

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2005-SC-000262-MR

DATE 9-14-06 ELLA GROWING D.C.

AARON FRASER

APPELLANT

V.

ON APPEAL FROM McCracken Circuit Court
HONORABLE R. JEFFREY HINES, JUDGE
NO. 03-CR-00288

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Aaron Daniel Fraser, was convicted of bail-jumping in the first degree and being a persistent felony offender in the first degree. The McCracken Circuit Court sentenced him to twenty years. This appeal is as a matter of right.¹

On April 25, 2003, Appellant was indicted upon a felony charge of fleeing and evading police in the first degree. He was also indicted on several misdemeanor charges. Appellant was released on bond upon the condition that he make all court appearances. During a pretrial conference on June 27, 2003, Appellant's trial was scheduled to commence on August 20, 2003. When that day arrived, Appellant did not appear. For his failure to appear, he was charged with first degree bail jumping and being a persistent felony offender in the first degree. Following a jury trial, Appellant was sentenced to twenty years.

¹ Ky. Const. § 110(2)(b).

Appellant's sole issue on appeal is whether the admission of evidence of other charges pending against him in the guilt phase of his trial was reversible error pursuant to KRE 404(b).² Appellant contends that even though this issue was not preserved at trial, this Court must review this error pursuant to RCr 10.26.³

Appellant argues that the Commonwealth's witness, McCracken Circuit Court Chief Deputy Clerk Glenda Ramson, gave prejudicial testimony against him when she read the entire indictment aloud during the trial. Ramson testified that in addition to being indicted for the underlying first degree fleeing and evading felony, Appellant was also charged with numerous misdemeanor charges that included operating a motor vehicle with a suspended license, operating a motor vehicle under the influence of drugs or alcohol, insufficient headlights, and an improper registration. Appellant asserts that Ramson should have been limited to testifying only as to the felony charge brought against him, and not the entire indictment. Inclusion of the misdemeanor charges are viewed by the Appellant as being irrelevant, inflammatory, and prejudicial.

From the facts in this case, the admission of other misdemeanor charges pending against Appellant during the guilty phase of the trial does not justify a reversal pursuant to KRE 404(b). Appellant concedes that this issue was not preserved. This Court has consistently held that "generally, a party must make a proper objection to the

² KRE 404(b) states "Other crimes, wrongs, or acts: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

³ RCr 10.26 states "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."

trial judge and request a ruling on that objection, or the issue is waived.”⁴ There was no such objection made by the Appellant. Therefore, this Court’s review will be limited to palpable error review pursuant to RCr 10.26.

We have taken the position that “the palpable error rule is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review.”⁵ Further, “an appellate court may consider an issue that was not preserved if it deems the error to be a palpable one which affected the defendant’s substantial rights and resulted in manifest injustice.”⁶

There was no palpable error that affected Appellant’s substantial rights and resulted in manifest injustice. The fact that Appellant jumped bail was uncontroverted. Further, the other offenses (the misdemeanor charges) were identified by the prosecutor during the trial as being “mere charges” and that the defendant was “presumed innocent” of those charges. There was no indication that the reading of the entire indictment against Appellant was unduly prejudicial.

However, it was disclosed during the penalty phase of the trial that Appellant had been convicted previously of five separate felony offenses that included a prior first degree bail jumping conviction. It was also disclosed during the penalty phase that Appellant had been convicted of several dozen misdemeanor offenses, as well as forty counts of contempt of court. Clearly, a reasonable jury could conclude that such evidence supported a persistent felon in the first degree conviction rather than a few misdemeanor charges for which the Commonwealth conceded Appellant to be

⁴ Lickliter v. Commonwealth, 142 S.W.3d 65, 70 (Ky. 2004) (citing Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002)).

⁵ Lickliter, 142 S.W.3d at 70.

⁶ Id.

presumed innocent. Appellant's argument does not approach the level of "there may have been a miscarriage of justice [such that the] court should use its extraordinary power and reverse conviction so that there may be a fuller development of facts."⁷

Accordingly, Appellant's convictions are affirmed.

Lambert, C.J., and Graves, McAnulty, Minton, Roach, Scott, and Wintersheimer, JJ., concur.

⁷ Stone v. Commonwealth, 456 S.W.2d 43, 44 (Ky. 1970).

COUNSEL FOR APPELLANT:

**Karen Maurer
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601**

COUNSEL FOR APPELLEE:

**Gregory D. Stumbo
Attorney General of Kentucky**

**Gregory C. Fuchs
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204**