

RENDERED: JANUARY 12, 2007; 10:00 A.M.

ORDERED NOT PUBLISHED BY SUPREME COURT: AUGUST 15, 2007
(FILE NO. 2007-SC-0111-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000411-MR

RICKIE LEE CLAY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
INDICTMENT NO. 05-CR-01277

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER¹ AND DIXON, JUDGES; PAISLEY,² SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Rickie Lee Clay appeals from a judgment of conviction entered by the Fayette Circuit Court. After a jury trial, Clay was convicted of solicitation of prostitution, possession of drug paraphernalia, trafficking in a controlled substance in the first degree, and being a persistent felony offender in the first degree. On appeal, Clay argues that the

¹ Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Commonwealth failed to present sufficient evidence to sustain a conviction for trafficking; that the jury instruction for trafficking presented multiple theories of guilt that were not supported by the evidence, thereby violating Clay's right to a unanimous verdict, and that the Commonwealth solicited inadmissible opinion testimony. We affirm.

On August 5, 2005, Stacy Shannon, an officer with the Lexington Police Department, along with other Lexington police officers, was conducting an undercover operation targeting individuals who solicit prostitutes. To carry out the clandestine operation, Officer Shannon posed as a prostitute and stationed herself on a street corner in an area of Lexington known for prostitution. While Shannon played the role of prostitute, her fellow officers monitored and recorded her conversations via a radio transmitter hidden on her person. A few minutes after 9:00 p.m., Officer Shannon observed a man drive by and make eye contact with her. This man was Rickie Lee Clay. Officer Shannon used a hand gesture to let Clay know that he should return, and Clay did so, pulling his car into a parking lot across the street from Officer Shannon. Clay then exited his vehicle and went to a pay phone. At that time, Officer Shannon approached Clay, and she and Clay had a brief conversation.

During the conversation, Officer Shannon inquired as to what Clay wanted, and he stated that he liked oral sex. Clay then asked the officer if she smoked crack, and she replied that

she did. Clay told the officer that he had some crack, that he had a hotel room, and that he wanted to have sexual intercourse and oral sex. The officer asked how much he had, and Clay replied that he had ten dollars. At this point, Officer Shannon signaled the other officers to arrest Clay.

After the officers arrested Clay, they searched him and his vehicle pursuant to the arrest. During the search, the officers found 3.12 grams of crack cocaine on Clay's person. The crack consisted of eight pieces or "rocks". Six of the rocks had been individually packaged in a plastic bag. Two of the rocks had been placed in one plastic bag. Inside Clay's car, the police found a used crack pipe.

On October 3, 2005, a Fayette County grand jury indicted and charged Clay with trafficking in a controlled substance in the first degree; possession of drug paraphernalia; prostitution (this charge was later amended to solicitation of prostitution); and being a persistent felony offender in the first degree. On January 19, 2006, Clay proceeded to trial. The Commonwealth presented several police officers as witnesses including Officer Shannon and Detective Ford. Officer Shannon testified to the facts previously set forth.

After Officer Shannon had testified, Detective Ford, who was not present when the officers arrested Clay, testified in general about the methodology used by drug dealers who traffic in crack. According to the detective, when the police suspect a person of being a crack dealer, they look for certain

indicators associated with trafficking, such as: scales used to weigh crack for sale; drug paraphernalia such as crack pipes; quantities of crack that would be greater than what one person would personally use; and, most importantly, whether the crack had been packaged for sale. With great detail, Detective Ford explained that crack dealers usually cut a large piece of crack into several smaller pieces or rocks with each rock weighing between 0.2 and 0.5 grams. Then, the detective explained, a crack dealer will package each smaller, individual rock in a plastic bag, a cellophane wrapper, or in paper. Detective Ford explained that if the police find a crack pipe, then the suspect is most certainly a crack user and that if the police find crack but do not find drug paraphernalia, then the suspect is most likely a drug dealer. However, the detective explained that if the police find crack and drug paraphernalia, it does not preclude the suspect from being a crack dealer since many crack dealers are also users. In such a situation, the most important factor, according to the detective, is whether the crack has been packaged for sale. Later, Detective Ford examined the crack the police had confiscated from Clay, and he stated that the eight rocks of crack were approximately the same size and weight and had been packaged for sale. The detective further testified that 3.12 grams of crack were probably more than one person could consume in one evening, although one person could possibly consume that much crack in one or two days.

After the Commonwealth presented its case-in-chief, Clay took the stand in his own defense. Clay admitted that he asked Officer Shannon if she smoked crack and that he and the officer had a conversation regarding sex. However, he denied that he offered to exchange either money or crack for sex. According to Clay's testimony, prior to his encounter with Officer Shannon, he had merely been trying to locate some of his friends, and he did not pull into the parking lot in response to Shannon's hand gesture. Instead, he pulled into the parking lot to call his friends but was unable to contact them. Clay later testified that he pulled into the parking lot to wait for his friends. In addition, Clay insisted that he had bought the 3.12 grams of crack for his own personal use and that he had intended to share it with his friends. After the close of the evidence, the jury convicted Clay on all counts, and the trial court sentenced Clay to ten years in prison. Now, Clay appeals his conviction to this Court.

Clay insists that the trial court erred when it denied his motion for directed verdict regarding the trafficking charge. According to Clay, Officer Shannon never testified that Clay offered to exchange crack for sex; thus, Clay reasons that Officer Shannon's testimony does not prove that he possessed the crack with the intent to traffic in it. Regarding Detective Ford's testimony, Clay states that the detective's testimony was both stupid and meaningless; thus, it was not sufficient to support his conviction for trafficking.

A leading case addressing directed verdicts in criminal cases is Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). According to Benham, when considering a motion for directed verdict, the trial court must draw from the evidence all fair and reasonable inferences in favor of the Commonwealth. Id. at 187. Additionally, the trial court is prohibited from granting a directed verdict if the evidence is sufficient to induce a reasonable juror to believe that the defendant is guilty beyond a reasonable doubt. Id. Also, the trial court must assume that the Commonwealth's evidence is true, although it must leave questions of credibility and weight for the jury. Id. When we review the trial court's decision, we must consider, given the totality of the evidence, whether it would be clearly unreasonable for a jury to find guilt. Id.

When considering Officer Shannon's testimony, a juror could logically and reasonably infer from the conversation between Clay and the officer that Clay was offering to exchange both crack and money for sex. In addition, when considering Detective Ford's testimony and the physical evidence that Clay possessed several individually packaged rocks of crack, a juror could logically and reasonably infer that Clay had packaged the crack in order to sell it and that he possessed the crack with the intent to do so. Despite Clay's insistence to the contrary, the Commonwealth presented ample evidence to support Clay's guilt.

While ample evidence existed to support a conviction under one of the Commonwealth's theories of trafficking, Clay argues that he was denied a unanimous verdict since the instruction regarding trafficking included multiple theories, and at least one of those theories was not supported by the evidence.

To understand Clay's argument, we must first look at the instruction that the trial court submitted to the jury regarding trafficking in a controlled substance in the first degree. The instruction read:

You will find the Defendant guilty of First-Degree Trafficking in a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about 5th [sic] day of August 2005 and before the finding of the Indictment herein, he had in his possession a quantity of cocaine;

B. That he knew the substance so possessed by him was cocaine;

AND

C. That he had the cocaine in his possession with the intent of distributing, dispensing, and/or selling it to another person.

Pursuant to the instructions, the trial court defined "traffic" as "[m]eans to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." The trial court also defined "dispense" as "[m]eans to deliver a controlled substance to an ultimate user."

Clay points out that Kentucky Revised Statutes (KRS) 218A.010(8) defines "dispense" as "means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the packaging, labeling, or compounding necessary to prepare the substance for that delivery." In light of the correct definition for "dispense", Clay argues that "dispensing" a controlled substance refers to dispensing a prescription drug by a medical practitioner which has nothing to do with crack cocaine or the trafficking in crack. Clay reasons that the Commonwealth presented no evidence that he possessed cocaine with the intent to dispense it.

When the Commonwealth presents multiple theories of guilt in one instruction, the evidence must support all of the various theories. If one or more of the theories is not supported by the evidence, then the criminal defendant's right to a unanimous verdict has been violated. Commonwealth v. Whitmore, 92 S.W.3d 76 (Ky. 2002). Clay argues that the jury instruction in this case clearly violated his right to a unanimous verdict under Sections 2, 7, and 11 of the Kentucky Constitution, under Kentucky Rules of Criminal Procedure (RCr) 9.82(1), and under the Federal Constitution.

Clay admits that he did not preserve this assignment of error for review, but argues that, pursuant to RCr 10.26, it rises to the level of palpable error. And, relying on Burnett v. Commonwealth, 31 S.W.3d 878 (Ky. 2000), Clay argues that

denial of a unanimous verdict is not subject to harmless error analysis. Thus, Clay requests this Court to vacate his conviction.

Since Clay failed to preserve this issue for appeal, the threshold question becomes: does it rise to the level of palpable error? The Kentucky Supreme Court defines palpable error as an irregularity which affects a party's substantial rights and, if the appellate court does not address the irregularity, it will result in a manifest injustice to the party. Schoenbachler v. Commonwealth, 95 S.W.3d 830, 837 (Ky. 2003). In other words, after considering the whole case, if the appellate court does not believe that there is a substantial possibility that the result would have been any different, then the irregularity will be deemed non-prejudicial. Id.

In resolving the question of palpable error, we find the holding in the recent case Commonwealth v. Rodefer, 189 S.W.3d 550 (Ky. 2006) to be dispositive. In Rodefer, the defendant was charged with trafficking in a controlled substance in the first degree, cocaine. Id. at 551. At the subsequent trial, the trial court submitted the following instruction to the jury:

You will find the Defendant guilty of First-Degree Trafficking in a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following

A. That in this county on or about July 3, 2002 and before the finding of the

Indictment herein, he had in his possession a quantity of cocaine;

AND

B. That he knew the substance so possessed by him was cocaine;

AND

C. That he had the cocaine in his possession wit[h] the intent to sell, *transfer*, dispense, or distribute to another.

Id. The Supreme Court held that the instruction was improper since it allowed the jury to convict the defendant under the theory of possession with intent to transfer, which is not trafficking as defined by KRS 218A.1412(1). Id. at 552-553. Since the defendant had failed to object, the error was not preserved. The Court deemed that the defective instruction did not constitute palpable error under RCr 10.26. Id. at 553. At trial, the defendant testified that he "shared" cocaine with two accomplices on the night he was arrested. Id. Based on this evidence, the Supreme Court concluded that:

[The defendant's] own testimony would have supported a conviction of trafficking under the "transfer" alternative of KRS 218A.010(34), though not under the "possession with intent to [traffic]" alternative. In view of [the defendant's] own testimony that he, in fact, committed the offense of which he was convicted, albeit by an alternative method, we conclude that the faulty instruction did not result in manifest injustice, much less seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Id. As we previously stated, the Commonwealth presented more than sufficient evidence to support Clay's conviction under the

theory that he possessed cocaine with the intent to sell it, and, as in Rodefer, the evidence in this case shows that Clay committed the offense he was convicted of, albeit pursuant to one of the alternate theories set forth in the jury instruction. So, like in Rodefer, we conclude that the defective instruction did not result in manifest injustice. Thus, it does not constitute palpable error.

We find some difficulty in reconciling the holdings of our Supreme Court in Burnett and Rodefer. In Burnett, the court held that an error in the instructions such as the one in this case, if preserved, could not constitute harmless error and required reversal. See also Commonwealth v. Whitmore, supra. In Rodefer, the court held that essentially the same error, unpreserved, is not palpable error. If Clay had objected to the instructions in this case, we would be required under Burnett to reverse. However, since he failed to object, we are required under Rodefer to determine if the error rose to the level of being palpable. Under these cases, this error cannot be harmless if preserved, yet is not necessarily palpable if unpreserved. Although the facts in this case are not exactly those in Rodefer, they are very similar. We can find no reasonable basis to distinguish this case from Rodefer.

In the alternative, Clay insists that he was denied a fair trial due to inadmissible testimony. As Clay points out, during direct examination, the prosecutor asked Detective Ford, "So in your estimation these [referring to the bags of crack

confiscated from Clay] were packaged for sale?" Detective Ford answered, "Yes." Citing Cooper v. Sowders, 837 F.2d 284 (6th Cir. 1988), Clay argues that, during this exchange, the Commonwealth solicited inadmissible opinion testimony from the detective, and that this testimony was inadmissible because it gave the jury an "insider's" opinion as to his guilt. Clay did not preserve this error for appeal but insists that it constituted palpable error under RCr 10.26.

As we previously stated, according to Schoenbachler v. Commonwealth, supra at 837, palpable error is an irregularity which affected a party's substantial rights and resulted in a manifest injustice. If, upon consideration of the whole case, we do not believe that there was a substantial possibility that the result would have been any different, then we will consider the irregularity to be non-prejudicial. Id. Given the ample evidence presented by the Commonwealth, we do not believe that there is a substantial possibility that the result would have been different absent Detective Ford's allegedly improper testimony. Therefore, we hold any irregularity to be non-prejudicial and decline to address the merits of Clay's assignment of error.

The judgment of conviction is affirmed.

ALL CONCUR.

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