

RENDERED: May 22, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 97-CA-0431-MR

KENNY WAYNE COLLINS

APELLANT

v. APPEAL FROM CLAY CIRCUIT COURT  
HONORABLE R. CLETUS MARICLE  
ACTION NO. 96-CR-00017

COMMONWEALTH OF KENTUCKY

APELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGIL, KNOX, and MILLER, JUDGES.

GUIDUGLI, JUDGE. Kenny Wayne Collins (Collins) brings this direct appeal of a final judgment of the Clay Circuit Court entered on February 11, 1997, sentencing him to three years in prison for theft by unlawful taking over \$300 following a jury verdict. We affirm.

On November 23, 1995, two large wooden spools of industrial grade rubber coated copper wire were stolen from the Clay Building Supply store in Burning Springs, Kentucky. The two spools were estimated to be worth approximately \$640 by the store owner.

On the night of November 23, 1995, the Clay County Sheriff's Department received information regarding the possible theft of some copper wire. Acting on the information, Deputy Sheriff Jeff Ruth and Manchester Police Officer Kevin Johnson were sent to Matthew Helton's residence in the Gum Branch area in an attempt to obtain further information. Helton told the police that Collins had come to his house in a black Chevette with some wire stolen from Clay Building Supply and wanted him to help sell it. Helton told them that Collins had burned the rubber coating off the wire at a vacant lot near Helton's residence.

After speaking with Helton, the two police officers went to Collins' grandfather's residence in an attempt to find Collins. Upon arriving, they saw a black Chevette and noticed some copper wire that appeared to be burnt lying in the back of the car. The police were unable to locate Collins, but they decided to impound the black Chevette. Due to inclement weather, Deputy Sheriff Ruth waited until the next day to go to the vacant lot and investigate the location identified by Helton as the place where the wire had been burned. Ruth discovered the burned remnants of some wooden spools, one of which still had the name Clay Building visible on it. Deputy Sheriff Ruth took several photographs of the scene at that time.

The next day, Deputy Sheriff Ruth and Sheriff Edd Jordan returned to Helton's residence to interview him. At that time, Helton gave a more extensive audiotaped statement implicating Collins in the possible theft of the wire from Clay

Building Supply. Helton stated that Collins admitted having stolen the wire from the Clay Building Supply store. He also told the police that he saw the name of the store imprinted on the spools of wire in Collins' black Chevette. Collins was arrested for theft a few days later.

On March 7, 1996, the Clay County Grand Jury indicted Collins on one felony count of theft by unlawful taking over \$300 (Kentucky Revised Statute (KRS) 514.030). During the trial, the Commonwealth called Matthew Helton, the three police officers and the owner of Clay Building Supply as witnesses. On January 14, 1997, after a one-day trial, the jury convicted Collins of theft by unlawful taking. On February 11, 1997, the trial court sentenced Collins consistent with the jury recommendation to three years imprisonment. This appeal followed.

Collins argues that the trial court erred by failing to grant his motion for a directed verdict. He further contends that because Matthew Helton was incompetent to testify, the conviction should be reversed. Collins points to testimony by Helton that he had a learning disability and was semi-illiterate as evidence that Helton was incompetent. Collins' position, however, fails to distinguish properly between the separate evidentiary concepts of competency and credibility.

The rules of evidence and case law clearly indicate that witness competency must be raised before the trial court. KRE 601 codifies the traditional general presumption that "every person is considered competent to testify except as provided by

the rules of evidence or statute." KRE 601(b) states that a person may be disqualified to testify as a witness if he lacks the capacity to perceive the matters involved in his testimony, or if at the time of trial he lacks the capacity to recollect facts, to express himself in an understandable manner, or to understand the obligation to tell the truth. However, the initial determination on competency is to be made by the trial judge. KRE 601(b).

Generally, a defendant must make a contemporaneous objection to evidence admitted at trial in order to preserve any alleged error for appellate review. RCr 9.22. "RCr 9.22 imposes upon a party the duty to make 'known to the court the action he desires the court to take or his objection to the action of the court. . . .' Failure to comply with this rule renders an error unpreserved." West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989) citing Bowers v. Commonwealth, Ky., 555 S.W.2d 241 (1977). Where evidence is otherwise relevant, an objection seeking exclusion of the evidence must be sufficiently specific to bring it to the attention of the trial court. Richardson v. Commonwealth, Ky., 483 S.W.2d 105 (1972). The contemporaneous objection rule is necessary in order to give the trial court an opportunity to correct any error. Sherley v. Commonwealth, Ky., 889 S.W.2d 794, 798 (1994). All witnesses are presumed to be competent and "the burden of showing incompetency is on the party objecting on that ground." Causey v. Commonwealth, Ky., 550 S.W.2d 494 (1977).

While Collins seeks reversal of his conviction on appeal because of Helton's alleged incompetency, defense counsel never sought a competency hearing and did not raise a contemporaneous objection or seek to strike Helton's testimony based on incompetency. During cross-examination, the trial court restricted defense counsel's attempt to challenge Helton's competency through questions related to an opinion by Helton's attorney on his client's competency. Defense counsel, however, did not seek to have the trial court determine Helton's competency; rather, he attempted to raise doubts about Helton's credibility.

Collins' suggestion that any error in admitting Helton's testimony because he was incompetent to testify as a witness was preserved by appellant's motions for a directed verdict is misplaced. Defense counsel moved for a directed verdict at the close of the Commonwealth's case based on insufficiency of the evidence, related in large part to Helton's "credibility problems." At the close of the defense case, counsel renewed his motion for directed verdict "for the same reasons" as the initial motion for directed verdict. These motions were not sufficiently specific to raise adequately before the trial court any complaint concerning Helton's competency. An appellant cannot raise a new or different theory of error in the appellate court from that raised in the trial court. Ruppee v. Commonwealth, Ky., 821 S.W.2d 484, 486 (1991). As a result, Collins failed to preserve for appellate review the issue of the

inadmissibility of Helton's entire testimony because of incompetency.

Even though Collins failed to preserve the issue of Helton's competency, this Court may review the issue under RCr 10.26, which authorizes the appellate court to grant relief involving a palpable error affecting the substantial rights of the defendant that results in manifest injustice. Although he has not specifically referred to RCr 10.26, Collins argues that it would be fundamentally unfair and a violation of due process to permit him to be convicted by the testimony of an incompetent witness. Admission of testimony by an incompetent witness that is crucial or highly significant to the criminal prosecution implicates due process concerns. Sinclair v. Wainwright, 814 F.2d 1516, 1522-23 (11th Cir. 1989). A conviction in violation of due process may constitute palpable error under RCr 10.26. Perkins v. Commonwealth, Ky. App., 694 S.W.2d 721 (1985). Nevertheless, review under RCr 10.26 is more restrictive than that under the harmless error principle available for errors preserved on the trial court level. Sherley v. Commonwealth, Ky., 889 S.W.2d 794, 802 (1994) (Leibson, J. concurring). RCr 10.26 involves palpable errors of a legal rule that seriously affect the fairness, integrity or public reputation of judicial proceedings. Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997) (citing United States v. Filani, 74 F.3d 378, 387 (2nd Cir. 1996)). After a review of the record, we believe Collins has not demonstrated entitlement to relief under RCr 10.26.

First, Collins has not shown that an "error" occurred by the trial court's allowing Helton to testify because Collins has not established that Helton was in fact incompetent at the time of the trial or when he gave his statements to the police shortly after the theft of the wire. Collins contends that Helton was evaluated for competency in January 1997 in a separate criminal proceeding, and he was declared incompetent to stand trial in October 1997.<sup>1</sup> Even assuming this fact is true, it does not clearly establish that Helton was incompetent to testify. As discussed earlier, a witness initially is presumed competent. The standard for competency to stand trial involves the ability to understand the proceedings and assist counsel in preparing a defense, while competency to testify involves the capacity to perceive, recollect facts, express oneself and understand the obligation to tell the truth. Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (discussing competency to stand trial); Wombles, 831 S.W.2d 172, 174 (1992) (involving competency of child witness); KRE 601(b).

In United States v. Phibbs, 999 F.2d 1053 (6th Cir), cert. denied, 510 U.S. 1119, 114 S. Ct. 1070, 127 L. Ed. 2d 389 (1993), the Sixth Circuit affirmed the trial court's finding that two prosecution witnesses were competent to testify even though one witness had been found incompetent to stand trial previously, had a history of auditory delusions and had spent time in mental

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<sup>1</sup>We note that there is nothing in the record to substantiate this assertion except for Collins' statement in his reply brief.

health facilities, and the other witness had been declared unable to assist in his upcoming trial by a psychiatrist. The trial court noted that the relevant time period involved in assessing credibility was when the witness testified. The appellate court indicated that as long as the witnesses were minimally capable of offering reliable evidence, any possible weaknesses in their testimony could be attacked on cross-examination and went to credibility, which was a jury issue. Id. at 1070. Similarly, the fact that Helton was found incompetent to stand trial over ten months after the trial at which he testified as a witness is insufficient to establish that he was incompetent to testify. Moreover, Collins' counsel was allowed to cross-examine Helton fully on the inconsistencies in his prior statements to the police and during his prior interview with defense counsel. The mere fact that the Commonwealth had to use his recorded statement to the police to refresh his recollection did not render Helton incompetent. KRE 612 and KRE 803(5). In conclusion, Collins has not rebutted the presumption that Helton was competent to testify, and therefore has failed to demonstrate an "error" subject to review under RCr 10.26.

Second, a review of the trial record reveals that Helton's performance did not clearly suggest that he was incompetent. While he professed an inability to remember the exact content of much of his prior conversations with the police and defense counsel, he did remember some portions of the statements. Helton also was able to express himself in an



understandable manner while testifying. Consequently, we cannot say that any alleged error was "palpable." Absent a "palpable error", Collins is not entitled to relief under RCr 10.26.

The final issue involves whether the trial court erred by refusing to grant Collins' motions for directed verdict. In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court reiterated the standard for handling a motion for directed verdict as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

816 S.W.2d at 187. The standard for appellate review of a denial of a motion for directed verdict based on insufficient evidence dictates that if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Benham, 816 S.W.2d at 187; Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 160, (1995). Moreover, a conviction may properly be based on circumstantial evidence when that evidence is of such character that reasonable minds would be justified in concluding that the defendant was guilty beyond a reasonable doubt. Baker v. Commonwealth, Ky., 860 S.W.2d 760 (1993).

In the case at bar, the Commonwealth presented sufficient evidence to withstand the defense motion for a directed verdict. Matthew Helton provided substantial information linking Collins with the theft of the copper wire. Helton also testified that Collins admitted having stolen the wire. In addition, the testimony of the police witnesses supported Helton's testimony. For instance, Deputy Sheriff Ruth found evidence that Clay Building Supply wire had been burned in the location identified by Helton. Deputy Ruth also saw burnt wire in the rear of the black Chevette parked where Collins resided shortly after the theft. Both Sheriff Jordan and Officer Johnson testified that Collins usually drove a black Chevette. While Helton's testimony was inconsistent at times, this was an issue of credibility for the jury. As the court stated in Leigh v. Commonwealth, Ky., 481 S.W.2d 75, 79 (1972): "In any trial there is the ever present possibility that a witness may not be telling the truth. . . . The jury decides what testimony to believe, and the mere possibility that a witness did not tell the truth is not a ground for reversal." Viewing the evidence as a whole and in the light most favorable to the Commonwealth, there was sufficient evidence for a reasonable juror to believe that Collins was guilty of stealing the wire from Clay Building Supply.

For the foregoing reasons, we affirm the judgment of the Clay Circuit Court.

ALL CONCUR.



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