No. 22593 - State of West Virginia v. Linda Hardesty

Cleckley, Justice, concurring:

I agree with the majority's opinion in all aspects. I concur only to express my view as to one of the evidentiary issues raised by the defendant.

To be admissible as substantive evidence, a transcript of a tape recording must satisfy both the best evidence rule and the hearsay rule. Unquestionably, the transcript in this case does not satisfy the requirements of the best evidence rule. Specifically, it does not qualify as a "duplicate" under Rule 1001(4) of the West Virginia Rules of Evidence because the transcript was prepared manually rather than mechanically.[1] See Wright v. Farmers Co-Op of Arkansas and Oklahoma, 681 F.2d 549, 553 n.3 (8th Cir. 1982). However, this determination is not dispositive of the issue raised on appeal. The best evidence rule is applied only to substantive

[1]Rule 1001(4) states:

> "Duplicate.--A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic recording, or by chemical reproduction, or by other equivalent techniques, which accurately reproduces the original."

evidence. Transcripts, as used in this case, are not introduced as substantive evidence but rather as demonstrative evidence--"as an accompaniment to the recording itself to aid the jury's understanding." Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 10.7 at 1218 (1994). See also Charles E. Carr, Voices, Texts, and Technology: Evidence Law Confronts Tapes and Their Transcriptions, 35 St. Louis U.L.J. 289 (1991). I believe the trial court properly allowed the admission of the transcript as demonstrative evidence.

The only remaining question is whether the trial court should have permitted the transcript to be used by the jury during deliberations. Again, the defendant has a difficult bridge to cross because no specific objection was made to this issue. In other words, the focus of the defendant's protest at trial was that the transcript could not be used at all because the transcript could not qualify under the best evidence rule. Once the trial court overruled this objection and permitted the use of the transcript as demonstrative evidence only, an additional protest was required under Rule 103(a)(1) of the West Virginia Rules of Evidence to preserve as an appellate issue the jury's access to the transcript

during deliberations. Had the trial court been confronted with this specific objection, it very well may have sustained the objection and denied the jury access to the transcript during deliberations. Of course, as a general rule, whether demonstrative evidence can go with the jury during deliberations is a discretionary call for the trial court. On the other hand, written demonstrative evidence, such as the transcript in this case, should not be permitted to go to the jury room in order to avoid giving it undue emphasis in relation to the tape recording itself and other testimonial evidence. See State v. Corbin, 117 W. Va. 241, 186 S.E. 179 (1936). See also U.S. v. Jonnet, 762 F.2d 16, 20 (3rd Cir. 1985); U.S. v. Abbas, 504 F.2d 123, 124-25 (9th Cir. 1974), cert. denied, 421 U.S. 988, 95 S. Ct.

In order to preserve this issue on appeal, the defendant must have objected specifically to the trial court's decision permitting written demonstrative evidence to be used by the jury during deliberations. As we suggested in Tennant v. Marion Health Care Foundation, Inc., ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (No. 22642 6/15/95) (Slip op. at 32-33), entering an objection to a trial court's ruling or action is not primarily a matter of building a record for appeal or a tactical maneuver by counsel. Its principal purpose is for counsel to bring to the attention of the trial court evidence that counsel considers inadmissible or prejudicial so that, if there is an error involved, the trial court has a chance to correct it on the spot.

Absent an objection, we can reverse the challenged action only for plain error. Plain error is obvious and substantial error which seriously affects the fairness, integrity, or public reputation of judicial proceedings. See State v. Miller, ___ W. Va. ___, ___ S.E.2d ___ (No. 22571 5/18/95). A review of all the evidence, including the contents of the transcripts, does not show that the trial court committed plain error.

1990, 44 L.Ed.2d 477 (1975).