

RENDERED: MARCH 12, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001894-MR

DOMENICO VILARDO

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND THOMPSON, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Domenico Vilaro appeals the September 15, 2008, final judgment of the Kenton Circuit Court, which found him guilty of two charges of assault in the third degree, one charge of menacing, and one charge of being a persistent felony offender in the first degree. Vilaro challenges the admittance of

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

certain evidence during the trial. Because we hold that the trial court did not abuse its discretion in its inclusion of the challenged evidence, we affirm.

Vilardo was an inmate at the Kenton County Detention Center when, on December 4, 2007, Officer Hilton Humphrey detected the smell of marijuana when walking by Vilardo's cell. After refusing to comply with a urine test, Vilardo was escorted to the Intensive Supervision Unit where he was placed in an isolation cell. Later that day, there was an altercation between Vilardo and several officers when Vilardo refused to change into a jumpsuit.² During the struggle, Vilardo injured his mouth and spat bloody spit which hit officers Ryan Simms and Stephen Johnson. Vilardo was subsequently placed into a restraining chair. When Officer Humphrey attempted to perform a check on Vilardo, Vilardo lunged towards Officer Humphrey and allegedly attempted to bite him.

Vilardo was subsequently indicted by the Kenton County Grand Jury for four counts of first-degree assault and for being a persistent felony offender. Detention facility personnel had captured some of the December 4, 2007, incident on tape, which the Commonwealth wanted to introduce as evidence. Vilardo filed a motion *in limine* to prohibit the introduction of the videotaped evidence. The trial court ruled that the videotape showed Vilardo's demeanor and aggressive behavior and denied the motion. Vilardo also filed a motion *in limine* to prohibit the Commonwealth from introducing evidence that Vilardo used racial slurs

² Because the majority of inmates in the intensive supervision unit are on suicide watch, jumpsuits were mandatory for all inmates in the unit in order to keep inmates from passing clothing to a suicidal inmate.

directed at Officer Humphrey. The trial court denied this motion as well, but informed Vilaro that he could object during trial, as the trial court's opinion regarding the evidence may be altered due to other evidentiary developments. A jury trial was held, and Vilaro was subsequently found guilty of two charges of assault in the third degree, one charge of menacing, and one charge of being a persistent felony offender in the first degree. He received a combined sentence of ten years. This appeal followed.

On appeal, Vilaro argues that he was substantially prejudiced and denied due process by the admission of the videotaped evidence, the evidence of his use of racial epithets, and the evidence regarding a prior altercation with Officer Humphrey in 2004. When reviewing an admission or exclusion of evidence, we must consider whether the trial court has abused its discretion. *Holt v. Commonwealth*, 250 S.W.3d 647 (Ky. 2008).

Vilaro first maintains that the introduction of the entire videotape was improper because it contained irrelevant material and its prejudicial nature outweighed any probative value. In support of this argument, Vilaro cites to KRE³ 403, which allows for the exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of undue prejudice." The challenged portion of the videotape features Vilaro agitated, cursing, and yelling. Vilaro argues that the only relevant portion of the videotape is that portion which shows him lunging towards Officer Humphrey.

³ Kentucky Rules of Evidence.

In response, the Commonwealth argues that the probative value of the videotape was not substantially outweighed by the danger of undue prejudice. Instead, the Commonwealth argues that it is a direct depiction of the events, it portrays the demeanor and intent of Vilardo, and substantiated the testimony of eyewitnesses. We agree with the Commonwealth. It has previously been held that a videotape was properly permitted when it was helpful to the jury's understanding of the events as they played out. *See, e.g., Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003). It has also been held that even gruesome videotapes are admissible if they are relevant and probative. *See, e.g., Fields v. Commonwealth*, 12 S.W.3d 275 (Ky. 2000). Vilardo has failed to show that the probative value of the videotape is outweighed by any prejudices. Consequently, he has also failed to show that the trial court abused its discretion in allowing the videotape.

Vilardo next argues that the trial court improperly allowed testimony that he was making racial slurs towards Officer Humphrey during the altercation. Vilardo cites to KRE 404(b), which prohibits evidence of other wrongs or acts in order to show action in conformity with the charged crime. KRE 404(b) allows such evidence if it is "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." It is not clear that the evidence was offered for a purpose allowed under KRE 404(b). Having not actually heard the testimony, the trial court deferred a ruling on the motion *in limine* until the evidence was actually offered. It was at this time, that the evidence was presented, that defense counsel failed to

object to the testimony, therefore also failing to preserve it for our review.

However, “a palpable error which affects the substantial rights of a party may be considered . . . even though insufficiently raised or preserved for review.” CR⁴

10.26. We may grant relief from such a palpable error if we determine “that manifest injustice has resulted from the error.” *Id.* Manifest injustice exists when the substantial rights of a party were prejudiced; *i.e.*, a substantial possibility exists that the result of the trial court would have been different. *Partin v.*

Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996) (*overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008)).

Vilardo has failed to show that the inclusion of the testimony resulted in manifest injustice. Said otherwise, he has failed to show that there is a substantial possibility that the trial result would have been different had the testimony been excluded. Between the videotape and the testimony of those present, the evidence appears to sufficiently support a conviction of Vilardo. Furthermore, the sentence which the jury recommended was for the minimum amount of time possible. Accordingly, Vilardo’s argument is without merit.

Vilardo ends his appeal with an attack on the Commonwealth for eliciting testimony that appellant had a prior altercation with Officer Humphrey in 2004 at the detention center. He again cites to KRE 404(b) and argues that the testimony led the jury to believe that he was more likely to commit the crimes with which he was charged. We do not agree. The testimony to which Vilardo refers

⁴ Kentucky Rules of Civil Procedure.

took place when the prosecutor asked Officer Humphrey whether he had previously had an altercation with Vilardo inside the detention center and Officer Humphrey replied “once, in 2004.” Defense counsel objected; the prosecutor subsequently apologized and withdrew his question; and the defense counsel requested no other relief. Accordingly, it would appear that counsel for Vilardo was satisfied with the prosecutor’s withdrawal. Vilardo may not request relief from this Court that was not requested from the trial court. Furthermore, the testimony that was elicited does not appear to be prejudicial in that it would have altered the outcome of the trial. As previously stated, the evidence against Vilardo was overwhelming, and he was given the minimum sentence possible.

For the foregoing reasons, the September 15, 2008, final judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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