

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000673-MR

BRANDON STEPHENSON

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE GEORGE DAVIS, JUDGE  
ACTION NO. 09-CR-00460

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CAPERTON, MAZE, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Brandon Stephenson, appeals the March 21, 2012, final judgment and sentencing of the Boyd Circuit Court affirming his jury conviction for first-degree trafficking in a controlled substance, first offense, and sentencing him to ten years' imprisonment in accordance with the recommendation of the jury. Stephenson appeals to this Court as a matter of right,

arguing that the court committed errors affecting his substantial rights when it allowed the introduction of evidence concerning other indictments against him, when it allowed introduction of an audiotape containing what Stephenson alleges was hearsay, and when it allowed erroneous testimony regarding good time credits. The Commonwealth disagrees and urges this Court to affirm. Upon review of the record, the arguments of the parties, and the applicable law, we reverse and remand this matter for additional proceedings consistent with this opinion.

In March of 2009, Casey McKee<sup>1</sup> worked as an informant for the Kentucky State Police making controlled buys. McKee contacted Detective Phil Clark and informed him that he had arranged to purchase ten Oxycontin pills from Stephenson, whom he had met through mutual friends. At that time, McKee believed that Stephenson's last name was actually Castle. McKee met Detective Clark at a predetermined location at which time Detective Clark searched McKee, gave him \$420.00 to conduct the drug transaction, equipped him with a recording device, and dropped him off near Stephenson's home. Clark testified that he had searched McKee to confirm that he had no drugs on his person prior to dropping him off.

McKee then entered Stephenson's residence and spoke with Stephenson, asking him "Are we going to be able to get ten of them?" Stephenson responded "We may be able to." McKee told Stephenson that "I will hook you up with twenty [dollars]," and Stephenson answered "Yeah, that will be cool. I

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<sup>1</sup> McKee is also a convicted felon.

appreciate it.” Stephenson then called Dave Perry to set up the buy. McKee got into Stephenson’s vehicle and drove to Perry’s residence. Detective Clark followed Stephenson’s vehicle at a distance.

At Perry’s residence, McKee gave Stephenson \$420 and Stephenson exited the vehicle and went inside. McKee remained in the vehicle and while he waited called Detective Clark and read to him the make, model, and license plate number of many of the vehicles in Perry’s driveway. In addition, McKee found a uniform citation inside of Stephenson’s vehicle which indicated that his last name was Stephenson and not Castle and also included Stephenson’s social security number. This confirmed the information that Detective Clark received upon running Stephenson’s license plate.

Stephenson soon returned to the vehicle and told McKee that he (Stephenson) had “a whole pocket full of them.” McKee clarified, “Well, that ain’t mine,” and Stephenson replied, “We can get high on that I tell you.” Stephenson then gave McKee ten pills, which McKee counted. Stephenson then dropped McKee off at the Marathon station.

After Detective Clark arrived, McKee turned over ten suspected Oxycontin pills, labeled “40” on one side and “OC” on the other. Subsequent testing confirmed that the pills contained oxycodone, a Schedule II narcotic.

On October 9, 2009, a Boyd County Grand Jury indicted Stephenson for first-degree trafficking in a controlled substance, first offense. After a delay for Stephenson to be evaluated for competency, the circuit court judge scheduled his

trial for February 2012. At the final pretrial conference below, the Commonwealth stated that it had offered Stephenson two years on an amended charge. Against his counsel's advice, Stephenson rejected the Commonwealth's offer and proceeded to trial in the hopes of being acquitted so that he would not lose his gun rights.

Stephenson's case went to trial on February 20, 2012. During the course of the trial, the Commonwealth presented testimony from KSP Chemist Joe Tanner, who confirmed that the pills contained oxycodone. KSP Sergeant Randy McCarty, who transported the pills to the lab; the informant, Casey McKee; and Detective Clark also testified below. In addition, the Commonwealth played the tape from the controlled buy for the jury.

The jury found Stephenson guilty of first-degree trafficking in a controlled substance and recommended the maximum penalty of ten years. Stephenson appeared for final sentencing on March 16, 2012, at which time he was sentenced in accordance with the jury's recommendation. It is from that sentence that Stephenson now appeals to this Court.

Prior to addressing the arguments of the parties, we note that Stephenson concedes that the alleged errors he raised on appeal were not preserved below. He nevertheless requests palpable error review pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26.

In addressing the arguments of the parties, we note first that RCr 10.26 provides that:

A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

For an error to be palpable, it must be easily perceptible, plain, obvious, and readily noticeable. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). A palpable error “must involve prejudice more egregious than that occurring in reversible error.” *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005). 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 at 349. We review this matter with these standards in mind.

As his first basis for appeal, Stephenson argues that he was denied due process of law because of the flagrant misconduct of the prosecutor in introducing evidence that the detective was investigating Stephenson in other drug cases and that Stephenson had already been indicted on two charges in another county. As noted, Stephenson concedes that this error was not preserved for review, but requests palpable error review pursuant to RCr 10.26.

In making this argument, Stephenson asserts that after his counsel had concluded cross-examination of Detective Clark, the prosecutor inexplicably asked the detective if it was true that he had other investigations in progress concerning

Stephenson. Detective Clark answered affirmatively, at which time the Commonwealth then specifically asked Detective Clark if Stephenson had already been indicted on two other charges in Greenup County. Detective Clark confirmed that fact.

On appeal, Stephenson now argues that the prosecutor, in questioning Detective Clark in this manner, committed flagrant misconduct. Stephenson notes that the Commonwealth not only questioned Detective Clark as to the other two indictments without any warning or notice that it intended to do so in advance but also referred to the indictments again in closing arguments, emphasizing them, and telling the jury to “use your judgment on whether he’s a small fish or not.” Stephenson asserts that despite the fact that he made only \$20 in his transaction with McKee and merely acted as a go-between in that transaction, the Commonwealth pointed toward the other indictments in its closing arguments for the purpose of implying that Stephenson was not a go-between and was actually an individual who was heavily involved in drug trafficking.

In response to Stephenson’s arguments, the Commonwealth asserts first that in light of what it argues is overwhelming and uncontroverted evidence in this case, any error if there was error, was not palpable. Concerning the introduction of evidence that there were other investigations involving Stephenson, the Commonwealth argues that the introduction of this evidence did not affect Stephenson’s substantial rights because he opened the door to this evidence and because this evidence proved intent and identity. The Commonwealth asserts that

during the cross-examination of Detective Clark, Stephenson asked if Dave Perry had been investigated. Detective Clark admitted that Perry had several open investigations. On re-cross, Stephenson again inquired about Perry. Stephenson asked Detective Clark to compare the amount of traffic at Perry's house with that of Stephenson's. Detective Clark admitted that considerable traffic moved in and out of Perry's house and that no significant traffic moved in and out of Stephenson's house. Stephenson then entered into the following exchange with Detective Clark:

**Counsel:** Now, at no time did Casey McKee claim that Brandon was a supplier of pills? ... The allegations are that Casey gave money to this person named Brandon. Brandon went to Dave Perry, got the pills, came back out, and handed them to Casey?

**Clark:** That's the way I took it.

**Counsel:** That would be the extent of this Brandon's involvement, to the best of your knowledge?

**Clark:** To the best of my knowledge.

Following this exchange, the Commonwealth then asked Detective Clark if he had been involved in other investigations of Stephenson and if Stephenson had been indicted on two other counts in Greenup County. Detective Clark stated that he had. The Commonwealth asserts that this line of questioning by the defense implied that Perry was the dealer and that if Stephenson was present, he acted as nothing more than a go-between in the transaction between McKee and Perry. Thus, the Commonwealth argues that its follow-up question properly rebutted Stephenson's questions by introducing testimony to contradict the implication that Stephenson was nothing more than a middleman.

Moreover, the Commonwealth asserts that Stephenson's defense and line of questioning placed his identity in question. The Commonwealth notes that in his opening statement, Stephenson denied selling pills and denied even being in the same community where this activity was occurring. The Commonwealth also asserts that Stephenson knew that the Commonwealth would introduce the citation found in his car into evidence and thus put forth a defense that his car had been stolen from his home. Detective Clark identified Stephenson as the person driving the vehicle in which McKee was a passenger. The Commonwealth asserts that in order to prove that Detective Clark could identify Stephenson, it properly introduced evidence that he knew Stephenson from other investigations.

The Commonwealth also argues that the evidence was properly introduced to demonstrate intent, particularly in light of the defense that Stephenson put forth *sub judice* in which he assured the jury that he did not sell pills to McKee, and insinuated that while Perry may have trafficked in pills, Stephenson did not. The Commonwealth asserts that this defense put Stephenson's mental state at issue and placed both his identity and intent in question. Thus, the Commonwealth asserts that its line of questioning was proper and that Stephenson opened the door to same.

Upon review of the arguments of the parties and the applicable law, we are compelled to agree with Stephenson that the evidence at issue was improperly admitted. Stephenson asserts, and the Commonwealth does not dispute, that it failed to provide notice of its intent to introduce evidence of the



other investigations pending against Stephenson. Ultimately, we find this fact to be dispositive of this issue. Clearly, Kentucky Rules of Evidence (KRE) 404(c) provides that:

(c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

Having found that the Commonwealth failed to provide notice of its intent to introduce evidence of the indictments, and having found no good cause as to why this was the case *sub judice*, we believe reversal is appropriate. We now turn to Stephenson's second basis for appeal.

As his second basis for appeal, Stephenson argues that he was denied due process of law when the Commonwealth played a recording of the alleged incident which contained conversations between himself and McKee and Detective Clark for the purpose of bolstering the inadequate audio, and provided an inappropriate interpretation of the recording with hearsay evidence of events not on the audio.

In response, the Commonwealth asserts that the audiotape was non-hearsay and that its admission was not in error. The Commonwealth argues that "buy-tapes," like the one in question, are routinely admitted into evidence and played for the jury, even in situations where a summary of the buy was provided

on the tape. Alternatively, the Commonwealth argues that even if this Court finds the statements on the tape to be hearsay, then they should be subject to the hearsay exception of present-sense impressions pursuant to KRE 803(1) because they were statements made by McKee and Detective Clark while they were perceiving the events at hand, or immediately thereafter. Finally, the Commonwealth asserts that McKee testified to the events on tape and that Stephenson thoroughly cross-examined McKee concerning the events and concerning his credibility. Thus, the Commonwealth argues that even if admission of the tape was in error, such error was harmless in light of the cumulative nature of the testimony and that the error would, accordingly, not have affected Stephenson's substantial rights.

KRE 801 provides that hearsay is 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. In *Norton v. Commonwealth*, 890 S.W.2d 632 (Ky. App. 1994), the Paducah Police Department organized an undercover drug buy during which an undercover officer and his informant purchased LSD from Norton and another defendant. The transaction and the conversations of the parties involved were recorded on tape and were played to the jury during trial. This Court addressed admission of the audiotape of the controlled buy, ultimately finding that the tapes at issue therein did not constitute hearsay. In so finding, this Court reviewed the nature of hearsay, finding that the tape at issue did not constitute hearsay and was instead evidence of the event itself, introduced for a

non-hearsay purpose. In so finding, this Court specifically distinguished the situation in *Norton* from a situation such as the one *sub judice*, stating:

Statements made outside the courtroom are divided into categories of hearsay and non-hearsay. If used to prove the truth of the matter asserted, such statements constitute hearsay. If used for some other purpose, the statements are non-hearsay. When such statements are offered into evidence for a non-hearsay purpose, they become evidence which the opposing party may fully scrutinize through cross-examination of the witness offering to prove the making of the statement. This has been the basis for the United States Supreme Court to rule that the admissibility of out-of-court statements for non-hearsay purposes does not in any way violate the confrontation clause. *Lawson, supra* at § 8.00. See *Tennessee v. Street*, 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985).

We conclude that the tapes at issue do not constitute hearsay; instead, they were evidence of the event itself, introduced for a non-hearsay purpose. The issue here is not whether someone else (for instance, the undercover officer) may testify as to what other persons said during the transaction but, instead, whether the tapes of the actual voices of the persons conversing during the course of the transaction are admissible as competent evidence, arguably the best evidence that the transaction or meeting did, in fact, occur and that the statements were, in fact, made. The playing of the tapes was not for the purpose of proving the truth of the matters being asserted, i.e., that a pound of marijuana cost \$2,000 or that someone “took a hit and a half and said he was fried,” or that the suppliers did not want to come to Norton's place or that Norton lived there since he was 6 years old or that Norton only had one hit left, etc.... The Commonwealth had no interest in proving whether such statements were true but rather that the defendants, Street and Norton, were present, engaged in negotiations, and were involved in the transaction that Officer Acree testified occurred.

*Norton* at 635.

Clearly our holding in *Norton* indicated that the situation therein could have been otherwise had the undercover officer in that case

been repeating or clarifying what other individuals had said during the transaction in order to prove what had happened. We believe this latter situation to be more akin to our situation *sub judice*. Were the Commonwealth seeking only to admit the discussions between the two individuals involved in the buy, for the purpose of establishing that they were present at the event as testified to by the officer, we would find same to be admissible for that limited purpose in accordance with *Norton*. However, the summary at the end of the recording, and the repetition and recitation of same by both the informant and the detective, is hearsay and we, accordingly, believe that its admission was in error.

In so finding, we reject the Commonwealth's argument that the statements on the tape were subject to the hearsay exception of present-sense impression as set forth in KRE 803(1). The narrative statements made on the tape are clearly a description of past events, even though very recently past. They were not made in the context of an ongoing emergency and they were not made during the actual course of the drug buy as it was occurring. *See Baker v. Commonwealth*, 234 S.W.3d 389, 393 (Ky. App. 2007)

Ultimately, however, this Court is of the opinion that though the admission of the audiotape was in error in light of the statements made by the informant and detective at the end, such error does not rise to the level necessary to meet the palpable error standard set forth in RCr 10.26. As noted, such an error must be one which creates 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 at 349.

We do not believe such to have been the case *sub judice*. Below, McKee personally testified as to the events on the tape. He was thoroughly cross-examined by Stephenson concerning both the events described on the tape and his credibility. Thus, in light of the cumulative nature of the testimony and the additional evidence submitted, we cannot find that the error which occurred was palpable. Accordingly, we decline to reverse on this basis.

As his third and final basis for appeal, Stephenson argues that he was denied due process of law because the Commonwealth introduced erroneous evidence stating that Stephenson would receive good time credits “no matter what” in the penalty phase of the trial, which Stephenson asserts misled the jury into giving him the maximum penalty. During the penalty phase, the following exchange occurred between the Commonwealth and Probation and Parole Officer Billy Sloan regarding credits which an inmate serving a sentence “may” be eligible to receive:

**Commonwealth:** Can you tell me about some of the credits that someone who is serving a sentence may be eligible to receive?

**Witness:** There are several different credits they get a man – uh – I’m sorry – there’s a statutory good time and a mandatory – uh let’s see – there’s statutory good time uh that’s good time that they are entitled – they get no matter what and the other good time is time that they get when they don’t have any violations.

**Commonwealth:** So statutory good time is a credit that will go on their sentence regardless?

**Witness:** Correct.

**Commonwealth:** How much statutory good time do you get?

**Witness:** Statutory is seven days a month.

**Commonwealth:** Seven days per month?

**Witness:** Per month.

**Commonwealth:** Okay, the other good time – what was it again?

**Witness:** there's statutory or meritorious.

**Commonwealth:** Meritorious good time – how much – that's if they don't violate any rules in prison?

**Witness:** The maximum is seven days.

**Commonwealth:** So, presumably if they are not having any violations they can get 14 days good time?

**Witness:** They can get 14 days, correct.

CD 1: 02/20/2012; 3:07:26-3:09:03.

In response to Stephenson's arguments, the Commonwealth asserts that no error occurred and, alternatively, if an error did occur, it was not palpable. While acknowledging that the officer's testimony was "inarticulate," the Commonwealth asserts that it was not erroneous to the point of palpable error. The Commonwealth argues that regardless of the fact that the testimony may have been articulate, it did not affect Stephenson's substantial rights. It asserts that though Stephenson received the maximum sentence, this merely reflected the counsel's advice and the reality of sentences for this type of crime in Boyd County. Further, the Commonwealth notes that despite being advised by his counsel of the severity of the potential sentence he could receive, Stephenson still chose to go to trial. Thus, the Commonwealth argues that error, even if it occurred, was not palpable. We disagree.

In reviewing this issue, we note that the statute existing at the time of Stephenson's trial allowed an inmate to be awarded statutory good time credit of ten days per month to be determined by the department from the conduct of the prisoner. *See* KRS197.045(1). Further, the same inmate might also be entitled to an additional seven days per month of meritorious good time credit at the discretion of the Commissioner. *See* KRS 197.045(1)(b)(3). Neither statute made the good time mandatory. A review of these provisions indicates that the testimony elicited above was in fact in error since they clearly do not provide for statutory good time which is given to the inmate "no matter what" and "will go on their sentence regardless."

Ultimately, this Court cannot know whether or not the jury would have given Stephenson the maximum sentence, absent this error. Certainly, if the jury were to rely upon the testimony set forth above, then it is within the realm of substantial possibility that the jury may have assigned a sentence greater than it otherwise might have under the belief that it would automatically be lessened each month with the good time credit Stephenson would receive "no matter what." Accordingly, we believe reversal is appropriate.

Wherefore, for the foregoing reasons, we hereby reverse and remand the March 21, 2012, final judgment and sentence of imprisonment issued by the Boyd Circuit Court, and remand this matter for additional proceedings consistent with this opinion.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

MAZE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I dissent from the portion of the majority opinion which reverses the jury verdict in the guilt phase of Stephenson's trial. I agree with the majority that Detective Clark's testimony about the two other indictments against Stephenson was improper evidence of prior bad acts. Contrary to the Commonwealth's argument, this testimony was not relevant to prove identity or intent, but only went to Stephenson's propensity to commit the charged offense. However, I am not convinced that admission of this evidence rises to the level of palpable error. Where the error is unpreserved, an isolated reference to other similar bad acts typically will not be so prejudicial as to cause manifest injustice. *Commonwealth v. Mitchell*, 165 S.W.3d 129, 134 (Ky. 2005). *See also Castle v. Commonwealth*, 44 S.W.3d 790, 793-94 (Ky. App. 2000). Under the circumstances, I do not believe that any error warrants reversal of the jury's verdict in the guilt phase.

On the other hand, I agree with the majority's analysis regarding the admission of the narrative statements on the audiotape. I also agree with the majority that the trial court's error in admitting this evidence did not rise to the level of palpable error. Finally, I agree with the majority that Officer Sloan's statements about Stephenson's parole eligibility were at least misleading and likely incorrect. I would also point out that such misstatements about parole eligibility



will generally be considered to rise to the level of palpable error where the defendant receives the maximum penalty. *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005). Therefore, I join with the majority's decision to reverse on this issue, and I would remand this matter to the trial court only for a new penalty phase.

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