

RENDERED: NOVEMBER 9, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000691-MR

JAMES EDEN

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE REBECCA K. PHILLIPS, JUDGE  
ACTION NO. 10-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: James Robert Eden appeals his conviction of one count of trafficking in a controlled substance, first degree. As a result of this conviction, Eden was sentenced to ten years' imprisonment. Finding no palpable errors justifying reversal, we affirm Eden's conviction and sentence.

In February 2010, Phyllis Binion began working as a paid confidential informant for the Five County Area Drug Enforcement Task Force (FADE).

Binion has used illegal drugs since she was twelve years old.<sup>1</sup> As part of her participation in FADE, Binion provided the officers with a list of people she believed would sell her drugs.

On March 31, 2010, Binion met with Deputy Larry Green and Officer Mark Jordan to set up a drug buy she claimed was with the Appellant, Eden. At this time, Binion had known Eden since she was approximately fourteen years old. The officers chose Binion for this buy because she knew Eden, and typically drug dealers only sell to people they know. The officers conducted a search of Binion's person for drugs and/or money, though they did not search under her clothing because she was female. The officers found that Binion did not have any drugs or money in her possession prior to the controlled drug buy.

Officer Jordan placed a recording device inside a purse and gave it to Binion to carry during the transaction. The wire was equipped with a transmitter that allowed the officers to listen to and record the entire transaction from a distance. For about a year prior to the buy in this case, the officers had used video recording devices to record drug buys. However, at the time of this buy the video recording devices were not working, so the officers used the audio recording devices that they had always used prior to obtaining the video devices. Deputy Green gave Binion \$90.00 with which to buy the drugs. The officers then drove Binion toward Eden's residence and let her out nearby. The officers continued past Eden's residence and parked just off a road nearby.

---

<sup>1</sup> Binion was 29 years old at the time of the trial in this case.

After being dropped off, Binion phoned Eden's residence on a cell phone as she walked toward his house. She tried to convince Eden to come and pick her up in his car so that she would not have to walk, but he refused to do so. Binion proceeded to the house. Once inside, Binion handed Eden the money Deputy Green had given her and told Eden that she wanted the oxycodone tablets.<sup>2</sup> Eden gave Binion the pills.

Eden then told Binion he wanted her to snort one of the pills in front of him before she left. Eden stated that he believed that if Binion took one of the pills, she would not be able to testify against him in court. Eden took Binion into the bathroom so that she could take the pill. Binion told Eden she did not want to take the pill, but Eden insisted. However, Eden stepped out of the bathroom momentarily, and while he was out Binion made sounds as though she was snorting the pill. She did not in fact use it, and instead she put it in her pocket. When Eden returned moments later, Binion pretended to have taken the pill.

Binion left Eden's residence and Deputy Green and Officer Jordan picked her up. She gave the officers five oxycodone 15mg tablets and the change from the transaction.

---

<sup>2</sup> The buy had been previously arranged for three oxycodone 30mg tablets. Since oxycodone typically sold for \$1.00 per milligram, Deputy Green had provided Binion with \$90.00 for the purchase. However, when Binion arrived at Eden's house, Eden only had 15mg tablets. After buying the five 15 mg tablets, Binion should have received \$15.00 in change. However, Eden kept \$5.00 because Binion owed him from a transaction the previous day. As such, Binion left Eden's residence with five oxycodone 15mg tablets and \$10.00.

On July 16, 2010, the Carter County Grand Jury indicted Eden on one count of first-degree trafficking in a controlled substance (first offense). The case proceeded to trial on March 3, 2011.

Eden's theory of the case was that Tony Hall was the person who sold the drugs to Binion, and Tony Hall was the person heard speaking on the recording of the buy. At trial, the audio recorded from the wire Binion was wearing was played for the jury. While certain portions of the conversation are difficult to hear, at one point a male voice can be heard clearly saying, "You want three 15's or three 30's?" A few minutes later the male voice said, "Well what I do, I just make sure anybody that comes and gets anything off me, I make sure they do some of it before they leave. That way they can't ever tell on me." Moments later, the same male voice says, "Actually, I've got the perfect thing to crush these up with. Use a spoon."

Binion testified that the male voice on the tape belonged to Eden, and denied that it belonged to Tony Hall. Binion stated that Eden had taken her money and given her the pills himself. Binion stated that Eden was the person who told her to do one of the pills in the bathroom. Binion testified that she had no conversation with Tony Hall during the transaction.

Deputy Green also testified at trial. At the time of the drug buy in this case, Deputy Green was a detective assigned to the FADE task force. He set up the controlled buy in this case and monitored the transaction through the wire in the purse given to Binion. Deputy Green testified that he had known Eden for

approximately ten years and that the male voice on the recording belonged to Eden.

Eden called three witnesses at trial. The first was Stephanie Eden, the appellant's wife. Mrs. Eden testified that the male voice on the tape belonged to Tony Hall. Mrs. Eden also offered testimony about Eden's general work schedule, but could not testify as to Eden's whereabouts on the day of the drug buy in this case, as she was in jail at that time. Eden's second witness was his sister, Sandy Manier. She testified that the male voice on the recording belonged to Tony Hall. Mrs. Manier also testified about Eden's work schedule, but she could not testify as to his exact whereabouts on the day of the drug buy in this case.

Eden's final witness was his brother-in-law and co-worker, Roger Manier. He did not testify about the voice on the recording, but testified extensively regarding their work schedule. However, he could not establish that Eden was in fact at work on March 31, 2010.

At the close of the evidence, the jury found Eden guilty of trafficking and sentenced him to ten years' imprisonment. The trial court sentenced Eden according to the jury's recommendation. Eden now appeals his conviction as a matter of right.

Eden concedes that neither of the issues he argues on appeal was properly preserved for this court, and accordingly he urges us to review them for palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. The applicable test for palpable error is that "if upon a consideration of the whole case

[the] Court does not believe that there is a substantial possibility that the result would have been different, the irregularity will be held non-prejudicial.”

*Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). In *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009), the Kentucky Supreme Court stated:

We note that an unpreserved error that is both palpable and prejudicial, still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice; in other words, unless the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Eden first argues that palpable error occurred when the Commonwealth improperly introduced irrelevant evidence of other bad acts without prior notice. Eden refers to the cross-examination of defense witnesses Stephanie Eden and Sandy Manier. Specifically, during the cross examination of Stephanie Eden, the Commonwealth questioned Ms. Eden about the appellant’s job history, asking about his work as a laborer. Then, this exchange occurred:

Commonwealth: Several jobs, alright. Okay. And, um, do any of those jobs involve the sale of drugs?

Stephanie Eden: He went to jail for that.

Commonwealth: Went to jail for that. Okay.

Commonwealth: Were you aware that Mr. Hall was selling drugs out of your house?

Stephanie Eden: No, I wasn’t aware that anyone was.

Commonwealth: Alright, but you knew that your husband did go to jail for that?

Stephanie Eden: Years ago, but we, you know, put that all behind us.

When questioning Sandy Manier during cross-examination, the following exchange occurred:

Commonwealth: Are you aware that, uh, Bobby Eden has been in jail for selling drugs before?

Sandy Mainer: Yes sir.

Commonwealth: How long ago was that?

Sandy Mainer: Uh, I can't really be specific on it.

Commonwealth: Okay. Was it six months ago...it couldn't have been six months ago because he was arrested for this....

At this point, defense counsel objected, and the trial court instructed the Commonwealth to end this line of questioning.

We agree with the Commonwealth that the inclusion of the above testimony by Ms. Eden and Ms. Manier does not constitute palpable error. Prior to the testimony of these women, the jury had already heard relevant, admissible testimony indicating that Eden had sold illegal drugs prior to March 31, 2010. Deputy Green testified that Binion provided the officers with a list of people from whom she could purchase illegal drugs and that Eden's name was on that list. The Kentucky Supreme Court has held that testimony explaining why a defendant has become a suspect in a drug investigation is relevant and admissible. *Peyton v.*

*Commonwealth*, 253 S.W.3d 504, 516 (Ky. 2008). A reasonable inference from the testimony by Binion and Deputy Green was that Binion thought she could buy drugs from Eden because she had done so before. So, the jury would not have been substantially swayed by learning that Eden had sold drugs on prior occasions because they had already heard evidence indicating that this was true.

We cannot say that the introduction of the testimony of Ms. Eden and Ms. Manier was palpable error. We do not believe there is a substantial possibility that the result would have been any different absent the testimony. *See Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). The testimony was not shocking or jurisprudentially intolerable. *Martin*, 207 S.W.3d at 4.

Eden's second and final argument is that the trial court committed palpable error when it allowed the Commonwealth to question witnesses in violation of *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), which prohibits the Commonwealth from asking a defendant to characterize the testimony of other witnesses as a lie. Eden refers to the following questioning by the Commonwealth of Ms. Eden:

Commonwealth: And of course, you're saying then that the confidential informant, Phyllis Binion, is lying about who sold her the drugs?

Stephanie Eden: Yes.

Commonwealth: Is that what you are saying?

Stephanie Eden: Yes.



During the Commonwealth's cross examination of Sandy Manier, a similar exchange occurred:

Commonwealth: What if, uh, Larry Green stated that that was definitely Bobby Eden's voice?

Sandy Manier: Well, um...

Commonwealth: Would he be lying?

Sandy Manier: Well, I'm saying that's not my brother's voice on there.

Moments later, another exchange occurred:

Commonwealth: So, if Larry said that he is absolutely certain that that is Bobby Eden's voice because he dealt with him for years, he would be either lying or mistaken?

Sandy Manier: He would be mistaken. Yes, sir.

Eden claims the above questioning violates *Moss*. As Eden concedes, however, the Court in *Moss* found that this questioning did not amount to palpable error, even if the line of questioning was improper. And, in interpreting *Moss*, the Supreme Court has insinuated that *Moss* only prohibits such questions when they are asked of the defendant himself. *King v. Commonwealth*, 276 S.W.3d 270, 277 (Ky. 2009). In *King*, the Supreme Court held there was no error where a witness other than the defendant was asked to characterize the testimony of another witness. *Id.* In the case at bar Eden was not asked to characterize another witness's testimony as a lie. Based on the holding in *Moss* that this type of questioning did not constitute palpable error and the fact that this was not the defendant himself being

asked to comment on another witnesses' testimony, we decline to say that the line of questioning in the instant case constituted palpable error.

Discerning no palpable error, we affirm the judgment and sentence of the Carter Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Brandon Pigg  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

M. Brandon Roberts  
Assistant Attorney General  
Frankfort, Kentucky