

RENDERED: December 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001870-MR

BRUCE MEADE

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 02-CR-00268

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Bruce Meade has appealed from a final judgment and sentence of ten years' imprisonment entered by the Pike Circuit Court on August 19, 2003, following a jury's verdict finding Meade guilty on one count of trafficking in a controlled substance in the first degree.¹ Having concluded that the prosecutor's closing arguments in the guilt and penalty phases of the trial were not improper, we affirm.

On December 11, 2002, a Pike County grand jury

¹ Kentucky Revised Statutes (KRS) 218A.1412.

indicted Meade on one count of trafficking in a controlled substance in the first degree. Meade entered a plea of not guilty to the charge and the case proceeded to a jury trial, held on June 30, 2003, and July 1, 2003, in the Pike Circuit Court.

The Commonwealth presented evidence that on March 18, 2002, Meade sold Oxycontin to Shirley Neely, a paid confidential informant² for the Kentucky State Police (KSP). Neely had contacted Meade earlier that day and arranged a meeting to purchase Oxycontin. The drug transaction occurred in the presence of Randy Hunter, an undercover Drug Enforcement Officer for the KSP, under the pretense that Neely was purchasing the drugs for Hunter. The drug transaction was videotaped and audiotaped.

Meade disputes the facts surrounding the initial contact between Neely and him regarding this drug transaction. However, it is undisputed that after the initial contact, Meade approached Neely as she sat in an undercover police car with Hunter at the L & M Mart in Pike County, Kentucky, on March 18, 2002. The videotape and audiotape played at trial revealed that during the drug transaction, Neely gave Meade \$1,200.00 in cash to purchase 20, 60 milligram tablets of Oxycontin. Meade left

² Neely testified that in December 2001, she contacted the KSP and offered to become a paid confidential informant, which led to her involvement in this particular transaction with Meade. Neely was addicted to Oxycontin at the time and decided, for pay, to help get drug dealers off the street.

with the cash and a second meeting occurred shortly thereafter at a different location where Meade passed a substance, later determined to be Oxycontin, to Neely through the window of the car. However, Meade only gave Neely four 40-milligram Oxycontin tablets and two 20-milligram Oxycontin tablets and returned to Neely all but \$300.00 of the money he had received from Neely at the earlier meeting.

It is undisputed that Meade was the person shown on the videotape and heard on the audiotape of the drug transaction. The only issue at trial was whether Neely entrapped Meade. Meade claimed that in March 2002, Neely was seeking favorable treatment from the police concerning a then-pending misdemeanor shoplifting charge;³ and that in order to gain this favorable treatment from the police, she forced him to be a part of the March 18, 2002, drug transaction.

Meade testified that Neely had been a customer at the junkyard where he had previously worked, but that he did not know Neely personally before she came to his house on March 17, 2002, the day before the drug transaction. Meade claimed Neely came to his house on March 17, 2002, and dropped off a quantity of Oxycontin and threatened his life if he refused to agree to meet her the next day at a designated location, pretend to go

³ In exchange for her work as an informant in this case, Neely received one-year probation on the shoplifting charge and \$200.00 as payment for her time and expenses.

get the drugs from someone other than her, and reappear 30 to 45 minutes later and pretend to sell the drugs to her. He testified that he complied with this alleged bizarre demand only out of fear for his life and that of his family.

Meade further testified that he did not sell Oxycontin, have a prescription for it, or use it himself, and that he did not profit from the drug transaction of March 18, 2002, because Neely came to his house on March 19, 2002, and took back the \$300.00 that she had paid him.⁴ However, from the videotape and the audiotape, Meade could be heard offering to get Neely more narcotics, describing the difference between various types of drugs, and stating his preference. Meade testified that he only provided this information because Neely had previously told him what to say. Meade testified that he did not alert law enforcement regarding this alleged threat by Neely because he was afraid and he did not know if the police would arrest Neely.

Neely testified that she did see Meade on March 17, 2002, at the L & M Mart, where she purchased Oxycontin for herself, but that she did not go to his house on March 17, 2002. Rather, Neely testified that she and Meade made the arrangements for the March 18, 2002, drug transaction earlier on March 18, 2002, before the meeting with Officer Hunter. Neely testified

⁴ There was no proof that the KSP ever recovered the \$300.00 received by Meade.

that she had known Meade for approximately two years before the March 18, 2002, drug transaction and that she had been to his house at least 100 times to purchase Oxycontin before March 18, 2002.

The jury returned a verdict finding Meade guilty of trafficking in a controlled substance in the first degree and recommended that Meade be sentenced to ten years' imprisonment for his conviction, the maximum sentence. The trial court entered a final judgment and order of imprisonment on August 19, 2003, sentencing Meade to ten years' imprisonment in accordance with the jury's recommendation. This appeal followed.

Meade contends that the prosecutor made improper closing arguments during both the guilt phase and the penalty phase of the trial. Meade relies on United States v. Francis,⁵ for his contention that he is entitled to a new trial because the prosecutor expressed a personal belief to the jury that Meade lied at trial, but failed to give examples of the discrepancies in Meade's testimony and other evidence.

Specifically, Meade challenges the following statements made by the prosecutor during her closing argument in the guilt phase of the trial:

⁵ 170 F.3d 546, 551-52 (6th Cir. 1999)(noting that it was improper for the prosecutor to call the defendant a liar in her closing arguments, without basing the attacks on evidence adduced at trial, and finding that the prosecutor should have given examples of discrepancies in the defendant's testimony and then drawn the conclusion that he lied).

Really, the only issue for you to examine and debate is whether or not this was a case of entrapment or whether or not this is just a cock and bull story that he has created here at trial. . . I think you saw the true Bruce Meade on the video when he didn't know he was being observed. Ladies and Gentleman, I submit to you that was no charade. That was no man in fear for his life, believing that this woman was going to come to his home and kill him if he didn't pull off this convincing charade. That's just craziness. . . . You have the opportunity now, through your verdict, to shut down one aspect, to close off one avenue of the transfer of this Oxycontin, through Bruce Meade. . . . The best he can do is come up with this crazy entrapment defense to try to claim that this wasn't something he would have otherwise done, that this woman threatened his life and made him pretend to be selling these drugs to her. Ladies and Gentlemen, that just doesn't hold water. It just doesn't make sense.

Meade also challenges the following statements made by the prosecutor during her closing argument in the penalty phase of the trial:

The first thing I think you need to think about is what Bruce Meade did here in this courtroom today, through his testimony earlier today, as well as his testimony just a couple minutes ago. The man has come in here and told an absolute whopper. One of the biggest lies imaginable, he has come in and is somewhat indignant that you all didn't fall for it. He comes in here and rather than an impassioned plea for mercy, he sits down and tells you again about this lie. He tells this same story all over again to try to get you to give him the minimum sentencing. You can hold that lie against him.

Meade notes that judging the credibility of a witness lies within the province of the jury,⁶ and he contends the prosecutor invaded the jury's territory by calling him a liar. When this Court evaluates a claim of prosecutorial misconduct, we "must focus on the overall fairness of the trial, and not the culpability of the prosecutor,"⁷ in determining whether the prosecutor's conduct "was of such an 'egregious nature'" as to deny the defendant his "constitutional right of due process of law".⁸

As our Supreme Court noted in Barnes v. Commonwealth,⁹ prosecutorial misconduct in a closing argument will result in reversal only under the following circumstances:

[I]f the misconduct is "flagrant" or if each of the following three conditions is satisfied:

- (1) Proof of defendant's guilt is not overwhelming;
- (2) Defense counsel objected; and
- (3) The trial court failed to cure the error with a sufficient admonishment to the jury.¹⁰

Initially, we note that no objection was made to

⁶ Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

⁷ Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411-12 (1987).

⁸ Id. at 411 (citing Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

⁹ Ky., 91 S.W.3d 564 (2002).

¹⁰ Id. at 568 (citing United States v. Carroll, 26 F.3d 1380, 1390 (6th Cir. 1994)).

the prosecutor's closing statements during the guilt phase of the trial and there was no contemporaneous objection made to the prosecutor's closing statements during the penalty phase of the trial. Meade's attorney raised his only objection to the prosecutor's closing arguments after the trial court dismissed the jury and revoked Meade's bond pending formal sentencing, by stating:

I do have a motion. I would move-- it's a belated objection. I would move for a mistrial due to the Commonwealth's characterization of my client's testimony as lies that occurred in the penalty phase. I am not sure whether it occurred at closing arguments in the guilt phase. I would have to review the tape on that. . . .

This motion was denied.

For an objection to be timely, it must be promptly interposed.¹¹ Specifically, "an objection to improper statements made during closing arguments must be contemporaneous. . . . The trial court should be given the opportunity to consider whether an admonition would cure the error."¹² Thus, Meade's failure to raise an objection to the prosecutor's argument until after the case was submitted to the jury was improper and this issue was not preserved for appellate review.

¹¹ Kentucky Rules of Criminal Procedure (RCr) 9.22; Bowers v. Commonwealth, Ky., 555 S.W.2d 241, 243 (1977).

¹² Weaver v. Commonwealth, Ky., 955 S.W.2d 722, 728 (1997).

Meade seeks review of this unpreserved error pursuant to RCr 10.26, under the palpable error standard of review.¹³ Since the three conditions set out in Barnes were not satisfied, we must determine if any misconduct was flagrant, and review the prosecutor's statements for palpable error under the test set out in Young v. Commonwealth.¹⁴ "A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief."¹⁵

The Supreme Court in Young stated that the factors to be considered in determining palpable error, include: (1) "examination of both the amount of punishment fixed by the verdict and the weight of evidence supporting that punishment"; (2) "whether the Commonwealth's statements are supported by

¹³ RCr 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

¹⁴ Ky., 25 S.W.3d 66 (2000).

¹⁵ Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996)(citing Jackson v. Commonwealth, Ky.App., 717 S.W.2d 511, 513 (1986)).

facts in the record"; (3) "whether the allegedly improper statements appeared to rebut arguments raised by defense counsel"; and (4) "these closing arguments, 'as a whole,' and . . . the wide latitude . . . allowed parties during closing arguments."¹⁶

Meade testified during both the guilt phase and penalty phase of the trial and told the jury that he was a victim of entrapment. The Commonwealth's evidence included a videotape and audiotape of the drug transaction and testimony of both the informant and the undercover officer who witnessed the transaction. The Commonwealth provided testimony that Neely had bought Oxycontin from Meade several times prior to this particular sale. Further, contrary to the Meade's testimony, Meade's girlfriend, Tina Elsza, testified at trial that Neely had been to Meade's home on a few occasions. This evidence provided the prosecutor with sufficient facts of record to support the statements she made in her closing arguments that Meade had been untruthful to the jury. Thus, we conclude that the prosecutor in her closing arguments sufficiently provided the jury with the basis for her contention that Meade had lied.

A prosecutor may comment on the credibility of the defendant, like any other witness, if he or she takes the

¹⁶ Young, 25 S.W.3d at 74-75.

stand,¹⁷ and “may comment on tactics, . . . evidence, and . . . as to the falsity of a defense position.”¹⁸ The statements made by the prosecutor in both of her closing arguments challenged Meade’s claim that he had been entrapped, and her arguments were consistent with the evidence presented by the Commonwealth. Further, since Meade again asserted the entrapment defense during the penalty phase when asking for a light sentence, the prosecutor was entitled to argue that Meade’s mitigating evidence was entitled to little weight.¹⁹ In reviewing the closing arguments as a whole, we conclude that there was no prosecutorial misconduct.

For the foregoing reasons, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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¹⁷ Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 39 (1998).

¹⁸ Slaughter, 744 S.W.2d at 412.

¹⁹ Tamme, 973 S.W.2d at 39.