

RENDERED: November 21, 1997; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 96-CA-0912-MR

BEVE FRANCE

APPELLANT

V. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 95-CR-0104

COMMONWEALTH OF KENTUCKY

APPELLEE

**OPINION**  
**AFFIRMING**

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BEFORE: COMBS, DYCHE, and HUDDLESTON, Judges.

COMBS, JUDGE: Beve France appeals from a final judgment entered on March 25, 1996, in the Laurel Circuit Court convicting him of driving under the influence (DUI) 4th Offense, in violation of Kentucky Revised Statutes 189A.010 and of being a persistent felony offender, second-degree. France raises three issues on appeal: (1) whether the trial court erred by admitting evidence of France's prior DUI convictions during the guilt phase; (2) whether the trial court erred by denying France's motion for a

directed verdict; and (3) whether France was denied a fair trial by virtue of cumulative error. We affirm.

The trial testimony indicated that on July 20, 1995, Deputy Sheriff Owens observed France crossing the center of the roadway and otherwise driving erratically. As a result, Owens activated his lights and siren and pursued France's vehicle. Once the vehicle stopped, Owens approached and smelled an odor of alcohol about France's person. Owens also noticed an open container of beer in the vehicle. When France stumbled from the vehicle, he appeared confused and his speech was slurred. Because he was unable to respond adequately to field sobriety tests, France was arrested and transported to the Laurel County Detention Center. At the detention center, France refused to take a breathalyzer test.

France was indicted on August 25, 1995, and the matter was set for trial. At trial, certified records enumerating France's prior DUI convictions were introduced. After deliberating, the jury returned a guilty verdict against France. On July 20, 1996, the trial court sentenced France to prison for a term of five years. This appeal followed.

First, we consider France's argument that he was unfairly prejudiced by the admission of evidence of his prior DUI convictions during the guilt phase of the trial. France admits that the question of whether evidence of his prior DUI convictions was improperly admitted was not preserved for appellate review pursuant to Kentucky Rules of Criminal Procedure

(RCr) 9.22; however, he argues that the alleged error should be reviewed pursuant to the palpable error rule. RCr 10.26 provides as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In applying the palpable error rule, we must first determine whether the trial court committed an obvious error. The error must be plain, clear, and obvious. Only those errors which are of such magnitude that they are easily recognized come under this rule. The error must undermine the defendant's constitutional right to a fair and impartial adjudication to such a degree that the reliability of the judgment is seriously questioned. See Osborne v. Commonwealth, Ky. App., 867 S.W.2d 484 (1993). Cf. Paenitz v. Commonwealth, Ky., 820 S.W.2d 480 (1991). Second, the error must affect the defendant's "substantial rights." And third, this error must have resulted in a "manifest injustice." Kentucky courts have stated that there is no manifest injustice unless there is a substantial possibility that the outcome would have been different except for the error. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996); Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511 (1986); Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981); and Abernathy v. Commonwealth Ky., 439 S.W.2d 949 (1969).

Recent rulings by the Kentucky Supreme Court support France's claim that it was error for the trial court to admit evidence of his prior DUI convictions during the guilt phase of the trial. However, the law at the time of the trial was unsettled, and we cannot say that any error amounted to palpable error. See Dedic v. Commonwealth, Ky., 920 S.W.2d 878 (1996); O'Bryan v. Commonwealth, Ky., 920 S.W.2d 529 (1996); and Ramsey v. Commonwealth, Ky., 920 S.W.2d 526 (1996). Since Ramsey was decided subsequent to France's trial, he cannot rely retrospectively on its new rule by arguing that the trial court erred in failing to anticipate a change in the law.<sup>1</sup> Without a palpable, plain, and obvious error at the trial level, RCr 10.26 cannot be used to avoid the preservation requirement of RCr 9.22. Thus, we cannot conclude that France is entitled to relief.

France argues in the alternative that the trial court erred by denying his motion for a directed verdict. He maintains that the Commonwealth failed to show that he had three prior DUI convictions within a five-year period as measured from the dates that the prior offenses occurred. The simple answer to this contention is that the certified records of France's prior convictions indicate that the convictions were based on offenses occurring in September 1990, October 1990, and October 1991.

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<sup>1</sup>For convenience of reference, we note the following sequence of events. On March 25, 1996, final judgment of conviction was entered against France. Ramsey was rendered on April 25, 1996. France was sentenced on July 20, 1996.

Thus, France was plainly subject to prosecution for DUI 4th Offense.

Lastly, France submits that the cumulative effect of the alleged trial errors deprived him of a fair trial. We disagree. Having found that no reversible error was committed with respect to the individual allegations, we cannot find the existence of cumulative error.

For the foregoing reasons, the judgment of the trial court is affirmed.

ALL CONCUR.

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