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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001440-MR

JIM ALLEN — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HON. KEN M. HOWARD, JUDGE
ACTION NO. 16-CR-00407

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND STUMBO, JUDGES.

STUMBO, JUDGE: Jim Allen appeals from the Hardin Circuit Court's judgment and sentence of nineteen years' imprisonment, entered September 1, 2016, and as amended September 12, 2016. Allen was convicted at jury trial on charges of first-degree promoting contraband,[1] first-degree possession of a controlled substance,[2]

[1] Kentucky Revised Statutes (KRS) 520.050, a Class D felony.
[2] KRS 218A.1415, a Class D felony punishable by up to three years' imprisonment.

and being a first-degree persistent felony offender.[3] After careful review, we affirm.

On the night of April 5, 2016, a motorist flagged down Deputy Steven Witte of the Hardin County Sheriff's Office because another vehicle, driven by Allen, had been following him. After informing the deputy about the matter, the motorist then departed without identifying himself. Deputy Witte began following Allen, and he shortly thereafter discovered the vehicle's license plate had expired. As a result of the traffic violation, Deputy Witte implemented a routine stop of the vehicle. Deputy Witte would later testify that Allen was cooperative during this process and gave no indication of being under the influence. Allen pulled the vehicle over properly when stopped and had no difficulty providing the deputy with his name, date of birth and social security number. Deputy Witte ran the information through his computer, discovered Allen had outstanding bench warrants, and placed him under arrest. During the pat down incident to arrest, Deputy Witte asked Allen if he had any drugs or weapons on his person. Allen denied carrying any contraband.

Deputy Witte transported Allen to the Hardin County Detention Center, where Sergeant Damon Lasley began the booking procedure. Sergeant Lasley smelled marijuana on Allen and asked if he had any drugs on his person. The sergeant would later testify he gave his usual speech, warning Allen that if he

[3] KRS 532.080.

did not turn over drugs or weapons, he would face a charge of promoting contraband if such items were discovered on him in the detention center dressing room. Allen stated he had smoked some marijuana earlier in the evening, but he currently did not have any on him.

When Sergeant Lasley took him into the dressing room, Allen became nervous and started sweating profusely while getting undressed. Allen began to have trouble breathing, while repeatedly saying he was "just trying to accept it." Sergeant Lasley then contacted a nurse on duty to evaluate Allen before admitting him to the jail. The nurse took Allen's vital signs and asked if he had taken any drugs. Allen repeated his earlier admission that he had smoked marijuana, and added that the marijuana may have been laced with another substance. Allen then lay down on the dressing bench. When he did so, Sergeant Lasley noticed the edge of a plastic bag protruding from Allen's underpants. The plastic bag was later found to contain a quantity of marijuana. While the sergeant was recovering the plastic bag, Allen produced a small vial and threw it to the floor. Inside the vial were two small plastic bags, one of which contained methamphetamine residue. Because Allen appeared to be in some continuing distress, medical staff telephoned for an ambulance to transport him to the hospital.

The Hardin County grand jury thereafter indicted Allen on eight counts stemming from this incident: (1) tampering with physical evidence; (2) first-degree promoting contraband; (3) first-degree possession of a controlled

substance; (4) possession of marijuana; (5) no or expired registration plates; (6) failure to maintain insurance; (7) operating on a suspended or revoked operator's license; and (8) being a first-degree persistent felony offender (PFO). At trial, Deputy Witte and Sergeant Lasley testified for the Commonwealth regarding the aforementioned facts.

Allen did not contest most of the Commonwealth's facts, instead choosing to focus on an intoxication defense. In his testimony, Allen admitted to possessing the marijuana and the vial containing the methamphetamine residue. In addition, he admitted to being a drug addict. However, Allen also testified that he did not intend to bring the items into the detention center, stating he had been awake for several days on a methamphetamine binge immediately prior to his arrest. In a key difference between his testimony and that offered by the Commonwealth witnesses, Allen testified that neither Deputy Witte nor Sergeant Lasley asked if he were in possession of contraband before he entered the detention center dressing room. He further claimed he attempted to turn over the contraband while undressing, but he then suffered his medical emergency.

The jury found Allen guilty of first-degree promoting contraband, possession of a controlled substance, and being a first-degree PFO. The jury then recommended a term of three years for the possession charge, and nineteen years for the promotion of contraband charge as enhanced by the PFO. On September 1, 2016, the circuit court entered its final judgment in accord with the jury's

recommendation, sentencing Allen to a concurrent term of nineteen years' imprisonment. This appeal follows.

Allen presents three issues on appeal, only the first of which is preserved. In his first issue, Allen contends the circuit court erred by denying his request for a jury instruction on voluntary intoxication. Because promotion of contraband requires a "knowing" mental state, he argues the voluntary intoxication instruction would have permitted the jury to find he did not have that *mens rea* for the offense. "[V]oluntary intoxication is a defense to a criminal charge if it 'negatives the existence of an element of the offense.'" *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007) (quoting KRS 501.080(1)). Allen asserts the evidence justified an intoxication instruction: he had been awake for multiple days while taking methamphetamine, he could not remember portions of his arrest, and he suffered a medical episode as a consequence of his methamphetamine binge.

"In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Hunt v. Commonwealth*, 304 S.W.3d 15, 30 (Ky. 2009) (citation and internal quotation marks omitted). However, "[t]he entitlement to an affirmative instruction is dependant [sic] upon the introduction of some evidence justifying a reasonable inference of the existence of a defense." *Fredline*, 241 S.W.3d at 797

(citation and internal quotation marks omitted). A trial court's decision on whether to give a particular instruction is reviewed for abuse of discretion. *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In this case, the circuit court denied the requested intoxication instruction, finding there was insufficient evidence to show Allen was intoxicated to the point where this instruction would be justified. We agree with the circuit court. "[T]he [voluntary intoxication] defense is 'justified only where there is evidence reasonably sufficient to prove that the defendant was so drunk that he did not know what he was doing.'" *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010) (quoting *Fredline*, 241 S.W.3d at 797) (internal quotation marks omitted). "[I]ntoxication is a defense to an offense only if it prevents a person from forming the requisite intent, and mere drunkenness will not raise this defense." *Reynolds v. Commonwealth*, 113 S.W.3d 647, 652 (Ky. App. 2003) (citation omitted).

Here, the circuit court found Allen was capable of performing actions which were inconsistent with the level of intoxication required for the instruction. According to testimony from Deputy Witte, Allen was able to drive normally. He was also able to pull his vehicle over to the curb appropriately, in response to the flashing lights from the deputy's cruiser. Even when a defendant consumes

intoxicants before commission of the offense, an intoxication instruction is not justified "where evidence showed that defendant was still capable of driving." *Harris*, 313 S.W.3d at 51 (citing *Stanford v. Commonwealth*, 793 S.W.2d 112 (Ky. 1990)). Furthermore, Deputy Witte testified he did not believe Allen to be impaired at any point during his interaction with him. Based on the facts relied upon by the circuit court, we cannot find the court abused its discretion in denying the voluntary intoxication instruction.

Allen's second and third arguments are both unpreserved, and so he asks for palpable error review under Kentucky Rule of Criminal Procedure (RCr) 10.26:

> 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 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) (citations and internal quotation marks omitted).

In Allen's second argument, he contends the circuit court improperly permitted the Commonwealth to question him as to whether the testimony of the law enforcement witnesses was dishonest. During the Commonwealth's cross-

examination, Allen was repeatedly asked about one of his few points of disagreement with the Commonwealth: whether Deputy Witte and Sergeant Lasley had asked him if he had contraband before he entered the detention center dressing room. At one point, the Commonwealth asked, "So you're saying that Sergeant Lasley's lying?" Allen correctly asserts that such questioning of a witness is completely improper:

> 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. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force.

Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997).

Although the Commonwealth's questioning was certainly erroneous, the Kentucky Supreme Court notes it "has never found a *Moss* violation to rise to palpable error under RCr 10.26." *Parker v. Commonwealth*, 482 S.W.3d 394, 406 (Ky. 2016) (citing *Luna v. Commonwealth*, 460 S.W.3d 851 (Ky. 2015)). The Commonwealth's questioning of Allen was certainly of the "blunt force" variety noted with disapproval in *Moss*, and we do not condone such questioning; however, this error does not rise to the level of manifest injustice, showing "[a] probability of a different result or error so fundamental as to threaten a defendant's

entitlement to due process of law." *Young*, 426 S.W.3d at 584. Accordingly, we decline to find palpable error on this issue.

For Allen's third and final argument, he contends the circuit court improperly permitted the Commonwealth to elicit opinion testimony from its witness during the sentencing phase of trial. The Commonwealth questioned Probation and Parole Officer Stephanie Wood as follows:

> Commonwealth: Alright. Now during your time doing this as a probation and parole officer, he has . . . five felony convictions since 2013?
>
> Officer Wood: Correct.
>
> Commonwealth: Have you ever seen another individual that had five prior felony convictions in the two- to three-year period?
>
> Officer Wood: That is pretty rare.
>
> Commonwealth: Pretty rare.

Insofar as we have the ability to determine, there is no exact guidance in our case law as to whether a probation and parole officer may offer opinion testimony on whether a defendant has an excessive number of violations. The Kentucky Supreme Court has previously held, in the context of a parole officer's testimony during the sentencing phase, that "'[t]he use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material.'" *Geary v. Commonwealth*, 490 S.W.3d 354, 360 (Ky. 2016) (quoting *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005)). The Kentucky

Supreme Court has also found such "incorrect or false" material testimony to be palpable error. *See Robinson*, *supra*. Furthermore,

> "the evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011) (discussing KRS 532.055(2)(a): "Evidence may be offered by the Commonwealth relevant to sentencing including . . . prior convictions of the defendant, both felony and misdemeanor [and t]he nature of prior offenses for which he was convicted.").

Baumia v. Commonwealth, 402 S.W.3d 530, 546 (Ky. 2013).

Under the circumstances presented here, we hold the elicited opinion testimony was improper, but did not rise to the level of palpable error. Officer Wood's opinion on Allen's number of convictions was of dubious value and should not have been permitted, as it exceeded the bounds of what the Commonwealth is permitted to offer under *Mullikan*. Nevertheless, the opinion was not explicitly "incorrect or false" material testimony under *Robinson*. "For an error to be palpable, it must . . . 'involve prejudice more egregious than that occurring in reversible error[.]'" *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (footnote omitted). In addition, "[a]n error is palpable only if it is shocking or jurisprudentially intolerable." *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (footnote and internal quotation marks omitted). Because the improper opinion was a small part of the overall evidence offered by the

Commonwealth, and it was not "incorrect or false" material testimony, we decline to find palpable error.

For the foregoing reasons, we affirm the Hardin Circuit Court.

ALL CONCUR.

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