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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-000912-MR

DATE 9-14-06 Ed A Grow III D.C.

KEVIN HUBER — APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HON. JOHN R. GRISE, JUDGE
INDICTMENT NO. 04-CR-00589

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART REVERSING IN PART

Appellant, Kevin Huber, was convicted in the Warren Circuit Court on September 10, 2004, of eleven felony counts of theft by deception over $300, thirteen misdemeanor counts of theft by deception under $300, and of being a persistent felony offender (PFO) in the first degree. Final judgment was entered on September 24, 2004, sentencing Appellant to twenty years imprisonment, a fine of $6500 and court costs of $160. Appellant now appeals to this Court as a matter of right pursuant to Ky. Const. § 110(2)(b), alleging several assignments of error, viz.: (1) that a directed verdict of acquittal was warranted as the Commonwealth failed to prove his guilt beyond a reasonable doubt, specifically as to count eleven of the indictment; (2) that the trial court erred when it proceeded with the combined Truth in Sentencing and Persistent Felony Offender phase before having the jury fix his punishment on the thirteen

misdemeanor counts; and, (3) that the trial court erred when it sentenced Appellant to court costs and fines notwithstanding KRS § 534.040(4). For the reasons set forth herein, we affirm Appellant's conviction, but reverse that part of his sentence regarding fines and court costs levied as a result of his misdemeanor convictions and remand to the trial court for proper sentencing in accordance with this opinion.

FACTS

Appellant was employed by Express Personnel, a temporary employment agency in Bowling Green, Kentucky. Appellant and another employee, Courtney Burkhart, were assigned to work with Sargumi Company, which was doing business at, and provided product support for, Car Top Systems (CTS), a Bowling Green company. The two were placed under the supervision of Charles Coulter, an employee of Sargumi Company. Sargumi required employees to sign in upon arriving at work and sign out when leaving. However, many times, for example, Burkhart would sign for himself, Appellant and Coulter as they arrived and left work at the same time on most occasions. Appellant and Burkhart would report their hours worked to Express Personnel by filling out weekly time sheets, and Coulter would sign them before Appellant and Burkhart each faxed their own timesheets to Express Personnel.

After Appellant had been working for approximately six months, a question arose concerning the number of hours listed on his timesheets. Although Appellant initially dodged any questions from Coulter about the issue, he later admitted to Coulter that he had been adding hours to his timesheets "for a while." In doing so, Appellant also admitted that he had a blank timesheet with Coulter's

signature already filled out, allowing Appellant to simply add the additional hours and then fax the timesheet to Express Personnel.

Coulter immediately fired Appellant and later discovered, after meeting with Express Personnel, that Appellant had claimed excessive hours for the previous six to eight weeks. The excessive hours became obvious when the hours Appellant reported were compared to the sign in sheets used by all employees. In fact, it was very unusual for any of Coulter's employees to work overtime, and even rarer for work to occur on weekends. By the time Appellant's scheme was discovered, he was claiming almost twenty-four hours of unworked overtime per week, much of it for work on Saturdays.

Following Coulter's calls to Express Personnel, Appellant was requested to come into the agency's office for questioning. There, Appellant admitted to several officials, including Express Personnel manager Joan Boone and owner Rhonda Lafollette, that he had padded his timesheets. Appellant also disclosed the forgery method he used to ensure Coulter never knew what he was doing. Appellant finally admitted to cashing the inflated paychecks and that he knew it was wrong.

Bowling Green Police Detective Darrell Bragg later questioned Appellant concerning the matter. When asked, Appellant admitted to Det. Bragg that he had padded his timesheets and was being paid for hours that were not worked. Appellant was then indicted by the Warren County Grand Jury in August of 2004 on twenty-six counts,[1] which included twelve felony counts of theft by deception

[1] Appellant was originally indicted for a single count of theft by deception over $300 and a persistent felony offender in the first degree. These were later dismissed on motion of the Commonwealth.

over $300, thirteen misdemeanor counts of theft by deception under $300, and one count of being a persistent felony offender in the first degree. Appellant was then convicted of eleven of the twelve felony counts, as well as all thirteen of the misdemeanor counts. The jury recommended twenty years on each of the felonies to run consecutively, and they recommended a $500 fine on all misdemeanor counts, except one, in which the jury recommended a twelve month jail sentence. The trial judge later reduced Appellant's sentence to twenty years, the maximum allowed by law for persistent felony offenders in the first degree involving Class D felonies. Additionally, the trial court imposed a fine of $6500, plus court costs, but deferred payment until Appellant was released from prison. It is from this judgment and sentence that Appellant now appeals.

ANALYSIS

A. Motion for directed verdict.

Appellant alleges that the trial court improperly denied his motion for directed verdict of acquittal with respect to count eleven of the indictment. Of the twenty-six total counts, count eleven specifically charged Appellant for theft by deception in the amount of $367.50 for the week ending October 19, 2003, a felony charge. KRS § 514.040(1), (7). Appellant contends that the Commonwealth's evidence was insufficient for a jury to convict him beyond a reasonable doubt.

The Commonwealth, however, disputes whether this issue is properly preserved. The Commonwealth concedes that Appellant's trial counsel did in fact make a motion for directed verdict of acquittal at the close of the

Commonwealth's case, but claims that Appellant failed to renew this motion following the close of all the evidence.

> [A] motion for directed verdict made after the close of the Commonwealth's case-in-chief, but not renewed at the close of all evidence, i.e., after the defense presents its evidence (if it does so) or after the Commonwealth's rebuttal evidence, is insufficient to preserve an error based upon insufficiency of the evidence.

Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003).

The record indicates beyond contravention, however, that during discussion on jury instructions, Appellant's motion for directed verdict as to all counts had been renewed, but specifically with respect to counts ten, eleven and twelve. The renewed motion came after presentation of all the evidence. The trial judge then overruled the renewed motion on grounds that there was sufficient evidence such that a jury finding of guilt would not be clearly unreasonable. Thus, Appellant's motions for directed verdict were properly preserved.

Appellant's contention that the trial court erroneously denied his motion for directed verdict of acquittal hinges on the allegation that the Commonwealth's evidence was insufficient as to whether or not Appellant actually received and cashed the paycheck concerning count eleven. Additionally, Appellant argues that the only evidence upon which his conviction for count eleven was premised involved hearsay evidence from a witness with no personal knowledge of whether or not Appellant actually received and cashed the paycheck for the week regarding count eleven. However, because Appellant did not object to the alleged hearsay during trial, he has waived his right to present this argument on appeal.

When ruling on motions for directed verdict, a trial court must assume all the evidence presented by the Commonwealth is, in fact, true, "leaving questions of weight and credibility to the jury." Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998) (citation omitted). The trial court is further required to "consider not only the actual evidence, but also 'must draw all *fair and reasonable inferences* from the evidence in favor of the Commonwealth.'" Lawson v. Commonwealth, 53 S.W.3d 534, 548 (Ky. 2001) (emphasis in original) (citation omitted).

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)). Stated differently, if after viewing the evidence in the light most favorable to the Commonwealth, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" then a directed verdict of acquittal may not be granted. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Furthermore, the task of the reviewing body is not to ask itself whether it believes that guilt was established beyond a reasonable doubt at trial, but whether a rational trier of fact could have reasonably found so. Jackson, 443 U.S. at 319; Commonwealth v. Jones, 880 S.W.2d 544, 545 (Ky. 1994).

In this case, the Commonwealth clearly established beyond a reasonable doubt that Appellant was involved in an ongoing scheme whereby he was consistently padding his time sheets and receiving payment for hours which he did not work. Furthermore, the Commonwealth introduced ample testimony

alleging that Appellant had claimed more hours than he had actually worked, that he openly confessed to doing so to more than one person, and that he had in fact received payment for these unworked hours. Appellant also admitted to Express Personnel owner Rhonda Lafollette that he was receiving inflated paychecks and cashing them. Thus, we find that a reasonable trier of fact could have found Appellant guilty as to count eleven of the indictment when the evidence is viewed in the light most favorable to the Commonwealth, and hold that the trial court correctly overruled Appellant's motion for directed verdict as to all counts.

Appellant's remaining argument, though not preserved for review, is that the only evidence from which a jury could reasonably find him guilty of count eleven was testimony from Joan Boone, manager of Express Personnel. Appellant alleges Ms. Boone had no personal knowledge as to whether Appellant actually received and cashed the check in question. KRE 602. Appellant further argues that Ms. Boone's testimony was hearsay and based on statements from someone in the corporate office that the check had been distributed and cashed. KRE 801(c), 802. Initially, Appellant objected to a photocopy of what was alleged to be a cleared check, issued by Express Personnel to the Appellant for the week in question. The trial court sustained this objection on the basis that the photocopy was illegible. However, Appellant never objected at trial when Ms. Boone testified that Appellant's check for this week was distributed and cleared Express Personnel's account.

This Court has addressed a similar issue, under very similar circumstances, in Sherley v. Commonwealth, 889 S.W.2d 794 (Ky. 1994). In Sherley, as in the case at bar, the appellant complained of hearsay testimony,

though he failed to object to the testimony during trial, and thus failed to preserve it for appellate review. This Court held that "[e]rror on appeal cannot be considered in the absence of a proper objection to preserve that error for appellate review." Id. at 796 (citing Todd v. Commonwealth, 716 S.W.2d 242 (Ky. 1986)). Nevertheless, we held the alleged error in Sherley to be harmless as the complained of hearsay evidence was cumulative and there was "no substantial possibility that the result would have been any different." Id.

Though unpreserved, if any error resulted from the admission of Ms. Boone's testimony, it would be nonetheless harmless, as the Commonwealth submitted ample evidence, including statements from various witnesses that Appellant confessed to padding his timesheets and being paid for unworked hours, from which the jury could reasonably conclude Appellant's guilt as to the count in question. Moreover, a "[c]onviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt." Graves v. Commonwealth, 17 S.W.3d 858, 862 (Ky. 2000). Here, we have a case where, "when the various items of evidence are added together, a mosaic appears upon which a reasonable jury could look and conclude that appellant was guilty." Davis v. Commonwealth, 795 S.W.2d 942, 947 (Ky. 1990). Thus a jury finding of guilt was not clearly unreasonable, despite the admission of hearsay evidence for which Appellant failed to object.

Finally, we see no reason to review this issue for substantial error under RCr 10.26. "[T]his is not an extraordinary case in which a constitutional violation

has probably resulted in the conviction of one who is actually innocent." Sherley, 889 S.W.2d at 798 (citation omitted).

Finding no error otherwise, we affirm Appellant's conviction and uphold the trial court's denial of a directed verdict of acquittal on this issue as the evidence was sufficient that a jury determination of guilt as to count eleven was not unreasonable.

B. Truth-in-sentencing/persistent felony offender phase.

In Appellant's second assignment of error, he argues the trial court erred when it proceeded with the combined truth-in-sentencing/persistent felony offender (TIS/PFO) phase of the trial before having the jury fix his punishment regarding the thirteen misdemeanor convictions. In making this argument, Appellant contends that this Court's certification of law regarding KRS § 532.055(1) in Commonwealth v. Philpott, 75 S.W.3d 209 (Ky. 2002), applies in this instance. Appellant also correctly points out that this alleged error is not preserved for appellate review, but nonetheless requests this Court to review the record under the substantial error standard of RCr 10.26.

Initially, we find that Appellant's argument is correct. In certifying the law in Philpott, supra, we stated that "[i]f, upon the conclusion of the trial of a multicount indictment, the jury returns verdicts finding the defendant guilty of both felony and misdemeanor offenses, and if either of the parties intends to offer evidence pursuant to KRS 532.055(2)," then the jury must immediately be instructed on the penalty range for the misdemeanor convictions first, "after which the procedure described in KRS 532.055(2) and (3) shall be followed with respect to the felony convictions." Philpott, 75 S.W.3d at 213-14.

The trial court in this case erred in failing to adhere to the well-reasoned decision in Philpott, supra. However, because the Appellant failed to preserve this issue for appellate review, we must now determine whether manifest injustice resulted from the trial court's failure to act in accordance with the law. We do not believe that a substantial error occurred in this case, as the result would have been the same had the court adhered to the proper procedure in sentencing Appellant, and thus Appellant suffered no manifest injustice.

"RCr 10.26 provides that an alleged error improperly preserved for appellate review may be revisited upon a demonstration that it resulted in manifest injustice." Butcher v. Commonwealth, 96 S.W.2d 3, 11 (Ky. 2002). Manifest injustice may be found where there is "a palpable error . . . which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). Furthermore, a palpable error "must involve prejudice more egregious than that occurring in reversible error." Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005).

Palpable error review is a fact-intensive inquiry and involves a case by case analysis. Ernst, 160 S.W.2d at 758 (citing United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1038, 1046-47, 84 L.Ed.2d 1 (1985)). "This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief." Id. (citing Jackson v. Commonwealth, 717 S.W.2d 511 (Ky. 1986)). Thus, we look to determine whether the punishment imposed on Appellant for the thirteen misdemeanor convictions would have been different as a result of the

court's error in combining the TIS/PFO phase of the trial with the misdemeanor sentencing.

KRS § 514.040(7) provides that theft by deception under $300 is a Class A misdemeanor. KRS § 534.040(2)(a) in turn provides that a fine of $500 is to be imposed where the defendant is found guilty of a Class A misdemeanor. Furthermore, KRS § 532.090(1) states that a Class A misdemeanor may be punishable by up to, but no more than, 12 months imprisonment, and this is considered a "definite term" of imprisonment. Finally, KRS § 534.040(1) provides:

> Fines and imprisonment for misdemeanors shall not be mutually exclusive. In any case where imprisonment is authorized, a fine may be levied in addition to the imprisonment, or a fine may be levied in lieu of imprisonment. Whether the fine is to be levied as the sole penalty or as an additional or alternative penalty shall be in the discretion of the judge or jury as the case may be. If the trial is by jury, the jury shall have the discretion. This rule shall apply in all cases where a fine is not the exclusive penalty authorized by law.

Appellant received a fine of $500, as required by KRS § 534.040(2) for a Class A misdemeanor, for twelve of the thirteen misdemeanor counts, and he received a sentence of imprisonment for twelve months for the last misdemeanor count pursuant to KRS § 532.090(1). The jury had only these two options in rendering its punishment. Further, fines and imprisonment are not mutually exclusive, and imposing one does not negate the other. KRS § 534.040(1). In any event, Appellant's twelve month prison sentence was set to run concurrently with his persistent felony offender in the first degree charge – the maximum allowed by law. Thus, Appellant would serve no additional time in prison on his misdemeanor convictions.

While we do not diminish the importance of a bifurcated penalty phase as required by Philpott, supra, we find the trial court's failure to do so in this case did not result in manifest injustice.

C. Court costs and fines levied in contradiction of KRS § 534.040(4).

In Appellant's final assignment of error, he alleges the trial court improperly assessed fines and costs against him despite the fact that the trial court had already recognized his indigent status pursuant to KRS Chapter 31. Furthermore, Appellant again correctly points out to this Court that this alleged error is not preserved for appellate review, but nonetheless requests the Court to review the issue pursuant to the substantial error standard of RCr 10.26.

Having already enunciated the standard when reviewing unpreserved errors for substantial error and manifest injustice, we find that, in this case, the trial court's failure to recognize Appellant's indigent status resulted in manifest injustice. But for the court's error, the result would have been different.

Appellant was found to be indigent under KRS Chapter 31 and also had a Department of Public Advocacy attorney appointed to represent him in the underlying action. After filing a notice of appeal and a motion to proceed on appeal in forma pauperis, the trial court entered an order adjudging Appellant to be indigent, per KRS § 453.190 and KRS § 31.110(2), and granted his motion to proceed on appeal without payment of costs. Appellant had also signed an affidavit of indigency on March 31, 2004.

KRS § 534.040(4) provides: "Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." Furthermore, KRS § 23A.205(2) states that "taxation of court

costs against a defendant, upon conviction in a case, shall be mandatory . . . unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay court costs in the foreseeable future."

Here, the jury fixed Appellant's punishment for twelve of the thirteen misdemeanor convictions at $500 for each Class A misdemeanor, pursuant to KRS § 534.040(2)(a). This must have been an oversight by the trial court. Appellant was an indigent person as provided for by the laws of this Commonwealth, and thus any levying of fines is specifically prohibited in this instance.

The trial court also levied court costs by failing to check the box on the final judgment marked "court costs are waived due to defendant having been found to be a 'poor person' under KRS 453.190(2)." KRS § 23A.205(2) requires the court to find that the Appellant is unable to pay the costs and will be unable to pay the costs in the foreseeable future. Thus, upon remand, the court must, in addition to its earlier ruling finding that Appellant was a "poor person" as defined in KRS § 453.190(2), find that Appellant is and will be unable to pay the court costs.

Although Appellant's underlying convictions are not affected by this ruling, the case must be remanded so that the court can enter the appropriate punishment, which would involve removing fines for twelve of Appellant's thirteen misdemeanor convictions due to his indigent status. Appellant's twelve month sentence as fixed by the jury for his remaining misdemeanor conviction, pursuant to KRS § 532.090(1) would thus be set to run concurrently with his sentence for

his persistent felony offender status. Remanding is also necessary so that the trial court can assess whether or not court costs are appropriate in this instance.

Thus, we reverse that portion of the final judgment imposing fines and costs and remand the issue to the circuit court for resentencing in accordance with this opinion.

All concur.

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