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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000224-MR

BRIAN R. SMITH — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 04-CR-00182

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

MOORE, JUDGE: Appellant Brian R. Smith appeals the Laurel Circuit Court's judgment convicting him of first-degree manslaughter. Appellant's motion for a mistrial was denied. A jury found Appellant guilty of the aforementioned offense. After a careful review of the record, we affirm the Laurel Circuit Court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

At approximately 4:30 a.m. on Thursday, June 10, 2004, Elmer Gray awoke to the sound of gunshots coming from the parking lot of the go-kart track that he owns

and where he also resides. He heard a total of five gunshots. However, Mr. Gray did not call anyone or do anything concerning the gunshots having heard noise and gunshots in that neighborhood in the past. And, because the building's alarm did not sound, he went back to bed.

A body was later found in the parking lot of the go-kart track. Investigators from the Laurel County Sheriff's Department and the Kentucky State Police found four spent shell casings and two live .45 caliber rounds at the scene. A fifth spent casing was found inside the victim's Range Rover vehicle, which had been abandoned on a distant road.

Investigators identified the body as that of Abe Smith by looking in his wallet and finding his driver's license. Detective Johnny Phelps from the Laurel County Sheriff's Department contacted Abe Smith's family to find out if they knew whom the victim had seen recently.

After interviewing several people, investigators were informed that Appellant knew the victim. Investigators tried to contact Appellant at his home, but he did not return home for the two days while investigators were staked out at his house.

Investigators eventually learned of Appellant's location when they were informed that he had gone to the state police post in London, Kentucky.[1] A state trooper testified at trial that Appellant went to the state police post to allege that he thought he was the victim of a crime because he believed that people were following him, including the Federal Bureau of Investigation. This allegation made the state trooper think that law

[1] When he arrived there, he was carrying two sticks of dynamite and some "crystal meth."

enforcement may be looking for Appellant, and the trooper contacted the Laurel County Sheriff's Department.

Appellant was interviewed by Detective Phelps. During this interview, Appellant alleged that he had been in the go-kart track's parking lot with Abe Smith when a white van pulled into the parking lot, and someone inside the van began firing at them. Appellant was interviewed a second time, and during that interview, he alleged that the person who had killed Abe Smith was a man by the name of Tony Hodge.

Despite Appellant's version of events, he was indicted on the charges of murder and theft by unlawful taking of property valued at $300 or more. Specifically, he was charged with the theft of Abe Smith's Range Rover. Appellant pled not guilty to both charges at his arraignment. He chose to be tried by a jury. Prior to trial, Appellant moved for discovery, requesting, *inter alia*, "[a]ny exculpatory evidence for [Appellant] that may be in the possession of the Commonwealth in accordance with the principles enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963)." In that motion, Appellant also sought the discovery of:

> [a]ny agreements or understandings reached by the Commonwealth of Kentucky, its agents, employees, attorneys, or anyone acting on behalf of or for the benefit of the Commonwealth of Kentucky, with any witness or defendant in the same or a related case, whereby said person or defendant has, will or might derive any benefit, or which would cause forbearance toward such person or defendant by the Commonwealth of Kentucky, as mandated by *Giglio v. United States*, 405 U.S. 250 (1972).

The court granted Appellant's motion for discovery.

At trial, Appellant's friend, Brian Davidson, testified that the night before Abe Smith was shot, Appellant asked Mr. Davidson if he had any rounds of ammunition, and he responded in the affirmative. Mr. Davidson gave Appellant eleven rounds of ammunition, and Appellant loaded those rounds into a .45 caliber gun that Appellant had in his possession. After Mr. Davidson learned that Abe Smith was killed, he gave the Sheriff's Department the rest of the box of .45 ammunition from which he had taken the ammunition that he provided Appellant.

Another friend of Appellant's, Travis Dixon, testified at trial. Immediately before Mr. Dixon testified, Appellant's counsel asked the prosecutor if he had any *Giglio* information concerning Mr. Dixon, and the prosecutor responded that he did not. Mr. Dixon testified that Appellant visited his house several days before the victim was killed. At that time, Appellant told Mr. Dixon that Abe Smith had been coming by Appellant's house and that a woman known as "Gypsy"[2] had told Appellant that Abe Smith was "a rat." Then, while moving his hand across the front of his throat in a slicing motion, Appellant told Mr. Dixon that Abe Smith had "to go."

On cross-examination, Mr. Dixon testified that weeks after Abe Smith was killed, Mr. Dixon was arrested for receiving stolen property valued at over $300.00. While Mr. Dixon was at the Laurel County Sheriff's Office on the day of his arrest, Detective Phelps asked to speak with him. Mr. Dixon ultimately provided a statement to Detective Phelps. Mr. Dixon testified at trial that the charge of receiving stolen property

[2] Gypsy's real name is Michelle Smith, but she is also known by her maiden name, Michelle Neal.

valued at over $300.00 was a felony charge carrying a possible sentence of one-to-five years of imprisonment. By cooperating with the authorities, Mr. Dixon's charges were amended to a misdemeanor charge with a sentence of probation. He testified in the present case that he "knew something that helped [him]." When his charge was amended to a misdemeanor and he pled guilty to that charge, Mr. Dixon was told that he had to testify truthfully in the present case.

John Elrod, a witness, was deposed prior to trial. During his deposition, Mr. Elrod, a truck driver, testified that he had been traveling through Kentucky in the early morning hours of June 10, 2004, when he stopped at the Shell Gas Station at the Truck Stop at Exit 38 on Interstate 75. While at the gas station, he saw a white Range Rover vehicle pull into the parking lot. He noticed the vehicle because it looked relatively new; yet it was very loud because it did not have an exhaust pipe on it. At his deposition, Mr. Elrod was shown a photograph of Abe Smith's Range Rover, and he attested that the vehicle he had seen on the date in question looked just like the one in the photograph. He testified that when the Range Rover drove into the gas station's parking lot, he saw two men and a woman in it. He recognized the woman as Gypsy, but he did not recognize the men who were with her. Mr. Elrod reported that Gypsy got out of the vehicle and went into the gas station. When Gypsy came back out of the gas station, she was with a tall man who had brown hair and a goatee. Gypsy and the man climbed into the back seat of the Range Rover.

During his deposition, Mr. Elrod acknowledged that he had previously been convicted of a felony. In fact, his deposition was taken at the prison where he was incarcerated.[3] He swore in his deposition testimony that he was telling the truth and everything that he knew about the matter, and he testified that he had no reason or motive to assist Appellant.

Prior to the commencement of Appellant's trial, Mr. Elrod was released from prison. Despite swearing that he had told the truth during his deposition testimony, Mr. Elrod's testimony changed at trial. He alleged that he had not testified truthfully during his deposition; he did not know Gypsy; he was not at the Shell Gas Station at the time he had stated during his deposition; he did not see the white Range Rover; and he had not seen the man that he had previously alleged to have seen walking out of the gas station with Gypsy. Mr. Elrod explained that while they were in jail together, Appellant had provided him with the description of the man that Mr. Elrod had previously alleged to have seen leaving the gas station with Gypsy. He testified that he lied during his deposition because Appellant asked Mr. Elrod to vouch for him by testifying that he had seen those people at the gas station.

Upon cross-examination by Appellant's counsel at trial, Mr. Elrod asserted that the reason why he changed his testimony was that shortly before he was scheduled to testify at trial, Detective Phelps confronted him. During this confrontation, Mr. Elrod alleged that Detective Phelps maintained that Mr. Elrod had lied in his deposition; told

[3] The parties do not explain, and Mr. Elrod did not state while testifying at trial, why Mr. Elrod was in prison at the time he was deposed, or why he was out of prison at the time of trial.

Mr. Elrod that he had to tell the truth; and that if he lied while on the witness stand, he would be charged with perjury. If he was charged with perjury, Mr. Elrod could then be "hit with a PFO [Persistent Felony Offender charge]," and sent back to prison.[4] He testified that the prosecutor was in the room when Detective Phelps confronted him on the day of trial but the prosecutor did not participate in the confrontation.[5]

At the close of the prosecution's case, Appellant moved for a mistrial based on the prosecution's alleged failure to provide the defense with *Giglio* information regarding the deal that Travis Dixon had made concerning the amendment of the charge against him from a felony to a misdemeanor, in exchange for his testimony at Appellant's trial. The circuit court overruled the motion.

Appellant then moved for a directed verdict based on: (1) the charge of theft of the Range Rover; and (2) the charge of murder. The circuit court granted Appellant's motion for a directed verdict concerning the theft charge and denied his motion concerning the murder charge.

The jury instructions permitted findings of not guilty, guilty of murder, or guilty of first-degree manslaughter. The jury found Appellant guilty of first-degree manslaughter. Appellant was subsequently sentenced to fifteen years of imprisonment.

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[4] Although there were multiple bench conferences during Mr. Elrod's trial testimony, and those conferences were not completely audible on the video tape of the trial, it does not appear, and Appellant does not argue, that his trial counsel raised any claims concerning Detective Phelps's alleged witness tampering. Moreover, defense counsel did not move for a mistrial based on the confrontation between Detective Phelps and Mr. Elrod.

[5] Appellant does not argue that the prosecutor overheard the confrontation between Detective Phelps and Mr. Elrod.

Appellant now appeals his conviction and sentence. First, he argues that the trial court erred to his substantial prejudice when it failed to grant his motion for a mistrial based on the Commonwealth's failure to disclose Travis Dixon's plea deal, in violation of Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections Two, Three, Seven and Eleven of the Kentucky Constitution. Second, under a palpable error argument, Appellant asserts that the trial court should have *sua sponte* declared a mistrial after learning that Detective Phelps confronted Mr. Elrod, a witness who was going to testify favorably for Appellant, and threatened Mr. Elrod with charges of perjury and PFO. According to Appellant, the circuit court's failure to do so resulted in a violation of Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections Two, Three, Seven and Eleven of the Kentucky Constitution.

II. ANALYSIS

A. FAILURE TO DISCLOSE WITNESS PLEA DEAL

In his first claim on appeal, Appellant alleges that the trial court erred to his substantial prejudice when it failed to grant his motion for a mistrial based on the Commonwealth's failure to disclose Travis Dixon's plea deal to Appellant, in violation of both the United States and Kentucky Constitutions. We review the denial of a motion for a mistrial for an abuse of discretion. *See Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). "A mistrial is appropriate only where the record reveals a manifest necessity

for such an action or an urgent or real necessity." *Id*. (internal quotation marks and citations omitted).

Before Travis Dixon was questioned during trial, defense counsel asked the prosecutor if there was any "*Giglio* information" concerning Mr. Dixon, and the prosecutor responded that there was none. However, during cross-examination, Mr. Dixon acknowledged that he had pled guilty to a misdemeanor after he had been charged with a felony and that his sentence was thereby reduced, but he was told at the time he pled guilty that he had to testify truthfully in the present case.

In *Giglio*, while the defendant's case was on appeal, defense counsel found new evidence of the Government's failure to disclose a promise that it purportedly had made to its key witness. The Government had promised that in exchange for the witness's testimony on the Government's behalf at Giglio's trial, the witness would not be prosecuted. *See Giglio*, 405 U.S. at 150-51. The Assistant United States Attorney who worked on Giglio's case admitted that he made that promise to the witness. *Id*. at 153. Giglio moved for a new trial based on the newly discovered evidence, and his motion was denied. *Id*. at 152-53.

While reviewing the denial of Giglio's motion for a new trial, the United States Supreme Court held that because the Government's case was based almost entirely on the witness's testimony, the credibility of that witness was an important issue, and the jury should have been informed of the Government's agreement with the witness. *Id*. at 154-55. Therefore, the Court concluded that Giglio's due process rights had been

violated, and the Court reversed Giglio's conviction and remanded the case for a new trial. *Id*. at 155.

Giglio was an extension of the rule that the Supreme Court announced in *Brady*. In *Brady*, the Court held that when a criminal defendant requests evidence that is material to guilt or punishment and the prosecution fails to disclose any such evidence that is favorable to the defendant, the prosecution violates the defendant's due process rights, regardless of whether the prosecutor suppressed such evidence in good or bad faith. *See Brady*, 373 U.S. at 87.

In *United States v. Bagley*, 473 U.S. 667, 105 S.et. 3375, 87 L.Ed.2d 481 (1985), the Court reiterated its holding from *Giglio* that the *Brady* rule that exculpatory evidence must be disclosed to a criminal defendant also extends to impeachment evidence which may be used to show that a witness for the Government is biased or has an interest in testifying in a particular case. *See Bagley*, 473 U.S. at 676. However, the Court noted that a prosecutor's suppression of impeachment evidence is unconstitutional only if it results in the denial of a fair trial and causes the reviewing court to have a lack of confidence in the trial's outcome. *Id*. at 678; *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). In *Bagley*, the Government failed to disclose impeachment evidence to the defense, and the defense was therefore unable to conduct an effective cross-examination of the witness at issue. *See Bagley*, 473 U.S. at 678.

In the present case, although the prosecutor failed to disclose evidence of the agreement that Appellee made with Mr. Dixon before trial, defense counsel was nevertheless able to elicit this evidence from Mr. Dixon during cross-examination. Specifically, Mr. Dixon acknowledged during cross-examination that he "knew something that helped [him]", that the charge against him was amended to a misdemeanor; that the amended charge carried a lighter punishment than the original charge; and that when he pled guilty to the amended charge, he was told that he had to testify truthfully in the present case.

The prosecutor's suppression of this impeachment evidence will be deemed unconstitutional only if it resulted in the denial of a fair trial such that we cannot have confidence in the trial's outcome. *See Bagley*, 473 U.S. at 678. Although we certainly do not condone the prosecutor's failure to disclose this evidence, we cannot hold that such failure denied Appellant a fair trial under the circumstances present in this case. Appellant's right to a fair trial was not violated because defense counsel nevertheless was able to and, in fact, unlike the *Bagley* case, did effectively question Mr. Dixon on cross-examination revealing to the trier of fact the plea deal he had struck with the Commonwealth. Thus, this impeachment evidence was presented to the jury, and the jury had the opportunity to weigh this evidence and Mr. Dixon's credibility during deliberations. Consequently, the trial court did not abuse its discretion when it denied Appellant's motion for a mistrial. *See Bray*, 68 S.W.3d at 383. Hence, Appellant's first claim lacks merit.

B. CONFRONTATION BETWEEN DETECTIVE PHELPS AND MR. ELROD

Appellant next asserts that the trial court should have *sua sponte* declared a mistrial after learning that Detective Phelps confronted Mr. Elrod. Appellant acknowledges that this claim was not properly preserved for appeal. We must therefore determine whether this claim rises to the level of a palpable error. 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.

Ky. RCr 10.26. "Manifest injustice" means that "a substantial possibility exists that the result of the trial would have been different." *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997). "[I]f upon a consideration of the whole case [the] court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (internal quotation marks and citation omitted).

Although the Commonwealth contends that, pursuant to *Carrs Fork Corp. v. Kodak Mining Co.*, 809 S.W.2d 699 (Ky. 1991), palpable error may only be found if it "result[ed] from action taken by the court rather than an act or omission by the attorneys or litigants," its assertion is misplaced. *Carrs Fork Corp.*, 809 S.W.2d at 701. The *Carrs Fork* case was a civil case in which the Court applied the definition of "palpable error" under Kentucky Civil Rule 61.02 to the facts. *Id*. Obviously, the present case is a

criminal matter and, as previously explained, Kentucky Criminal Rule 10.26 is applicable to the facts of this case. Therefore, CR 61.02 is inapplicable here.

Further, in *Chumbler v. Commonwealth*, 905 S.W.2d 488 (Ky. 1995), the Kentucky Supreme Court held that a prosecutor committed palpable error under RCr 10.26 when the prosecutor provided incorrect statistical calculations to the jury concerning the likelihood that a cigarette butt was one that had been left by the defendant in that case. *See Chumbler*, 905 S.W.2d at 494-95. This is contrary to the *Carrs Fork* holding discussed previously. Because *Chumbler* was decided after *Carrs Fork*, and both opinions were rendered by the Kentucky Supreme Court, we must conclude that the *Carrs Fork* holding applies only to civil cases. Thus, because the present case is a criminal matter, the *Carrs Fork* holding is inapposite, and the Commonwealth's argument is misplaced.

Appellant alleges that his constitutional rights were violated when Detective Phelps confronted Mr. Elrod and coerced him into changing his testimony. In *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), a witness was singled out by the trial judge and admonished by the judge outside of the jury's presence. The judge told the witness, who had a criminal record and who was going to testify on behalf of the defendant, that the witness did not have to testify, but if he did testify and lied on the witness stand, the judge was going to ensure that the alleged perjury would be presented to a grand jury. The judge informed the witness that he would be indicted and probably convicted on that charge. Further, the judge told the witness that if he was convicted of

perjury, he would get additional time in prison and the prison parole board would hold the perjury conviction against him when considering him for parole. *See Webb*, 409 U.S. at 95-96. Webb's defense counsel objected to the judge's comments and argued that the comments deprived Webb of the right to present a defense because the judge had convinced Webb's only witness not to testify. *Id*. at 96.

The United States Supreme Court noted that in admonishing Webb's witness, the trial judge did not simply inform the witness that he could refuse to testify and that if he testified, he had to do so truthfully. *Id*. at 97. Rather, the Court found that the judge's comments indicated that he expected the witness to lie, and the judge threatened the witness and coerced him into refusing to testify by telling the witness that he would likely be convicted of perjury and sentenced accordingly if he lied. *Id*. The Supreme Court held that the judge's comments likely exerted duress on the witness and that the witness probably was unable to freely and voluntarily decide whether to testify for Webb's defense. *Id*. at 98. Thus, the Court concluded that Webb's Sixth and Fourteenth Amendment due process rights to present a defense had been violated. *Id*.

Although a trial court judge or a prosecutor may inform a potential witness of the penalties for committing perjury, such warnings may not be emphasized to the extent that they coerce the witness not to testify. *See United States v. Blackwell*, 694 F.2d 1325, 1335 (D.C. Cir. 1982). Additionally, this type of overemphasized admonishment of a potential witness is unconstitutional not only when committed by a prosecutor or a trial judge, but also when it is made by a member of law enforcement. *See United States*

v. Thomas, 488 F.2d 334, 336 (6th Cir. 1973) (holding that a Secret Service Agent's act of admonishing a prospective defense witness was unconstitutional).

In the present case, Detective Phelps's conduct when he confronted Mr. Elrod before he testified at trial raises serious constitutional concerns. Similar to the circumstances in *Webb*, Detective Phelps's statements to Mr. Elrod indicated that he expected Mr. Elrod to lie. Further, Detective Phelps threatened Mr. Elrod and coerced him into changing his testimony by telling Mr. Elrod that he would be charged and convicted of perjury and PFO and that he would be returned to prison if he testified at trial in accordance with his prior deposition testimony. *See Webb*, 409 U.S. at 97. Therefore, we find that Detective Phelps's actions certainly raise constitutional concerns, pursuant to *Webb*.

However, that finding does not end our inquiry concerning Appellant's second claim. As previously explained, Appellant's second claim was not preserved for appeal, and we must review it for palpable error. *See* RCr 10.26. After a review of the case as a whole, we find that the constitutional error was not palpable under the circumstances presented. *See Schoenbachler*, 95 S.W.3d at 836.

First, the error was not palpable because Mr. Elrod testified during trial that he had been threatened by Detective Phelps into changing his testimony. Consequently, this evidence was presented to the jury, and the jury then had the opportunity to decide whether Mr. Elrod's trial testimony was credible, considering the duress placed on him by Detective Phelps shortly before he testified.

Second, Appellant's friend, Brian Davidson, testified during trial that the night before the victim was killed, Appellant asked Mr. Davidson if he had any rounds of ammunition. Mr. Davidson testified that he provided Appellant with eleven rounds of .45 ammunition, and watched as Appellant loaded those rounds into a gun he had in his possession. It is undisputed that .45 shell casings were found at the scene of the crime.

Third, Travis Dixon testified that he saw Appellant several days before Abe Smith was killed and that Appellant told Mr. Dixon that Gypsy had claimed Abe Smith was "a rat." Then, while moving his hand in a slicing motion across the front of his throat, Appellant told Mr. Dixon that Abe Smith had "to go."

Based on this evidence, there was ample evidence to support the jury's finding of guilt beyond a reasonable doubt. We therefore conclude that Appellant has failed to show a manifest injustice resulted from Detective Phelps's actions. Even if Detective Phelps had not coerced Mr. Elrod into changing his testimony and Mr. Elrod had testified at trial in accordance with his deposition testimony, his testimony would not necessarily have rebutted the Commonwealth's case that Appellant killed Abe Smith. Mr. Elrod testified during his deposition that close to the time of the shooting, he saw Gypsy at a gas station getting out of a white Range Rover similar to that driven by the victim. Mr. Elrod also testified that he saw two men drive into the gas station parking lot with her, and one additional man left the gas station with them. He attested that he was uncertain whether one of the men was Appellant. Thus, the jury reasonably could have concluded that one of those men who were purportedly at the gas station was Appellant.

Consequently, we do not believe that there is a "substantial possibility . . . that the result of the trial would have been different," if Detective Phelps had not confronted Mr. Elrod in the manner alleged. *Brock*, 947 S.W.2d at 28. Therefore, Appellant's second claim lacks merit.

Accordingly, the judgment of the Laurel Circuit Court is affirmed.

NICKELL, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I respectfully dissent. I am compelled to agree with appellant's argument that a mistrial should have been declared by the court, *sua sponte*, upon learning of the misconduct of Detective Phelps in threatening and intimidating Elrod prior to his taking the stand as a witness. Although unpreserved, this alleged error clearly qualifies for our consideration under the palpable error standard of RCr 10.26.

The alleged error with respect to Dixon (failure of the prosecution to disclose his plea agreement) is a closer call and requires us to scrutinize whether the government's suppression of that exculpatory evidence was of such impact in the over-all context of the trial as to result in a deprivation of due process to the defendant. I am inclined to find reversible error on this ground as well – especially when viewed in conjunction with the deliberate misconduct involving Elrod.

The combined effect of these errors militates in favor of a new trial. Therefore, I would hold that the trial court abused its discretion in failing to declare a mistrial and to order a new trial.

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