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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001531-MR

JEROME LESLIE TAYLOR APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. PAMELA GOODWINE, JUDGE
INDICTMENT NO. 14-CR-00714

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

COMBS, JUDGE: After a trial in which Jerome Taylor was convicted of trafficking in a controlled substance, Jerome appeals from the Fayette Circuit Court's Final Judgment and Sentence of Imprisonment entered on September 10, 2015. After our review, we affirm the circuit court.

On the morning of June 13, 2014, narcotics officers from the Lexington Police Department raided the house and its environs at 460 Hawkins

Avenue in Lexington, Kentucky. The area had previously been the subject of complaints relating to alleged sales of crack cocaine, and thus this raid was the culmination of a long-term police investigation. As part of their investigation, officers had installed a "pole camera" on top of a nearby street light pole in order to monitor the area.

When police approached the house at 460 Hawkins Avenue, people who had been sitting on the porch scattered in all directions. One of those who fled was Jerome Leslie Taylor, the appellant, who was found nearby lying down on his stomach. Sergeant Jack Dawson detained, frisked, and questioned Taylor, but Dawson did not find anything incriminating on him. Taylor cooperated with Sergeant Dawson, giving him his name, date of birth, and address before being permitted to leave. During an ensuing search of the yard at 460 Hawkins Avenue, Sergeant Dawson found a bag containing 5.254 grams of crack cocaine. At that time, he did not know who may have dropped the cocaine. After the raid, however, Sergeant Dawson and Detective Charles Johnson reviewed the surveillance video obtained from the pole camera. Both officers saw a man whom Sergeant Dawson recognized as Taylor pull a bag from the back of his shorts and throw it into the yard at 460 Hawkins Avenue in the same location where Sergeant Dawson had found the bag of cocaine.

On July 15, 2014, Taylor was indicted by the Fayette County grand jury on the charge of "Trafficking in a Controlled Substance First Degree, First Offense – (Greater Than or Equal to 4 Grams Cocaine)." The indictment further

specified that this offense was a Class C felony. At Taylor's trial, the Commonwealth's evidence included the testimony of the police officers, the surveillance video, and testimony from a Kentucky State Police forensic chemist, who identified the substance in the bag as cocaine weighing 5.254 grams.

The jury found Taylor guilty of first-degree trafficking in a controlled substance. However, because the jury instruction only asked that they find Taylor had "a quantity" of the cocaine, there was no determination by the jury as to the actual amount of cocaine that was in Taylor's possession. Following the guilty verdict, Taylor's counsel and the Commonwealth approached the bench and informed the circuit court that they had agreed to waive jury sentencing and to accept an offer from the Commonwealth of a sentence of five-years' imprisonment. The circuit court rendered judgment in accord with the negotiated sentence in open court on September 4, 2015. On September 10, 2015, the circuit court entered its written order of Final Judgment and Sentence of Imprisonment, reciting that the jury found Taylor guilty of "Trafficking Controlled Substance 1st Degree 1st Offense (> = 4 GMS Cocaine)." However, as already noted, the jury never made an actual determination on the precise amount of cocaine involved.

Taylor now appeals and presents two issues arising from his trial. Since neither of the alleged errors was preserved, he requests that we review for palpable error pursuant to under RCr[1] 10.26. That rule provides as follows:

> palpable error which affects the substantial rights of a party may be considered … even though insufficiently

[1] Kentucky Rules of Criminal Procedure.

> raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

"Manifest injustice" requires a showing of the probability of a different result or that the error in the proceeding was of such magnitude as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 3-4 (Ky. 2006).

Taylor's first issue on appeal is that the jury instruction for first-degree trafficking in a controlled substance deprived him of a fair and reliable verdict because it omitted an element of the offense. The instruction stated in relevant part: "You will find the Defendant guilty of Trafficking in a Controlled Substance, First Degree under this Instruction if … he had in his possession a quantity of cocaine." The instruction did not require the jury to find that Taylor had four or more grams of cocaine -- as indicated by the indictment under which he was charged. Taylor argues that this language omitted an essential element of the offense and that palpable error occurs when a jury instruction fails to include all of the elements necessary for conviction.

The relevant portions of the first-degree trafficking in a controlled substance statute, KRS[2] 218A.1412, provide as follows:

> (1) A person is guilty of trafficking in a controlled substance in the first degree when he or she knowingly and unlawfully traffics in:
> (a) Four (4) grams or more of cocaine… [or]

[2] Kentucky Revised Statutes.

(e) **Any quantity of** a controlled substance specified in paragraph (a)… of this subsection in an amount less than the amounts specified in those paragraphs…

(3) (a) Any person who violates the provisions of subsection (1)(a) … shall be guilty of a Class C felony for the first offense…
(b) Any person who violates the provisions of **subsection (1)(e) … [s]hall be guilty of a Class D felony** for the first offense… (Emphases added.)

The jury found Taylor guilty of first-degree trafficking in a controlled substance based upon the instruction requiring them to find that Taylor had in his possession "a quantity" of cocaine. The finding of "a quantity" was all that was necessary to convict Taylor of first-degree trafficking in a controlled substance under KRS 218A.1412(1)(e), a Class D felony. Absent a jury determination as to the precise amount of cocaine, the instruction would indeed have been flawed if Taylor had then been sentenced in accord with KRS 218A.1412(1)(a) to a Class C felony. But before the jury could recommend a sentence, Taylor and the Commonwealth negotiated an agreement whereby Taylor agreed to waive the penalty phase of his trial and take five-years' imprisonment.

The uncontroverted evidence at trial indicated that the cocaine weighed 5.254 grams. If the jury had determined -- conceivably during the penalty phase -- that he was trafficking in more than four grams of cocaine, Taylor ran a substantial risk that the jury would sentence him to ten years in prison. Taylor's prison sentence of five years was effectively a negotiated one that placed him at the lowest possible term of years in prison for a possible Class C felony. Five years is also the maximum possible term for a Class D felony. Thus, his sentence

was consistent with the penalty for trafficking under KRS 218A.1412(1)(e), which required the jury to find that he had **"[a]ny quantity** of a controlled substance specified in paragraph (a)." (Emphasis added). The negotiated sentence was, therefore, not contrary to law, as it was consistent with either statutory sentencing provision. We conclude that no palpable error produced a manifest injustice on this issue.

Taylor's second assignment of error is that the trial court should not have permitted Sergeant Dawson to testify as to his interpretation of the events in the surveillance video that led him to identify the appellant. Taylor argues that Sergeant Dawson did not view the events in real time and thus had no personal knowledge of what was being portrayed. He contends that Dawson's testimony amounted to improper narration about the video. The Supreme Court of Kentucky has provided guidance on this issue in the recent case of *Boyd v. Commonwealth*, 439 S.W.3d 126 (Ky. 2014). Narrative testimony that exceeds the personal knowledge of a witness is indeed improper and in violation of KRE[3] 602 and 701.[4] However, in *Boyd*, our Supreme Court held that:

> the error was harmless because the jurors were watching the video and were in a position to interpret the security footage independently from the testimony, which provides fair assurance that the judgment was not

[3] Kentucky Rules of Evidence.

[4] "[KRE 602 and 701] govern the admissibility of narrative testimony. KRE 602 limits testimony to matters within the personal knowledge of the witness, while KRE 701 further limits testimony by a lay witness to matters, a) rationally based on the perception of the witness; [and] b) helpful to a clear understanding of the witnesses' testimony or demonstration of a fact in issue." *Boyd*, 439 S.W.3d at 131 (internal citations and quotations omitted).

> 'substantially swayed by the error.' *Id.* at 131-32 (citations omitted).

Boyd is applicable to the case before us. Even if we were to agree that Sergeant Dawson may have engaged in improper interpretation of the video, the jury was permitted to view the video at least twice: once during the Commonwealth's opening statement and again during the testimony. Because the jurors were able to view the video footage, they were able to interpret the contents for themselves. *Boyd* holds that this procedure amounts to harmless error. Thus, there was no palpable error resulting in manifest injustice.

We affirm the Fayette Circuit Court's order of September 10, 2015.

ALL CONCUR.

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