

RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001269-MR

DENISE SASSER

APPELLANT

APPEAL FROM KNOX CIRCUIT COURT
v. HONORABLE REBECCA OVERSTREET, SPECIAL JUDGE
ACTION NO. 06-CR-00072

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

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BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Denise Sasser (Sasser) appeals her conviction of criminal possession of a forged prescription and first-degree persistent felony offender, in the Knox Circuit Court. Sasser argues that it was error for the court to deny her

¹ Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Revised Statutes (KRS) 21.580.

motion for a directed verdict. Sasser also argues that the prosecutor's repeated misconduct throughout the trial resulted in a denial of due process of law. After a careful review of the record and counsel's arguments, we find no error entitling Sasser to relief and, thus, affirm the Knox Circuit Court.

Testimony at trial established that Sasser went to the Knox County emergency room to be treated for low back pain on May 5, 2006. The treating physician testified that he prescribed the narcotic, Lortab, and recorded in his notes that the prescription was for ten tablets.² The treating physician testified that he did not hand the prescription directly to Sasser but instead, handed the prescription to a nurse with further discharge instructions.

Sasser then took the prescription to the Rite Aid pharmacy to be filled. The pharmacy technician noticed that the writing on the prescription was odd because the ink on the quantity was darker than the ink used on the rest of the prescription. The quantity on the prescription at that time was twenty (20). She was also suspicious as she believed that the treating physician did not usually write the quantity of pills on the prescription. The pharmacy called the police.

Officer Robert Brown testified that he arrived at the pharmacy and found Sasser with her boyfriend. When questioned about the prescription, Sasser maintained that the prescription was unaltered by either her boyfriend or herself. On cross examination, Officer Brown was asked about his conversation with the

² The treating physician testified that the prescription was written out in his handwriting but the numeral "2" in the quantity of twenty (20) was not his handwriting.

treating physician and the discharge nurse. Officer Brown stated that he spoke with a nurse but was unsure if this was the same nurse who discharged Sasser.

Sasser testified that she had no knowledge of the alteration of the prescription. She further testified that she did not need the prescription because she already received both ample amounts and a higher dosage of Lortab tablets per month.

Sasser argues that the trial court erred in denying her motion for a directed verdict. She claims that the Commonwealth failed to present a crucial link in the evidence, the testimony of the discharge nurse, and thus was entitled to a directed verdict.

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.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal. *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky.1983).

Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

At trial, defense counsel moved for a directed verdict based on the insufficiency of the evidence. On appeal Sasser argues that a “missing link in the chain of custody” occurred after the doctor wrote the prescription and handed it to

a nurse because there was no evidence presented that the nurse did not alter the prescription. Defense counsel did not object to the admission of the evidence at trial. Under KRE 103 a timely objection must be made before error can be predicated thereon absent palpable error. By not objecting to the admission of the evidence nor there being any grounds for palpable error, the admission of such evidence cannot be grounds for reversal. KRE 103. We do not agree with Sasser that moving for a directed verdict based on insufficiency of the evidence salvages the alleged error.³ We therefore will treat the argument as that of a defense to the forgery.

Assuming arguendo, that Sasser's motion for a directed verdict was sufficient to preserve for review her claim of error, the Commonwealth was not required to prove that an intervening actor did not change the prescription prior to giving it to Sasser. Any gap between the doctor writing the prescription and Sasser receiving the prescription would go to the weight of the evidence. *See Benham*. Further, the Commonwealth is not required to produce duplicitous witnesses to prove each particular element of a crime.

The Commonwealth at trial established that the prescription presented to the jury was the one which Sasser presented to the pharmacy and the treating physician testified that the numeral "2" was not in his handwriting. Given the evidence presented at trial, it was not unreasonable for a jury to find guilt. As such, the denial of Sasser's directed verdict motion was not error.

³ A general motion for a directed verdict is not sufficient to preserve an issue for appellate review. See *Gibbs v. Commonwealth*, 208 S.W. 3d 848 (Ky. 2006).

Sasser argues that the repeated misconduct of the Commonwealth's Attorney throughout the trial denied her due process of law. The alleged misconduct occurred when the Commonwealth's witness, Officer Brown, testified as to why he took certain action, namely arresting Sasser after speaking with other witnesses. Sasser argues that the introduction of the testimony amounts to investigative hearsay.⁴ Alternatively, Sasser argues that the testimony amounted to the officer's opinion of the evidence, i.e., Sasser was arrested based on the statements given to the officer, which he believed to be true, and thus she must be guilty.

This error was unpreserved for appeal and thus must be considered under a palpable error analysis of RCr 10.26. RCr 10.26 states that

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.

Id. ‘Manifest injustice’ requires that substantial rights of the defendant were prejudiced by the error, i.e., there is a substantial possibility that the result of the trial would have been different. *Schaefer v. Commonwealth*, 622 S.W.2d 218 (Ky. 1981) and *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky.App. 1986).

⁴ Within the investigative hearsay argument Sasser presents a separate argument that Officer Brown's testimony impermissibly bolstered the Commonwealth's witnesses. Based on our review of the record, Officer Brown's testimony does not bolster the Commonwealth's witnesses given our jurisprudence under prior consistent statements. *See Smith v. Commonwealth*, 920 S.W.2d 514 (Ky. 1995)

Our review of the record indicates that Officer Brown was asked by Commonwealth if he spoke with the witnesses, and so then charges were brought against Sasser based on the conversations. As stated in *Nugent v. Commonwealth*, 639 S.W.2d 761(Ky. 1982), “[t]he issue of guilt or innocence is one for the jury to determine, and an opinion of a witness which intrudes on this function is not admissible.” *Id.* at 764. In *Nugent* the witness’s statement that he believed that the defendant had committed murder was introduced. In the case sub judice, Officer Brown did not testify as to his belief in Sasser’s guilt or innocence. Further, any error in the admission of the testimony did not amount to palpable error, as required for an unpreserved error. No manifest injustice resulted from the error as there is not a substantial probability that the outcome of the proceeding would have been any different after exclusion of the officer’s testimony.

Sasser similarly argues that Officer Brown’s testimony amounted to impermissible investigative hearsay. The Kentucky Supreme Court has held that:

The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible only if there is an issue about the police officer's action

Bussey v. Commonwealth, 797 S.W.2d 483(Ky. 1990), citing *Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988)(overruled on other grounds by

Hudson v. Commonwealth, 202 S.W.3d 17 (Ky. 2006)). Assuming that the testimony of Officer Brown amounted to investigative hearsay, any perceived error in the admission of Officer Brown's testimony does not amount to palpable error. In light of the other evidence presented at trial, we fail to see how the requirements of RCr 10.26 are met, i.e., manifest injustice. Therefore, we disagree with Sasser that the claimed errors mandate a reversal of the conviction.

After a thorough review, we hereby affirm.

ALL CONCUR.

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