

RENDERED: NOVEMBER 1, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-001192-MR

RYAN TROXLER

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE ROBERT B. CONLEY, JUDGE  
ACTION NO. 17-CR-00089

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \*\*

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

MAZE, JUDGE: A Greenup County jury found Appellant, Ryan Troxler, guilty of first-degree trafficking in a controlled substance and being a first-degree persistent felony offender (PFO). Troxler argues he was unfairly prejudiced by the Commonwealth's introduction of cumulative photographs and that the trial court committed palpable error during the PFO stage of trial by permitting testimony regarding a prior indictment. We hold that the Commonwealth's photographs were

not unfairly prejudicial and that no palpable error occurred. Hence, we affirm.

This case began when an acquaintance of Troxler's, Stephanie Smith, agreed to "work off" drug charges by acting as a confidential informant for law enforcement. Smith arranged to purchase ten oxycodone pills from Troxler for \$400. The police then equipped Smith with video recording equipment and cash. After meeting Troxler in a parking lot in Wurtland, Kentucky, Smith provided the police with pills she alleged she had purchased from Troxler, which were later tested and confirmed to be oxycodone.

Troxler was subsequently indicted for trafficking in a controlled substance and being a first-degree PFO. At trial, the Commonwealth's proof revolved primarily around the recording made by Smith and her testimony about the controlled drug buy with Troxler. Although the visual quality of the recording is poor, Troxler can be seen sitting inside his vehicle handling cash. Troxler can also be heard at one point discussing an apparently exasperating encounter with a different acquaintance who frequently discusses money problems, whom he opines should stop selling "fucking dope" if she was going to complain about losing money every week. After playing the video, the Commonwealth introduced screen shots from the video over Troxler's objection. One picture shows a hand holding at least one \$100-dollar bill, which Smith testified was among the \$400 she gave Troxler for oxycodone pills. The remaining screen shots consisted of a blurred

close-up of Troxler's face; a picture of Troxler with cash in his hand; and a picture of Troxler holding an object, which Smith testified was a small plastic bag full of oxycodone pills Troxler gave to her in exchange for cash. Troxler did not put on any evidence in his defense. Instead, defense counsel conceded during closing argument that Troxler sold oxycodone to Smith but urged the jury to find he was entrapped by the police. The jury was unconvinced and returned a guilty verdict for first-degree trafficking in a controlled substance.

During the penalty phase of trial, the Commonwealth called Justin Tackett, a probation and parole officer, to testify about Troxler's prior felony convictions to prove his PFO status. Reading off certified court judgments, Tackett testified to Troxler's four previous felony convictions for fleeing or evading police; theft by unlawful taking; retaliation against a witness; and trafficking in a controlled substance near a school. Unfortunately, Tackett also testified that Troxler was once indicted for first-degree burglary, which was amended to criminal trespass, a class A misdemeanor. No other reference was made to Troxler's indictment for first-degree burglary. The jury ultimately found Troxler guilty of being a first-degree PFO and recommended a PFO-enhanced sentence of fifteen years' imprisonment, out of a possible twenty. The trial court sentenced Troxler accordingly. This appeal follows.

## I. Photographs

Troxler's first argument on appeal is that he was unfairly prejudiced by the Commonwealth's introduction of screen shots from Smith's clandestine recording. Photographs are admissible when relevant and their probative value is not substantially outweighed by their potential for unfair prejudice to the defendant. *Holbrook v. Commonwealth*, 525 S.W.3d 73, 85 (Ky. 2017). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE<sup>1</sup> 401. However, "[w]hen there is already overwhelming evidence tending to prove a particular fact, any additional evidence introduced to prove the same fact necessarily has lower probative worth, regardless of how much persuasive force it might otherwise have by itself." *Hall v. Commonwealth*, 468 S.W.3d 814, 824 (Ky. 2015). A photograph that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case is unfairly prejudicial." *Hammond v. Commonwealth*, 577 S.W.3d 93, 101 (Ky. App. 2019) (citations and internal quotation marks omitted). We review a trial court's decision to admit photographs for an abuse of discretion. *Id.* at 100.

---

<sup>1</sup> Kentucky Rules of Evidence.

Troxler contends the screen shots were needlessly cumulative because the jury had already seen the video and he did not even deny selling oxycodone to Smith. We disagree on both fronts. First, the video and screen shots were complementary, not needlessly cumulative. Although the recording appears to show a drug transaction, the video quality was poor and there was no explicit discussion regarding the exchange of cash for controlled substances. The screen shots, along with Smith's testimony, made clear to the jury that Troxler trafficked in a controlled substance by selling Smith oxycodone pills for \$400. Second, Troxler's claim that he did not deny selling oxycodone to Smith is misleading. Defense counsel elected to defer giving an opening statement until after the Commonwealth rested. However, no opening statement was made after Troxler decided not to put on any evidence. It was not until closing arguments that the entrapment defense was raised. The Commonwealth had no way of knowing Troxler would not dispute selling oxycodone when it was presenting its case-in-chief. Thus, the screen shots were probative to a matter still in dispute and not proven overwhelmingly by other available evidence. Even if that were not the case, the screenshots did not appeal to the jury's sympathies or instinct to punish. Troxler's citation to cases involving gory crime scene photographs is unpersuasive. Under these circumstances, the trial court's evidentiary ruling was not an abuse of discretion.

## II. Evidence of Amended Charge

Next, Troxler contends, and the Commonwealth's agrees, that the trial court erred by permitting testimony regarding his prior indictment for first-degree burglary. Because Troxler failed to object to this testimony at trial, we may reverse only if we find palpable error. "A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (footnote omitted). Whether the introduction of amended or dismissed charges during the penalty phase of trial amounts to palpable error is an issue the Kentucky Supreme Court has addressed on multiple occasions.

In *Blane v. Commonwealth*, 364 S.W.3d 140 (Ky. 2012),<sup>2</sup> a jury found the defendant guilty of two counts of trafficking in cocaine, plus one count of trafficking in marijuana, and recommended the maximum sentence for each conviction. The Commonwealth then called a deputy clerk to testify to the defendant's prior convictions to establish his PFO status. The clerk then testified to the defendant's two prior convictions, referencing both the defendant's original charges and the charges as amended. The prosecutor also emphasized the prior

---

<sup>2</sup> *Blane* was abrogated on other grounds by *Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015).

amended charges in closing argument. The jury found the defendant guilty of being a PFO and recommended fifteen-year sentences for each count of trafficking in cocaine and five years for trafficking in marijuana, to be served consecutively for a total sentence of thirty-five years' imprisonment. Based on these facts, particularly the jury's recommendation of the maximum sentence for the underlying charges, the Supreme Court held that the defendant suffered the manifest injustice necessary to reverse for palpable error.

In reviewing *Blane* and its progeny, the Kentucky Supreme Court has noted that in cases in which palpable error was found the improper evidence was usually read to the jury by a witness or was emphasized by the prosecutor during closing argument, or both. *Wallace v. Commonwealth*, 478 S.W.3d 291, 301 (Ky. 2015). Accordingly, the *Wallace* Court held that palpable error did not occur in that case because the defendant's prior amended charges were introduced only through unredacted court documents provided to the jury. *Id.* at 302. The Court also found significant that the jury's recommended sentence was in the "mid-to-low range" rather than the maximum. *Id.* In *Miller v. Commonwealth*, 394 S.W.3d 402 (Ky. 2011), the defendant was found guilty of first-degree possession of a controlled substance and of being a first-degree PFO, and the jury recommended a sentence of twenty years' imprisonment. However, the Supreme Court did not find palpable error when the prosecutor cross-examined the defendant on the amount of

times he sold drugs without getting caught. *Id.* at 406. The Court noted that the jury had appropriately before it the defendant's three prior felony convictions and three separate parole violations. *Id.* at 408. The Court concluded the jury's recommended sentence was more likely the result of the defendant's multiple convictions and continuous return to illegal activity. *Id.*

In this case, we hold that Tackett's testimony regarding Troxler's indictment for first-degree burglary does not rise to the level of palpable error. Although this evidence was introduced by a testifying witness, no other reference to this indictment was made during trial and the Commonwealth did not emphasize the charge during closing argument. The jury's recommended sentence was in the medium range: instructed to fix a sentence somewhere between ten and twenty years, the jury recommended fifteen years' imprisonment. Similar to the defendant in *Miller*, Troxler's sentence was more likely the result of his multiple felony convictions and repeated return to illegal activity. Under all the circumstances, we are confident that there is not a substantial possibility the result of trial would have been different had Tackett not referenced Troxler's indictment for first-degree burglary.<sup>3</sup>

Accordingly, the judgment of the Greenup Circuit Court is affirmed.

---

<sup>3</sup> Because we hold that no palpable error occurred, there is no need to address the Commonwealth's alternative argument that Troxler waived this issue by consenting to the use of certified court records to prove his PFO status.



ALL CONCUR.

BRIEF FOR APPELLANT:

Karen Shuff Maurer  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky

Christopher Henry  
Assistant Attorney General  
Frankfort, Kentucky