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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000710-MR

STEVE STAMPER

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE ROBERT E. GILLUM, JUDGE
INDICTMENT NO. 04-CR-00133

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: McANULTY, MINTON, AND VANMETER, JUDGES.

MINTON, JUDGE: Steve Stamper brings this direct appeal from the judgment and conviction for possession of a controlled substance and of being a second-degree persistent felony offender (PFO II). We agree with Stamper that at trial, the Commonwealth impermissibly defined reasonable doubt during *voir dire*, elicited testimony describing his prior felony conviction, and commented on his right to remain silent. But we hold these errors are harmless errors in light of the overwhelming evidence

against Stamper. Our overarching focus is whether Stamper received "a fair trial, not a perfect one."¹ So we affirm because we believe that Stamper's trial was fundamentally fair.

Responding to an anonymous tip, Detective Matt Bryant of the Rockcastle County Sheriff's Department went to Stamper's apartment complex. Shortly after he arrived there, Detective Bryant saw Stamper pull up in a vehicle and walk toward his apartment. Before Stamper reached his apartment, Bryant approached him, told him the purpose of his visit, and asked for consent to search Stamper's person. Stamper consented to the search, which yielded a prescription bottle containing one half pill of methadone, a controlled substance. The prescription was issued to a Charlotte McClure.

From this incident, Stamper was eventually indicted for Possession of a Controlled Substance, First Degree, First Offense, and for being a PFO II. His case was tried by a jury. At the trial, Stamper testified that he found the prescription bottle in the floor of his vehicle after he had given McClure, the mother of one of his neighbors, a ride. Nevertheless, the jury found Stamper guilty of the possession and PFO II charge and recommended the minimum sentence, five years' incarceration. Stamper was sentenced in accordance with the jury's verdict, after which he filed this direct appeal.

¹ Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

Stamper raises five arguments on appeal. First, he contends that the trial court erred by permitting the Commonwealth to define reasonable doubt during *voir dire*. Second, Stamper argues that he was entitled to a directed verdict. Third, he contends that the trial court erred by permitting the Commonwealth to question him about why he was on probation. Fourth, Stamper argues that his Fifth Amendment right to remain silent was violated when the Commonwealth asked Detective Bryant whether Stamper made any statements. Finally, he argues that the trial court erred when it allowed Detective Bryant to testify that he had gone to Stamper's apartment complex based upon an anonymous tip. We will address each argument separately.

**DID THE COMMONWEALTH IMPERMISSIBLY
DEFINE REASONABLE DOUBT?**

During *voir dire*, the assistant Commonwealth's attorney prefaced a question to the venire by stating that the Commonwealth's "burden is to prove the case beyond a reasonable doubt." And then he asked "[i]s there anyone here who would hold me to a higher standard, beyond all doubt." The trial court overruled Stamper's counsel's objection to that question. On appeal, Stamper argues that the Commonwealth's reference to "beyond all doubt" was an impermissible attempt to define

reasonable doubt. We agree that it was error, but it is a harmless error.

We agree with Stamper that neither the Commonwealth nor defense counsel may attempt to define reasonable doubt at any time during a trial.² But the statement in this case is similar to one the Kentucky Supreme Court recently found to be only a harmless error in Johnson v. Commonwealth. In Johnson, the Commonwealth's *voir dire* contained the following comment: "you'll see it on the TV or you'll hear it on the radio, or you'll read it in the newspaper, or you'll read it in a novel or a book or something—beyond a shadow of a doubt. Now listen carefully. There ain't no such thing in the criminal justice system in the United States of America. That's one of the myths that has arisen. Nobody has to prove anything beyond a shadow of a doubt."³ Like Stamper, the defendant in Johnson argued that the Commonwealth's reference to "beyond a shadow of a doubt" was an impermissible attempt to define reasonable doubt. The Supreme Court disagreed, holding that "the prosecutor in this case simply informed the jury that the Commonwealth did not have to prove its case beyond a shadow of a doubt and that the proper standard was proof beyond a reasonable doubt. He offered no hypothetical to explain 'beyond a reasonable doubt' and did not

² Johnson v. Commonwealth, 184 S.W.3d 544, 548 (Ky. 2005).

³ *Id.*

engage in a lengthy discussion of the standard.”⁴ The Supreme Court then found that the alleged statement “was, at worst, harmless [error].”⁵

Likewise, in the case at hand, better practice would have been for the Commonwealth to avoid any attempt whatsoever to define reasonable doubt. But given the isolated nature of this *voir dire* question, the strong evidence against Stamper and the similarity between the comment in the case at hand and the one in Johnson, we find that the error, standing alone, did not affect the ultimate outcome of the case. Thus, we deem the Commonwealth’s statement to be a harmless error.⁶

WAS STAMPER ENTITLED TO A DIRECTED VERDICT?

The familiar standard for ruling on a motion for directed verdict is as follows:

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.

⁴ *Id.* at 550.

⁵ *Id.*

⁶ See Kentucky Rules of Criminal Procedure (RCr) 9.24.

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.⁷

Stamper argues that he did not knowingly and unlawfully possess the prescription bottle containing the methadone because his intent was to return it to McClure or a member of McClure's family. But the jury was not obligated to believe Stamper's version of the events.⁸ In contrast to Stamper's contention that she left the bottle in his car, McClure testified that Stamper never gave her a ride. Instead, she testified that the bottle became missing after she left it downstairs at her daughter's apartment while she was upstairs helping her daughter prepare to move. Furthermore, McClure testified that she noticed Stamper near her daughter's apartment on the day in question. Since the jury could choose which version of events to believe,⁹ and since we are directed to favor the Commonwealth with all reasonable inferences to be drawn from the evidence,¹⁰ we find that the Commonwealth introduced sufficient evidence for a reasonable

⁷ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

⁸ See, e.g., Morton v. Commonwealth, 817 S.W.2d 218, 223 (Ky. 1991) (holding that in a case involving conflicting evidence, the jury was not obligated to believe a defendant's version of the facts).

⁹ Darnell v. Commonwealth, 558 S.W.2d 590, 595 (Ky. 1977) ("A witness' expectation of a benefit or motive to testify falsely is a factor that goes to the credibility of the witness and to the weight of his testimony. Such matters are within the scope of the jury's duty.").

¹⁰ Benham, 816 S.W.2d at 187.

juror to conclude that Stamper knowingly and unlawfully possessed McClure's methadone. So we must conclude that the trial court properly denied Stamper's motion for a directed verdict.

**DID THE TRIAL COURT ERR BY PERMITTING
THE COMMONWEALTH TO ASK STAMPER
WHY HE WAS ON PROBATION?**

On direct examination, Stamper voluntarily disclosed to the jury that he had previously been convicted of a felony. Under established precedent and Kentucky Rules of Evidence 609(a), unless the witness denies the existence of the conviction, the identity of the crime upon which the conviction was based may not be disclosed.¹¹ But on cross-examination in the case at hand, the Commonwealth asked Stamper, "[y]ou said you had a prior felony conviction. What's that conviction for?" After Stamper's counsel objected, the Commonwealth withdrew the question after a brief bench conference. No admonition was given to the jury, nor was one requested.

Then, on redirect, Stamper testified that he had his own prescription for methadone for head injuries he sustained in an automobile accident. On re-cross, the Commonwealth and Stamper had the following exchange:

Q. Do you do any other type of drugs?

¹¹ See, e.g., Hodge v. Commonwealth, 17 S.W.3d 824, 848 (Ky. 2000).

A. No.

Q. You don't do any type of drugs?

A. No; I have to take a drug test, my parole officer gave me . . .

Q. You said who tested you?

A. My probation officer and doctor, he drug tests me once a month, too.

Q. So, you are on probation now?

A. Yeah.

Q. Were you on probation on July 1, 2004?

A. I don't remember.

Q. So, when they drug test you, you test positive for Methadone?

A. Yes, sir.

Q. And, he's aware of that?

A. Yes, sir.

Q. Has he ever tested you positive for any other drug?

A. No, sir, he hasn't.

Q. Why are you on probation?

[Defense Counsel]: Objection, Your Honor.

[Commonwealth]: He opened the door, Judge.

[Defense Counsel]: No, he did not.

[Court]: Overruled.

Q. Why are you on probation?

A. I had a habit, a Cocaine habit.

Q. I thought you just told us a second ago you didn't do any type of drugs?

A. Not now I don't. I haven't, for over a year.

Q. So, how does your Cocaine habit lead to you being on probation?

A. I got caught with Cocaine.

Opening the door, sometimes referred to as curative admissibility, occurs when one party introduces false, misleading, or inadmissible evidence that opens the door to impeachment by the other party using equally inadmissible evidence to challenge the witness's credibility and to correct false or misleading evidence.¹² Clearly, Stamper did not open the door to the Commonwealth's question regarding why he was on probation because evidence that Stamper was on probation and had a previous felony conviction was not false, misleading, or otherwise inadmissible. So the curative admissibility rule does not apply. Furthermore, the Commonwealth's argument that the elicited evidence actually inures to Stamper's benefit because it was potentially exculpatory is speculation that has no bearing on whether the questioning was improper.

The Commonwealth's questioning Stamper as to the specific reason he was on probation violates the rule that a

¹² Purcell v. Commonwealth, 149 S.W.3d 382, 399 (Ky. 2004).

defendant may not be asked the specific nature of his earlier felony conviction unless he denies having such a conviction. The question then becomes whether the error was harmless.

An error is harmless unless "there is no reasonable possibility that, absent the error, the verdict would have been different."¹³ In the case at hand, the evidence offered by the Commonwealth was overwhelming. Indeed, Stamper really only disputed the reason he possessed the methadone, not the possession itself. So we conclude that the error, standing alone, is harmless.

**DID THE COMMONWEALTH IMPERMISSIBLY
COMMENT UPON STAMPER'S SILENCE?**

During the course of Detective Bryant's direct examination, he engaged in the following exchange with the Commonwealth:

- Q: So, you had a conversation with the defendant?
- A. Yes, I asked him a few questions.
- Q. Did he make any incriminating statements?
- A. Not to me, no, he didn't make any particular statements.
- Q. He didn't make any statements whatsoever?
- A. Nothing . . .

¹³ Hodge, 17 S.W.3d at 848. See also RCr 9.24.

Stamper's counsel then objected—an objection the trial court quickly overruled. Similarly, the trial court denied Stamper's motion for a mistrial. On appeal, Stamper contends that the Commonwealth's questions and Detective Bryant's answers constitute an impermissible infringement of his right to remain silent.

The Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody.¹⁴ The time period referred to in Detective Bryant's testimony, however, apparently occurred before Stamper was informed of his rights, arrested, and placed into custody. But "[t]he giving of a Miranda warning does not suddenly endow a defendant with a new constitutional right. The right to remain silent exists whether or not the warning has been or is ever given."¹⁵ Thus, although it may alter the section of the constitution under which the error is analyzed,¹⁶ similar comments have been found to be error, regardless of whether a

¹⁴ See, e.g., Romans v. Commonwealth, 547 S.W.2d 128, 130 (Ky. 1977); Doyle v. Ohio, 426 U.S. 610 (1976).

¹⁵ Green v. Commonwealth, 815 S.W.2d 398, 400 (Ky. 1991).

¹⁶ See Combs v. Coyle, 205 F.3d 269, 280-283 (6th Cir. 2000) (holding that prosecutor's comment on defendant's silence preceding giving of Miranda warnings during case-in-chief could not violate due process but, instead, violated Fifth Amendment privilege against self-incrimination).

defendant had been given his Miranda rights.¹⁷ Accordingly, the fact that Stamper had not been taken into custody and been advised of his rights when he declined to speak to Detective Bryant does not give the Commonwealth leave to comment upon his silence.

In a similar vein, we reject the Commonwealth's argument that the questions at issue were proper for impeachment purposes. We know, of course, that a defendant who chooses to testify in his own behalf runs the risk that the Commonwealth will be permitted to question him about his prior silence.¹⁸ But in the case at hand, the testimony in question was elicited during the Commonwealth's case-in-chief, before it was definitively known that Stamper would testify in his own behalf. Thus, the Commonwealth's argument that the testimony was merely elicited for impeachment purposes is not well taken. Furthermore, we flatly reject the Commonwealth's attempt to

¹⁷ Green, 815 S.W.2d at 400.

¹⁸ See Jenkins v. Anderson, 447 U.S. 231, 238 (1980) ("Once a defendant decides to testify, 'the interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.' Brown v. United States, 356 U.S. 148, 156, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958).")

Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.").

harmonize this case with the Sixth Circuit's opinion in Seymour v. Walker.¹⁹ In Seymour, the prosecutor used his closing argument to impeach the previously given testimony of the defendant. But in the case before us, Stamper had not yet testified when the offending exchange occurred, nor was it certain that he would later testify. So Seymour is inapposite to the case at hand.

Accordingly, after the potentially bewildering and distracting legal technicalities are laid aside, it becomes clear to us that the testimony at issue could only have been elicited for the purpose of attempting to prove Stamper's guilt. Given the nature of such testimony, we agree with the Sixth Circuit's reasoned conclusion that "the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination."²⁰

As with the other errors previously discussed, however, the fact that the questions were erroneous does not mean that Stamper is entitled to a new trial. Instead, having found error, our task now is to determine if the error was harmless. "An error of constitutional proportions must be shown

¹⁹ 224 F.3d 542 (6th Cir. 2000).

²⁰ Combs, 205 F.3d at 283.

to be harmless beyond a reasonable doubt.”²¹ Again, the exchange in question was brief and the evidence against Stamper was overwhelming. Thus, we are constrained to find that the outcome of the trial would not have been different, absent the fleeting comments upon Stamper’s pre-arrest silence. Accordingly, we must find the error to be harmless beyond a reasonable doubt.

**DID THE TRIAL COURT ERR BY ADMITTING TESTIMONY
REGARDING A CONFIDENTIAL INFORMANT?**

During its direct examination of Detective Bryant, the Commonwealth asked him the following questions:

- Q. Did you respond to an anonymous call at [the] Castle Village [apartment complex] on July 1, 2004?
- A. Yes, I did.
- Q. And, Castle Village, that is in Rockcastle County, Kentucky?
- A. Yes, it is.
- Q. When you arrived on the scene, could you describe for the jury what you observed?
- A. We went to apartment 101 initially. Detective Adams and I went to that apartment, for the specific purpose of speaking with Mr. Stamper.

²¹ Renfro v. Commonwealth, 893 S.W.2d 795, 797 (Ky. 1995) (citing Chapman v. California, 386 U.S. 18 (1967)).

On appeal, Stamper contends that Detective Bryant's reference to an anonymous tip was impermissible hearsay requiring a new trial. We disagree.

It is uncontested that the kind of testimony regarding informants involved in this case, often referred to as "investigative hearsay[.]" "may be admissible to prove why the police acted in a certain manner, . . . however, such information is admissible only if there is an issue about the action of the police officer."²² Thus, an officer should testify only that he "acted 'upon information received,' or words to that effect[.]"²³

Although the phrasing of the question before us was inartful, it essentially asked Detective Bryant to state whether he went to Stamper's apartment complex "upon information received." No mention was made of the substance of the allegations made by the anonymous caller, nor did the Commonwealth further expound upon the substance of the anonymous caller's conversation with Detective Bryant. The brief reference to an anonymous caller is not nearly as egregious as that found in Brown v. Commonwealth²⁴ and Hughes v.

²² Gordon v. Commonwealth, 916 S.W.2d 176, 179 (Ky. 1995).

²³ *Id.* at 178.

²⁴ 892 S.W.2d 289 (Ky. 1995).

Commonwealth,²⁵ relied upon by Stamper, since, unlike those cases, the jury was not told that the anonymous caller accused Stamper of committing the crime for which he was standing trial. Indeed, the jury was only told that an anonymous caller caused the authorities to speak to Stamper. Although better practice would have been to omit any reference to the anonymous caller, under these limited facts, we find that the testimony in question is the functional equivalent of eliciting testimony that the officer acted "upon information received." The fact that the information received in the case at hand came from an anonymous caller is, in our view, a distinction without a significant difference. Thus, we hold that Stamper is not entitled to relief on this issue.

CONCLUSION.

This case, unfortunately, clearly illustrates the maxim that minor errors are "virtually inevitable" in every case.²⁶ But because we believe none of the errors in this case ultimately affected its outcome, the judgment of the Rockcastle Circuit Court must be affirmed.

ALL CONCUR.

²⁵ 730 S.W.2d 934 (Ky. 1987).

²⁶ Van Arsdall, 575 U.S. at 681.

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