

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001855-MR

ANTHONY JOHNSON

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE ANDREW SELF, JUDGE  
ACTION NO. 07-CR-00365

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, NICKELL AND STUMBO, JUDGES.

NICKELL, JUDGE: Anthony Johnson was convicted of multiple charges in the Christian Circuit Court, including being a Persistent Felony Offender in the second degree (PFO II),<sup>1</sup> and was sentenced to serve a term of imprisonment of seventeen years. He appeals as a matter of right. We affirm.

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<sup>1</sup> Kentucky Revised Statutes (KRS) 532.080.

The facts of this case are relatively simple and undisputed. As the result of a traffic stop, Johnson was charged with speeding,<sup>2</sup> unlawful possession of two or more operators' licenses,<sup>3</sup> operating a motor vehicle under the influence of drugs or alcohol, first offense,<sup>4</sup> and trafficking in a controlled substance in the first degree, second or subsequent offense.<sup>5</sup> He was convicted by a jury of the traffic offenses as charged. The jury found Johnson not guilty on the trafficking charge, instead finding him guilty of the lesser-included offense of possession of a controlled substance in the first degree.<sup>6</sup> During the penalty phase of the trial, it was stipulated that the possession charge was a subsequent offense. Johnson was also charged and convicted of being a PFO II. The jury fixed his sentence at seventeen years' imprisonment. This appeal followed.

Johnson raises one allegation of error arising from the penalty phase instructions which were given to the jury regarding the PFO II charge. Johnson admits this error is unpreserved, but requests our review under the palpable error standard as set forth in RCr<sup>7</sup> 10.26. "When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so

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<sup>2</sup> KRS 189.390, a violation.

<sup>3</sup> KRS 186.412(9) (now KRS 186.412(16)), a Class B misdemeanor.

<sup>4</sup> KRS 189A.010, a Class B misdemeanor.

<sup>5</sup> KRS 218A.1412, a Class B felony.

<sup>6</sup> KRS 218A.1415, a Class C felony.

<sup>7</sup> Kentucky Rules of Criminal Procedure.

manifest, fundamental and unambiguous that it threatens the integrity of the judicial process.” *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). For an error to be palpable, it “must involve prejudice more egregious than that occurring in reversible error.” *Ernst v. Commonwealth*, 160 S.W.3d 74, 758 (Ky. 2005). We will reverse a conviction only if we believe there is a “substantial possibility” that the outcome would have been different but for the alleged error. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). It is with this standard in mind that we review Johnson’s allegation of error.

Johnson contends the trial court’s penalty phase instructions on the PFO II charge were faulty. The challenged instruction read as follows:

You will find the Defendant, Anthony Johnson, guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That prior to April 2<sup>nd</sup> (sic), 2007, the Defendant was convicted of Trafficking in a Controlled Substance, First-Degree by Final Judgment of the Christian Circuit Court dated June 25<sup>th</sup> (sic), 2003;

B. That he was eighteen (18) years of age or older when he committed the offense of which you believe he was so convicted;

C. That pursuant to said prior conviction, he was sentenced to a term of imprisonment of one year or more;

D. That he was on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for when (sic) he now stands convicted;

**AND**

E. That he is now twenty-one (21) years of age or older.

No objection was raised when the instructions were given. Johnson testified he had received a five-year sentence on his prior felony, and served two years of that time before being released on parole. He stated he was on parole at the time of his arrest on the instant charges. In conformity with the instructions, the jury convicted Johnson on the PFO II charge.

Johnson now contends paragraph D of the trial court's instruction deprived him of his constitutional right to a unanimous verdict as it presented "the jury with theories of commission that are not supported by the evidence." He argues there was no evidence presented that he was ever "on probation, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release" and that the trial court's instruction offering these choices was constitutionally infirm because jurors could have convicted him based on one of these alternate theories for which there was no evidence. He believes paragraph D should only have included "on parole" as justification for a finding of guilt. Johnson thus contends his conviction should be reversed based on this palpable error. We disagree, having found no such error.

Based on Johnson's own testimony, there was sufficient evidence to convict him of being a PFO II. Thus, even if he had objected to the instruction and the trial court had given the instruction proffered in his brief to this Court, the outcome would have been the same—a conviction of PFO II. In light of Johnson's

own admission that he was, in fact, on parole at the time of his arrest, we conclude that any alleged fault in the instruction “did not result in manifest injustice, much less seriously affect the fairness, integrity, or public reputation of judicial proceedings.” *Commonwealth v. Rodefer*, 189 S.W.3d 550, 553 (Ky. 2006). *See also Martin; Shoenbachler*. Therefore, there was no palpable error in the trial court’s instructions to the jury.

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

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