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NOT TO BE PUBLISHED OPINION

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RENDERED: NOVEMBER 21, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000383-MR

JONATHAN CRAIG CARDWELL — APPELLANT

V.

ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 10-CR-00164

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Jonathan Craig Cardwell appeals from a June 22, 2011, Judgment of the Muhlenberg Circuit Court convicting him of arson in the first degree. Cardwell argues that the trial court erred when it denied his motion for a directed verdict because there was insufficient evidence to support the charge of arson. He also claims that the trial court erred when it failed to hold a suppression hearing after it was notified that Cardwell made incriminating statements to a Corrections Officer. Finally, Cardwell claims the trial court erred when it sustained the Commonwealth's objections to questions relating to those statements. We find no error as to the directed verdict claim and conclude the trial court was not required to hold a suppression hearing absent Cardwell's motion to suppress or timely objection. Accordingly, we affirm.

RELEVANT FACTS

On July 26, 2010, Corrections Officer Stacey Solsberry was on duty in Dormitory 8 of the Green River Correctional Facility ("GRCC") in Muhlenberg County, Kentucky. At approximately 7:35 a.m., Officer Solsberry was assisting in the transfer of Jonathan Cardwell's cellmate, inmate Billy Robinson, to another facility. At that time, Cardwell was among approximately 64 inmates present in their cells for morning count. Upon Officer Solsberry's leaving with Mr. Robinson, the cell door locked automatically behind them, leaving Cardwell alone in the cell. Approximately five minutes later, Officer Solsberry noticed smoke coming out from under Cardwell's cell door. After the officer notified GRCC's Central Control of the potential fire, he ran to Cardwell's cell. It took Officer Solsberry several attempts to open the cell door, as it was hot to the touch. Upon opening the cell door, Officer Solsberry observed three to four foot flames emanating from a fire in the doorway. He also observed Cardwell tossing paper items, including books, newspapers, and paperwork, into the blaze. Officer Solsberry instructed Cardwell to exit the cell, but Cardwell refused. After a second request to exit, Cardwell complied and was escorted to GRCC's Special Management Unit ("SMU"). Before he left the scene, Cardwell handed a note to Officer Solsberry that instructed him to contact a local television news station.

Upon his arrival at the SMU, Cardwell was placed in a holding cell. Sergeant Shelia Chaney, who was on duty in the SMU that morning, passed by

the holding cell and noticed that Cardwell was crying. When Sergeant Chaney entered the holding cell to ask Cardwell if he was all right, Cardwell explained that was upset with the treatment he was receiving at GRCC, and that he had recently had a dispute with his family. Cardwell also admitted to starting the fire in his cell, but stated that he did not mean any harm to the inmates and staff. Shortly after he was first placed in the SMU, Cardwell surrendered two packs of matches to Officer Herbert Yates.

Meanwhile, the other inmates were evacuated and the fire was extinguished by GRCC staff. A subsequent arson investigation by Kentucky State Police Detective Mike Smith revealed that the source of the fire was a nylon laundry bag, and no accelerants were detected. Detective Smith observed heat damage to the door and smoke damage to the wall and both inside and outside of the door. Detective Smith calculated damages in the amount of $1,000.

Cardwell was indicted by a Muhlenberg County Grand Jury for arson in the first degree and persistent felony offender ("PFO") in the second degree.[1] Officer Solsberry, Sergeant Chaney, Detective Smith, and Officer Yates all testified at Cardwell's trial. During direct examination by the Commonwealth, Sergeant Chaney testified about her conversation with Cardwell while he was in the SMU holding cell. During cross-examination, Cardwell's counsel asked if Sergeant Chaney read him his *Miranda* rights prior to engaging in the

[1] The PFO charge was dismissed without prejudice.

conversation with Cardwell. The Commonwealth objected on the grounds of relevancy and the court sustained the objection. When Cardwell's attorney proceeded to asked Sergeant Chaney if Cardwell was "detained" in the holding cell, the Commonwealth objected on the same grounds and, again, the court sustained that objection.

At the close of the Commonwealth's case, Cardwell moved for a directed verdict based on insufficiency of the evidence. The trial court denied the motion. Cardwell did not present any evidence, but did renew his motion for a directed verdict, which the trial court again denied. The jury found Cardwell guilty of arson in the first degree, and recommended a fifty-year sentence. Cardwell brings this appeal as a matter of right from a judgment imposing a fifty-year sentence. Ky. Const. § 110(2)(b). We begin our review with Cardwell's claim that the trial court erred when it denied his motion for a directed verdict.

ANALYSIS

I. The Trial Court Properly Denied the Motion for a Directed Verdict.

Kentucky Revised Statute (KRS) 513.020(1) provides, in pertinent part, that "[a] person is guilty of arson in the first degree when, with intent to destroy or damage a building, he starts a fire or causes an explosion, and; (a) The building is inhabited or occupied or the person has reason to believe the building may be inhabited or occupied . . . ." Cardwell does not dispute the fact that he started the fire, or that Dorm 8 was occupied by inmates and staff

when the fire began. However, Cardwell contends that the Commonwealth failed to offer sufficient evidence of his intent to damage or destroy the building. In support of his position, Cardwell points to his conversation with Sergeant Chaney in the SMU. Sergeant Chaney's testified that Cardwell explained that he started the fire because he was upset with his family and his treatment at GRCC, and that he was "hot." He now argues that he started the fire in an attempt to get the attention of GRCC personnel. Cardwell also presents the circumstances of the fire itself as evidence of his lack of intent to damage or destroy the building, arguing that no accelerants were used in setting the blaze, and that the concrete cinderblock walls of the cell were not a "flammable material." He further points to the fact that the two mattresses were left intact as evidence of his lack of intent to damage or destroy the building.

At trial, the Commonwealth bore the burden of proving each element of the charged offense beyond a reasonable doubt. *Commonwealth v. Benham,* 816 S.W.2d 186 (Ky. 1991). As oft-noted, the Commonwealth must produce "more than a mere scintilla" of evidence to support a conviction. *Smith v. Commonwealth*, 361 S.W.3d 908 (Ky. 2012). On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Benham,* 816 S.W.2d at 187. When reviewing a trial court's denial of a directed verdict, this Court must consider the evidence

as a whole and determine whether it was "clearly unreasonable" for the jury to find the defendant guilty. *Id.*

Direct evidence of a defendant's intent to commit a crime, such as a confession or other explicit statement, is rarely available. *Quisenberry v. Commonwealth*, 336 S.W.3d 19 (Ky. 2011). However, intent may be inferred by the act itself or by the surrounding circumstances. *Talbott v. Commonwealth*, 968 S.W.2d 76 (Ky. 1998); *Anastasi v. Commonwealth*, 754 S.W.2d 860 (Ky. 1988). This Court has permitted such inferences because "a person is presumed to intend the logical and probable consequences of his conduct." *Stopher v. Commonwealth*, 57 S.W.3d 787 (Ky. 2001) (*citing Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998)).

As to the element of intent, the Commonwealth presented sufficient evidence so that Cardwell's intent to damage or destroy the building could be inferred. Detective Smith testified that the nylon bag used by Cardwell to start the fire operated as a make-shift candle wick to fuel the blaze. Officer Solsberry observed Cardwell feeding paper products, such as toilet paper, legal paper, and books, into the flames. The fire was destructive because the cell wall and door sustained heat/fire damage in the amount of $1,000. Detective Smith testified that he could not predict the damage that might have occurred had the fire not been quickly discovered and extinguished by GRCC staff. The damage to the cell was both a logical and probable consequence of Cardwell's actions. In reviewing the evidence as a whole, it was not clearly unreasonable

for the jury to find Cardwell guilty of arson in the first degree. The trial court's denial of the motion for a directed verdict was proper because the Commonwealth offered sufficient evidence to prove intent. As such, Cardwell's rights to due process under the United States and Kentucky Constitutions were not violated.

II. Palpable Error Did Not Result When the Trial Court Did Not *Sua Sponte* Hold a Suppression Hearing.

Cardwell contends that the trial court erred when it failed to hold a suppression hearing on the admissibility of his statements to Sergeant Chaney. Because this error is unpreserved, Cardwell requests palpable error review under RCr 10.26, which states that "[a]n 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." *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011) (*citing Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002)). To determine whether an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." *Barker*, 341 S.W.3d at 114 (*citing Commonwealth v. McIntosh*, 646 S.W.2d 43 (Ky.1983)). A palpable error is one that is so egregious and fundamentally prejudicial, that the defendant's right to due process of law is threatened if the error is uncorrected. *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). Upon review, we conclude that no palpable error occurred.

The statements to which Cardwell now objects were first introduced in the Commonwealth's direct examination of Sergeant Chaney. Sergeant Chaney testified that while in the SMU holding cell, a distraught Cardwell complained of a desire to "cut all ties" with his family, and expressed frustration with the fact that his recreational time had been suspended. During that conversation, Cardwell admitted to starting the fire, and was undaunted by the fact that he would "catch more time" for the offense. He further explained that he was "hot" and wanted to take a shower, and meant "no harm" to the other inmates and staff in starting the fire. On cross-examination, Cardwell's counsel asked Sergeant Chaney if Cardwell was advised of his *Miranda*[2] rights prior to making these statements. The Commonwealth objected on the grounds of relevancy, and the court sustained the objection. Later when Cardwell's counsel asked Sergeant Chaney if Cardwell was "detained" in the SMU, the Commonwealth again objected. The court sustained the objection and a bench conference followed. Cardwell's counsel told the trial judge that he wanted to ask Sergeant Chaney about the *Miranda* warnings because talking to inmates in the SMU was "a part of [her] job." The judge replied that the issue of the "voluntariness" of a confession was a question for the court to decide, and reminded counsel that the substance of the conversation was already on the record.

Cardwell now argues that the trial court erred when it excluded evidence by sustaining the Commonwealth's objections to the questions relating to the

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

incriminating statements. Cardwell also contends that the trial court further erred when it failed to hold a suppression hearing to determine the admissibility of his statements to Sergeant Chaney. Cardwell claims that such a hearing was necessary because his ability to relate his version of events to the jury was cut short when the trial court sustained the Commonwealth's aforementioned objections. Although the precise grounds for this challenge are unclear from his brief, Cardwell appears to attack both the admissibility and credibility of the SMU statements. As for the admissibility argument, Cardwell relies on *Brown v. Commonwealth*, 564 S.W.2d 24 (Ky. App. 1978), a case in which the admission of non-*Mirandized* statements resulted in reversal of a conviction. Cardwell also offers *Crane v. Kentucky*, 476 U.S. 683 (1986), a case that discusses a defendant's right to attack the credibility of an incriminating statement after a pretrial determination of the voluntariness of the statement has been made.

To the extent that Cardwell challenges the admissibility of his non-*Mirandized* statements, the court was correct in sustaining the Commonwealth's objection. Kentucky Rule of Evidence ("KRE") 104(c) states, in pertinent part, that: "Hearings on the admissibility of confessions or the fruits of searches conducted under color of law shall in all cases be conducted out of the hearing of the jury." Any evidence relating to the admissibility of the statements could not, properly, be heard by the jury. Such evidence must be submitted to the trial court by timely motion pursuant to Kentucky's Rule of

Criminal Procedure ("RCr") 9.78, which places an affirmative duty on the court to hold a suppression hearing when a party moves to suppress an incriminating statement *before* a trial, or when a party makes a timely objection to an incriminating statement *during* a trial. *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999) (*overruled on other grounds* by *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010)). (emphasis added). To support his position, Cardwell relies on *Brown v. Commonwealth*, wherein the defendants' convictions were reversed when the trial court failed to hold a suppression hearing pursuant RCr 9.78 after a motion to suppress was filed. 564 S.W.2d at 29-30. However, this case is undoubtedly distinguishable from *Brown* in one key respect, as Cardwell, unlike the defendants in *Brown*, never filed a motion to suppress nor did he make a timely objection to the statements.

Despite having ample opportunity to do so, at no point during the trial did Cardwell object to those statements. In fact, by the time that the Commonwealth objected to Cardwell's question regarding the *Miranda* warnings, the jury had heard Sergeant Chaney's recitation of Cardwell's statements in its entirety. Despite his failure to timely object to the statements, Cardwell argues that once the trial court was on notice of the non-*Mirandized* statements to Sergeant Chaney, the trial court's failure to hold a suppression hearing pursuant to RCr 9.78 constituted palpable error. This argument is unavailing. A trial court is under no obligation to hold a

suppression hearing on its own motion. *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004). The language of RCr 9.78 requires a court to hold a suppression hearing only when the defendant first moves to suppress or makes a timely objection. Cardwell failed to move to suppress or to object to the incriminating statements. The court's failure to hold a suppression hearing *sua sponte* when no motion to suppress was made and no timely objection followed does not constitute error.

To the extent that Cardwell now challenges the reliability of those statements, contending that the trial court erred when it excluded evidence of the circumstances of the confession when it sustained the Commonwealth's objections, the unpreserved issue does not constitute palpable error. Cardwell correctly notes in his brief that he was entitled to present the jury with the circumstances under which he made the statements to Sergeant Chaney. The requirement that a trial court make a pretrial determination of the voluntariness of an incriminating statement does not automatically foreclose a defendant's ability to present evidence of the circumstances surrounding that statement. *Crane v. Kentucky*, 476 U.S. at 683. We have held that, notwithstanding a trial court's ruling on the voluntariness of an incriminating statement, a criminal defendant has a constitutional right to a "fair opportunity" to attack the credibility of those statements. *Holloman v. Commonwealth*, 37 S.W.3d 764 (Ky. 2001). However, there was no palpable error here when the trial court sustained the Commonwealth's objections.

First, there is no suggestion that Cardwell's statements to Sergeant Chaney in the SMU were unreliable. Cardwell never challenged the reliability or credibility of those statements at trial, nor does he make such a challenge on appeal. Second, Sergeant Chaney's testimony did not represent a critical part of the Commonwealth's case against Cardwell. Cardwell claims that the statement that he started the fire and "did not care" was the only evidence from which the jury could infer that he intended to damage or destroy the building. We disagree. The Commonwealth presented nearly conclusive evidence that Cardwell, alone in his cell, set the fire using matches, a laundry bag, bed sheets, and various paper products. Officer Solsberry described the blaze as directly in front of the cell door, producing flames that were three to four feet high as Cardwell added paper to fuel the fire. As noted, the wall and door sustained $1,000 in fire and smoke damages. Even without the incriminating statements, the jury could infer Cardwell's intent to damage or destroy the building from the natural and probable consequences of his actions.

Pursuant to RCr 10.26, there is not a probability that the result of the trial would have been different without the statements, nor does the admission of the statements constitute a prejudicial, fundamental error warranting reversal. *Brooks v. Commonwealth*, 217 S.W.3d 219 (Ky. 2007). Further, the trial court's action here does not rise to the level of the errors that we have deemed palpable in previous cases. In *Commonwealth v. Nash*, 338 S.W.3d 264 (2011), we found that manifest injustice resulted when a defendant who

was never required to register as a sex offender was charged with the crime of failure to register. In *Alford v. Commonwealth*, 338 S.W.3d 240 (Ky. 2011), we likewise found that the admission of a detective and a doctor's testimony that bolstered the credibility of a sex abuse victim constituted palpable error. In *Stewart v. Commonwealth*, 306 S.W.3d 502 (Ky. 2010), we found that palpable error resulted when a flawed jury instruction omitted the defendant's prior conviction element which precluded the defendant from being convicted of a more serious offense. In light of the entire record, we cannot say that manifest injustice resulted from the introduction of Cardwell's incriminating statements, or from the trial court's "failure" to hold a suppression hearing.

Finally, we note Cardwell's contention that the trial court's failure to hold a suppression hearing on its own motion error violated his rights under the 5th, 6th, and 14th amendments of the United States Constitution and §§ 2, 3, and 11 of the Kentucky Constitution. Aside from the bare assertion that the alleged error violated his constitutional rights, Cardwell's brief fails to state an argument or reference to pertinent authorities to this point. We have determined that the trial court did not err when it failed to hold a suppression hearing on its own motion. As such, no palpable error occurred, and Cardwell's constitutional rights to the due process of law were not violated.

CONCLUSION

In sum, the trial court did not err when it denied Cardwell's motion for a directed verdict. The trial court was not required to hold a suppression hearing

absent Cardwell's motion to suppress or a timely objection, and thus there was no error at all, much less palpable error. Accordingly, we affirm the judgment of the Muhlenberg Circuit Court.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., not sitting.

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