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# Commonwealth of Kentucky

## Court of Appeals

NO. 2014-CA-001017-MR

WILLIE PALMER

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE FRED A. STINE, V., JUDGE  
ACTION NO. 12-CR-00950

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND J. LAMBERT,  
JUDGES.

LAMBERT, J., JUDGE: Willie G. Palmer has directly appealed from the judgment of the Campbell Circuit Court convicting him of second-degree assault and sentencing him to the maximum sentence of ten-years' imprisonment following a jury trial. Palmer contends that the trial court improperly permitted the Commonwealth to introduce evidence during the guilt phase that he had two

girlfriends as well as improper evidence of prior amended or dismissed charges and convictions in the penalty phase. We have carefully considered the record and the parties' arguments, and we find no merit in Palmer's arguments. Therefore, we affirm his conviction and sentence.

On December 20, 2012, the Campbell County grand jury indicted Palmer for second-degree assault pursuant to Kentucky Revised Statutes (KRS) 508.020 for intentionally causing serious physical injury to another person. The alleged assault took place on October 12, 2012, at a party at a home in Newport, Kentucky. Palmer and the victim, Jay Malarkey, were involved in a dispute when Palmer struck him on the left side of his face. Jay fell through a glass door, breaking the glass and hitting his head on the floor. Jay was hospitalized for the injuries he incurred. Palmer contended that he hit Jay across the face with an open palm to defend his girlfriend, Emily Schoonover, and that Jay fell because he was drunk and injured himself.

The matter proceeded to trial in September 2013. The jury was instructed on second-degree assault, fourth-degree assault, and the defense of protection of another. The jury returned a verdict of guilty on the second-degree assault charge. The matter proceeded to the sentencing phase, where the jury was instructed it could fix his punishment between five and ten years. The jury recommended a ten-year sentence as Palmer's punishment. On October 21, 2013, the trial court entered a judgment and sentence pursuant to the jury's verdict and recommendation. An amended judgment and sentence was entered on November

15, 2013, sentencing Palmer to ten-years' imprisonment, ordering him to pay \$2,976.76 in restitution to the victim and to pay \$155.00 in court costs within 180 days from his release from custody. Palmer's motion for shock probation was denied in April 2014. Palmer filed a motion for belated appeal on June 25, 2014, and following an evidentiary hearing before the trial court, a three-judge panel of this Court granted Palmer's motion on March 13, 2015.

On appeal, Palmer argues that the trial court abused its discretion in permitting the Commonwealth to improperly admit Kentucky Rules of Evidence (KRE) 404(b) evidence of other crimes, wrongs, or acts that he asserts reflected badly on his character during the guilt phase of his trial. He also seeks relief under the palpable error rule, Kentucky Rules of Criminal Procedure (RCr) 10.26, for the admission of improper evidence of prior charges and convictions during the penalty phase.

For his first argument, Palmer contends that the Commonwealth was permitted to introduce evidence in contravention of KRE 404(b) concerning his relationship with two women at the same time that he claims was both highly prejudicial and irrelevant. A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion:

Trial courts must apply the rules of evidence to control the trial and to avoid the injection of collateral and overly prejudicial matters. To this end, the trial courts are given the power to determine the admissibility of all evidence and are given substantial leeway—sound discretion—in making those determinations. For this reason, an appellate court will review a trial court's

evidentiary rulings for an abuse of discretion, and will determine that a trial court acted within that discretion absent a showing that its decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

*Commonwealth v. Bell*, 400 S.W.3d 278, 283 (Ky. 2013).

KRE 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Generally, “[a]ll relevant evidence is admissible,” unless otherwise provided, and “[e]vidence which is not relevant is not admissible.” KRE 402. However, KRE 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.”

KRE 404 governs the introduction of character evidence and evidence of other crimes. KRE 404(b) specifically addresses evidence of other crimes, wrongs, or actions, and provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

The Supreme Court cautioned that:

KRE 404(b) is “exclusionary in nature,” and “any exceptions to the general rule that evidence of prior bad acts is inadmissible should be ‘closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.’” *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007) (quoting *O’Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982)).

*Graves v. Commonwealth*, 384 S.W.3d 144, 147-48 (Ky. 2012). “Showing the evidence comes within KRE 404(b) is only the first step in deciding the admissibility of the evidence. Additionally, the trial court must weigh the evidence's probativeness against the danger of undue prejudice.” *Bell*, 400 S.W.3d at 283, citing *Bell v. Commonwealth*, 875 S.W.2d 882, 889–90 (Ky. 1994).

“Undue prejudice is most often found when there is a risk that the evidence ‘might produce a decision grounded in emotion rather than reason’ or where the evidence ‘might be used for an improper purpose.’” *Wilson v. Commonwealth*, 438 S.W.3d 345, 350 (Ky. 2014), *citing* Kentucky Evidence Law at § 2.15[3][b].

The Commonwealth introduced testimony at trial from several witnesses concerning the fact that Palmer had two girlfriends at the same time, one with whom he lived (Tasha Popp) and the other girlfriend (Emily) lived in the same apartment complex. In addition, the witnesses testified that Palmer had fathered children with both women. The witnesses included the victim’s sister,

Debbie Malarkey, who lived in the house where the party took place. Debbie, along with another brother, James, her daughter, Michelle, and her son, had previously lived at the same apartment complex where Palmer, Tasha, and Emily lived, and they all knew each other. Michelle, James, and Debbie all testified about Palmer's relationships with Tasha and Emily before being asked about the events of the night in question. In addition, both Emily and Tasha were questioned by the Commonwealth about their respective relationships with Palmer. Tasha described Palmer as her fiancé, and Emily, who had accompanied Palmer to the party that night, testified that she would do anything in her power to help Palmer and had his name tattooed over her heart. Palmer argued that this testimony was only meant to place him in a bad light with the jury and had nothing to do with whether he assaulted the victim. Therefore, Palmer argues that it should not have been admitted.

The Commonwealth contends that this testimony was relevant to establish bias and explain admissions Palmer made to Tasha and conversations he had with her regarding Emily's version of what happened over a recorded, jail-house telephone call. Palmer's defense at trial was that he had assaulted the victim to defend his girlfriend, Emily, making the credibility of the witnesses testifying in support of this defense relevant. In *Wilson, supra*, the Supreme Court of Kentucky addressed the jury's role in determining the credibility of witnesses:

[T]he determination of witness credibility is the jury's responsibility. *Tuttle v. Perry*, 82 S.W.3d 920 (Ky. 2002). To that end, KRE 104(e) permits a party "to

introduce before the jury evidence relevant to weight or credibility, including evidence of bias, interest, or prejudice.” This Court has held that because witness credibility is “always at issue ... relevant evidence which affects credibility should not be excluded.”

*Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). And, of course, our rules expressly allow a party to impeach the credibility of that party's own witness. KRE 607.

*Wilson*, 438 S.W.3d at 349.

Palmer agrees that evidence of bias is certainly admissible, but he contests the sheer amount of testimony introduced concerning his relationships with Tasha and Emily, citing to *Wilson, supra*. Had the relationships between Palmer, Tasha, and Emily not been intertwined in this case, we might agree with Palmer. But here, we must agree with the Commonwealth that this testimony was necessary and relevant to contest Palmer's defense and to establish witness bias, in particular Emily's bias in his favor. Accordingly, we hold that the trial court did not abuse its considerable discretion in permitting the admission of evidence concerning Palmer's relationships with Tasha and Emily.

Next, Palmer contends that the trial court abused its discretion in permitting the introduction of evidence of prior charges. Because this issue is unpreserved, Palmer requests that this Court review it pursuant to the palpable error rule. RCr 10.26. In *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003), the Supreme Court explained palpable error review as follows: “A palpable error is one [that] ‘affects the substantial rights of a party’ and will result in ‘manifest injustice’ if not considered by the court, and ‘[w]hat it really boils down to is that if

upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.” (Footnotes omitted).

During the penalty phase, the Commonwealth introduced documents from a prior criminal action in Kenton Circuit Court (Case No. 99-CR-378) showing that Palmer had been originally charged with second-degree manslaughter and for being a second-degree persistent felony offender (PFO II). The indictment includes a factual recitation of the alleged criminal behavior, including the victim’s name, and the judgment reflects that the manslaughter charge was amended down to reckless homicide and the PFO II charge was dismissed. The other exhibit included documents from another criminal action in Kenton Circuit Court (Case No. 95-CR-479-2), for which Palmer was charged with receiving stolen property and for which he entered a guilty plea.

Palmer argues that the Commonwealth is limited by KRS 532.055(2)(a) in what evidence it may introduce during the guilt phase:

Evidence may be offered by the Commonwealth relevant to sentencing including:

1. Minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor;
2. The nature of prior offenses for which he was convicted[.]

The Supreme Court of Kentucky has made it clear that:



Nothing in KRS 532.055(2)(a) permits a jury to hear evidence during the penalty phase of prior charges that have been amended—it is only permitted to hear evidence of “the nature of the prior offenses for which [the defendant] was *convicted*.” [KRS 532.055(2)(a)(2)] (emphasis added). And we have recognized that “it is also well settled that the Commonwealth cannot introduce evidence of charges that have been dismissed or set aside.” *Cook v. Commonwealth*, 129 S.W.3d 351, 365 (Ky. 2004) (citations omitted)[.]

*Blane v. Commonwealth*, 364 S.W.3d 140, 152 (Ky. 2012), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015). And in *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011), the Supreme Court held and instructed:

[W]e hold today that the evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed. We suggest this be done either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself. Said recitation for the jury's benefit, we feel, is best left to the judge. The description of the elements of the prior offense may need to be customized to fit the particulars of the crime, i.e., the burglary was of a building as opposed to a dwelling. The trial court should avoid identifiers, such as naming of victims, which might trigger memories of jurors who may—especially in rural areas—have prior knowledge about the crimes.

Palmer’s argument is this: The jury in this case was provided with information concerning charges that had been amended or dismissed as well as details of the allegation, which, coupled with the maximum sentence he received, established prejudice and manifest injustice.

In response, the Commonwealth contends that Palmer's reliance upon *Blane* is misplaced because it did not elicit testimony from any witnesses regarding either the original charge or the underlying facts of the charge. In support of this argument, the Commonwealth relies upon the holding in *Chavies v. Commonwealth*, 354 S.W.3d 103 (Ky. 2011), in which the Supreme Court found the admission of an indictment showing charges that were dismissed and amended to be erroneous, but the error did not reach the level of palpable error because "the dismissed and amended offenses were never pointed out to the jury by the trial judge, the Commonwealth, or the Commonwealth's witness." *Id.* at 115.

It is more likely . . . that the jury's recommendation of fifty years' imprisonment for manufacturing methamphetamine and twenty years' imprisonment for receipt of stolen property was the result of Chavies's multiple prior convictions, including second-degree burglary, theft of a firearm, criminal mischief, theft of property valued at \$300 or more, first-degree robbery, and attempted kidnapping of a minor. So we cannot find that the erroneous introduction of prior amended and dismissed charges seriously affected the fairness of the proceeding.

*Id.* at 115-16. In the present case, the Commonwealth asserts that because it did not elicit testimony from its witness about the original charges or the underlying facts or mention this in its closing argument, Palmer cannot establish palpable error.

We agree with the Commonwealth that while the introduction of the documents related to the manslaughter and PFO II indictment was in error, this did

not reach the level of manifest injustice necessitating reversal under the palpable error rule.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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