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**NOT TO BE PUBLISHED OPINION**

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# Supreme Court of Kentucky

2020-SC-0038-MR

STACEY JOE CARTER

APPELLANT

V. ON APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE JILL CLARK, SPECIAL JUDGE  
NO. 2017-CR-00246

COMMONWEALTH OF KENTUCKY

APPELLEE

## **MEMORANDUM OPINION OF THE COURT**

### **AFFIRMING**

Stacey Joe Carter appeals his convictions for first-degree burglary, first-degree robbery, third-degree criminal mischief, tampering with physical evidence, possession of a handgun by a convicted felon, and for being a persistent felony offender in the first degree (PFO-1). Carter makes three substantive arguments: (1) that he was entitled to a directed verdict on the tampering with physical evidence charge; (2) that Detective Smith's use of Carter's photo in the police station to help the victim identify him was improper under KRE<sup>1</sup> 403 and 404; and finally (3) that Detective Smith's testimony at trial amounted to impermissible hearsay. We affirm the Logan Circuit Court.

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<sup>1</sup> Kentucky Rules of Evidence.

## **I. Factual and Procedural Background**

In 2017, Shelva Walker was robbed at gunpoint in her home. The burglar, whom Walker recognized as Carter, stole more than \$15,000 worth of jewelry before leaving the house. Despite Carter's parting admonition, that Walker wait an hour before going to police, Walker immediately left for the Russellville police station, only waiting long enough to watch Carter get in a vehicle and be driven away. When Walker arrived at the police station, she made her initial statement to Officer Kennedy. Although Walker was able to accurately describe Carter's features, stature, and voice, she could not recall his name. Because of Officer Kennedy's familiarity with Carter, he pointed to a photo on the police station wall nearby, and asked Walker whether the man in the photo was the perpetrator. Immediately, Walker recognized the photo and confirmed the identification.

Shortly thereafter, Detective Smith arrived at the police station and interviewed Walker. During the interview, Walker stated that she recognized Carter because she had hired Carter for odd jobs around her home, had sat with him on her front porch, lent him money, and even allowed him to borrow her vehicle on one occasion. Following the interview, Detective Smith went to Walker's home where she identified a distinctive shoe print on the backdoor, where the burglar had broken in. Carter was arrested soon after. Through her investigation Detective Smith learned that the shoes belonged to Carter's brother Troy, who stated that he had lent the pair to Carter.

Following his arrest, and while awaiting trial, Carter called his girlfriend at the time, Kristen Hines. During the call, Carter implored Hines to sell “car parts” which apparently Hines understood to mean the jewelry Carter had stolen from Walker and stored in their shared room. Hines did as she was instructed and sold the stolen goods to Maurice Gordon, with whom Carter had past dealings. However, after completing the purchase, Gordon turned the jewelry over to the Russellville police department.

At trial, Hines testified about the phone call and subsequent jewelry sale; while Carter’s driver on the night of the burglary, Eric Castille, testified about his relationship with Carter, admitting that he often drove Carter around, including to Walker’s home on the night of the burglary. Castille also testified that Carter had admitted to committing the burglary.<sup>2</sup>

Ultimately, Carter was convicted of first-degree burglary, first-degree robbery, third-degree criminal mischief, tampering with physical evidence, and being a felon in possession of a handgun. During the penalty phase, Carter was also convicted of being a PFO-1 and sentenced to life in prison. On appeal, Carter challenges the introduction of the phone call between himself and Hines. Carter also argues that Walker’s identification of him at the police station was prejudicial, and finally, that Detective Smith’s testimony at trial regarding her interviews with Hines and Castille amounted to impermissible hearsay.

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<sup>2</sup> Both Hines and Castille were given felony diversion in exchange for their truthful testimony at Carter’s trial.

## II. Standard of Review

We review a trial court's decision to admit evidence for abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). Consequently, we do not disturb the trial court's ruling unless the decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citation omitted). Further, the standard for reviewing a trial court's ruling on a motion for a directed verdict is clear:

When considering a motion for a directed verdict, the trial court is required to draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Only when the evidence is insufficient to induce reasonable jurors to believe beyond a reasonable doubt that defendant is guilty, should a directed verdict be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of directed verdict is, if under the evidence as whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

*Bullitt v. Commonwealth*, 595 S.W.3d 106, 109 (Ky. 2019) (citations omitted).

Finally, we review unpreserved issues for "palpable error." RCr<sup>3</sup> 10.26.

Palpable error is only present when the trial court's decision results in "manifest injustice[,]" which is a "defect in the proceeding [that is] shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

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<sup>3</sup> Kentucky Rules of Criminal Procedure.

### **III. Analysis**

#### **A. *Tampering with physical evidence.***

Carter's claim for a directed verdict on his tampering with physical evidence charge is rooted in the argument that the Commonwealth's introduction of a phone call between himself and Hines was unduly prejudicial and the call should not have been admitted. Carter asserts that without the phone call, the only evidence of the charge was Hines's testimony, upon which no reasonable jury could have convicted him. We disagree.

The core of admissibility resides in KRE 401, 402 and 403. KRE 402 states "[a]ll relevant evidence is admissible, except as otherwise provided[.]" Relevant evidence means "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 than it would be without the evidence." KRE 401. KRE 403 provides the trial court latitude to exclude otherwise relevant evidence because the "probative value is substantially outweighed by the danger of undue prejudice[.]" However, as we stated in *Probus v. Commonwealth*, "[t]he inclusionary thrust of the law of evidence is powerful, unmistakable, and undeniable, one that strongly tilts outcomes toward admission of evidence rather than exclusion." 578 S.W.3d 339, 347 (Ky. 2019) (citation omitted). Indeed, "KRE 403 is carefully calculated to leave trial judges with extraordinary discretion in the application and use of [KRE 403]." *Id.* (citation omitted).

The phone call between Carter and Hines fails to meet KRE 403's extraordinary threshold because the phone call was neither duplicative nor

unduly prejudicial. Our review of the record shows that the phone call between Carter and Hines was carefully edited to remove any reference to the call's point of origin (which was from jail). Moreover, as the Commonwealth correctly points out, the phone call connects Carter to the sale of the jewelry and is consequently probative of the tampering with physical evidence charge.<sup>4</sup> Since Carter was already incarcerated when the jewelry was sold, his directions to Hines were instrumental in establishing the necessary elements of the charge. Likewise, Carter's decision to speak in coded language does not automatically render the call irrelevant. Neither the court nor the jury is required to suspend disbelief based purely on Carter's versions of the facts. The jury was entitled to hear the phone call and the trial court did not err by allowing its introduction.

Furthermore, Carter was not entitled to a directed verdict. KRS 524.100(1) requires the Commonwealth to prove that Carter: (1) acted on the belief "that an official proceeding [was] pending. . ." and (2) that he "remove[d] . . . physical evidence which he believe[d was] about to be produced or used in the official proceeding with intent to impair its verity or availability[.]" As we stated in *Mullins v. Commonwealth*, "'removal' of evidence under KRS 524.100

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<sup>4</sup> KRS 524.100(1) defines the offense as:

(1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

(a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

...

must be construed differently for different defendants.” 350 S.W.3d 434, 443 (Ky. 2011). Consequently, we look for an “intentional act” by the defendant to remove the evidence and avoid prosecution. *Id.* at 444. As for appellate review of a directed verdict, “the test [] is, if under the evidence as a whole, it would be unreasonable for a jury to find guilt[.]” *Id.* at 442 (citation omitted). In this case, Carter’s phone call to Hines, along with Hines’s and Gordon’s accompanying testimony, provided enough evidence for a reasonable jury to convict Carter of tampering with physical evidence. Denying the motion for a directed verdict was not erroneous.

***B. Carter’s police station photo.***

Next, Carter argues that the testimony about the photo identification violated KRE 404(a) and (b) because his photo was on the wall in the Russellville police station and both Officer Kennedy and Detective Smith testified that they recognized Carter from Walker’s description. Carter asserts that the combination of his photo on the police station wall and the officers’ testimony made it impossible for the jury not to assume some evidence of prior criminal behavior. Since Carter failed to object at trial we review for palpable error and will only reverse if we find “manifest injustice.” RCr 10.26.

KRE 404(a) states that “[e]vidence of a person’s character . . . is not admissible for the purpose of proving action in conformity therewith[.]” For its part, KRE 404(b) states evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Neither rule is absolute, however, and in this case,

Walker's identification of Carter squarely falls under the KRE 404(b)(1) exception, which makes evidence admissible "[i]f offered for some other purpose, such as proof of . . . knowledge [or] identity[.]" Carter had made his identity an issue at trial, in part, because Walker could not remember Carter's name and initially identified him to police by his voice and stature, before using the photo to confirm the identification. Notably, at trial it was Carter's counsel who connected the photo to prior bad acts with the following colloquy:

Defense Counsel: You saw this photograph up in the police station?  
And I imagine it was like a mug shot or something?

Walker: I don't know what kind of picture it was.

Consequently, when, as here, the photo is relevant to the identity of the perpetrator and the Commonwealth limits its reference of the photo only to verify an identity, no undue prejudice exists, much less palpable error. After all, a witness is "allowed to reaffirm the accuracy of her previous identification as long as that previous identification has not been impermissibly . . . tainted." *Barnes v. Commonwealth*, 410 S.W.3d 584, 587-88 (Ky. 2013).

### **C. Detective Smith's testimony.**

Finally, we address the matter of Detective Smith's testimony. Since Carter's trial counsel failed to object to any of Detective Smith's testimony, the challenge is unpreserved, and we only review her testimony for palpable error. RCr 10.26. Palpable error occurs when the defendant suffers a "manifest injustice, either through the probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law."

*Jones v. Commonwealth*, 331 S.W.3d 249, 256 (Ky. 2011) (internal quotation marks omitted).

None of the challenged testimony, even if erroneous, is palpable. If Detective Smith had not testified at all, the jury would still have heard evidence that Carter had a relationship with Walker; that he often asked Castille for “rides” including on the night of the burglary; and that Carter called Hines and used coded language to ask Hines to sell the stolen jewelry to Gordon. Moreover, the jury was presented with evidence of the sneakers used to break in Walker’s back door and the testimony connecting the sneakers to Carter. Consequently, little doubt exists that Carter would not have had a different result at trial, nor that the hearsay error was fundamental.

#### **IV. Conclusion**

For the foregoing reasons, Carter’s conviction is affirmed.

All sitting. All concur.

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