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Supreme Court of Kentucky

2015-SC-000245-MR

KYLE THOMPSON

APPELLANT

V. ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
NO. 14-CR-00344

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

After a jury trial, Kyle Thompson was convicted of first-degree murder, three counts of first-degree assault, first-degree fleeing or evading, terroristic threatening, and second-degree persistent felony offender. The trial court sentenced Thompson to life in prison.

Thompson appeals the resulting judgment as a matter of right.¹ He contends the trial court erred by (1) allowing certain portions of testimony by Trooper Michael Cook about his impressions during his investigation of the crime and (2) admitting testimony by Probation and Parole Officer Michael McMahon concerning an outstanding warrant for Thompson's arrest. All

¹ Ky. Const. § 110(2)(b).

alleged errors were unpreserved at the trial-court level. We find no palpable error in the trial proceedings and affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND.

The material facts leading to Thompson's conviction are not disputed. Dispatch received a call from Delores Thompson², who stated she had been receiving threatening calls. In response to a call by dispatch, Trooper Cook traveled to her home. While Trooper Cook was at the home, Delores received a phone call from Thompson laced with profanity and threats of violence. During the call, Thompson told Delores that the police "wouldn't be able to protect them."

Sometime after this phone call, Trooper James Martin arrived at the residence to assist. Thompson drove past the residence after Trooper Martin's arrival. Delores identified Thompson as the driver, and Trooper Martin left the residence in an attempt to pull Thompson over.

When Trooper Martin reached Thompson, he activated his lights, and in response, Thompson activated his hazard lights. After approximately 30 seconds, Trooper Martin turned on his siren. At this time, Thompson led Trooper Martin on a high-speed chase, reaching speeds of approximately 92 miles per hour, while driving on a road with a posted speed limit of 55 miles per hour.

During this high-speed pursuit, Thompson ended up traveling in the wrong lane, going the wrong way, and colliding with an oncoming vehicle. The other

² No relation to Kyle Thompson.

vehicle was occupied by Ashlee Nicole Berry, who died at the scene as a result of her injuries. At the time of the wreck, Thompson had been driving with three children in the vehicle. All three children sustained injuries in the wreck.

Thompson's appeal is premised on two separate, unpreserved trial errors. The first claimed error concerns a portion of Trooper Cook's testimony, in which he testified to the effect of the accident scene on him. Thompson argues that the trooper's testimony constituted victim-impact evidence, which is inadmissible during the guilt phase of trial.

Secondly, Thompson contends that evidence of the existence of an outstanding arrest warrant admitted through the testimony of Officer McMahon was an impermissible use of evidence under Kentucky Rule of Evidence (KRE) 404(b).

II. ANALYSIS.

Thompson admits both alleged errors are unpreserved for appellate review, so he requests review under Kentucky Rule of Criminal Procedure (RCr) 10.26.³ Under RCr 10.26, one must show "palpable error."⁴ Palpable error requires a showing that the alleged error affected the "substantial rights" of a defendant and that relief may be granted "upon a determination that manifest injustice has resulted from the error."⁵ And to find a manifest injustice, this Court must conclude that the error so seriously affected the fairness, integrity, or public

³ Kentucky Rules of Criminal Procedure 10.26.

⁴ *Id.*

⁵ *Id.*

reputation of the proceeding as to be “shocking or jurisprudentially intolerable.”⁶

A. Trooper Cook’s Testimony did not Create Palpable Error.

The crux of Thompson’s argument on this issue rests on the comments made by Trooper Cook during trial. More particularly, Thompson asserts that Trooper Cook’s testimony was in error when he stated, “[a]ny time you respond to a call with children, it’s going to affect you. It’s one that I will never forget.” Thompson also argues error in Trooper Cook’s testimony about his blood-soaked shirt after the accident.

Thompson characterizes Trooper Cook’s testimony on both of these matters as a victim-impact statement and not that of a fact witness. As Thompson properly notes, Trooper Cook would not qualify as an individual who could submit victim-impact testimony under Kentucky Revised Statute 421.500.⁷ But this attempted classification is misguided.

Thompson cites *Ice v. Commonwealth* to bolster his argument, but as the Commonwealth points out, the facts are not analogous.⁸ In *Ice*, a mother introduced photographs of her daughter, a 7 year-old murder victim, spoke extensively about the terrible loss she had sustained, and elaborated on her great love for her daughter.⁹ A minister also testified that the Bible teaches the

⁶ *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

⁷ Kentucky Revised Statutes 421.500.

⁸ *Ice v. Commonwealth*, 667 S.W.2d 671, 677 (Ky. 1984).

⁹ *Id.*

death penalty is appropriate in murder cases, and if the jurors did not condemn the Defendant to death, they would be condemned by God.¹⁰ The facts in *Ice* are far from Trooper Cook's isolated comments. Trooper Cook's testimony was not that of a victim-impact statement, rather it was proper testimony of a fact witness.

Thompson further contends that Trooper Cook's testimony was more prejudicial than probative under KRE 403.¹¹ KRE 403 gives a trial court discretion to exclude evidence if it finds that the "probative value is substantially outweighed by the danger of undue prejudice"¹² Thompson notes that an officer testifying will likely receive greater jury deference as a "figure of authority." His assertion that Trooper Cook's testimony was a sensationalizing tactic creating undue prejudice is not supported by the record.

As the Commonwealth points out, Thompson cites to a small section of testimony by Trooper Cook. Assuming the Court were to agree that the disputed testimony of Trooper Cook was in fact a violation of KRE 403, the lack of proof that this isolated testimony induced the jury to convict Thompson on emotion rather than facts is not supported in Thompson's brief or the record. As this Court noted in *Commonwealth v. Rieder*, "the driving question [is] whether the error was of such weight as to tilt the scale toward a result that

¹⁰ *Id.*

¹¹ Kentucky Rules of Evidence 403.

¹² *Id.*

was unfairly reached.”¹³ Based on the facts presented, this Court cannot reach that conclusion.

B. Evidence of Mr. Thompson’s Outstanding Warrant was not Palpable Error.

Thompson argues that the introduction of evidence reflecting an outstanding arrest warrant, which had been issued for Thompson before the actions that gave rise to the present charges, was a violation of KRE 404(b).¹⁴ KRE 404(b) serves the purpose of preventing the prosecution from introducing evidence of “other crimes, wrongs, or acts” to prove the character of the defendant “in order to show action inconformity therewith....”¹⁵ But, 404(b)(1) provides that evidence prohibited under KRE 404(b) may be admissible to show proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹⁶

In determining if evidence falls within a KRE 404(b)(1) exception, we have articulated a three-part test for (1) relevance, (2) probative value, and (3) prejudice of the evidence.¹⁷

1. Relevance.

Both parties correctly recognize that the evidence must be relevant to fall within a KRE 404(b)(1) exception. More specifically the Court asks, “is the other crimes evidence relevant for some purpose other than to prove the criminal

¹³ *Commonwealth v. Rieder*, 474 S.W.3d 143, 147 (Ky. 2015).

¹⁴ Kentucky Rules of Evidence 404(b).

¹⁵ *Id.*

¹⁶ Kentucky Rules of Evidence 404(b)(1).

¹⁷ *Id.*

disposition of the accused?”¹⁸ Thompson argues that evidence of his arrest warrant was not relevant to the evading police charge, “in light of the defense admission and [other] evidence the prosecution put on.” In rebuttal, the Commonwealth correctly stresses that the prosecution is “permitted to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away parts of the case that he does not want the jury to see.”¹⁹

The Commonwealth sufficiently stated in its KRE 404(c) notice that the introduction of the arrest warrant was evidence of Thompson’s “motive, intent and absence of mistake.” And the use of the outstanding arrest warrant sufficiently stands to prove Thompson’s motive and *intent*. It does not take a large logical leap to conclude that the outstanding warrant was indeed evidence of a motive for Thompson’s *intent* to evade police, the first element required for conviction of evading.

Lastly, Thompson focuses on the fact that neither Trooper Cook nor Trooper Martin was aware of Thompson’s outstanding arrest warrant at the time of the pursuit. This argument is misguided. Neither Trooper must be aware of the outstanding arrest warrant to establish that the outstanding warrant was the motive or intent behind Thompson’s actions.

2. Probative Value.

The probative value is tested by asking if the “evidence of the uncharged crime [is] sufficiently probative of its commission by the accused to warrant its

¹⁸ *Id.*

¹⁹ *Barnet v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998).

introduction into evidence.”²⁰ This question is distinct from the one posed by Thompson, who asks whether the probative value supports an element of the charged crime. The Commonwealth correctly contends that the live testimony by the parole officer was sufficiently probative of the fact that an arrest warrant did in fact exist.

3. Prejudice.

When evaluating prejudice, we ask whether “the potential for prejudice from the use of other crimes evidence substantially outweigh[s] its probative value.”²¹

Thompson argues that previously presented trial evidence, which he believes had less of a chance to create prejudice with the jury, was still sufficient for a conviction. We disagree.

The Commonwealth addresses this argument by pointing to the fact that evidence introduced by the prosecution will be inherently prejudicial to any defendant. The test is if the inherent prejudice outweighs the probative value. The Commonwealth draws the Court’s attention to the fact that the arrest warrant was very probative to Thompson’s *intent*. We agree with the Commonwealth. Furthermore, the Court cannot conclude that the introduction of Thompson’s arrest warrant during trial was substantially outweighed by any prejudice.

²⁰ *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994).

²¹ *Id.* at 890.

Once again, even if we accepted Thompson's argument that the introduction of the arrest warrant at trial was error, he has failed to show the level of prejudice required for palpable error. There is nothing in the briefs or record to show this Court that a "manifest injustice" would occur if the trial court's decision is not reversed.

III. CONCLUSION.

For the foregoing reasons, we affirm the trial court's judgment.

All sitting. All concur.

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