

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000281-MR

JOE BERT JONES

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 05-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER, LAMBERT AND STUMBO, JUDGES.

KELLER, JUDGE: Joe Bert Jones has directly appealed from the judgment of the Marion Circuit Court convicting him of First-Degree Assault, two counts of First-Degree Wanton Endangerment, and of Fourth-Degree Assault under extreme emotional disturbance, and sentencing him to a ten-year term of imprisonment. The sole issue Jones raises on appeal addresses a possible violation of *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), when the Commonwealth asked Jones on cross-examination to comment

on the credibility of other witnesses. Because this issue was unpreserved, Jones requests that this Court review the matter for palpable error under RCr 10.26. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a shooting incident on the night of December 15, 2004, at TJ's Lounge in St. Mary's, Kentucky. We shall attempt to summarize the events that took place that night in as succinct a manner as possible, utilizing the somewhat divergent testimony introduced at trial. Jones, who had been banned from TJ's by the owner, Jimmy Thomas, was permitted to enter the bar that evening by Thomas' wife, Theresa. Once in the bar, Jones told his long-time friend, John Wise, that he was going to shoot John Campbell because Campbell was “messing” with his “old lady”. Wise felt the gun in Jones' belt buckle when Jones leaned against his arm. Wise then went to the men's room.

Thomas, upon learning that Jones brought a gun into the bar, immediately confronted Jones. A scuffle ensued, during which Jones attempted to hit Thomas with a beer bottle, but was stopped by TJ's employees, William Elder and Walter Golden. Jones then pulled out the gun and hit Thomas two times on top of his head. Elder and Golden intervened in the scuffle, and Jones hit Elder on the ear with the gun. Jones fired the gun at least two times while he was inside the bar, once toward the floor between Thomas' legs and again toward the wall or ceiling. Several men forcibly took Jones to the patio area outside of the bar. While the men attempted to get the gun away from Jones, Campbell walked outside to the patio area and observed the confrontation. Jones then

began to shoot the gun, hitting Campbell in the leg. According to Campbell, as he approached Jones in an effort to disarm him, Jones continued to shoot at him. Campbell fell to the ground, having been shot a total of seven times in his abdomen, buttock, thigh, calf, and forearms. Amazingly, Campbell survived the attack. Following the shooting, Jones escaped from the patio by jumping the fence. He turned himself in to authorities the next day.

The police arrived shortly after the shooting. Marion County Deputy Sheriff Jimmy Clements was the first to arrive. He immediately found Campbell lying on the ground in the patio area, still conscious. Campbell identified Jones to Deputy Clements as the person who shot him. As he was talking to Campbell, an unidentified man “from Bardstown” told Deputy Clements that “he had the gun” used in the shooting and handed it over to Deputy Clements. Another officer, Deputy Tim Able, later secured the weapon. The officers continued to investigate the shooting, photographing the crime scene, interviewing witnesses, and obtaining written witness statements. The record contains the written statements of Thomas, Wise, Elder, and Morgan. The police did not, however, perform any type of forensic tests on Jones once he was arrested, such as a gun shot residue test, nor did they obtain a search warrant for Jones' residence.

On January 21, 2005, the Marion County grand jury indicted Jones on five charges related to the events described above. Jones was charged with one count of Assault in the First Degree (KRS 508.010) for intentionally causing serious physical injury to Campbell with a deadly weapon; with two counts of Assault in the Second

Degree (KRS 508.020) for intentionally causing physical injury to Thomas and Elder with a deadly weapon; and with two counts of Wanton Endangerment in the First Degree (KRS 508.060) for shooting a handgun inside TJ's. The matter went to trial in late November. The Commonwealth introduced the testimony of the three alleged assault victims (Campbell, Thomas, and Elder) as well as many of the witnesses, including Golden, Wise, TJ's employee Doug Hutchins, and bar patrons Terry Ewing and Mark Morgan. On cross-examination, Jones attempted to identify discrepancies in the witnesses' varying versions of the events on the night of the shooting. We note that several of the witnesses had been drinking that night; for instance, Terry Ewing testified that he was "looped". Once the Commonwealth rested its case, Jones introduced the testimony of both his son and his former girlfriend, who testified that they had never seen the handgun used in the shooting. Jones also opted to testify. He denied shooting Campbell. Instead, he testified that he believed Thomas instigated the attack against him as "payback", and that he, not Campbell, was the intended victim of the shooting.

At the conclusion of the trial, the jury returned a verdict finding Jones guilty of Wanton First-Degree Assault as to Campbell; guilty of Fourth-Degree Assault under extreme emotional distress as to Thomas; and guilty of two counts of First-Degree Wanton Endangerment. The jury found Jones not guilty of any charges related to Elder. Following the penalty phase, the jury recommended a ten-year sentence on the First-Degree Assault count; one-year sentences on the wanton endangerment counts; and a ten-day jail sentence on the Fourth-Degree Assault count, all to be served concurrently for a

total of ten years. The circuit court entered its judgment and sentence in accordance with the jury's recommendation, and this direct appeal of the conviction followed.

On appeal, Jones confines his argument to an admittedly unpreserved issue; namely, whether the Commonwealth violated the dictates of *Moss v. Commonwealth* during its cross-examination of Jones by asking him to comment on the credibility of its witnesses. Jones asserts that this violation constituted palpable error and that his conviction should be vacated. On the other hand, the Commonwealth argues that Jones failed to prove that the alleged error constituted palpable error, and that Jones himself opened the door to such a question by cross-examining witnesses about the veracity of its other witnesses.

STANDARD OF REVIEW

Because the issue Jones raises is unpreserved, we must review this matter under the palpable error rule of 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.

This rule “is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. . . . In determining whether an error is palpable, ‘an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.’” *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002). More recently, in *Martin v. Commonwealth*, 207 S.W.3d 1,

4 (Ky. 2006), the Supreme Court of Kentucky stated: “To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.”

ANALYSIS

The former Court of Appeals set forth the standard for cross-examination in *Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324, 329 (1928):

Although to aid in the discovery of the truth reasonable latitude is allowed in the cross-examination of witnesses, and the method and extent must from the necessity of the case depend very largely upon the discretion of the trial judge, yet, where the cross-examination proceeds beyond proper bounds or is being conducted in a manner which is unfair, insulting, intimidating, or abusive, or is inconsistent with the decorum of the courtroom, the court should interfere with or without objection from counsel. The court not only should have sustained the objections to this character of examination, but should have admonished counsel against such improper interrogation.

In *Howard*, the questions at issue involved the Commonwealth's Attorney asking the defendant about the testimony of other witnesses, in one instance asking “I am asking you if what Maud Denton swore is a lie.” *Id.* In *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997), the Supreme Court reaffirmed *Howard*, stating:

A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force.

However, in situations where such claims of errors are unpreserved, including in *Moss*, Kentucky's appellate courts have not identified any palpable error. Although holding the line of questioning to be improper, the *Moss* Court nevertheless held that “[a]ppellant's failure to object and our failure to regard this as palpable error precludes relief.” 949 S.W.2d at 583. Likewise, in *Tamme v. Commonwealth*, 973 S.W.2d 13, 28 (Ky. 1998), a death penalty appeal, the Supreme Court held: “While we do not approve of this type of cross-examination, *i.e.*, asking one witness to characterize the testimony of another, . . . there was no contemporaneous objection and we are unpersuaded that absent this inquiry, the result would have been different.” In *Caudill v. Commonwealth*, 120 S.W.3d 635, 662 (Ky. 2003), another death penalty appeal, the Supreme Court concluded that “the totality of the circumstances are persuasive that exclusion of the improper inquiries would not have resulted in different verdicts in this case.” Citing to its decision in *Caudill*, the Supreme Court found no reversible error in *St. Clair v. Commonwealth*, 140 S.W.3d 510, 554 (Ky. 2004), despite the Commonwealth's Attorney's inclusion of questions impermissible under *Moss* by the Commonwealth's Attorney during cross-examination of the defendant. Finally, in *Ernst v. Commonwealth*, 160 S.W.3d 744, 764 (Ky. 2005), the Supreme Court stated:

On several occasions, the Commonwealth's Attorney brought to Appellant's attention the trial testimony of various Commonwealth's witnesses and asked him whether he would characterize those statements as lies. We have held that this method of cross-examination is improper. *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997) (“A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer,

as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony.”). However, after a review of the record as a whole, we are not persuaded that the result would have been different had these questions been withheld. *Compare Caudill*, 120 S.W.3d at 662; *Tamme*, 973 S.W.2d at 28; *Moss*, 949 S.W.2d at 583. While the questions were improper, they did not result in manifest injustice, thus did not amount to palpable error.

In the present case, it is undisputed that Jones' claim of error is unpreserved. In support of his assertion that manifest injustice resulted, Jones argues that he was the only defense witness who testified as to the events of the night of the shooting, and that the Commonwealth's improper question placed him in such an unflattering light that his testimony was completely undermined. Nevertheless, while the question does appear to be improper in light of *Howard* and *Moss*, we agree with the Commonwealth that Jones has failed to show that any manifest injustice occurred or that the result would have been any different had the question not been asked. In light of the testimony of the many witnesses the Commonwealth called, even with discrepancies from witness to witness, the jury had more than sufficient evidence upon which to base its verdict. In particular, Campbell, one of the victims, identified Jones as his assailant immediately after the shooting. Furthermore, we note that the jury opted to convict Jones on lesser charges on two of the assault counts and found him not guilty on the third. For these reasons, we hold that there was no palpable error justifying a reversal of Jones' conviction, nor any defect in the trial that was either “shocking or jurisprudentially intolerable.” *Martin*, 207 S.W.3d at 4.

In light of our holding that Jones failed to establish that any manifest injustice resulted, we need not address the Commonwealth's additional argument that Jones opened the door to such questioning by attacking the veracity of other witnesses' testimony.

For the foregoing reasons, the judgment of the Marion Circuit Court is affirmed.

ALL CONCUR.

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