

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

NO. 2009-CA-001602-MR

JEFFERY FELTNER

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE WILLIAM ENGLE III, JUDGE  
ACTION NO. 07-CR-00288

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,<sup>1</sup>  
SENIOR JUDGE.

CLAYTON, JUDGE: This appeal derives from the Perry Circuit Court's  
conviction of Jeffery Feltner, Appellant, for possession of a controlled substance in  
the first degree, tampering with physical evidence, and possession of drug

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<sup>1</sup> 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 (KRS) 21.580.

paraphernalia. We are asked to review the conviction under Kentucky Rules of Criminal Procedure (RCr) 10.26 for a palpable error. Finding no such error, we affirm.

On the morning of August 31, 2007, Detective David Wiseman of the Hazard County Police Department pulled over a vehicle for an expired license plate. The vehicle contained two men, both sitting in the front two seats of the car. In noticing that the two men were acting suspicious, Detective Wiseman took the driver out of the vehicle and to the back of his police cruiser. Feltner, who was still seated in the passenger seat, took this opportunity to then throw a syringe out his window. However, the Detective noticed Feltner's activity and upon the arrival of Captain James East, the Detective went to retrieve the syringe which was near the side of the road. Captain East then asked Feltner what was in the syringe to which Feltner admitted that it was "OC" and that he had "shot up" earlier that day. He was then arrested and the matter proceeded to trial.

At trial, both officers testified as to these events. The prosecutor asked Captain East to clarify what "OC" means, and he responded that it means oxycodone or oxycontin. Following this testimony, Lee Ann Garrison of the Kentucky State Police crime lab testified that the liquid in the syringe had contained oxycodone. The jury then found Feltner guilty and the court ordered

Feltner's sentences to run concurrently for a total period of five years.

Subsequently, Feltner filed a belated appeal which we granted and now address.

Feltner argues that the Commonwealth did not properly provide a foundation that qualified Officer East as an expert witness to testify as to the meaning of the term "OC." Given that the issue is unpreserved, he seeks review under RCr 10.26 substantial error. The statute allows for a reversal when a manifest injustice occurs based upon a palpable error of an unpreserved issue. As such, Feltner contends that Officer East's testimony regarding the term "OC" constitutes a palpable error resulting in a manifest injustice that merits the reversal of his conviction.

In determining whether an error rises to the level of being palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." *Com. v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983); *Brewer v. Com.*, 206 S.W.3d 343, 351 (Ky. 2006). The Supreme Court of Kentucky dictates that, "[w]hen an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Com.*, 207 S.W.3d 1, 5 (Ky. 2006).

The decision as to the admissibility of expert testimony rests initially in the sound discretion of the trial court. *Com. v. Craig*, 783 S.W.2d 387, 388 (Ky. 1990). This decision is thereby reviewed under the standard of an abuse of discretion. *Evans v. Com.*, 116 S.W.3d 503, 509 (Ky. App. 2003). In order to

testify as an expert, a witness must be qualified as one based upon his knowledge, practice, skill, experience, long observation, training or education in a given area or subject. Kentucky Rules of Evidence (KRE) 702; *Mondie v. Com.*, 158 S.W.3d 203, 212 (Ky. 2005). “[T]here is no precise rule as to the mode in which such skill or experience must be acquired.” *Craig*, 783 S.W.2d at 388. Whether this knowledge is scientific, technical or specialized, it must be of the type that the average juror would not be expected to have acquired. *Dixon v. Com.*, 149 S.W.3d 426, 430 (Ky. 2004). Furthermore, in *Allgeier v. Com.*, 915 S.W.2d 745 (Ky. 1996), we noted that a police officer’s opinion based on training and experience can be “distinguished from the more extensive and complex knowledge required for testimony by traditional experts, such as accident reconstructionists and forensic pathologists.” *Id.* at 747.

It is well established by our caselaw that police officers are allowed to testify as expert witnesses. See *Sargent v. Com.*, 813 S.W.2d 801 (Ky. 1991); *Kroth v. Com.*, 737 S.W.2d 680 (Ky. 1987); *Dixon*, 149 S.W.3d 426. In both *Sargent* and *Kroth*, the Court allowed police narcotics officers to testify as experts that possession of drugs in a particular amount would usually indicate that they were for the purposes of sale rather than for personal use based on their experiences derived from their many drug-related investigations. *Sargent*, 813 S.W.2d at 802; *Kroth*, 737 S.W.2d at 681. Similarly, in *Dixon*, a narcotics officer testified as to the meaning of notations contained on a piece of note paper that was thought to be an account of transactions and money amounts. 149 S.W.3d at 430.

The Court again found no abuse in discretion in allowing such testimony because it assisted the jury in understanding evidence that they would not normally have been able to do so on their own. *Id.*

Though it is true that in the aforementioned cases of *Sargent*, *Kroth* and *Dixon* the officers were specially trained in the field to which they testified, formalized training and education, as mentioned, are not the only ways in which an expert may be considered properly qualified. Captain East was asked three questions concerning his qualifications to establish a foundation for allowing him to testify as an expert witness. These questions concerned his time and experience with the police department. His answers to these qualifying questions were that he was the Operations Commander for the Hazard City Police Department, had been employed there for the last four years and six months, and that he held the rank of Captain. The absence of a particular qualification does not preclude the Captain from testifying as an expert. The question turns solely on whether the existing qualifications were within the trial courts wide latitude of discretion to allow his testimony. We find Captain East's four years' experience and practice as a commanding officer in the police force consistent with KRE 702's list of proper qualifications to be able to testify as to the meaning of the term "OC."

Even so, it is unlikely that the outcome of the case would have been any different had Captain East not testified as to the meaning of the term. It is our belief that clarification of a term based upon an officer's experience and knowledge gained while performing his or her duty, is materially different from

identifying an object for the record. Ms. Garrison of the Kentucky State Police crime lab identified the liquid as containing oxycodone based upon a scientific analysis of the liquid. As noted by *Allgeier*, an officer's opinion based on training and experience is distinguished from the more complex knowledge required for testimony by traditional experts. 915 S.W.2d at 745. Captain East did not testify that the substance was in fact oxycodone, he simply clarified the term "OC" for the jury based upon his experience since it was likely not a term they would be familiar with.

Given Captain East's simple clarification of the term, his experience and Ms. Garrison's identification of the liquid as oxycodone, we find no error in allowing Captain East's testimony. Perry Circuit Court's conviction of Jeffery Feltner is confirmed.

LAMBERT, SENIOR JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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