

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000651-MR

CHARLES AGAN

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 17-CR-00477

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Charles Agan brings this appeal from an April 13, 2018, Final Judgment and Sentence of Imprisonment of the McCracken Circuit Court adjudicating him guilty of first-degree trafficking in a controlled substance, second or subsequent offense, and sentencing him to eight-years' imprisonment. We affirm.

Agan was indicted by a McCracken County Grand Jury upon one count of first-degree trafficking in a controlled substance, second or greater

offense. The indictment alleged that on or about March 14, 2017, Agan knowingly and unlawfully sold, transferred, or distributed less than four grams of cocaine to a confidential informant. Following a jury trial, Agan was adjudicated guilty of the indicted offense and sentenced to eight-years' imprisonment. This appeal follows.

Agan contends the trial court erred by allowing the Commonwealth to improperly bolster the testimony of the confidential informant involved in the controlled drug buy. Agan asserts the trial court erroneously admitted testimony of Detective Cory Wilmore, who testified concerning the reliability of the confidential informant. Specifically, the Commonwealth asked Detective Wilmore if he had used this particular informant before; Wilmore replied, "Yes." The Commonwealth then asked Detective Wilmore if the informant had proved reliable in the past. Wilmore responded in the affirmative.

In support of his assertion that Detective Wilmore's testimony improperly bolstered the testimony of the informant, Agan relies heavily upon *Farrow v. Commonwealth*, 175 S.W.3d 601, 605-07 (Ky. 2005). In *Farrow*, the Commonwealth introduced testimony that the informant was reliable and that previous involvement with the informant had resulted in numerous convictions. The *Farrow* Court ultimately determined that such testimony constituted inadmissible character evidence pursuant to Kentucky Rule of Evidence (KRE) 404(a). *Farrow*, 175 S.W.3d at 605 (citation omitted). The Court observed that

KRE 404(a) provides generally that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]”¹ *Farrow*, 175 S.W.3d at 605 (quoting KRE 404(a)). The *Farrow* Court pointed out that “[c]haracter evidence offered to impeach or support a witness’s credibility . . . must be limited to the particular character trait of truthfulness or untruthfulness.” *Id.* at 606 (citation omitted). And, “[w]hile a character for ‘truthfulness’ might arguably be inferred from a character for ‘reliability[,]’” the Court concluded that the witness was not referring to the informant’s truthfulness as a witness but rather to her “reliability” as an informant. *Id.* at 606. In sum, the *Farrow* Court ruled that such testimony was inadmissible per KRE 404(a).

Likewise, in the case *sub judice*, Detective Wilmore’s testimony referenced the fact that the informant had worked for police before and that she had proved reliable. This testimony was obviously offered to prove that the informant had accomplished previous drug buys resulting in convictions. As set forth in *Farrow*, 175 S.W.3d 601, the testimony of Detective Wilmore was inadmissible pursuant to KRE 404(a).

Having decided the testimony of Detective Wilmore was inadmissible, we must now determine whether its admission constituted reversible

¹ Kentucky Rules of Evidence 404(a) provides exceptions to this general rule in Subsections (1), (2), and (3). The exceptions are not relevant herein.

error. Agan concedes the error was not preserved for appellate review and seeks review for palpable error pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26.

RCr 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Pursuant to RCr 10.26, a palpable error occurs if a defendant's substantial rights were affected and a manifest injustice occurred. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). A manifest injustice occurs where there is a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Id.* at 3. And, implicit in the palpable error analysis "is that the error is so obvious that the trial court was remiss in failing to act upon it *sua sponte.*" *Lamb v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017). For the foregoing reasons, we simply cannot conclude that a palpable error resulted per RCr 10.26.

At trial, the jury was presented with overwhelming evidence of Agan's guilt. The evidence included an audio recording of the informant calling Agan to arrange the drug buy, an audio/video recording of the controlled buy, and testimony from two officers involved in the controlled buy. The jury was also

presented with testimony from the informant and police describing in detail how the controlled buy operated from beginning to end. In sum, there is not a substantial probability the outcome would have been different if the trial court had excluded Detective Wilmore's testimony that the informant was reliable. We, thus, conclude that Agan's substantial rights were not affected and no manifest injustice resulted from the admission of the testimony. As a result, we are of the opinion that no palpable error occurred. RCr 10.26. The error was harmless at most.

For the foregoing reasons, the Final Judgment and Sentence of Imprisonment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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