

RENDERED: AUGUST 21, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2013-CA-001463-MR

TIMOTHY GREGORY

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT  
HONORABLE ROBERT COSTANZO, JUDGE  
ACTION NO. 13-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: J. LAMBERT, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Timothy Gregory appeals from a Judgment of the Bell Circuit Court reflecting a jury verdict of guilty of one count of Second-Degree Trafficking in a Controlled Substance. Gregory argues that evidence was improperly introduced at trial in violation of Kentucky Rules of Evidence (KRE) 401, 403, and 404(b), thus entitling him to a new trial. We find no error, and AFFIRM the Judgment on appeal.

On February 15, 2013, the Bell County grand jury indicted Gregory on one count of Trafficking in a Controlled Substance in the Second Degree, First Offense, in violation of KRS 218A.1413. The indictment was based on events occurring on March 21, 2012, when Deputy B.J. Brock of the Bell County Sheriff's Department set up a controlled drug buy using a confidential informant named Jason Trosper. On that day, Brock provided Trosper with a vehicle for the purpose of meeting with Gregory and purchasing illegal narcotics from him. Prior to the transaction, Brock searched Trosper and the vehicle to ensure that no contraband was present, and then provided Trosper with a recording device on a key fob. Brock gave \$45 to Trosper to purchase the drugs.

Trosper drove to Gregory's residence while Brock remained nearby. Several minutes later, Trosper met with Brock and produced two pink hydrocodone pills and approximately \$29 in change. Trosper also gave the recording device to Brock. Brock subsequently watched the recorded video, and one of the pills was later analyzed by Erin Powers, who was a forensic specialist with the Kentucky State Police Southeastern Crime Lab in London, Kentucky. Powers would later testify that the tested pill contained the schedule III narcotic hydrocodone.

The matter later proceeded to trial, whereupon the jury returned a guilty verdict on the charge of Trafficking in a Controlled Substance in the Second Degree, First Offense. Gregory was sentenced to three years in prison. This appeal followed.

Gregory now argues that certain evidence was improperly admitted at trial in violation of KRE 401, 403, and 404(b). Specifically, he maintains that the conversation secretly recorded by Trospen during the drug buy revealed evidence of Gregory's past criminal behavior. Directing our attention to *Driver v. Commonwealth*, 361 S.W.3d 877, 883 (Ky. 2012), and KRE 404(b), Gregory contends that evidence of past crimes is inadmissible. He goes on to argue that such evidence may only be introduced under KRE 404(b) after it is determined that 1) the evidence is relevant, 2) it has probative value, and 3) its probative value substantially outweighs its prejudicial effect. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). In that portion of the recorded conversation to which Gregory objects, he spoke with Trospen about other crimes and/or bad acts, including Gregory's knowledge of the area's drug trade, past sales and past usage. Gregory contends that the improper portions of the recorded conversation rendered the trial fundamentally unfair in violation of the Due Process Clause, that the prejudicial effect outweighed any probative value, and that he is entitled to a new trial.

We must first note that Gregory's trial counsel did not object to the introduction of the recorded conversation, nor argue that it had the effect of wrongfully prejudicing the proceedings against him. As such, this argument is not preserved for appellate review. Gregory acknowledges that the issue is not preserved, but contends that it nevertheless constitutes a palpable error under RCr 10.26, and is therefore subject to review despite its lack of preservation.

A palpable error is one that affects the substantial rights of a party and relief may be granted for such error only upon a determination that manifest injustice resulted. RCr 10.26. In order to grant relief under RCr 10.26, the reviewing court must conclude that a substantial possibility exists that the verdict would have been different but for the alleged error. *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986).

In the matter at bar, we cannot conclude that a substantial possibility exists that Gregory would have received a not guilty verdict but for the recorded portions of the conversation to which he now objects. At trial, the Commonwealth produced the testimony of Brock, who set up the drug buy, and Trosper who carried it out. This formed the foundation of the Commonwealth's evidence against Gregory. Additional evidence was tendered that Trosper exchanged money for two pills received from Gregory, which were later demonstrated by a forensic specialist to be hydrocodone. Brock searched Trosper and the vehicle before the drug buy to ensure that no illegal drugs were present, and the recorded conversation details the exchange of money for hydrocodone. Given the totality of the evidence, we cannot conclude that there was a substantial possibility that the outcome of the proceeding would have been different but for those portions of the recorded conversation to which Gregory now objects. *Arguendo*, even if the claim of error which Gregory now raises were properly characterized as palpable under RCr 10.26, we could not go so far as to conclude that its introduction unduly prejudiced the proceedings against Gregory nor ran afoul of the Due Process

Clause. The record and the law do not demonstrate that Gregory is entitled to a new trial.

For the foregoing reasons, we AFFIRM the Judgment of the Bell Circuit Court.

ALL CONCUR.

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