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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000098-MR

KIMIKO LAVELLE OGLE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 10-CR-00237

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

[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. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

LAMBERT, SENIOR JUDGE: Kimiko Ogle appeals from his conviction for manslaughter in the second degree in a drunk driving case. On appeal, Ogle alleges penalty phase errors, improper admission of blood-alcohol results, improper admission of urinalysis results, that a mistrial is required because two jurors were sleeping during the trial, that he was prejudiced by a "surprise witness" of the prosecution, that the trial court erred in refusing to name a particular juror as the alternate, and that manifest injustice occurred when several police officers gave hearsay testimony. Upon review, we affirm the Fayette Circuit Court.

History

On the evening of September 11, 2009, Ogle was driving his car down Lane Allen Road in Fayette County, Kentucky, when his car crossed the center line and hit another vehicle. The car Ogle struck was driven by Bryan Yanko. As the accident occurred, two other men, Justin Lee and Antwon Reed, were pulling out of a parking lot and witnessed the collision.

Antwon Reed saw a red car (Ogle's) cross over the center line of the roadway and hit a silver car (Yanko's). Reed exited his vehicle and went to Yanko's car to check on him while Lee called for help. Yanko was still conscious, and asked Reed to call his wife. Reed did so. Reed went up to Ogle's car and saw that he was non-responsive and had blood coming from his mouth. Although Reed did not know for sure, his impression was that Ogle was intoxicated.

Firefighter Timothy Nelms arrived on the scene. When attempting to extricate Ogle from the vehicle, Nelms thought he smelled alcohol and excrement.

Both Yanko and Ogle were taken to the hospital. Due to the fact that neither Yanko nor Ogle had life-threatening injuries, a full investigation was not performed at the scene. Instead, the position and angle of the vehicles was marked on the roadway and photographs were taken.

At the hospital, a blood sample was taken from Ogle by the on-staff nurse, Kathleen Stump, and recorded by the night shift supervisor, Cynthia Maupin. This was standard procedure. Stump thought Ogle appeared intoxicated, and noted that he was belligerent and uncooperative. The procedure in this situation was for one nurse to record the information and the other nurse to draw the blood. After the blood was drawn, a label with the patient information would be affixed to the vial and then checked against the patient's wrist band. The nurses had no reason to believe there was any deviation on this night. Maupin testified that there was no deviation.

The blood sample was then sent via pneumatic tube to the hospital lab. Vials of blood sent in this manner always have the patient's name, date of birth, and a lab identification number on them. Maupin testified that there was no deviation to this standard practice. Roger English worked in the department of toxicology at the UK medical center. He testified that the blood comes through the pneumatic tube into the lab and is labeled with the patient information and lab number. Upon opening the tube, it is first tested for alcohol. The vial of Ogle's blood showed a blood-alcohol level of .259, approximately three times the legal limit. The urine screen was positive for oxycodone and cannabinoids. English

noted the importance of blood testing in the hospital's regular practice, because proper treatment of the patient is dependent upon being aware of what is in the patient's system.

The chief technologist at the UK lab testified that blood samples taken for medical purposes do not have a "chain of custody," in that there is no accompanying document that tracks the handoff of the specimen.[2] Samples obtained by law enforcement, however, are accompanied by such a document. Regardless, testimony indicated that the lab was a secure environment and the blood sample would have travelled directly from the nurses via pneumatic tube to the lab, where the blood was ultimately tested. As stated, the vial would have been labeled and double-checked against the patient bracelet. The time the sample was obtained was misrecorded on the label as 14:54 hours, although the sample was actually obtained at 22:29 hours. A lab employee testified that he mislabeled the vial.

Dr. Davis, a doctor employed with the University of Kentucky, testified regarding the blood alcohol and urine results. In Davis's opinion, Ogle was too impaired by alcohol to be driving a motor vehicle. He testified that Ogle's ability to think clearly and reason would have been decreased, his ability to gauge time and distance would have been decreased, and his reflexes and reaction time would have been decreased. Davis could not say whether the marijuana and

[2] In the present case, the chain of custody documentation did not begin until the UK lab was informed by police that the blood sample needed to be sequestered until a warrant could be obtained.

oxycodone detected in Ogle's urine screen would have had any effect on Ogle at the time of the collision because they were not necessarily in his blood at the time of the accident. Such drugs can show up in a urine screen for days or weeks after taking them.

After the accident, Ogle was treated for bone fractures of his fibula, tibia, and face. Although the ER physician did not recall smelling alcohol on Ogle, he noted in the medical records that Ogle was "grossly intoxicated." Yanko was treated for a much greater number of fractures, including fractures to his thigh bone, ankle, foot, pelvis, ribs, and sternum. He also had bruising of the lungs. While in surgery for these fractures, he went into cardiac arrest. A trauma surgeon at the hospital stated that Yanko had a pulmonary embolism (blood clot) due to the injuries he sustained in the collision. While doctors were able to get Yanko's heart beating again, it took a considerable amount of time. By the time his heart was operating again, Yanko had no brain activity and was comatose. He was kept alive for two more days so that his organs could be harvested.

Two Lexington Police officers, Officers Presley and Sleet, met with both Ogle and Yanko at the UK medical center after the wreck, for the purpose of determining whether either individual had been operating under the influence at the time of the collision. Neither officer smelled alcohol on Ogle at the time, but they could clearly smell defecation. Officer Presley believed the fact that he didn't smell any alcohol may have had to do with the fact that Ogle had blood coming out of his mouth and nose. When Officer Presley asked Ogle if he had anything to

drink that night, Ogle stated that he drank six beers. Later, at trial, Ogle would state that he drank one beer at four in the afternoon and did not remember consuming alcohol after that. In the hospital, when Officer Presley asked how long ago Ogle drank the beers, Ogle responded by saying that he had not done anything wrong. Both officers read the card asking for Ogle's consent to draw blood and the officers determined that Ogle was unwilling to submit to a blood test. This was determined by the fact that in response to the officers questions, Ogle repeatedly answered that he did nothing wrong.

After Yanko's death, a follow-up investigation was initiated. Officer Taylor of the Lexington police, who had been present on the night of the wreck, worked with a collision reconstruction unit. Taylor marked the location of the vehicles on the roadway and explained that it was Ogle's vehicle that was in the wrong lane. Yanko's vehicle was in the correct lane. During the course of the investigation, Taylor spoke with Ogle two times. On one occasion, Ogle explained that he was driving his car home from Masterson Station. However, the place of the accident was across town from where Ogle lived. During the other conversation, Ogle stated that he had left a restaurant and had no recollection of the accident, but that his breaks had failed. Taylor ordered an inspection on the brakes, but the inspection revealed that there was no brake failure. The collision reconstruction unit determined that Ogle's vehicle had been travelling at 67 miles per hour.

As part of the follow-up investigation, officers asked UK hospital not to dispose of the blood they'd drawn from Ogle until a warrant could be obtained. The UK lab sequestered the blood. Once a warrant was obtained, Officer Scott Lynch picked up the blood sample from a UK toxicologist at the hospital. The blood sample was then tested by the Kentucky State Police lab in Frankfort. Amanda Sweet, who worked for the KSP lab, found the alcohol concentration to be 0.24. She could not test for drugs because the sample provided was too small. After Sweet tested the blood, it was placed in a waste container and then held for 90 days until it was destroyed. The sample was destroyed on March 1, 2010. Sweet was not asked to preserve it.

At trial, Ogle moved for a directed verdict at the close of the Commonwealth's case, arguing that the Commonwealth had failed to meet its burden of proof that he was driving under the influence. Ogle pointed to an e-mail where a Lexington Police Officer stated: "Good luck figuring out what specimen they are referring to." That officer testified that the e-mail had come to him by mistake and that he did not know what the case was about. The trial judge denied the motion and found the jury had enough information from which to determine that Ogle was, in fact, intoxicated at the time of the crash.

At the conclusion of the jury trial, the jury found Ogle guilty of manslaughter. During the penalty phase, the jury heard evidence regarding to prior DUIs and various other convictions involving alcohol intoxication and marijuana. Yanko's wife of 22 years and his two teenage daughters testified to the

catastrophic impact his death had on their lives. The jury sentenced Ogle to ten years' imprisonment.

Analysis

Ogle makes numerous arguments on appeal. Specifically, he argues (1) that he is entitled to a new penalty phase because the jury received information exceeding the scope of Kentucky Revised Statute(s) (KRS) 532.055, (2) that the trial court erred by refusing to exclude the blood tests, (3) that the trial court erred, to his prejudice, by admitting urinalysis results which showed the presence of illegal drugs and controlled substances, (4) that he was denied his right to a jury trial when two sleeping jurors were permitted to judge his guilt and recommend a sentence, (5) that he was prejudiced by the testimony of a surprise witness not disclosed until the eve of trial, (6) that the trial court erred in failing to excuse a particular juror as the alternate, and (7) that he was prejudiced by the improper admission of "investigative hearsay."

Penalty Phase Errors

We first address Ogle's argument that he is entitled to a new penalty phase because the jury received information outside the scope of KRS 532.055.[3] This issue was not preserved for review by contemporaneous objection. Kentucky

[3] As our Supreme Court has previously stated, "The Supreme Court of this Commonwealth has the authority to prescribe rules of practice and procedure in the courts of this Commonwealth. Because K.R.S. 532.055 is a legislative attempt to invade the rule making prerogative of the Supreme Court by legislatively prescribing rules of practice and procedure, it violates the separation of powers doctrine enunciated in Section 28 of the Kentucky Constitution." (*Internal citations omitted*). *Commonwealth v. Reneer*, 734 S.W.2d 794, 796 (Ky. 1987). Nonetheless, our courts continue to recognize this statute under the principle of comity. *Id*. at 798.

Rules of Criminal Procedure (RCR) 9.22. We review for palpable error at Ogle's request. RCr 10.26.

During the penalty phase of trial, the Commonwealth introduced Ogle's prior DUI and DUI 2nd convictions. The Commonwealth's attorney read to the jury the date for each offense, the date of judgment, and the penalty imposed for each. During the cross-examination of Ogle's mother, the Commonwealth asked if Ogle was living with her when he got his first DUI. The Commonwealth also asked if Ogle's mother had ever had any conversations with him about the DUIs and if it had occurred to her that if he "kept it up," he might kill someone. Ogle's mother acknowledged that it had occurred to her. During the cross-examination of Ogle's grandmother, the Commonwealth asked whether she was aware of Ogle's prior DUI convictions, and she said that she was not. Neither Ogle's mother nor grandmother provided any detailed information about either of the DUIs.

During the cross-examination of Ogle, the Commonwealth asked about the circumstances surrounding the prior DUIs. Ogle acknowledged having two prior DUIs, but could not recall a blood-alcohol level for either. He did state that a car accident was involved in one of the DUI cases, and that he had rear-ended a truck, but no one was injured. He also described leaving a friend's house on another occasion, being pulled over by police, and ultimately charged with a DUI. In the closing statement, the prosecutor stated, "If he never had a DUI in the

past, maybe you would think about a minimum sentence. Two prior DUIs, two prior drinking and driving, and one of them we now find out was a wreck."

Kentucky's truth-in-sentencing statute, KRS 532.055, allows the introduction of the nature of a defendant's prior convictions in the penalty phase of trial. The statute "has the overriding purpose of providing the jury with information relevant to delivering an appropriate sentence." *Cuzick v. Commonwealth*, 276 S.W.3d 260, 263 (Ky. 2009). Because the purpose of the statute is not to allow juries to retry prior crimes, our courts have held that only a general description of prior crimes should be introduced. *Robinson v. Commonwealth*, 926 S.W.2d 853, 855 (Ky. 1996). However, *Robinson* has been implicitly overruled by the recent Supreme Court decision in *Mullikan v. Commonwealth*, which holds that the information conveyed cannot go beyond the "elements" of the crime, and that best practice is to simply read directly from a form book or the Kentucky Revised Statutes. 341 S.W.3d 99, 109 (Ky. 2011). Because this is Ogle's direct appeal, rather than a collateral attack, the decision in *Mullikan* is applicable. *Leonard v. Commonwealth* , 279 S.W. 3d 151, 160 (Ky. 2009). [4]

It is clear that more than just the "elements" of the prior convictions came in during the penalty phase. While the details were not more than what would have previously been described as a general description of the crimes under

[4] New judicial precedent is not retroactively applied to cases long since tried, where the appeal is final, through collateral attack. *Leonard, supra*. However, it is applicable when cited in a direct appeal.

Robinson or *Cuzick*, they clearly exceed the elements of the crime as might be garnered from a form book or the KRS. According to the new precedent set by *Mullikan*, this was error.

However, because our review is under the palpable error standard, we will not reverse unless the error would have made a different result probable or the error is so "manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006)

In the present case, we cannot say that the information that Ogle's family members were aware of his prior DUIs, and that one of the prior DUIs involved a motor vehicle accident, would have made a the jury reach a different result. Indeed, even under the new rule in *Mullikan*, the jury would have heard that he had two prior DUIs, meaning that on two prior occasions, he was operating (or was in physical control of) a motor vehicle in this state while having a breath or blood alcohol concentration of 0.08 or more. KRS 89A.005, *et seq*. Thus, we find no probability of a different result here. There is no manifest injustice.

Admission of the Blood Tests

We now address Ogle's second argument on appeal, that the trial court erred by admitting the blood tests into evidence. Ogle argues that there were numerous problems in the chain of custody of his blood specimen: specifically, he finds fault with the fact that there was no formal documentation of how the blood changed hands, and who placed the blood in the pneumatic tube. Further, Ogle

argues that he was denied due process when the blood sample was destroyed before he had the chance to independently test it.

We first address Ogle's chain of custody argument. To begin, as we have often stated, "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification." *Rabovsky v. Commonwealth*, 973 S.W.6, 8 (Ky. 1998). Rather, so long as there is persuasive evidence, by a reasonable probability, that the evidence has not been altered in any material respect, it is sufficient. *Id*. Regardless, any gaps in the chain of custody go to weight of the evidence rather than to its admissibility. *Id*.

There is no reasonable probability in this case that the blood sample was altered in any way. *Rabovsky v. Commonwealth*, 973 S.W.6 (Ky. 1998). Rather, the blood sample was labeled with Ogle's information and was handled in the way blood samples were typically handled as part of hospital procedure. There is no allegation or indication that anyone other than hospital personnel handled the blood or had any reason to tamper with its contents. Further, as stated, any gaps in this chain would go to weight of the evidence. The jury heard defense counsel's arguments at trial regarding the handling of the specimen and the misreporting of the time, and thus, could have assigned less weight to the evidence if it chose to.

We now address the final issue regarding the blood sample, the destruction of the specimen. Ogle argues that under *Green v Commonwealth*, 684 S.W.2d 13 (Ky. App. 1984), the blood alcohol test results should have been

excluded because the lab unnecessarily destroyed the blood sample. In the *Green* case, a panel of this Court held that:

> the unnecessary (though unintentional) destruction of the total drug sample, after the defendant stands charged [with a drug offense], renders the test results inadmissible, unless the defendant is provided a reasonable opportunity to participate in the testing, or is provided with the notes and other information incidental to the testing, sufficient to enable him to obtain his own expert evaluation.

Id. at 16. The present case differs from *Green* in that it does not involve a defendant charged with a drug crime, and it does not involve testing of a drug. Rather, it involves the testing of blood in a homicide case. In a drug case, the entire crime rests upon the possession of the illegal substance, which can often only be ascertained by a test on the substance to determine its chemical makeup. Further, in *Green*, no notes or other incidental information was provided to the defendant. Here, the Commonwealth provided notes and information incident to the testing to Ogle.

Further, thirteen years after *Green* was decided, the Supreme Court of Kentucky adopted the rule in *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1998), that there is no denial of due process absent a showing of bad faith on the part of law enforcement or the Commonwealth where law enforcement or the Commonwealth have failed "to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Collins v. Commonwealth,* 951 S.W.2d 569, 572 (Ky. 1997), quoting *Arizona v. Youngblood,*

488 U.S. at 57, 109 S.Ct. at 337. Indeed, as the Supreme Court recently reiterated in *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004), "the Due Process Clause is implicated only when the failure to preserve…evidence was intentional and the potential exculpatory nature of the evidence was apparent at the time it was lost or destroyed." *Id,* quoting *Estep v. Commonwealth*, 64 S.W.3d 805, 811 (Ky. 2002).

Because there was no showing of bad faith, and since the Commonwealth provided notes and information incident to the testing to Ogle, we find no error in the admission of the blood test results.

Admission of the Urinalysis Results

Ogle next argues that the trial court erred by admitting the urinalysis performed at UK hospital, which showed the presence of oxycodone and cannabinoids in his urine. Specifically, Ogle argues that neither of these drugs was in his bloodstream at the time of the wreck, as evidenced by the blood specimen testing performed by UK and KSP. Ogle argues that he was prejudiced by the admission of the irrelevant urinalysis results.

It is of note that the Commonwealth mentioned the presence of oxycodone and cannabinoids in Ogle's urine as early as the opening statement. Later testimony explained it couldn't be said that the drugs affected Ogle at the time of the collision, because the drugs were not in his bloodstream. Rather, it could only be said that Ogle consumed those drugs at some time in the past.

In *Bush v. Commonwealth*, 839 S.W.2d 550, 555 (Ky. 1992), the Supreme Court held that it was error for the trial court to admit urinalysis results which showed the presence of illegal drugs in the defendant's urine in a DUI-related wanton murder case, where the defendant's blood contained no traces of the drugs. However, the Bush court found that even if it was error to admit the urinalysis, such error was harmless. *Id*. Yet, in a similar case, *Burton v. Commonwealth*, 300 S.W.3d 126 (Ky. 2009), the Supreme Court held that the error was not harmless where no blood test had been performed and the only evidence was a urinalysis, which only definitively showed the defendant had consumed illegal drugs at some time in the past.

In the present case, we conclude that it was error for the trial court to admit the urinalysis results. *See, Bush, supra; Burton, supra*. The mere fact that Ogle consumed illegal or controlled substances at some point in the past was irrelevant to the question of whether he was driving while under the influence on the night of September 11, 2009. Rather, the only possible relevance of this evidence would be to show that Ogle had used illegal drugs in the past and thus was a person who tended to act "recklessly" or in contravention of the law, which would clearly be inadmissible "bad character" evidence under Kentucky Rules of Evidence (KRE) 404(b). Further, such evidence would tend to be far more prejudicial than probative. KRE 403.

Nonetheless, as in *Bush*, we view this error on the part of the trial court as harmless. There was ample evidence that Ogle was driving while

intoxicated and caused the death of Mr. Yanko. Indeed, he had a blood-alcohol concentration of approximately three times the legal limit on the night of the collision and he crossed over the center line at approximately 67 miles per hour. Because of the overwhelming evidence of Ogle's intoxication, we find the admission of the urinalysis to be harmless.

The "Sleeping Jurors"

Ogle also argues that he was denied his right to a jury trial when two sleeping jurors were permitted to adjudge his guilt and recommend a sentence. This issue is not preserved for review, but Ogle has briefed and requested palpable error review pursuant to RCr 10.26.

During the testimony of Officer Lynch regarding the accident reconstruction, two jurors reportedly fell asleep. A break was taken during Lynch's testimony, at which time certain materials were obtained by Lynch for a demonstration. During the break, the trial court pointed out that two of the jurors had "nodded off" and that things were moving "incredibly slow." The trial court asked the Commonwealth if they could try to "move things along." There was no objection or motion by defense counsel. The two jurors have not been identified in the record, and thus, it is unknown whether they both remained on the jury after the alternate was chosen.

Immediately prior to the break, during the time when the two jurors were allegedly sleeping, Lynch described the reconstruction of the collision. He described how he measured the scene and made a diagram, how he used a device

to collect data, and how certain gouge marks on the roadway helped him reconstruct the vehicle's position.

It is well settled in the Commonwealth that a "juror's inattentiveness is a form of juror misconduct, which may prejudice the defendant and require the granting of a new trial." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 276 (Ky. 2006). However, as a threshold matter in a case involving a sleeping juror, "the aggrieved party must present some evidence that the juror was actually asleep or that some prejudice resulted from that fact." *Id*.

In the present case, the trial court acknowledged that two jurors were "nodding off." It is unclear to this Court whether "nodding off" meant that their heads were falling forward because they were getting sleepy, or whether the jurors were actually asleep. Regardless, even if we are to assume that the two jurors were sleeping, Ogle has shown no prejudice. The jurors slept through a portion of the Commonwealth's presentation of the case regarding how the accident was reconstructed. If anything, it would appear that the Commonwealth would be the party prejudiced by a juror sleeping during this testimony. By the time of cross-examination, a break had been taken and there was no further discussion or mention of any sleeping jurors. The jurors, then, heard the second half of Lynch's testimony, as well as defense counsel's cross-examination.

Under these circumstances, we cannot say that Ogle suffered any prejudice. Hence, we affirm on this ground.

The Commonwealth's "Surprise Witness"

The Commonwealth called defense counsel the day before trial to inform the defense that an eye-witness to the accident would be called at trial. For the first time, defense counsel was informed of Antwon Reed, a passenger in Justin Lee's vehicle that witnessed the collision.

On the following day, defense counsel moved to exclude Reed as a witness. The Commonwealth argued that, although they knew Reed existed, they did not have a last name, a phone number, or a physical address for him. Reed called the Commonwealth's office, at which point the Commonwealth was able to obtain the information from him. The Commonwealth notified defense counsel thereafter.

The trial court noted that the Commonwealth did not violate the pretrial discovery order. In addition to finding there was no discovery order violation, the trial court noted that defense counsel had not asked for a bill of particulars, so there was no other basis upon which it could see to exclude Reed's testimony. The trial court had asked the Commonwealth what its reasons were for failing to disclose Reed, and the Commonwealth had stated that it did not know how to contact Reed until the day before trial.

Whether to allow "a surprise or unannounced witness [to] testify is within the sound discretion of the trial judge." *Peyton v. Commonwealth*, 253 S.W.3d 504, 512 (Ky. 2008). Accordingly, we find that the trial court was within its discretion to allow the witness Reed.

Failure to Name the "Cough Drop" Juror as the Alternate

During defense counsel's cross-examination of Dr. Davis at trial, a juror began coughing and the Commonwealth's Attorney gave the juror a cough drop. Ogle argues that the trial court should have named the juror as the alternate.

After Dr. Davis's cross-examination, the judge called the parties to the bench and told the Commonwealth's Attorney that he should not have had any contact with the juror. Defense counsel asked the court to name that juror as the alternate, to remove any risk that the juror's impartiality had been affected, and moved for a mistrial. The trial court refused to name the juror as an alternate and denied defense counsel's motion for a mistrial. In doing so, the trial court noted that he believed the prosecutor's actions were "knee jerk" and that the court did not believe there was any evil intent behind them.

On review, we note that KRS 29A.310(2) provides that no attorney before the court "shall, without leave of court, converse with the jury or any member thereof upon any subject after they have been sworn." In the present case, the prosecutor did not "converse" with the juror. While it was poor form to offer the juror a cough drop, such action did not rise to the level of a non-verbal communication, or involve any interaction of substance. Such *de minimis* contact is not reversible error. *Talbott v. Commonwealth*, 968 S.W.2d 76, 86 (Ky. 1998).

Alleged "Investigative Hearsay" Evidence

We now reach Ogle's final argument on appeal, that he was prejudiced by the improper admission of "investigative hearsay." Ogle argues that he was prejudiced by the admission of such hearsay testimony from Officers

Presley, McBride, and Taylor. Because these statements were not preserved for review, we will review them for palpable error under RCr 10.26.[5]

Hearsay is defined by KRE 801 as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." As our Supreme Court has previously noted, "there is no separate rule, as such, which is an investigative hearsay exception to the hearsay rule." *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). Indeed, "hearsay is no less hearsay because a police officer supplies the evidence." *Id*. Thus, the label "investigative hearsay" is something of a misnomer. *Burchett v. Commonwealth*, 314 S.W.3d 756 (Ky.App. 2010). Any hearsay testimony by officers of the law is just that: *hearsay*. Nonetheless, as we continue to receive briefs alleging "investigative hearsay" as error, we will continue to reiterate this point in our opinions.

With this distinction in mind, we consider the statements in question. To begin, Officer Presley testified that Officer McBride told him to go to the hospital to check on Ogle and see if he was driving under the influence. Officer McBride testified that he had been advised by the fire department that they detected an odor of alcohol on Ogle while extricating him from the vehicle.

[5] The only preserved hearsay objection we could find was made in response to a statement by Officer McBride concerning what other officers said about whether they smelled alcohol on Ogle. The trial court sustained defense counsel's objection. Since the trial court sustained the objection, and defense counsel requested no other relief from the court, the defendant cannot be heard to complain on appeal. Thus, we review only the other, unpreserved, hearsay statements.

McBride also testified that Officer Sleet told him he didn't know if he could smell alcohol on Ogle because Ogle had defecated and Sleet had a sinus infection. McBride further testified that Sleet and Presley questioned Ogle about whether he had been drinking, and that they offered him a blood test. In addition, Officer Taylor testified that he received an e-mail from Lynch that Ogle's car did not have a brake failure.

Clearly, many of these statements are hearsay. They go to the truth of the matter asserted: whether Ogle's car crashed because he was intoxicated. The question becomes whether the admission of these statements rises to the level of palpable error. A palpable error affects a defendant's substantial rights, resulting in a manifest injustice. RCr 10.26. Manifest injustice has occurred when there is a defect in the proceeding that is "shocking or jurisprudentially intolerable." *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002). The error is palpable when there is a "substantial possibility" that the result would have been different without the error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

In the present case, despite the fact that considerable hearsay came in through various officers of the law, the error was not palpable. Indeed, the hearsay testimony in question was cumulative of other properly admitted evidence. Because the testimony was cumulative, it cannot be said to have contributed to the verdict. For this reason, there is no substantial possibility the result would have been different. *See, e.g., Collins v. Commonwealth*, 951 S.W.2d 569, 576 (Ky. 1997).

Conclusion

In light of the foregoing, we affirm the Fayette Circuit Court.

ALL CONCUR.

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