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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000554-MR

TROY HAYES — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 07-CR-00158

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Troy Hayes appeals from a judgment in which he was sentenced to ten years for trafficking in cocaine and being a Persistent Felony

[1] Senior Judge David C. Buckingham, 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.

Offender (PFO). Hayes was found guilty of Trafficking in a Controlled Substance, cocaine, First Degree, First Offense by a jury; thereafter Hayes entered a conditional guilty plea to PFO in the First Degree, which enhanced his sentence for trafficking to ten years. On appeal, Hayes asserts two errors. First, the trial court committed reversible error in allowing a narcotics detective to explain the lack of illegal narcotics found on Hayes as a habit of drug dealers in an attempt to show that Hayes was a drug dealer and thus guilty of trafficking in cocaine. Second, the trial court erred in admitting an audio recording which was only a copy of a copy of the original when the police had destroyed the original. The Commonwealth asserts that the trial court did not err. After a thorough review of the parties' arguments, the record and applicable law, we reverse and remand.

The facts in the case *sub judice* were testified to at a two-day jury trial. Therein, Officer Charles Kelton testified that he worked an undercover buy of crack cocaine on June 28, 2007. Kelton drove an old van into a parking lot and was approached by an unnamed African-American female. The female asked Kelton what he was doing there. He told her that he was looking for either oxycontin or crack cocaine. She responded that she did not have any oxycontin but then asked how much money he had. Kelton replied that he had fifty dollars. The female then called additional people from the nearby breezeway, including an unidentified African-American male and a second unidentified African-American female. The first female asked Kelton if he was a police officer, to which he responded no. The second female went over to the nearby apartment complex and

came back with a second African-American male, who was later identified by Kelton as Hayes. Kelton testified that Hayes came up to the driver's side door of the van, looked him in the eyes, and walked to the back of the van without saying anything.

Kelton watched Hayes in the driver's side mirror with the second female. Hayes pulled out a large white substance, broke off a piece, and handed it to the second female. She then brought the piece[2] to Kelton, and Kelton gave her the fifty dollar bill, the serial number of which Kelton had previously recorded onto his digital audio recorder. While Kelton kept recording with his digital audio recorder during the time of the drug buy, Hayes never spoke during the buy. After Kelton drove away, he described Hayes and the second female into his digital audio recorder. The digital audio recording was played for the jury.

Kelton then testified that he returned to the Kentucky State Police post and requested that a uniformed officer film the area where the buy had occurred so that Kelton could identify from whom he made the buy.

Officer Martin testified that he went to the apartments and filmed the area using his on-board cruiser camera.[3] After Kelton identified Hayes as the seller, Martin and another trooper went to the apartment complex and arrested Hayes. Hayes was searched incident to arrest and $132.51 in cash was taken off

[2] This was later identified at trial as cocaine by a forensic drug chemist for the Kentucky State Police.

[3] Martin testified that he actually had to videotape the apartments twice, as the first time he only taped the back of the person of interest. The two videos were combined into one tape that was played for the jury.

Hayes; this included the fifty dollar bill that Kelton had used in the drug buy.[4] Martin then testified as to the serial number from the fifty dollar bill to the jury.

After hearing the aforementioned testimony, digital audio recording, and video tape, the jury convicted Hayes of trafficking in controlled substance in the first degree, first offense. Hayes then entered a conditional guilty plea to PFO in the First Degree, which enhanced his sentence for trafficking to ten years. It is from this judgment that Hayes now appeals.

On appeal, Hayes presents two arguments. First, the trial court erred and committed reversible error in allowing a narcotics detective to explain the lack of illegal narcotics as a habit of drug dealers in an attempt to show that Hayes was a drug dealer and thus guilty of trafficking in cocaine. Second, the trial court erred in admitting a digital audio recording which was only a copy of a copy of the original when the police had destroyed the original. Both of the alleged errors concern evidentiary rulings by the trial court.

We review evidentiary rulings for abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson,* 11 S.W.3d 575, 577 (Ky. 2000) citing *Commonwealth v. English*, 993

[4] While Martin was present during the search of Hayes, he personally did not take the cash off of Hayes. On cross-examination, Martin admitted to making multiple mistakes in his report. The report listed the wrong address for Hayes, described him as a white male, and stated the wrong time of the undercover buy. There was also a discrepancy between the report and Kelton as to what color or pattern Hayes's shorts were. In addition, the report only lists the fifty dollar bill as the only amount of money taken off Hayes. The most significant of the mistakes was that the report listed Kelton for trafficking and not Hayes.

S.W.2d 941, 945 (Ky. 1999). Further, no evidentiary error shall be grounds for reversal unless it affects the substantial rights of the parties. CR 61.01 and KRE 103. We review Hayes's claimed errors with these standards in mind.

Hayes first argues that the trial court committed reversible error in allowing a narcotics detective to explain the lack of possession of illegal narcotics as a habit of drug dealers in an attempt to show that Hayes was a drug dealer and thus guilty of trafficking in cocaine. As previously noted, the search incident to the arrest of Hayes produced the fifty dollar bill used by Kelton in the undercover drug buy, but no other evidence typically associated with the drug trade. The Commonwealth called Detective Jerry Warman, an expert in the drug trade.[5] Detective Warman testified that he had been with the Shelbyville Police Department for three years and was in charge of a special investigation unit to combat drug activity. Detective Warman started in law enforcement in 1973 and had worked previously in Louisville and with federal law enforcement agencies. Detective Warman had over 30 years of experience as a law enforcement officer with a focus on narcotics. In light of his extensive experience with the drug trade, the trial court permitted Detective Warman to testify as an expert. Detective Warman testified regarding the general drug trade, and then the Commonwealth asked if it was unusual for a drug dealer not to have drugs on him when arrested. Detective Warman replied that it was not uncommon and that he had arrested

[5] The Commonwealth argues extensively that this issue was not preserved. However, the issue concerning the testimony presented by the expert witness was called to the attention of the trial court, and we find this sufficient.

"many, many drug dealers who had no drugs on them." Detective Warman then testified that it was not unusual to use another person as a go-between in order to limit exposure and to avoid the police.

Hayes argues that Detective Warman's testimony constituted impermissible habit evidence of a class, i.e., drug dealers, in the attempt to place Hayes within said group, and thus make him guilty of being a drug dealer. Hayes likens this testimony to evidence regarding the habit of a class which has been disallowed by the Kentucky Supreme Court in multiple cases, such as in *Miller v. Commonwealth,* 77 S.W.3d 566 (Ky. 2002), and *Kurtz v. Commonwealth*, 172 S.W.3d 409 (Ky. 2005).

The Commonwealth argues that expert testimony about the methods of drug dealers is routinely admitted because the drug trade is often outside the knowledge of jurors. The Commonwealth asserts that Detective Warman's testimony helped explain why no drugs were found on Hayes and how he would still be guilty of trafficking in narcotics. The Commonwealth further argues that Detective Warman's testimony was not about the habits of drug dealers, i.e., not a profile of drug dealers, as claimed by Hayes but instead was about the methods of business associated with the drug trade. While the Commonwealth is correct that courts have routinely admitted expert testimony to explain evidence in regard to the drug trade, we believe that these cases are distinguishable from the facts *sub judice.*

In *Dixon v. Commonwealth*, 149 S.W.3d 426, 430-431 (Ky. 2004),[6] the Kentucky Supreme Court held that the trial court did not abuse its discretion by permitting the officer to render his opinion that a certain list of initials and numbers found in the defendant's vehicle at the time of his arrest constituted evidence of drug transactions and money exchanged, based upon his specialized knowledge as a law enforcement officer. Similarly, in *McCloud v. Commonwealth*, 286 S.W.3d 780 (Ky. 2009) the detective testified "about the drug trade, including things like baggies being used to package drugs, the amount of cocaine in a typical "hit," and his opinion regarding whether the amount of drugs seized from McCloud indicated an intent to traffic or for personal usage." *McCloud* at 788.

The expert testimony elicited in *Dixon* and *McCloud* helped explain evidence obtained from the defendant to the jury. This is fundamentally different from the facts *sub judice* where the expert opined that it was common for drug dealers to not have drugs in their possession when arrested which allowed the jury to infer Hayes was guilty from the lack of drugs on his person when arrested. We agree with Hayes that the opinion as expressed by the expert of the habit of a class of individuals, i.e., drug dealers, was an attempt to prove that Hayes was a member of the class and acted in accordance. As explained in *Kurtz, supra,*

> We held that "a party cannot introduce evidence of the habit of a class of individuals either to prove that another member of the class acted the same way under similar

[6] *Dixon* provides a learned discussion on the type of evidence that police officers as an expert have been permitted to explain.

> circumstances or to prove that the person was a member of that class because he/she acted the same way under similar circumstances." *Id.* (citing *Johnson v. Commonwealth,* 885 S.W.2d 951, 953 (Ky. 1994)).

Kurtz at 414.

Thus, the trial court exceeded its discretion in allowing expert testimony regarding the habits of drug dealers in an attempt to prove that Hayes was a drug dealer and guilty of trafficking. This error affected the substantial rights of Hayes and requires reversal.

We now turn to Hayes's second argument, namely, that the trial court erred in admitting a digital audio recording which was only a copy of a copy of the original when the police had destroyed the original. At trial, Kelton testified that he wore a small digital recorder underneath his clothing during the drug buy and that after he arrived at his office, he downloaded the recording onto his computer and then transferred the audio file to a CD that was played in court. Kelton testified that the he had read off the serial number of the fifty dollar bill into his digital recorder prior to the buy.

The first objection by Hayes was after Kelton first authenticated the digital audio recording. When counsel approached the bench, he informed the court that "we can go ahead and play it, but I would like it published for the jury that this is not that recording, that this is a subsequent copy of something." When the court asked if there was any good faith belief that the recording being offered was different than the original, counsel replied,

> That is in good....No no no no...I haven't even seen the first one. It was never provided to me. My client is telling me that when he has listened to it that he believes that the numbers were not read off the $50 dollar bill before the transaction took place...In just listening to the sequence of time, that he believes that it was not read off, but it was read off...afterward based on the time frame...you've got Trooper Martin who says this whole thing took place at 6:30, not 8:30. Then we have Trooper Kelton saying that this happens at 8:30....So there is some inconsistencies here...Since I don't have the original all I can say is that what the Commonwealth has right now is a make up of something, because I have not heard the original. So I just want the jury to understand that this is not the original...[7]

See Video Record 1/22/2009, 2:25-3:04.

The court said that Hayes could establish the CD being played was a copy through cross-examination.[8] Two hours later, counsel objected and moved for a mistrial, as "we don't have the original here, there's no way I can cross-examine the accuracy of that statement." *See* Video Record 1/22/2009, 4:42-4:43. The court overruled the motion for a mistrial.

[7] Trooper Martin testified that he had erred when he had the time of the buy listed at 6:30.

[8] This objection was again raised when the Commonwealth moved to admit the recording.

In support of his claimed error, Hayes's argues[9] that any computer savvy individual could tamper with the audio file, especially since the original was not around for comparison; that the police destroyed the original and did not provide an explanation for it; and that this should amount to a finding of bad faith in the destruction of the evidence.

The Commonwealth argues that Hayes did not properly preserve his objection to the introduction of the audio CD; that the CD was properly authenticated and admitted into evidence; and that Hayes has no legitimate good faith belief that the recording was not an accurate duplicate.[10] With these in mind, we turn Hayes's arguments concerning the potential for tampering with the digital audio recording and the need for a bad faith instruction.

Certainly, there is a potential for any evidence to be subjected to tampering. However, the potential for tampering, without evidence of tampering,

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[9] Hayes further argues that unlike *Shegog v. Commonwealth,* 142 S.W.3d 101 (Ky. 2004), there was no missing evidence instruction in the case *sub judice* that would render an error harmless. However, we are unaware of a request for a missing evidence instruction. This Court is not obliged to scour the record on appeal to ensure that an issue has been preserved. We decline to address these arguments as we are unclear if these arguments were presented to the trial court. *See Jewell v. City of Bardstown,* 260 S.W.3d 348, 350-351 (Ky.App. 2008)("the circuit court did not address any of these issues in reaching its decision. We only review decisions of the lower courts for prejudicial error, consequently, without a ruling of the lower court on the record regarding a matter, appellate review of that matter is virtually impossible.") and *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App.1998)("[a]n appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory.").

[10] We agree with the Commonwealth that Hayes's request for a mistrial two hours after the playing of the audio recording, to which he had agreed to the admission of the recording, did not require a mistrial. *See Woodard v. Commonwealth,* 147 S.W.3d 63, 68 (Ky.2004) (decision to grant a mistrial is within the trial court's discretion, absent a showing of abuse of discretion, ruling will not be disturbed; a mistrial is an extreme remedy to correct a fundamental defect in the proceedings.)

in not enough. Our Supreme Court in *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998) stated:

> Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that "the reasonable probability is that the evidence has not been altered in any material respect." *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir.1989), cert. denied, 491 U.S. 909, 109 S.Ct. 3197, 105 L.Ed2d 705 (1989). See also *Brown v. Commonwealth Ky.*, 449 S.W.2d 738, 740 (1969). Gaps in the chain normally go to the weight of the evidence rather than to its admissibility. *United States v. Lott*, 854 F.2d 244, 250 (7th Cir.1988).

While *Rabovsky* concerned blood samples, we believe that the reasoning applies here as well. Kelton, a police officer, had custody of the digital audio recorder, downloaded the audio file to his computer, and recorded the file to a disc. His testimony was necessary to establish the foundation for admission of the CD into evidence. Once the foundation was established, Hayes must present at least some evidence that the CD was not an authentic representation of the original audio recording.

Hayes failed to present any evidence that the CD was other than what the Commonwealth purported it to be, a genuine reproduction of the digital audio recording made during the course of a drug transaction. Thus, the CD was properly authenticated and admitted into evidence by the trial court.[11]

[11] The more relevant question would have been what it was offered to prove. It did not contain any voice other than that of the officer, and thus is no more than contemporaneous notes by the officer. First, it is most certainly hearsay, KRE 801, and as such is inadmissible with exceptions,

As to Hayes's second argument, that he was entitled to a bad faith instruction, we turn to *Shegog v. Commonwealth*, 142 S.W.3d 101, 107 (Ky. 2004) (internal citations omitted) in which the Kentucky Supreme Court required a showing of bad faith for the destruction of evidence by the police. In *Shegog* the Court held, "Appellant offered no evidence that the surveillance tape was purposely erased. Absent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process." In the case *sub judice* there is no indication in the record of bad faith by the police in the destruction of the original.[12] Moreover, as explained in *Hayes v. Commonwealth*, 58 S.W.3d 879, 883 (Ky. 2001), "In the case before us, the trial judge asked defense counsel what relief she wanted. She received the relief requested and never asked for an admonition. The trial court did not err by allowing the trial to proceed." In the case *sub judice,* when counsel agreed to the playing of the recording and requested that the jury be informed that said recording was only a copy and not the original, the trial court did not err in allowing the trial to proceed.

In light of the foregoing, we reverse and remand for a new trial.

KRE 802. Its evidentiary worth may be no more than the report of an officer, and such is inadmissible under KRE 803(8). Perhaps it has evidentiary value in refreshing the memory of the officer, KRE 612 (applies to writings), or a memo of past recollection recorded, KRE 803(5), or is offered as a prior consistent statement, KRE 801A. Regardless, the application of the correct evidentiary rule may turn upon whether the officer was testifying from present memory refreshed or past recollection recorded. *See Disabled American Veterans, Dept. of Kentucky, Inc., v. Crabb*, 182 S.W.3d 541 (Ky.App. 2005).

[12] While there is no explanation for the lack of the original, we are unaware if Hayes pursued the bad faith line of questioning of Kelton or argued such before the court, given the dearth of evidence on why the original was not submitted. *See* Footnote 9, *supra.*

MOORE, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, DISSENTING: I respectfully dissent for three reasons. First, as explained to the court when the testimony was allowed to be introduced, the Commonwealth introduced the testimony to rebut the appellant's cross-examination of the witness wherein the appellant had elicited testimony that no drugs were found on the appellant when he was arrested. The testimony that the majority states was erroneously introduced was simply rebuttal testimony concerning a matter the appellant himself raised. In other words, the appellant "opened the door" on the issue of the significance, if any, of the fact that he had no drugs in his possession when he was arrested. *See Purcell v. Commonwealth*, 149 S.W.3d 382, 399 (Ky. 2004).

Second, the testimony was not prejudicial, and its introduction into evidence does not warrant reversal. *See* RCr 9.24. The whole subject of the appellant not having drugs on him was irrelevant. But, the appellant brought it up, and, in my opinion, the Commonwealth was entitled to present testimony to rebut the appellant's implied assertion to the jury that it had significance. In my view, I don't think that the jury would have been any more likely to convict the appellant because of testimony that drug dealers don't generally have drugs on them when they are arrested. Common sense is that most people don't have drugs on them

when they are arrested, and I believe a jury recognized this fact and that the whole issue is irrelevant because it proves nothing.

Third, the appellant did not adequately preserve error in this regard because his only objection to this testimony was that it was "guesswork." *See Richardson v. Commonwealth*, 483 S.W.2d 105 (Ky. 1972), wherein the appellate court stated that "[A]n objection made in the trial court will not be treated in the appellate court as raising any question for review which is not within the scope of the objection as made, both as to the matter objected to and as to the grounds of the objection, so that the question may be fairly held to have been brought to the attention of the trial court." *Id*. at 106, quoting 24 C.J.S. Criminal Law § 1677, p. 1167. Before the trial court, the appellant objected on the grounds that this particular part of the testimony amounted to guesswork. Before this court, the appellant contends that the testimony was inadmissible testimony of habit. I conclude that any error was not preserved and also would not amount to palpable error.

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