

RENDERED: JULY 18, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002176-MR

AMBER MOSHER

APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 12-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Amber Mosher appeals from judgment of the Leslie Circuit Court, where a jury convicted her of receiving stolen property over \$500. After review, we affirm the trial court's decision.

FACTS AND PROCEDURAL HISTORY

Mosher was indicted with theft by unlawful taking over \$500 and criminal mischief in the first degree for the theft of radiators and other car parts which were the property of Grant Baker, a local mechanic. Jury instructions at trial included the elements for theft by unlawful taking, criminal mischief, and receiving stolen property. The jury found Mosher not guilty of theft by unlawful taking or criminal mischief, but guilty of receiving stolen property over \$500. Mosher was sentenced to one year in prison.

ANALYSIS

On appeal, Mosher argues the following: that the trial court failed to grant her motion for directed verdict; the trial court should not have instructed the jury on receiving stolen property; and the trial court should not have allowed certain testimony of Grant Baker to be admitted. For those reasons, Mosher requests that this court reverse and remand this case for a new trial.

1. **The trial court correctly denied Amber's motion for a directed verdict. Alternatively, the issue was not preserved for review.**

Mosher first argues that the trial court improperly denied her motion for a directed verdict because the prosecutor failed to prove every essential element of receiving stolen property. In making our determination we address not the content of the jury instructions, but the evidence presented at trial and the resulting jury verdict based upon that evidence. It is well established that the standard of

review for a directed verdict at trial dictates that acquittal is only available if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). There must be substantial evidence to support an acquittal. *Id.*

The discretionary standard on review is preempted by whether the issues were preserved at trial. *Ellison v. R & B Contr., Inc.*, 32 S.W.3d 66, 73 (Ky. 2000). For a specific issue to be heard on appeal, it is necessary to preserve the issue at trial by objecting to it or raising a motion in objection. *Hopewell v. Commonwealth*, 641 S.W.2d 744, 745 (Ky. 1982). At the close of the Commonwealth's case, Mosher's attorney requested to make an unspecified motion. This motion was denied. After the jury left the courtroom to deliberate, but before they returned with a verdict, the judge referenced a conversation between him and counsel that was off the record, after which Mosher's counsel renewed a motion for a directed verdict. This motion was also denied.

Upon reviewing the record, we do not conclude that there were any objections made at trial regarding the Commonwealth's burden of proof in relation to the evidence presented, nor were there any specific motions made on the record. Had Mosher made the objection that the Commonwealth had not met its burden of proving that each element of the crime detailed in the jury instructions was met, we would be able to further review the elements and evidence on appeal.

Even if Mosher successfully made a motion for a directed verdict at trial, as she contends in her brief, then that alone would not have been sufficient to

address the specific issue of the Commonwealth's meeting its burden of proof pursuant to Kentucky Rules of Civil Procedure (CR) 50.01. As held in *Johnson v. Commonwealth*, 292 S.W.3d 889 (Ky. 2009), "[a] motion for a directed verdict shall state the specific grounds therefor." We have consistently applied this rule in criminal cases, holding that the failure to state a specific ground for directed verdict "will foreclose appellate review of the trial court's denial of the directed verdict motion." *Pate v. Commonwealth*, 134 S.W.3d 593, 597-98 (Ky. 2004) (citing *Daniel v. Commonwealth*, 905 S.W.2d 76, 79 (Ky. 1995); *Hercules Powder Co. v. Hicks*, 453 S.W.2d 583, 589 (1970)).

Alternatively, Mosher requests a palpable error review under RCr 10.26. Consideration may be given to an issue on appeal that is otherwise unpreserved if it rises to the level of a palpable error. Kentucky Rules of Criminal Procedure (RCr) 10.26. To reverse a trial court's judgment on the basis of palpable error, the Supreme Court of Kentucky has held that there must be a "manifest injustice" and the probability of a different result; or, the error must be so fundamental that it threatens the defendant's entitlement to due process of law. *Goncalves v. Commonwealth*, 404 S.W.3d 180, 205 (Ky. 2013); *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). A palpable error is considered to be "shocking" or "jurisprudentially intolerable." *Martin, supra*, 207 S.W.3d at 4.

We determine that the denial of a directed verdict in this case does not rise to the level of palpable error by being "shocking" or "jurisprudentially

intolerable.” Additionally, there were questions of fact for the jury to adjudicate based on the evidence presented to them at trial.

The standard of review on appeal regarding questions of fact examines if there is a clear error that was made in the final determination. *Turley v. Commonwealth*, 399 S.W.3d 412, 419-20 (Ky. 2013). Since the jury bears the responsibility of listening to and judging evidence (as the finders of fact), deference is given to them. *Webb v. Commonwealth*, 387 S.W.3d 319, 325 (Ky. 2012).

II. The trial court properly instructed the jury on receiving stolen property.

Next, Mosher argues that the trial court should not have instructed the jury on receiving stolen property. This argument is based on Mosher’s indictment for the crime of theft by unlawful taking. Jury instructions are reviewed based upon an abuse of discretion. *Hall v. Commonwealth*, 337 S.W.3d 595 (Ky. 2011). The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principle. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007).

The record does not indicate that there were any objections or motions made in reference to the jury instructions given; therefore, the issue was not preserved for review. However, Mosher relies on *State v. Trusty*, a Tennessee Supreme Court case, to argue that the trial court lacked jurisdiction because the

court proceeded [to instruct the jury] based on an indictment that did not inform Mosher of the elements of the offense she was eventually charged with. *State v. Trusty*, 919 S.W.2d 305, 309-10 (Tenn. 1996). The case that Mosher relies on is not controlling to this court. Kentucky courts have ruled that if the trial court gives or fails to give a particular jury instruction, that does not strip the court's jurisdiction. *Sitar v. Commonwealth*, 407 S.W.3d 538, 542 (Ky. 2013).

Alternatively, Mosher argues even if the court had jurisdiction and the issue was not preserved, that these instructions amount to a palpable error pursuant to RCr 10.26. However, a recent decision by the Kentucky Supreme Court held that RCr 9.54(2) bars palpable error review for unpreserved claims that the trial court erred in the giving or failure to give a specific instruction. *Martin v. Commonwealth*, 409 S.W.3d 340, 345 (Ky. 2013). Further, Kentucky law dictates that a defendant can be convicted of a crime with which he or she was not formally charged if it can be proved by some or fewer than all of the facts presented at trial. Kentucky Revised Statutes 505.020(2)(a). Thus, the jury instructions were proper. Mosher's remaining arguments on this issue are without merit.

III. The majority of Grant Baker's testimony was not preserved for review, and the admission of the portion that was preserved amounts to harmless error.

Lastly, the issue of a portion of Grant Baker's testimony was also not preserved at trial, and its admittance does not arise to a palpable error. The

standard of review for an evidentiary ruling is for abuse of discretion by the trial court. *Benjamin v. Commonwealth*, 266 S.W.3d 775, 791 (Ky. 2008).

When Baker was questioned by Mosher's attorney at trial regarding her participation in the theft, Baker testified regarding how he believed the theft had occurred, stating that there had to be more than one person and describing in detail how the crime likely happened. There was no objection to this portion of the testimony.

Not only was there no objection to the majority of Baker's testimony, but this testimony also occurred while Mosher's attorney was cross-examining the witness. First, the Commonwealth argues that the lack of objection was due in part to trial strategy because the testimony regarding how the theft may have occurred would have helped Mosher's case that she did not take part in the actual theft. We agree with the Commonwealth.

In *Meece v. Commonwealth*, 348 S.W.3d 627, 656 (Ky. 2011), the Kentucky Supreme Court determined that a party's failure to object to a statement because of trial strategy does not result in a palpable error review. In this case, Mosher's attorney elicited the testimony of the witness during cross-examination. There was no error brought to the attention of the court.

Next, regarding the part of Baker's testimony relating to Mosher's children, which was preserved, we conclude that this amounted to a harmless error. Baker's testimony included conversations that he heard between Mosher and the police officers on the scene the morning of her arrest. This testimony could have

been excluded as hearsay under Kentucky Rules of Evidence (KRE) 801(c) and KRE 802. When Mosher objected to this part of the testimony, it was overruled. We believe that it amounts to a harmless error. An evidentiary error may be deemed harmless if an appellate court can say with fair assurance that the error did not substantially sway the result. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) (quoting *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed.1557 (1946)). We do not believe that the admission of this testimony swayed the result of the trial court or prejudiced Mosher's trial.

Therefore, we affirm the opinion of the Leslie Circuit Court.

ALL CONCUR.

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