

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000896-MR

TAMMY DAY

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 05-CR-00154

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

KELLER, JUDGE: On March 1, 2006, a jury found Tammy Day (Day) guilty of Promoting Contraband in the First Degree and Possession of Methamphetamine.² The trial court imposed the jury's recommended sentence of four years' imprisonment. On appeal, Day asserts that: (1) the trial court erred when it permitted a handwritten

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² We note that, in November of 2005, Day stood trial on the same charges, the jury was unable to reach a verdict, and the trial judge declared a mistrial.

statement from Sheriff's Deputy Brown (Brown) to be introduced into evidence and published to the jury; (2) the convictions of promoting contraband and possession of methamphetamine amounted to double jeopardy; (3) the trial court erred when it did not grant Day's motion for directed verdict; and (4) testimony regarding Day's silence after receiving her *Miranda* warning violated her right to remain silent and her right to due process. For the reasons set forth below, we affirm.

FACTS

The parties presented diverse versions of the facts in this matter. Therefore, we will outline the basic undisputed facts, then summarize the relevant testimony from the witnesses. Day pled guilty to driving under the influence and served one day of her seven-day sentence in June of 2005. Because her daughter had been in an accident in June of 2005, Day requested and obtained a thirty-day furlough so that she could care for her daughter before serving the rest of her sentence. Day reported to serve the remainder of her sentence on Friday, July 15, 2005. Prior to reporting to jail on July 15, 2005, Day thought she had arranged for work release so that she could care for her seriously ill brother.

Prisoners who receive work release change from their jail uniforms into their street clothes before leaving the jail. Each prisoner's jail uniform is then placed in a green drawstring bag and put in the property room. When a prisoner returns, she is given the appropriate drawstring bag so that she can change from her street clothes into her jail uniform. The prisoner's street clothes are then placed in the drawstring bag and returned

to the property room. Each prisoner is permitted to bring in clean underwear and socks and prisoners are permitted to have a limited number of photographs and Zippo lighters. Prisoners are also permitted to have AM/FM radios with headphones; however, radios must be purchased from the jail's commissary. Prisoners are not permitted to have butane lighters or tape recorders.

A. Day's Testimony

On Saturday, July 16, 2005, Day learned that jail personnel had not received any orders from the district court providing for work release. When she learned she was not going to be released, Day became concerned that her brother was needlessly suffering from lack of care. Because of her concern for her brother's well-being, Day asked several jail personnel, in particular Deputy Jailer Donna Wiley (Wiley), to check on the status of the order granting work release. According to Day, Wiley was less than helpful.

On Monday, July 18, 2005, the district court judge signed a work release order providing that Day was to be released from jail at 7:00 a.m. and was to return by 3:00 p.m. For reasons that are not clear from the record, Day was not released from jail until approximately 8:30 a.m.³ After her release, Day called the jail and asked if she could return later because she had not been released on time. Day was advised by Wiley that she had to return as set forth in the order. Day then advised Wiley that she would

³ Although there is no direct testimony regarding this issue, the order was signed the morning of July 18, 2005, and it appears that the order simply was not transmitted to the jail in time for Day to be released any earlier.

Speak with Wiley's supervisor, which Day did. Wiley's supervisor also advised Day to return to the jail by 3:00 p.m.

At approximately 3:15 p.m., Day returned to the jail. When she returned, Day was carrying a paper bag containing clean underwear, socks, and a photograph of her daughter. Day also had a tape recorder and butane lighter, which she had on her person, not in the bag. When Day reached the booking area, Wiley took her bag and went into the jail, leaving Day in the booking area for approximately 20 minutes. When Wiley returned, she had Day's paper bag and another bag, and Wiley told Day that she had to be strip-searched. While Day was removing her blouse, her jail wrist identification bracelet fell off and, when Day bent down to pick up the bracelet, Wiley stated that the bracelet looked like drugs. Wiley then pulled a bra from one of the bags and said, "What is this?" pointing to holes in the bra cups and plastic bags sticking out of the holes. Day was surprised to see the bra and stated that it was not hers. Deputy Jailer Loretta Drake (Drake) then appeared and Wiley handed the bra to Drake and told her to take the bra out of the room. Day finished dressing in her jail uniform, and Wiley took her to a holding cell.

Several minutes later, Brown attempted to interrogate Day in the holding cell. When he arrived in the holding cell, Brown read the *Miranda* warning to Day, and Day stated that she wanted to speak with an attorney. Day did not say anything else to Brown or Wiley.

B. Wiley's Testimony

Wiley testified that she did not remember having any conversations with Day regarding the initiation of work release or regarding extending the time for work release. Any such questions Wiley would have referred to her supervisor.

On July 18, 2005, Day returned from work release at or near 4:00 p.m. When she came into the booking area, Day had a plastic bag. Wiley took the plastic bag from Day, gave Day her green drawstring bag containing Day's jail uniform, and told Day to go into the changing room to change clothes. Wiley then searched the contents of the plastic bag and found a photograph that had a slit in the back and some type of powdery residue. After searching the plastic bag, Wiley went into the changing room and told Day that she would have to be strip-searched. Day had already changed into her jail uniform and she began removing her blouse. When Day removed her blouse, Wiley saw a plastic bag fall to the floor. Day picked up the bag and put it in the back of her pants. After removing her blouse, Day seemed reluctant to remove her bra, and Wiley had to tell her to do so twice, the second time in a commanding tone of voice. After Wiley told Day to remove her bra the second time, Drake came into the changing room. Day removed her bra and Wiley saw holes in the bra cups and three plastic bags, two containing white powder and one bag containing a green leafy substance.⁴ Wiley then gave the bra to Drake and told Drake to take it out of the room. Day continued disrobing and Wiley found a tape recorder and butane lighter hidden in Day's pants. After Drake left the

⁴ It is uncontested that the white powdery substance was methamphetamine and the green leafy substance was marijuana.

room, Day told Wiley that the bra was not hers and that she had just bought it at the Salvation Army.

Day finished dressing in her jail uniform, and Wiley took her to a holding cell, where Day was interrogated by Brown. While Wiley was in the holding cell, Day told Brown that the bra was not hers and that she had just bought it at the Salvation Army.

C. Drake's Testimony

When Day returned to the jail from work release, she was carrying two plastic bags of clothes. Wiley took Day to the changing room sometime between 3:30 and 4:00 p.m. While Wiley was in the changing room with Day, Drake heard Wiley raise her voice. Drake then went into the changing room to see if Wiley needed any assistance. When Drake went into the changing room, Day was holding her bra to her chest and wearing white boxer shorts. Day gave the bra to Wiley who noted the holes in the cups and the plastic bags. Wiley then gave the bra to Drake and told Drake to take the bra out of the room. Drake did not hear Day say anything about the bra.

D. Brown's Testimony

Brown received a call from the jail indicating that a prisoner had attempted to smuggle contraband substances into the jail. Shortly after receiving the call, Brown arrived at the jail and went into the holding cell. He asked Day "what was going on" and Day stated that, "This isn't my bra. I bought this bra at the Salvation Army." Brown then read Day the *Miranda* warning and Day stated that she wanted to talk to an attorney.

On cross-examination, Brown admitted that none of his official reports contained any mention of the statement by Day about the Salvation Army. However, Brown did have a "personal note" (the note) regarding Day's statement about the Salvation Army. Brown testified that he prepared the note at the same time he prepared the official reports. Day objected to admission of the note into evidence because the note had not been part of the official police record. However, Day admitted that the existence and the contents of the note were not a surprise. The trial court, noting that Day was aware of the note and that the note had been admitted into evidence during Day's prior trial, overruled Day's objection. The court then permitted the note to be published to the jury. While the jurors were passing the note around, the court took a brief recess. The court advised the jurors to just leave the note on a chair to be collected with the other exhibits.

E. Carla Miller's Testimony

Day testified that she never told anyone that she had purchased the bra at the Salvation Army. However, Carla Miller (Miller), an employee at the clerk's office, testified that Day said that what happened was not true and that she did not "know about the bra" which she "got . . . at the Salvation Army."

With this factual background in mind, we will analyze the issues presented by Day. We will address the standard of review for each issue in turn.

ANALYSIS

A. Admission of Brown's Note

The standard of review on evidentiary issues is whether the trial court abused its discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

As noted above, the trial court admitted into evidence the note reflecting Day's statement that she purchased the bra at the Salvation Army. Day argues that the trial court denied her the right to be present during every stage of the proceedings when it permitted the note to be introduced into evidence, published to the jury, and taken to the jury room during deliberations. However, since Day was present in the courtroom when Brown reviewed and read the note and when the note was published to the jury, her real argument is that the trial court should not have permitted the jury to take the note into the jury room during deliberations. Day's secondary argument is that Brown's written statement constitutes hearsay and therefore should have been excluded from evidence. For the reasons set forth below, we hold that Day's arguments lack merit both factually and legally. We will address Day's hearsay argument first.

Day argues that the note "while not an official police report, is clearly a hearsay report by a police officer." In support of that argument, Day cites *Manning v. Commonwealth*, 23 S.W.3d 610 (Ky. 2000). However, Day's reliance on *Manning* is

misplaced. In *Manning*, the Commonwealth sought to introduce into evidence a copy of the investigating officer's report. The Supreme Court of Kentucky held that the police report was not admissible under the business records exception to the hearsay rule, KRE 803(6), because the report contained information the investigating officer obtained from an unidentified witness. *Id.* at 613-14. As the Court noted,

[U]nder the Kentucky Rules of Evidence, if a report is admissible pursuant to KRE 803(6), then all parts of the report must be admissible under some hearsay exception. If a particular entry in the record would be inadmissible for another reason, it does not become admissible just because it is included in a business or public record. Moreover, hearsay within hearsay, i.e. "double hearsay," is inadmissible unless each part of the combined statements conforms with a recognized exception to the hearsay rule. *Prater v. Cabinet for Human Resources*, Ky., 954 S.W.2d 954, 958-959 (1997). Consequently, anything in the police report regarding what an unidentified white female may have told Officer Leach, or what anyone else may have said, would be inadmissible, as these statements do not qualify for admission under any other hearsay exception.

Manning, 23 S.W.3d at 614.

Manning is distinguishable because the statement in the note that the bra had been purchased at the Salvation Army came directly from Day, not from an unidentified witness. Day's statement to Brown was an admission of a party and therefore admissible under KRE 801A(1)(b).

As to whether the trial court erred by permitting the jury to take the note into the jury room, we agree with the Commonwealth that there is no evidence that the note was taken into the jury room. The record reflects that, after the note was introduced

into evidence, it was published to the jury. While the jurors were circulating the note, the court went into recess and the jurors were told to leave the note on a chair at the end of the jury box so that it could be placed with other exhibits. It is unclear what, if anything, happened with the note after that.

However, even if the jury did have Brown's written statement in the jury room, Day must establish that the trial court committed an error that affected Day's "substantial rights." RCr 9.24. As noted above, Brown, Wiley, and Carla Miller testified that Day said that she had purchased the bra at the Salvation Army. Therefore, even if permitting the jury to take the note into the jury room was error, it was harmless error as there is no evidence that Day's substantial rights were in any way affected.

Finally, we note that Day's reliance on *Mills v. Commonwealth*, 44 S.W.3d 366 (Ky. 2001), and *Berrier v. Bizer*, 57 S.W.3d 271 (Ky. 2001), is misplaced. In *Mills*, the jury listened to tapes of witness interviews in the jury room when those tapes had not been played in court during the trial. The Supreme Court held that the jury should not have been permitted to listen to the tapes because neither Mills nor his counsel were present when the tapes were played, violating Mills's right to be present during all stages of the proceedings. *Mills*, 44 S.W.3d at 371. In the case herein, Brown testified that Day told him that she purchased the bra at the Salvation Army and he read the note in court. Therefore, Day, unlike Mills, was present during all stages of the relevant proceedings.

In *Berrier*, Bizer's attorney interviewed a number of Bizer's employees and generated summaries of those interviews. At the conclusion of each employee's

testimony at trial, Bizer admitted into evidence the appropriate summary. The Supreme Court held that the trial court committed error when it admitted the summaries into evidence because the summaries contained facts and opinions to which the witnesses did not testify. *Berrier*, 57 S.W.3d at 276-77. As noted above, Brown testified to the contents of his written statement and that written statement contained information that Brown obtained from Day. Therefore, *Berrier* has no application to Day's case.

B. Double Jeopardy

If multiple convictions arise out of a single course of conduct, then a defendant may have been placed in double jeopardy. KRS 505.020, *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996). The court must "determine whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not." *Burge* 947 S.W.2d at 811. In order to make that determination, we must examine the statutes under which Day was convicted.

KRS 520.050(1)(b) provides that "[a] person is guilty of promoting contraband in the first degree when: [b]eing a person confined in a detention facility or a penitentiary, he knowingly makes, obtains, or possesses dangerous contraband." KRS 520.010(3) defines, in pertinent part, dangerous contraband as "any quantity of marijuana." Based on the preceding, the Commonwealth was required to prove that Day was confined in a detention facility and that she possessed a quantity of marijuana.

KRS 218A.1415(1) provides that "[a] person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains any quantity of methamphetamine[.]" Based on the preceding, the Commonwealth was required to prove only that Day had a quantity of methamphetamine, but was not required to prove that Day was confined in a detention facility. Since promoting contraband requires proof of a fact that possession of a controlled substance does not, i.e., confinement in a detention facility, Day's conviction of both crimes does not violate her constitutional right to be protected from being placed in double jeopardy.

C. Directed Verdict

When reviewing a jury verdict, this Court is restricted to determining whether the trial court erred in failing to grant or in granting a directed verdict. In doing so, this Court must consider all evidence favoring the prevailing party as true and may not determine the credibility or weight to be given to the evidence. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (Ky. 1990). Furthermore, we must draw all reasonable inferences in favor of the defendant while refraining from questioning the credibility of the defendant and while refraining from assessing the weight that should be attributed to the evidence. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). This Court may reverse the jury only when the verdict is so flagrantly against the weight of the evidence as to indicate passion or prejudice. *Bierman v. Klapheke*, 967 S.W.2d 16, 19 (Ky. 1998).

Day argues that Wiley and Brown lacked credibility because neither completed an official report documenting Day's statement that she purchased the bra at the Salvation Army. Ignoring for the moment the fact that credibility is an issue for the jury and not one to be addressed on appeal, we note that Day's argument fails to address the note. Brown testified that he prepared the note at the same time he prepared his police report. Day's argument also fails to account for Miller's testimony that Day told her about purchasing the bra at the Salvation Army. Miller's testimony supports the testimony from Wiley and Brown, and there is nothing in the record that brings into question Miller's credibility. Reviewing this testimony in a light most favorable to the Commonwealth, we cannot say that the jury's verdict was flagrantly against the weight of the evidence. Therefore, we affirm the trial court's denial of Day's motions for directed verdict.

D. Testimony Regarding Day's Silence

Day is correct that a defendant's silence following a *Miranda* warning cannot be used to impeach her. *See Green v. Commonwealth*, 815 S.W.2d 398, 400 (Ky 1991). However, because Day failed to preserve the issue before the trial court, we must analyze it using the palpable error standard. RCr 10.26. Palpable error is an irregularity which affects a party's substantial rights and, if the appellate court does not address the irregularity, it will result in a manifest injustice to the party. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 837 (Ky. 2003). To determine if 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. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983). To be palpable, an error must be "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) citing *Black's Law Dictionary* (6th ed. 1995).

During direct examination, Brown testified that, after Day stated that she purchased the bra at the Salvation Army, he advised her of her right to remain silent. Day then stated that she wanted to speak with an attorney. This testimony by Brown was not used to impeach Day but simply to set forth the timeline with regard to Brown's interrogation of Day. Furthermore, as noted by the Commonwealth, Day used Brown's testimony regarding her silence on cross-examination to impeach Brown. Therefore, we discern no error.

However, even if Brown's testimony should have been excluded, there is no evidence that the outcome of the trial would have been any different. The Commonwealth did not refer to Day's silence in its opening statement or closing argument. Furthermore, as noted above, there was sufficient evidence, absent any testimony regarding Day's silence, to support the jury's verdict. Therefore, if admitting Brown's testimony constituted error, that error was not palpable.

CONCLUSION

For the reasons set forth above, we hold that the trial court did not err when it admitted Brown's handwritten statement; that Day was not subjected to double

jeopardy; that Day was not entitled to a directed verdict; and that testimony regarding Day's silence was not error. Therefore, we affirm.

ALL CONCUR.

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