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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002011-MR

JEROME CASEY — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 09-CR-00192

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Jerome Casey, appeals the October 20, 2009, Judgment and Sentence of the Campbell Circuit Court, following a jury trial, in which he was found guilty of three counts of first-degree trafficking in a controlled substance, and for being a first-degree persistent felony offender, for which he was sentenced to ten years in prison. These charges arose out of three

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

separate controlled drug buys conducted by the Northern Kentucky Drug Strike Force, on February 26, March 3, and March 9, 2009. On appeal, Casey argues that the trial court erred in overruling his motion to suppress evidence collected at his apartment, that the court erred in admitting evidence of prior bad acts, and that the court erred in allowing the Commonwealth to provide the jury with a prepared transcript to accompany audio recordings which were submitted into evidence. Having reviewed the record, the arguments of the parties, and the applicable law, we reverse.

In early 2009, the Strike Force received complaints about drug activity in the area surrounding Norton's Bar in Newport, Kentucky. Sergeant Bill Birkenhauser contacted Bob Beeman, a cooperating witness working for the Strike Force, to begin working in the area around Norton's to see who was selling drugs. Beeman was provided an apartment in the area and began frequenting Norton's, where he met Casey, who was a bartender and manager there. Beeman testified below that he saw Casey give folded napkins to people who would give money to him in return.[2] Beeman testified that he saw transactions of this sort five or six times.

Beeman stated that while at the bar, he began buying drugs from several employees. According to Beeman, Casey then approached him and asked why he was buying from the other employees. Casey then advised Beeman that he could "hook [Beeman] up," and that he would "take care of" Beeman.

[2] During one controlled buy, Casey passed drugs to Mr. Beeman in a folded napkin.

On February 26, 2009, Beeman went to Norton's, spoke with Casey, and arranged to make a buy from Casey later that evening. That evening, Beeman also met with agents from the Strike Force, who wired him with an audio recorder and a wireless transmitter. Beeman then went to Norton's. Casey was not present but another bartender, Tiffany Sanders, advised Beeman that Casey was expecting him and would return soon. While waiting for Casey, another drug trafficker[3] approached Beeman and offered to sell cocaine to him. Instead of waiting for Casey to return, Sanders entered into a transaction with Beeman and received some cocaine Casey had given her to sell. Casey returned soon thereafter, and Sanders told him, "I did it." Casey replied "Okay." Sanders then gave Casey the money from the transaction, and Casey gave her a balled-up napkin in return. After the transaction was completed, Beeman left the bar, returned to a predetermined location, and gave the drugs to Agent Kim Williams.

On March 3, 2009, Beeman went to Norton's early in the day, at which time he spoke with Casey and made an arrangement to buy one gram of cocaine for a hundred dollars later that day. Prior to returning to the bar, Beeman met with agents, who searched him and equipped him with a recording device. Beeman then entered the bar. According to Beeman, the transaction was quick. He approached the bar, at which time Casey reached into a pocket on a flannel jacket behind the bar, retrieved the cocaine, wrapped it in a napkin, and gave it to

[3] The identity of this third drug trafficker is unclear to this Court, as this individual was not identified in the briefs of the parties.

Beeman. Beeman then gave Casey $100.00, after which time he exited the bar and turned the cocaine over to the Strike Force agents.

On March 9, 2009, Beeman once again met with Casey and arranged to purchase 1/8 of an ounce of cocaine for $225.00. Beeman returned later that evening for the transaction, but Casey did not have the drugs at the bar. According to Beeman, Casey called someone and arranged for them to bring him the cocaine. Beeman then gave Casey the money and Casey exited the bar. While Casey was outside of the bar getting the cocaine from his supplier, the owner of the bar arrived. In an effort to conceal his trafficking activities from the owner, Casey put the cocaine inside a cigarette pack, handed it to Beeman, and explained that Beeman had left his cigarettes in the bathroom. Beeman then left the bar and turned the cigarette pack and cocaine over to the Strike Force agents. This entire transaction was recorded on a video recorder.

In late March of 2009, the Strike Force obtained and executed a search warrant at Norton's Bar. Casey was not present at the time the search was executed, but Sanders was present. Strike Force agents recovered money, drugs, and a white envelope in Sanders's purse that read, "Jerome $20 from." Sanders testified that Casey would bring her baggies of cocaine to sell, and she would keep them in the envelope.

While Strike Force agents executed the search warrant at Norton's, Technician Matthew Rolfsen, along with members of the Newport City Police,

traveled to an apartment Carol Gillespie[4] shared with Casey.[5] Testimony established that Gillespie was the leaseholder of the apartment and paid the rent. Gillespie consented to a search of the apartment and, in fact, requested that the officers do so. Gillespie stated that she did not want anything illegal in her apartment. Inside the bedroom that Casey and Gillespie shared, Tech Rolfsen recovered a drug ledger in a dresser.[67] In the same area, Tech Rolfsen found Casey's wallet and identification card.

On April 2, 2009, Tech Rolfsen delivered all the suspected drugs to the Kentucky State Police Crime Lab. Testing confirmed that all of the suspected drugs Casey delivered to Beeman were cocaine. Accordingly, on April 23, 2009, a Campbell County Grand Jury returned an indictment against Casey, charging him with three counts of first-degree trafficking in a controlled substance. On August 27, 2009, another indictment was issued, charging Casey with being a first-degree persistent felony offender.

A trial was conducted on August 31, 2009. The Commonwealth called agents from the Strike Force, Beeman, and Sanders to testify about the transactions. It also played two audio recordings and one video recording of the

[4] Gillespie's name was not mentioned at trial. Agent Rolfsen testified as to her name at a pretrial hearing.

[5] Casey's own testimony confirmed that he and Gillespie shared the bedroom.

[6] There was dispute below as to whether the item recovered was a drug ledger or not. Agent Rolfsen testified that the notes, in his experience, were drug ledger notes. Casey testified that that the pages represented his accounting for the time when the bar's owner was on vacation, and he was in charge of receiving all money from the employees for each night's receipts.

[7] Testimony indicated that the dresser contained men's clothes. Casey testified that the dresser was his, and that Gillespie did not have "her stuff in there." He did not testify that Gillespie was not allowed to have access to the dresser, nor that he had exclusive control of the dresser.

individual transactions. The Commonwealth also called a forensic scientist from the Kentucky State Police Crime Lab who testified that the substances recovered by the Strike Force were cocaine.

Sanders testified that she had known Casey for over eight years and had worked with him at Norton's. Sanders stated that she had both purchased and sold cocaine for Casey. She explained that if she sold four $50.00 bags of cocaine, Casey would give her a fifth bag for her own personal use. Sanders also testified that she saw Casey sell cocaine on a daily basis at the bar.

Casey testified on his own behalf below. He stated that although he was present at the bar on February 26, March 3, and March 9, 2009, he never sold drugs to Beeman nor gave Sanders drugs to sell to Beeman. The jury found Casey guilty of all three counts of first-degree trafficking and of first-degree persistent felony offender. The jury recommended the minimum sentence of ten years. Casey now appeals to this Court.

As his first basis for appeal, Casey argues that the trial court erred in overruling his motion to suppress based on the assertion that it was improper to search the dresser in his apartment which was exclusively his property based on his girlfriend's consent. Below, Casey's counsel argued that Casey's girlfriend could not effectively give the police permission to search areas that were used or possessed only by Casey because they were exclusively within his control. Casey also argued that the recovery of the alleged ledger was particularly prejudicial, as it provided an unmistakable link to the alleged crime. A suppression hearing was

held prior to trial but the court overruled the motion and found that the girlfriend had the right to give consent, that her consent was effective for all areas of the apartment, and that as the dresser was not immediately identifiable as only belonging to Casey, the fruits of the search were not suppressible.

In response to the arguments made by Casey on this issue, the Commonwealth argues that the trial court properly denied Casey's motion to suppress because Gillespie, who was the leaseholder of the apartment, consented to the search. The Commonwealth argues, in accordance with the ruling of the court below, that because Gillespie consented to the search of the apartment and Casey failed to establish that the dresser was within his exclusive control, then the court's decision to deny the motion to suppress was supported by substantial evidence. Further, the Commonwealth argues that the trial court's decision was correct as a matter of law in determining that Gillespie had the power to consent to the search of the entire apartment.

Our standard of review of a trial court's determination regarding suppression motions is set forth in RCr 9.78, which establishes that if supported by substantial evidence then the factual findings of the trial court shall be conclusive. Thus when the findings of fact are supported by substantial evidence, the question necessarily becomes whether the rule of law as applied to the established facts was or was not violated. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (quoting *Ornelas v. U.S.*, 517 U.S. 690, 697 (1996)). This Court has held that we

will review *de novo* the issue of whether the court's decision is correct as a matter of law. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000).

Having reviewed the record and applicable law, we are in agreement with the Commonwealth and the court below on this issue. The record reveals that Gillespie, the leaseholder of the apartment in question, clearly advised the agents conducting the search that she and Casey shared the apartment and that the bedroom was used in common by herself and Casey. Further, there is no question that Gillespie consented to the search, and indeed, requested that the officers find and remove anything illegal that might be in the apartment. Our courts have long held that consent is an exception to the warrant requirement. *See Farmer v. Commonwealth*, 6 S.W.3d 144, 146 (Ky. App. 1999).

Unquestionably Gillespie, as leaseholder, had the authority to consent to a search of the apartment. *See McQueen v. Commonwealth*, 669 S.W.2d 519, 523 (Ky. 1984)[8]. However, Casey argues that although this may be so, Gillespie could not consent to the search of the dresser as it was an "un-common area". Concerning this issue, it has repeatedly been held that the test for whether third-party consent is valid is, "whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched." *Commonwealth v. Nourse*, 177 S.W.3d 691, 696 (Ky. 2005) (citing *United States v. Gillis,* 358 F.3d 386, 390 (6th

[8] Holding that consent may be given by anyone who has common authority over or other sufficient relationship to the premises sought to be inspected. *See also Sarver v. Commonwealth*, 425 S.W.2d 565, 566 (Ky. 1968), wherein our Kentucky Supreme Court held that the defendant's girlfriend could give valid consent to search the residence because she paid the rent, professed to have dominion over it, and freely consented to the search.

Cir. 2004). Our Kentucky Supreme Court further opined in *Nourse, supra,* that "[t]his Court's inquiry into the reasonableness of a warrantless search 'must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?'" *Nourse,* 177 S.W.3d at 696 (quoting *Illinois v. Rodriguez,* 497 U.S. 177, 189, 110 S.Ct. 2793, 2801, 111 L.Ed.2d 148 (1990)).

In the matter *sub judice*, this Court is in agreement with the trial court that it was entirely reasonable for the agents searching Gillespie and Casey's apartment to assume that Gillespie could consent to the search of the dresser. It was located in a bedroom that she and Casey both admitted they shared, and it was not locked or otherwise set aside in a manner that would immediately indicate to officers that it was intended only for Casey's personal use. Accordingly, believing Gillespie's consent to the search to be sufficient and the officer's belief that the consent extended to the dresser to be reasonable, we find no error and affirm on this issue.

As his second basis for appeal, Casey argues that the trial court erred to his substantial prejudice when it allowed the Commonwealth to introduce evidence of prior bad acts that he asserts were more prejudicial than probative. Below, the Commonwealth filed a notice of its intent to introduce, through the testimony of Beeman and Sanders, evidence of bad acts other than those with which Casey was charged in the indictment. Specifically, both Beeman and Sanders offered testimony that they observed other drug transactions in which

Casey had exchanged unknown items contained in rolled up napkins for money. Casey filed a response asserting that there were no lab reports or other scientific proof that what was observed being passed between Casey and others was cocaine. Further, Casey argued that none of that evidence tended to prove an element of the offenses charged.

A hearing was conducted on this issue on the morning of trial. After hearing argument from both sides, the court ruled that both Sanders and Beeman would be permitted to testify about their observance of other "deals." In making this ruling, the court found that Sanders could discuss transactions where she sold drugs on Casey's behalf because it was part of the common plan or scheme between the two of them, and that the probative value of her testimony outweighed any prejudicial effect. Regarding Beeman's testimony, the Commonwealth explained to the court that Beeman witnessed a number of transactions between Casey and third parties which were similar to the ones between himself and Casey, and that Beeman could also testify concerning the transactions he witnessed. The court also found that the probative value of Beeman's testimony would exceed any prejudicial effect.

On appeal, Casey argues that the evidence concerning "other deals" was not relevant or necessary to prove that the crimes with which he was charged must have been committed by Casey, because identity was not an issue which the jury was asked to determine. Moreover, Casey argues that the evidence at issue was not inextricably intertwined with other evidence to such a degree that it could

not be separated without serious adverse effect on the offering party. He argues that the admission of this evidence, if having any probative value, was significantly outweighed by the prejudice he incurred as a result of its admission. Casey asserts that evidence of these collateral bad acts likely prejudiced the jury. Further, he asserts that this evidence bolstered the testimony of Sanders and Beeman, and that the evidence was inherently speculative as neither Beeman nor Sanders had any personal knowledge as to what was in the napkins Casey was passing to individuals during the course of these other acts.

In response, the Commonwealth notes that during the course of the trial, Casey's defense was that although he was present at the bar and knew drugs were being sold, he was not selling any drugs himself. The Commonwealth thus argues that the evidence of other crimes was admissible under a number of "other purpose" exceptions set forth under KRE 404(b), including Casey's intent to sell cocaine to Beeman, explaining Casey's operation and his identity as the seller, and that it intended to negate his defense of mere presence at the bar. Thus, the Commonwealth argues that the evidence is highly probative, and that its probative value exceeds any prejudice, particularly as any potential prejudice was lessened by the trial court's refusal to allow Sanders or Beeman to testify that the other transactions, meaning those whose evidentiary value was disputed, were for illegal drugs.

In reviewing this issue, we note that the proper standard for review of the evidentiary decision of a trial court is abuse of discretion. *Commonwealth v.*

English, 993 S.W.2d 941, 945 (Ky. 1999). The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* Further, we note that upon review, we address the issues of whether the evidence is relevant, probative, or prejudicial, respectively. *See* Lawson, *The Kentucky Evidence Law Handbook*, 3rd Ed., §2.25 (1993).

It is well-established that relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. KRE 401. Evidence that is not relevant is inadmissible. KRE 402. Further, Kentucky Rule of Evidence 404(b) provides that evidence of other crimes, wrongs, or acts are not admissible to prove character, or predisposition to commit a crime, unless such evidence is offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b).

Accordingly, to be relevant, the other transactions at issue, witnessed by Sanders and Beeman, must have made it more probable that Casey intended to sell the cocaine based on the acts for which he was charged. In the matter *sub judice*, to find Casey guilty of first-degree trafficking in cocaine, the jury had to believe beyond a reasonable doubt that: (1) Casey knowingly possessed cocaine; and (2) He possessed the cocaine with intent to sell it to another person or persons. Stated otherwise, where the issue addressed is the defendant's intent to commit the

offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense. *See Walker v. Commonwealth*, 52 S.W.3d 533, 536 (Ky. 2001)(citing *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978)).[9]

In *Walker*, as in the matter *sub judice*, the defendant provided a "mere presence" defense, arguing, as Casey did below, that although he was present when crimes were being committed, he did not personally engage in any of the criminal activity at issue. As noted by our Supreme Court in *Walker*, the question of whether a "mere presence" defense creates a material issue as to the defendant's mental state was addressed in *United States v. Thomas,* 58 F.3d 1318 (8th Cir.1995). After noting that the issue was one of first impression within the circuit, the *Thomas* Court answered the question in the affirmative:

> When a defendant raises the issue of mental state, whether by a "mere presence" defense that specifically challenges the mental element of the government's case or by means of a general denial that forces the government to prove every element of its case, prior bad act evidence is admissible because mental state is a material issue.

* * * * *

[9] As noted in *Walker*, the number of cases holding that prior sale evidence is relevant under the Federal Rules of Evidence to show intent to sell is legion. *See, e.g.,* United States v. Thomas, 58 F.3d 1318 (8th Cir.1995), collecting cases; *United States v. Adrian,* 978 F.2d 486 (9th Cir.1992); *United States v. Hadfield,* 918 F.2d 987 (1st Cir.1990), *cert. denied,* 500 U.S. 936, 111 S.Ct. 2062, 114 L.Ed.2d 466 (1991), collecting cases; *United States v. Robison,* 904 F.2d 365 (6th Cir.1990), *cert. denied,* 498 U.S. 946, 111 S.Ct. 360, 112 L.Ed.2d 323 (1990); *United States v. Harris,* 903 F.2d 770 (10th Cir.1990), *United States v. Hicks,* 798 F.2d 446 (11th Cir.1986), *cert. denied,* 479 U.S. 1035, 107 S.Ct. 886, 93 L.Ed.2d 839 (1987); and *United States v. Beechum,* 582 F.2d 898 (5th Cir.1978), *cert. denied,* 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

> Because [the] "mere presence" defense raises the[ ] issues of intent and knowledge, admission of ... prior bad act evidence [is] not relevant solely to a propensity inference, and [is] therefore proper under Rule 404(b).
> *Id.* at 1322, 1323.

In the matter *sub judice*, as in *Walker*, the Commonwealth was required to prove intent to sell as a separate element of the crime charged. Casey's "mere presence" defense attacked both the possession and intent to sell elements of the trafficking charge, and certainly placed the issue of intent to sell in dispute.

Having reviewed the holding in *Thomas,* we are in agreement with the Commonwealth that by offering a "mere presence" defense, Casey has placed the issue of intent in dispute. As found by the Court in *Thomas*, by denying the crime generally, Casey has placed the Commonwealth in a position of being forced to prove each and every element of the crime, which would certainly include proof of the element of intent. Nevertheless, the evidence which the Commonwealth seeks to admit in proof of this element must sufficiently mirror the current facts of the crimes for which Casey is being charged. Holding otherwise would open the door to admission of evidence of any prior bad act to show intent when a defendant denies a crime, even if based on dissimilar facts.

Sub judice, the Commonwealth sought to introduce evidence that established, essentially, that Casey had been observed passing napkins back and forth with patrons on several different occasions. No evidence was introduced that those napkins contained illegal drugs or money associated with drug transactions. This Court is thus suspect of the benefit or probative value of this evidence

because the content of the napkins, if anything, was not shown to have a nexus with drug trafficking. Persons may pass napkins for many reasons. Without testimony or evidence establishing that the passing of the napkins on other occasions has a nexus with drug trafficking, the act of passing the napkins establishes nothing.[10]

Moreover, while the passing of napkins, as the Commonwealth argues, might tend to evidence an operation, this evidence seems both redundant and cumulative, as the facts of this case speak for themselves. The evidence submitted by the Commonwealth included three alleged drug deals between

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[10] It appears that the Commonwealth seeks to establish that since the napkin passing between Beeman and Sanders was associated with drug trafficking, then all prior acts of napkin passing should be admissible. To the contrary, evidence that Casey previously passed napkins to third parties and that such acts were shown by proper evidence to be associated with drug transactions may have been admissible if properly offered for a purpose consistent with KRE 404(b) exceptions. Certainly, however, it is of importance that the other crime is not being used for the purpose of showing propensity of the accused to commit criminal acts. *See* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, Section 2.25, p. 137 (4th Ed. 2003).

The Commonwealth argues, however, that the passing of napkins on other occasions should be admissible to prove intent. On this point, we note that our law is clear that if intent is not in genuine dispute, there can be no proper use of other crimes to prove that element. *See* KRE 404(b), and Robert G. Lawson, *The Kentucky Evidence Law Handbook*, Section 2.25, p. 142 (4th Ed. 2003). However, as noted herein previously, in the matter sub judice, we agree with the Commonwealth that by offering a mere presence defense, Casey did in fact place the issue of intent in dispute. *See Walker v. Commonwealth*, 52 S.W.3d 533, 536 (Ky. 2001), citing *United States v. Thomas,* 58 F.3d 1318 (8th Cir.1995). Nevertheless, it has also been clearly held that even if intent is in dispute, commission of the other "crimes" must in some specific way satisfy the relevance requirement. *See* KRE 404(b), and Robert G. Lawson, *The Kentucky Evidence Law Handbook*, Section 2.25, p. 142-43 (4th Ed. 2003). We do not believe that the evidence at issue does so in this instance.

We believe the evidence sought to be admitted in the matter sub judice to be distinguishable from that admitted in cases such as *Walker v. Commonwealth*, 52 S.W.3d 66 (Ky. 2000) cited by the parties herein. In *Walker*, the defendant was prosecuted for trafficking in cocaine after being caught flushing cocaine down a drain, and the charge required proof of his intent to sell the cocaine. Evidence that he had sold cocaine to an informant a day earlier was held admissible to prove his intent to sell. This is contrasted with the situation sub judice, in which there has been no proof offered that the activities in which Casey was involved in on the prior occasions (passing napkins, the content of which were unknown) were in fact drug sales. Thus, this Court cannot find the evidence at issue relevant to prove Casey's intent to commit the crimes for which he was ultimately charged.

Beeman and Casey. This Court is not persuaded that the additional evidence of Casey passing napkins back and forth with patrons on prior occasions was probative of the issue of intent to any greater degree than the evidence which was already submitted.[11] Accordingly, having found that such evidence was neither relevant nor necessary to prove the elements of the crimes for which Casey was charged, we are compelled to reverse the trial court on the admission of this evidence.

Casey nevertheless argues that even if the evidence at issue is relevant and probative, any probative value is outweighed by its prejudicial effect. Having determined that the evidence at issue was not relevant and probative, we do not address this argument further herein.

As his final basis for appeal, Casey argues that his rights were violated when the prosecution handed out a prepared transcript to the jury to follow along with audio recordings. He notes that when Beeman was on the stand, the prosecution played the audio recordings of the two alleged transactions from February 26th and March 3rd. Prior to playing the recordings, however, the prosecution provided the jury with prepared transcripts of the recording. Casey asserts that the transcripts included only those portions of one of the tapes that the prosecution deemed important, and did not cover large portions of the conversation that the defense insisted be played, citing KRE 106.[12] Casey noted that it was

[11] Perhaps, if on the prior occasions in which Casey had passed napkins he had used language similar to that which he used in the instant transactions, i.e., "I did it," and "Good," this evidence would be probative in signifying the closure of a drug transaction, and thus, the prior transactions would be important in giving meaning to such language. Such was not the case *sub judice.*

[12] The Rule of Completeness.

never established below that Beeman was consulted during preparation of the transcripts, and that the prosecution thus disregarded the holding in *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988)(*overruled on other grounds* by *Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006)), the leading case on interpretation of inaudible drug buy tapes.[13] In making this argument, Casey acknowledges that it was not preserved for appellate review, but nevertheless requests review for palpable error pursuant to RCr 10.26.

In response, the Commonwealth argues that the jury's use of the transcripts below did not threaten Casey's entitlement to due process of law. The Commonwealth notes that after the tapes were played, Beeman testified that the information in the transcript was an accurate account of the events heard on tape. Concerning Casey's reliance on *Sanborn*, the Commonwealth asserts that such reliance is misplaced, as this Court has previously ruled that in circumstances differing from those in *Sanborn*, allowing a jury to review a prosecutor's transcript of a recording is not error.[14]

Having reviewed the record and applicable law, we are in agreement with the Commonwealth that *Sanborn* is distinguishable from the matter *sub*

[13] Wherein, our Kentucky Supreme Court held that, "It is within the discretion of a trial judge to decide whether because portions of a tape are inaudible or indistinct, the entire tape must be excluded. *United States v. Robinson*, 707 F.2d 872, 876 (6th Cir. 1983). It is not, however, within the discretion of the court to provide the jury with the prosecutor's version of the inaudible or indistinct portions … It is for the jury to determine as best it can what is revealed in the tape recording without embellishment of interpretation by a witness."

[14] Specifically, the Commonwealth relies upon *Norton v. Commonwealth*, 890 S.W.2d 632 (Ky. App. 1994), wherein this Court found that a trial court's decision to allow a jury to review a transcript did not violate *Sanborn* because, unlike the circumstances in *Sanborn*, the prosecutor in *Norton* accurately reflected in the transcript those portions of the recording that were inaudible without attempting to offer his own interpretation.

judice. As noted by the Commonwealth, in *Norton v. Commonwealth*, 890 S.W.2d 632 (Ky.App. 1994), our Court has previously held that in circumstances differing from those in *Sanborn*, allowing a jury to review a prosecutor's transcript of a recording is not error, much less palpable error, as Casey argues herein. In *Norton*, as in the matter *sub judice* and in contrast to *Sanborn*, the Commonwealth accurately reflected on the transcript the portions of the tape which were inaudible and did not attempt to offer its own interpretation. Further, unlike the case *sub judice* and the situation in *Norton*, the transcript offered to the jury in *Sanborn* contained more than twenty-five alleged errors. In the matter *sub judice*, there has been no argument that the transcript at issue contained specific inaccuracies or errors, and indeed, Beeman himself testified that it accurately reflected the contents of his conversation with Casey. Thus, we find nothing in the transcripts offered to the jury that threatened Casey's entitlement to due process of law. Accordingly, we affirm on this issue.

Wherefore, for the foregoing reasons, we hereby reverse the October 20, 2009, Judgment and Sentence of the Campbell Circuit Court, and remand for any and all additional proceedings not inconsistent with this opinion.

ALL CONCUR.

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