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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001660-MR

BRAD CALLINAN — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JUDY D. VANCE, JUDGE
ACTION NO. 15-CR-00006

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND VACATING IN PART

** ** ** ** **

BEFORE: ACREE, JONES AND VANMETER, JUDGES.

VANMETER, JUDGE: Brad Callinan appeals from the Casey Circuit Court's Judgment and Sentence on Jury Verdict, entered October 30, 2015. We affirm the circuit court as to its written judgment and sentence, but vacate the order to show cause for non-payment entered by the circuit court on October 12, 2015.

BACKGROUND

Jacob Logan Durham cared for his ailing mother through a Medicaid waiver program administered by the Lake Cumberland Area Development District. This program essentially employed Mr. Durham, paying him a monthly stipend to act as his mother's caregiver. At some point in February 2014, Mr. Durham noted that his check from the program had not yet arrived with its usual timeliness. He called the Area Development District, only to find that the check for $447.12 had been mailed on February 14, 2014, and was thereafter cashed by the Casey County Bank. Mr. Durham contacted Officer Kerry Patten of the Liberty Police Department to report the stolen check. The two men went to the bank to investigate. They discovered that the canceled check had an endorsed signature on the back that did not belong to Mr. Durham, and the check had been cashed at a local store called the Tobacco Shed.

When Officer Patten went to the Tobacco Shed, he spoke to a cashier working there, Kayla Evans, about the check. Ms. Evans remembered cashing the check. Ms. Evans pulled the store security video of the transaction which allegedly showed the appellant, Brad Callinan, cashing the check. She showed this video to Officer Patten. The appellant was a regular customer at the Tobacco Shed, and Ms. Evans knew his face from his regular transactions at the store, though she did not know his name. She gave Officer Patten the store's copy of the receipt from the check-cashing transaction. This receipt, dated February 18, 2014, indicated that a check for $447.12 was used in payment for cigarettes and a drink, and that

the customer received $396.05 in change. Unfortunately, the security video showing the incident at the Tobacco Shed was not preserved for later use at trial. Officer Patten finally told Ms. Evans to call him if the customer from the video were to return to the store.

Callinan returned to the Tobacco Shed the following week. Ms. Evans immediately recognized him and telephoned the police. Officer Ronnie Smith of the Liberty Police Department spoke to Callinan, ascertained his contact information, and told him that Officer Patten wanted to speak with him. After several unsuccessful attempts to contact Callinan, Officer Patten eventually presented the case to the grand jury. On February 9, 2015, Callinan was charged with second-degree criminal possession of a forged instrument and for being a first-degree persistent felony offender (PFO). The case proceeded to trial on July 15, 2015; Callinan was found guilty and sentenced to one year in prison, enhanced to fifteen years for the PFO. This appeal follows.

ANALYSIS

Callinan brings three issues on direct appeal. For his first issue, Callinan asserts that the circuit court erred in denying him a directed verdict on his persistent felony offender status. This issue is not preserved, and Callinan requests that we review for palpable error under RCr[1] 10.26.[2] The essence of the claim is

[1] Kentucky Rules of Criminal Procedure.

[2] "Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule's requirement of manifest injustice

that the Commonwealth did not prove every element of the persistent felony offender statute beyond a reasonable doubt. The Commonwealth called a single witness during the penalty phase, Shelia Bowmer of the Casey County Clerk's Office. Through Ms. Bowmer, a deputy clerk, the Commonwealth introduced two certified judgments of conviction for prior offenses committed by Callinan. The first, entered October 28, 2010, sentenced Callinan to one year and six months' imprisonment, with credit for two days in custody, forty-five days to serve, and the remainder to be probated for three years. The second judgment of conviction, entered January 27, 2012, sentenced Callinan to two years' imprisonment, with credit for nineteen days in custody, thirty days to serve, with the remainder probated for five years. Ms. Bowmer further testified that Callinan's date of birth and Social Security Number were identical on the documents.

Callinan claims that the requirements of the persistent felony offender statute were not met, in that the witness did not testify with particularity on whether he fell within the statutory time frames provided in KRS[3] 532.080(3)(c). That statute requires:

> [t]hat the offender:
>
> > 1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted; or

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requires showing a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Young v. Commonwealth*, 426 S.W.3d 577, 584 (Ky. 2014) (internal citations and quotations omitted).

[3] Kentucky Revised Statutes.

> 2. Was on probation, parole, postincarceration supervision, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or
>
> 3. Was discharged from probation, parole, postincarceration supervision, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted; or
>
> 4. Was in custody from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or
>
> 5. Had escaped from custody while serving any of the previous felony convictions at the time of commission of the felony for which he now stands convicted.

Callinan cites to *Moore v. Commonwealth*, 462 S.W.3d 378 (Ky. 2015) for the proposition that "it is manifestly unreasonable to hand over to a jury of reasonable citizens of the community, a series of criminal judgments, a chart of parole eligibility guidelines, and a set of complex statutory-based instructions, and say, in effect: 'Here; figure this out for yourselves.'" *Id*. at 386. However, the Supreme Court of Kentucky has also held that "[a] reasonable inference is sufficient to meet the requirements of the PFO statute." *Martin v. Commonwealth*, 13 S.W.3d 232, 235 (Ky. 1999). This point was reaffirmed in *Moore*: "[T]o uphold a conviction, an appellate court must be convinced that the evidence supports a reasonable inference and is not just mere 'guess work.'" *Moore*, 462 S.W.3d at 387 (citing *Whittle v. Commonwealth*, 352 S.W.3d 898, 907 (Ky. 2011)).

Moore was distinguished on the facts from an earlier case, *Shabazz v. Commonwealth*, 153 S.W.3d 806 (Ky. 2005), in which the Court held that the jury could make a reasonable inference as to that appellant's PFO status because the new felony offense was committed three and one-half years after an Order of Probation placing him on probation for five years. "We held in *Shabazz*, and we agree now, that a reasonable juror could reasonably infer that the defendant was still on probation when he committed his current crimes." *Moore*, 462 S.W.3d at 385 (Ky. 2015). In *Moore*, on the other hand, the Court's decision to reverse the PFO conviction hinged on the fact that the Commonwealth had only submitted documentary evidence showing the appellant's previous conviction date of March 13, 2006, while the five-year time span critical for applying PFO status ran backward from October 24, 2011 to October 24, 2006. The Court found that this was insufficient for the PFO charge: "Nothing was presented to show explicitly whether Appellant completed the sentence or whether he was later granted shock probation or parole; nothing was introduced concerning Appellant's fate following the entry of the March 13, 2006 judgment." *Id*. at 384.

The Commonwealth submits that this case is more like *Shabazz* than *Moore*. We agree. The critical time period in this case runs backward five years from the date of the offense on February 18, 2014, to February 18, 2009. Both of Callinan's documented prior felony judgments of conviction were entered *within that five-year time frame*. The jury could make a reasonable inference from this

evidence to apply the PFO instruction they were given, which states in relevant part:

> D. That [Appellant] has completed service of the sentence imposed on any of the previous felony convictions within 5 years prior to the date of the commission of the felony for which he now stands convicted of or was on probation, parole, conditional discharge, conditional release, or furlough or appeal bond, from said prior convictions at the time he committed the offense of which you have found him guilty in this case…

The Commonwealth has satisfied its burden of proof and we find no error on this issue.[4]

For his second issue on appeal, Callinan alleges that the prosecution engaged in pervasive misconduct sufficient to deny his right to due process and a fair trial. Most of the incidents cited by the appellant stem from the lost Tobacco Shed video that allegedly documented the transaction between Callinan and Ms. Evans. Because the video was lost and could not be admitted into evidence at trial, references to what it may have contained were deemed hearsay, and so any reference to even the existence of the video was properly disallowed by the circuit court. Despite the circuit court's ruling, however, three witnesses for the Commonwealth made passing reference to the existence of the video. On these

[4] A better practice, however, is for the Commonwealth to follow the guidance provided in *Moore*. "The Commonwealth's burden in a PFO proceeding is both positive and clear: show, beyond a reasonable doubt, the criminal or corrections status of an individual on a certain date in question," preferably by direct testimony from a court clerk or probation or parole officer. *Moore*, 462 S.W.3d at 388.

occasions, the appellant made contemporaneous objections which were sustained by the circuit court, followed by an admonishment to not talk about the video.

The sole allegation of misconduct not related to the video was when the prosecutor on direct questioning asked Officer Patten if he believed Callinan had committed the crime. The appellant objected to the question, and the circuit court sustained, telling the Commonwealth to rephrase the question. The Commonwealth then asked Officer Patten whether he had presented the case to the grand jury and obtained an indictment against Callinan, and this phrasing was not objected to by the appellant. Callinan now asks that we review this rephrased question as palpable error.

On the issue of the improper references to the video, Callinan cites to *Schaefer v. Commonwealth*, 622 S.W.2d 218 (Ky. 1981), stating that repeated allusions to a tape not in evidence may be prejudicial. We should also note that the jury did ask about the video in a question directed to the court while it was deliberating. While Callinan takes the position that this is evidence of damage through misconduct, we believe that this is far more likely to be related to curiosity than prejudice, and there is no evidence that the mystery of the video swayed the jury in any particular fashion. "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. A defendant is entitled to a fair trial but

not a perfect one." *Bruton v. United States*, 391 U.S. 123, 135, 88 S. Ct. 1620, 1627, 20 L. Ed. 2d 476 (1968) (internal citations and quotations omitted).

Furthermore, "[i]ssues involving the admission of evidence or testimony, when ruled upon by the trial court, do not constitute prosecutorial misconduct." *St. Clair v. Commonwealth*, 451 S.W.3d 597, 640 (Ky. 2014), *reh'g denied* (Feb. 19, 2015), *cert. denied sub nom. St. Clair v. Kentucky*, 136 S. Ct. 194, 193 L. Ed. 2d 152 (2015) (citing *Stopher v. Commonwealth*, 57 S.W.3d 787, 806 (Ky.2001)). We also note that the erroneous references were cured by the circuit court's admonitions in each case.

> The trial court's admonition put this issue to rest. A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error… There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, or (2) when the question was asked without a factual basis and was inflammatory or highly prejudicial.

Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) (internal citations and quotations omitted). Neither of those exceptions appear to apply here. In addition, despite the Callinan's contention that these references were part of a cynical and blatant attempt to get the evidence of the missing video before the jury, an examination of the record indicates that this was more likely the result of inartful questioning than deliberate misconduct. This also seems a likely explanation for the question relating to whether Officer Patten believed the appellant guilty.

Placed in context, the question was merely an attempt to have the officer explain the last part of his investigation – he thought that he had grounds to bring the case to the grand jury. The rephrasing of the question made it clear that this was the Commonwealth's intent, and nothing intentionally improper.

As an additional argument on these grounds, Callinan asserts that the repeated errors in testimony taken together should result in cumulative error. As the errors individually were testimonial slips and not substantial, we cannot find cumulative error resulting from them. "We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010) (citing *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky.1992)). "Where, as in this case, however, none of the errors individually raised any real question of prejudice, we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice." *Id*. (citing *Furnish v. Commonwealth*, 95 S.W.3d 34 (Ky.2002)). For these reasons, we decline to find error on the basis of prosecutorial misconduct.

Callinan's final issue on appeal is that the circuit court erroneously assigned court costs to him in the amount of $165, despite his indigency. The Commonwealth states that there is no error on the issue of court costs, because the circuit court did not include court costs in its final written judgment of conviction, dated October 30, 2015. The confusion on this issue seems to be the result of inconsistent rulings by the circuit court. In Callinan's appearance for sentencing in

open court, held August 24, 2015, the circuit court specifically ordered the appellant to pay court costs of $165. Callinan was afterward ordered to pay $165 in court costs pursuant to a standardized form from the Administrative Office of the Courts entitled "Fine & Cost List With Order to Show Cause for Non-Payment," which was entered on October 12, 2015. Finally, in the circuit court's *written* order of Judgment and Sentence on Jury Verdict, entered October 30, 2015, there is no mention of court costs assigned to the appellant at all.

Court costs are undeniably part of a defendant's sentencing. "Because court costs may be waived given certain statutory findings, the trial court's determination of whether the costs should be assessed or waived must be made upon the defendant's conviction and sentencing." *Goncalves v. Commonwealth*, 404 S.W.3d 180, 209 (Ky. 2013) (citing KRS 23A.205 and *Buster v. Commonwealth*, 381 S.W.3d 294, 306 (Ky. 2012)). In addition, "…where there is an inconsistency between the oral statements of a court and that which is reduced to writing as the court's final judgment, the latter shall prevail and the former shall be disregarded." *Commonwealth v. Hicks*, 869 S.W.2d 35, 38 (Ky. 1994) *overruled on other grounds by Keeling v. Commonwealth*, 381 S.W.3d 248 (Ky. 2012). The show cause order entered by the court on October 12, 2015 was questionable in its validity, not only because it was issued *prior* to Callinan's formal written judgment, but also because it contradicts the written judgment, which did not assign court costs at all. It is also significant that the Commonwealth effectively concedes this issue in its brief: "[B]ecause the written

order did not impose court costs, there was no error." In the course of affirming the circuit court's written judgment, we must also vacate that same court's show cause order as not being in conformity therewith.

CONCLUSION

For the foregoing reasons, we affirm the Casey Circuit Court's judgment and sentence entered October 30, 2015, but vacate the order to show cause for non-payment entered by the Casey Circuit Court on October 12, 2015.

JONES, JUDGE, CONCURS IN RESULT ONLY.

ACREE, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING IN RESULT ONLY: I concur in the result reached by the majority opinion. However, I disagree with the analysis of the admissibility of testimony regarding the lost videotape. Pursuant to Kentucky Rule of Evidence (KRE) 1004(1) "[t]he original is not required, and other evidence of the contents of a . . . photograph is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" For purposes of our rules of evidence, " 'Photographs' include still photographs, X-ray films, video tapes, and motion pictures." KRE 1001(2).

For this reason primarily, I can concur only in the result reached by the majority.

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