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RENDERED: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-001133-MR

DATE 5-11-06 ElliaGrowth D.C.

DOUG WILLIAMS APPELLANT

V.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
NO. 02-CR-00060

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

Appellant, Doug Williams, was convicted on November 18, 2004, in the Boyle Circuit Court for first degree assault and second degree persistent felony offender. Appellant was sentenced to twenty years imprisonment, which was enhanced to twenty-five years based on the conviction of second degree persistent felony offender. Appellant now appeals to this Court pursuant to Ky. Const. § 110(2)(b), alleging three claims of error, *viz*: (1) that the trial court erred in its admission of incriminating statements made by a non-testifying co-defendant warranting a reversal, (2) that the trial court committed palpable error in admitting "investigative hearsay" despite Appellant's failure to preserve the issue for appellate review, and (3) that the trial court improperly considered a felony conviction for which Appellant served no time in prison in the conviction for

second degree persistent felony offender. Having reviewed the record, we affirm the conviction and sentence.

II. Facts

On the night of January 29, 2002, Appellant, Steven Durham, and Galen Eisenbeis[1] arrived at the home of the victim, David Gorley, to discuss his firing of Durham from a minor repair job to Gorley's home. Gorley had been dissatisfied with Durham's performance and informed Durham that he would no longer be required to finish the job of installing windows at Gorley's house. Durham was angered by Gorley's actions, and Gorley testified that Durham had told him on the phone that "You can't run me off a job."

According to testimony elicited at trial, there were other incidents that also soured the relationship between Gorley and Appellant. In particular, Appellant was angry that Glenda Dinsmore, Gorley's girlfriend, had told Appellant's sister that Appellant and his mother were attempting to obtain custody of a child parented by Dinsmore's niece and Durham. Appellant telephoned Gorley about the situation. That same night, someone cut the brake line and valve stem on Dinsmore's car as it was parked in the driveway at Gorley's house.

Testimony from James Wilburn, Jr., revealed that about 5:30 p.m. on January 29, 2002, Durham and he had a conversation in Appellant's presence. Durham and Appellant (and two other men Wilburn did not know) stopped and spoke with Wilburn for a while at Wilburn's residence. During their conversation, Wilburn mentioned that he needed to go to Gorley's store, and then Durham

[1] A fourth man, Greg Smith, also accompanied the three men to Gorley's house that evening. However, Smith has not been implicated in the crime and has not been indicted.

responded, "Piss on David Gorley." Wilburn also stated that Durham hated "the son of a bitch" and that Durham said if Gorley fooled with him, he'd shoot him.

When the men arrived at Gorley's home, Gorley told Durham to leave. Gorley testified that he saw a gun in Appellant's hand so he retreated into his bedroom to get his own gun. Upon returning, he found Durham and Eisenbeis in his kitchen, where Durham was holding Gorley's girlfriend, Glenda Dinsmore, by the arms after she had tried to call 911. When Gorley asked Durham what he was doing, Durham released Dinsmore, and Gorley again told Durham to leave. After Durham and Gorley exchanged words, the men finally left the Gorley residence.

Later that evening, Appellant drove Eisenbeis and Durham back toward Gorley's home, parking the truck at the foot of Gorley Road. Eisenbeis testified that, as Appellant exited the vehicle, he saw a pistol in his waistband.

Gorley, suspecting the men might return, went to retrieve a deer rifle. As he was loading the weapon, he was shot in the back through a window. The weapon was never recovered by police.

Appellant was arrested around 4:00 a.m. on January 30, 2004. During an audiotaped interview, Appellant admitted being at Gorley's house, but denied having a pistol. Appellant claimed that the argument erupted because Durham thought Gorley had stolen Durham's marijuana, and Appellant claimed that Gorley had "put out a hit" on him and Durham. Appellant later admitted to having a .22 caliber pistol in his hand while he and the other men were at Gorley's residence on the evening of the alleged crime. However, he never admitted to shooting Gorley.

Kentucky State Police also arrested Durham upon suspicion of involvement in Gorley's shooting. A search of Durham's vehicle uncovered a .22 caliber handgun, marijuana, and a set of scales. Durham told police he had not been at Gorley's house that night. He later recanted his story and admitted to having been at Gorley's house, but told police he and Gorley had an argument over a satellite dish. Durham was subsequently indicted for first degree assault, prompting his refusal to testify at Appellant's trial. However, a jury of the Boyle Circuit Court acquitted Durham of the charges on September 20, 2005.

Eisenbeis was indicted for first degree assault. However, as the result of a plea agreement, Eisenbeis testified against Appellant in exchange for a diversion for five years.

During Appellant's trial, several prosecution witnesses testified that Appellant shot Gorley that evening.[2]

Eisenbeis testified that when he asked Appellant what was going on, Appellant replied, "I popped David. He's a dead man." He also said he waited for over an hour in Appellant's truck on the night of the shooting. Eisenbeis testified that when Appellant returned to the truck, he no longer had the pistol with him, and his clothes were wet and muddy. According to Eisenbeis, the gun was buried somewhere in an adjacent county. However, when Eisenbeis testified that Durham told him Appellant had shot Gorley, Appellant objected and

[2] Most of Appellant's assignments of error involve the admission of testimony involving hearsay statements made by Durham to several witnesses. Durham invoked his Fifth Amendment privilege against self-incrimination, thus prompting the prosecution to attempt to have the jury hear his statements through other witnesses.

moved for a mistrial. The trial judge sustained the objection, denied the motion for a mistrial, and admonished the jury to disregard Eisenbeis' statement.

Det. Owens testified that Durham told him, during an interview following his arrest, that Williams was not with him and Eisenbeis when they went to Gorley's residence. Appellant objected on the ground of inadmissible "investigative hearsay." However, because Det. Owens received contradictory statements during his investigation, such as Eisenbeis' statement that Appellant was at Gorley's home, the trial court overruled the objection.

Det. Owens also testified regarding statements made to him by Kentucky State Trooper Eric Taylor. Trooper Taylor told Owens that the gunshot wound sustained by Gorley was from a large caliber weapon and that the .22 caliber revolver taken from Durham's truck had not been fired (i.e. was "clean"). Det. Owens further testified that a bullet fragment taken from Gorley's hand was not in a condition to determine either its caliber or from what weapon it had been fired. Appellant failed to object and thus failed to preserve this issue for appeal.

James Wilburn testified that Durham, in Appellants presence, told him he hated Gorley and that "if [Gorley] fooled with him, he'd shoot him." Appellant again objected on grounds of hearsay, which the trial court overruled, finding the testimony showed Durham's state of mind and knowledge.

Several witnesses testified that Appellant went to the home of his sister, Delena Smith, some time after Gorley was shot. Delena heard over a radio scanner that police were looking for Appellant, Durham, and Eisenbeis. When she asked Appellant what was going on, Appellant told her that she should not worry about Durham (her son) and that Durham was "not involved in what had

went down." Delena also inquired about her gun. Appellant told her that he "took care of it."

Bea Shelton, who was also at Delena's home, testified she told Appellant and Delena that they could come to her house for coffee. Shelton testified that Appellant's clothes were muddy and wet when he arrived at Delena's house and that Delena had said to Appellant, "I pray to God. I pray to God that he don't die. Doug, do you think he's dead?" According to Shelton, Appellant responded, "Yes, he's a dead man." Shelton asked Appellant if he really thought he killed Gorley, and he replied, "I've deer hunted too much. He's a dead man." Shelton also stated that Appellant also told her and Delena that he thought Gorley had been shot in the heart.

Finally, the trial court allowed Appellant's prior felony conviction to be used as a basis for his conviction of persistent felony offender although he did not actually serve any time in prison.

The jury returned a guilty verdict on November 18, 2004. Appellant was sentenced on November 29, 2004, to a total of twenty-five years imprisonment. This appeal followed.

III. Analysis

A. Admission of a non-testifying co-defendant's statements.

1. *Trial Court committed harmless error in admitting testimony involving a non-testifying co-defendant's inculpatory statements.*

During Eisenbeis' testimony on behalf of the prosecution, he was asked whether Durham made any statements to him when he picked Durham up on the road after the latter flagged him down. Eisenbeis replied that Durham told him Appellant shot Gorley. Appellant immediately objected and moved for a mistrial,

to which the prosecution responded that it did not know Eisenbeis would respond to that question in such a way. The trial court sustained the objection, denied the motion for a mistrial, and admonished the jury to disregard Eisenbeis' statement.

Appellant argues that the trial court committed reversible error in admitting the statement and thus violated Appellant's Sixth Amendment right to confront witnesses against him. In Bruton v. United States, 391 U.S. 123, 135-37, 88 S.Ct. 1620, 1627-28, 20 L.Ed.2d 476 (1968), the United States Supreme Court held that a defendant's right to confront witnesses against him under the Sixth Amendment is violated when a non-testifying codefendant's statements inculpating defendant are admitted at trial. The defendants in Bruton were tried in a joint trial where the statements of one co-defendant were found to unduly prejudice the other defendant. The United States Supreme Court found the abrogation of the defendant's right to confront the witness warranted reversal.

Despite the admonition given by the trial court, Appellant argues that Bruton, supra, is applicable, and that the admonition does not cure the damaging nature of the hearsay statement. We find Appellant's argument compelling, as Bruton certainly is applicable in this particular instance, despite the fact that Bruton involved a joint trial of the defendants.[3] The non-testimonial statement was made by a non-testifying co-defendant and inculpates the defendant.

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[3] On this issue, we note our decision in Terry v. Commonwealth, 153 S.W.3d 794, 801 (Ky. 2005), wherein we stated:

> The only distinction between Bruton and the case *sub judice* is that this was not a joint trial. However, Bruton's concern in that regard related primarily to the fact that the statement was admissible against the declarant codefendant but not against the other codefendant. The issue was whether the jury could properly consider it against the declarant but disregard it with respect to his codefendant. Here, there is no question that the statement was

The Court in Bruton ultimately held that

> the introduction of [the non-testifying co-defendant's] confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard [the non-testifying co-defendant's] inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.

Id. at 137, 88 S.Ct. at 1628.

Subsequent cases, however, have distinguished Bruton's holding. Most significantly, in Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284 (1969), the Supreme Court held, under the harmless error analysis announced in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the admission of a non-testifying co-defendant's statements were harmless beyond a reasonable doubt and did not warrant reversal of Harrington's conviction because the wrongfully admitted evidence was cumulative, and proof of the defendant's guilt was overwhelming.

Despite Appellant's argument that every situation such as this warrants automatic reversal, the United States Supreme Court has held otherwise. In Delaware v. Van Arsdell, 475 U.S. 673, 682, 106 S.Ct. 1431, 1437, 89 L.Ed.2d 674 (1986), the Court stated as follows:

> In Harrington v. California, [395 U.S. 250, 254, 89 S.Ct. 1726, 1728-29, 23 L.Ed.2d 284 (1969),] . . . we expressly rejected the claim that the admission into evidence of a statement made by a

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> inadmissible against Appellant, who is in the same position in this case as was the declarant's codefendant in Bruton . . . . We perceive no significant distinction between the prejudice attending the use of a nontestifying codefendant's hearsay statements to inculpate a codefendant in a joint trial, as in Bruton, or in a separate trial . . . .

> nontestifying codefendant, in violation of Bruton v. United States, supra, can never be harmless. Harrington, which we have expressly reaffirmed on more than one occasion, see, e.g., Schneble v. Florida, [405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972)]; Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973), demonstrates that the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case.

Most significant in this respect is the testimony of Bea Shelton and Galen Eisenbeis. Shelton testified that when she asked Appellant if he really thought *he* killed Gorley, Appellant replied, "I've deer hunted too much. He's a dead man." Shelton also testified that Appellant told his sister, Delena Smith, during the same conversation that Gorley was shot in the heart. Eisenbeis also testified that when Appellant returned to the truck that night, he told Eisenbeis that he "popped David" and that Gorley was "a dead man." The improperly admitted statement was thus cumulative of other properly admitted evidence.

Although we find Bruton applicable in this situation, we are not persuaded to reverse Appellant's conviction. Appellant is correct in asserting that his Sixth Amendment right to confront Durham was abrogated when Durham's statements inculpating Appellant were given by a third party, Eisenbeis. However, this statement was merely cumulative of other properly admitted evidence regarding Appellant's guilt in the commission of the crime, and thus any error in its admission was harmless. Appellant's argument regarding the admonition may be correct; however, having found the inadmissible statement to be cumulative and harmless, we decline to address whether the admonition in this case was futile.

2. *Trial Court committed harmless error in admitting non-testifying co-defendant's testimonial statement.*

The prosecution questioned Det. Owens as to whether Durham had denied that Appellant was with him and Eisenbeis when they visited Gorley's residence. Appellant objected on hearsay grounds, arguing the statements were improper "investigative hearsay." The trial court overruled the objection, finding that these statements aided Det. Owens in his investigation and prompted him to take certain steps.

In his brief, Appellant argues that the admission of this statement was unnecessary because Det. Owens testified that he arrested Appellant based only on Eisenbeis' statement that Appellant was at Gorley's house that evening with him and Durham. Appellant characterizes the prosecution's use of this hearsay statement as a subterfuge to suggest that Durham was actually covering for Appellant because of Appellant's involvement in the crime. We find the trial court erred in admitting these statements as no hearsay exception can be applied to allow their admission and because the statements were testimonial in nature and Appellant had no opportunity to cross-examine Durham. However, we find the error to be harmless beyond a reasonable doubt as Appellant was not prejudiced by the admission of the statement.

This Court held in Sanborn v. Commownealth, 754 S.W.2d 534, 541 (Ky. 1988), that "hearsay is no less hearsay because a police officer supplies the evidence. . . . [T]here is no separate rule, as such, which is an investigative hearsay exception to the hearsay rule." At issue in Sanborn was the prosecution's "extensive use of testimony from three different police officers repeating what was told to them by persons whom they interviewed during the course of their investigation, offered under the guise of a so-called 'investigative

hearsay' exception to the hearsay rule." Id. Quoting Lawson's Kentucky Evidence Law Handbook, § 8.00 (2d ed. 1984), we distinguished "investigative hearsay" from the verbal act doctrine, stating "'[a]n extrajudicial statement has a proper nonhearsay use when its utterance (not its substance) is a part of the issues of the case.'" Id. We further noted that "'[a verbal act] is not hearsay evidence; it is not admitted for the purpose of proving the truth of what was said, but for the purpose of describing the relevant details of what took place.'" Id. (quoting Preston v. Commonwealth, 406 S.W.2d 398, 401 (Ky. 1966)). We ultimately held that

> [t]he rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officer's action.

Id. (emphasis in original). In essence, it goes to a "state of mind" in issue.

We note that Det. Owens' actions in arresting Appellant were not an issue in this case. However, more important in this appeal is the testimonial nature of Durham's statements to Det. Owens. In Crawford v. Washington, 541 U.S. 36, 54, 124 S.Ct 1354, 1365, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that a defendant's Sixth Amendment right to confrontation is violated where out-of-court testimonial statements are offered against him "unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." The Court declined to delineate exactly what constitutes "testimonial," though it provided some guidance. The Court stated that the term "testimonial" applies "at a minimum to prior testimony at a preliminary hearing,

before a grand jury, or at a former trial; and to police interrogations." Id. at 68, 124 S.Ct. at 1374.

We have addressed the issue of what constitutes a "testimonial" statement in the context of Crawford. In Bray v. Commonwealth, 177 S.W.3d 741, 745 (Ky. 2005), we opined that "Crawford endorsed the view that statements were testimonial if, *e.g.*, they 'were made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.'" (quoting Crawford, 541 U.S. at 52, 124 S.Ct. at 1364). In finding Bray's spontaneous statements, made to her sister, to be nontestimonial, we cited similar results from sister states. Most relevant to our analysis here is the Eighth Circuit Court of Appeals' holding in United States v. Manfre, 368 F.3d 832, 838 n.1 (8th Cir. 2004), where the court held that statements "made to loved ones or acquaintances . . . are not the kind of memorialized, judicial-process-created evidence of which Crawford speaks" and are thus nontestimonial. Statements have also been held nontestimonial where "[n]o government official was present . . . [and] [t]he statements were made spontaneously to co-workers." People v. Butler, 127 Cal.App.4th 49, 25 Cal.Rptr.3d 154, 161-62 (2005). Even statements made to police have been held nontestimonial where the statements "did not result from structured questioning." People v. Coleman, 16 A.D.3d 254, 791 N.Y.S.2d 112, 113-14 (N.Y.App.Div. 2005).

However, Durham's statements to Det. Owens are not the type of statements to which the rationale of Crawford is applicable as they do not inculpate Appellant. Similarly, Durham's statements made to Eisenbeis, were not the kind of statements, which, when made, would lead him to reasonably believe

they would be later used at trial, i.e. testimonial, thus Crawford is likewise inapplicable. Thus Appellant's reliance on Crawford is misplaced.

Finally, we reiterate that there is no "investigative hearsay" exception to the hearsay rules. As Det. Owens' actions in arresting Appellant were not an issue in this case, the verbal act doctrine has no applicability. However, any alleged hearsay violation in the admittance of these particular statements was harmless beyond a reasonable doubt. Durham's statement to Det. Owens that Appellant was not with him and Eisenbeis that night does not inculpate Appellant, as the statement only goes to show whether or not Appellant went with Durham and Eisenbeis to Gorley's, not whether Appellant committed the crime. Thus, Bruton, supra, is not applicable in this instance, nor is Crawford, as these were not inculpatory statements. Moreover, when Appellant took the stand, he admitted to having been at Gorley's house along with Durham, Eisenbeis, and Greg Smith, on the night of the crime. Durham's statements given through Det. Owens' testimony were contradicted by Appellant's own testimony. If anything, Det. Owens' testimony regarding Durham's statements might have actually worked to exculpate Appellant by removing him from the scene of the crime had Appellant not testified to the contrary. If any party should have objected to the admission of this statements, it should have been the Commonwealth, not Appellant. Regardless, the admission of Durham's testimonial statements by way of Det. Owens was harmless error, as the outcome of the trial would have been the same despite the error.

3. *Trial Court did not err in admitting statement of non-testifying co-defendant where the statement showed declarant's state of mind and was not inculpatory.*

Appellant also argues that the trial court committed reversible error in admitting Durham's out of court statements through the testimony of James Wilburn. The prosecution began to question Wilburn concerning Durham's statements made to him in Appellant's presence, and Appellant objected on hearsay grounds. After the prosecution informed the trial judge of the substance of Wilburn's testimony in this respect, the trial judge overruled the objection and ruled that Wilburn's testimony went to Durham's then existing state of mind. Specifically, Wilburn testified that, after stating he needed to go Gorley's store, Durham responded by saying "Piss on David Gorley." Wilburn also stated that Durham told him he "hated the son of a bitch, and if [Gorley] fooled with him, he'd shoot him."

Appellant again cites Bruton for the proposition that a non-testifying co-defendant's statements incriminating the defendant cannot be admitted against the defendant where there has been no prior opportunity to cross-examine the declarant concerning the statement. We find the argument unpersuasive as Bruton is inapplicable in this situation. Bruton, supra, applies only to statements which tend to incriminate or inculpate the defendant. In this case, Durham's statements actually inculpate or incriminate himself, not Appellant.

We find the trial court's ruling to be correct, as KRE 803 excludes such statements from the hearsay rules. Durham's statements, through Wilburn's testimony, show his then existing state of mind or emotion concerning his unrepentant feelings toward Gorley. It is inconceivable how Durham's state of mind might be transposed to Appellant, rendering them inculpatory in the process.

B. Trial Court's admission of hearsay statements from Det. Owens' testimony was not preserved for appellate review; no manifest injustice resulted.

During the trial, the prosecution presented evidence through the testimony of Det. Owens that was arguably hearsay in nature. Specifically, Det. Owens testified that the wound sustained by the victim was from a large caliber weapon, that the bullet fragment taken from the victim's hand was too small to determine the caliber of the weapon used, and that Durham's .22 caliber revolver was "clean," i.e. it had not been fired. Appellant, however, failed to object to the admissibility of this testimony or otherwise preserve these issues for appellate review. Nonetheless, Appellant argues that the palpable error standard of RCr 10.26 applies and that his conviction should be reversed as a result.

RCr 10.26 provides that an unpreserved issue may be considered on appeal where (1) error resulted, (2) the error affects the substantial rights of a party, and (3) manifest injustice has resulted from the error. See Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003). We now address each instance of error alleged by Appellant.

In the first instance, Det. Owens was permitted to testify concerning the size of the wound sustained by the victim, Gorley. Appellant contends that Det. Owens testified as to what he was told by Trooper Eric Taylor, who in turn was told that the gunshot wound was from a large caliber weapon. Interestingly, the victim, David Gorley, was the first witness to testify in the prosecution's case-in-chief and was the first to identify photographs of the wound in his back. These photographs were subsequently published to the jury. Thus, the jury was apprised of the size of the wound prior to Det. Owens' testimony.

In no event, however, did any witness testify as to the caliber of weapon used, but rather testimony revealed only that the wound was from a large caliber weapon, which was obvious from the photographs. Appellant argues that this improperly admitted hearsay specifically ruled out Durham as the shooter, leaving only the Appellant, Williams, as the guilty party. Although it would have been the better course to have the individual who relayed the information to Trooper Taylor concerning the size of the wound to testify, the jury could see for itself that the wound was large and must have resulted from a large caliber weapon. Furthermore, Eisenbeis testified that the gun he saw in Appellant's waistband was a large caliber weapon. It could hardly be surmised that the admission of Det. Owens' testimony in any way resulted in manifest injustice, regardless of the hearsay issue, as Det. Owens' testimony was cumulative of what the jury had been told by Gorley and had seen for itself from the photographs properly authenticated by Gorley.

In the second instance, Det. Owens testified that the bullet fragment taken from Gorley's hand was too small to confirm the caliber of weapon used in the commission of the crime. The prosecution contends that a proper foundation was laid concerning this evidence and that Det. Owens, in his experience as a Kentucky State Police Detective, was qualified to testify that bullet fragments were insufficient to produce precise results in ballistics examinations. We agree.

While Det. Owens may not have been a "ballistics expert," it is well within his purview and expertise to testify that bullet fragments were insufficient to test. Furthermore, we are not inclined to find that the testimony in any way resulted in manifest injustice to Appellant as the evidence was inconclusive, and thus the

jury could draw no inferences concerning the bullet fragment. Other ample testimony provided evidence beyond a reasonable doubt that Appellant was guilty.

Finally, Det. Owens testified that the .22 caliber revolver found in Durham's vehicle upon his arrest was "clean," i.e. it had not been fired. The prosecution contends that Appellant failed to object to Det. Owens testimony as a matter of trial strategy in that the prosecution could have simply recalled Kentucky State Trooper Taylor to testify to the same thing. While it was error to allow Det. Owens to testify to evidence that was relayed to him by Trooper Taylor, we again are not inclined to find this resulted in manifest injustice as the final result would not have differed.

The outcome of the trial would have been the same had Det. Owens not testified to any of the issues for which Appellant alleges error in this instance. Finding no palpable or substantial error in the admission of the hearsay evidence, we affirm appellant's conviction.

C. Trial Court did not err in considering Appellant's prior felony conviction; probation serves as "institutional rehabilitation" for purposes of KRS 532.080.

Appellant finally urges this court to reverse his conviction for second degree persistent felony offender ("PFO") as provided in KRS 532.080(2)(c)(2). Finding no error in the trial court's application of the statute to Appellant, we affirm Appellant's conviction for second degree persistent felony offender.

Appellant argues that the trial court improperly considered a prior felony conviction for which Appellant was placed on probation and served no time in prison. Citing the 1974 Commentary to KRS 532.080, Appellant mistakenly

assumes that trial courts may not consider probation in determining second degree PFO status. As originally enacted, KRS 532.080 did not contain language suggesting that probation could be used in determining PFO status. See 1974 Ky. Acts Ch. 406, § 280. The 1974 Commentary provided with the statute suggests that probation was not a consideration in PFO status at the time of the statute's enactment. However, KRS 532.080 has been amended several times since its enactment in 1974.

Most significantly, when the General Assembly amended the statute in an Extraordinary Session in 1976, it added the provision which provided the trial court's basis for the second degree PFO charge in this case. Following the amendment, the statute provided that

> [A] previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided . . . [t]hat the offender . . . *[w]as on probation or parole from the previous felony conviction at the time of commission of the felony for which he now stands convicted.*

1976 Ky. Acts (Extra. Sess.) Ch. 14, § 474; KRS 532.080(2)(c)(2) (emphasis added). This portion of the statute has changed very little since the amendment in 1976. Thus, the 1974 Commentary is of no help in this situation as the statute has been changed substantially since its original enactment.

We addressed this issue in Combs v. Commonwealth, 652 S.W.2d 859, 861-62 (Ky. 1983), wherein we found that

> [t]he 1974 commentary to the criminal code makes it plain that the intent of the persistent felony offender statute was to restrict its application to persons who have been previously exposed to an institutional rehabilitative effort . . . . The persistent felony offender statute has been amended since its enactment in 1974. Nothing in the amendments, however, indicates any legislative intent to repudiate the 1974 commentary. . . . The amendment retained the

> concept of not regarding an individual as a persistent offender unless he has been exposed to some rehabilitative effort.
>
> A second amendment now no longer requires actual imprisonment in the definition of conviction. A probated sentence now comes within the definition of a conviction, whereas under the 1974 Act it did not. K.R.S. 532.080(2)(c)(2) and 532.080(3)(c)(2). This amendment recognizes that probation of a sentence is subject to the supervision of a probation officer and the court and that probation is in itself, an effort toward rehabilitation. *A person who has previously been convicted of a felony and probated may now be convicted as a persistent felony offender for the commission of a subsequent felony.*

(Emphasis added).

Finding no error in the trial court's application of KRS 532.080, we affirm the trial court's ruling with respect to the conviction for second degree persistent felony offender.

CONCLUSION

For the reasons stated above, we affirm Appellant's conviction for first degree assault and his subsequent conviction for second degree persistent felony offender.

Cooper, Graves, Roach, Scott and Wintersheimer, JJ., concur. Johnstone, J., concurs in result only. Lambert, C.J., dissents.

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