IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 25, 2005
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2003-SC-0288-MR DATE 9-15-05 ELA Grantham D.C.

TORRENCE SARVER — APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
03-CR-90

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Torrence Sarver, was convicted by a Warren Circuit Court jury of trafficking in a controlled substance in the first degree and possession of drug paraphernalia. He was sentenced to twenty years imprisonment on the trafficking charge, enhanced to thirty years upon the jury's finding that he was also a persistent felony offender in the first degree (PFO 1st); and to twelve months on the paraphernalia charge which, pursuant to KRS 532.110(1)(a), was ordered to run concurrently with the thirty-year sentence. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting three claims of error: (1) improper impeachment of a character witness; (2) admission of KRE 404(b) evidence without giving the notice required by KRE 404(c); and (3) insufficiency of the evidence to support his conviction of possession of drug paraphernalia. None of these alleged errors were preserved for

appellate review. Finding no violation of Appellant's substantial rights and no occurrence of manifest injustice, we affirm. KRE 103(e); RCr 10.26.

On March 6, 2002, Detective Brian Harrell of the Bowling Green Police Department stopped a vehicle operated by Lindsay Barks for a traffic violation. He discovered "corner baggies" on the floor of the vehicle which he believed contained testable amounts of crack cocaine. There was evidence that crack cocaine dealers cut the corners off of regular "sandwich baggies" and use them to package their product for purposes of sale. To avoid being charged with possession of cocaine, Barks agreed to act as an informant for the police. She told Harrell that she could purchase some crack cocaine from a person known to her only as "Bama." The police did not learn that "Bama" was Appellant until his arrest. Detective Harrell turned Barks over to Detective Melanie Scott, a member of the Drug Task Force.

Barks made three telephone calls to Appellant's cellular phone. Each call was tape-recorded and subsequently played for the jury at trial. During the first call, Barks told Appellant that she needed "some," and Appellant responded that he was on his way home from Russellville and would be at his residence in approximately thirty minutes. Appellant addressed Barks as "baby girl" and asked her what she was "looking for." Barks responded, "A sixteenth," meaning 1/16th of an ounce of crack cocaine. Appellant replied, "Sounds good." Barks made a second call in an apparent attempt to change the meeting place, but Appellant had already passed the place proposed by Barks and stated that he did not have "it" on him. When Barks again mentioned what she was looking for, Appellant responded that he had made a telephone call. During the third call, Appellant told Barks that he was not sure what he had at his place but that he would be home in a minute.

Detective Scott searched Barks prior to the controlled buy to ensure that she was not in possession of any crack cocaine that she could falsely claim to have obtained from Appellant. She then equipped Barks with a recording device and gave her five twenty-dollar bills with recorded serial numbers, the amount needed to purchase 1/16th of an ounce of crack cocaine. Scott then drove Barks to Appellant's residence and Barks went inside. Appellant only had a "twenty-dollar rock," so Barks gave him one of the twenty-dollar bills, and Appellant gave Barks a corner baggie containing 13/100ths of a gram of crack cocaine. Barks returned to Detective Scott's vehicle, delivered the cocaine and the remaining eighty dollars to Scott, and gave Scott a description of Appellant. Police officer David Whitson was stationed under a window of Appellant's apartment when a twenty-dollar bill fell out of the window and into his hands. The serial number on the bill confirmed that it was the same twenty-dollar bill that Barks had given to Appellant. Appellant later admitted he threw the money out the window because he suspected he was being "set up." He told the police that Barks owed him twenty dollars and had come to his apartment to pay her debt.

The police searched Appellant's apartment and found no controlled substances. However, they found a box of sandwich baggies and $121.00 in cash under his bed.

I. IMPEACHMENT OF CHARACTER WITNESS.

Appellant called only one witness in his defense, Frank O'Hara, who was wearing an orange jump suit with the words "Warren County Detention Center" across the back. O'Hara testified that Barks was a liar and a drug addict who would say anything necessary to satisfy her drug habit or to stay out of jail, and that he could not say anything good about her. On cross-examination and without objection, the prosecutor elicited from O'Hara that he had been convicted of stealing a motorcycle and was

presently incarcerated because he had violated a condition of his probation. O'Hara then testified in detail about the fact that he had "taken the rap" for a friend who had actually stolen the motorcycle, then "loaned" it to O'Hara while using O'Hara's pickup truck to move some furniture. Obviously, eliciting from O'Hara the nature of his prior conviction was a violation of KRE 609(a) ("The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction.").

> A palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered . . . 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.

KRE 103(e) (emphasis added).

> Under KRE 103(e), we review unpreserved claims of evidentiary error for palpable error. A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, and the error must have resulted in "manifest injustice." Authorities discussing palpable error consider it to be composed of two elements: obviousness and seriousness, the latter of which is present when a failure to notice and correct such an error would seriously affect the fairness, integrity, and public reputation of the judicial proceeding. A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily dependent upon the facts of each case.

Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005) (internal citations and quotations omitted). No palpable error, much less manifest injustice occurred here. O'Hara was not a substantive witness, but only a character witness; and not even a witness to Appellant's good character, but only a witness to the bad character of a witness for the Commonwealth. It would be rare, indeed, when the improper impeachment of a character witness would affect the substantial rights of a party. It certainly did not occur here where the jury obviously knew O'Hara was in jail and, by identifying the nature of the offense, which was hardly the "crime of the century," the

prosecutor opened the door for O'Hara to explain that he was not guilty of the felony of which he was convicted but only "took the rap" for a friend.

II. PRIOR BAD ACTS.

Detectives Harrell and Scott testified that they targeted Appellant for this controlled drug buy because Barks told them she was confident she could purchase crack cocaine from a person known to her only as "Bama." Harrell testified that it was only after Appellant's arrest that he recognized Appellant as someone he knew as "BamBam." Appellant claims that both statements were evidence of prior misconduct, inadmissible under KRE 404(b): Barks's statement by identifying him as a drug dealer, and Harrell's statement by identifying him as someone who had previously broken the law. Appellant also argues that he was not given the notice required by KRE 404(c).

Neither statement resulted in manifest injustice. Barks did not testify that she had previously bought drugs from Appellant, but only that she was confident that she could do so. That fact was confirmed by the three recorded telephone conversations and her actual purchase of crack cocaine from Appellant. See Commonwealth v. Mitchell, 165 S.W.3d 129, 134 (Ky. 2005); Castle v. Commonwealth, 44 S.W.3d 790, 794 (Ky. App. 2000). Harrell did not testify that he knew Appellant because of Appellant's prior criminal activity, and the fact that a police officer has previously met a defendant does not necessarily connote prior misconduct on the defendant's part. Fields v. Commonwealth, 12 S.W.3d 275, 284 (Ky. 2000). The failure to give KRE 404(c) notice of this testimony does not rise to the level of palpable error.

III. POSSESSION OF DRUG PARAPHERNALIA.

At the conclusion of the Commonwealth's case, Appellant moved for a directed verdict of acquittal only on grounds that the audiotape of the drug transaction was not properly authenticated because it was largely inaudible. No motion was made with respect to the sufficiency of the evidence to support the drug paraphernalia charge. At the conclusion of all the evidence, Appellant did not move for a directed verdict of acquittal on either charge. Nor did he object to the instruction on possession of drug paraphernalia. In fact, defense counsel advised the trial court that she had no objection to any of the instructions prepared by the trial court. RCr 10.24 provides:

> Not later than five (5) days after the return of a verdict finding a defendant guilty of one or more offenses, or after the discharge of the jury following their having not returned a verdict, a defendant who has moved for a directed verdict of acquittal at the close of all the evidence may move to have the verdict set aside and a judgment of acquittal entered, or for a judgment of acquittal. Likewise, if a defendant has been found guilty under any instruction to which at the close of all the evidence such defendant objected upon the ground that the evidence was not sufficient to support a verdict of guilty under that instruction, the defendant may move that to that extent the verdict be set aside and a judgment of acquittal entered. . . .

(Emphasis added.)

We have consistently applied the same rule with respect to claims of insufficiency of the evidence when raised on appeal. Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998) (claim not preserved for review where defendant failed to renew motion for directed verdict at the conclusion of all the evidence); Jackson v. Commonwealth, 670 S.W.2d 828, 832 (Ky. 1984) (claim that Commonwealth failed to prove value of stolen property not preserved for review where defendant failed to move for directed verdict on that ground), disapproved of on other grounds by Cooley v. Commonwealth, 821 S.W.2d 90, 91 (Ky. 1991); Helmes v. Commonwealth, 558 S.W.2d 162, 163 (Ky. 1977)

(claim not preserved where defendant failed to move for directed verdict either at close of Commonwealth's case or at close of all the evidence); Crain v. Commonwealth, 484 S.W.2d 839, 842 (Ky. 1972) (same).

Furthermore, when, as here, there are two or more charges and the evidence is sufficient to support one or more, but not all, of the charges, the allegation of error can only be preserved by objecting to the instruction on the charge that is claimed to be insufficiently supported by the evidence. Harrison v. Commonwealth, 858 S.W.2d 172, 176 (Ky. 1993); Seay v. Commonwealth, 609 S.W.2d 128, 130 (Ky. 1980); Campbell v. Commonwealth, 564 S.W.2d 528, 530-31 (Ky. 1978); Kimbrough v. Commonwealth, 550 S.W.2d 525, 529 (Ky. 1977).

> We have held consistently that insufficiency of the evidence to support a verdict must be timely raised in the trial court – ordinarily by a motion for a directed verdict or, as would have been appropriate in this instance, an objection to the instruction or instructions that are not sufficiently supported by the evidence – in order for the question to be reviewable on appeal. . . . It is settled that except in the most flagrant of circumstances even constitutional rights may be waived by nonassertion.

Rudolph v. Commonwealth, 564 S.W.2d 1, 4 (Ky. 1977), overruled on other grounds by Woods v. Commonwealth, 793 S.W.2d 809, 815 (Ky. 1990).

Even if the issue had been preserved and Appellant improperly convicted, there would have been no manifest injustice. The offense was a misdemeanor, which is legally required to run concurrently with the felony sentence, KRS 532.110(1)(a); and the conviction did not add substantially to Appellant's existing six-page "rap sheet," which included two prior convictions of trafficking in a controlled substance in the first degree. Furthermore, the evidence was sufficient to support Appellant's drug paraphernalia conviction. KRS 218A.500(1) defines "drug paraphernalia" as "all equipment, products and materials of any kind which are used [or] intended for use . . .

in . . . packaging, repackaging, storing, containing . . . a controlled substance in violation of this chapter." (Emphasis added.) KRS 218A.500(2) provides that "[i]t is unlawful for any person to . . . possess with intent to use drug paraphernalia for the purpose of . . . packing, repacking, storing, containing, . . . a controlled substance in violation of this chapter." There was evidence in this case that sandwich baggies are used to package controlled substances for the purpose of sale. Although no controlled substances were found during the search of Appellant's residence, the jury obviously believed that he had sold a controlled substance to Barks which was packaged in a "corner baggie." Appellant would have had a better argument if the box of sandwich baggies had been found in a kitchen cabinet or drawer. However, this box of sandwich baggies was found under Appellant's bed along with $121.00 in cash. A jury could reasonably believe that Appellant possessed these baggies with intent to use them for the purpose of packaging drugs for sale. Commonwealth v. Benham, 816 S.W.2d 186, 187-88 (Ky. 1991).

Accordingly, the judgment of convictions and the sentences imposed by the Warren Circuit Court are affirmed.

All concur.

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