Commonwealth of Kentucky
Kentucky Supreme Court

CASE NO. 2013-SC-000824
2013-SC-226

COMMONWEALTH OF KENTUCKY **APPELLANT/CROSS APPELLEE**

v.

Appeal from Pendleton Circuit Court
Hon. Jay B. Delaney, Judge
File No. 10-CR-00076

FLOYD WRIGHT **APPELLEE/CROSS APPELLANT**

Commonwealth's Combined Reply / Cross Appellee Brief

Submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant/Cross Appellee has been mailed, postage pre-paid, this 29th day of September, 2014, to the Hon. Jay B. Delaney, Judge, Pendleton Circuit Court, Courthouse, 233 Main Street, Falmouth, KY. 44040; to: Hon. Brandon Neil Jewell, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601, and Electronically mailed to: Hon. E. Douglas Miller, Commonwealth's Attorney, 130 South Main Street, Cynthiana, Ky. 441031.

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INTRODUCTION

This is a Appellant/Cross-Appellee's combined reply/cross-appellee brief addressing the issues raised on appeal from a Pendleton Circuit Court judgment sentencing appellee/cross appellant to ten years imprisonment upon his conviction for complicity to trafficking in cocaine and being a persistent felony offender in the second degree wherein on direct appeal the Court of Appeals reversed because the trial court allowed the jury to listen to an exhibit in the jury room on the prosecutor's computer.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is warranted by the law or facts.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

CROSS-APPELLEE'S COUNTERSTATEMENT OF THE CASE

Cross-Appellant Floyd Wright begins his statement noting that Sean Records was required to testify truthfully as part of a plea agreement. To the extent that he then sets forth that Record testified that Wright had nothing to do with the drug deal involving the confidential informant, the Commonwealth believes that it should be noted that the Commonwealth did not call Mr. Record to testify but the testimony was proffered by the defense. (See VR 1 3/11/11 2:24:02 et seq).

While Appellant/Cross-Appellee otherwise disagrees with Appellee/Cross-Appellee's repeated argumentative characterization of the actions of the trial court as improper in his Counterstatement, the Commonwealth will refrain from making any further statements as the Commonwealth's initial statement in its Brief for Appellant and the Appellee/Cross-Appellant's counterstatement adequately set forth the operative facts necessary for this Court's resolution of the issues on this discretionary review.

ARGUMENT

I.

THE PENDLETON CIRCUIT COURT DID NOT ERR IN DENYING WRIGHT'S MOTION FOR A DIRECTED VERDICT.

Cross-appellant's first argument is that it was error to deny his motion for a directed verdict. The motion is only on the record to the Commonwealth's case in chief and does not appear in the record at the conclusion of the Commonwealth's case. So whereas the majority of his argument is the testimony of co-defendant Sean Record in the defense case explaining that Wright did not have anything to do with the cocaine sale

transaction, the trial court would not have had the opportunity to rule based upon that and it is otherwise improper to make one argument to the trial court and another to the appellate court. Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1976).

But regardless, Records' testimony except for the statements that Wright only went to the kitchen to get a beer and then to the bathroom in a back bedroom (VR 1 3/11/11 2:36:03), that he did not tell Wright what he had put in the freezer (VR 1 3/11/11 2:34:25) and that he did not recall if Wright said anything (VR 1 3/11/11 2:44:55) though was not particularly relevant. And those portions are only relevant to the extent that they are contradicted by the testimony of Sherri Klups and, on the motion, if it had been made, the court considers the evidence in the light most favorable to the Commonwealth. See Commonwealth v. Benham, 816 S.W.2d 186 at 187 (Ky. 1991).

Sherri Klups testified that she heard Wright and Records talking to each other in the kitchen, baggies being handled and the freezer door being opened. (See VR 1 3/11/11 11:53:11-11:57:10). She also testified that she would have otherwise been able to have heard if anyone had been in the refrigerator to get a beer and that she did not hear anyone get anything out of the refrigerator nor did she hear a toilet flush. (VR 1 3/11/11:57:30 et seq). Ms. Klups, however, testified that Wright and Records left together when she asked to see the cocaine and when they returned together with the cocaine and she inquired about its condition it was Wright who answered "that we had stuck it in the freezer..." (VR 1 3/11/11 2:01:45).

The court then denied the motion noting the fact that the two left together and returned together with the cocaine and that Wright stated that the cocaine had been put in

the freezer and was otherwise described as monitoring the transaction. And a person is guilty of complicity to the commission of an offense when he aids another person in committing the offense. See KRS 502.020. Insofar as Ms. Klups questioned whether the substance was in fact cocaine, Wright's statement to her about it being put in the freezer to cool down was aiding in the sale of the cocaine to her as well as others in as it can be reasonably inferred from their actions that it was done to maintain the integrity of the cocaine for purposes of sale as Records in his testimony added that it had gotten hot while returning from Cincinnati.

In Commonwealth v. Suttles, 80 S.W.3d 424 (Ky. 2002), this Court held that the Court of Appeals erred in reversing denial of directed verdict and explained why the evidence was sufficient to establish Suttles' intent to commit the crime of intentional complicity to first degree assault as follows:

> It has long been held by this Court that intent can be inferred from the act itself and the surrounding circumstances. *See Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999); *Talbott v. Commonwealth*, 968 S.W.2d 76 (Ky. 1998); *Dishman v. Commonwealth*, 906 S.W.2d 335 (Ky. 1995); *Stevens v. Commonwealth*, 462 S.W.2d 182 (Ky. 1970); *See also Waters v. Kassulke*, 916 F.2d 329 (6th Cir.1990). This Court has held that because a person is presumed to intend the logical and probable consequences of his conduct, a person's state of mind may be inferred from his actions preceding and following the charged offense. *Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998); *see also Parker v. Commonwealth*, 952 S.W.2d 209 (Ky. 1997); *Wilson v. Commonwealth*, 601 S.W.2d 280 (Ky. 1980).

Therefore, the Commonwealth submits that the trial court did not abuse its discretion in denying Wright's motion for a directed verdict and that the evidence was

otherwise sufficient to sustain Wright's conviction when that evidence is taken in a light most favorable to the Commonwealth. Contrary to Wright's argument, the trial court and trial jury were not constitutionally compelled to believe Records' testimony that he was not involved even if the argument had been properly made. Reversal now is otherwise unwarranted as it is not improper for a case to be based upon circumstantial evidence.

II.

THE PENDLETON CIRCUIT COURT DID NOT ERR TO WRIGHT'S SUBSTANTIAL PREJUDICE IN NOT SUA SPONTE STRIKING TESTIMONY FROM DETECTIVE ARNSPERGER.

Cross-Appellant's second argument is an unpreserved claim that Detective Arnsperger impermissibly interpreted the audio recording of the undercover drug transaction that the jurors had difficulty understanding. RCr 10.26 permits a criminal defendant to raise on appeal an insufficiently preserved or unpreserved error but only if the error "affects the substantial rights of a party" may the appellate court consider the issue. *Ibid.*

If an unpreserved error is both palpable and prejudicial, it "still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice; in other words, unless the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" Miller v. Commonwealth, 283 S.W.3d 690, 695 (Ky. 2009) (quoting Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006). To make this determination, "a reviewing court must plumb the depths of the proceeding . . . ." Martin, 207 S.W.3d at 4.

When the unpreserved claim is of an evidentiary error, KRE 103(e) controls palpable error review. See Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005). Thereunder palpable evidentiary error "must involve prejudice more egregious than that occurring in reversible error[.]" *Ibid.* The error must be reviewed in light of all evidence presented in the case, and again "the inquiry is heavily dependent upon the facts of each case." *Ibid.* (citing United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1038 (1985)).

The comments herein though can hardly be called palpable error. It was not a direct and obvious error. His testimony was not made during the playing of the tape as to impermissibly interpret inaudible portions as condemned in Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). And it is otherwise clear in this case that the complained of testimony when considered with the later course of proceedings did not "invade" the province of the jury as the jury in this case asked not about what the officer said but asked to listen to the tape itself to compare it again not with the officer said but to Ms. Klups's testimony. (See VR 1 3/11/11 3:41:40). The focus in this case was never the testimony of Detective Arnsperger.

None of the cases cited by Wright state that this claim of error results in a manifest injustice. Nor do the facts in the case support a finding that there was a manifest injustice. A manifest injustice is shown by a probability that but for the error, the outcome would have been different. Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 2006); Hardaway v. Commonwealth, 352 S.W.3d 600 (Ky. 2011). It cannot be said that but for this error there is a probability that the outcome would have been different. The jury had the testimony of Ms. Klups and Mr. Records to compare against the tape as to

whether there was third person involved. And it is not likely a jury that twice asked to rehear the tape itself was relying on the comment of the detective that it was clear to make their decision. Reversal now is otherwise unwarranted.

III.

THE PENDLETON CIRCUIT COURT DID NOT ERR TO WRIGHT'S SUBSTANTIAL PREJUDICE IN NOT SUA SPONTE STRIKING DETECTIVE ARNSPERGER'S TESTIMONY.

Wright's next claim of error is likewise unpreserved. He therefore otherwise asks the Court to review for palpable error Detective Arnsperger's testimony that undercover informants need to be credible and if Ms. Klups was not credible it was not going to happen. (See e.g.VR 1 3/11/11 10;56:20 et seq and 11:04:01 et seq). The error though is hardly reversible error as Wright cites this Court to the case of Fairrow v. Commonwealth, 175 S.W.3d 601 (Ky. 2005) involving a similar claim with even more egregious specific vouching that the informant's work "had always resulted in convictions" and the Supreme Court stated " Nor are we satisfied that the admission of improper evidence of character of a mere witness affected Appellant's substantial rights and constituted manifest injustice to require reversal for palpable error". Id. at p. 607. The improper comments herein then cannot be said to have affected Wright's substantial rights either. Reversal now is otherwise unwarranted. See also Baker v. Commonwealth, 320 S.W.3d 699 (Ky. App. 2010)(statement that witness made over 200 cases not reversible).

IV.

SHERRI KLUPS DID NOT STATE IMPROPER OPINION EVIDENCE IN VERBALIZING THE NATURE OF WRIGHT'S ACTIONS.

Wright's fourth allegation of error is the unpreserved claim that Sherri Klups stated improper opinion testimony that he was guilty when she stated that she purchased cocaine from him and Sean Records. (See VR 1 3/11/11 11:42:51; 12:06:00; 1:43:40). He also complains that Ms. Klups gave improper opinion testimony that he was attempting to induce her to purchase the cocaine when he said that they had placed it in the freezer to resolves her concerns for its physical state and that he otherwise monitored the transaction. (See VR 2:10;45 et seq.; 2:12:20). Wright though concedes that there was no objection to any of the testimony and once again to review the claim as palpable error. There though was no palpable error simply because none of the statements were error.

It is not an improper statement of guilt for a witness to identify the defendant in court as the person from whom she had purchased drugs. Identification of the defendant as perpetrator of a crime is an essential element of any criminal prosecution. St. Clair v. Commonwealth. 140 S.W.3d 510 (Ky. 2004). And it especially was not palpable error in this case as there was no dispute that Wright was present at the drug transaction as his counsel acknowledged as much in opening and closing arguments. The only issue in this case was the degree of Wright's involvement in the drug transaction and the witness's other testimony is no more than a verbal expression of the actions she observed–e.g. when she asked to see the cocaine, he left with Records, they talked together when she

heard the cocaine being taken out of the freezer and put in the baggie, they returned together and when she questioned the cocaine's unusual physical texture that it was cross-appellant Wright not Records who responded in explanation. Reversal now on this claim is entirely unwarranted.

V.

THE PENDLETON CIRCUIT COURT DID NOT ERR IN ALLOWING THE JURY TO TAKE AN EXHIBIT INTO THE JURY ROOM FOR FURTHER REVIEW.

Cross-Appellant's last argument is that it was a violation of RCr 9.74 for the court to allow the jury to listen to the recording of the drug buy in the jury room, the issue for which this Court granted the Commonwealth's motion for discretionary review. It was raised only as an objection under that rule and whereas Wright now argues that it was also an objection to the manner in which the recording would be played his words to the trial court was only an objection to sending the exhibit back outside the defendant's presence.(See VR 1 3/11/11 4:52:20).

The drug buy though admitted as Commonwealth's Exhibit 2 without objection and played in full at trial for the jury. (See VR 1 3/11/11 12:08:43 et seq). And while RCr 9.74 does limit giving information after the jury has retired, RCr 9.72 says the jury may take papers and other things received as evidence upon retiring for deliberation. It would have only been a problem if the exhibit was testimonial. See Mc Atee v. Commonwealth, 413 S.W.3d 608 (Ky. 2013). It was otherwise within the judge's discretion then to allow the jury to take the exhibit to be replayed and not error to provide

equipment for its playback. See Springfield v. Commowealth, 410 S.W.2d 589 (Ky. 2013)(in Springfield the appellant made a specific objection under RCr 9.74 to the use of electronic equipment for replay of audio and video of a drug transsaction but the Court disagreed that it was even error finding the transaction non-testimonial); see also Johnson v. Commonwealth, 134 S.W.3d 563 (Ky. 2004).

And even if it was error to send the exhibit back to the jury in the jury room after deliberating had started, it could hardly be reversible error in this case as the court, in fact, had already replayed the audio recording back to the jury in open court in the defendant's presence. No information was submitted to the jury for consideration outside the defendant's presence which had not already been submitted to the jury in the defendant's presence. (See VR 1 3/11/11 3:49:00 et seq.). The error if any is harmless under RCr 9.74 and reversal now thereunder is otherwise unwarranted RCr 9.24.

Wright is otherwise correct that we live in a computer age and it is reasonable to conclude that the vast majority of people know how to open files on a computer. There then would be a risk of the jury in this case accessing files if a computer is used to playback the recording. But a risk is all there is in this case.
Reversal then was not otherwise warranted. Winstead v. Commonwealth, 327 S.W.3d 386 (Ky. 2010).

The record otherwise shows that the jury was directed to simply use the laptop to replay the properly admitted exhibit in a limited way. The Court of Appeals at p. 4) noted that the jury did not take the laptop back to the jury room and the court's instructions were not unfettered access but that the laptop was set up in the jury room during a recess

and the jury was then instructed to insert the disk and play the tape using Windows Media Player. But actually, the Court instructions were even more precise that the computer would be set up and there would be a play button with the self-deprecating rejoinder for someone younger than himself to figure out how to push. (VR 1 3/11/11 4:56:20). The risk under those circumstances is minimal, if not infinitesimal–no one would need to search the computer and the recording could be replayed with one click. And while there then may have been a risk of juror misconduct, a mere risk is not error and as such could not be palpable error. Winstead.

CONCLUSION

For all the foregoing reasons, the Commonwealth respectfully submits that the opinion of the Court of Appeals be reversed and the judgment of the Pendleton Circuit Court be affirmed.

Respectfully submitted,

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