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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000804-MR

RODNEY LEE

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 03-CR-00317

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Rodney Lee appeals from a judgment of conviction and final sentencing entered by the Boone Circuit Court on March 29, 2005. According to the judgment of conviction, Lee was convicted after a jury trial of theft by unlawful taking over \$300.00, a Class D felony, and the trial court sentenced him to serve five years of incarceration. On appeal, Lee argues that the trial court erred when it admitted a prior inconsistent statement made by Lee's brother Richard, who testified on Lee's behalf, because the statement implicated an inadmissible prior bad act. Lee also argues that the

trial court erred in denying Lee's motion for a directed verdict because the Commonwealth failed to establish the value of the stolen property. Lastly, Lee argues that the Commonwealth engaged in prosecutorial misconduct by vouching for the credibility of its witnesses and by referring to Lee and his brother Richard as liars. Finding no merit to any of Lee's claims, we affirm the judgment of conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 5, 2003, a Boone County Grand Jury indicted and charged Lee with two counts of theft by unlawful taking over \$300.00, a Class D felony under Kentucky Revised Statutes (KRS) 514.030. In the first count of the indictment, the Commonwealth alleged that, on March 14, 2003, Lee had stolen a paint sprayer valued at approximately \$5,000.00 from William Jackson. In the second count, the Commonwealth alleged that, on April 3, 2003, Lee had stolen items valued at approximately \$450.00 from Dan Volls Mechanical Service. On October 26, 2004, Lee moved, pursuant to the Kentucky Rules of Criminal Procedure (RCr) 9.16, to sever Count I and Count II. On December 31, 2004, the trial court granted Lee's motion and ordered the two counts to be tried separately. The present case only concerns the resolution of Count II of the indictment.

On February 16, 2005, Lee proceeded to trial on Count II of the indictment. The following facts were adduced at trial. On April 3, 2003, a few minutes before 3:00 p.m., Greg Gerth, who worked as an independent contractor for DVMS, and a companion arrived at the Lowe's Home Improvement store located in Florence, Boone County,

Kentucky. T.R. Tape 8, 2/16/05, at 11:19:00-11:21:23. Gerth parked his vehicle close to the front of the store, and he and his companion entered it, staying for approximately twenty minutes. Upon exiting the store, Gerth found, near his van, a police officer investigating an alleged theft. At this time, Gerth discovered that two pieces of equipment that belonged him, a Mikita battery-operated drill and a DeWalt battery-operated reciprocating saw, had been taken from his van. *Id.* at 11:21:00-11:23:40.

On the same day, the manager of Lowe's, Harold Hignite, was sitting in his truck in the store's parking lot. It was Hignite's custom to eat lunch in his truck which gave him the opportunity to observe both the store's parking lot and his employees as they worked outside. *Id.* at 11:44:00-11:46:30. While Hignite was eating, he noticed Gerth's van parking about forty feet away from Hignite's truck. Hignite noticed Gerth's van because the word "mechanical" was written on the side, and Hignite had decided to contact DVMS to solicit the company's business. *Id.* at 11:48:00-11:49:20. Shortly thereafter, Hignite noticed that another vehicle parked beside Gerth's van. Hignite observed the driver of the second vehicle, Rodney Lee, exit his vehicle, open the doors to Gerth's van, and enter. Hignite observed Lee remove an item from Gerth's van and place it in his vehicle. Hignite then started his truck and drove towards Lee. When he was approximately twenty feet away, Hignite observed Lee re-enter the van and remove another item. Upon exiting the van, Lee noticed Hignite and, without taking his eyes off Hignite, Lee re-entered his vehicle and left. *Id.* at 11:49:50-12:00:25. After an investigation, Lee was arrested and subsequently indicted.

At trial, the Commonwealth called both Gerth and Hignite to the stand, and they testified to the previously mentioned facts. Hignite testified that the theft took approximately three minutes, and during that time, he was able to closely observe Lee's face for ten-to-twenty seconds. *Id.* at 11:49:50-12:00:25. Hignite made an in-court identification of Lee as the thief. *Id.* at 11:59:40. Hignite also testified that police had shown him a photographic line-up, and he immediately identified Lee's photograph as the culprit. *Id.* at 1:23:11. In addition to Gerth and Hignite, the Commonwealth called Lowe's loss prevention officer and the investigating police officer as witnesses on its behalf. Furthermore, the Commonwealth introduced into evidence and played for the jury a videotape made by one of Lowe's surveillance cameras. The videotape was time and date stamped April 3, 2003, and showed the arrival of both Gerth's van and Lee's vehicle. The videotape also showed the departure of Lee's vehicle; however, because Lowe's surveillance camera only activated and took new footage every three minutes, the videotape failed to capture the theft. After the close of the evidence, the jury convicted Lee of theft by unlawful taking over \$300.00. The trial court subsequently sentenced Lee to serve five years in the state penitentiary.

II. ANALYSIS

A. APPELLANT'S FIRST ASSIGNMENT OF ERROR

1. STANDARD OF REVIEW

The proper standard for reviewing a trial court's evidentiary decision is abuse of discretion. *Colston Investment Co. v. Home Supply Co.*, 74 S.W.3d 759, 765

(Ky. App. 2001) (citing *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000)). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or unfairly, or when its decision is unsupported by sound legal principles. *Goodyear Tire & Rubber Co.*, 11 S.W.3d at 581.

2. THE COMMONWEALTH INTRODUCED A PRIOR INCONSISTENT STATEMENT THAT CONTAINED A VAGUE CONNECTION TO A PRIOR BAD ACT.

In Lee's brief, he avers that his brother Richard testified on Lee's behalf. At trial, Richard stated that, according to his business records, Lee had worked on the day in question, providing Lee with an alibi. Furthermore, Richard testified that Lee had worked for him continuously since 1999. On cross-examination, the Commonwealth asked Richard if he had ever fired his brother. Richard avoided the question. The Commonwealth asked if he remembered talking to Officer Dolan of the Florence Police Department on March 14, 2003. Richard denied the conversation. The Commonwealth then confronted Richard Lee with a prior inconsistent statement. The Commonwealth asked if Richard had told Officer Dolan on March 14, 2003, that Richard had fired Lee two months prior for stealing and pawning equipment for Lee to buy drugs. Richard Lee denied making such a statement to Officer Dolan. On rebuttal, the Commonwealth called Officer Dolan to the stand, and he testified regarding Richard's prior inconsistent statement.

Now, Lee argues that the prior inconsistent statement should have been excluded because, in laying the proper foundation to introduce it, the Commonwealth

revealed the time-frame, March 14, 2003, in which Richard made it. According to Lee, because the Commonwealth revealed the date of the prior inconsistent statement, the jury could have inferred from that date that the police were investigating Lee as a suspect in the prior March 14, 2003 theft. Thus, Lee contends that the testimony regarding the prior inconsistent statement was also testimony about a prior bad act. Lee points out that, pursuant to KRE 404(b), prior bad acts are inadmissible unless they fall within one of ten enumerated exceptions. According to Lee, Richard's prior inconsistent statement does not fall within any of the exceptions found in KRE 404(b).

In addition, Lee argues that the prejudicial effect of Richard's prior inconsistent statement was greater than its probative value. Also, Lee acknowledges that pursuant to KRE 613, to lay the proper foundation to introduce Richard's prior inconsistent statement, the Commonwealth was required to confront Richard with “the circumstances of time, place and persons present[.]” However, Lee argues that the Commonwealth could have laid the proper foundation without revealing the exact date of the statement.

KRE 801A controls whether a prior inconsistent statement may be used at trial. The pertinent part of KRE 801A reads:

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:

(1) Inconsistent with the declarant's testimony[.]

According to KRE 801A, the party seeking to introduce a prior inconsistent statement at trial must lay the proper foundation as set forth by KRE 613. The pertinent part of this rule reads:

Examining witness concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it.

KRE 613(1). As can be seen, to introduce Richard's prior inconsistent statement, the Commonwealth had to comply with KRE 613 by confronting Richard with the circumstances surrounding the statement including *the time* it was made. The Commonwealth did as it was required, and Lee acknowledges this in his brief. After the Commonwealth confronted Richard with the prior statement, Richard denied making the statement. Consequently, pursuant to KRE 801A, the Commonwealth was free to introduce the prior inconsistent statement to impeach Richard's credibility. The Commonwealth complied with the rules of evidence that govern prior inconsistent statements. There was no error.

Lee also insists that Richard's prior inconsistent statement was inadmissible pursuant to KRE 404(b) because it implicated the prior March 14 theft. However, Richard's prior statement contained no information regarding the March 14, 2003 theft; contained no information that the police were investigating Lee regarding the March 14 theft; and contained no information linking Lee to the March 14 theft. The only

connection between Richard's prior inconsistent statement and the March 14 theft was the date. This is a vague and tenuous connection at best. Given this feeble connection, Richard's prior inconsistent statement was not evidence regarding the March 14 theft. Consequently, KRE 404(b) did not apply to Richard's prior statement. In addition, the statement's probative value regarding Richard's credibility outweighs its prejudicial effect given that it contained no information about the March 14 theft.

Because the Commonwealth complied with KRE 613 and KRE 801A when it introduced Richard's prior inconsistent statement, the trial court did not abuse its discretion when it permitted the introduction of that statement.

B. APPELLANT'S SECOND ASSIGNMENT OF ERROR

1. STANDARD OF REVIEW

One of the leading cases addressing the sufficiency of the evidence and directed verdicts in criminal cases is *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). According to *Benham*, when a trial court considers a motion for directed verdict, it must draw from the evidence all fair and reasonable inferences in favor of the Commonwealth. *Benham*, 816 S.W.2d at 187. Furthermore, a trial court is prohibited from granting a directed verdict if the evidence is sufficient to persuade a reasonable juror to believe that the defendant is guilty beyond a reasonable doubt. *Id.* In addition, the trial court must accept the Commonwealth's evidence as true; however, it must reserve questions of credibility and weight for the jury. *Id.* When we review the trial

court's decision, we must determine, given the totality of the evidence, whether it would be clearly unreasonable for a jury to find guilt. *Id.*

2. THE COMMONWEALTH FAILED TO PRESENT SUFFICIENT EVIDENCE REGARDING THE VALUE OF THE STOLEN ITEMS.

According to Lee, the Commonwealth failed to prove that the value of the stolen power tools was over \$300.00. Lee acknowledges that Gerth testified regarding the value of the stolen items and acknowledges that Hignite's testimony confirmed Gerth's testimony. Relying on *Commonwealth v. Reed*, 57 S.W.3d 269, 270 (Ky. 2001), Lee argues that the Commonwealth was required to prove the market value of the stolen items at the time and place of the theft. Lee admits that the Commonwealth can use the owner's testimony to establish the value of stolen items, but Lee asserts that the owner's testimony must contain sufficient detail for a jury to make a determination of value. *Id.* However, such testimony must be limited to items actually found in the criminal defendant's possession. *Id.* at 271. According to Lee, the stolen items were never recovered, implying that they were not found in his possession. Furthermore, Lee opines that Gerth's and Hignite's testimonies regarding the value of the stolen items were merely speculation. Therefore, Lee concludes that the Commonwealth failed to produce evidence regarding value.

In *Reed*, an unknown individual stole tools, a tool chest, three weed-eaters, a saw, and a drill from the victim. *Reed*, 57 S.W.3d at 270. The defendant sold a few of the stolen tools to a third party for \$30.00. *Id.* The defendant was subsequently charged with receiving stolen property valued over \$300.00. *Id.* At trial, the victim testified that

all of the stolen items together were worth over \$300.00; however, he never testified regarding the value of the items found in defendant's possession. *Id.* at 271. This Court overturned the defendant's conviction because “the Commonwealth had failed to establish that the items which had been in the [defendant's] possession actually met the dollar amount required by the offense (\$300.00).” *Id.* at 270. Upon discretionary review, the Supreme Court affirmed this Court and noted:

The Commonwealth presented proof that the only items found in [the defendant's] possession were the tool box and a burlap bag with a few tools. Nowhere in the testimony did [the victim] give a specific value for the items found in [the defendant's] possession. In fact, the only testimony at trial regarding the value of the tools was given by [the victim], and he only discusses the value of all of the items taken from him.

Id. at 271.

In *Reed*, the defendant was charged with receiving stolen property valued over \$300.00; thus, the Commonwealth was limited to presenting evidence regarding the value of items that were actually in the defendant's possession, which the Commonwealth did not do. *Id.* However, in the present case, Lee was charged with theft by unlawful taking over \$300.00; therefore, the holding in *Reed* does not apply. Consequently, the Commonwealth was not limited to presenting evidence regarding items found in Lee's possession.

At trial, the Commonwealth questioned Gerth regarding the stolen power tools. In response, Gerth described both tools in detail, and he testified about the value of each one. According to him, the drill was about six months old, and he had purchased it

for \$250.00. He testified that, at the time of the theft, he could have sold it for \$200.00. Regarding the saw, Gerth stated that it was new and that he had never used it. Gerth testified that he had purchased the saw for \$350.00 and testified that, at the time of the theft, he could have sold it for that amount. T.R. Tape 8, 2/16/05, at 11:23-20-11:26:00.

In addition to Gerth's testimony, Hignite testified regarding the value of the stolen power tools as well. Hignite testified that, as the manager of Lowe's, he was very familiar with the price of power tools. Hignite opined that Gerth's estimate regarding the drill, which was \$200.00, was fair. Regarding the saw, Hignite claimed that his store did not sell that type of saw but sold a similar, smaller saw that was not as expensive. Hignite testified that the smaller saw sold for \$180.00 to \$200.00, and he opined that Gerth's larger saw would have been more expensive than \$180.00 or \$200.00. *Id.* at 1:25:10-1:29:13.

It has been well-established that “the testimony of the owner of stolen property is competent evidence as to the value of the property.” *Reed*, 57 S.W.3d at 270 (citing *Poteet v. Commonwealth*, 556 S.W.2d 893, 896 (Ky. 1977)). And, in the present case, the owner of the stolen property testified in detail regarding the value of each item. In addition, the Commonwealth presented Hignite's testimony which corroborated Gerth's testimony. Furthermore, we note that Lee presented no evidence to contradict either Gerth or Hignite. Given the totality of the evidence, it was reasonable for the jury to conclude that the stolen items were worth over \$300.00 at the time of the theft. Thus, the

Commonwealth met its burden of proof regarding the value of the stolen items. KRS 500.070.

C. APPELLANT'S PALPABLE ERROR CLAIM

1. STANDARD OF REVIEW

According to 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.

The Supreme Court of Kentucky has held that palpable error is an irregularity that affects the substantial rights of a party and will result in manifest injustice to the party if not addressed by an appellate court. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 837 (Ky. 2003). In other words, after considering the whole case, if we do not believe that there is a substantial possibility that the result would have been any different, then we will deem the irregularity to be non-prejudicial. *Id.*

2. THE COMMONWEALTH COMMITTED PROSECUTORIAL MISCONDUCT BY VOUCHING FOR ITS WITNESS AND BY REPEATEDLY REFERRING TO APPELLANT AND HIS BROTHER AS LIARS.

According to Lee, to rebut his brother's testimony, the Commonwealth called Officer Dolan to the stand to impeach Richard Lee. During Officer Dolan's testimony, Lee avers that the following exchange occurred:

Prosecutor: You state [in the report] that the brother was very honest and credible [at that time].

Dolan: That is correct.

Citing *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999), Lee contends that with this exchange between the prosecutor and Officer Dolan, the prosecutor improperly vouched for Officer Dolan's credibility.

Lee fails to explain, and we fail to see, how this exchange enhanced the officer's credibility. This exchange did not constitute improper vouching by the prosecutor. Lee's substantial rights were not affected by this exchange, and no manifest injustice resulted from the prosecutor's conduct. Therefore, we decline to address the merits of this claim because it does not rise to the level of palpable error pursuant to RCr 10.26.

In addition, Lee points out that during the Commonwealth's closing argument, the prosecutor stated that Hignite was a “perfectly credible, totally honest witness” who had no reason to lie or fabricate his testimony. T.R. Tape 8, 2/16/05, 4:55:18-4:56:00. Lee also points out that the prosecutor stated that there was no comparison between the credibility of the Commonwealth's witnesses and Lee's witnesses. *Id.* at 4:58:25.

Lee cites *United States v. Dandy*, 98 F.2d 1344, 1353 (6th Cir. 1993) for the proposition that, during closing argument, it is improper for a prosecutor to state that a witness is honest because such a statement conveys the prosecutor's personal belief that the witness is credible. Based on *Francis*, 170 F.3d at 550 and *Dandy*, 98 F.2d at 1353, Lee argues that the Commonwealth improperly vouched for Hignite's credibility.

According to the United States Court of Appeals for the Sixth Circuit,

[i]mproper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility thereby placing the prestige of the office of the United States Attorney behind that witness. *See, e.g., Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993); *United States v. Martinez*, 981 F.2d 867, 871 (6th Cir. 1992). Generally, improper vouching involves either blunt comments, *see, e.g., United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (stating that improper vouching occurred when prosecutor asserted own belief in witness's credibility through comments including “I think he [the witness] was candid. I think he is honest.”), or comments that imply that the prosecutor has special knowledge of facts not in front of the jury or of the credibility and truthfulness of witnesses and their testimony, *see, e.g., Carroll*, [26 F.3d 1380, 1388 (6th Cir. 1994)] (stating that improper vouching occurred when prosecutor argued that the witness testifying under a plea agreement was in jeopardy if the court or government did not find the testimony truthful).

Francis, 170 F.3d at 550. During closing argument, the prosecutor stated bluntly that Hignite was a “perfectly credible, totally honest witness[.]” T.R. Tape 8, 2/16/05, 4:55:18-4:56:00. According to *Francis*, the prosecutor's remarks regarding Hignite constituted improper vouching. However, because this error was unpreserved, we will only address its merits if it rises to the level of palpable error. RCr 10.26. To be palpable error, the prosecutor's improper remarks must have affected Lee's substantial rights and must have resulted in manifest injustice. *Schoenbachler*, 95 S.W.3d at 837. The test for palpable error is whether there was a substantial possibility that the result would have been any different if the error had not occurred. *Id.* Given the totality of the evidence,

there was no substantial possibility that the result of the trial would have been different absent the prosecutor's remarks. Therefore, we find no palpable error. *See* RCr 10.26.

In addition to vouching for the credibility of the Commonwealth's witnesses, Lee claims that, during closing argument, the prosecutor repeatedly claimed that Lee and his brother Richard Lee had lied and that they were liars. The prosecutor also repeatedly referred to Richard Lee's business records, which supported Lee's alibi that he was working for his brother on the day of the theft, as a joke. Relying once more on *Francis*, 170 F.3d at 551, Lee argues that if a jury could reasonably believe that a prosecutor has expressed a personal opinion regarding a criminal defendant's testimony, instead of emphasizing the discrepancies between the evidence and the defendant's credibility, then the prosecutor's conduct constitutes misconduct. Lee argues that when the prosecutor called Lee and his brother liars, he was expressing his personal opinion. Based on *Francis*, 170 F.3d at 551, Lee asserts that the prosecutor's conduct was improper.

Turning once more to the language in *Francis*, 170 F.3d at 551, the Court stated:

[i]f a defendant testifies as here, a prosecutor may attack his credibility to the same extent as any other witness. *See Raffel v. United States*, 271 U.S. 494, 497, 46 S. Ct. 566, 70 L. Ed. 1054 (1926), *see also Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S. Ct. 944, 44 L. Ed. 1078 (1900). This Court has held that a prosecutor may assert that a defendant is lying during her closing argument when emphasizing discrepancies between the evidence and that defendant's testimony. *See United States v. Veal*, 23 F.3d 985, 989 (6th Cir. 1994). To avoid impropriety, however, such comments must “reflect

reasonable inferences from the evidence adduced at trial.” *See id.* (quoting *United States v. Goodapple*, 958 F.2d 1402, 1409-10 (7th Cir. 1992)). Again, misconduct occurs when a jury could reasonably believe that the prosecutor was, instead, expressing a personal opinion as to the witness's credibility. *Taylor*, 985 F.2d at 846 (citing *United States v. Causey*, 834 F.2d 1277, 1283 (6th Cir. 1987), *cert. denied*, 486 U.S. 1034, 108 S. Ct. 2019, 100 L. Ed. 2d 606 (1988)).

According to the Sixth Circuit, a prosecutor can call a criminal defendant a liar as long as the prosecutor is emphasizing the discrepancies between the defendant's testimony and the evidence. *Francis*, 170 F.3d at 551. At the beginning of the Commonwealth's closing argument, the prosecutor stated that Lee and his brother had lied; however, the prosecutor did not refer to any discrepancy between their testimonies and the evidence. T.R. Tape 8, 2/16/05, 4:45:00-4:49:00. Later, the prosecutor repeatedly stated that Richard Lee had lied; however, while making these statements, the prosecutor pointed out the discrepancies between Officer Dolan's testimony regarding Richard's prior inconsistent statement and Richard's trial testimony. *Id.* at 4:59:00-5:01:00. The prosecutor also referred to Richard's business documents as a joke, but he did so while pointing out the discrepancies regarding the dates found in the documents. *Id.*

According to the record, the prosecutor made one improper remark about the credibility of Lee and his brother. However, given the totality of the evidence, there was no substantial possibility that the result of the trial would have been different had the prosecutor not made this improper remark. Lee's substantial rights were not affected and

no manifest injustice resulted from the prosecutor's improper remark. Thus, we conclude this claim does not rise to the level of palpable error.

III. CONCLUSION

Finding no merit to Lee's claims, the judgment of conviction entered by the Boone Circuit Court on March 29, 2005 is AFFIRMED.

ALL CONCUR.

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