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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002240-MR

LEROY ROCKCORRY LEE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CR-00804

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Leroy Rockcorry Lee has appealed from the final judgment and sentence of imprisonment entered by the Fayette Circuit Court on October 7, 2003, which convicted him of trafficking in a controlled substance in the first degree (crack cocaine),[1] and possession of prescription drugs not in a proper

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

container.[2] Having concluded that (1) the trial court did not err in denying Lee's motion for a directed verdict of acquittal; (2) the Commonwealth did not improperly bolster the credibility of a police informant who testified at trial; (3) the trial court did not abuse its discretion by denying Lee's motion to strike for cause a juror who was employed as a police officer; and (4) Lee received a fundamentally fair trial, we affirm.

On June 30, 2003, a Fayette County grand jury returned an indictment against Lee charging him with trafficking in a controlled substance in the first degree and possession of prescription drugs not in a proper container. The charges stemmed from a drug transaction involving Lee and a confidential informant, Harold Torkle, Jr., that took place in Lexington, Kentucky, on May 21, 2003. Lee entered pleas of not guilty to both charges and the case proceeded to trial.

Detective Shawn Ray, a member of the narcotics unit of the Lexington Metro Police Department, testified at trial concerning the procedures employed by the police to ensure that informants used to purchase drugs are "qualified." Det. Ray stated that an informant must perform two controlled buys to be considered "qualified" and he explained that this procedure is designed, inter alia, to ensure that a particular informant is "trustworthy." Det. Ray testified that Torkle "had been

[2] KRS 218A.210.

qualified." Det. Ray further testified that Torkle was working under his supervision on May 21, 2003, and he stated that he met Torkle at police headquarters in Lexington that afternoon. Det. Ray further stated that he placed an electronic transmission device in the trunk of Torkle's car and provided him with some "buy money." Det. Ray testified that he then followed Torkle to the 100 block of Rand Avenue. Det. Ray explained that he pulled into a "park area" located nearby while Torkle continued along Rand Avenue. Det. Ray stated that Torkle proceeded to purchase $20.00 worth of crack cocaine from an individual he met on Rand Avenue.[3] Det. Ray testified that he called Torkle's cell phone shortly after the transaction took place and obtained a description of the individual who sold him the drugs, which he relayed to the other officers from his unit that were in the area. Det. Ray stated that he then met Torkle at a predetermined rendezvous point. Det. Ray testified that Torkle gave him a baggie which contained what appeared to be approximately .2 grams of crack cocaine.[4] Det. Ray stated that he escorted Torkle back to Rand Avenue, where he identified Lee, who had already been arrested at this point based on the

[3] Det. Ray explained that he listened to the transaction over the transmission device.

[4] Lab tests later revealed that the baggie contained approximately .116 grams of crack cocaine.

description Torkle provided to Det. Ray, as the individual who sold him the crack cocaine.

Torkle explained that he agreed to act as a confidential informant in April 2003, after he was charged with a drug-related offense. In sum, Torkle's testimony was consistent with Det. Ray's account of the transaction. Torkle testified that he purchased $20.00 worth of crack cocaine from Lee on May 21, 2003. Torkle stated that when he turned onto Rand Avenue, Lee approached his car. Torkle explained that he asked Lee if he had a "deuce," the street term for .2 grams of crack cocaine. Torkle testified that Lee proceeded to a house on Rand Avenue and returned with the drugs. Torkle stated that he rendezvoused with Det. Ray shortly thereafter. Torkle explained that Det. Ray then escorted him back to Rand Avenue, where he identified Lee as the individual who sold him the drugs.

Det. Albert Dixon, who is also a member of the narcotics unit of the Lexington Metro Police Department, testified that he arrived on the scene shortly after the transaction took place. Det. Dixon stated that he found Lee sitting in front of a house on Rand Avenue and placed him under arrest. Det. Dixon explained that he identified Lee based on the description provided by Torkle. Det. Dixon stated that Det. Ray arrived with Torkle shortly thereafter. Det. Dixon

testified that Torkle identified Lee as the individual who sold him the drugs. Officer Eric Rice, who is also employed by the Lexington Metro Police Department, testified that he searched Lee and discovered in one of his pockets a clear plastic baggie containing 12 blue pills, which turned out to be Zyprexa.[5] Officer Rice stated that Lee consented to the search. At the close of the Commonwealth's case-in-chief, Lee moved for a directed verdict of acquittal on both charges, which the trial court denied. Lee presented no evidence.

The jury returned a verdict of guilty on both counts of the indictment. On October 7, 2003, the trial court sentenced Lee to prison for six years and six months on the conviction for trafficking in a controlled substance in the first degree, and 90 days in jail on the conviction for possession of prescription drugs not in a proper container.[6] This appeal followed.

Lee raises several issues on appeal. Lee contends (1) the trial court erred in denying his motion for a directed verdict of acquittal; (2) the Commonwealth improperly bolstered Torkle's credibility during Det. Ray's testimony; (3) the trial court erred in denying his motion to strike for cause a juror

[5] Zyprexa is a prescription drug used to treat psychotic mental disorders, such as schizophrenia.

[6] The trial court ordered the sentences to be served concurrently. See KRS 532.110(1)(a).

who was employed as a police officer; and (4) he was denied a fair trial due to certain comments made by the Commonwealth's Attorney during closing arguments in the penalty phase of the trial.

In Commonwealth v. Benham,[7] our Supreme Court explained the test for a trial court to follow when ruling on a motion for a directed verdict:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not 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.[8]

The Court went on to state the appropriate standard for an appellate court to follow when reviewing a trial court's ruling on a motion for a directed verdict.

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.[9]

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[7] Ky., 816 S.W.2d 186 (1991).

[8] Id. at 187.

[9] Id.

Lee contends he was entitled to a directed verdict of acquittal due to the fact he was never "identified" in open court. In sum, Lee maintains that the Commonwealth was required to identify him by name as the perpetrator during the trial in order to obtain a conviction. We disagree. Although a direct in-court identification is the preferred procedure for identifying a defendant as the alleged perpetrator, where the circumstances do not indicate a likelihood of confusion, that type of identification is not required.[10] The record reflects that the appellant was introduced to the jury during voir dire as "Leroy Lee." The indictment names "Leroy Rockcorry Lee" as the "defendant"[11] and the jury instructions are styled under the caption "Commonwealth of Kentucky v. Leroy Rockcorry Lee." Moreover, during her opening statement the Commonwealth's Attorney identified "Leroy Lee" as the "the defendant."[12] In addition, Torkle repeatedly referred to Lee as "the defendant" or "the suspect" throughout his testimony.[13] Although Torkle

[10] See generally Clark v. State, 47 S.W.3d 211, 214 (Tex.App. 2001)(quoting Roberson v. State, 16 S.W.3d 156, 167 (Tex.App. 2000))(stating that "[i]dentity may be proved by direct or circumstantial evidence. In fact, identity may be proven by inferences. When there is no direct evidence of the perpetrator's identity elicited from trial witnesses, no formalized procedure is required for the State to prove the identity of the accused").

[11] The trial court read the indictment to the jury during voir dire.

[12] Specifically, the Commonwealth's Attorney began her opening statement with the following remark, "ladies and gentlemen of the jury, the defendant, Leroy Lee, is a drug dealer."

[13] In fact, the Commonwealth's Attorney asked Torkle during direct examination "if he had any doubt that it was the defendant" who sold him the drugs, to

never specifically identified Lee by name, we are persuaded that the jury was adequately apprised that he was referring to Lee as "the defendant" or "the suspect."[14] Consequently, we cannot conclude that the trial court erred in denying Lee's motion for a directed verdict of acquittal.

Lee next contends that the Commonwealth improperly bolstered Torkle's credibility during Det. Ray's testimony. Specifically, Lee takes issue with Det. Ray's testimony concerning the procedures employed by the police to ensure that informants are "qualified." As previously discussed, Det. Ray testified at trial that an informant must perform two controlled buys to be considered "qualified" and he explained that this procedure is designed, inter alia, to ensure that a particular informant is "trustworthy." Det. Ray further testified that Torkle "had been qualified." Thus, Lee maintains that Det. Ray's testimony improperly bolstered Torkle's credibility, thereby prejudicing his right to a fair trial. We disagree.

First and foremost, Lee has failed to preserve this issue for appellate review. "The general rule is that a party

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which Torkle responded, "No." Det. Ray, Det. Dixon, and Officer Rice also referred to Lee as "the defendant" or "the suspect" throughout their testimony.

[14] See generally, Rohlfing v. State, 612 S.W.2d 598, 601 (Tex.Crim.App. 1981)(stating that "[a]lthough at no time did the prosecutor request that the record be made to reflect that the person referred to in the courtroom was appellant, we conclude from a totality of the circumstances the jury was adequately apprised that the witnesses were referring to appellant").

must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived."[15] Lee did not object to Det. Ray's testimony at trial. Nevertheless, Lee urges us to review this issue for palpable error pursuant to RCr 10.26. "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."[16] For an error to be palpable, it must have been "easily perceptible, plain, obvious and readily noticeable."[17] Moreover, "the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief."[18] In addition, "[t]he palpable error rule set forth in RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review."[19]

A thorough review of Det. Ray's testimony reveals that he never offered an opinion concerning the truthfulness of Torkle's testimony. Det. Ray merely explained departmental procedures designed to produce reliable information, which laid

[15] Commonwealth v. Pace, Ky., 82 S.W.3d 894, 895 (2002). See also Kentucky Rules of Criminal Procedure (RCr) 9.22.
[16] Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

[17] Burns v. Level, Ky., 957 S.W.2d 218, 222 (1998)(citing Black's Law Dictionary (6th ed. 1995)).

[18] Partin, 918 S.W.2d at 224.

[19] Pace, 82 S.W.3d at 895 (2002).

a proper foundation for the admission of the Commonwealth's evidence.[20] Although Det. Ray's testimony corroborated some elements of Torkle's testimony, "admissible testimony that has the incidental effect of bolstering or corroborating other testimony is not inappropriate."[21] Regardless, Lee has failed to demonstrate that a substantial possibility exists that the result would have been different had the trial court sua sponte excluded this portion of Det. Ray's testimony. Consequently, we find no palpable error with respect to this issue.

Lee further complains that the trial court erred in denying his motion to strike juror #566 for cause. During voir dire, juror #566 informed the trial court that he was a police officer and that he had testified on behalf of the Commonwealth in prior drug cases. Juror #566 was then asked to approach the bench where he was questioned by defense counsel and the Commonwealth's Attorney regarding whether his experience as a police officer would prevent him from acting as a fair and impartial juror. In sum, the following colloquy took place at the bench:

> Defense counsel: Do you think you could be fair?
>
> Juror #566: Yes.

[20] Det. Ray's testimony was probative of how the drugs came into Torkle's possession.

[21] Contreras v. State, 7 P.3d 917, 921 (Wyo. 2000).

Defense counsel: Do you think you would believe the testimony of a police officer over another witness based on the fact that they were police officers?

Juror #566: No.

Defense counsel: Right now in your head do you think that he [the defendant] probably did something or he wouldn't be here?

Juror #566: Right now he's not guilty.

Defense counsel: Do you feel like the police ever charge people that are not guilty?

Juror #566: [inaudible] Not guilty is up to the court to determine.

Defense counsel: Okay good. Right now do you feel that he did anything illegal?

Juror #566: Right now he's not guilty.

Commonwealth's Attorney: The officers we intend to call are Shawn Ray . . . Det. Albert Dixon . . . and Eric Rice. Do you know any of them?

Juror #566: I know all three of them.

Commonwealth's Attorney: Would you consider any of them to be a close friend of yours . . . ?

Juror #566: No.

Defense counsel: Do you feel like it would be difficult for you to explain to your friends or co-workers if you sat on a criminal jury and came back with a not guilty verdict?

Juror #566: No.

Lee then moved to strike juror #566 for cause. The trial court denied the motion, reasoning that juror #566 "answered all the questions appropriately." Lee subsequently exercised one of his peremptory challenges to remove juror #566.[22]

It is well-established that "[i]t is within the trial court's discretion to excuse a juror for cause, and great deference is afforded that decision in the absence of an abuse of discretion."[23] Moreover, "the mere fact that a person is a current or former police officer is insufficient to warrant removal for cause."[24] Simply put, "[a]dditional evidence of bias must be shown."[25] "[H]aving some acquaintance with or knowledge about the participants and their possible testimony does not automatically disqualify for cause."[26]

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[22] It is important to note that Lee exercised all of his peremptory challenges, thereby preserving this issue for appellate review. See e.g., Thomas v. Commonwealth, Ky., 864 S.W.2d 252, 259 (1993)(stating that "'[a] party must exercise all of his peremptory challenges in order to sustain a claim of prejudice due to the failure of the court to grant a requested challenge for cause'"[citation omitted]), cert. denied, 510 U.S. 1177, 114 S.Ct. 1218, 127 L.Ed.2d 564 (1994).

[23] Mills v. Commonwealth, Ky., 95 S.W.3d 838, 842 (2003). See also Furnish v. Commonwealth, Ky., 95 S.W.3d 34, 44 (2002)(stating that "[t]he decision whether to excuse a juror for cause is a matter within the sound discretion of the trial court").

[24] Mills, supra at 842.

[25] Id.

[26] Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 299 (1997), cert. denied, 522 U.S. 986, 118 S.Ct. 451, 139 L.Ed.2d 387 (1997).

In sum, Lee contends that "[t]here can be no question that there would be at least a doubt whether a [ ] police officer . . . who has been a witness for the prosecution on previous drug cases, and who knows the three police officers listed to testify for the Commonwealth . . . could be free of any subconscious bias in favor of the prosecution." In other words, Lee asserts that juror #566 should have been excused based on an implied bias arising from his status as a police officer and his relationship with the officers scheduled to testify at trial.[27] We disagree.

"[T]he doctrine of implied bias is limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances."[28] The case before us simply does not present one of those situations. The responses elicited from juror #566 during voir dire indicate that he was committed to rendering a fair and impartial verdict. Juror #566 and the officers scheduled to testify at trial were casual acquaintances, i.e., they knew each

[27] See Randolph v. Commonwealth, Ky., 716 S.W.2d 253, 255-56 (1986)(stating that "[a] potential juror may be disqualified from service because of connection to the case, parties or attorneys and that is a bias that will be implied as a matter of law"), overruled on other grounds Shannon v. Commonwealth, Ky., 767 S.W.2d 548 (1988). See also Godsey v. Commonwealth, Ky.App., 661 S.W.2d 2, 4-5 (1983).

[28] Person v. Miller, 854 F.2d 656, 664 (4th.Cir. 1988).

other but did not have a close relationship.[29] Thus, we are not persuaded that the trial court abused its discretion in determining that juror #566 could "render a fair and impartial verdict on the evidence[.]"[30] Consequently, we cannot conclude that the trial court abused its discretion by denying Lee's motion to strike juror #566 for cause.

In closing, Lee asserts that he was denied a fair trial due to certain comments made by the Commonwealth's Attorney during closing arguments in the penalty phase of the trial. Specifically, Lee contends the Commonwealth's Attorney made an improper appeal to the interests of the community. The Commonwealth's Attorney's closing argument including the following remarks:

> The last and final thing we ask you to take into consideration is the victim of this crime. Many people say drugs in our community and any drug trafficking is a victimless crime. However, it isn't ladies and gentleman. The victim of this crime is our community, the people who live in the area of Rand Avenue who have to constantly call the police because they see drug dealers on the street. . . . The people who will never feel safe because they know the area of town they live in is targeted as a

[29] See Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 670 (1990)(fact that juror was a police officer in county of trial and knew several testifying officers did not establish bias as a matter of law).

[30] RCr 9.36. Lee's reliance on Godsey, supra, is misplaced as the juror in that case was the County Attorney when the defendant's preliminary hearing on the charges in question proceeded through district court. Godsey, 661 S.W.2d at 4. Juror #566's connection to the case before us was far more attenuated than the juror in Godsey. Lee's reliance on Randolph, supra, is similarly misplaced as the juror in that case was the Commonwealth's Attorney's secretary. Randolph, supra, 716 S.W.2d at 255-56.

> drug infested area. Also, the victims of this community are families who are destroyed by people using crack cocaine. . . . So ladies and gentlemen the Commonwealth would contend that this is not a victimless crime. . . . There is a victim here and it is the community, the citizens of Fayette County.

We begin by noting that Lee failed to preserve this issue for appellate review by way of a contemporaneous objection. "[A]n objection to improper statements made during closing arguments must be contemporaneous."[31] Nevertheless, Lee urges us to review this issue for palpable error pursuant to RCr 10.26.

When analyzing claims of improper argument, we must "'determine whether the conduct was of such an "egregious" nature as to deny the accused his constitutional right of due process of law.'"[32] "'The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor.'"[33] In addition, it is well-established that "prosecutors are allowed wide latitude during

[31] Weaver v. Commonwealth, Ky., 955 S.W.2d 722, 728 (1997). Lee did request a mistrial at the conclusion of the Commonwealth's closing argument, which the trial court denied.

[32] Foley v. Commonwealth, Ky., 953 S.W.2d 924, 939 (1997), cert. denied, 523 U.S. 1053, 118 S.Ct. 1375, 140 L.Ed.2d 522 (1998)(quoting Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411 (1987), cert. denied, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989)).

[33] Foley, supra at 939 (quoting Slaughter, supra at 411-12).

closing arguments[.]"[34] Bearing these principles in mind, we cannot conclude that the remarks made by the Commonwealth's Attorney during her closing argument were so egregious as to render the penalty phase of Lee's trial fundamentally unfair. Simply put, Lee has failed to demonstrate that a substantial possibly exists that the result would have been any different had the statements he complains of not been made.

Based on the foregoing reasons, the final judgment and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky

[34] Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 866 (2002).