

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000427-MR

CHRISTOPHER MATTHEW MCFARLAND

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN D. MINTON, JR., JUDGE  
ACTION NO. 01-CR-00110

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: McFarland appeals his conviction for receiving stolen property and Persistent Felony Offender Second Degree, on the grounds that the trial court erroneously admitted a hearsay statement purporting to identify him as the person committing the charged offenses. Although this error was not preserved by contemporaneous objection, the Court will review the claim of denial of constitutional rights under RCr 9.24 and RCr 10.26,

permitting such review where there is a claim that substantial rights of the defendant may have been affected.

McFarland is alleged to have stolen a car in Bowling Green, Kentucky. When the car was pulled over by police, the driver of the vehicle ran between the police cars and escaped. Police arrested the vehicle's passenger, Ralph Glass, who is McFarland's step-brother. Glass originally identified a third party as the vehicle's driver, but later changed his testimony to identify the driver as McFarland. Glass did not testify at trial.

At trial defense counsel questioned the investigating officer as to whether Glass had initially named a different driver for the vehicle. The officer testified that Glass initially gave him the name of a third party but that later he changed that testimony. On re-direct examination, counsel for the Commonwealth asked the officer which name Glass gave him later, eliciting the testimony that Glass had later named McFarland as the driver. McFarland asserts that the testimony by the investigating officer as to what Glass told him is hearsay, and should not have been admitted into evidence.

Kentucky law is clear in holding that testimony regarding what a police officer is told "is no less hearsay because it comes from a police officer. . . ." Bussey v. Commonwealth, Ky., 797 S.W.2d 483 (1990). A witness must

confine his testimony to matters admissible pursuant to KRE 803. The officer's testimony regarding what Glass told him was hearsay evidence, and should properly have been found inadmissible.

The Commonwealth asserts that because defense counsel elicited evidence from the investigating officer that Glass had initially named a third party as the driver of the automobile, the Commonwealth could introduce the change in Glass' testimony, wherein he identified McFarland as the vehicle's operator pursuant to KRE 806. The Commonwealth claims that the testimony naming McFarland was a properly admissible subsequent inconsistent statement. Where a party opens the door to a reasonable inquiry, subsequent admission of evidence should not be grounds for reversal. Smith v. Commonwealth, Ky., 904 S.W.2d 220, 222 (1995). Even where testimony may be hearsay, it is not automatically grounds for reversal. Louisville & NR Co. v. Roberts, Ky., 218 S.W.2d 713 (1920). In determining whether an error is harmless, "an appellate court may consider whether on the whole case there is a substantial possibility that the result would have been any different." Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983). We find that other significant evidence existed supporting the jury's finding that McFarland was the operator of the stolen vehicle. Under such

circumstances, introduction of the police officer's testimony does not constitute reversible error.

The hearsay evidence was not the only evidence linking McFarland to the charged offense. Eyewitness testimony from one of the police officers on the scene indicated that Officer Buckner, a passenger in the car parked next to the stolen vehicle, saw McFarland running from the vehicle after the stop. The officer was less than ten feet from McFarland at that time. Glass's mother testified that McFarland was driving a blue vehicle that night when he picked Glass up at her house. She also testified that McFarland did not own a car. There is no showing that the evidence was insufficient to support the jury's determination that McFarland was the driver of the vehicle in question.

McFarland argues that he was denied his constitutional right to confront his accuser when the police officer's testimony was admitted, without McFarland being given the opportunity to confront Glass. Glass did not testify at the trial, and was not called as a witness by the defense. McFarland's counsel did not call Glass to the stand or make any other effort to determine whether the officer's characterization of Glass' testimony was correct. There is no showing that Glass would have given a different statement to the jury than he did to the police officer. Under such circumstances, the fact that

Glass was not cross-examined by the defense does not constitute reversible error.

McFarland's motion for directed verdict on the grounds that the Commonwealth had failed to meet its burden of proof was denied. McFarland claims that this is reversible error. He argues that the Commonwealth did not prove the elements of KRS 514.110 as required by law. These elements include proof that the defendant retained stolen property; that the property was valued at over \$300; and that defendant knew or should have known that the property was stolen. McFarland claims that absent the inadmissible hearsay evidence regarding Glass' testimony, there was no evidence linking him to the stolen blue car.

McFarland's contention is unsupported by the evidence before the court. A motion for directed verdict may only be granted where, "under the evidence as a whole, it would be clearly unreasonable for the jury to find guilt." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Glass' mother identified McFarland as having driven a blue car when he came to pick up Glass, and one of the officers involved in finding and seizing the stolen blue car identified McFarland as the operator of the automobile. Kentucky law holds that issues of fact and witness credibility are the province of the jury. Commonwealth

v. Smith, Ky., 5 S.W.3d 126, 129 (1999). There is no reversible error. Therefore, we affirm the jury's verdict.

TACKETT, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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