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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000884-MR

CHARLES D. EAPMON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 03-CR-00603

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: Charles D. Eapmon appeals from a judgment of the Kenton Circuit Court following his conviction by a jury of first-degree trafficking in a controlled substance (cocaine) and trafficking in marijuana. He was sentenced to serve five years in prison. Eapmon argues that he was deprived of a fair

[1] Senior Judge John D. Miller, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

trial due to numerous errors -- none of which was preserved for appellate review. Finding no error, we affirm.

On September 12, 2003, police officers were dispatched to the area around Boxwood Avenue in Independence, Kentucky, to investigate an altercation involving a group of young men. The officers had been informed that a male passenger in a black Chevrolet Beretta with temporary plates had brandished a handgun and had threatened to shoot another individual. Police officers Michael Richman[2] and Michael Clifton located the vehicle and made a stop.

After explaining the reason for the stop, the officers asked permission to search the interior of the car. The driver, Jimmy Collins, consented to the search but advised that the car did not belong to him. Eapmon, who was sitting in the front passenger seat, told the officers that the car belonged to him; he, too, consented to a search of the vehicle. He later told the officers that the title to the car was in his grandmother's name.

Collins, Eapmon, and a fifteen-year-old male sitting in the back seat were asked to exit the vehicle; they were then subjected to a pat-down search of their persons. The officers uncovered no weapon or other contraband at that time. After the

[2] There is some confusion in the record as to the correct spelling of this officer's name. In the briefs, it appears as "Richmond." His own reports and citations in the record are signed as "Richman," the spelling that we have elected to use throughout this opinion.

search of the interior of the car revealed nothing, the officers asked permission to search the trunk. Eapmon again consented and unlocked the trunk with a key that was attached to a chain around his neck. After opening the trunk, Eapmon began moving things around. He was asked by the officers to step away from the car. The officers immediately observed a bag containing clothing, which Eapmon identified as his. They then lifted the carpet and searched the spare tire well and found another bag containing a large chunk of cocaine, marijuana, digital scales, and plastic zip lock baggies.

Eapmon and Collins were placed under arrest and were charged with trafficking in marijuana and cocaine. A second search of their persons revealed that each possessed a large sum of money. Eapmon had $841 in his pockets; Collins was carrying $203.

Prior to trial, Eapmon filed a motion *in limine* in which he sought to suppress the introduction of the police reports and the citations generated as a result of the traffic stop. The motion was granted. Because no gun was found in the car, it was not mentioned at trial as the specific reason for the initial stop of the vehicle. As background, the officers merely explained to the jury that they were responding to a report of an altercation or disorderly conduct in the Boxwood area involving a black Beretta.

Eapmon did not testify in his own defense. He offered instead the testimony of several witnesses to establish that the car did not belong to him (contrary to what he had allegedly told the police) but that it was actually owned by his co-defendant, Collins. Three of Eapmon's friends testified that they saw Collins driving the Beretta for several days immediately preceding the incident. Barbara Eapmon, the appellant's grandmother with whom he resided, told the jury that she had purchased the Beretta for $600 from Jordan's Auto Repair on September 6, 2003. Within days of the sale, a knocking noise in the car caused her to become dissatisfied with the automobile. She put a "for sale" sign on the car and parked it in her driveway. She testified that Collins saw the sign in the car while visiting her grandson and offered to buy it from her for $800. She stated that she gave him the title to the vehicle and the only set of keys.

Testifying in his own defense, Collins denied having made any agreement with Mrs. Eapmon for the purchase of the Beretta or having ever driven the vehicle prior to the night of his arrest. He said that he was driving on the night in question because Eapmon called and asked him to drive him around as Eapmon's driver's license was suspended and there were a lot of police on the streets. He said that he met Eapmon and Eapmon's girlfriend at a service station where he left his car.

After they took the girlfriend home, Eapmon got a call on his cell phone telling him about an altercation involving another of his friends in the Boxwood area.

Collins, who had recently graduated from high school, testified that he had never been in any trouble before and denied having any knowledge that there were drugs in the trunk of the car. Collins's mother testified that she had never seen her son driving the Beretta. She also testified that she and her husband had transferred one of their cars to him and that he was still making the payments on that vehicle. Because Collins worked only sporadically, she testified that he could not possibly have had enough money to buy yet another car from Mrs. Eapmon.

The jury found Collins guilty of possession of cocaine and possession of marijuana. It recommended a sentence of one year. The jury found Eapmon guilty of trafficking in both cocaine and marijuana and recommended a sentence of five years. Eapmon was formally sentenced on April 12, 2004. This appeal followed.

On appeal, Eapmon argues that the trial court erred by allowing the prosecutor and Dennis Alerding, counsel for his co-defendant, Collins, to comment on his failure to testify. He contends that he was denied the rights guaranteed by the Fifth Amendment to the United States Constitution, Section Eleven of

the Kentucky Constitution, and KRS[3] 412.225 when both attorneys made comments during closing arguments compromising his right to remain silent.

Attorney Alerding made the first comment that arguably mandates a reversal of his conviction according to Eapmon. During his summation on behalf of Collins, Alerding stated:

> Now, I'm not a prosecutor and I'm not here to convict Eapmon. Maybe one of Eapmon's friends put [the drugs] in [the vehicle]. Maybe someone else borrowed this car. Maybe [the drugs] were there when they bought [the car] from Jordan's Auto Sales. How do I know?
>
> We are in America where nobody takes responsibility for anything. It's a darn sad thing when Eapmon is now trying to make the implication that [Collins]-- with no [criminal] record and no drug involvement -- is somehow involved in a drug case. That's ridiculous. [Collins] took the stand; he told you what he knows; he told you about himself; he told you about his life. **Now, you don't have to take the stand but you ought to get some points for taking it.** [Collins] took it, he told you, and if you don't like what he said, convict him. (Emphasis added.)

In his summation, the prosecutor responded to Alerding's argument as follows:

> Mr. Alerding has talked a lot about the acceptance of responsibility. How all that goes. **No one is going to step up to the plate – no one who is facing a sentence of five to ten years in the state penitentiary**

[3] Kentucky Revised Statutes.

> **– and accept responsibility and say, "Send me to prison."** Nobody is going to say that. But they sure as heck are going to try to look and try to pin it on some one else – in a heartbeat. "Don't convict me. Send that person to prison. He had the vehicle. He had control over it. He knew the stuff was in there. It was his scales, his baggies, his cocaine, his marijuana. Not mine. Send that person to prison." (Emphasis added.)

Eapmon argues that both of these statements constitute a flagrant violation of his right to remain silent. He admits that he neither objected to these comments nor requested an admonition or any other relief from the trial court. The issue is, therefore, unpreserved. RCr[4] 9.22. Nevertheless, Eapmon argues that the comments resulted in a manifest injustice warranting a reversal of his conviction pursuant to the palpable error rule, RCr 10.26.

Despite the fact that Eapmon failed to preserve this issue properly for appeal, we have examined his claim and hold it to be entirely lacking in merit. It is a settled principle that neither the Commonwealth nor a co-defendant may intrude upon a defendant's right to remain silent and to refrain from testifying at trial. Bradley v. Commonwealth, 261 S.W.2d 642 (Ky. 1953); Luttrell v. Commonwealth, 554 S.W.2d 75 (Ky. 1977). However, when reviewed in context, neither statement implicated

[4] Kentucky Rules of Criminal Procedure.

Eapmon's constitutional or statutory rights with respect to self-incrimination.

A review of the prosecutor's summation reveals that he did not refer to Eapmon's silence. Instead, his "step up to the plate" remarks were made in direct response to Attorney Alerding's argument about accepting responsibility in lieu of condoning the blame-shifting trial strategy employed by both defendants. It was a proper argument under the circumstances. Haynes v. Commonwealth, 657 S.W.2d 948 (Ky. 1983).

Rather than commenting on Eapmon's silence, Alerding focused on the fact that Collins, his client, did elect to testify. In highlighting his own client's willingness to take the stand, counsel may have caused the jury incidentally to contrast the choices made by Eapmon and Collins in litigating the case. However, in seeking due credit for Collins, Attorney Alerding did not specifically invite the jury to convict Eapmon of trafficking because of his failure to testify. Eapmon's silence spoke for itself by the very contrast with Collins's testimony. Alerding did not violate Eapmon's constitutional right to remain silent. See, U.S. v. Robinson, 485 U.S. 25, 33-34, 108 S.Ct. 864, 99 L.Ed.2d 23, 32 (1988).

Even if Alerding's closing argument tangentially had implicated Eapmon's exercise of his rights, we are not persuaded

that the comments resulted in a degree of prejudice that would warrant reversal under RCr 10.26.

> 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.

When invoking relief under this rule, a defendant must show that there was a substantial possibility that the result of the trial would have been different had the error not occurred. Castle v. Commonwealth, 44 S.W.3d 790, 794 (Ky.App. 2000). In this case, the jury was aware that Eapmon did not testify. Additionally, the trial court took care to instruct the jury not to draw any adverse inference of guilt from his failure to testify. Finally, a review of the record reveals that the evidence of Eapmon's guilt was overwhelming: Eapmon not only had access to the vehicle, but he carried the sole key to the trunk around his neck. Thus, we are not persuaded that Collin's attempt to showcase his willingness to testify at trial resulted in a manifest injustice to Eapmon as contemplated by RCr 10.26.

Eapmon next argues that that the trial court erred in allowing the Commonwealth to question the arresting officer about the money found on his person. Eapmon has not challenged

the legality of the traffic stop. However, he contends that the pat-down search of his person that uncovered $841 in cash exceeded the scope of a search permitted by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Accordingly, he argues that it should have been suppressed.

This issue also has not been preserved for review. The trial court was not given the opportunity to consider the suppression of this evidence since Eapmon filed no motion to suppress nor did he object to the introduction of the evidence at trial. As with the previous allegation of error, Eapmon seeks a reversal of his conviction pursuant to the palpable error rule.

Under the circumstances of this case, we are persuaded that the evidence was legally seized and that Eapmon's right to be free of unreasonable searches and seizures was not violated. Officer Richman testified that he was dispatched to the Boxwood area due to a reported altercation involving the vehicle occupied by Eapmon and driven by Collins. The police had reason to believe that at least one occupant in the car might be armed with a handgun. Thus, the officers were more than justified in stopping the vehicle and had sufficient reason to conduct a pat-down search of Eapmon for their own protection. Terry, supra.

Officer Richman testified that after he discovered the drugs and other paraphernalia in the trunk of the car, he placed

handcuffs on Eapmon while his partner handcuffed Collins. At that time, the men were patted down again. It was during this search -- the search incident to their arrests -– that the officer discovered the rolls of cash on each man. Having made a lawful custodial arrest of Eapmon, the officers did not need any further justification for conducting a search of his person. Davis v. Commonwealth, 120 S.W.3d 185, 193, n. 46 (Ky.App. 2003), quoting United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). There was no error in allowing the officers to testify at trial about the money seized from the appellant.

Eapmon's third allegation of error concerns the introduction of evidence of his involvement in other criminal activity. He complains that the prosecutor disregarded the trial court's ruling on his motion *in limine* during his opening statement by alluding to the "altercation" on Boxwood. He also alleges that he was prejudiced by Officer Richman's testimony that he was dispatched to find the vehicle because of its involvement in the altercation.

We find no breach of the court's ruling *in limine*. The trial court was asked to exclude from evidence the police reports and the citations. In compliance with the court's ruling, those items were not introduced. The jury was not told of the details of the altercation, nor was it made aware of the

allegation that a male passenger in the vehicle had brandished a weapon. The brief allusion to the altercation did not violate any rules of evidence, and it did not prejudice the appellant so as to result in a manifest injustice to him.

Eapmon claims that several other items of prejudicial evidence were erroneously admitted, including: (1) Collins's testimony that Eapmon pulled a gun on him and threw a brick through his window just days before trial; (2) Collins's testimony that he renewed his acquaintance with Eapmon after Eapmon's release from jail; (3) Officer Richman's testimony that Eapmon's driver's license had been suspended; and (4) the officer's testimony that there was a minor in the back seat of the vehicle. Eapmon raised no objection at trial to any of these items of testimony. Moreover, as the Commonwealth points out, some of this evidence was solicited by Eapmon's own counsel (*i.e.*, the testimony concerning the problems between Collins and Eapmon prior to trial and the fact that Eapmon's driver's license was suspended). We cannot agree that any of this evidence warrants reversal of Eapmon's conviction under the stringent standards entitling a defendant to relief under RCr 10.26.

Eapmon also argues that the trial court erred when it allowed Officer Richman to testify that the quantity of cocaine found in the truck of his car was the "largest amount" of

cocaine that he had ever seen. He believes that the testimony bolstered the officer's credibility as well as enhancing the Commonwealth's case against him. While not preserved for review, Eapmon urges that the testimony "was patently prejudicial" and constituted grounds for reversal. (Appellant's brief, at p. 13.)

We agree with the Commonwealth that no improper bolstering resulted from the officer's testimony. Based upon his eight years of professional experience, Officer Richman was qualified to express his opinion that the quantity of drugs discovered was indicative of trafficking. See, Sargent v. Commonwealth, 813 S.W.2d 801 (Ky. 1991), and Kroth v. Commonwealth, 737 S.W.2d 680 (Ky. 1987). It is undoubtedly true that the Commonwealth's case was supported by the officer's testimony that the cocaine was the largest amount he had seen. However, its admission did not constitute error. Any enhancement of the Commonwealth's case was incidental rather than a deliberate effort at improperly enhancing credibility.

Improper bolstering occurs when the Commonwealth attempts to establish the credibility of a victim or one of its witnesses by asking other witnesses (*i.e.*, police officers) to repeat what the victim or witnesses had said. This issue is discussed in definitive terms in Sanborn v. Commonwealth, 754

S.W.2d 534 (Ky. 1988), where the Supreme Court set forth the parameters of testimony by police officers:

> The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case. Such information is then admissible, not to prove facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officer's action.

Id. at 541. Pursuant to Sanborn, we hold that Officer Richman's statements do not meet the definition of bolstering. We find no error on this issue.

Eapmon also argues that he was denied a fair trial as a result of a juror's alleged inability to devote his full attention to the case. This claim is based on the fact that one of the jurors seated in this case received two numeric pager messages during the trial. On each occasion, the trial court called a short recess to order to allow the juror to respond to the pager by telephone. No objection was made by the Commonwealth or by either defendant.

For the first time on appeal, Eapmon contends that he suffered extreme prejudice due to juror misconduct. He relies upon Lester v. Commonwealth, 132 S.W.3d 857 (Ky. 2004), a case in which the court found no abuse of the trial court's

discretion for removing a juror who had been observed (and heard) sleeping during the trial. The facts of this case are highly distinguishable. There is no evidence to support Eapmon's suggestion that the juror failed to give adequate attention to the case simply because of a momentary interruption. His consciousness was at no time impaired or suspended. We find no error.

In his final argument, Eapmon contends that he was deprived of a fair trial by "the magnitude and multitude of errors." (Appellant's brief, at p. 14.) Since we find that no single error occurred in Eapmon's trial, cumulative error is an impossibility.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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