RENDERED: MARCH 29, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001788-MR

AARON REYNOLDS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 16-CR-002657

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, NICKELL, AND TAYLOR, JUDGES.

JONES, JUDGE: Following a jury trial, Appellant, Aaron Reynolds, was convicted on numerous charges and sentenced to eleven years' imprisonment. Reynolds now brings this appeal, challenging only his conviction for trafficking in methamphetamine. Following a review of the record and applicable law, we AFFIRM.

I. BACKGROUND

On August 12, 2016, Louisville Metro Police Department Officer Jason McNeil was dispatched to the home of Reynolds's uncle, Dewayne Beard, to take a report on a disturbance. Upon arriving at Beard's home, McNeil was informed that Reynolds had fired a shot at Beard's feet, ordered Beard to empty his pockets, then taken Beard's possessions and left the home in Beard's truck. While Officer McNeil was finishing his report, Reynolds drove by Beard's home in Beard's vehicle. A pursuit of Reynolds ensued, which ultimately ended back at Beard's home. Upon Reynolds's arrest, officers recovered two baggies of what appeared to be narcotics from Reynolds's general vicinity. Based on this incident, a Jefferson County Grand Jury issued an indictment against Reynolds on October 5, 2016, charging him with numerous offenses.[1]

Pursuant to Kentucky State Police ("KSP") protocol, only one of the baggies officers recovered was tested for the presence of narcotics. Accordingly, on May 25, 2017, the Commonwealth filed notice of its intent to call an expert in the field of narcotics or to qualify one of the officers involved in Reynolds's case

[1] One count of first-degree robbery; one count of possession of a handgun by a convicted felon; one count of first-degree trafficking in a controlled substance, methamphetamine, two grams or more; one count of first-degree trafficking in a controlled substance, heroin, two grams or more but less than 100 grams; one count of first-degree wanton endangerment; one count of first-degree fleeing or evading police in a motor vehicle; one count of tampering with physical evidence; and one count of third-degree trafficking in a controlled substance, alprazolam, twenty dosage units or more but less than or equal to 100 dosage units.

to identify the contents of the untested bag. The day before his trial began, Reynolds filed a motion *in limine* requesting that the trial court preclude the Commonwealth from introducing any evidence related to "the baggie of 20.171 grams of white, crystalline material due to the fact that it was not tested by a scientific means to determine the contents." Reynolds's motion contended that evidence must be excluded under KRE[2] 403, as any mention of it would greatly prejudice him with no scientific basis. The trial court denied Reynolds's motion to exclude the evidence.

At trial, the Commonwealth called Ashley Willis, a forensic chemist employed by KSP, to testify about the contents of the two bags of suspected narcotics recovered from the scene. Willis testified that the bag she had tested contained a mix of heroin, cocaine, and methamphetamine. Before Willis could continue with her testimony, Reynolds again objected to any mention of the second, untested bag. Reynolds contended that if the second bag had not been tested, the only proof that the Commonwealth could offer was an officer "eyeballing" the bag and speculating that it contained methamphetamine. Reynolds contended that such testimony was insufficient proof and that even mentioning the second bag would cause him undue prejudice. The trial court overruled the objection. Continuing with her testimony, Willis explained that KSP

[2] Kentucky Rules of Evidence.

lab protocol is to test only the highest penalty item based on weight. Therefore, when she tested the first bag and determined it contained over two grams of heroin, she concluded that it was not necessary to test the contents of the second bag.

To prove that the second bag did in fact contain methamphetamine, the Commonwealth called Detective Justin Witt. Detective Witt testified that he works as a plainclothes detective and mainly handles narcotics offenses. He stated that he had been assigned to that detail for approximately five years. Detective Witt testified that he frequently comes into contact with controlled substances during his work. He testified that, based on his training and experience, he was able to identify the differences between controlled substances. Detective Witt was shown the first bag of suspected narcotics, and identified it as containing heroin. He was then shown the second bag, which he identified as containing methamphetamine. Detective Witt showed the contents of the second bag to the jury and explained that he believed that the substance was methamphetamine because of the "ice" or "rock" like texture. Detective Witt testified that, based on his experience, the quantity of narcotics contained in both baggies was inconsistent with personal use.

Reynolds objected twice during Detective Witt's testimony without elaboration—directly after Detective Witt identified the substance in the first bag as heroin and directly after Detective Witt testified that the amount of

methamphetamine contained in the second baggie was inconsistent with personal use. The trial court overruled both objections, but permitted Reynolds to explain his objections for the record once Detective Witt was done testifying. At that time, Reynolds stated that he did not believe that the Commonwealth had established Detective Witt's qualifications to identify the crystalline substance as methamphetamine. The trial court agreed with Reynolds that the Commonwealth's *voir dire* on Detective Witt's qualifications could have been more thorough; however, the trial court found that Detective Witt was qualified to offer his opinion on what the substance was.

As further proof that the substance in the second bag contained methamphetamine, the Commonwealth played portions from two phone calls Reynolds had made while in jail. In the first portion, Reynolds states, "I didn't even know that I had all that stuff on me, in my pocket anyway. I thought I threw all that out [inaudible]." VR 6/14/17, 10:08:00-10:10:50. In the second call, an unidentified speaker asks Reynolds, "Where in the hell did the drugs come from?" Reynolds responds, "In my pocket." VR 6/14/17, 10:10:04-10:10:21.

At the close of the Commonwealth's case, Reynolds moved for a directed verdict on the trafficking in methamphetamine charge, which was denied. Reynolds elected not to put on any evidence and renewed his motion for a directed verdict, which was again denied. Following deliberation, the jury announced a

verdict finding Reynolds guilty of one count each of: first-degree robbery; first-degree trafficking in a controlled substance, methamphetamine, two grams or more; first-degree trafficking in a controlled substance, heroin, two grams or more but less than 100 grams; first-degree wanton endangerment; and tampering with physical evidence. The Commonwealth then put on proof on the charge of possession of a handgun by a convicted felon and Reynolds was found guilty on that charge.

The jury recommended that Reynolds be sentenced fifteen years for the first-degree robbery; three years for both first-degree wanton endangerment and tampering with physical evidence; five years for both counts of first-degree trafficking in a controlled substance; and ten years for possession of a handgun by a convicted felon, with all sentences to run concurrently. The trial court deviated from the jury's recommendation on the robbery charge and sentenced Reynolds to a total of eleven years' imprisonment, with all sentences to run concurrently.

This appeal follows.

II. ANALYSIS

On appeal, Reynolds contends that the circuit court erred in finding that Detective Witt was qualified as an expert and allowing him to testify without

first holding a *Daubert*[3] hearing and in denying his motion for a directed verdict on the trafficking in methamphetamine charge. We consider the arguments below.

A. *Daubert* Hearing

Before reaching the merits of Reynolds's appeal, we must determine if he properly preserved his argument concerning the lack of a *Daubert* hearing for review. "It has long been the law of this Commonwealth that an error will not be reviewed on appeal if the trial court has not had an opportunity to rule on the objection." *Commonwealth v. Petrey*, 945 S.W.2d 417, 419 (Ky. 1997) (citing RCr[4] 9.22; KRE 103(a)(1)). Reynolds contends that he properly preserved his argument by filing a motion *in limine* and by objecting to Detective Witt's testimony that he believed the substance contained in the untested baggie was methamphetamine. While the Commonwealth acknowledges that Reynolds's motion *in limine* did seek to exclude any mention of the "white, crystalline material" and that Reynolds did object to Detective Witt classifying the substance as methamphetamine, it contends that neither of these actions was sufficient to preserve Reynolds's claimed error. The Commonwealth notes that Reynolds never raised an objection to Detective Witt being qualified as an expert prior to Detective Witt's testifying and never requested a *Daubert* hearing.

[3] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[4] Kentucky Rules of Criminal Procedure.

The Commonwealth filed notice of intent to call an expert in field of narcotics or to qualify one of the officers as an expert in the field of narcotics several weeks before Reynolds's trial was set to begin. Following that notice, Reynolds did move the trial court to exclude any mention of the contents of the second baggie; however, that motion was couched in terms of KRE 403 and made no mention of expert qualifications. A blanket motion *in limine* is insufficient to preserve an error for appellate review. *Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky. 2005). At no time prior to trial did Reynolds move the trial court to hold a *Daubert* hearing on the officer the Commonwealth intended to qualify as an expert or question the proposed expert's qualifications. The word "*Daubert*" was never uttered either before or during Reynolds's trial. Reynolds did not raise an objection immediately following Detective Witt's testifying about his qualifications and did not seek to further *voir dire* Detective Witt on his qualifications. Accordingly, Reynolds's claim that the trial court erred in not conducting a *Daubert* hearing is unpreserved.

Nonetheless, Reynolds has requested that we review this claim of error under RCr 10.26. "Under that rule, an unpreserved error may be noticed on appeal only if the error is 'palpable' and 'affects the substantial rights of a party,' and even then relief is appropriate only 'upon a determination that manifest injustice has resulted from the error.'" *Commonwealth v. Jones*, 283 S.W.3d 665,

668 (Ky. 2009) (quoting RCr 10.26). Manifest injustice occurs when "the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Id.* (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

We cannot find that the trial court committed palpable error in allowing Detective Witt to testify as an expert without first holding a *Daubert* hearing. The trial court is under no requirement to conduct a *Daubert* hearing *sua sponte* each time the admission of expert testimony is challenged. *See Tharp v. Commonwealth*, 40 S.W.3d 356, 368 (Ky. 2000); *Mondie v. Commonwealth*, 158 S.W.3d 203, 212 (Ky. 2005). "The analysis set forth in *Daubert* [typically] applies to scientific expert testimony, which 'implies a grounding in the methods and procedures of science.'" *Debruler v. Commonwealth*, 231 S.W.3d 752, 756 (Ky. 2007) (quoting *Daubert*, 509 U.S. at 590, 113 S.Ct. at 2795). "Thus, when a party seeks to introduce expert testimony, an initial determination is whether the expert is proposing to testify to scientific knowledge which 'entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid.'" *Id.* (citing *Daubert*, 509 U.S. at 592-93, 113 S.Ct. at 2796).

Detective Witt's opinion that the untested baggie contained methamphetamine was properly characterized as expert testimony, as the average juror would not likely be able to identify the substance at issue. KRE 702.

However, the testimony given by Detective Witt did not concern any scientific technique, theory, or methodology. His testimony was limited to his personal observation of the substance in question and his opinion—based on his training and experience in handling narcotics—that the substance was methamphetamine. While *Daubert* can apply "not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge[,]" we cannot find that such an analysis would have been helpful in this instance. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (quoting *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 140-41, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238, 246-47 (1999)). A *Daubert* analysis "requires the trial court to analyze the testability of the scientific technique, whether it has been subject to peer review, the existence of scientific standards, and the level of general acceptability in the scientific community." *Debruler*, 231 S.W.3d at 756 (citing *Daubert*, 509 U.S. at 593-94, 113 S.Ct. at 2796-97). This analysis would not have provided any guidance in assessing the reliability of Detective Witt's personal observation and experience-based testimony.

The trial court determined that Detective Witt was qualified to testify as an expert based on Detective Witt's testimony that he: works as a plainclothes detective mainly investigating narcotics offenses; has been assigned to the narcotics detail for approximately five years; frequently comes into contact with

controlled substances; and, based on that experience, is able to identify the differences between different types of controlled substances. This was sufficient testimony on which the trial court could rely to determine that Detective Witt was qualified to testify as an expert. Detective Witt demonstrated that he was "skilled in a particular field and stated facts from which an opinion could be draw"—*i.e.*, that the "rock," "ice," or "glass" like texture of the substance at issue indicated that it was methamphetamine. *Sargent v. Commonwealth*, 813 S.W.2d 801, 802 (Ky. 1991) (citing *Coots v. Commonwealth*, 295 Ky. 637, 175 S.W.2d 139 (1943)).[5] As such, the failure to conduct a *Daubert* hearing before permitting Detective Witt to testify does not rise to the level of manifest injustice.

B. Motion for Directed Verdict

Reynolds next contends that the trial court erred in denying his motion for a directed verdict on the trafficking in methamphetamine charge. He argues that the evidence against him on this charge was insufficient when the only evidence presented by the Commonwealth on the methamphetamine charge was Detective Witt's testimony and it was acknowledged that no chemical testing was done on the substance. The proper standard of review on a motion for a directed

[5] "Though *Sargent* . . . [is a] pre-*Daubert* decision[], [it is] representative of the type of expert opinion based on 'specialized knowledge' for which a formal *Daubert* hearing on reliability may be unnecessary." *Dixon v. Commonwealth*, 149 S.W.3d 426, 431 (Ky. 2004).

verdict is stated in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991) as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187 (citations omitted).

"Kentucky case law has made clear that chemical testing of an alleged controlled substance is not required to sustain a conviction." *Jones v. Commonwealth*, 331 S.W.3d 249, 252 (Ky. 2011). Circumstantial evidence can be sufficient to sustain a conviction for an offense involving a controlled substance. *Id.* at 253.

The Commonwealth provided expert testimony that the substance in the untested bag was methamphetamine. As noted above, Detective Witt's testimony was based on his training and experience in investigating narcotics-related crimes. Additionally, the Commonwealth did introduce evidence that the

first baggie was chemically tested and was found to contain heroin. The confirmation by chemical testing of the first baggie "of the alleged illicit drugs lends support to the likelihood that the other was authentic." *Id.* at 254. The Commonwealth also played recorded jail phone calls in which Reynolds acknowledges twice that he was in possession of drugs at the time of his arrest.

While the evidence presented by the Commonwealth on the methamphetamine charge was certainly not the strongest, "[o]ur duty in considering a directed verdict on appeal is not whether the evidence would have persuaded us to return a guilty verdict." *Id.* at 256. "To the contrary, our role is strictly limited to determining if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Id.* (citing *Benham*, 816 S.W.2d at 187-88). Construing the evidence presented at trial in the light most favorable to the Commonwealth, we cannot conclude that a jury would have been clearly unreasonable in finding Reynolds guilty of trafficking methamphetamine.

III. CONCLUSION

In light of the foregoing, we AFFIRM the judgment of conviction and sentence of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Cassandra F. Kennedy
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Joseph A. Newberg, II
Assistant Attorney General
Frankfort, Kentucky