

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000454-MR

REX ALLEN GRAY

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 10-CR-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

** ** * ** * ** *

BEFORE: LAMBERT, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Rex Allen Gray appeals from a Knox Circuit Court's judgment of conviction following a jury trial on the charges of burglary in the third degree, theft by unlawful taking over \$500 but less than \$10,000, and being a persistent felony offender in the second degree (PFO-II).

After midnight, on January 25, 2010, Barbourville Police Officer Jack Knuckles was on patrol looking for a white, four-door car based on a call to police. Around 2 a.m., Officer Knuckles observed a vehicle matching the suspect vehicle's description travelling east on Knox Street toward the officer's position. As the car neared, its driver made a sudden U-turn, which Officer Knuckles believed was suspicious conduct and, therefore, he initiated a traffic stop.

During the course of the stop, Officers Randy Clark and Clay Helton arrived and assisted in the investigation. Police discovered that Gray, who was alone, was driving on a suspended license and arrested him. After Gray consented to the search of his car, police discovered \$3,300 in cash under the vehicle's front passenger seat, a stack of receipts, a check written out to La Esperanza Mexican Restaurant, and a pair of needle-nose pliers.

When Officers Clark and Helton transported Gray to the police department, Gray began voluntarily "running his mouth" about the La Esperanza Mexican Restaurant to explain his side of the story. According to police, Gray, who had not been given his *Miranda* rights, voluntarily stated that he had been in the restaurant, that he was supposed to take care of the money, and that the door of the restaurant was still open. Responding to those statements, police deviated from their trip to the jail and drove Gray to the rear of the restaurant.

Subsequently, Officer Knuckles went to the restaurant to investigate the substance of Gray's statements. Officer Knuckles met with Jorge Madrid, the manager of the restaurant, and the two discovered the restaurant's door ajar.

Madrid informed police that a lock on the cabinet containing the safe where the money was secured was cut and the money and restaurant receipts were missing. As a result of the evidence found in his car, his statements, and the circumstances discovered at the restaurant, Gray was arrested for burglary and theft.

On February 26, 2010, Gray was indicted by a Knox County grand jury for burglary in the third degree, theft by unlawful taking over \$500 but less than \$10,000, and being a persistent felony offender in the second degree. At trial, during the Commonwealth's opening argument, defense counsel objected to the prosecutor's recitation of Gray's statements immediately made after his arrest. Counsel argued that the statements were made before he was *Mirandized* and, therefore, were constitutionally inadmissible against Gray.

During the bench conference, the prosecutor informed the trial court that police officers would testify that Gray volunteered his statements without questioning from law enforcement. The trial court then denied Gray's motion. Subsequently, Madrid testified that he was responsible for securing the money before leaving the restaurant. He testified that Gray did not work at the restaurant but had visited someone there after closing a couple of times.

At the conclusion of the trial, the jury found Gray guilty of all charges contained in his indictment. The jury recommended that Gray serve consecutive terms of five years for the PFO-enhanced theft conviction and five years for the PFO-enhanced third-degree burglary conviction. In accordance with the jury's recommendation, the trial court sentenced Gray to ten years.

Gray contends that the trial court committed reversible error by failing to conduct an evidentiary hearing outside the presence of the jury when he moved to suppress his incriminating statements made to police after his arrest. Citing RCr 9.78, Gray argues that the trial court was mandated to hold an evidentiary hearing when he moved to suppress his confession.

The Commonwealth argues that Gray's allegation of error was unpreserved because he did not lodge a contemporaneous objection when Officer Clark recited Gray's out-of-court statements during its case-in-chief. Arguing that opening statements are not evidence, the Commonwealth contends that Gray was required to object when his statements were introduced as evidence.

Generally, a defendant's objection to the use of his out-of-court statements during opening statements does not preserve an evidentiary error absent an objection during the parties' case-in-chief. *Justice v. Commonwealth*, 987 S.W.2d 306, 315-116 (Ky. 1998). When an issue is unpreserved, we may review an allegation for palpable error. *Chavies v. Commonwealth*, 354 S.W.3d 103, 114 (Ky. 2011). Palpable error only occurs if an error affects the fairness, integrity, and public reputation of a proceeding. *Id.*

When a defendant moves to suppress statements that he made to police, a trial court must conduct a suppression hearing even if the defendant does not request it. *Lewis v. Commonwealth*, 42 S.W.3d 605, 610 (Ky. 2001). The Commonwealth has the burden to "affirmatively establish by a preponderance of

the evidence the voluntariness of the defendant's confession or incriminating statement." *Id.*

When defense counsel objected to the prosecutor's opening statement regarding Gray's statements, the trial court held a bench conference where defense counsel was asked why no suppression motion had been filed prior to trial.

Defense counsel replied that it was obvious the evidence was inadmissible because the statements were made prior to Gray's signing of a *Miranda* form refusing to make a statement to police.

The prosecutor responded that police had not been asked whether Gray made the statements before or after he was given his *Miranda* warnings.

However, the prosecutor stated:

...Sergeant Clark has personally told me this morning that he could not shut up the defendant. The defendant would not shut up and talked all the way back to the station. So, I think any exception to any *Miranda* for the defendant running his mouth without any questions being asked— I think Sergeant Clark probably would say when he testifies and he will testify.

After this discussion, the trial court denied Gray's objection.

Although it is uncertain what evidence, including Gray's testimony, would have been introduced during a suppression hearing, the introduction of Gray's out-of-court statements were not palpable error. First, a defendant must be subjected to custodial interrogation before *Miranda* warnings are required.

Callihan v. Commonwealth, 142 S.W.3d 123, 126 (Ky. 2004). While Gray was in custody, the record indicates that Gray was not being interrogated when he made

his statements and, therefore, *Miranda* warnings were not required. *Smith v. Commonwealth*, 312 S.W.3d 353, 358 (Ky. 2010).

Additionally, even if Gray's statements were inadmissible due to a constitutional violation, the result of Gray's case would not have been affected because of the substantial evidence establishing his guilt. *Talbott v. Commonwealth*, 968 S.W.2d 76, 83-84 (Ky. 1998). Accordingly, we conclude that the introduction of Gray's statements was not reversible error.

Gray contends that the trial court erred by denying his motion for a directed verdict of acquittal on the charge of third-degree burglary. He contends that the Commonwealth failed to prove beyond a reasonable doubt that he unlawfully entered or remained in the restaurant because there was no testimony that he was prohibited from accessing the restaurant after hours.

Our review of a denial of a motion for directed verdict of acquittal is governed by the standard set forth in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

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.

KRS 511.040(1) provides that “[a] person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building.” Based on the record, we conclude that the trial court did not err when it denied Gray’s motion for directed verdict on his burglary charge. Madrid testified that he put the money in the safe located in the cabinet and placed the check and credit card receipts in the cabinet at closing time. He testified that he was the last person to leave when he locked the restaurant’s door. He then testified that these items were missing when police later met him at the restaurant.

Officer Knuckles testified that money, credit card receipts, a check to La Esperanza, and pliers were found in Gray’s vehicle a few hours after the restaurant closed. Police testified that they discovered a cut lock which secured the cabinet at the restaurant. Police further testified that Gray admitted to taking the money and other items from the restaurant. Based on this evidence, it was not clearly unreasonable for the jury to find that Gray knowingly entered or remained in the restaurant with the intent to steal items. The evidence was sufficient to establish that Gray did not lawfully enter or remain in the restaurant.

Gray argues that the trial court erred by imposing court costs totaling \$130 on him because he was adjudged an indigent person by the court.

Prior to *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012), this Court and our Supreme Court held that it was palpable error to impose court costs on an indigent defendant. See *Edmonson v. Commonwealth*, 725 S.W.2d 595, 596 (Ky. 1987). However, in *Maynes*, the Court held that a “needy” person under KRS 31.100 does not necessarily qualify as a “poor” person exempt from the imposition of court costs under KRS 23A.205. The Court held that even if a public defender has been appointed, the imposition of costs may be proper unless the defendant qualifies as a “poor person” as defined by KRS 453.190(2), and is unable to pay costs presently or within the foreseeable future without depriving himself and his dependents of the basic necessities of life. *Maynes* at 361.

Based on *Maynes*, the trial court is required to find whether Gray is a “poor person” as defined in KRS 453.190(2), and is unable to pay court costs and will be unable to pay court costs in the foreseeable future.¹ Thus, we reverse the imposition of court costs and remand for appropriate findings.

For the foregoing reasons, we affirm in part, vacate in part, and remand for a determination of whether Gray is a “poor person” as defined in KRS 453.190(2) and whether he will be unable to pay court costs in the foreseeable future.

ALL CONCUR.

¹ Because of the length of Gray’s sentence, if he is a “poor person” now, he will necessarily be a poor person in the foreseeable future. *Smith v. Commonwealth*, 361 S.W.3d 908, 921 n. 15 (Ky. 2012).

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