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 NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000116-MR

EARNIE L. VIRES

APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 02-CR-00505-01

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Earnie L. Vires (hereinafter "Vires") appeals from a jury verdict convicting him of trafficking in a controlled substance, first degree (KRS 218A.1412) and imposition of an eight (8) year sentence. We affirm.

Vires was indicted by a Kenton County Grand Jury on the charge of trafficking in a controlled substance in the first degree and possession of a firearm by a convicted felon (KRS 527.040). The indictment followed a consensual search of

Vires's home on February 18, 2002. During the search numerous syringes containing demoral and morphine were found, as well as, marijuana, rolling papers, scales, firearms and over \$17,000 in coins and currency. While admitting he possessed the contraband, Vires denied any intent to traffic in illegal drugs. A jury trial was conducted on October 22, 2002. Vires testified he had purchased the syringes containing morphine and demoral for his seriously ill wife and their injured dog, Bandit. (Bandit had been injured, according to Vires, when the mailman stepped on him. Vires testified that Bandit would not take his medication orally and thus, he injected the dog with morphine and demoral). Vires also testified that the large sum of cash recovered from his residence was his wife's money received from workers' compensation settlements in 1993 and 1997 and an insurance settlement from 1997. The jury returned a guilty verdict on the trafficking charge and recommended an eight (8) year sentence. Thereafter, Vires entered a guilty plea to the handgun charge which had been ordered severed. The trial court sentenced Vires to five (5) years on the handgun charge and ran the time concurrently. This appeal followed.¹

¹ Following the final judgment, the Commonwealth moved for forfeiture of the \$17,937 in coins and currency seized in conjunction with the trafficking charge. The trial court granted the forfeiture but allowed \$2,500 of the forfeited money to be paid to the Public Advocacy Department. The Commonwealth has appeal that ruling. That appeal is being handled separately by opinion rendered in No. 2003-CA-000392-MR.

On appeal, Vires makes two arguments: (1) that the trafficking conviction should be reversed for insufficient evidence; and (2) that the prosecuting attorney improperly insinuated, in voir dire, that Vires had committed uncharged crimes. Vires requested a directed verdict at the conclusion of the trial but did not object to the jury instruction relative to trafficking in a controlled substance. However, he maintains the issue is reviewable as palpable error (RCr 10.26) since a conviction on less than sufficient proof violates due process. Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830 (2003) and Miller v. Commonwealth, Ky., 77 S.W.3d 566 (2002).

Schoenbachler defines palpable error as follows:

A palpable error is one of that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court, [RCr 10.26] and "[w]hat it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." [Abernathy v. Commonwealth, Ky., 439 S.W.2 949, 952 (1969)]. We recognize not only that "the burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude," [Miller, supra at 576] but also that the nature of the error alleged here is such that, if the trial court did, in fact, err by failing to direct a verdict of acquittal, that failure would undoubtedly have affected Appellant's substantial rights. (Footnote omitted).

And, we likewise observe that the trial result necessarily would have been different if the trial court had directed a verdict in Appellant's favor. Accordingly, we examine the merits of Appellant's allegation.

95 S.W.3d at 836-37.

In reviewing an argument relative to sufficiency of the evidence, the Schoenbachler Court set forth the following standard:

We review Appellant's argument under the standard articulated in Commonwealth v. Benham [Ky., 816 S.W.2d 186 (1991)]:

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 reserv[e] to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. [Id. at 187].

Schoenbachler, supra, at 837. In the case before us, Vires admitted possession of the contraband - 23 syringes containing

morphine and demoral, four handguns, six rifles, marijuana, rolling papers, scales, and over \$17,000 in U.S. coins and currency. The jury was instructed on both trafficking and mere possession. The attorneys argued their respective positions and what inferences could be made based upon the testimony and evidence presented. Despite Vires's argument to the contrary, sufficient evidence existed to "induce a reasonable juror to believe beyond a reasonable doubt that [Vires was] guilty" of trafficking in a controlled substance.

Vires also contends that his conviction should be reversed based upon prosecutorial misconduct. Specifically, he alleges that the following statements made by the Commonwealth during voir dire resulted in palpable error:

And there may be some other questions that you might have, like "Why did he do it?" "How long has he done it?" "How many times before has he done it?" Things like that. And those questions may not be answered for you. And I can't answer some of those questions. So will you all promise me that you will only require the Commonwealth to prove the elements of the offense, and not all the other questions that you may like to know the answer to? Does anyone have any problem with that? [No response.]

Vires did not file a contemporaneous objection to these statements, but asks this Court to review them under the palpable error standard. RCr 10.26. We have reviewed the trial video and do not believe there is a substantial possibility that

the result would have been different had a timely objection been made to these statements. While we discourage any argument that may be viewed as commenting on other uncharged crimes of a defendant or evidence that will not be presented at trial, we do not believe that the statement resulted in manifest injustice to Vires.

For the foregoing reasons, we affirm the final judgment and sentence of imprisonment entered by the Kenton Circuit Court.

MINTON, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

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