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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JANUARY 24, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000494-MR, 2006-SC-000497-MR
AND 2006-SC-000533-TG

DATE 2-14-08 ELAGRANT, D.C.

BARRY EVANS — APPELLANT

V.

ON APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
NOS. 06-CR-000001, 05-CR-000267, AND 06-CR-000012

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Following a jury trial, Appellant, Barry Ron Evans, was convicted of various drug-trafficking offenses under three separate Logan County indictments.[1] He was also convicted of being a persistent felony offender (PFO) and was sentenced to a term of

[1] Indictment No. 05-CR-00267 was handed down by the Logan County Grand Jury on December 20, 2005, charging Appellant with first degree trafficking in a controlled substance, second offense; first degree possession of a controlled substance, first offense; and with being a PFO. Appellant pled not guilty at arraignment. On the Commonwealth's motion, the indictment was amended on April 28, 2006, to reflect that these violations allegedly occurred on October 7, 2005, and to clarify that the PFO charge was first degree rather than second degree. Indictment No. 06-CR-00001 was handed down on January 6, 2006, for a crime that allegedly occurred on October 14, 2005. This indictment charged Appellant with first degree trafficking in a controlled substance, second offense, and being a PFO in the first degree. Indictment No. 05-CR-00012 was handed down on January 6, 2006, charging Appellant with first degree possession of a controlled substance, first offense; possession of drug paraphernalia, second offense; possession of a prescribed controlled substance in an improper container; and with being a PFO in the first degree.

sixty-five years in prison. Appellant argues on appeal that the trial court improperly instructed the jury on the two counts of trafficking in a controlled substance and requests this Court to reverse his conviction and remand for a new trial. In the alternative, Appellant alleges that the record demonstrates ineffective assistance of counsel on its face, and Appellant contends that as a result, this Court should reverse his conviction. Upon our examination of the record, the parties' briefs, and relevant case law, we hereby affirm the final judgment and sentence of the Logan Circuit Court.

The facts related to Appellant's claim on appeal are straightforward and uncontested. On two separate occasions, Appellant approached and sold crack cocaine to confidential informants working on behalf of the South Central Kentucky Drug Task Force. During both encounters, the vehicle utilized by the informants was equipped with an audio and video recording system that recorded the entire transaction. According to Agent Robert Toombs of the Russellville City Police Department and the South Central Kentucky Task Force, Appellant was not specifically targeted, but the informants were driving around in "high drug activity areas of Russellville."

According to testimony at trial, during the first controlled drug buy on October 7, 2005, Appellant flagged down the confidential informants' vehicle and asked, "Hey, what do you want?" The passenger informant, Vernon Hayes, responded, "I want some rock if you can get it." Appellant said, "Oh yeah, I got it right here in my pocket." Shortly thereafter, near a park, Appellant handed Hayes the drugs. Hayes identified Appellant at trial as the man who sold him the rock of crack cocaine. The other confidential informant, Mary Teresa Russell Hughes, testified that she drove the vehicle that night and she too identified Appellant as the man who sold Hayes the drugs. In addition to

the informants' testimony, the videotape of the October 7, 2005, drug buy was played for the jury at trial. Other testimony was presented demonstrating that the chain of custody was appropriate and upon testing at the Kentucky State Police lab, the substance Appellant sold the informants contained cocaine, a Schedule II narcotic. According to testimony, the informants were searched before and after the drug buy and they were given $40 to utilize in purchasing the drugs.

The second controlled drug purchase from Appellant took place one week later on October 14, 2005. This time, Vernon Hayes testified that he and Agent Jerry Smith were parked near a car wash in the video and audio equipped Task Force vehicle when Appellant approached and asked what they wanted. When Hayes said, "a forty," i.e. forty dollars worth of crack cocaine, Appellant responded, "I can get it." Appellant then took the money, returned minutes later with crack cocaine, and gave it to Hayes. According to testimony from David Hack, a chemist with the Kentucky State Police lab in Madisonville, the substance given to Hayes by Appellant was cocaine. The videotape of the October 14, 2005, transaction was also played for the jury.

At trial, Appellant testified regarding the October 7, 2005, and October 14, 2005, drug deals. Appellant told the jury that he was a cocaine user, but not a seller. He also stated that on October 7, 2005, he had gotten the cocaine from "some guys over there in the park." On October 14, 2005, Appellant testified that he had gotten the cocaine from "guys on the corner" and then had given it to the informant. On the stand, Appellant admitted that during both encounters, he had taken money from Vernon Hayes and in return had given him cocaine.

After hearing all of the evidence, the jury found Appellant guilty of first degree trafficking in a controlled substance under Indictment No. 05-CR-00267 (October 5, 2005, transaction); first degree trafficking in a controlled substance under Indictment No. 06-CR-00001 (October 14, 2005, transaction); first degree possession of a controlled substance, use of drug paraphernalia, and possession of a controlled substance in an unauthorized container under Indictment No. 06-CR-00012 (this crime occurred on December 5, 2005, and nothing relating to it is an issue on appeal). The jury also found Appellant guilty of being a first degree persistent felony offender. He was sentenced to a total of sixty-five years on June 20, 2006.

Without having preserved the claim, Appellant challenges the jury instructions utilized for the two counts of first degree trafficking in a controlled substance and the definitional instruction, claiming that the language of the instructions denied him a unanimous verdict as guaranteed by Sections 2, 7, and 11 of the Kentucky Constitution, RCr 9.82(1)[2], and the Fifth and Fourteenth[3] Amendments to the United States Constitution. The instructions at issue are as follows:

Instruction No. 3
Count I
First Degree Trafficking in a Controlled Substance

> You will find the Defendant guilty of First-Degree Trafficking in a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

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[2] RCr 9.82 provides: "The verdict shall be unanimous. It shall be returned by the jury in open court."

[3] See Wells v. Com., 561 S.W.2d 85, 87 (Ky. 1978) ["The 6th and 14th amendments of the United States Constitution do not require a unanimous verdict in criminal cases tried in state courts, and lack of unanimity among jurors does not violate the requirement of proof beyond a reasonable doubt. Apodaca v. Oregon 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)."].

A. That in Logan County on or about the 7th day of October, 2005, he had in his possession a quantity of Cocaine.
B. That he knew the substance so possessed by him was Cocaine;
AND
C. That he had the Cocaine in his possession with the intent of selling or dispensing it to another person.

Instruction No. 5
Count I
First Degree Trafficking in a Controlled Substance

You will find the Defendant guilty of First-Degree Trafficking in a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Logan County on or about the 14th day of October, 2005, he had in his possession a quantity of Cocaine.
B. That he knew the substance so possessed by him was Cocaine;
AND
C. That he had the Cocaine in his possession with the intent of selling or dispensing it to another person.

Instruction No. 10
Definitions

Dispense – Means to deliver a controlled substance to an ultimate user.
Sell – Means to dispose of a controlled substance to another person for consideration or in furtherance of commercial distribution.
Possession – Means to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object.

As stated previously, Appellant raised no objection at trial to the instructions quoted hereinabove. He requests palpable error review pursuant to RCr 10.26, and upon that review we have determined that there was no palpable error.

Appellant argues that Instruction No. 3 and Instruction No. 5 denied him a unanimous verdict because the language "in his possession with the intent of selling" and "in his possession with the intent of dispensing" presents multiple theories of guilt.

Appellant relies on Commonwealth v. Whitmore,[4] where we concluded that the drug trafficking instruction at issue there violated the unanimity requirement. In Whitmore, although there was sufficient evidence presented at trial that the defendant was guilty of possessing cocaine with the intent to sell or distribute it, the evidence did not support the alternate theories contained in the instruction, possession with the intent to manufacture or dispense cocaine. We held,

> Any instruction which permits a conviction on the basis of alternative theories that are not supported by the evidence runs afoul of the due process requirement that each juror's verdict be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt.[5]

This case is easily distinguishable because the evidence presented supports both theories found in the instructions. Where multiple theories are supported by the evidence, we have said, "[A] verdict can not be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense."[6] In the case sub judice, we are presented with two operative terms, possession with intent to *dispense* and possession with intent to *sell*. The evidence presented was sufficient for a reasonable juror to believe beyond a reasonable doubt that Appellant was guilty of either or both means of committing the crime.

Indeed, at trial Appellant admitted that on October 7 and again on October 14, 2005, he had crack cocaine in his possession and gave it to the informant in exchange

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[4] 92 S.W.3d 76 (Ky. 2002).

[5] Id. at 81.

[6] Wells v. Com., 561 S.W.2d 85, 88 (Ky. 1978).

for money. By necessary implication, Appellant's testimony also acknowledged that on both occasions, he dispensed the drugs to the informant, i.e., delivered a controlled substance to an ultimate user. From the evidence, we conclude that the jury had before it sufficient evidence to support both theories of guilt, allowing the verdict to be based on either or both.[7] The Commonwealth proved each and every element beyond a reasonable doubt. As Appellant was not denied a unanimous verdict, there was no error in this regard.

Appellant also complains that the trial court erred in instructing on the definition of "dispense" by failing to utilize the entire statutory definition. He contends that KRS 218A.010(8) relates to the delivery of controlled substances in circumstances that involve an authorized practitioner and that street trafficking of controlled substances is not embraced in the concept of dispensing. If the claim Appellant makes here had been presented to the trial court, i.e., that the definition of "dispense" as found in the instructions does not accurately reflect the intent of KRS 218A.010(8), relief might have been available. In that circumstance, there would have been a possible conclusion that failure to properly define "dispense" led to the erroneous inclusion of dispensing in the instructions and therefore destroyed the unanimity requirement. But such is not the case. Appellant did not object to the instruction, and we are left to review his claim pursuant to the palpable error rule and that alone. We observe that the trial court used "dispense" when he should have used the term "distribute." This mistake did not "unduly impact" Appellant's rights, certainly not to the level of palpable error.[8]

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[7] See Com. v. Whitmore, 92 S.W.3d 76 (Ky. 2002).

[8] See Muncy v. Com., 132 S.W.2d 845 (Ky. 2004).

RCr 9.54(2) provides, "No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter which the party objects and the ground or grounds of the objection."[9] "Failure to comply with RCr 9.54(2) has consistently been interpreted to prevent review of claimed error in the instructions because of the failure to preserve the alleged error for review."[10] Appellant admits in his brief that his claim of error is unpreserved and that he failed to fairly and adequately present his position to the trial judge by motion or objection.

From the foregoing, Appellant's only possible avenue for relief is RCr 10.26. In Commonwealth v. Pace,[11] we said, "The palpable error rule set forth in RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review." The general rule is that a party must make a proper objection and request a ruling on the objection at trial or the issue is waived.[12] Pursuant to RCr 10.26, an appellate court may consider an issue that was not preserved if it deems the error to be a "palpable" one that affected the defendant's "substantial rights" and resulted in "manifest injustice."[13] In determining whether an error is palpable, "an appellate court must consider whether on the whole case there is a substantial

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[9] RCr 9.54(2).

[10] Com. v. Thurman, 691 S.W.2d 213, 216 (Ky. 1985), citing Hopper v. Com., 516 S.W.2d 855 (Ky. 1974).

[11] 82 S.W.3d 894, 895 (Ky. 2002).

[12] Id.

[13] Id.

possibility that the result would have been any different."[14] In addition, we have held that "the error must seriously affect the fairness, integrity or public reputation of judicial proceedings."[15]

In Commonwealth v. Rodefer,[16] we recently analyzed an allegation of palpable error when a trial court gave an improper jury instruction for Appellant's charge of trafficking in a controlled substance in the first degree. The instruction in Rodefer allowed the jury to convict Appellant of the offense if it found he had "possessed cocaine with the intent to transfer to another," and we concluded that the General Assembly had deliberately chosen not to include "possession with the intent to transfer" as part of the statutory definition of trafficking.[17] In Rodefer, Appellant conceded that he had not properly preserved the error for appellate review, leaving Appellant only with an allegation of palpable error. Therefore, applying the palpable error analysis we held, "In view of Appellant's own testimony that he, in fact, committed the offense of which he was convicted, albeit by an alternative method, we conclude that the faulty instruction did not result in manifest injustice, much less seriously affect the fairness, integrity, or public reputation of judicial proceedings."[18] Likewise, in the instant case, Appellant has conceded his failure to preserve the error for appellate review, and he also admitted

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[14] Com. v. Pace, 82 S.W.3d 894, 895 (Ky. 2002), quoting Com. v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

[15] Com. v. Rodefer, 189 S.W.3d 550, 553 (Ky. 2006), quoting Brock v. Com., 947 S.W.2d 24, 28 (Ky. 1997)

[16] Com. v. Rodefer, 189 S.W.3d 550 (Ky. 2006).

[17] Id. at 553.

[18] Id. at 553.

committing the offenses of which he was convicted. Therefore, we hold that Appellant was not subjected to manifest injustice.

Appellant's final claim is that the record demonstrates ineffective assistance of counsel on its face, and therefore, this Court should reverse his conviction. As we held in Humphrey v. Commonwealth, "As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered."[19] In this case, the trial court record contains no claim whatsoever alleging ineffective assistance of counsel. Of course, there has been no trial court determination of any such claim. We have held that "claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made."[20] We therefore decline to review any issue in this regard at this time and hold that an ineffective assistance of counsel claim must await another day after having been raised in a post-conviction RCr 11.42 motion.[21]

For the foregoing reasons, we affirm the final judgment and sentence of the Logan Circuit Court.

All sitting. All concur.

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[19] Humphrey v. Com, 962 S.W.2d 870, 872 (Ky. 1998) [The Court continued, "This is not to say, however, that a claim of ineffective assistance of counsel is precluded from review on direct appeal, provided there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on that issue." Citing Hopewell v. Com., 641 S.W.2d 744 (Ky. 1982); Wilson v. Com., 601 S.W.2d 280, 284 (Ky. 1980).].

[20] Humphrey v. Com., 962 S.W.2d at 872.

[21] See Humphrey v. Com., 962 S.W.2d at 872.

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