RENDERED: MAY 3, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001931-MR

CHARLES D. FREELAND — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 16-CR-00967

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND K. THOMPSON, JUDGES.

NICKELL, JUDGE: Charles D. Freeland appeals from the judgment and sentence of ten years' imprisonment entered by the Hardin Circuit Court, following his conviction by a jury of reckless homicide[1] and tampering with physical evidence,[2]

[1] Kentucky Revised Statutes (KRS) 507.050, a Class D felony.

[2] KRS 524.100, a Class D felony.

Freeland challenges five of the trial court's evidentiary rulings and argues the Commonwealth engaged in prosecutorial misconduct during closing argument. Following a careful review, we affirm.

I. BACKGROUND

Freeland and his "weekend girlfriend," Marissa Davis, checked into the Royal Inn Motel in Hardin County on September 9, 2016. On September 10, 2016, the pair drove to Louisville around 6:15 p.m. to go to Raising Cane's, a fast food restaurant. Although Freeland claimed initially he thought the sole purpose of the trip was dining, he later admitted Davis procured heroin. Freeland testified he did not know Davis purchased heroin until they were returning to the Royal Inn.

The two returned to the hotel room around 8:00 p.m., and Tracy LaFollette, a friend and co-worker of Freeland, stopped by around 8:55 p.m. to pick up tools and marijuana from Freeland. LaFollette later delivered the marijuana to Freeland's roommate, David Devers. While in the hotel room, LaFollette spoke with Davis, and testified he did not notice any injuries on her body. LaFollette was the last person to see Freeland and Davis before Davis' death.

LaFollette left the hotel, and Freeland entered the bathroom at some point thereafter. Freeland testified he exited the bathroom between 9:00 p.m. and the early morning hours of September 11, 2016. He found Davis lying between the

bed and the wall, apparently overdosing, and attempted to revive her with CPR. Freeland testified he wanted to call 9-1-1, but Davis told him not to do so because there were warrants out for her arrest. Instead of calling 9-1-1, Freeland admits employing unorthodox methods in an attempt to revive Davis, including slapping her face, hitting her in the stomach, and using his foot to perform chest compressions—allegedly because his arm and hip were injured.

After continuing these attempts to revive Davis for an hour or two, Freeland decided he needed help and needed to remove the drugs from the hotel room—ostensibly to protect Davis from additional embarrassment after her overdose. He drove twenty to twenty-five minutes to his home to drop off the drugs and get Devers who had experience with overdoses. Freeland told Devers that Davis was bruised up, and it looked like he "beat the hell out of her." Devers declined to go back to the Royal Inn with Freeland because he had an outstanding arrest warrant, but another roommate, Kyle Bowlds, accompanied Freeland.

When Freeland and Bowlds returned to the Royal Inn around 1:50 a.m., Freeland entered the room alone while Bowlds remained in the truck. Freeland returned to the truck, confirmed Davis was dead, and went back into the room to call 9-1-1. EMS arrived at approximately 1:57 a.m. After confirming Davis had no pulse and was not breathing, the paramedics called the coroner.

The next day, Freeland attempted suicide by consuming the same drugs Davis had used the night before. Freeland claimed he had removed the drugs from the hotel room both to protect Davis and to use them. He argued he had not removed them intending to prevent the drugs from being used in an official proceeding.

During trial, the medical examiner, Dr. Donna Stewart, testified Davis died from multiple injuries indicative of an assault and not a drug overdose, despite having methamphetamine, fentanyl, and gabapentin in her system. Dr. Stewart opined the manner of death was homicide. Davis suffered injuries to her face, neck, and abdomen. The photographs of her face showed injuries consistent with rough slapping and blunt force injuries. The evidence of asphyxiation was inconsistent with an attempt to revive her. Davis also had multiple internal injuries. There were injuries to her chest and ribs that were likely from chest compressions, but she also had injuries inconsistent with CPR. Davis had substantial internal bleeding, totaling approximately one-third of her blood. Davis also had lacerations to her heart and liver, which Dr. Stewart testified she had never seen caused by a normal CPR attempt. Additionally, Dr. Stewart testified the rib fracture locations were inconsistent with the location of the organ injuries.

During trial, Freeland testified he did his best to save Davis, but stated, "I could see the damage I was doing. She would come to. She would say

'ow.' I could see what I was doing to her." He further testified, "after I seen her face where I was hurting her, I couldn't smack her there no more to get her to come back and breathe again. So I slapped her belly, and that worked for a little while." Freeland also testified, "She turned blue, and I knew I was hurting her." Freeland was aware he injured Davis as he struck her, but he argued anyone would do anything they could to revive a friend or relative.

The jury found Freeland guilty of reckless homicide and tampering with physical evidence, and the trial court sentenced him to ten years' imprisonment. This appeal followed.

II. STANDARD OF REVIEW

"[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (citations omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). This standard "captures the necessary deference that should be afforded to trial courts for their evidentiary determinations while still allowing for appellate courts to find trial court errors for decisions made that are 'unsupported by sound legal principles[.]'" *Mason v. Commonwealth*, 559 S.W.3d 337, 342 (Ky. 2018) (citation omitted).

III. ANALYSIS

Freeland raises six issues on appeal. His first two issues, in which he argues the trial court erred when it: (1) permitted testimony LaFollette was Freeland's drug courier; and (2) prevented Freeland from presenting a full defense by denying him the opportunity to provide context as to why he did not call 9-1-1, are properly preserved. Freeland's next issue is partially preserved. He argues references to his drug activity by several witnesses was irrelevant and prejudicial. Finally, Freeland raises three unpreserved issues in which he argues the trial court erroneously permitted: (1) testimony he had two girlfriends; (2) testimony regarding his subsequent overdose; and (3) prosecutorial misconduct during the Commonwealth's closing argument.

KRE[3] 404(b) precludes "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith" unless one of these exceptions applies:

> (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.

[3] Kentucky Rules of Evidence.

Id. We cautiously apply exceptions to the general rule because of the risk of "prejudicial consequences." *Huddleston v. Commonwealth*, 542 S.W.3d 237, 243 (Ky. 2018). "To determine the admissibility of prior bad act evidence, we have adopted the three-prong test described in *Bell v. Commonwealth*, 875 S.W.2d 882, 889-891 (Ky. 1994), which evaluates the proposed evidence in terms of: (1) relevance, (2) probativeness, and (3) its prejudicial effect." *Id.*

A. Preserved Issues

For his first preserved issue, Freeland argues testimony LaFollette was a drug courier for Freeland was irrelevant and highly prejudicial. During a bench conference, Freeland argued this evidence was unrelated to the particular drugs taken from the hotel room which led to the tampering with physical evidence charge, and there was no KRE 404(b) notice. LaFollette was a friend, co-worker, and drug courier for Freeland. When he took the stand, he stated he did not want to testify. LaFollette was the last person to see Freeland and Davis before the events ending in Davis' death. The Commonwealth asked LaFollette the purpose for his visit that evening. He said he picked up a small amount of marijuana from Freeland. The trial court permitted this line of questioning because it was relevant to the tampering charge and LaFollette's credibility as a witness.

Evidence of a collateral crime, such as distributing marijuana in the minutes or hours before Davis' death, is admissible when offered for a proper

purpose under KRE 404(b)(2). *See Burton v. Commonwealth*, 300 S.W.3d 126, 136 (Ky. 2009). Determination of the relevancy of evidence indicating LaFollette received marijuana from Freeland was an issue "reserved for the sound discretion of the trial judge." *Id.* at 137 (internal quotation marks and citation omitted). Here, the trial court reasonably determined this testimony was relevant to the charge of tampering with physical evidence and to establishing Freeland's motive and intent to remove drugs from the hotel room before police arrived.

Additionally, the trial court admonished the jury it could use information about LaFollette's relationship with Freeland and the marijuana only to weigh bias and witness credibility. "A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) (citing *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999)). "[F]ailure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted." *Blount v. Commonwealth*, 392 S.W.3d 393, 398 (Ky. 2013) (internal quotation marks and citation omitted). Thus, we assume Freeland was satisfied with the trial court's admonition.

Even if LaFollette's testimony about receiving marijuana from Freeland was prejudicial, admitting it was harmless error under RCr[4] 9.24.

[4] Kentucky Rules of Criminal Procedure.

"Harmless error . . . presupposes preservation and an erroneous trial court ruling, but nevertheless permits a reviewing court to disregard it as non-prejudicial." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). Freeland admitted removing drugs from the hotel room before police arrived even though he argues he removed them for personal use rather than to conceal them from police. Despite his testimony, the jury could have inferred a different motive because he waited until after the drugs were removed to call 9-1-1 for Davis. Thus, any trial court error was harmless because "we can say with fair assurance that the judgment was not substantially swayed by the error." *Welch v. Commonwealth*, 563 S.W.3d 612, 618 (Ky. 2018) (quoting *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010) (internal quotation marks omitted)).

For his second preserved issue, Freeland argues the trial court erred in preventing him from telling the jury why he did not call 9-1-1 to help Davis. During Freeland's opening statement, counsel stated Freeland did not call 9-1-1 because Davis told him not to. Before Freeland could explain Davis had outstanding warrants, the Commonwealth objected. Freeland preserved this issue by submitting a memorandum to the trial court in response to the Commonwealth's objection to this testimony. He argued not calling 9-1-1 was not hearsay under KRE 801 and the evidence was necessary for him to provide a full defense. Freeland specifically argued the statement was not being "offered 'to prove the

truth of the matter asserted.' Rather, it [was] offered to explain the action that was taken and has relevance regardless of whether the statement was true or false." *Ruiz v. Commonwealth*, 471 S.W.3d 675, 682 (Ky. 2015). Freeland argued Davis' statement would be offered to show its effect on him, which was crucial for the jury to evaluate "whether his actions were criminally reckless." Freeland further argued even if the statement was hearsay, it would fall under the present sense impression or excited utterance exceptions to the hearsay rule under KRE 803(1)-(2).

The trial court ruled on the issue during Freeland's testimony, permitting Freeland to testify he did not call 9-1-1 because Davis told him not to do so. However, the court precluded Freeland from explaining Davis told him not to call because she had outstanding warrants. The trial court reasoned telling Freeland not to call was relevant to his defense because it explained why he decided to attempt to revive her instead, but the statement alluding to her outstanding warrants was offered to establish the truth of the matter asserted.

Freeland's testimony that Davis had outstanding warrants is arguably a non-hearsay statement. However, even if the trial court erred in excluding the full reason Freeland did not call 9-1-1, the error was harmless as it did not sway the outcome. *Welch*, 563 S.W.3d at 618. As discussed throughout our analysis, Freeland admitted using unorthodox methods in an attempt to revive Davis and

admitted he knew he was hurting Davis by using said methods. Furthermore, the medical examiner opined Davis' cause of death was injuries caused by Freeland's actions; not a drug overdose. Even if the trial court had permitted Freeland to testify Davis did not want him to call 9-1-1 due to outstanding warrants, the jury could have convicted him of reckless homicide based solely on his admission and the medical examiner's testimony.

B. Partially Preserved Issue

Freeland's next issue is partially preserved. Multiple witnesses, including Devers, mentioned his prior drug use and drug dealing, and Freeland now asserts these references were inadmissible and unduly prejudicial. He further argues LaFollette's testimony opened the floodgate for testimony regarding his drug activities. Such testimony was elicited from several witnesses, but Freeland objected only when Devers testified he observed Freeland use heroin before Freeland's attempted suicide via overdose. The trial court stated its concern about delving too far into Freeland's prior drug use, sustained Freeland's objection, and admonished the jury to disregard Devers' answer. Although Freeland argued this testimony might be grounds for a mistrial when he objected, he did not move for a mistrial after the court admonished the jury. Thus, we must assume Freeland was satisfied with the admonition and say no more. *Blount*, 392 S.W.3d at 398.

Freeland did not object to any other testimony regarding his drug activity and requests palpable error review of these claims.

> 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) (internal quotation marks and citations 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) (internal quotation marks and citation omitted). There must be a "'substantial possibility' that the result in the case would have been different without the error. If not, the error cannot be palpable." *Id.* Additionally, "[a]n error is palpable only if it is shocking or jurisprudentially intolerable." *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (internal quotation marks and citation omitted).

As discussed above, Freeland admitted he removed drugs from the hotel room before police arrived. Evidence of Freeland's drug use and trafficking was relevant to prove his motive to remove the drugs from the hotel room, during which time he left Davis alone. The jury could infer Freeland's intent from

removing the drugs before calling 9-1-1. There is no possibility exclusion of this evidence would have caused a different result.

Freeland further argues the Commonwealth sought to establish he was a drug dealer and drug dealers are violent through multiple witnesses, including Devers and another roommate, Josey Allender; Freeland; and Detective Curl. Whether we review for palpable error or harmless error, the result of Freeland's trial would be the same without evidence of his drug activity. To the extent this argument is preserved, any error was harmless. During trial, Freeland admitted using unorthodox methods to attempt to revive Davis. He admitted he could see he was hurting her. The medical examiner testified as to the battered condition of Davis' body. There is no possibility a different result would have occurred without this testimony. Thus, if there was any error, it was harmless.

Furthermore, to the extent this argument is unpreserved, there was no manifest injustice. Freeland's repeated assertion that he could see the injuries he was causing to Davis' body, coupled with the medical examiner's testimony, was far more probative of Freeland's guilt than any potential prejudice caused by an inference he was a violent drug dealer. There was no manifest injustice, and the trial court did not palpably err.

C. Unpreserved Issues

For his first wholly unpreserved issue, Freeland argues the trial court should not have allowed the Commonwealth to elicit testimony he had two girlfriends. At least four witnesses, including Officer Newell, Bowlds, Detective Curl, and Freeland, testified Davis was Freeland's "weekend girlfriend" and he also had a "weekday girlfriend." Although no objection was made to this testimony during trial, Freeland now argues this evidence was irrelevant, and the only purpose it served was to paint him as being immoral.

Freeland concedes this issue is unpreserved and requests palpable error review under RCr 10.26. Although evidence of Freeland's relationship with Davis hardly seems relevant to whether his recklessness caused her death, there is no possibility excluding reference to having two girlfriends would have resulted in acquittal. Freeland testified he knew he was hurting Davis and saw the injuries he was causing during his nonstandard resuscitation method. The medical examiner asserted Davis' cause of death was the injuries Freeland caused. As such, comments about Freeland having two girlfriends did not result in manifest injustice and did not constitute palpable error.

For his second unpreserved issue, Freeland argues evidence of his subsequent overdose was irrelevant and prejudicial. This issue was addressed at a pretrial hearing where Freeland admitted he needed evidence of his subsequent

overdose to prove he took the drugs from the hotel room for personal use instead of preventing their availability in an official proceeding. Freeland did not object to testimony regarding his overdose during trial as required by the contemporaneous objection rule. *Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky. 2005) (citing KRE 103(a)(1)). He even mentioned in his opening statement he removed the drugs to use them. Furthermore, Freeland should have raised this issue when the testimony was given to give the trial court "a chance to address the issue. Because there was no contemporaneous objection at trial, this error was not preserved for our review." *Id*. at 33. Not only is this alleged error unpreserved, Freeland invited the error by requesting admission of evidence of his overdose and mentioning it during his opening statement. *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011) (citing *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006)). "Generally, a party is estopped from asserting an invited error on appeal." *Id.* Thus, Freeland waived his right to appeal this issue. *Id.*

For his final unpreserved issue, Freeland argues the Commonwealth engaged in prosecutorial misconduct when it portrayed him as an immoral drug dealer during its closing argument. He specifically takes issue with the Commonwealth's statements regarding him having two girlfriends and his drug activity. We consider the Commonwealth's closing argument "as a whole while remembering that counsel is granted wide latitude during closing argument. The

longstanding rule is that counsel may comment on the evidence and make all legitimate inferences that can be reasonably drawn therefrom." *Murphy v. Commonwealth*, 509 S.W.3d 34, 50 (Ky. 2017) (internal quotation marks and citations omitted). We have already held the trial court did not err or abuse its discretion in admitting all evidence Freeland argues was improper. Freeland did not object to either of these alleged instances of prosecutorial misconduct during trial, so we review for palpable error. *Id.* (citing RCr 10.26). The Commonwealth's closing argument was based on evidence properly admitted by the trial court, so we cannot conclude the Commonwealth's closing argument "rendered the trial fundamentally unfair." *Id.* at 51. The Commonwealth's arguments were based on the evidence and did not result in an unfair trial.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Hardin Circuit Court.

COMBS, JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Steven Nathan Goens
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Joseph A. Beckett
Assistant Attorney General
Frankfort, Kentucky