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RENDERED: MAY 24, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000822-MR

JAMES TRAINER — APPELLANT

V.

ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 10-CR-00050

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

James Trainer appeals from his conviction of manufacturing methamphetamine and being a first-degree persistent felony offender (PFO I) for which he received a total sentence of 25 years' imprisonment. He appeals to this Court as a matter of right.

On January 17, 2010, the house trailer in which Appellant lived caught fire. It is undisputed that Katrina Laster was inside the trailer at the time. Laster, who was severely burned in the fire, told police that she, along with Appellant and Aaron Gardner, were in the process of manufacturing methamphetamine when the mixture exploded, causing the trailer to catch on fire. Appellant and Gardner, who were not injured, denied any involvement. Appellant claimed he had given Laster permission to do her laundry in his trailer and that he was out running errands when the fire occurred. Appellant was ultimately charged with manufacturing methamphetamine and being a

first-degree persistent felony offender. A jury trial commenced on May 19, 2011.

At trial, Appellant and Laster gave conflicting accounts. Laster testified that on January 17, 2010, she had a couple of boxes of Sudafed and was looking for some methamphetamine in exchange - something she had done before. She went to Aaron Gardner's apartment, which was across the street from Appellant's trailer. Appellant was there. She told Gardner she was looking for some methamphetamine and Gardner said they did not have any, but were waiting on some. They subsequently realized that between the three of them they had everything they needed to make methamphetamine, and walked over to Appellant's trailer to do so.

Laster testified that she, Appellant, and Gardner went into a small back bedroom which had a fan sitting on a table by the window. Laster testified that they were using the "shake and bake" method to make methamphetamine, which she described as putting the ingredients into one container and adding water to activate the mixture. Appellant and Gardner stripped lithium from batteries, and the lithium strips were placed in a pitcher along with Drano crystals, ammonium nitrate pellets, and ether (which she testified was already out of the can and in a jar).

Laster testified that they were all standing around the pitcher when either Appellant or Gardner put in a capful of water and the mixture caught fire. They tried to smother the fire out, but it spilled, and in seconds the small room was covered in flames. They tried to put the fire out by putting water on

it, which Laster stated was "like putting gasoline on it." Realizing they were not going to be able to put out the fire, the three headed for the door. Laster noticed that her jeans were on fire and began screaming for help. Appellant and Gardner, who were in front of her, kept going and did not offer any help. Laster decided to try to find the bathroom, thinking that if she could get in the shower she would be able to put the fire on her jeans out. She ran down the hallway, but it was smoky and she could not find the bathroom. She took off her jeans, and ended up in a back bedroom where she had to break out a window to escape the fire.

Laster testified that she got into her truck, then realized she did not have her keys. She knew her legs were badly burned and that she needed help, but also did not want to get caught by the police. Laster testified that she got out of her truck, and saw Appellant and Renee Baxter in a car. She asked if she could have a ride and got in the back seat. Laster had Baxter take her to Jason Schmidt's house and drop her off, thinking that she could get cleaned up there, and then go to a hospital outside the county and say she had been in a grease fire. Baxter knocked on Schmidt's door. Seeing that Schmidt was home, Laster told Baxter to leave. She did not recall (as Baxter testified) telling Baxter to delete information from her phone. Laster was not certain when Appellant got out of the car, as she had been lying in the back seat.

In pain and screaming for help, Laster knocked on Schmidt's door and beat on his window until it broke, but Schmidt would not come out. She begged Schmidt to throw some milk outside, because she had heard that milk

would help counteract methamphetamine-related burns. When Schmidt, who lived by a Wal-Mart, threatened to call the police, she walked to the Wal-Mart parking lot, hoping to see someone she knew. She saw a car with the door open that had the engine running in the Wal-Mart parking lot and got in it and took off. Laster testified she had not intended to steal a car, but at this point she was desperate and realized she needed to go to the hospital. A short time later she saw the police in her rear view mirror and pulled into a driveway. Laster had sustained severe burns and required a lengthy hospitalization.

Laster acknowledged that she had been advised that she would be charged in the near future for her participation in the crime. She denied that the prosecutor had made her any promises in exchange for her testimony - only that her cooperation would help. She testified that she also wanted to tell the truth because, although she knew she was going to jail, she did not want to go to jail for Appellant and Gardner, who had also been there and had not helped her.

Renee Baxter testified that she lived in the apartment building across the street from Appellant's trailer. She knew Appellant from his maintenance job at the apartment building and had met Laster once before. On the evening of January 17, 2010, she heard someone trying to open her door, which was locked. She asked who it was, and opened the door upon hearing it was Appellant. Appellant and Laster were standing there. Laster was only wearing a t-shirt and underwear, and her legs were bloody. Baxter was shocked at what she saw. Appellant said they needed to hurry and go. Baxter thought

they were taking Laster to the hospital. The three got into Baxter's vehicle. Laster appeared to be in pain and fell three times trying to get into the car. Appellant got in the passenger seat and Laster in the back seat. After a short distance, Appellant told Baxter to stop and let him out. As he exited the car he told her, "You haven't seen me, I wasn't here."

Baxter drove on, still assuming she was taking Laster to the hospital. Laster kept asking for milk and telling Baxter to drive faster. When they got by Wal-Mart, Laster told her to take her to Jason Schmidt's house (whom Baxter knew as well). Baxter got out of the car and beat on Schmidt's door, but no one answered. Laster, who had exited the car, told Baxter to get out of there. She also told Baxter her cell phone was in her vehicle back at the apartments, and to get it and delete everything on it. Baxter left, but immediately called 911 and told them what had happened and where she had dropped Laster off. On cross-examination, defense counsel asked if Laster was complaining about being burned. Baxter replied that all Laster said was that she wanted milk, that Baxter was not driving fast enough, and to hurry up. When asked if Appellant appeared injured, Baxter replied that Appellant did not appear to have any burns.

Officer Jason Lindsey participated in the traffic stop of Laster. He described Laster as being in excruciating pain and having suffered what looked like extensive chemical burns. Emergency medical personnel were summoned and Laster was transported to the hospital. Lindsey was subsequently dispatched to the fire at Appellant's trailer. Upon arrival, fire personnel

notified Lindsey that the fire could possibly be the result of a methamphetamine lab inside the residence.

Fire and law enforcement personnel removed items from the trailer associated with methamphetamine manufacturing: two cans of ether with punch marks in the bottom, a crock pot, a half-melted bottle of Drano crystals, and a mason jar. Mason jars containing white sludge associated with methamphetamine manufacturing were observed on top of Appellant's refrigerator. The sludge was not tested. Mark Boaz, an arson investigator for the Kentucky State Police, testified that there was a small room in the back of the trailer that showed consistent even burning around the top of the room, which was consistent with having a suspended ignitable vapor lighter than air.

Officer Cheyenne Albro, the director of the Pennyrile Narcotics Task Force, testified as to ingredients and methods used to manufacture methamphetamine. Common ingredients include lithium strips, ether, and Drano crystals. Albro explained that, if the ingredients are together in a container and too much water is added, the lithium and ether will ignite, causing an explosion or a fireball. If water is put on the fire in an attempt to put it out, the fire will become larger, because the ether is lighter than water, and water additionally heightens the reaction of the lithium. Albro also testified that window fans are common to help get rid of the odor associated with methamphetamine manufacturing.

Officer Lindsey interviewed Appellant several days after the fire. Appellant claimed that he that he had been out running errands on foot,

including going to Blockbuster Video, when the fire occurred. In an attempt to verify Appellant's statement, Lindsey thereafter went to Blockbuster Video and obtained and viewed a copy of the surveillance tape. Over defense objection, Lindsey testified that he did not see Appellant on the surveillance tape.

Appellant testified in his own defense and disputed Katrina Laster's story. Appellant testified that he had been living at the trailer for four or five months as of January 17, 2010. He had an agreement with the owner of the trailer that he would repair it in exchange for living there. After living there for about a month, he became the maintenance man for the apartments across the street, which the owner of the trailer owned as well. On January 17, 2010, he was visiting his friend Aaron Gardner, who lived in one of the apartments. Laster came over at around 4:30 or 5:00 p.m., and asked Gardner if she could use his washer and dryer. Gardner said no, because he was using them. As Appellant got up to leave, Laster asked Appellant if she could use his. Appellant told her that she could but that she would have to leave afterwards because he was getting ready to leave town, and his girlfriend was coming to pick him up. Appellant testified that he helped Laster carry her bags of laundry to the trailer and started the first load for her. He told her to leave his keys in the mailbox when she left, lock the door, and let the dog out, because he was going to Union County to spend the night as the next day was a holiday and he did not have to work.

Appellant testified that he left the trailer around 5:30 p.m. to run errands on foot as he had no vehicle. He went to the dollar store where he bought a

Mountain Dew, and then to Blockbuster Video looking for a movie which they did not have. He was in Blockbuster for five or ten minutes. He then went to the tobacco store where he bought cigarettes. He paid for the cigarettes and Mountain Dew with cash but did not keep the receipts as he had no reason to. His girlfriend had to wait for a friend to take her to get her mother's truck which she was going to use to come get him, so he was killing time while he waited for her to come. He walked up to the wellness center to lift weights, but they had just closed at 7 p.m., so he went walking down the walking trail about a half-mile and back. He decided his girlfriend was not coming to get him and headed back home.

Appellant testified that as he got close to home, he smelled something, and then heard breaking glass and hollering. He saw his trailer was on fire and saw something "flopping" on the ground, and realized it was Laster. She was screaming and had smoke coming from her. She was badly burned and asking for help. Appellant helped her up, and they walked over to Renee Baxter's apartment, because she had a vehicle. In his panic, he tried to open Baxter's door. Baxter opened her door, and agreed to help. Appellant told Baxter they had to get to the hospital. As Baxter drove, Appellant kept asking Laster, who was in the back seat, what happened and where the fire started. Laster told him she burned his house down "cooking dope" and was "so sorry." Appellant testified that he got angry because Laster had just taken everything he had worked so hard for. He told Baxter to stop the car and got out saying "You ain't seen me." Appellant testified that he did this because he knew how

things work - that although Laster had burned down his house, the police would pin the crime on him because he was the only one living there.

Carolyn Dunning, who managed the apartments and the trailer, testified that, as the property manager, she had been in Appellant's trailer several times after he moved in. Dunning testified that the prior tenants had been evicted and had left the trailer a disaster, and that the owner made an agreement with Appellant that he could live in the trailer in exchange for repairing it. She testified that Appellant kept his end of the bargain. She testified that he kept the trailer in "immaculate shape," and she had never seen cans of ether or starter fluid or an interior or window fan. She testified the last time she was in the trailer was about a week prior to the fire, when Appellant had invited her in to see the work he had done, and that she had walked all the way through.

Aaron Gardner testified that Laster came to his apartment on January 17, 2010. Appellant was there. Appellant and Laster left around 5:00 or 5:30 p.m. Appellant told Gardner he was leaving to go out of town. Gardner went to sleep thereafter, and was awakened by hollering and screaming outside. He saw "flashing" out the windows. He ran to the door and opened it and heard someone yelling that "Jimmy" (Appellant) was in the trailer. Gardner told the person that Appellant was not in the trailer because he had left to go out of town. Gardner denied Katrina Laster's allegation that he, Appellant, and she had been making methamphetamine or that he had been in Appellant's trailer when the fire occurred. Gardner testified that Laster's reputation in the community was that of a "big liar." Gardner acknowledged that he was a

convicted felon. On cross-examination, Gardner admitted that he knew he was the subject of investigation in the case as well and his activities were going to be submitted to the grand jury.

Jeff Willis, who had been Laster's boyfriend, testified that Laster visited him twice in jail after she was released from the hospital. Willis testified that at the second visit, May 9, 2010, he asked her what happened, and she told him she was at Appellant's house and was trying to do something with meth and a fire broke out and she was trapped inside and almost killed. She told him she was the only one who was there, but that someone else was being blamed and that was her way out. On cross-examination, Willis admitted that he and Appellant were in the same jail together. The Commonwealth recalled Laster in rebuttal, and she denied making these statements.

The jury found Appellant guilty of manufacturing methamphetamine, as well as being a first-degree persistent felony offender (PFO I). Appellant was sentenced to 10 years for the manufacturing conviction, enhanced to 25 years by the PFO I. He appeals to this Court as a matter of right.

POLICE OFFICER'S TESTIMONY REGARDING SURVEILLANCE VIDEO

Prior to trial, the prosecutor informed defense counsel that he intended to have Officer Lindsey testify as to the contents of the Blockbuster surveillance video - namely, that he did not see Appellant on the tape - for the purpose of refuting Appellant's alibi, but that he would not introduce the tape into evidence. Defense counsel subsequently filed a motion *in limine* pursuant to KRE 1002 and the best evidence rule, to preclude Officer Lindsey or any other

witness from testifying to the contents of the video. Pursuant to said rules, defense counsel argued that the Commonwealth would either have to offer the original tape as the evidence, or not mention the evidence. At the hearing on the motion, defense counsel reiterated that he had no objection to the Commonwealth playing the video (provided it was the original pursuant to KRE 1002),[1] but that his objection was to *Officer Lindsey* being permitted to testify as to what the video showed. The trial court denied the motion.

Accordingly, at trial, Officer Lindsey testified that he spoke to Appellant five to seven days after the fire. Appellant told him that he was not at the trailer when the fire occurred. Appellant said he did not have a vehicle and had walked into town to the tobacco store and Blockbuster Video. Asked if he did anything to verify Appellant's story, Lindsey testified that he obtained the surveillance video from Blockbuster.[2] He testified that he watched the video from approximately an hour and a half before the time of the fire. He stated he watched the tape twice, and that another officer was with him when he watched it. The prosecutor then asked Lindsey if he was able to confirm the statement Appellant made to him about his whereabouts. Defense counsel objected and was overruled. Lindsey then told the jury he watched the video and did not see Appellant enter the building. The prosecutor then asked to approach the bench, where he stated he would offer the original video into evidence, but that he did not intend to show the video himself. Defense

[1] It was undisputed that the original was not lost or destroyed. At the hearing, the prosecutor confirmed he did have the original.

[2] Lindsey testified that the tobacco store did not have surveillance video.

counsel stated that he had no objection to the introduction of the tape, and that he did intend to show the video to the jury. The tape was then introduced into evidence.

On cross-examination, Lindsey admitted that the quality of the video was not good. When asked if it was possible that Appellant was in the store and he just did not see him on camera, Lindsey first responded that he watched the video and did not see Appellant enter the store. When reminded of the poor quality of the video – in particular that it was grainy, difficult to see,[3] and ran at five times normal speed – if it was possible that Appellant was in the store and Lindsey just did not see him, Lindsey then admitted that it was possible. Defense counsel then played the videotape for the jury. After the tape was played, defense counsel asked Lindsey if, having just watched the tape again, it was, in fact, difficult to determine who was in the store due to the poor quality and speed of the tape. Lindsey agreed that was true. Lindsey then admitted it was possible that Appellant was in the store and that he just could not positively identify him on the tape. On redirect, however, Lindsey again stated he had watched the video twice and that another officer observed it as well.

On appeal, Appellant argues that the trial court erred in allowing the prosecutor to offer the testimony of Officer Lindsey about what was on the video. Appellant argues that the video was the best evidence of what occurred in Blockbuster Video, and, per the best evidence rule, the Commonwealth

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[3] The video is in black and white, and the screen is divided into four smaller sections pointing to different places in the store.

should have simply played the video. Appellant contends that the error was not cured by defense counsel's playing the video for the jury, as the tape is of such poor quality the jury likely substituted Officer Lindsey's opinion for its own. Alternatively, Appellant raises as an unpreserved argument, that the tape was of such poor quality it should have been excluded as irrelevant, and, hence, inadmissible.

The best evidence rule requires a party to produce the most authentic evidence which is within its power to produce. *Marcum v. Commonwealth*, 390 S.W.2d 884, 886 (Ky. 1965). The foundation of the rule, found in KRE 1002, provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required . . . ." *Johnson v. Commonwealth*, 231 S.W.3d 800, 805 (Ky. App. 2007). Also relevant to the matter herein are KRE 701, which limits opinion testimony by a lay witness to that which is "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the witness' testimony or a determination of a fact in issue," and KRE 602, which requires a witness to have personal knowledge before being allowed to testify about a subject.

While a witness testifying from personal knowledge and rational observation of events perceived may proffer narrative testimony within the permissible confines of the rules of evidence, "he may not *interpret* audio or video evidence, as such testimony invades the province of the jury, whose job is to make determinations of fact based upon the evidence." *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265-66 (Ky. 2009) (internal quotation marks

omitted and emphasis added). "It is for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness." *Gordon v. Commonwealth*, 916 S.W.2d 176, 180 (Ky. 1995).

In the present case it is undisputed that Officer Lindsey had no personal knowledge of the events recorded on the Blockbuster Video surveillance tape. Per KRE 701, KRE 602, and KRE 1002, it was error for the trial court to allow Lindsey to testify as to his interpretation of the events shown on the tape – namely that he watched and did not see Appellant. This testimony impermissibly invaded the province of the jury. *Cuzick*, 276 S.W.3d at 265-66; *Gordon*, 916 S.W.2d at 180.

"A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009). Appellant argues that defense counsel's playing the tape for the jury did not render the error harmless. Appellant argues that because the tape is of such poor quality, the jury likely substituted Officer Lindsey's opinion for its own – particularly given the fact that Lindsey, as a police officer, was presented to the jury as a trained professional, the implication being that he had special skills of observation or expertise in viewing these types of films. Additionally, Appellant points to the fact that Lindsey bolstered his own credibility by stating that he had watched the tape twice – with his opinion confirmed by a colleague.

Having viewed the tape we agree with Appellant that it is virtually impossible to glean anything from the tape other than there are, in fact, people in the store. The camera is so far away from what is being recorded, that combined with lighting glare, one cannot identify any particular gray "blob" as a specific person entering the store. That being said, the tape was played to the jury, and we find it hard to believe that the jury would see it any differently. Appellant argues, however, that the poor quality of the tape may have resulted in the jury substituting Officer Lindsey's opinion (that Appellant was not on the tape) for its own. However, because Officer Lindsey eventually admitted on cross-examination that it was possible that Appellant was on the tape and that he just could not identify him, we do not deem it likely that the verdict was substantially swayed by the error. *Winstead*, 283 S.W.3d at 688–89.[4]

IRRELEVANT, PRIOR BAD ACTS, AND HEARSAY TESTIMONY

Appellant next argues that statements by various witnesses were irrelevant, introduced in violation of KRE 404(b), or were inadmissible hearsay, and that this testimony denied his right to a fair trial and his right to confront his accusers. Appellant concedes that no objections were made at trial to any of the statements of which he now complains, and requests review pursuant to RCr 10.26.

After apprehending Katrina Laster, Officer Lindsey was dispatched to the scene of the trailer fire. Lindsey did not go inside the trailer or participate in

[4] Having concluded that the error was harmless. we need not address Appellant's request for palpable error review as to his relevancy argument.

the collection of items from the trailer. He testified that Officer James Jenkins and members of the fire department removed items from the trailer. Lindsey testified that the firemen removed the following items associated with methamphetamine manufacturing: two cans of ether which had punch marks in the bottom, a crock pot, a half-melted bottle of Drano crystals, and a mason jar. Lindsey testified that the items were not tested, as they were too heavily damaged and contaminated. Lindsey testified that ether cans with punch marks in the bottom are associated with manufacturing methamphetamine. The prosecutor asked Lindsey if anything else led him to believe methamphetamine manufacturing was going on. Lindsey replied that Jenkins told him there were other jars and containers in the trailer that had substances in them related to manufacturing methamphetamine.

Officer Jenkins was a narcotics detective with the Pennyrile Narcotics Task Force. He was also trained and certified in the clean-up and dismantlement of methamphetamine labs. Jenkins testified that he had been doing some undercover narcotics buys in the area when the fire occurred, and came to the scene to provide assistance. When asked about methamphetamine related items found in the trailer, Jenkins testified that punctured ether cans are a tell-tale sign of methamphetamine manufacturing, and that Drano crystals are associated with methamphetamine manufacturing as well. He testified that mason jars are often used in methamphetamine manufacturing to mix items.

Mark Boaz was an arson investigator with the Kentucky State Police. He was also trained in methamphetamine lab dismantlement. He was called to the scene to investigate the fire. He observed that the ceiling had collapsed on top of the refrigerator in the kitchen area, and that there were some mason jars on top of the refrigerator that were broken as the ceiling fell on top of them. The jars had white sludge residue material in the bottom. The prosecutor asked Boaz, based on his experience and training, what the significance of the mason jars and sludge was. Boaz answered that generally, but not exclusively, those are found in methamphetamine manufacturing labs. Boaz testified that the residue is part of the process, but that even though he dismantles labs, this is not his line of expertise and would prefer someone else comment on it. Boaz further testified that he talked to a couple of the officers that were at the fire, and that they told him they had a past opportunity to deal with some of the people in the area and that it was somewhat of a high-drug area.

On appeal, Appellant contends that the testimony regarding the mason jars containing white sludge was irrelevant, because the officers were just guessing at what was in the jars as they were neither collected nor tested. Accordingly, Appellant contends that the testimony was inadmissible under KRE 401. Further, Appellant contends that Lindsey and Boaz's testimony regarding the mason jars violated KRE 404(b), as it suggested to the jury that Appellant had manufactured methamphetamine on a prior occasion and then possessed it in mason jars on his refrigerator. Appellant made no objections to any of the above testimony at trial and requests review per RCr 10.26.

We see no error in any of the complained-of testimony. Lindsey, Boaz, and Jenkins were called to the scene to investigate a possible methamphetamine lab fire. They personally observed the crime scene, and could testify to their observations, including the presence of mason jars with white sludge. Their opinion that such is associated with methamphetamine manufacturing was based on experience and training.[5] *See Allegeier v. Commonwealth*, 915 S.W.2d 745 (Ky. 1996); *Sargent v. Commonwealth*, 813 S.W.2d 801 (Ky. 1991). Appellant made no objections to their qualifications to offer said opinions, and was able to bring out on cross-examination that the sludge was not tested. Any inference of prior bad acts by the Appellant is incidental to a description of the crime scene. As there was no error, there can be no palpable error.

Appellant next takes issue with statements by Boaz and Jenkins that Appellant's trailer was in a high-crime area. Appellant contends that Boaz's testimony, which repeated the statements of unidentified officers who did not testify at trial, was hearsay evidence that violated the Confrontation Clause. Appellant further argues that these statements by Boaz and Jenkins were totally irrelevant to prove any essential element of the charged offense, and served only to infer that Appellant lived in a high-drug area and thus was associated with drug activity. No objections were made to any of the above testimony, and Appellant requests review per RCr 10.26. We see no error in

[5] Jenkins and Boaz had special training in dismantling methamphetamine labs. Lindsey had received methamphetamine-related training in the course of his police training.

Jenkins' testimony as to why he was near the scene. Error, if any, in Boaz's repetition of hearsay that the trailer was in somewhat of a high-drug area would not rise to the level of palpable error under the facts of this case. The comment was brief and did not associate Appellant with any criminal activity. RCr 10.26.

GRAPHIC PICTURES AND TESTIMONY REGARDING KATRINA LASTER'S INJURIES

Katrina Laster testified as to having suffered severe burns in the fire. She testified that she was burned all the way up her legs and that her ankles were burned to the tendons. She testified that she spent two and a half months at a burn center, and required seven surgeries on her legs, including five skin grafts. Her hands and face were burned somewhat, but healed. She had only been able to walk for three or four weeks before the trial. The Commonwealth had Laster identify seven photographs, which showed her burns in various stages of her recovery. Appellant did not object to Laster's testimony regarding her injuries and treatment, or to the introduction of the photographs.

On appeal, Appellant argues that the specific nature and extent of Laster's injuries, her prolonged treatment, and the photographs depicting such were irrelevant to any material issue at trial. Appellant further argues that the horrifying and graphic nature of the photos created substantial prejudice that outweighed any probative value. Appellant concedes the alleged error was unpreserved, as no objection was made to either Laster's testimony or the photos, and requests palpable error review per RCr 10.26.

Not only was the alleged error not preserved, but it appears to have been a trial strategy of Appellant to contrast the fact that Laster was so severely burned with the fact that Appellant was uninjured to show that, had Appellant been in the trailer when the fire occurred, he would have certainly sustained burns as well. Because Appellant's lack of objection appears to have been trial strategy, we decline to review for palpable error. *See Alexander v. Commonwealth*, 220 S.W.3d 704, 711 (Ky. App. 2010).

IMPROPER CROSS-EXAMINATION AND IMPEACHMENT OF APPELLANT BY THE PROSECUTOR

In his testimony, Appellant claimed that when he, Renee Baxter, and Katrina Laster were in the car, Laster said she had burned down his house cooking dope and that she was "so sorry." On cross-examination, the prosecutor inquired of Appellant, whether, given the size of Baxter's car (a Jeep), Appellant would agree that Baxter would have heard anything that Laster, who was in the back seat, said. Appellant testified that he thought Baxter would have heard anything Laster said. Referring to Appellant's testimony that Laster made the aforementioned statement, the prosecutor asked Appellant if he would agree "that little conversation is the first time you would have told me or you told anybody but your attorney." Defense counsel objected that the prosecutor had crossed the line into piercing the attorney-client privilege when he asked if Appellant had told this to anybody but his attorney, and that the prosecutor was improperly trying to ask whether Appellant made prior consistent statements. The prosecutor stated the basis of his line of questioning was that Baxter was sitting inches from Appellant and

she never said that she heard Laster's statement. The trial court told the prosecutor to continue.

The prosecutor clarified with Appellant that he, Baxter, and Laster were sitting in close proximity in the car. He then asked if Appellant would agree that anything and everything said by him and Laster would have been heard by Baxter. Defense counsel objected on grounds that Appellant could not testify to what Baxter heard, but could only testify as to what he *thought* she may have heard. Defense counsel further noted that Baxter had testified and that the prosecutor could have asked her these questions. The trial court overruled the objection and told Appellant he could answer. Appellant responded that he could not say whether Baxter heard Laster's statement or not, that Baxter was probably concentrating on the road. The prosecutor then asked Appellant if the statement given by Baxter (to the police) - which Appellant agreed he had read - simply stated what Baxter had testified to. Appellant responded affirmatively.

On appeal, Appellant contends that his right to a fair trial was violated when the prosecutor engaged in the aforementioned attempts to improperly impeach him about whether he told anyone but his attorney about Laster's confession, about whether Baxter could hear Laster's statement, and about whether Baxter's statement to the police was consistent with her trial testimony.

We agree with Appellant that the prosecutor's questioning regarding what Appellant may have told his attorney was improper. Communications

between a defendant and his attorney are privileged. KRE 503(b). While the trial court did not sustain the objection, following the discussion at the bench the prosecutor abandoned this question. Because Appellant was not required to answer the question, we deem the error harmless. *Winstead*, 283 S.W.3d at 688-89.

We further agree that it was error for the prosecutor to ask Appellant if Baxter *would have heard* Laster's statement. Appellant had no personal knowledge as to whether Baxter heard Laster's statement. KRE 602. Had the question been framed "could have heard," there would have been no error. KRE 602; KRE 701. Therefore the trial court erred in overruling the objection. However, in light of Appellant's answer that he could not say whether Baxter heard it or not, we deem the error harmless. *Winstead*, 283 S.W.3d at 688-89.

Finally, we agree with Appellant that it was error for the prosecutor to ask Appellant if Baxter's testimony was consistent with her statement to police. Appellant did not object to this question and hence we review for palpable error per RCr 10.26. The testimony at issue falls under the general rule on prior consistent statements that "'[a] witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony.'" *Smith v. Commonwealth*, 920 S.W.2d 514, 516-17 (Ky. 1995) (quoting *Eubank v. Commonwealth*, 275 S.W. 630, 633 (1925)). Accordingly, it was error for the prosecutor to require Appellant to affirm that Baxter's statement to police was consistent with her trial testimony. While the effect of the error was to improperly bolster Baxter's testimony, it does not rise to the

level of palpable error under the facts of this case. While Baxter did not testify that she heard the statement, she was not asked whether she believed she heard everything that was said. Nor did Baxter's testimony implicate Appellant in the crime. Accordingly, we see no manifest injustice. RCr 10.26.

For the aforementioned reasons, the judgment of the Muhlenberg Circuit Court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Kathleen Kallaher Schmidt
Appeals Branch Manager
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601-1109

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

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