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RENDERED: SEPTEMBER 26, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000664-MR

JAMES E. MUDD — APPELLANT

V.

ON APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
NO. 11-CR-00095

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Grayson Circuit Court jury found Appellant, James E. Mudd, guilty of trafficking in a controlled substance in the first-degree. Mudd was also found to be a first-degree persistent felony offender (PFO) and was sentenced to the maximum term of twenty years' imprisonment. He now appeals as a matter of right, Ky. Const. § 110(2)(b), asserting that (1) the trial court abused its discretion by denying Appellant's motion for a continuance, (2) the trial court erred in overruling Appellant's motion for a directed verdict as to the first-degree trafficking count, (3) he suffered manifest injustice as a result of statements made during the prosecutor's closing argument, and (4) a twenty-year sentence for first-degree trafficking constitutes cruel and unusual punishment. For the following reasons, we affirm.

I. BACKGROUND

On December 30, 2010, Detective Kevin Henderson of the Kentucky State Police (KSP) set up a controlled narcotics purchase from Appellant in the vehicle of Greg Hodge, a confidential informant. Hodge was equipped with an audio recording device and documented money, which he was instructed to use in the drug transaction. Appellant alleges that Hodge was also fitted with a video recording device, which the Commonwealth denies.[1] After providing Hodge with the recording equipment and money, KSP sent Hodge and his girlfriend, Kimberly Detraina, to a nearby parking lot to make the purchase. Hodge waited in his vehicle until Appellant approached and got in the car. Appellant then sold one sixty-milligram tablet of morphine to Hodge for forty dollars. Following the controlled buy, KSP collected the morphine tablet and audio device from Hodge. As a result of the KSP's controlled drug purchase, Appellant was indicted by a Grayson County Grand Jury on charges of trafficking in a controlled substance in the first-degree and first-degree PFO.

At trial, Appellant was found guilty of trafficking in a controlled substance and first-degree PFO. The jury recommended a maximum sentence of twenty years' imprisonment, which was adopted by the trial court.

[1] Appellant's claim that video equipment was used is based on notations in Detective Henderson's police report. *See infra* Part II.A.2 and note 2.

II. ANALYSIS

A. The Trial Court Did Not Abuse Its Discretion by Denying Appellant's Motion for a Continuance

Appellant first argues that the trial court abused its discretion when it denied his motion for a continuance. In support of his claim, Appellant raises two underlying allegations of error, which he asserts justified a continuance: 1) the Commonwealth did not comply with the trial court's discovery order, and 2) the Commonwealth failed to disclose possible exculpatory evidence. Appellant asserts that the trial court should have granted him a continuance allowing him additional time for discovery of evidence wrongfully withheld by the Commonwealth.

Under RCr 9.04, the trial court has broad discretion on whether to grant or deny a continuance. *See Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013). Thus, denial of a motion for continuance does not provide grounds for reversing a conviction "unless that discretion has been plainly abused and manifest injustice has resulted." *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006) (quoting *Taylor v. Commonwealth*, 545 S.W.2d 76, 77 (Ky. 1976)).

1. The Commonwealth Complied with the Trial Court's Discovery Order

Appellant alleges that the trial court erred to his substantial prejudice when it did not grant a continuance allowing him more time to interview Detraina. Specifically, Appellant argues that by not turning over the identity of Detraina earlier, the Commonwealth violated the trial court's discovery order and he should have been granted additional time prior to trial to investigate

Detraina in case she observed "anything about the transaction that would assist in presenting a defense." For the following reasons, we disagree.

The trial court, following the language of RCr 7.24(1), ordered the Commonwealth to provide "[t]he substance, including time, date, and place of any oral incriminating statement . . . made by [Appellant] to any witness . . . ." In response, the Commonwealth furnished the audio recording but withheld the identity of Detraina,[2] whose voice is heard on the tape.

This Court has found reversible error when defendant's incriminating statements were admitted at trial after being withheld during discovery in violation of RCr 7.24. *See Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008); *Anderson v. Commonwealth*, 864 S.W.2d 909 (Ky. 1993). During discovery, the Commonwealth provided defense counsel with the opportunity to listen to the complete audio recording of the drug transaction involving Appellant, Detraina, and Hodge. Because the audiotape was made available timely in discovery, and contained all the incriminating statements made by Appellant offered at trial, discovery of the audio recording was sufficient for compliance with the trial court's order.

Additionally, pursuant to RCr 7.26(1), the trial court's discovery order required the Commonwealth to furnish "[a]ny statement of any witness for the Commonwealth in the form of a document or recording in its possession which related to the subject matter of the witness's testimony . . . ." This Court has

[2] The Commonwealth did not provide Detraina's identity until a later pretrial conference.

held that the objective of RCr 7.26 is "to allow defense counsel a reasonable opportunity to inspect previous statements made by a prosecution witness without interrupting the trial to do so." *Wright v. Commonwealth*, 637 S.W.2d 635, 636 (Ky. 1982).

The plain language of RCr 7.26(1) and the discovery order only requires the Commonwealth to turn over the statements of *testifying* witnesses. In *Wright*, this Court stated that "the common-sense construction of the rule [(RCr 7.26)] is . . . that if the Commonwealth intends to use a witness and the defense seeks access to his recorded statements it is within the trial court's sound discretion whether to allow it prior to trial . . . ." *Id.*

To be clear, we do not say today that a trial court could not order discovery of the statements of a non-testifying witness if it so desired. "Broad discretion in discovery matters has long been afforded trial courts in both civil and criminal cases." *Commonwealth v. Nichols*, 280 S.W.3d 39, 43 (2009) (citations omitted). We simply hold that, in this instance, the Commonwealth was not required to provide additional discovery relating to Detraina by the trial court's discovery order or by RCr 7.26(1). Therefore, pursuant to both RCr 7.24 and RCr 7.26, we find that the Commonwealth fully complied with the trial court's order and there was no apparent or demonstrated need for a continuance allowing Appellant additional time to discover evidence related to Detraina.

2. *The Commonwealth Did Not Fail to Provide Exculpatory Evidence*

Appellant also alleges that the trial court erred to his substantial prejudice when it did not grant a continuance allowing him additional time to seek discovery of an alleged videotape of the drug transaction and Detraina's observations during the transaction. Specifically, Appellant asserts that by not turning over the alleged videotape and the identity of Detraina the Commonwealth violated its duties as established in *Brady v. Maryland*, 373 U.S. 83 (1963), and he should have been granted additional time to investigate the possible existence of the videotape and Detraina's observations of the drug transaction.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. However, the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112 (1976). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109-10.

As previously stated, there is no evidence of any discoverable statements made by Detraina outside those furnished to Appellant through the audio recording of the drug purchase. As to Appellant's claim that a videotape of the drug transaction exists, this allegation is based largely on a statement in

Detective Henderson's police report that video was used.[3] Detective Henderson testified at trial that a video recorder was not used and that it was mentioned in his report only because he was typing over a previous report and forgot to delete the reference to video.[4]

Assuming arguendo that there was in fact a videotape, Hodge testified at trial that he carried the entire recording apparatus in his pocket during the drug transaction. Therefore, had it been given it seems unlikely that any video recording device in Hodge's pocket would provide exculpatory video evidence. Thus, we find no merit in Appellant's supposition that the Commonwealth violated *Brady*, or that he was substantially prejudiced by the denial of a continuance aimed at discovering the alleged videotape.

Thus, the Commonwealth fully complied with the trial court's discovery order and, despite Appellant's speculation, there is no indication that exculpatory evidence was withheld by the Commonwealth. Moreover, Appellant has failed to show how the denial of further discovery relating to Detraina or the alleged videotape resulted in substantial prejudice to him. In evaluating denial of a continuance, "[i]dentifiable prejudice is especially important. Conclusory or speculative contentions that additional time might prove helpful

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[3] Detective Henderson can also be heard to state that he has recovered the audio and video equipment at the end of the audio recording of the drug transaction. Additionally, during pretrial conference, the Commonwealth stated that there was video equipment given to Greg Hodge, but that it was not functional during the drug buy. However, in its objection to Appellant's renewed motion for directed verdict, the Commonwealth reiterated that there was no video evidence.

[4] Detective Henderson's assertion that the mention of a video record in his report was an error is supported by the fact that different sections of the report cite the recovery of the audio equipment independent of any further reference to video equipment.

are insufficient." *Bartley*, 400 S.W.3d at 733. Considering the lack of identifiable prejudice to Appellant resulting from denial of a continuance, the trial court cannot be said to have abused its discretion such that manifest injustice resulted by deciding against postponing a trial on the verge of commencement. *See Hudson*, 202 S.W.3d at 22-23.

Though the issue of the trial court's denial of Appellant's motion for bill of particulars was not briefed for this Court, we pause briefly to note that the trial judge denied this motion and the motion for continuance at the same pretrial conference held six days before Appellant's scheduled trial. The motion for bill of particulars included a request for the names and addresses of any person present at the time the alleged criminal acts were committed. Appellant's counsel made his argument in support of his motion for bill of particulars concurrently with his argument for a continuance and asserted that disclosure of Detraina's identity would aid him in investigating whether she could provide exculpatory evidence. In response, the Commonwealth gave Appellant's counsel Detraina's name,[5] but no further information, and explained that it had already provided information on Hodge.

As previously stated, Detraina's entire percipient involvement in the drug transaction was provided to Appellant through the audio recording; therefore, it seems farfetched that revealing Detraina's identity earlier than six days before

[5] At the pretrial conference, the Commonwealth stated that it does not reveal the names of confidential informants until a trial date is set because the possibility of reaching a plea agreement exists up to that point. The Commonwealth asserts that identifying Detraina prior to trial would have been tantamount to identifying the confidential informant, Hodge.

trial would have lead to exculpatory evidence.[6] Considering the arguments before us, we find no substantial prejudice to Appellant from the denial of the continuance where he was provided with Detraina's name prior to trial along with the earlier-disclosed audio recording encompassing her entire involvement as an informing witness.

B. The Trial Court Did Not Err in Overruling Appellant's Motion for Directed Verdict

Appellant argues that the trial court erred in denying his motion for a directed verdict because the Commonwealth did not adequately prove that he trafficked in morphine. Specifically, Appellant alleges that the evidence produced at trial was insufficient to support his conviction for the offense of first-degree trafficking in a controlled substance. We disagree.

The standard of review for a motion for directed verdict is set forth in *Commonwealth v. Benham*:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury

[6] Regarding disclosure of an informant, this Court has held that a requesting defendant must "make a showing that disclosure would be relevant and helpful to the defense." *Taylor v. Commonwealth*, 987 S.W.2d 302, 304 (Ky. 1998) (citing *Schooley v. Commonwealth*, 627 S.W.2d 576, 578 (Ky. 1982)).

> questions as to the credibility and weight to be given such testimony.

816 S.W.2d 186, 187 (Ky. 1991). Upon review we must determine if, given the totality of the evidence, "it would be clearly unreasonable for a jury to find guilt." *Id.* Only then is Appellant entitled to a directed verdict. Furthermore, the Commonwealth only needs to produce more than a "mere scintilla" of evidence in order to defeat Defendant's motion for directed verdict. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1993).

In the present case, there is more than adequate evidence for a jury to convict Appellant of first-degree trafficking.[7] KSP gave Hodge forty dollars to purchase drugs from Appellant. Detective Henderson testified that he thoroughly searched Hodge after the drug transaction. No cash was found, but one morphine tablet was recovered. Hodge testified at trial that he purchased the morphine from Appellant. A KSP chemist testified that the substance was in fact morphine. Additionally, an audio tape of the drug transaction was presented at trial. Given the evidence presented, the jury could reasonably conclude that Appellant trafficked in morphine. The Commonwealth produced

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[7] KRS 218A.1412 states, in pertinent part, that a person is guilty of first-degree trafficking if he knowingly and unlawfully traffics in:

> (c) Ten (10) or more dosage units of a controlled substance that is classified in Schedules I or II and is a narcotic drug, or a controlled substance analogue;
>
> . . . .
>
> (e) Any quantity of a controlled substance specified in paragraph (a), (b), or (c) of this subsection in an amount less than the amounts specified in those paragraphs.

more than a mere scintilla of evidence thus meeting its burden of proof. *Sawhill*, 660 S.W.2d at 5. Therefore, we find no error.

C. The Commonwealth's Closing Argument Did Not Amount to Palpable Error

Appellant next argues that the Commonwealth's closing argument during both the guilt phase and the sentencing phase was improper. Specifically, Appellant alleges that the Commonwealth urged the jury to set a standard for the community and impose the maximum sentence upon him, thereby denying him due process. Although we continue to disfavor "send a message" arguments by the Commonwealth during the guilt phase, we do not believe that the arguments in this case rose to the level of palpable error.

Appellant concedes that this issue was not preserved for appellate review but requests that we review for palpable error. RCr 10.26; KRE 103. Under the palpable error standard, an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." RCr 10.26. "[W]hat a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citations omitted). Further, when reviewing claims of prosecutorial misconduct, we "focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as

to have undermined the overall fairness of the proceedings." *Id.* (citing *Soto v. Commonwealth,* 139 S.W.3d 827, 873 (Ky. 2004)).

1. The Commonwealth's Guilt Phase Closing Argument

Appellant takes issue with the following statement made by the prosecutor during closing argument of the guilt phase: "James Mudd is a drug dealer; he sells drugs to people in your town—in your town. What are you going to do about it?"

In *Commonwealth v. Mitchell,* 165 S.W.3d 129, 131-33 (Ky. 2005), Mitchell alleged that the guilt phase closing argument of the Commonwealth contained an improper "send a message" argument that we should find to be palpable error. This included the prosecutor's admonishment in *Mitchell* that:

> [I]t's time to send a message to this defendant and to this community that we're going to punish drug dealers for doing what they're doing. It's time we send a message. . . . The case is in your hands, and it's only you that can hold the Defendant accountable for doing what she did, selling Oxycontin.

Id. at 161. However, we reviewed this closing argument in its entirety and found that, taken in context, the comments did not prejudice Mitchell's right to a fair trial and thus, did not amount to palpable error. *Id.* at 132, 133.

In the present case, the complained of statement constituted less than twenty seconds of a thirteen-minute argument. Here, the Commonwealth's statement that "James Mudd . . . sells drugs to people in your town" was a valid response to defense counsel's argument that Appellant was completely innocent. Moreover, on the audiotape of the transaction presented at trial, Appellant stated that he could procure more morphine in the future. Thus, to

some extent, the Commonwealth's closing argument during the guilt phase was also responsive to the evidence. Admittedly, there were comments that were not responsive and that we might have held to be error had valid objections been made. Yet, in reviewing the Commonwealth's guilt phase argument in this instance, we do not find manifest injustice.

2. The Commonwealth's Sentencing Phase Closing Argument

Appellant also claims that portions of the Commonwealth's closing argument during the sentencing phase were so improper as to constitute palpable error. The comments referred to were:

> We're all here on behalf of the Commonwealth, the people who live in Kentucky—your community. That's what I'm here for. What we're looking to do is to fashion an appropriate sentence for a man who just won't stop doing crimes.
>
> . . . .
>
> If he gets twenty years, if you hammer him and give him twenty years . . . four years he could be back out on your streets selling drugs and doing what he does. Folks, who determines the standard for your community? . . . I come to you and say here's the penalty range. You decide what the standard is for your community. What do you all do with people who sell drugs consistently and commit crimes in your neighborhood? Folks, don't go gentle on him, it doesn't work. Ring him up. Give him the twenty years. Ring him up. Thank you.

It is well-settled that prosecutors enjoy wide latitude in closing statements. *See, e.g., Wheeler v. Commonwealth*, 121 S.W.3d 173, 180 (Ky. 2003); *Tamme v. Commonwealth*, 973 S.W.2d 13, 39 (Ky. 1998), *cert. denied*, 525 U.S. 1153 (1999). And the Commonwealth's demand for a maximum sentence is "neither

surprising nor improper." *Brewer*, 206 S.W.3d at 350 (citations omitted). In *Cantrell v. Commonwealth*, 288 S.W.3d 291, 299 (Ky. 2009), this Court held that it would be "illogical" to limit the prosecution from encouraging the jury to "impose a sentence that speaks to deterrence, as well as punishes the specific crime before it." *Id.* Here, the prosecution spoke to punishing the specific crime before it. Therefore, applying our holding in *Cantrell* to the present case, we find no error in this sentencing phase argument. *Id.*

D. Appellant's Sentence Does Not Constitute Cruel and Unusual Punishment

Finally, Appellant argues that his sentence constitutes cruel and unusual punishment. Specifically, Appellant alleges that his twenty-year sentence is so disproportionate to his offense that it amounts to cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States and Section 17 of the Kentucky Constitution.

Appellant concedes that this issue was not preserved and requests our review for palpable error under RCr 10.26; KRE 103. Because we find no such error, Appellant is not entitled to relief on this issue.

Appellant does not dispute that he has been convicted of two prior felonies and that he qualifies as a first-degree PFO under KRS 532.080.[8]

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[8] Under KRS 532.080,

> [a] person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows: . . . If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years not more than twenty (20) years.

KRS 532.080(6)(b).

Appellant also does not assert that his sentence is unlawful under the clear wording of the statute. "Generally, if the punishment given is within the maximum prescribed by statute, a reviewing court will not disturb the sentence." *Marshall v. Commonwealth*, 60 S.W.3d 513, 524 (Ky. 2001) (citations omitted). Nonetheless, Appellant claims that his sentence violates his constitutional right to not be subjected to cruel and unusual punishment.

Appellant is correct that Eighth Amendment prohibits punishment disproportionate to the crime. *Graham v. Florida*, 560 U.S. 48 (2010). However, the United States Supreme Court has also explained that the "narrow proportionality principle . . . forbids only extreme sentences that are "grossly disproportionate" to the crime." *Id.* (internal quotation marks omitted) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991)).

Appellant urges us to find gross disproportionality because all of his prior offenses were nonviolent class D felonies. Appellant points to *Solem v. Helm*, 463 U.S. 277 (1983) as an example of the United States Supreme Court finding gross disproportionality when the underlying offenses of a persistent felon were nonviolent. However, the facts in *Solem* can be distinguished from Appellant's case, in that the defendant in *Solem* received a life sentence without parole, which is a considerably more harsh sentence than Appellant's twenty-year sentence.

Moreover, the United States Supreme Court has upheld lengthier sentences than Appellant's for comparably minor offenses. *See Ewing v. California*, 538 U.S. 11 (2003) (twenty-five years to life for theft of golf clubs);

Rummel v. Estelle, 445 U.S. 263 (1980) (life with the possibility of parole for obtaining $120.75 by false pretenses where the underlying offenses were also small check and credit card frauds).

As to Appellant's argument that his twenty-year sentence violates Section 17 of the Kentucky Constitution, this Court has held that the protections provided by Section 17 are similar to those included in the Eighth Amendment to the U.S. Constitution. *Turpin v. Commonwealth*, 350 S.W.3d 444, 448 (2011). In both *Turpin* and *Riley v. Commonwealth*, 120 S.W.3d 622 (Ky. 2003), defendants received twenty-year PFO sentences based solely on class D felonies that could be characterized as nonviolent. In both cases, this Court found that the sentences were not so extreme as to be grossly disproportionate.

In the present case, Appellant's sentence was within the limits set by statute. As such, we find that Appellant's sentence of twenty years' imprisonment was not grossly disproportionate to his crimes of first-degree trafficking and PFO. Therefore, we conclude that Appellant's sentence is not unconstitutional.

III. CONCLUSION

For the foregoing reasons, the judgment and sentence of the Grayson Circuit court is affirmed.

All sitting. All concur.

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