RENDERED: November 14, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000922-MR

TERRY D. NEUKAM — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 01-CR-00221

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Terry D. Neukam has appealed from the final judgment and sentence entered by the Henderson Circuit Court on May 1, 2002, finding him guilty pursuant to a jury verdict of the offense of theft by unlawful taking over $300.00[1] and sentencing him to prison for a term of three years. Having found no abuse of discretion on the part of the trial court in denying Neukam's motion for a mistrial, and having concluded

[1] Kentucky Revised Statutes (KRS) 514.030.

that the use of Neukam's prior convictions for impeachment purposes during the guilt phase of his trial did not result in a manifest injustice warranting reversal under RCr[2] 10.26, we affirm.

On October 12, 2001, at approximately 1:20 p.m., Wal-Mart Loss Prevention Officer Willie Bratcher observed Neukam remove a Sony Playstation 2 video game machine from a shelf located in the electronics department of a Wal-Mart department store located in Henderson County, Kentucky. According to Bratcher, Neukam took the video game machine to the end of the aisle and slide it through a gap in the wall, which led to an adjacent aisle located in a different department. Bratcher then witnessed Neukam repeat the process with a second machine, after which he left the electronics department with his companion, Catherine Helmerson. Shortly thereafter, Bratcher witnessed Neukam and Helmerson retrieve the two video game machines and place them in a shopping cart. According to Bratcher, Neukam covered the two video game machines with several rolls of toilet paper and proceeded to the lawn and garden section of the store. Once Neukam and Helmerson reached the outdoor area of the lawn and garden section, Bratcher watched Neukam slide the two video game machines under a chain-linked fence separating the outdoor portion of the store from the parking lot. At this point,

[2] Kentucky Rules of Criminal Procedure.

Bratcher approached Neukam and identified himself as an employee of Wal-Mart. Bratcher then handcuffed Neukam and escorted him to a police substation located within the store. Shortly thereafter, Officer Todd Seibert, a police officer for the City of Henderson, arrived on the scene. Officer Seibert advised Neukam of his Miranda[3] rights and placed him under arrest.[4] Officer Seibert then spoke with Neukam's companion, Helmerson, who led him to a white van located in the Wal-Mart parking lot. According to Officer Seibert, Helmerson opened up the driver-side door to the van and pulled out a white cardboard box. The box contained several items of drug paraphernalia and a small quantity of rock cocaine.

On November 14, 2001, a Henderson County grand jury returned an indictment against Neukam charging him with theft by unlawful taking over $300.00,[5] possession of a controlled substance in the first degree (cocaine),[6] possession of drug paraphernalia,[7] and public intoxication.[8] On April 4, 2002, Neukam filed a motion to suppress the contraband obtained from

[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[4] Helmerson was not arrested.

[5] The video game machines were valued at $299.96 each.

[6] KRS 218A.1415.

[7] KRS 218A.500.

[8] KRS 525.100. Helmerson was not named in the indictment.

the van. Neukam claimed the contraband was procured in violation of the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. A hearing was conducted on the issue and Neukam's motion to suppress was denied.[9] The case then proceeded to trial.

At trial, Bratcher, who was the first witness to testify, described in detail the events that transpired in the Wal-Mart store on the afternoon of October 12, 2001. Bratcher described the layout of the store and how he witnessed Neukam attempt to steal two Playstation 2 video game machines. Officer Seibert also testified on behalf of the Commonwealth and he described the contraband that was obtained from the van. Officer Seibert also noted that when Neukam was arrested he was not carrying any credit cards and that he had approximately $6.00 on his person. Officer Seibert further testified that after he advised Neukam of his Miranda rights, Neukam "stated that he didn't want to say anything." Defense counsel immediately objected to this line of questioning and moved for a mistrial, asserting that Officer Seibert's testimony constituted an improper use of Neukam's post-arrest silence. The motion for a mistrial was denied, but the trial court admonished the jury not to consider this portion of Officer Seibert's testimony.

[9] The trial court concluded that Helmerson voluntarily retrieved the cardboard box from the van and turned it over to Officer Seibert. Thus, the trial court reasoned that a "search" never took place.

Neukam testified in his own defense and provided a somewhat different account of the events that transpired on the afternoon of October 12, 2001. Neukam insisted that he acted in a suspicious fashion intentionally, in order to annoy Bratcher. Neukam claimed that he was angry with Bratcher as a result of a prior encounter, which had not occurred at the Wal-Mart store. Neukam admitted that he removed the two video game machines from the shelf, that he placed the two video game machines in a shopping cart, and that he took them to the lawn and garden section of the store. However, Neukam claimed that he set the two video game machines on the floor in the lawn and garden area of the Wal-Mart store. He denied sliding the two video game machines under the chain-linked fence. In fact, Neukam claimed that it would have been impossible to have done so because the fence went "in the ground." Neukam also disavowed any prior knowledge of the contraband obtained from the van.

On cross-examination, the prosecutor asked Neukam if he currently used drugs, to which Neukam responded "No." The prosecutor then asked Neukam how long it had been since he used drugs and Neukam responded that it had been about three years since he used drugs. At this time, the prosecutor confronted Neukam with a prior conviction for possession of a controlled

substance in the second degree,[10] dated May 11, 1999, after which Neukam admitted that he had used drugs in the past. Defense counsel did not object to this line of questioning. The prosecutor then asked Neukam if the white van located in the Wal-Mart parking lot belonged to him and Neukam conceded that it did. Neukam also admitted that he told Bratcher that "he would see him after hours." In closing, the prosecutor asked Neukam if he had ever been convicted of a felony and Neukam responded affirmatively. Defense counsel did not object to this line of questioning either. The case was then submitted to the jury.[11]

The jury returned a verdict of guilty as to the theft charge, recommending a prison sentence of three years. The jury acquitted Neukam of the remaining charges contained in the indictment. On April 29, 2002, the trial court adopted the jury's recommendation and sentenced Neukam to a prison term of three years. This appeal followed.

Neukam first contends that his due process rights were violated when Officer Seibert commented upon his post-arrest silence at trial. Neukam claims that "[t]he admonition read by the court [did] nothing to alter the fundamental unfairness of the substantive use of [his] post-arrest silence." As previously discussed, Officer Seibert testified on direct

[10] KRS 218A.1416.

[11] Helmerson did not testify at trial.

examination that after he advised Neukam of his Miranda rights, Neukam "stated that he didn't want to say anything." Neukam correctly cites Doyle v. Ohio,[12] for the proposition that a defendant's due process rights preclude prosecutorial reference to his or her post-arrest silence as part of the Commonwealth's case-in-chief.[13] Thus, it goes without saying that Officer Seibert's comment amounted to error. The question before us on appeal, however, is whether the comment made by Officer Seibert amounted to reversible error. We conclude that it did not.

While not overwhelming, the evidence presented against Neukam at trial was significant. Bratcher testified that he witnessed Neukam remove two Playstation 2 video game machines from a shelf located in the electronics department of the Wal-Mart store. Bratcher further testified that he witnessed Neukam proceed to the lawn and garden section of the store and slide the two video game machines underneath a chain-linked fence separating the outdoor portion of the store from the parking lot. Moreover, after defense counsel objected to the improper comment elicited by the prosecutor during Officer Seibert's direct-examination, the trial court admonished the jury not to

[12] 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

[13] See Hall v. Commonwealth, Ky., 862 S.W.2d 321, 323 (1993); Green v. Commonwealth, Ky., 815 S.W.2d 398, 400 (1991); Wallen v. Commonwealth, Ky., 657 S.W.2d 232, 233 (1983); Campbell v. Commonwealth, Ky., 564 S.W.2d 528, 532 (1978); Darnell v. Commonwealth, Ky., 558 S.W.2d 590, 593 (1977); and Niemeyer v. Commonwealth, Ky., 533 S.W.2d 218, 221 (1976). But cf., Port v. Commonwealth, Ky., 906 S.W.2d 327, 331 (1995) (authorizing the use of post-arrest silence for the purpose of impeaching a defendant's trial testimony).

consider this portion of Officer Seibert's testimony as evidence. After the trial court admonished the jury, the prosecutor did not focus upon Neukam's post-arrest silence nor did he attempt to create a negative inference based upon Neukam's post-arrest silence.[14] Thus, we cannot conclude that a "substantial probability exists that the result [of Neukam's trial] would have been any different."[15] Stated otherwise, "[t]he alleged Doyle infraction is harmless."[16] Accordingly, we find no abuse of discretion on the part of the trial court in denying Neukam's motion for a mistrial.

Neukam next argues that he was denied a fair trial when he was impeached by a prior misdemeanor conviction involving drug use. As previously discussed, the prosecutor confronted Neukam on cross-examination with a prior conviction for possession of a controlled substance in the second degree, dated May 11, 1999, after which Neukam admitted that he had a prior history of drug use. The conviction in 1999 was Neukam's only prior conviction for possession of drugs. Possession of a controlled substance in the second degree is a Class A misdemeanor for the first offense. Thus, Neukam claims that his

[14] See Wallen, 657 S.W.2d at 233.

[15] Green, 815 S.W.2d at 400 (citing Abernathy v. Commonwealth, Ky., 439 S.W.2d 949 (1969), and Niemeyer, 533 S.W.2d at 221).

[16] Wallen, supra at 233-234 (citing United States v. Davis, 546 F.2d 583 (5th Cir. 1977)).

prior conviction was inadmissible under KRE[17] 609, which limits the admissibility of prior convictions used for impeachment purposes to felonies.[18] However, since Neukam failed to object to this evidence at trial, pursuant to RCr 10.26 he is not entitled to relief on appeal, unless the error is a palpable error which affected his substantial rights and resulted in a manifest injustice.

The Supreme Court of Kentucky was recently faced with a similar issue involving the use of prior misdemeanor convictions for impeachment purposes. In Commonwealth v. Pace,[19] the defendant, Ricky Pace, was arrested for DUI while operating his ATV. Pace was subsequently indicted for DUI, fourth offense in five years; driving while his license was suspended for DUI, second offense; and for operating an ATV on a highway. At trial, Pace testified in his own defense and denied that he was under the influence of an intoxicant at the time of his arrest. During cross-examination, the prosecutor questioned Pace concerning his prior DUI convictions. Pace's attorney did not object to this line of questioning and Pace was subsequently found guilty of all the charges contained in the indictment.

[17] Kentucky Rules of Evidence.

[18] See, e.g., Slaven v. Commonwealth, Ky., 962 S.W.2d 845, 859 (1997).

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

In his appeal to this Court, Pace argued that his prior DUI convictions were inadmissible as "prior bad acts" under KRE 404(b).[20] This Court agreed and reversed Pace's DUI conviction, holding that the introduction of his prior DUI convictions amounted to palpable error affecting his substantial rights and resulting in a manifest injustice under RCr 10.26. The Supreme Court, however, reversed, reasoning that "[t]he 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."[21] The Supreme Court noted that "[i]n determining 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.'"[22] Applying this criterion, the Supreme Court was unable to "conclude that the outcome would have been any different had the evidence in question been excluded."[23] Thus, while the Supreme Court agreed that Pace's prior DUI convictions were inadmissible during the guilt phase of his trial, it

[20] See Commonwealth v. Ramsey, Ky., 920 S.W.2d 526, 529 (1996).

[21] Pace, 82 S.W.3d at 895.

[22] Id.

[23] Id. at 896.

concluded that the error, absent an objection, did not "constitute palpable error warranting review under RCr 10.26."[24]

Similarly, in the case sub judice, we are unable to "conclude that the outcome would have been any different had the evidence in question been excluded." Neukam stood trial for possession of a controlled substance in the first degree (cocaine), possession of drug paraphernalia, and public intoxication, in addition to theft by unlawful taking over $300.00. However, Neukam was acquitted of possession of a controlled substance in the first degree (cocaine), possession of drug paraphernalia, and public intoxication. Since Neukam was acquitted of the drug-related charges, it would be difficult to conclude that the Commonwealth's use of Neukam's prior conviction for possession of drugs for impeachment purposes resulted in a manifest injustice in his conviction for theft.

Neukam further claims that his right to a fair trial was violated when the Commonwealth questioned him about his prior felony conviction. As previously discussed, the prosecutor asked Neukam on cross-examination if he had ever been convicted of a felony and Neukam responded affirmatively. No objection was made to this line of questioning and the nature of Neukam's prior felony conviction was never revealed to the

[24] Id.

jury.[25] Neukam's prior felony conviction, which occurred in Illinois, was for residential burglary.[26] KRE 609 clearly permits the use of prior felony convictions for impeachment purposes, provided that a period of more than ten years has not elapsed since the date of the conviction.[27] Neukam's burglary conviction is dated September 17, 1986. However, KRE 609 further permits the use of a prior felony conviction even if more than ten years has elapsed since the date of the conviction, provided the trial court determines that the probative value of the conviction substantially outweighs any prejudicial effect.[28] Neukam argues on appeal, and the Commonwealth does not deny,[29] that the trial court failed to make any findings as to whether the probative value of Neukam's prior felony conviction substantially outweighed its prejudicial effect. Neukam further argues that the use of his prior felony conviction at trial constituted reversible error under RCr 10.26. We disagree.

As was stated by the Supreme Court in Pace, supra, "[t]he palpable error rule set forth in RCr 10.26 is not a

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[25] See KRE 609(a).

[26] Neukam was sentenced to a prison term of six years for the conviction.

[27] KRE 609(b).

[28] Id.

[29] The Commonwealth chose not to brief this issue.

substitute for the requirement that a litigant must contemporaneously object to preserve an error for review."[30] Even assuming arguendo that the trial court erred by failing to make any findings to support the admission of Neukam's prior felony conviction, we cannot conclude that without such error the result of Neukam's trial would have been any different, thereby resulting in a manifest injustice. As previously noted, while not overwhelming, the evidence presented against Neukam at trial was significant, at least in respect to the theft charge. Once again, we are unable to "conclude that the outcome would have been any different had the evidence in question been excluded."[31]

Based upon the foregoing reasons, the final judgment and sentence of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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[30] Pace, 82 S.W.3d at 895.

[31] Id. at 896.