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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000082-MR

KENNY D. HOLLAND

APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
ACTION NO. 06-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: □ FORMTEXT □ □ ACREE, DIXON, AND TAYLOR □, JUDGES.

TAYLOR, JUDGE: Kenny Holland brings this appeal from a December 8, 2006, judgment of the Webster Circuit Court upon a jury verdict finding him guilty of one count of theft by unlawful taking under \$300, assault in the fourth degree, resisting arrest, and three counts of wanton endangerment in the first degree. We affirm in part, reverse in part, and remand.

On February 28, 2006, Holland contacted his mother-in-law, Nancy Buchanan, and requested assistance in receiving treatment for his drug addiction. In an attempt to assist Holland, Buchanan took him to the emergency room at a local hospital. Once in the emergency room, Holland refused treatment. Buchanan was unable to convince Holland to stay at the hospital, so she attempted to take him to her home in Providence, Kentucky. Holland subsequently fled from Buchanan's vehicle and proceeded into various business establishments exhibiting very erratic behavior. Holland was eventually spotted by Providence Police Chief Keith Stine. Stine witnessed Holland's attempt to ignite a gasoline pump with a lighter and arrested Holland. After Holland was taken into custody, a scuffle ensued in which Holland kicked Stine's leg causing it to break.

Holland was indicted by the Webster County Grand Jury upon sundry offenses. Following a jury trial, Holland was found guilty of theft by unlawful taking under \$300, fourth-degree assault, resisting arrest and three counts of first-degree wanton endangerment. Holland was sentenced to twelve-years' imprisonment. This appeal follows.

Holland initially argues that prosecutorial misconduct denied him due process and a fair trial. Upon appellate review of a claim of prosecutorial misconduct, we are directed to consider the "overall fairness of the trial" and may only reverse if such misconduct "was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer v. Com.*, 206 S.W.3d 343, 349 (Ky. 2006).

Holland concedes that the issue of prosecutorial misconduct was not preserved for appellate review but requests this Court to review it under the palpable error rule of Kentucky Rules of Criminal Procedure (RCr) 10.26. Thereunder, an unpreserved error may be considered on appeal if the error is “palpable.” A palpable error is one that affects the substantial rights of a party and will result in manifest injustice if not reviewed by the appellate court. *Schoenbachler v. Com.*, 95 S.W.3d 830 (Ky. 2003). Succinctly stated, a palpable error occurs when there exists a substantial possibility that the result would have been different absent the error. *Brewer*, 206 S.W.3d 343.

Holland specifically cites to four different instances of alleged prosecutorial misconduct: “introduction of victim impact evidence in the guilt phase,” “comment on Holland’s failure to testify,” “impugning the intoxication defense,” and “appealing to the fears of the community.” We shall address these instances seriatim.

Holland contends that the prosecutor engaged in misconduct by introducing “victim impact evidence” during the guilt phase of trial. Specifically, Holland asserts that the prosecutor erroneously elicited testimony from Stine and Jamie Harkins, an employee of the City of Providence, regarding the extent of Stines’ injury and the filing of his workers’ compensation claim:

Jamie Harkins, a city worker, testified as to his role in the apprehension of Kenny Holland. He said he was not present when Chief Stine was injured. However, he did say he handled workers[’] compensation claims for the city. Defense counsel immediately objected on

hearsay grounds. The prosecutor said Harkins could testify under the business record exception and that Stine was present.

By that time, the damage had been done. The jury had already heard that Chief Stine had broken his leg after Holland had become boisterous while in police custody. Stine's need for workers['] compensation for a period of time was offered for only one reason: to compound the prejudice to Kenny Holland.

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Chief Stine testified that his leg was injured so severely that he had a titanium plate from his ankle almost to his knee and eight pins on each side of the plate. He also testified that he was "not 100% back" on the leg. The jury also saw him limping. Clearly, the jury saw the devastating impact the crime had upon his life. However Chief Stine's interest in letting the jury know the impact of the injury was accommodated by his testimony. Testimony that he was on workers['] compensation simply violated Kenny Holland's right to a fair trial and jeopardized the reliability of the jury's consideration of legitimate defenses and its determination of guilty. (Citations omitted.)

Holland's Brief at 9-10.

In this case, Holland was indicted upon the charge of assault in the second degree for kicking Stine in the leg. To prove that Holland committed second-degree assault, the Commonwealth was required to produce evidence demonstrating that Holland inflicted "serious physical injury" upon Stine. Thus, the testimony concerning the extent of Stine's physical injury was admissible to prove the element of "serious physical injury." As to the testimony concerning Stine's filing of a workers' compensation claim, we cannot conclude that there

exists a substantial possibility that the outcome of the trial would have been different absent same. Hence, Holland failed to prove palpable error under RCr 10.26.

Holland also claims that the prosecutor engaged in misconduct by improperly commenting upon Holland's failure to testify at trial. Holland specifically points to the prosecutor's comment during closing argument that "the only witness that came in" for Holland was Buchanan. Holland believes such comment improper as an indirect comment upon his failure to testify. We disagree. We believe such statement is reasonably interpreted as a comment upon the weakness of Holland's defense at trial and nothing more. *See Tinsley v. Com.*, 495 S.W.2d 776 (Ky. 1973). Hence, we reject Holland's claim that the prosecutor improperly commented upon Holland's failure to testify at trial.

Holland next asserts that the prosecutor engaged in misconduct by improperly "impugning" Holland's intoxication defense. In particular, Holland maintains that the prosecutor:

[A]sked Stine whether Holland was able to communicate, form simple judgments or answer questions, as if communication and simple judgment were the only requirements for intoxication or non-intoxication. Stine replied that he "absolutely did not believe" Kenny Holland "lacked the ability to understand what he was doing." That was not enough, however.

He recalled Chief Stine and related that the lab report on Holland's blood test showed levels of .005 amphetamine; .002 hydrocodone and .01915 methamphetamine. Stine replied that he had seen individuals driving a motor vehicle with those levels of

intoxicants in their bloodstreams. The prosecutor went one step further and then asked whether based upon those levels, Stine could say whether someone could form the intent to commit a crime.

On cross, he asked Nancy Buchanan, Holland's mother-in-law, whether Holland had been able to sign and fill out forms when she took him to the hospital in Madisonville. Buchanan said he signed the forms, but that she did not remember him filling them out.

In his closing argument, the prosecutor returned to the theme. He said Kenny Holland 'had enough wits' to sign the consent forms." [sic] He said the Madisonville Police did not see "that [Holland was] unable to control himself or they would have arrested him." He said "all" Nancy Buchanan "had to do was drive a hundred yards" to the Providence Police Station if she believed Holland "had no mental state about him, could not make decisions for himself." Finally, he told the jury that the intoxication defense was "an excuse." (Citations omitted.)

Holland's Brief at 11.

The testimony complained of by Holland was elicited in response to Holland's defense of voluntary intoxication. Thus, we think the testimony was relevant and admissible. Nevertheless, upon consideration of the overall fairness of the trial and the overwhelming evidence amassed against Holland, we cannot conclude that there exists a substantial possibility that the outcome of the trial would have been different absent the above allegations of misconduct. Thus, Holland failed to demonstrate palpable error. RCr 10.26.

Holland lastly claims that the prosecutor engaged in misconduct by improperly appealing to the fears of the community during his questioning of

Buchanan and in closing argument. While questioning Buchanan, the prosecutor inquired as to whether Buchanan thought Holland “was a potentially dangerous person to turn out on the streets” and stated that the community should beware. Holland also cites the prosecutor’s closing argument wherein he stated that the hospital had turned Holland loose upon the public and stated:

[N]obody was really harmed here. Do we really want to wait until it happens and blows up Huck’s in downtown Providence before we say that’s enough? We’re not going to let that happen, not in Webster County.

Holland’s Brief at 14-15. Even if the prosecutor improperly appealed to the fears of the community, we do not conclude that such constituted palpable error under RCr 10.26. Considering the fairness of the overall trial and the evidence amassed against Holland, we simply do not believe that there exists a substantial possibility that the outcome of the trial would have been different absent such misconduct. Accordingly, we conclude that Holland did not demonstrate that the alleged instances of prosecutorial misconduct amounted to palpable error under RCr 10.26. We now turn to Holland’s remaining argument on appeal.

Holland next argues that evidence of his out-of-state juvenile record was erroneously admitted during the penalty phase of trial. More specifically, Holland asserts that the computer printout of his juvenile record from Indiana was erroneously admitted in violation of Kentucky Revised Statutes (KRS) 422.040.

KRS 422.040 provides, in relevant part:

The records and judicial proceedings of any court of any state, attested by the clerk thereof in due form, with the

seal of the court annexed if there be a seal, and certified by the judge, chief justice, or presiding magistrate of the court, shall have the same faith and credit given to them in this state as they would have at the place from which the records come. . . .

It is well-established that the Commonwealth is permitted to introduce evidence of a defendant's prior record for the jury's consideration during sentencing. The issue in this case is whether the computer printout of Holland's juvenile record was improperly admitted. The record was introduced through the testimony of a Kentucky probation and parole officer. The record had been attested to by the clerk of the Indiana court but was not “certifi[ed] by the judge, chief justice, or presiding magistrate.” Holland contends that this omission was fatal to the proper admission of the record into evidence. We agree.

We view *Robinson v. Com.*, 926 S.W.2d 853 (Ky. 1996) as dispositive. In *Robinson*, the Commonwealth introduced a computer printout certified by the clerk of an Ohio court. *Id.* The printout was introduced through the testimony of an investigating officer from Kentucky. Relevant to this appeal, the *Robinson* Court held that the printout was improperly admitted because it was introduced by the investigating officer who had no knowledge of how the printout was compiled or whether it was kept in the ordinary course of business. *See id.* The Court further held that it would not allow introduction of such evidence without satisfaction of KRS 422.040 or testimony by a witness that the record comports with the business records exception to the hearsay rule. *Id.* The *Robinson* Court also noted that “any further relaxation in the rules of evidence is

inappropriate and dangerous to both our system of justice and the right of a defendant to have duly admissible evidence presented to the jury.” *Id.* at 854.

In this case, as in *Robinson*, KRS 422.040 was not satisfied as Holland’s juvenile record was not certified by a judge, justice or magistrate. Furthermore, the Kentucky probation officer was not qualified to testify that the out-of-state record comported with the business records exception to the hearsay rule. Following the mandate of *Robinson*, 926 S.W.2d 853, we hold that Holland’s juvenile record was improperly admitted and such erroneous admission requires reversal of Holland’s sentence of imprisonment. *See Dillingham v. Com.*, 995 S.W.2d 377 (Ky. 1999).

In sum, we affirm Holland’s convictions upon theft by unlawful taking under \$300, fourth-degree assault, resisting arrest, and three counts of first-degree wanton endangerment but reverse and remand for a new penalty phase of trial.

For the foregoing reasons, the judgment of the Webster Circuit Court is affirmed in part, reversed in part, and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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