

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000758-MR

MARTY HARRIS

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NO. 08-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KELLER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Marty Harris appeals from the judgment of the Crittenden Circuit Court sentencing him to fifteen years' imprisonment. For the following reasons, we affirm.

In 2008, Harris was charged with trafficking in marijuana (two counts), second-degree trafficking in a controlled substance, and first-degree

persistent felony offender as a result of Harris' purchase of thirteen hydrocodone pills and over a quarter-ounce of marijuana from a confidential informant for the Kentucky State Police.

Harris pled not guilty and was tried before a jury on March 23, 2009. In the closing remarks during the guilt phase of the trial, the Commonwealth stated the transactions showed Harris' "predisposition and experience as a drug dealer." The jury returned a verdict of guilty on all counts.

During the sentencing phase of trial, the Commonwealth submitted to the jury certified copies of prior judgments against Harris which discussed prior charges brought against him that were dismissed. Also, in its closing remarks during the sentencing phase the Commonwealth stated, "the defendant is clearly an experienced drug dealer." Thereafter, the jury recommended twelve months on each count of trafficking in marijuana and fifteen years on the second-degree trafficking in a controlled substance charge enhanced by being a persistent felony offender in the first degree, which the trial court imposed to run concurrently. This appeal followed.

Harris concedes his claims of error are unpreserved for our review. An unpreserved error may only be "noticed on appeal if the error is 'palpable' and 'affects the substantial rights of a party[.]'" *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (citing CR¹ 10.26). Kentucky law suggests "a palpable error 'affects the substantial rights of a party' only if 'it is more likely than ordinary

¹ Kentucky Rules of Civil Procedure.

error to have affected the judgment.”” 283 S.W.3d at 668 (citations omitted).

Relief is not justified unless the palpable error has “resulted in a manifest injustice.” *Id.* (citations omitted). Manifest injustice means “the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’” *Id.* (citations omitted).

First, Harris contends he was denied a fair trial because the Commonwealth made improper comments in its closing remarks during both the guilt and sentencing phases of trial. We disagree.

When considering allegations of prosecutorial misconduct on appeal, we must focus “on the overall fairness of the trial” and “to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair.” *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004) (citations omitted). Furthermore, we note that during trial the Commonwealth may offer its interpretation of the evidence to the jury. *Hamilton v. Commonwealth*, 401 S.W.2d 80, 88 (Ky. 1966). Similarly, the Commonwealth is permitted to draw all “reasonable inferences from the evidence and may make reasonable comments upon such evidence.” *Hunt v. Commonwealth*, 466 S.W.2d 957, 959 (Ky. 1971).

In this case, the Commonwealth presented evidence that Harris used experienced terminology in dealing with the dosages of the pills, and sought out the confidential informant to sell him marijuana at the purchaser’s residence. From this evidence, the Commonwealth reasonably inferred that the transactions showed Harris’ predisposition and experience as a drug dealer. Thus, the Commonwealth’s

comments were a proper interpretation of the evidence and did not result in prosecutorial misconduct so as to deny Harris a fair trial.

Next, Harris argues he was denied a fair trial because the trial court submitted to the jury certified copies of judgments against him which discussed nine charges previously brought against him but dismissed. While we agree that the admission of the dismissed charges was error, manifest injustice did not result from their admission so as to render Harris' trial unfair.

KRS² 532.055(2)(1) permits the Commonwealth to offer evidence during the sentencing phase that is relevant to the sentence including “prior convictions of the defendant, both felony and misdemeanor[.]” However, “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) (citing *Robinson v. Commonwealth*, 926 S.W.2d 853, 854 (Ky. 1996); *Scrivener v. Commonwealth*, 539 S.W.2d 291, 293 (Ky. 1976); *Dial v. Commonwealth*, 142 Ky. 32, 133 S.W. 976, 977 (1911)). Thus, under KRS 532.055, allowing the Commonwealth to introduce evidence of dismissed charges against Harris was erroneous.

Our review of an error “to determine whether it resulted in ‘manifest injustice’ necessarily must begin with an examination of both the amount of punishment fixed by the verdict and the weight of evidence supporting that punishment.” *Young v. Commonwealth*, 25 S.W.3d 66, 74 (Ky. 2000). We note

² Kentucky Revised Statutes.

that under KRS 532.070(1), the final determination in regard to sentencing is to be made by the trial court. *Id.* at 75. In addition, though Kentucky sentencing procedures do “not insulate all sentencing phase errors from palpable error review, we believe [they] provide an additional layer of protection from prejudice which we should consider in the context of RCr 10.26 review[.]” *Id.*

Here, the Commonwealth submitted over fifteen charges of which Harris was convicted, at least eight of which constituted felony convictions. As a result, the jury only recommended a fifteen-year sentence on a possible maximum sentence of twenty years for the first-degree persistent felony offender charge. Given that the jury did not recommend the maximum sentence, and the weight of the evidence supported the fifteen-year sentence ultimately imposed by the trial court, we conclude Harris was not denied a fair trial and is not entitled to relief.

The judgment of the Crittenden Circuit Court is affirmed.

KELLER, JUDGE, CONCURS IN RESULT ONLY AND WILL NOT FILE SEPARATE OPINION.

COMBS, JUDGE, CONCURS IN RESULT ONLY BY SEPARATE OPINION.

COMBS, JUDGE, CONCURRING: I reluctantly concur in the result in this case. I am disturbed and appalled at the blatantly improper behavior of the Commonwealth in submitting copies of charges against Harris which had been dismissed – a clear and unequivocal violation of established case law holding such evidence inadmissible. Were it not for overwhelming evidence of other charges of

conviction, we would have had to reverse this conviction. I would emphasize that our ruling in no way condones the impropriety on the part of the Commonwealth. It knew better and nonetheless flaunted the law.

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