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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000438-MR

TARIO CURTIS — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 10-CR-00041

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: The appellant, Tario Curtis, appeals a conviction for first-degree trafficking, second or subsequent offense, and for being a persistent felony offender (PFO) in the first degree. Curtis asserts that the circuit court erred by failing to exclude evidence that was not disclosed by the Commonwealth in violation of the circuit court's discovery order, by failing to submit an instruction

on possession, and by improperly enhancing his sentence in violation of Kentucky Revised Statutes (KRS) 532.080(10). We disagree and affirm the conviction.

Curtis was indicted on two counts of first-degree trafficking in a controlled substance, second or subsequent offense, and for being a PFO in the first degree. His case was heard by a jury on January 26, 2012, and January 27, 2012. Curtis was acquitted of the first count of trafficking and was convicted on the second trafficking count. Curtis was also convicted of being a PFO and was sentenced to fifteen years in prison.

Prior to the trial, the circuit court entered a discovery order instructing the Commonwealth to disclose incriminating statements pursuant to Kentucky Rules of Criminal Procedure (RCr) 7.24(1). The Commonwealth filed two discovery responses, each of which contained over fifteen pages and a compact disc. Among the discovery materials were two police reports, one for each of the alleged transactions wherein a suspect was alleged to have trafficked cocaine. Both reports identified a blue Mazda and its license plate number. Both buys were recorded on video and photographs of the suspect were obtained. The suspect was using aliases, "D.Y." and "What Up," at the time of the transaction; the reports indicated that when the subject's true identity was confirmed, an arrest warrant would be sought and executed.

The items produced by the Commonwealth did not indicate how the true identity of the suspect was obtained, but the disclosure included a copy of the uniform citation which listed Curtis's name, address, social security number, and

other indentifying information. Also included was a laboratory report confirming that the exchanged substance was cocaine. Further, there was a note on the report indicating that D.Y. was Curtis's street name.

At trial, the confidential informant testified regarding the circumstance of the controlled buy and identified Curtis as being present for both controlled buys.[1] The investigating officer who had observed the controlled buys also testified. During his testimony, the officer indicated that he set up a third buy with the confidential informant and the suspect asked them to meet him at a Wendy's. When the investigating officer arrived at Wendy's, the blue Mazda he observed during the previous buys pulled up at the same time and the license plate was a match. The investigating officer, who was in uniform, proceeded into Wendy's and asked to speak with the person driving the blue Mazda. Under pretenses that the vehicle had been the victim of a hit and run, the officer obtained the suspect's driver's license and confirmed that he was the individual in the video of the controlled buys. His true name was Tario Curtis. The details of this interaction were not disclosed and were presented for the first time at trial.

The defense objected to the evidence regarding the officer's in-person identification, asserting that it violated the discovery order. The circuit court disagreed and declined to exclude the officer's testimony. At the conclusion of the trial, the defense requested a possession instruction on the second trafficking count, but the court declined. Both denials are the subject of this appeal. Curtis also

[1] The first controlled buy included a third party and did not result in a conviction for trafficking.

raises a third unpreserved issue alleging that KRS 532.080(10) prohibits the PFO enhancement of a conviction already enhanced by a subsequent or greater offense. We will address each of these arguments in turn.

First, we must determine if the Commonwealth violated the discovery order by failing to disclose information regarding the officer's in-person identification at Wendy's. In other words, does in-person identification qualify as an "incriminating statement" under RCr 7.24(1)? If so, is there a reasonable probability that disclosure would have affected the outcome at trial? *Thorpe v. Commonwealth*, 295 S.W.3d 458, 462 (Ky. App. 2009) ("An appellate court may set aside a conviction if a discovery violation creates a reasonable probability that had the evidence been disclosed the result at trial would have been different.") (Internal quotation omitted).

RCr 7.24(1) states that "the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness[.]" Disclosure also requires the opportunity to inspect and copy relevant written or recorded statements. RCr 7.24 (1). This is the case because "[t]he Commonwealth's ability to withhold an incriminating oral statement through oversight, or otherwise, should not permit a surprise attack on an unsuspecting defense counsel's entire defense strategy." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 296 (Ky. 2008).

Curtis's defense counsel used the strategy of mistaken identity, a strategy he likely would not have employed had he known that the officer made the identification. That being said, the identification made at Wendy's was not the only identification evidence presented at trial. The confidential informant and the police officer identified Curtis as the man in the controlled buy videos based on their personal knowledge. Further, images of the suspect were pulled from the video and given to the jury. Defense counsel was fully aware that identification evidence would be presented because this evidence was the basis for the warrant. An analysis of whether the Wendy's identification should have been disclosed pursuant to RCr 7.24(1) is not necessary because, with or without the evidence, it is unlikely that the result of the trial would have been different in light of the other identification evidence produced at trial.

Next, we turn to the jury instruction issue. Specifically, we must determine if the circuit court erred in failing to instruct on possession. KRS 218A.1415(1)(a) dictates that an individual is guilty of possession if they knowingly possess a controlled substance. We review a trial court's decision regarding jury instructions for abuse of discretion. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006). Curtis avers that because possession is a lesser-included offense to trafficking that he was entitled to the instruction.

"[J]ury instructions must be complete and the defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury…." *Hudson v. Commonwealth*, 202 S.W.3d 17, 29 (Ky.

2006). In essence, a lesser-included offense is a defense against a higher charge. *Slaven v. Commonwealth*, 962 S.W.2d 845 (Ky. 1997). "[W]hen a guilty verdict as to the alternative crime would amount to a defense of the charged crime, *i.e.*, when being guilty of both crimes is mutually exclusive[,]" a lesser-included instruction is required. *Hudson*, 202 S.W.3d at 22. That is not the case here. When the evidence indicates that drugs were transferred, an instruction on possession is not required because possession and trafficking are not mutually exclusive and possession is not a lesser-included offense. *Commonwealth v. Day*, 983 S.W.2d 505, 509 (Ky. 1999). In this case, the confidential informant testified that Curtis sold him cocaine. The jury could either believe that the seller was Curtis or that it was someone else. There was no evidence to support the position that Curtis merely possessed cocaine. As a result, an instruction on possession was not required.

Lastly, we consider whether the enhancement of Curtis's sentence was improper. This unpreserved issue is reviewed for manifest injustice. RCr 10.26.

> For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. A palpable error must involve prejudice more egregious than that occurring in reversible error. A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis boils down to is whether the reviewing court believes there is a substantial possibility that the result in the case would have been different without the error. If not, the error cannot be palpable.

Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006) (internal citations and quotations omitted). Curtis correctly asserts that KRS 532.080(10) prohibits PFO enhancement of a conviction already enhanced by a subsequent or greater conviction. However, the provision at issue was not enacted at the time Curtis committed the crime.[2] While KRS 446.110 allows for an exception to the general rule that statutes are not to be retroactively applied, the Kentucky Supreme Court has "consistently interpreted KRS 446.110 to require courts to sentence a defendant in accordance with the law which existed at the time of the commission of the offense unless the defendant *specifically consents* to the application of a new law[.]" *Lawson v. Commonwealth*, 53 S.W.3d 534, 550 (Ky. 2011) (emphasis added).

While it is likely that Curtis would have been entitled to mitigation under KRS 532.080, he did not consent to its application at trial. As a result of Curtis's failure to consent, the trial court was without authority to apply the statute and, thus, the court's alleged error in failing to apply the statute did not amount to palpable error.

For the foregoing reasons, we affirm.

ALL CONCUR.

[2] The statute became effective on March 2, 2011. HB 463, 2011 Gen. Assem., Reg. Sess. (Ky. 2011).

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