Raggs.

Like Tyler, Raggs was initially charged with first-degree robbery and being a persistent felony offender. If convicted of both counts, as Tyler points out, Raggs's punishment would have been set within a sentencing range of twenty to fifty years or life in prison. *See* KRS 515.020(2); 532.060(2)(a); 532.080(5), (6). Instead, in exchange for his pleading guilty to the robbery

charge and testifying during Tyler's trial, the Commonwealth agreed to drop the PFO charge and recommend a sentence of twelve years in prison for the robbery conviction.

It was these specific terms of the Commonwealth's plea agreement with Raggs that Tyler claims he was erroneously barred from introducing to the jury through cross-examination. He argues that by being prohibited from providing the jury with the specifics of the favorable deal, he was precluded from fully showing the extent of Raggs's bias and motive for testifying against him, thus preventing him from presenting a full and complete defense.

Our review of the trial court's ruling below, however, belies this argument. In ruling on the admissibility of the exact terms of the plea deal, the trial court first correctly noted that the fact of Raggs's having entered into a favorable plea deal was relevant but that the court had some discretion to limit the scope of cross-examination to prevent jury confusion, among other things. Finding that the actual length of the sentence under the plea agreement was not particularly relevant, the trial court ruled that defense counsel was permitted to get the "gist" of the deal before the jury—by eliciting, for example, whether he got a favorable deal, whether any charges were dropped, whether the recommended sentence was less than the maximum, etc.—without the specific number of years coming in. The court explained that defense counsel had at his disposal "various ways that [he] could get to the end result without it being years-specific." In other words, the trial court's ruling barred Tyler from cross-examining Raggs only as to the actual number of years (twelve) of the sentence under the plea agreement; everything else was fair game.

It has long been the rule that "[t]he presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge." *Moore v. Commonwealth*, 771 S.W.2d 34, 38 (Ky. 1988). That being said, "[w]henever limitations on the right of cross-examination are analyzed, it should be remembered that the right implicated is a fundamental constitutional right and that such limitations should be cautiously applied." *Commonwealth v. Maddox*, 955 S.W.2d 718, 720 (Ky. 1997). Taking that into account, then, this Court has made clear that, while the credibility of witnesses and the motives or biases underlying their testimony are always at issue, "[s]o long as a reasonably complete picture of the witness'[s] veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." *Id.* at 721 (quoting *United States v. Boylan*, 898 F.2d 230, 245 (1st Cir. 1990)).

As noted above, the judge here exercised her discretion to set boundaries on Tyler's cross-examination of Raggs, namely, limiting questioning on the actual number of years of the sentence he would receive in exchange for his testimony at trial. Tyler was free to conduct a thorough cross-examination of Raggs in all other respects, so the trial court's limitation did not prevent him from developing a reasonably complete picture of the witness's credibility, bias, and motive for testifying. This Court cannot say the trial court's limit was inappropriate. Thus, the trial court did not abuse its discretion.

B. The trial court did not err in refusing to grant a new trial.

Next, Tyler claims that the trial court erred in overruling his post-judgment motion for a new trial. After the trial, Tyler moved for a new trial

under Criminal Rule 10.02,[1] raising two grounds: first, that the trial court's limitation on his cross-examination of Raggs about his plea agreement prevented him from having a fair trial; and second, that allegedly defective testimony by the lead investigator in his case, Detective Preston Herndon denied him a fair trial, where the detective allegedly misstated facts and contradicted his own prior sworn testimony.

First, having already concluded in the preceding discussion that the trial court did not abuse its discretion in limiting Tyler's cross-examination of Raggs about his plea deal, this Court can similarly dispose of his claim that he was entitled to new trial on the same ground. Since the limitation on cross-examination was not error, it also was not error to deny the request for a new trial on that basis.

As to the second basis for requesting a new trial, the detective's testimony that Tyler complains about involved the photo identification card apparently found by police in one of the bedrooms of the brothers' house.[2] During a preliminary hearing, Detective Herndon testified that police had discovered an identification card belonging to Ervin located in the front bedroom where some of the evidence of the robbery was discovered. As the Commonwealth points out, the testimony at issue involved the detective

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[1] Criminal Rule 10.02 provides, in part: "Upon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." RCr 10.02(1).

[2] As noted in the Background section above, the photo identification card was not preserved as physical evidence. Police took a picture of the card, however, although it was apparently of poor quality and the name on the card seems to have been largely illegible.

reading from a report completed by another officer who had executed the search warrant; it does not appear Detective Herndon testified that he, personally, saw the identification card.

At Tyler's trial, however, when defense counsel asked, "Were any items located that would indicate someone else other than Mr. Tyler was living there?" Detective Herndon replied, "Nothing that I know of." During further questioning, the detective denied seeing anything containing Ervin's name and added, "To be clear, I'm not saying that there wasn't anything in the home that didn't have [Ervin's] name on it; I just didn't see it."

Tyler claims that Detective Herndon thus misstated material facts at trial in contradiction with his prior testimony at the preliminary hearing and that this false testimony highly prejudiced his defense theory that only his brother, Ervin, had been involved in the robbery and had left the incriminating evidence at their house.

In overruling Tyler's motion for a new trial, the trial court, citing *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999), noted that perjured or false testimony can support a motion for a new trial provided there is a "reasonable certainty" that the conviction would not have occurred absent the false testimony. The trial court then found that Tyler's claim failed under that standard because Detective Herndon's testimony at trial was not in fact contrary to his prior testimony at the preliminary hearing and, even if it was contrary, that there was no reasonable certainty that the inconsistency affected the guilty verdict. The court also noted that the defense would have had access to the record of the preliminary hearing at the time of trial and there was no

reason why that record could not have been used to impeach the detective's trial testimony.

Whether to grant a new trial under Criminal Rule 10.02 lies within the trial court's discretion. *E.g.*, *Collins v. Commonwealth*, 951 S.W.2d 569, 576 (Ky. 1997). Even assuming the detective's trial testimony was actually inconsistent with his prior testimony, we agree with the trial court that this testimony did not constitute sufficient grounds for a new trial because Detective Herndon could have been cross-examined on any inconsistency at trial. Indeed, the record reveals that defense counsel conducted a fairly extensive cross-examination of the detective that at least alluded to the prior testimony in attempting to have the detective admit that Ervin's identification card, and not Tyler's, had been found in the bedroom containing evidence of the robbery. That defense counsel's cross-examination was unsuccessful in this regard is not a sufficient ground to require a new trial, especially when the video recording of the preliminary hearing at which the detective gave the allegedly inconsistent testimony was available to impeach the witness at trial. Therefore, the trial court did not abuse its discretion in refusing to grant a new trial based on the detective's allegedly false testimony.

C. Tyler's forty-year prison sentence does not violate the Eighth Amendment.

Tyler's last claim is that his PFO-enhanced prison sentence of forty years for complicity to first-degree robbery is "grossly disproportionate" in violation of the Eighth Amendment's prohibition against cruel and unusual punishments. He admits that this claim of error is unpreserved and asks for palpable-error

review. *See* RCr 10.26; *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006) ("[T]he required showing [of 'manifest injustice'] is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.").

As this Court has recognized, the Eighth Amendment "prohibits not only barbaric punishments such as torture, but also punishments disproportionate to the crime." *Turpin v. Commonwealth*, 350 S.W.3d 444, 447 (Ky. 2011) (citing *Graham v. Florida*, 130 S. Ct. 2011 (2010)). However, "[t]his 'proportionality principle' ... is narrow and 'does not require strict proportionality between the crime and sentence but rather forbids only extreme sentences that are grossly disproportionate to the crime.'" *Id.* (internal quotation marks omitted) (quoting *Graham*, 130 S. Ct. at 2021). So, in determining whether a particular sentence has breached this principle, "a court must begin by comparing the gravity of the offense and the severity of the sentence." *Graham*, 130 S. Ct. at 2022. And the Supreme Court has further explained:

> "[I]n the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Id. (alterations in original) (citation omitted) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)). That being said, "[r]eviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well

as to the discretion that trial courts possess in sentencing convicted criminals." *Solem v. Helm*, 463 U.S. 277, 290 (1983). Indeed, "if the punishment is within the maximum prescribed by the statute violated, courts generally will not disturb the sentence." *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003). And it has been observed that "proportionality review has never (or hardly ever) been used to strike down a mere prison sentence." *Hampton v. Commonwealth*, 666 S.W.2d 737, 741 (Ky. 1984) (citing *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)).

In applying these principles, we conclude that Tyler's enhanced prison sentence of forty years for complicity to first-degree robbery and being a second-degree persistent felony offender is not so extreme a sentence to amount to cruel and unusual punishment. First-degree robbery is a grave offense indeed, and a forty-year sentence for the conduct involved in the commission of that offense, when coupled with Tyler's prior felony convictions—including felony possession of marijuana, trafficking of marijuana, and being a convicted felon in possession of a handgun—does not lead to an inference of gross disproportionality or invoke any sense of fundamental unfairness. His sentence is nothing more than a PFO sentence similar to countless others that have been rendered under the PFO statute or prior habitual-offender statutes, which have long been held to be constitutional. *See, e.g., Barber v. Thomas*, 355 S.W.2d 682, 682–83 (Ky. 1962); *see also Riley v. Commonwealth*, 120 S.W.3d 622, 633–34 (Ky. 2003) ("[A] State is justified in punishing a recidivist more severely than it punishes a first

offender." (alteration in original) (quoting *Solem v. Helm*, 463 U.S. 277, 296 (1983))).

III. Conclusion

For the reasons set forth above, the judgment of conviction and sentence of the Henderson Circuit Court is affirmed.

Minton, C.J.; Hughes, Keller, Noble, Venters and Wright, JJ., concur. Cunningham, J., concurs in result only.

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