

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000396-MR

JOSHUA P. CRAIG

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 08-CR-00710

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

VANMETER, JUDGE: Joshua Craig appeals from the judgment of the Christian
Circuit Court sentencing him to four years' imprisonment and imposing a fine in
the amount of \$100. For the following reasons, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

While on patrol, Sergeant Clayton Sumner noticed a car pulling out of a driveway and stopping abruptly. He observed the car, began following it, and noticed the car did not have the required tags. The car circled around the block, Sgt. Sumner activated his lights and siren, and the car accelerated and pulled into the original driveway it had earlier pulled out from.

Sgt. Sumner testified at trial he saw Craig exit the driver's side of the car, while his friend, Robin Melcher, exited the passenger's side holding a beer. Sumner ordered both men to stop and return to the car.

Craig failed several field sobriety tests, and while in custody, blew a .089 on the breathalyzer. He was charged with disorderly conduct, improper/expired registration plates, and operating a motor vehicle under the influence of alcohol, 4th offense in five years.

Melcher testified at trial that he owned and was driving the car when it was pulled over by Sgt. Sumner. He explained that Craig was riding in the passenger seat, but the passenger door did not open, so Craig followed Melcher through the driver's side door when exiting the vehicle. Melcher further testified he had walked around to the passenger side to check a tire which was leaking air. An investigator for the defense testified that he tested the passenger side door of the vehicle and confirmed it could not open from the inside.

Craig was convicted of improper/expired registration plates, and operating a motor vehicle under the influence of alcohol, 4th offense in five years. This appeal followed.

Craig argues the trial court erred by denying his motion for a directed verdict at the close of the Commonwealth's evidence on the offense of operating a motor vehicle under the influence of alcohol. He further argues the Commonwealth introduced materially false testimony concerning the time Craig would serve before becoming eligible for parole, resulting in manifest injustice. We disagree.

Since Craig failed to properly preserve his claims of error,² any error may only be “noticed on appeal if the error is ‘palpable’ and ‘affects the substantial rights of a party[.]’” *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). Kentucky law suggests “a palpable error ‘affects the substantial rights of a party’ only if ‘it is more likely than ordinary error to have affected the judgment.’” *Id.* (citations omitted). Relief is not justified unless the palpable error has “resulted in a manifest injustice . . . in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’” *Id.* (citation omitted).

Upon consideration of a motion for a directed verdict, “the trial court must draw all fair and reasonable inferences from the evidence in favor of the

² Craig failed to renew his motion for a directed verdict at the close of the presentation of all the evidence. Thus, the claim is unpreserved. *See Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998) (citation omitted).

Commonwealth.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citations omitted). Additionally, “[i]f 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.” *Id.* (citations omitted).

Craig claims the Commonwealth failed to prove beyond a reasonable doubt that he was operating the vehicle. The Commonwealth presented the testimony of Sgt. Sumner that he witnessed and recognized Craig behind the wheel of the car and saw him exiting the driver’s side of the car. Sgt. Sumner also testified though Melcher initially said he was driving the car, Melcher later told Sgt. Sumner he only said that in order to keep Craig out of trouble. Though the defense presented evidence that the passenger door wasn’t working properly, the jury as fact-finder was free to believe the Commonwealth’s proof over the proof offered by the defense. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996) (the trier of fact may believe any witness in whole or part). Here, Sgt. Sumner’s testimony was sufficient evidence to induce a reasonable juror to believe beyond a reasonable doubt that Craig was operating the vehicle under the influence of alcohol. Accordingly, Craig was not entitled to a directed verdict.

Next, Craig contends the Commonwealth introduced materially false testimony during the sentencing phase of trial. If material testimony provided by the Commonwealth is false and the Commonwealth knows or should have known the testimony is false, the use of such testimony is a violation of a defendant’s due process rights. *Melcherson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005)

(citations omitted). Testimony is material if we find “any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Id.* (citation omitted).

During the sentencing phase of trial, the Commonwealth presented the testimony of a probation and parole officer who testified that for a non-violent offense, Craig would be eligible for a parole hearing after serving 15% of his sentence. When the Commonwealth asked the officer when Craig would be eligible for a parole hearing if he was sentenced to one year, the officer incorrectly responded Craig would be eligible within two months. Under KRS 189A.010(8), a person convicted of a fourth offense within five years of operating a motor vehicle under the influence must serve at least 120 days’ imprisonment.

However, despite the officer’s incorrect testimony, we do not believe Craig has made a showing of a reasonable likelihood the testimony affected the judgment of the jury. The officer testified that Craig would only be eligible for a parole hearing, not that a hearing or an early release was guaranteed. Further, the officer correctly testified to the date of eligibility for a parole hearing if Craig received a longer sentence, and explained that Craig could serve the full length of any sentence. Accordingly, we do not find the incorrect testimony to have resulted in a manifest injustice.

The judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Erin Hoffman Yang
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky