

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001561-MR

SONYA ELAINE RODGERS

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT V. COSTANZO, JUDGE
ACTION NOS. 15-CR-00398 AND 15-CR-00437

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Sonya Elaine Rodgers appeals from the Bell Circuit Court's final judgment entered October 7, 2016, following a jury trial in which she was found guilty of three counts of trafficking in a controlled substance¹ and being a second-degree persistent felony offender² (PFO). We affirm.

¹ Kentucky Revised Statutes (KRS) 218A.1412(1)(e), a Class D felony.

² KRS 532.080(2).

I. BACKGROUND

The facts of this case involve three controlled drug purchases between Rodgers and Terri York, a confidential informant (CI) working for Kentucky State Police (KSP) in Bell County, Kentucky. On April 10, 2015, York's contact, Detective Brian Greene, followed his usual procedure when employing a CI in a controlled drug purchase: He preliminarily searched York and her vehicle for contraband, he equipped her with a hidden digital audio recording device, and he gave her \$120 in buy money. After calling Rodgers to set up the meeting, York drove herself to the location of the controlled purchase, under Detective Greene's observation, and she returned to him afterward with three pills containing oxycodone. Detective Greene repeated this process on April 22, 2015, sending York to Rodgers with \$160 in buy money. On this occasion, York returned to him with four more pills containing oxycodone. On June 26, 2015, KSP Detective Keith Saylor employed York to make a third controlled purchase from Rodgers. Detective Saylor followed similar procedural precautions in outfitting York as Detective Greene and gave her \$80 in buy money. York returned to Detective Saylor with \$20 in unused cash, along with six hydrocodone tablets and one-half of a thirty-milligram oxycodone tablet.

On November 4, 2015, the Bell County grand jury charged Rodgers with two counts of trafficking in a controlled substance and for being a second-

degree PFO in indictment number 15-CR-00398, based on the two controlled purchases in April 2015. Shortly thereafter, the grand jury issued a second indictment, 15-CR-00437, charging Rodgers with an additional count of trafficking in a controlled substance, based on the controlled purchase made on June 26, 2015. The Bell Circuit Court subsequently consolidated the two indictments for trial purposes.

In Rodgers's one-day jury trial, held June 16, 2016, the Commonwealth presented testimony and evidence asserting the aforementioned incidents. The jury heard testimony from Detectives Greene and Saylor, as well as testimony from York, detailing the three controlled drug purchases. The jury also heard testimony from the KSP forensic scientist who analyzed the pills, and she confirmed the pills she tested³ contained oxycodone. The jury also heard the entire, unredacted audio recordings surrounding the three drug purchases, as captured by the digital recorder hidden on York. The defense evidence consisted solely of Rodgers testifying on her own behalf. She initially denied selling drugs to York, instead claiming York was the one selling drugs to her. On cross-examination, Rodgers admitted *obtaining* pills for York, but denied ever *selling*

³ The forensic scientist explained in her testimony that she did not analyze all of the pills recovered, per protocol, as a matter of conserving laboratory resources. For example, the hydrocodone tablets were not chemically tested, but they bore the markings of manufactured hydrocodone which, she admitted, could be counterfeited. Despite this limitation on her testing, the forensic scientist chemically analyzed a sampling of pills from all three transactions, and these tested positive for oxycodone.

them. Instead, Rodgers described her relationship with York as being friends who would use pills together.

After the close of the Commonwealth's case, the jury found Rodgers guilty on all three counts of trafficking in a controlled substance. During the penalty phase, the jury heard Probation and Parole Officer Michelle Hensley testify regarding Rodgers's prior felony convictions in Bell County and her eligibility for the PFO charge. Rodgers was previously convicted of two counts of second-degree trafficking in a controlled substance (09-CR-00118), for which she served a concurrent four-year sentence. In addition, Rodgers had been convicted of one count of first-degree promotion of contraband (09-CR-00130), for which she served a one-year sentence running consecutively to the four-year term imposed in 09-CR-00118. Rodgers completed parole supervision in November 2012. The defense did not cross-examine Officer Hensley, and the jury heard no other testimony during the penalty phase.

Following Officer Hensley's testimony, the jury returned a verdict fixing Rodgers's sentence at three years, enhanced to ten years, on one count of trafficking, with a recommended sentence of three years each on the two remaining counts. The jury further recommended each count should be served consecutively, for a total of sixteen years' imprisonment. The trial court entered final judgment

on October 7, 2016, sentencing Rodgers in accord with the jury's recommendation. This appeal follows.

II. ANALYSIS

1. Admission of the Audio Recordings

Rodgers presents four issues on appeal, only the first of which is preserved in any manner. Rodgers's first set of issues relate to the admission of the audio recordings of the three controlled drug transactions. "[W]e review a trial court's evidentiary rulings for an abuse of discretion." *Dunlap v. Commonwealth*, 435 S.W.3d 537, 553 (Ky. 2013). "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 554 (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

In this case, the trial court permitted the Commonwealth to play each recording in its entirety, including portions which Rodgers argues were hearsay. The jury heard telephone conversations between Rodgers and York setting up meetings to arrange the transaction, the transaction itself, and conversations between York and the detective summarizing the transaction which had just occurred. In other portions, the jury heard the detective's recorded narrative summary regarding telephone conversations which had just occurred between York and Rodgers. At trial, Rodgers objected on the basis of hearsay to all portions of

the recordings which were neither telephone calls setting up the transactions, nor of the transactions themselves. Rodgers has therefore preserved her issue regarding the recorded summaries involving York's debriefing and the detective's narration.

“‘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.” Kentucky Rule of Evidence (KRE) 801(c). “Hearsay . . . is generally inadmissible at trial unless ‘it meets one of our well established exceptions.’”

Moore v. Commonwealth, 462 S.W.3d 378, 381 (Ky. 2015) (quoting *Wells v. Commonwealth*, 892 S.W.2d 299, 301 (Ky. 1995) and citing KRE 802).

Rodgers correctly argues the trial court erred by permitting the jury to consider hearsay portions of the audio recordings. In *Norton v. Commonwealth*, 890 S.W.2d 632 (Ky. App. 1994), this Court held tape recordings of a drug transaction were not hearsay, because “they were evidence of the event itself, introduced for a non-hearsay purpose.” *Id.* at 635. However, in *Baker v. Commonwealth*, 234 S.W.3d 389 (Ky. App. 2007), this Court distinguished *Norton*, concluding an informant's recorded conversation with a detective summarizing a recent drug buy was hearsay not falling within a valid exception to the hearsay rule:

[The confidential informant's] statements in this case are clearly a description of past events—albeit 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. The statements undoubtedly implicated [Appellant] as being involved in criminal activity. These facts, taken together, suggest that the statements were testimonial in nature.

Id. at 393. *Norton* permits the trial court to allow recordings of the transaction as evidence, for the non-hearsay purpose of demonstrating the transaction actually occurred. *Baker*, however, forbids recorded testimonial summaries or commentaries. The case *sub judice* bears greater similarity to *Baker* than *Norton*. Here, not only did the trial court permit the jury to hear recordings of the KSP detectives and York summarizing recent drug transactions, the jury also heard the detectives' extraneous recorded summaries of the telephone conversations between York and Rodgers. As in *Baker*, these summaries should have been deemed hearsay and were thus erroneously admitted.

Despite the trial court's error admitting the recordings, however, we conclude, as in *Baker*, that the error was harmless. Kentucky Rule of Criminal Procedure (RCr) 9.24 provides the following:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

“An error is harmless where, considering the entire case, the substantial rights of the defendant are not affected or there appears to be no likely possibility that the result would have been different had the error not occurred.” *Greene v. Commonwealth*, 197 S.W.3d 76, 84 (Ky. 2006) (citation omitted).

Our review of the record indicates the jury heard significant evidence detailing the drug transactions with Rodgers, including testimony from the KSP detectives and York. Even if the trial court had properly restricted the audio recordings to portions admissible under *Baker* and *Norton*, the jury would still have heard audio recordings of the transactions, as well as testimony from the detectives and York asserting the transactions had taken place. The jury would also have heard testimony from the KSP forensic scientist identifying the pills York acquired from Rodgers as oxycodone. The defense’s evidence consisted solely of Rodgers’s equivocal denial of a *sale* while she admitted *providing* the drugs to York. “After reviewing the record before us, we cannot say that there is a likely possibility that the result of the trial would have been different[.]” *Baker*, 234 S.W.3d at 394. The trial court’s error was harmless.

Rodgers presents two adjunct unpreserved arguments on the admissibility of the audio recordings. First, Rodgers contends the trial court erred in allowing the jury to hear portions of the recordings which alluded to Rodgers previously having sold Xanax (alprazolam) for gas money, as well as other

references to her children which allegedly permitted the jury to infer she was a bad parent. Although unpreserved, Rodgers now claims these references were improper under KRE 404(b). For her unpreserved second adjunct argument, Rodgers asserts the Commonwealth did not provide adequate notice of this “other bad acts” evidence as required by KRE 404(c).

Because Rodgers made no contemporaneous objections to admission of the allegedly improper evidence in the recordings, she now requests review for palpable error:

Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule’s requirement of manifest injustice requires showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014) (citations and internal quotation marks omitted). “For an error to be palpable, it must . . . involve prejudice more egregious than that occurring in reversible error.” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). In addition, “[a]n error is palpable only if it is shocking or jurisprudentially intolerable.” *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (citation and internal quotation marks omitted).

This Court considered a similar KRE 404(b) issue in *Norton v. Commonwealth*, 890 S.W.2d 632 (Ky. App. 1994), discussed *supra* on Rodgers’s hearsay issue. Relevant to this issue, however, the appellant in *Norton* argued the trial court erroneously admitted a recorded drug transaction containing references to a proposed sale of marijuana—a criminal act which was not related to the offense being tried. *Id.* at 637. KRE 404(b) prohibits “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.” However, the rule also contains two exceptions to this generalized prohibition against evidence of unrelated bad acts:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

KRE 404(b). “[T]he rule is intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background and perspective.” *Norton*, 890 S.W.2d at 638 (quoting Robert G. Lawson, *THE KENTUCKY EVIDENCE LAW HANDBOOK* § 2.25 (3d ed. 1993)). The *Norton* court considered the extraneous information captured by the audio recording and

determined the unrelated marijuana discussion was “inextricably intertwined with other evidence essential to the case.” *Id.* (quoting KRE 404(b)(2)). In its final analysis, the *Norton* court said,

[t]he rule [is] that all evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also approve or tend to prove the commission of other crimes by him or to establish collateral facts.

Id. (quoting *Smith v. Commonwealth*, 366 S.W.2d 902, 906 (Ky. 1962)).

Based on *Norton*, Rodgers’s claim that the jury heard improper character evidence, based on allusions to Xanax and bad parenting, cannot succeed. As in *Norton*, the extraneous information was intertwined with the discussions held between York and Rodgers during the recorded drug transactions. They were “collateral facts” established by the Commonwealth’s recording of the drug transaction. The trial court did not err, palpably or otherwise, by admitting evidence containing references to collateral bad acts intertwined with the charged offense.

For Rodgers’s second related argument stemming from the audio recordings, she asserts the Commonwealth did not provide notice of the “other bad acts” evidence in the audio recordings as required under KRE 404(c):

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.

An examination of the record does not reveal the Commonwealth tendered a KRE 404(c) notice to the trial court. However, the Commonwealth contends in its brief that “[t]he Appellant was on notice that these references were in the recordings as they were provided to her in discovery prior to trial.” Rodgers acknowledges receiving the recordings as part of discovery in her reply brief but disputes this provided formal notice sufficient to comply with KRE 404(c).

“KRE 404(c) serves ‘to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion *in limine* and to deal with reliability and prejudice problems at trial.’” *Walker v. Commonwealth*, 52 S.W.3d 533, 538 (Ky. 2001) (quoting *Tamme v. Commonwealth*, 973 S.W.2d 13, 31 (Ky. 1998)). “But where the accused has received ‘actual notice’ of the intention to introduce KRE 404(b) evidence and the accused has suffered no prejudice, the notice requirement in KRE 404(c) is satisfied.” *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005) (citations omitted).

Here, it is not disputed the Commonwealth provided the recordings to the defense as part of discovery. Consequently, the defense could reasonably be presumed to have been made aware of the contents of the recordings and should

certainly have anticipated the Commonwealth would play the recordings for the jury. In addition, the allusions to Xanax and bad parenting were relatively minor collateral issues, compared to the probative value of the recordings as evidence and the overall strength of the Commonwealth's case. We conclude Rodgers suffered no prejudice on this issue; therefore KRE 404(c)'s notice requirement was satisfied under *Matthews*. Furthermore, Rodgers did not preserve this issue for appeal, and the lack of formal notice did not arise to a level of "manifest injustice" required for a finding of palpable error.

2. Improper Bolstering

For her second main argument on appeal, Rodgers asserts the trial court erred by admitting testimony by Detective Saylor which impermissibly bolstered the credibility of Terri York. This issue is not preserved, and Rodgers requests review for palpable error under RCr 10.26. The Commonwealth questioned Detective Saylor on direct examination as follows:

Commonwealth: Has Ms. York been anything other than truthful to you?

Detective: No, ma'am.

Commonwealth: So she's always been truthful with you?

Detective: She's been very reliable.

Rodgers now argues this questioning resulted in one witness vouching for the credibility of another, which is not permitted under our case law.

Rodgers is correct that such bolstering is improper. “Testimony about a C.I.’s reliability is appropriate in an affidavit taken to establish probable cause when the police are seeking to obtain a search warrant. However, admission of such evidence at a criminal trial is a different matter.” *Fairrow v. Commonwealth*, 175 S.W.3d 601, 605 (Ky. 2005) (citations omitted). An officer’s testimony asserting an informant is reliable is inadmissible character evidence under KRE 404(a). *Id.* Our rules allow character evidence for the purpose of supporting a witness’s truthfulness, but “only *after* the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.” KRE 608(a) (emphasis added). Detective Saylor testified *before* York, which is crucial for determining the applicability of KRE 608:

[A]t the time [the police detective] was questioned about [the informant’s] truthfulness and reliability, the informant has yet to take the stand and testify himself. Because [the informant] was not a “witness,” Rule 608 is inapplicable.

Fairrow, 175 S.W.3d at 606 (quoting *United States v. Hernandez*, 873 F.2d 925, 929 (6th Cir. 1989)). Accordingly, it was error to allow Detective Saylor’s assertion regarding York’s reliability.

Despite the trial court's error, however, the Kentucky Supreme Court held in *Fairrow* and in a more recent case, *Commonwealth v. Wright*, 467 S.W.3d 238 (Ky. 2015), that such improper bolstering does not constitute palpable error. “[W]e found ‘that . . . the admission of improper evidence of the character of a mere witness’ did not affect Fairrow’s substantial rights nor did it constitute manifest injustice sufficient ‘to require reversal as palpable error.’” *Id.* at 248 (quoting *Fairrow*, 175 S.W.3d at 607). The case *sub judice* is materially indistinguishable from these precedents. The trial court did not palpably err on this issue.

3. Unanimity on the PFO Charge

For her third argument on appeal, Rodgers contends the trial court erroneously instructed the jury during the penalty phase on her PFO charge, and therefore, the verdict was not unanimous as required by the Kentucky Constitution. This issue is not preserved; Rodgers again requests palpable error review under RCr 10.26. Rodgers claims the trial court erroneously instructed the jury in the penalty phase, in relevant part, as follows:

SECOND-DEGREE PERSISTENT FELONY OFFENDER

You will find the Defendant, Sonya Elaine Rodgers, guilty of being a Second-Degree Persistent Felony Offender under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That prior to the 10th day of April, 2015, the Defendant was convicted of Promoting Contraband in the First Degree by final judgment of the Bell Circuit Court on the 31st day of August, 2009; OR of two (2) Counts of Trafficking in a Controlled Substance in the Second Degree, First Offense, by final judgment of the Bell Circuit Court on the 31st day of August, 2009”

Rodgers asserts the “OR” connector meant some of the jurors could have found her guilty of the PFO based on her promoting contraband conviction, while other jurors could have found her guilty based on the second-degree trafficking conviction. This, she contends, results in a violation of the constitutional requirement for jurors to arrive at a unanimous verdict. “[S]uch a scenario—a general jury verdict based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof—violates the requirement of a unanimous verdict.” *Johnson v. Commonwealth*, 405 S.W.3d 439, 449 (Ky. 2013).

However, the Kentucky Supreme Court has held “that when it comes to PFO proceedings if a jury believes any of the Commonwealth’s evidence then it must believe it all.” *Springfield v. Commonwealth*, 410 S.W.3d 589, 596 (Ky. 2013) (citing *Payne v. Commonwealth*, 656 S.W.2d 719, 721 (Ky. 1983)). In explaining why, the Supreme Court reasoned as follows:

[I]n order to convict Appellant as a second-degree PFO, the jury would have to believe at least part of the proof presented by the Commonwealth, that he had previously

been convicted of another felony charge. However, it would also require the jury to disbelieve a part of the proof which, according to *Payne*, is impermissible absent evidence calling that proof into question. When it comes to the presentation of proof for PFO status, the jury must take the Commonwealth's proof all-or-nothing "in the absence of some evidence bringing one or both prior convictions into dispute." [*Payne*, 656 S.W.2d] at 721. That is to say, the jury cannot accept part as true and question the rest unless there is an evidentiary basis for disregarding a prior conviction.

Springfield, 410 S.W.3d at 597.

Rodgers claims the jurors could have found her guilty of being a PFO based on one of her previous convictions but not the other, leading to a violation of the unanimous verdict requirement. However, there was no evidentiary basis for disregarding either conviction. Probation and Parole Officer Michelle Hensley was the only person to testify during the penalty phase, and she described both of Rodgers's previous convictions for the jury. Following direct examination, Rodgers declined to cross-examine Officer Hensley and provided no testimony or evidence of her own. Based on the proof presented, a rational juror would not have believed Rodgers was convicted of one offense but not the other. There was no unanimity error.

4. Assessment of Court Costs

In her final issue on appeal, Rodgers asserts the trial court erroneously imposed court costs despite her indigency. Rodgers did not preserve this argument

by contemporaneous objection, and she again requests review for palpable error under RCr 10.26. Following conviction, the trial court held a sentencing hearing on July 6, 2016. At that time, the trial court *orally* ordered her to pay court costs of \$151.00 within six months of release. However, when the trial court issued its *written* final judgment on October 7, 2016, court costs were not included as part of her sentence.

The trial court's assessment of court costs is undeniably part of a defendant's judgment and sentence. "Because court costs may be waived given certain statutory findings, the trial court's determination of whether the costs should be assessed or waived must be made upon the defendant's conviction and sentencing." *Goncalves v. Commonwealth*, 404 S.W.3d 180, 209 (Ky. 2013) (citing KRS 23A.205 and *Buster v. Commonwealth*, 381 S.W.3d 294, 306 (Ky. 2012)). However, "[a] judgment is a *written* order of a court adjudicating a claim or claims in an action or proceeding." Kentucky Rule of Civil Procedure (CR) 54.01 (emphasis added). "Circuit courts speak only through written orders entered upon the official record." *Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky. App. 2012) (citation and internal quotation marks omitted). In addition,

where there is an inconsistency between the oral statements of a court and that which is reduced to writing as the court's final judgment, the latter shall prevail and the former shall be disregarded. Such a construction is essential to the operation of the Court of Justice for

judges often voice views and opinions which may be inconsistent with their final judgments.

Commonwealth v. Hicks, 869 S.W.2d 35, 38 (Ky. 1994), *overruled on other grounds by Keeling v. Commonwealth*, 381 S.W.3d 248 (Ky. 2012). Based on these considerations, we hold there is no error to correct on this issue because the trial court did not include costs as part of Rodgers's written final judgment and sentence.

III. CONCLUSION

For the foregoing reasons, we affirm the Bell Circuit Court's judgment of conviction entered October 7, 2016.

ALL CONCUR.

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