

RENDERED: MAY 15, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001864-MR

SEAN ADAMS

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 11-CR-00213-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Sean Adams appeals from a Madison Circuit Court judgment and sentence entered after a jury convicted him of one count of trafficking in a controlled substance. We affirm the judgment on appeal.

Adams, who is from Detroit, was visiting Kentucky with some members of his family to attend a college graduation. According to Adams, he brought along

\$2,500.00 in cash to purchase a car while he was in Kentucky. Adams and his cousin drove to Richmond, where they noticed a “For Sale” sign on a car at the home of Bobby Samples. Adams paid Samples \$1,200.00 for the car and drove away. He had to return soon afterwards, however, because the car overheated. Samples told Adams he could repair the car if Adams bought the parts. Jeffrey King, who was at Samples’s house, offered to drive Adams to Autozone. Adams and King drove off in King’s black Jeep.

Detective Parker had the Cottage Hearth Inn under surveillance on that day. He testified that he saw a black Jeep pull up to the motel, and a black male he later identified as Sean Adams, step out from the passenger side and go briefly into one of the hotel rooms. Adams returned to the Jeep and it pulled away. Detective Johnson of the Central Kentucky Area Drug Task Force was working with Detective Parker. He saw the black Jeep driving away from the Inn and noticed a green minivan following the Jeep very closely. Detective Johnson observed the Jeep and the minivan pull up to an apartment building and saw King and the driver of the minivan go into an apartment. Adams stayed in the Jeep. King and the minivan driver came out shortly afterwards and King got back into his Jeep and drove away. Detective Johnson saw that King had not put on his seatbelt, so he initiated a traffic stop. After running King’s license, he learned that King had outstanding warrants. Johnson asked King to get out of the Jeep and placed him under arrest. King gave Johnson permission to search his vehicle. The detective also asked Adams to get out of the Jeep. Johnson found two thirty-milligram

Percocet tablets in a piece of torn plastic between the console and the passenger seat. Johnson also noticed that there were pills hidden in a wet paper towel in the cup holder between the passenger and driver's seats. As he picked up the paper towel, some pills fell out of it and some were dissolving. Johnson testified that he recovered thirty-two tablets. There was a Dasani water bottle on the passenger side containing water. Detective Johnson did not note if the bottle was sealed. Adams was charged immediately with first-degree trafficking in a controlled substance. King was charged with non-payment of fines; he was not charged with trafficking until some time later.

Adams and King were tried jointly for trafficking in a controlled substance. At trial, Adams denied having left the Jeep to go into the hotel. He also testified that he noticed the paper towel in the cup holder in King's car, but denied touching or handling it, or the water bottle on the floorboards. He testified that he never saw any pills in the vehicle while he was in it, and he did not know anything about them. Adams had \$1059.00 in cash on his person when he was arrested. Detective Johnson did not recall finding any cash on King.

The jury returned guilty verdicts against King and Adams, and recommended sentences of eight years for both. The trial court entered a judgment in accordance with the jury's verdict, and this appeal by Adams follows.¹

Adams's first argument concerns the definitions provided in the jury instructions. Although the issue is unpreserved, it may be reviewed for palpable

¹ The same panel of this Court has considered King's appeal in Appeal No. 2013-CA-001840-MR.

error because it concerns a defect with the instructions that were actually given.

“[A]ssignments of error in ‘the giving or the failure to give’ an instruction are subject to [Kentucky Rules of Criminal Procedure] RCr 9.54(2)’s bar on appellate review, but unpreserved allegations of defects in the instructions that were given may be accorded palpable error review under RCr 10.26.” *Martin v.*

Commonwealth, 409 S.W.3d 340, 346 (Ky. 2013). RCr 10.26 permits unpreserved error to be reviewed if it affected “the substantial rights” of a defendant and resulted in “manifest injustice.” To rise to the level of palpable error, there must be a “defect in the proceeding” that is “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

The jury instruction on first-degree trafficking in a controlled substance required the jury to find Adams guilty if he “possessed Oxycodone with the intent to traffic in said Oxycodone[.]” The term “traffic” was defined in the instructions as “to manufacture, distribute, dispense, sell, transfer, or possession with the intent to sell a controlled substance.” “Transfer” was defined as “to dispose of a controlled substance without consideration and in furtherance of commercial distribution.”

Adams contends that the definition of “traffic” contains two mutually exclusive concepts: “sell” involves money or consideration, whereas “transfer” does not. Consequently, he argues, there is no way to ascertain whether he received a unanimous verdict because the jurors could have found he possessed the pills with either the intent to transfer or the intent to sell.

“[A] defendant is denied a unanimous verdict when the jury is presented with alternate theories of guilt in the instructions, and one or more of those theories, but not all, are unsupported by the evidence.” *Commonwealth v. Whitmore*, 92 S.W.3d 76, 81 (Ky. 2002). “The requirement of unanimity is satisfied if the evidence supported conviction under both theories. This is because, no matter which theory they accepted, all the jurors convicted under a theory supported by the evidence and all the jurors convicted the defendant of the same offense.” *Kingrey v. Commonwealth*, 396 S.W.3d 824, 830 (Ky. 2013) (footnotes and internal quotation marks omitted). Adams argues that there was insufficient evidence of “transfer” to allow for a conviction under that theory of the case. We disagree. As Adams himself acknowledges, the jurors could have believed that he “transferred” the pills to King in furtherance of commercial distribution and that the cash found on Adams’s person was the change from his purchase of the car from Samples. Adams contends that the fact that the greatest number of pills was found in the cup holder in the center console of the Jeep undermines this finding. But the location of the pills in an area accessible to both the driver and his passenger does not negate the possibility that they were transferred by Adams to King in furtherance of commercial distribution. We conclude that the inclusion of the words “transfer” and “sell” in the definition of “traffic” in the jury instructions does not rise to the level of palpable error.

Next, Adams argues that the trial court erroneously excluded evidence regarding his codefendant King which would have assisted his own case.

According to Adams, King was not immediately charged with trafficking at the scene of the arrest, as Adams was, because he was going to work as a confidential informant to assist the police in finding drug dealers. Adams's counsel attempted to elicit testimony from Detective Johnson to this effect, but King's attorney objected, telling the trial court that there was no way he could defend his client if this evidence was admitted. The trial court sustained the objection on the grounds that the evidence was simply too prejudicial to King to be admitted.

Adams contends that the harm to his case was further compounded by King's counsel's repeated suggestions to the jury that King was not charged that day because the police believed that the pills belonged to Adams. Adams did not object to these remarks, and this aspect of the issue is consequently unpreserved. Adams argues that he was prevented from rebutting these allegations because he could not question the police officers about the other reason King may not have been charged – his purported agreement to help the police as a confidential informant.

When a trial court excludes evidence, its decision is reviewed for an abuse of discretion, the test for which is “whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Clutter v. Commonwealth*, 364 S.W.3d 135, 138 (Ky. 2012) (quoting *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). “The balancing of the probative value of . . . evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge.” *Commonwealth v.*

English, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). “[P]reserved evidentiary and other non-constitutional errors will be deemed harmless . . . if we can say with fair assurance that the judgment was not substantially swayed by the error.” *Ordway v. Commonwealth*, 391 S.W.3d 762, 774 (Ky. 2013) (quoting *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010)).

Adams argues that if the jury had heard that King was not arrested immediately for trafficking because he was going to serve as a confidential informant, not because the police believed Adams was the only guilty party, there is a substantial possibility that the verdict as to Adams would have been different. The Commonwealth contends that King’s post-arrest actions as a confidential informant were not material to the guilt or innocence of either defendant and that the question to Detective Johnson was an attempt to impeach King on a collateral matter.

The trial court did not abuse its discretion in concluding that the prejudicial effect of Detective Johnson’s potential testimony on King’s case outweighed the probative value to Adams’s case. The suggestion that the police believed King could assist them in catching drug dealers would have been extremely damaging to, if not dispositive of, his case. In any event, the jury knew that King was eventually charged with trafficking, and proceeded to convict him of that charge, which suggests that King’s counsel’s subsequent comments implying that the police thought the pills belonged to Adams did not rise to the level of palpable error.

Next, Adams requests palpable error review of an alleged instance of prosecutorial misconduct. The jury learned, from defense counsel's opening statement and from the testimony of Adams's girlfriend and his mother, that Adams had been shot on two occasions: once as a teenager, and once, more recently, while leaving a nightclub in downtown Detroit. When Adams was cross-examined by King's counsel, he testified that he was a bystander at the nightclub shooting. He explained that he thought it was gang-related, but he just happened to go outside when the shots were fired and he was hit in the leg when he tried to run back into the building. When the Commonwealth's attorney cross-examined Adams, he asked if the shootings were drug-related. Adams replied, "No sir." The Commonwealth's attorney then asked, "A lot of drugs were in the club, weren't there?" Adams replied, "No, just alcohol, people drinking. I don't know about drugs." The Commonwealth's attorney asked, "You didn't know that people were taking drugs around this club?" Adams replied, "No, sir."

Adams argues that the prosecutor was allowed to insinuate, without any evidentiary basis, that he was connected to the drug trade through his involvement in drug-related shootings. Although the question was prejudicial to Adams, it did not rise to the level of palpable error which must so seriously affect "the fairness, integrity or public reputation of the proceeding as to be shocking or jurisprudentially intolerable." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (citing *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

Finally, Adams argues that he suffered undue prejudice when co-defendant's counsel questioned him about the truthfulness of Detective Parker's testimony. He requests palpable error review.

When cross-examining Adams, King's counsel asked him to acknowledge that Detective Parker identified him as the man he saw getting out of the black Jeep and going into the motel. King's counsel asked Adams to acknowledge that he heard Parker swear an oath to tell the truth in his testimony, and then asked, "So you're saying he's lying, is that right?" Adams replied, "Correct." King's attorney inquired if Adams knew any reason in the world why Parker would lie about what he saw, and Adams replied, "I have no idea."

Adams argues that this line of questioning was a clear violation of the general rule that "[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." *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). In *Moss*, the prosecutor badgered the defendant into testifying that a police officer, who was the state's main witness, was lying. The Kentucky Supreme Court described the questioning as improper, but refused to characterize it as palpable error. Apart from the fact that the questioning in this case was not conducted by the prosecutor but by co-defendant's counsel, the tenor of the questioning was less egregious than that described in *Moss*; under the precedent set in that case, therefore, it did not rise to the level of palpable error.

The judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Molly Mattingly
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky