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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000648-MR

CHARLES TOMMIE GRAY, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
ACTION NO. 02-CR-00616-02

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

SCHRODER, JUDGE: After being convicted for various felonies, Charles Tommie Gray ("Gray") appeals to this Court as a matter of right seeking reversal. Gray insists the Fayette Circuit Court committed numerous errors such as improperly polling the jury; denying his trial counsel's motion to withdraw due to an actual conflict; denying his motion for directed verdict on the charge of fleeing or evading; and overruling his objection to

the Commonwealth's use of an audio tape to impeach a witness. Gray insists that double jeopardy prohibited the Commonwealth from prosecuting him for both fleeing or evading and wanton endangerment. He also accuses the prosecutor of engaging in misconduct that rendered his entire trial fundamentally unfair. Finding no reversible error in Gray's allegations, this Court affirms his conviction.

In April of 2002, the Lexington Police Department received a tip from a confidential informant that Gray would be returning from Pennsylvania on the 29th with an unknown amount of narcotics. On that day, Sergeant Hart ("Hart") and Detective Famularo ("Famularo") were watching the residence of Nicole Osborne ("Osborne"), Gray's girlfriend, on 3808 Duffy Court in Lexington, Kentucky. Around 4:30 pm, Famularo contacted Hart, who was on a break, and told Hart that Gray's car had just left. Famularo followed Gray's car but could not stop it since his unmarked car lacked emergency equipment. Eventually, Gray turned north onto Nicholasville Road. While Gray continued north on Nicholasville Road, Hart, whose car had emergency equipment, caught up to him. Fearing that Gray would escape in heavy traffic, Hart activated his lights and siren. Despite this, Gray refused to stop. He only came to a halt when traffic stopped at a red light. Hart stopped behind Gray and he approached, on foot, the passenger side of the Gray's car.

Famularo pulled up on the left side in an attempt to block Gray's car. Famularo then approached the driver side. Hart opened the passenger door where Sean Foster ("Foster"), Gray's brother, sat. Hart ordered Foster to place his hands where Hart could see them. At that moment, Famularo ordered Gray to put the car in park. Gray did not obey Famularo's order and he pulled away as traffic went forward. Since Famularo had partially blocked Gray, Gray turned to the right and went around Famularo's car. As he did this, Hart jumped back to avoid being hit by Gray's car since Hart had been standing up against the passenger side of Gray's car. As Gray continued north on Nicholasville Road, Foster threw a plastic bag from the car. Suspecting the bag contained drugs, Hart retrieved the plastic bag. Famularo continued to chase Gray and caught up to him in the parking lot of a local K-Mart. Then the officers arrested both Gray and Foster on drug charges.

In June of 2002, Gray was indicted on one count of trafficking in a controlled substance (cocaine) in the first degree; one count of fleeing or evading the police in the first degree; two counts of wanton endangerment in the first degree; one count of tampering with physical evidence; one count of escape in the second degree and one count of being a persistent felony offender in the first degree. Gray proceeded to trial and on February 4, 2003, was convicted of one count of

possession of a controlled substance (cocaine) in the first degree; one count of fleeing or evading police in the first degree; two counts of wanton endangerment in the second degree; and one count of persistent felony offender in the first degree. Foster also was indicted as Gray's co-defendant but he pled guilty. During Gray's trial, Foster was called to the stand by the Commonwealth to testify against Gray.

**FIRST CLAIM: THE TRIAL COURT IMPROPERLY POLLED JURY**

Gray insists that the Fayette Circuit Court violated RCr 9.57(2) by improperly polling the jury. Gray admits that he did not preserve this issue for appeal and asks this Court to review it as palpable error under RCr 10.26.

After deliberating for around two hours, the jurors sent a note to the trial court asking what would happen if they could not reach a consensus on the trafficking charge. In response to the note, the trial court brought the jury back into the court room and polled the jury. The jurors told the trial court that the vote was nine to three. The trial court then instructed the jury in accordance with RCr 9.57(1), and the jury retired for further deliberations.

Gray points out that RCr 9.57(2) prohibits the trial court from polling the jury when it is deadlocked. In Brasfield v. United States, 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926), the jury in a criminal case found itself deadlocked. In

resolving the issue, the trial court polled the jury. The United States Supreme Court reversed the conviction and held that, by polling the jury, the trial court had improperly, but immeasurably, influenced the jury. Gray insists that this Court should reverse his conviction as the Supreme Court did in Brasfield.

Even though Gray failed to object, thus, failed to preserve his claim for appellate review, this Court may still consider it as palpable error under RCr 10.26. Palpable error is an irregularity that affects the substantial rights of a party and will result in manifest injustice to the party if not addressed by an appellate court. Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 837 (2003). In other words, after considering the whole case, if the appellate court does not believe that there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial. Id. The jury acquitted Gray on the trafficking charge. So, his substantial rights were not affected when the trial court polled the jury on that charge. The trial court's actions did not result in manifest injustice. So, this Court adjudges that there was no palpable error and declines to address the merit of Gray's claim.

**SECOND CLAIM: CONFLICT OF INTEREST**

At a status hearing, Gray's trial counsel moved to be withdrawn as counsel. Trial counsel argued that if Gray were to testify, trial counsel would have to ask the trial court's permission for Gray to testify in the narrative. Gray argues that the trial court erred when it denied the withdrawal motion because the motion alerted the trial court to a potential conflict of interest that the trial court failed to properly investigate. Gray points out that the only investigation done by the trial court was to ask Gray if he were satisfied with his attorney. Gray cites Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978), and argues that since the trial court failed to properly investigate the potential conflict, this Court should presume he was prejudiced by the conflict.

Not only does Gray argue that a potential conflict existed, but he also argues that this conflict of interest actually existed and it adversely affected his trial counsel's representation. Gray insists that the proof of this actual conflict can be found in the record. When the prosecutor cross-examined Gray, she introduced evidence that Gray had a prior felony conviction, in order to cast doubt on Gray's credibility. On re-direct, the following exchange took place between Gray and his trial counsel.

COUNSEL: You pled guilty when you were convicted of a felony before, correct?

GRAY: Yes.

COUNSEL: And you had taken responsibility for what you had done?

GRAY: Yes.

COUNSEL: And why is that you're going to trial this time?

GRAY: Because I'm innocent. I didn't have nothing to with it.

COUNSEL: But if you were guilty, you would have pled guilty, correct?

GRAY: Yes, because, you know.

After this exchange, the prosecutor immediately introduced evidence that Gray had two prior felony convictions and that, in one, Gray had been tried and convicted by a jury. This contradicted Gray's implication in this case that if he had been guilty he would have pled guilty instead of proceeding to trial. The prosecutor later emphasized this in her closing argument. Gray argues that this proves the existence of an actual conflict of interest, therefore the trial court erred when it denied the withdrawal motion.

First, since Gray's counsel alerted the trial court that he would have to request permission for Gray to testify in the narrative, it is obvious that trial counsel believed that if Gray were to testify, he would commit perjury. So he asked to

be withdrawn to avoid a breach of ethics. Due to his ethical duty of confidentiality, Gray's trial counsel would have been prohibited from revealing any further information to the trial court. Given this, the trial court adequately investigated the situation without infringing on the duty of confidentiality that Gray's trial counsel owed to him.

Second, while Gray insists that his counsel acted under an actual conflict, he fails to explain how the exchange between himself and his trial counsel proves the existence of a conflict of interest. He also fails to show how this alleged conflict affected the adequacy of his trial counsel's representation. The record shows that Gray's trial counsel was obviously attempting to bolster Gray's credibility after the prosecutor had vigorously attacked it. The fact that the prosecutor exploited this attempted exchange does not prove the existence of a conflict of interest. Nor does it support Gray's allegation that the trial court erred.

**THIRD CLAIM: DOUBLE JEOPARDY**

Gray insists that double jeopardy prohibited the Commonwealth from prosecuting him for both fleeing or evading in the first degree and wanton endangerment in the first degree. According to Gray, fleeing or evading contains all the elements of wanton endangerment. While fleeing or evading requires proof of at least one additional element that wanton endangerment does

not, Gray contends that all of the elements for wanton endangerment are contained in fleeing or evading. So he concludes that double jeopardy applied.

According to Commonwealth v. Burge, Ky., 947 S.W.2d 805, 811 (1996), cert. denied, 522 U.S. 971, 118 S. Ct. 422, 139 L. Ed. 2d 323 (1997), when answering questions concerning double jeopardy, the Commonwealth uses the analysis found in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932). Double jeopardy does not prohibit the Commonwealth from charging an accused with two crimes arising out of the same course of conduct as long as each statute requires proof of an additional element which the other does not.

The elements required to prove fleeing or evading in the first degree and to prove wanton endangerment in the first degree are:

**Fleeing or Evading in the First Degree**

(1) A person is guilty of fleeing or evading in the first degree:

(a) When, while operating a motor vehicle

with intent to elude or flee

the person knowingly or wantonly disobeys a direction to stop his or her motor

**Wanton Endangerment in the First Degree**

A person is guilty of wanton endangerment in the first degree

when, under circumstances manifesting extreme indifference to the value of human life,

he wantonly engages in conduct which creates a substantial danger of death

vehicle given by a person or serious physical injury to  
recognized to be a police officer, and at least one (1) another person. KRS 508.060  
of the following conditions  
exists:

4. By fleeing or eluding, the  
person is the cause, or  
creates substantial risk, of  
serious physical injury or  
death to any person or  
property[.] KRS 520.095

To prove fleeing or evading, the Commonwealth must prove the following elements: that the accused was operating a motor vehicle; that he had intent to flee; and that he knowingly or wantonly disobeyed a police officer's order to stop. Wanton endangerment does not contain these elements. To prove wanton endangerment, the Commonwealth must prove that the accused manifested an extreme indifference to the value of human life. Fleeing or evading does not contain this element. As can be seen, fleeing or evading requires proof of three additional elements that wanton endangerment does not. Wanton endangerment requires proof of one additional element that fleeing or evading does not. Therefore, double jeopardy did not prohibit the Commonwealth from prosecuting Gray for both charges.

**FOUR CLAIM: INSUFFICIENT EVIDENCE**

Gray argues that the trial court erred when it denied his motion for directed verdict. He argues that the Commonwealth did not present sufficient evidence to convict him

of fleeing or evading the police. To support Gray's argument, he points to the testimony of Sergeant Hart. Gray claims that Hart testified that if he had not jumped back when Gray fled, Gray's car would have, at most, run over Hart's feet. Gray points out that to prove fleeing or evading, the Commonwealth had to prove that there was a substantial risk of death or serious physical injury. According to Gray, Hart's testimony did not prove that he was at risk of either death or serious physical injury. Gray concludes that the trial court should have granted him a directed verdict concerning fleeing or evading.

When reviewing the denial of a directed verdict, the test is whether, given the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Schoenbachler v. Commonwealth, 95 S.W.3d at 837, quoting Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). Hart did not testify as Gray claims. Hart testified that he was standing up against the passenger side of Gray's car when Gray fled, and if he had not jumped back, Gray's car would have struck him or would have, at the very least, run over his feet. Given this evidence, it was clearly reasonable for the jury to conclude that Hart faced a substantial risk of death or serious physical injury. So, the trial court did not err when it denied Gray's motion for directed verdict.

**FIFTH CLAIM: IMPEACHMENT**

Gray argues that the Fayette Circuit Court erred when it allowed the prosecutor to impeach Foster by playing an audiotaped recording of a conversation Foster had with Nicole Osborne. During the trial, the Commonwealth called Foster to the stand to testify against Gray. But to the prosecutor's chagrin, Foster testified that Gray knew nothing about the cocaine and that he never possessed it. Foster testified that he exclusively possessed the cocaine. In response to Foster's testimony, the prosecutor confronted Foster with this statement, "It was in his pocket. That's the only reason I told him to pull over." Foster had made this statement during a telephone conversation with Nicole Osborne. After a bench conference, Gray's trial counsel objected to the prosecutor playing the tape. He argued that the tape was ambiguous, prejudicial, and misleading. He argued that the tape gave no indication what the "it" in Gray's pocket was and he felt that the tape would cast Gray in a bad light. The trial court overruled the objection, and the prosecutor played the tape. The jury heard Foster say to Osborne, "Nik, you know when they first pulled us over, right? It was in his pocket. That's the only reason I told him to pull over." After the tape was played, Foster testified that the "it" to which he referred had not been the cocaine but had been Gray's cell phone. Later, Gray testified the same way.

On appeal, Gray argues that the Commonwealth failed to meet the foundational requirements found in KRE 613. KRE 613 concerns the admission of prior statements made by a witness. Before a prior statement can be admitted, the witness must be confronted with the statement and questioned about the circumstances surrounding it such as time, place, and persons present. Gray points out that the prosecutor failed to ask Foster any of these questions. Gray also argues that the Commonwealth failed to properly authenticate the tape as required by KRE 901.

The Commonwealth counters that Gray failed to properly preserve this issue for appeal. This Court agrees. "A party is confined to specific grounds of objection to the admission of evidence and is deemed to waive any other ground. It is too late to present other grounds on appeal." Harris v. Commonwealth, Ky., 342 S.W.2d 535, 539 (1960). At trial, Gray objected to the tape as being misleading, ambiguous, and prejudicial. He did not object based on foundation. Since Gray never argued lack of foundation, he failed to properly preserve his claim for appellate review.

Even though Gray failed to properly preserve his claim, this Court may still consider it as palpable error under RCr 10.26. But this Court finds that the admission of the tape, despite the lack of proper foundation, did not affect Gray's

substantial rights. At trial, if Gray had objected based on lack of foundation, the trial court would have been obliged to sustain the objection. But this would not have excluded the tape automatically. The prosecutor would still have had an opportunity to meet the foundational requirements. She could have done this through Foster. He was on the stand and he was familiar with the taped conversation since it was his conversation with Osborne that had been taped. If the prosecutor had provided the proper foundation, and this Court believes she would have, the tape would have been perfectly admissible since it contained highly relevant evidence that not only impeached Foster but also placed the cocaine in Gray's pocket. The admission of the tape did not result in manifest injustice. So this Court declines to review Gray's claim as palpable error.

**SIXTH CLAIM: PROSECUTORIAL MISCONDUCT**

Gray presents a laundry list of alleged prosecutorial misconduct that he believes rendered his entire trial fundamentally unfair. First, he contends that the prosecutor intentionally elicited inadmissible evidence from Monica Jones ("Jones"). Jones, who has a daughter by Gray, testified on Gray's behalf. She stated that Gray was watching her daughter on April 28th, implying that Gray could not have been in Pennsylvania retrieving cocaine. According to Jones, Gray

watched her daughter every day that Jones had to work. The prosecutor asked if Gray had watched Jones's daughter during the entire month of April. Jones replied he had. The prosecutor asked if Gray had done so in March as well. Jones answered he did after he was released from jail. Gray contends this was prosecutorial misconduct that rendered his trial fundamentally unfair.

In order to reverse a conviction based on prosecutorial misconduct, the prosecutor's action must have been so egregious that the entire trial was rendered fundamentally unfair. Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 805 (2001), cert. denied, 535 U.S. 1059, 122 S. Ct. 1921, 152 L. Ed. 2d 829 (2002). The record reveals no evidence that the prosecutor intentionally elicited from Jones that Gray had been incarcerated in March of 2002. Jones simply volunteered this information when answering an unrelated question. Also, Gray admits he failed to object to the prosecutor's questions. The prosecutor's actions did not constitute prosecutorial misconduct.

Second, Gray claims that the prosecutor elicited testimony from Hart and Famularo with the intent to suggest that Gray was subject to random urine drug tests. Both officers testified that Famularo had found latex gloves on Gray's person. Both also testified that drug dealers often used latex gloves to

prevent drugs from being absorbed into the skin. This would allow a person to test clean if subjected to a urine drug test. Gray claims that this line of questions also constituted misconduct.

When she questioned the officers about the latex gloves, the prosecutor was not eliciting testimony suggesting Gray was subject to urine drug tests. The record clearly shows the prosecutor was intentionally eliciting testimony that would suggest that Gray was a drug dealer, which only makes sense because Gray had been, in fact, charged with trafficking in cocaine. Given this, the prosecutor's questions were proper.

Third, Gray claims that the prosecutor effectively testified during Foster's testimony. On re-direct, the prosecutor asked Foster if he were aware that the Fayette Commonwealth Attorney's Office never objected to shock probation when a person was eligible for it. Foster answered no and the prosecutor said, "Well, now you are." Gray claims that the prosecutor's actions rendered his trial fundamentally unfair.

According to the record, Gray's trial counsel questioned Foster about his eligibility for shock probation in an attempt to bolster his credibility. The prosecutor was merely attempting to attack Foster's credibility. Her actions did not constitute misconduct, hence they did not render Gray's trial fundamentally unfair.

Fourth, Gray accuses the prosecutor of intentionally eliciting evidence of post-Miranda silence. The prosecutor asked Famularo if Gray had been read his Miranda rights. The officer testified yes. The prosecutor asked if Gray had made any statements. Famularo testified no. The subject was never mentioned again. Gray insists that this violated Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

According to the record, the prosecutor did in fact ask whether Gray had made any statements after he had been read his Miranda rights. But this question did not violate Wainwright as Gray insists. In Wainwright, the United States Supreme Court held that it is fundamentally unfair for a prosecutor to make evidentiary use of a criminal defendant's post-Miranda silence in order to impeach the defendant or to prove the defendant's sanity. Wainwright v. Greenfield, 106 S. Ct. at 640-641. After reviewing the record, this Court found no instances where the prosecutor made any evidentiary use of Gray's post-Miranda silence. Absent such evidentiary use by the prosecutor, such a question would not constitute misconduct.

Fifth, Gray argues that the prosecutor intentionally invoked the "war on drugs" to inflame the jury. To support his argument, he cites United States v. Solivan, 937 F.2d 1146 (6<sup>th</sup>

Cir. 1991). Gray insists that this constituted prosecutorial misconduct that would justify reversal.

The prosecutor spoke extensively about drug trafficking in her closing argument. But, at no time did the prosecutor call upon the jury to act as the conscience of the community by convicting Gray. The prosecutor did not call upon the jury to send a message to other drug dealers by convicting Gray. She did not suggest in any way that the jury had the duty to protect the community from drug dealers. Nor did she suggest the only way the jury could protect the community was by convicting Gray. During closing argument, both attorneys in a criminal case are given great leeway in what they argue. Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 412 (1987), cert. denied, 490 U.S. 1113, 109 S. Ct. 3174, 104 L. Ed. 2d 1036 (1989). And while she often referred to the business of drug trafficking, she did not attempt either intentionally or unintentionally to inflame the passions of the jury. The prosecutor's closing argument did not render Gray's trial fundamentally unfair.

#### **CONCLUSION**

None of Gray's alleged errors, taken either individually or cumulatively, justify reversing his conviction. Therefore, this Court affirms his conviction.

ALL CONCUR.

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