

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001418-MR

KENNETH R. BREWER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 02-CR-01159-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: JOHNSON, MINTON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Kenneth R. Brewer has appealed from the final judgment and sentence entered by the Fayette Circuit Court on June 4, 2003, finding him guilty pursuant to a jury verdict of robbery in the second degree,¹ possession of a controlled substance in the third degree,² and as being a persistent felony offender in the first degree (PFO I).³ Having concluded that any

¹ Kentucky Revised Statutes (KRS) 515.030.

² KRS 218A.1417.

³ KRS 532.080(3).

error committed by the trial court by allowing inadmissible testimony was not preserved for appellate review and does not rise to the level of palpable error, we affirm.

The trial testimony most favorable to the Commonwealth revealed that Jason Reeves was working at a BP gasoline station on North Broadway in Lexington, Kentucky on September 13, 2002, when Kenneth Brewer, Timothy Brewer,⁴ and Joe Bennett, whose wife worked at the BP, came into the store at approximately 10:40 p.m. The three men, who apparently came into the store for cigarettes, beer, and food, appeared to be intoxicated. Reeves witnessed the three men "carrying on and pushing things over" in the store. Brewer approached Reeves and offered to sell him some "little white pills," but Reeves declined the offer. The three men left the store at approximately 11:00 p.m., but according to Reeves, Brewer came back about 15 minutes later and took eight, 12-pack containers of beer from the store.

Reeves testified that employees of the store and their relatives were authorized to take merchandise from the store, so long as a "tab" was kept on the items. Consequently, Reeves took no action in stopping the three men from removing the items from the store. However, Reeves testified that after the three men took the beer to their car, Brewer came back inside the

⁴ Kenneth and Timothy are brothers. Timothy was also charged as a result of this robbery.

store, hit Reeves with a baseball bat, and stated "you are being robbed." Reeves stated that Brewer demanded money and asked for the keys to Reeves's car. Reeves testified that Brewer then took some money from the cash register and store safe and apologized for hitting him with the baseball bat. Brewer also allegedly offered to split the money with Reeves if Reeves would give Brewer his phone number. Reeves gave Brewer a false phone number, and Brewer instructed Reeves to tell the police that a black man had robbed the store.⁵ Subsequently, Reeves stated that he observed Kenneth and Timothy Brewer pushing their vehicle off the station's parking lot onto North Broadway.⁶ Joe Bennett, who had re-entered the store while Kenneth Brewer was taking money from the cash register and store safe, remained at the scene.

Officer Jared Harris of the Lexington Police Department responded to the police dispatch and went to the BP station to investigate. Officer Harris obtained a description of the Brewer brothers from Reeves and their names from Bennett. Officer David Hart also responded to the dispatch and began patrolling the area where the BP station was located. Officer Hart soon noticed two men pushing a blue Chevrolet Nova, which matched the description of the car Kenneth Brewer had been

⁵ Brewer is Caucasian.

⁶ At that time, the vehicle would not start because of mechanical problems.

driving, on North Broadway. After circling back towards the two men, Officer Hart stopped and asked the men if they needed assistance. As Officer Hart walked by the vehicle, he saw in plain view several 12-packs of beer, cartons of cigarettes, and a baseball bat.

Shortly thereafter, Officer James Ison arrived to assist Officer Hart. Officer Ison, who had already been to the BP station, recognized the beer and cigarettes as being items that had been taken from the store. Officer Hart and Officer Ison then placed Kenneth and Timothy Brewer under arrest. A search of Kenneth Brewer's person revealed three pills, which turned out to be a generic form of the prescription drug Xanax, and \$650.00 in cash. Kenneth Brewer was then taken back to the BP station where Reeves identified him as being the individual who had struck Reeves with the baseball bat. After his arrest, Kenneth Brewer alleged that he, Timothy Brewer, Bennett, and Reeves were all "in" on the robbery.

On November 13, 2002, Kenneth Brewer was indicted by a Fayette County grand jury on one count of robbery in the first degree,⁷ one count of possession of a controlled substance in an improper container,⁸ and as being a PFO I.⁹ At a trial held on May 7, 2003, the jury found Brewer guilty on one count of

⁷ KRS 515.020.

robbery in the second degree, one count of possession of a controlled substance in the third degree, and as being a PFO I. The jury recommended that Brewer be sentenced to six months in jail for his conviction for possession of a controlled substance in the third degree, and five years' imprisonment for his conviction for robbery in the second degree, which would then be enhanced to 15 years' imprisonment pursuant to his PFO I conviction. On June 4, 2003, after a pre-sentence investigation had been completed, the trial court followed the jury's recommendations and sentenced Brewer to a total sentence of 15 years' imprisonment.¹⁰ This appeal followed.

Brewer claims that during the presentation of the Commonwealth's case-in-chief, Officer Harris and Sergeant Wallace Hayes impermissibly gave opinion testimony regarding their beliefs as to the veracity of the statements Reeves had made to the officers on the night of the robbery. Brewer specifically points to four instances in which this allegedly inadmissible testimony was given:

⁸ KRS 218A.210.

⁹ Timothy Brewer was indicted under the same indictment on identical charges, and both men were tried together. At the close of all evidence, the trial court granted Timothy's motion for a directed verdict of acquittal on all charges.

¹⁰ Pursuant to KRS 532.010(1)(a), Brewer's sentence for his conviction for possession of a controlled substance in the third degree was ordered to run concurrently with his other sentences.

Q: After speaking with [Reeves], did you consider him to be a suspect?

Officer Harris: I did not consider him to be a suspect. He seemed pretty shaken up. He had a visible injury where he was struck by something. He claimed it was a baseball bat.

. . .

Q: After speaking with [Bennett], did you consider him to be a suspect?

Officer Harris: I did not consider him to be a suspect. He seemed to be blown away that they actually did it. He was kind of in awe, and he didn't seem to want to be a part of it.

. . .

Q: Tell the jury why you didn't request any other type of fingerprinting, or, just any other type of police processing [at the scene]?

Officer Harris: Everything happened as far as the suspects being located and whenever that happened, [Reeves], his story matched up with the scene. There were busted beer bottles at the scene like he had stated previously, and everything seemed to match up. They got out with the suspects' vehicle, it was pretty close to the scene.

Later, Sergeant Hays testified in part as follows:

Q: Can you tell us why [you didn't charge Reeves and Joe Bennett]?

Sergeant Hays: [Reeves] was the clerk at the store. He had [a] visible injury to his back, which was allegedly caused by being struck with a baseball bat. No information was gained which led me to believe that he was involved in this as far as being an inside from the top operation. Also, nothing he said implicated Mr. Bennett.

As Brewer has conceded on appeal, no objection was made at trial to the introduction of the above testimony. Thus, these alleged errors were admittedly not preserved for appellate review. However, Brewer argues that his convictions should nevertheless be reversed pursuant to the palpable error rule.¹¹ We disagree.

"A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error."¹² For an error to be palpable, it must have been "easily perceptible, plain, obvious and readily noticeable."¹³ Moreover, "[t]he reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief."¹⁴

Essentially, Brewer argues that Officer Harris and Sergeant Hays impermissibly stated that, in their respective opinions, Reeves's version of the events should be believed over

¹¹ See generally Commonwealth v. Pace, Ky., 82 S.W.3d 894, 895 (2002)(stating that "[t]he general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived. An 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'" [citations omitted]); and Kentucky Rules of Criminal Procedure 10.26.

¹² Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

¹³ Burns v. Level, Ky., 957 S.W.2d 218, 222 (1998)(citing Black's Law Dictionary (6th ed. 1995)).

¹⁴ Partin, supra at 224.

the version of the events as stated by Brewer. In other words, Brewer claims that the officers impermissibly testified that Brewer's defense at trial, i.e., that Reeves was "in on it" with the other three men, was not credible.¹⁵ In a related argument, Brewer claims that if any one of the officers' statements was not a sufficient error to warrant a reversal of his conviction, the cumulative effect of all four statements constitutes palpable error, which justifies a reversal. We reject both contentions.

Although the testimony at issue probably was inadmissible evidence,¹⁶ there was a substantial amount of other evidence upon which the jury could have concluded that Reeves was not an accomplice to the robbery. In addition to Reeves's own testimony in which he identified Brewer as the man who had hit him with the baseball bat and who had stolen cigarettes and

¹⁵ Since a robbery is committed against a person and not a store, we assume that Brewer's contention is that Reeves could not have been robbed because he was a co-conspirator in the theft from the store. See Morgan v. Commonwealth, Ky., 730 S.W.2d 935, 937 (1987)(stating that "[w]hereas theft has always been considered to be a crime against property, the distinguishing element between theft and robbery is the additional element of the use or the threat of immediate use of physical force against a person"). Of course, Brewer could still be found guilty of theft by unlawful taking over \$100.00, but that offense is a Class D felony, while robbery in the second degree is a Class C felony.

¹⁶ See generally Bussey v. Commonwealth, Ky., 797 S.W.2d 483, 485 (1990)(stating that "[t]here is little doubt that Officer Shirley's statement amounted to a declaration that he believed the story told by the victim. In a number of cases, this has been held reversible error"). It should be noted that the Court in Bussey expressly found that the defendant's counsel at trial had properly objected to Officer Shirley's testimony, which thereby preserved the issue for appellate review.

money from the cash register and store safe, Officer Harris testified that Bennett also identified Brewer as the individual who had committed those same acts. Furthermore, Reeves had visible injuries on his right shoulder as a result of being hit with a baseball bat.

Therefore, based on this evidence, we cannot conclude that a “manifest injustice” resulted from the introduction of the testimony at issue,¹⁷ or that there was a “substantial possibility” that the result would have been different if that testimony had been objected to and excluded at trial.¹⁸ Accordingly, we reject Brewer’s argument that the introduction of this evidence resulted in a “manifest injustice” warranting a reversal of his convictions.

Based on the foregoing, the final judgment and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

John R. Tarter

¹⁷ See Pace, 82 S.W.3d at 895.

¹⁸ See Partin, 918 S.W.2d at 224.

Assistant Attorney General
Frankfort, Kentucky