

RENDERED: February 4, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002650-DG

WAYNE DEBOE

APPELLANT

ON DISCRETIONARY REVIEW FROM MCCRACKEN CIRCUIT COURT  
V. HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 03-XX-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: It is well established that objections to incompetent evidence offered at trial must be timely made in order to preserve the issue for review on appeal. If an evidentiary issue is not properly preserved, the appellate court may only reverse if there is palpable error. The question we are asked to review is whether a police officer's opinion testimony regarding the combined effects of taking both alcohol and Lortabs was properly allowed in evidence at trial. We

believe the testimony should have been excluded. But the issue was not preserved for review by a sufficient and timely objection at trial. And because we do not believe introduction of this testimony affected the defendant's substantial rights, we affirm.

Wayne Deboe was making a left turn out of the parking lot of Jimbo's Tavern when Kentucky State Police Sergeant Keith Mick first spotted him. Mick testified that Deboe pulled out in front of oncoming traffic, failed to use a turn signal, and straddled the centerline of the road while driving. After stopping Deboe, Mick observed that he had a "strong," "noticeable" smell of alcohol; that he was swaying back and forth on a level surface; and that his responses were very slow. When Mick asked Deboe if he had been drinking, Deboe confessed that he had consumed three or four beers at Jimbo's Tavern and that he had been taking Lortabs for a bad knee. Deboe admitted that he had taken one 10-milligram Lortab pill that morning and another 10-milligram pill earlier in the evening. Mick arrested Deboe for driving under the influence (DUI).

Deboe refused a field sobriety test, and he refused to give a blood and urine sample after Mick transported him to a local hospital. Upon arriving at the county jail, Deboe submitted to a breathalyzer test and blew a 0.054.

At trial in the district court, Mick was asked several questions regarding his on-the-job experience. He testified that he had been a police officer for 24 years and had been a state trooper for 17½ years. Mick guessed that during his tenure as a police officer, he had made approximately twelve hundred to fifteen hundred DUI arrests and that he had "abundant" experience observing people under the influence of intoxicants.

During direct examination, Mick was asked his opinion as to the effect that the combination of alcohol and Lortabs has on a person. Defense counsel objected. Following a brief bench conference, the trial court allowed the Commonwealth to proceed further in this vein on the condition that it lay a proper foundation.<sup>1</sup> Thereafter, the Commonwealth's line of questioning was rephrased in order to establish that Mick had previous exposure to people who had taken a combination of alcohol and Lortabs. Mick estimated that he had observed people under the influence of both alcohol and Lortabs some thirty times and people under the influence of both alcohol and some other depressant approximately one hundred times.

---

<sup>1</sup> The discussion between counsel and the trial judge during the bench conference at trial is inaudible. However, we have assumed that the judge instructed the prosecution to lay a foundation because of the way in which the prosecutor's line of questioning proceeded from that point and because Deboe's brief stipulates as such.

Based on this experience, Mick ventured to say that in his opinion, drugs and alcohol "amplify" each other when consumed simultaneously. Mick further asserted that in his opinion, the combination of alcohol and Lortabs was the source of Deboe's intoxication. He stated that it was obvious there was "something wrong" with Deboe but that it was unlikely that a blood alcohol level of 0.054 was the sole catalyst for Deboe's behavior. Because Deboe had already admitted to consuming both alcohol and Lortabs, Mick assumed the intoxicants had "amplified" each other, resulting in Deboe's peculiar conduct.

The defense did not interpose an objection to Mick's opinion, nor was there a motion to strike. In fact, no further mention was made of any opposition to Mick's testimony until Deboe's conviction was appealed.

On appeal, Deboe asserted that Mick's testimony should have been excluded because it was not the proper subject matter of lay witness testimony. Specifically, Deboe argued that "Trooper Mick should not have been allowed to testify regarding his opinion that Loratab [sic] and alcohol 'amplify each other' because that opinion was not 'rationally based on the perception of the witness' as required by KRE<sup>2</sup> 701." Alternatively, Deboe claimed Mick's testimony should have been excluded because he

---

<sup>2</sup> Kentucky Rules of Evidence.

was not qualified as an expert witness and because his testimony was more prejudicial than probative. On appeal, the reviewing circuit court disagreed with Deboe, finding that "the Trooper possessed sufficient knowledge and experience on the question to satisfy the requirements of KRE 701 and aid the jury in its determination." Therefore, Deboe's conviction was affirmed; and his appeal was dismissed with prejudice. We granted discretionary review of the circuit court's decision.

Our analysis of this case necessarily begins with a discussion of contemporaneous objections. As stated, defense counsel initially objected to Trooper Mick's testimony. But after the Commonwealth was permitted to proceed with foundation questions, the objection to the offering of an opinion was never reasserted and counsel did not make a motion to strike.

RCr<sup>3</sup> 9.22 states:

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or any objection to the action of the court, and on request of the court, the grounds therefor . . . .

KRE 103(a) further states that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a

---

<sup>3</sup> Kentucky Rules of Criminal Procedure.

substantial right of the party is affected; and (1) . . . [if] the ruling is one admitting evidence, a timely objection or motion to strike appears of record . . . ."

The issue of contemporaneous objections has been widely discussed by our courts. In Salisbury v. Commonwealth,<sup>4</sup> we described RCr 9.22's requirement of a contemporaneous objection to be "salutary . . . because it gives the trial judge an opportunity to remedy any errors in the proceedings."<sup>5</sup> We have further stated:

[o]ne claiming error may not rely on a broad ruling and thereafter fail to object specifically to the matter complained of. When trial counsel is aware of an issue and fails to request appropriate relief on a timely basis, the matter will not be considered plain error for reversal on appeal.<sup>6</sup>

Moreover, the Supreme Court recently established 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. The general rule is that a party must make a proper objection to the trial court and request a ruling on the 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." In

---

<sup>4</sup> 556 S.W.2d 922 (Ky.App. 1977).

<sup>5</sup> *Id.* at 926.

<sup>6</sup> Tucker v. Commonwealth, 916 S.W.2d 181, 183 (Ky. 1996).

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."<sup>7</sup>

Upon review of the record, we believe defense counsel failed to contemporaneously object to the introduction of Mick's testimony. Although counsel made an initial objection, opposition to Mick's testimony was never reasserted after the Commonwealth laid a foundation and proceeded with direct examination. Likewise, counsel did not make a motion to strike after Mick testified. We believe this error constitutes a failure to adhere to the requirements of RCr 9.22 and KRE 103 and, therefore, amounts to a failure to preserve the issue for appellate review.

However, as established in Commonwealth v. Pace, reversal may still be warranted if we find that the error is "a 'palpable' one which affected the defendant's 'substantial rights' and resulted in 'manifest injustice.'"<sup>8</sup> In order to make this determination, we must fully discuss Deboe's arguments.

Deboe's brief consists of three main contentions: first, Mick's testimony was not admissible as lay witness opinion testimony under KRE 701; second, Mick was not qualified as an expert witness under KRE 702; and, third, the probative

---

<sup>7</sup> Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002) (citations omitted).

<sup>8</sup> *Id.*

value of Mick's testimony was outweighed by the danger of undue prejudice.<sup>9</sup>

Deboe first argues that Mick's testimony was erroneously introduced as lay witness opinion testimony.

KRE 701 states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness; and
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

In its brief, the Commonwealth argued that Mick's testimony was admissible as lay witness opinion testimony because "[i]t has long been the law in Kentucky that [lay] witnesses can offer an opinion as to intoxication." Citing Commonwealth v. Rhodes,<sup>10</sup> the Commonwealth stated that because Mick was a state trooper and because he observed Deboe's driving and physical condition, he "was qualified as a witness, both lay and expert, to offer an opinion that the motorist was intoxicated."

We agree with the Commonwealth's interpretation of the Court's holding in Rhodes; however, the decision in Rhodes is

---

<sup>9</sup> KRE 403.

<sup>10</sup> 949 S.W.2d 621 (Ky.App. 1996).

inapplicable to this case. There is no question that a lay witness, whether a police officer or otherwise, may offer his opinion as to a person's intoxication. And there is no question as to the admissibility of Mick's opinion in this case regarding Deboe's intoxication at the time of his arrest. Rather, the focus of our review is whether Mick could offer his opinion as to the effect that the combination of alcohol and Lortabs has on a person.

Deboe asserts that lay witnesses "should not be allowed to give opinions in regards [sic] to the ability of unknown amounts of drugs and alcohol to amplify each other." We agree. There is no doubt that Mick had extensive exposure to people who had consumed both alcohol and other depressants; however, this exposure alone was insufficient to justify his testimony that drugs and alcohol "amplify" each other. We do not believe that such a sweeping statement on the combination of alcohol and Lortabs is the proper subject matter of lay witness opinion testimony. Moreover, we do not consider the pharmacological effects of two intoxicants on the human organism to be a topic that can necessarily be "perceived" based on a lay witness's experiences. So, we hold that Mick's testimony was improperly admitted as the opinion of a lay witness.

However, although we agree that the testimony was erroneously admitted, we may only reverse if the error was

palpable. Because Deboe failed to contemporaneously object to Mick's testimony, reversal is only necessary if the erroneous introduction of the testimony affected Deboe's substantial rights or created manifest injustice.

The jury was instructed that Deboe must be found guilty of DUI if the evidence established beyond a reasonable doubt that Deboe was operating a motor vehicle, "while the alcohol concentration in his blood or breath was 0.080 or more based on the definition of alcohol concentration," or "that while so doing he was under the influence of alcohol," or **"that while so doing he was under the combined influence of alcohol and any other substance."**

Deboe admitted to Mick at the time of arrest that he had consumed alcohol and taken Lortabs. Furthermore, Mick properly testified that in his own opinion, Deboe was intoxicated and that he later had a breathalyzer reading of 0.054. We believe this evidence was sufficient to establish that under the instructions given to the jury, Deboe could be found guilty of DUI. The fact that Mick's opinion regarding the amplified effect of alcohol and Lortabs was admitted into evidence is inconsequential; the testimony did not affect Deboe's substantial rights, nor did it result in manifest injustice. Even excluding Mick's testimony, there was sufficient evidence to convict Deboe of the crime. Deboe's

conviction did not rest on whether the combination of alcohol and Lortabs in his system had created an amplification effect; rather, as elucidated by the jury instructions, the only required proof was that Deboe was operating a motor vehicle while under the "combined influence of alcohol and any other substance." We believe this fact was proved beyond a reasonable doubt. Therefore, we do not think the erroneous introduction of Mick's lay witness opinion testimony created a palpable error constituting reversal.

Second, although we agree with Deboe's argument that Mick was not qualified as an expert witness, we are admittedly unclear whether Mick was, in fact, ever deemed to be an expert. KRE 702 permits testimony by expert witnesses if the court finds that the expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." A witness must be qualified as an expert by establishing his "knowledge, skill, experience, training, or education;" his testimony may be "in the form of an opinion or otherwise."<sup>11</sup>

A number of recent cases have enumerated specific factors that a trial court may take into account when determining if a witness qualifies as an expert. However, the

---

<sup>11</sup> *Id.*

Kentucky Supreme Court has held that these factors "are neither exhaustive nor exclusive. A trial court may apply any or all of these factors when determining the admissibility of any expert testimony."<sup>12</sup> The trial court's decision as to the admissibility of expert testimony is reviewed under the abuse of discretion standard.<sup>13</sup>

Upon review of the record, it does not appear Mick's testimony was admitted on the basis that he was an expert witness. The prosecution did not make any attempt to qualify Mick as an expert witness, nor did Mick hold himself out as an expert when he testified on the combined effect of alcohol and Lortabs. In fact, during cross-examination, Mick clearly stated that he was not a doctor or a pharmacist. The only stated basis for his testimony was his own personal experience from his exposure to people who had consumed both alcohol and Lortabs and his opinion on the resulting effects of that combination.

Nonetheless, we would like to clarify that if Mick was indeed qualified by the court to be an expert witness, such qualification was in error. Although Mick has ample experience in issuing DUI citations and extensive exposure to people intoxicated by both alcohol and other depressants, this experience does not qualify him as an "expert" on the combined

---

<sup>12</sup> Goodyear Tire and Rubber Company v. Thompson, 11 S.W.3d 575, 578 (Ky. 2000).

<sup>13</sup> Evans v. Commonwealth, 116 S.W.3d 503, 509 (Ky.App. 2003).

effects of two intoxicants. Therefore, with regard to this particular issue, we agree with Deboe's argument that Mick was not qualified as an expert witness. But because there is nothing in the record indicating that the court ever considered Mick to be an expert, we do not think the error was "palpable;" so, we affirm on this issue.

Finally, we do not agree with Deboe's argument that the probative value of Mick's testimony was outweighed by the danger of undue prejudice.<sup>14</sup> Deboe argues:

[S]uch a vague statement offered by the County Attorney's witness in effect bootstrapped expert testimony in the place of a lay witness. Only a qualified expert could determine whether the amount of alcohol in defendant's system, which mixed with a certain quantity of Loratab [sic], taken at a specific time, could or would have had an amplifying effect. In turn this caused Trooper Mick's opinion to be highly prejudicial, but with very little probative value which is in violation of KRE 403.

KRE 403 states, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." When making a KRE 403 ruling, "a trial court must consider three factors: the probative worth of the evidence, the probability that the

---

<sup>14</sup> KRE 403.

evidence will cause undue prejudice, and whether the harmful effects substantially outweigh the probative worth.”<sup>15</sup> The term “prejudice” is defined as “that which is unnecessary and unreasonable.”<sup>16</sup> Evidence is only considered “unfairly prejudicial” if it “‘appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish,’ or otherwise ‘may cause a jury to base its decision on something other than the established propositions in the case.’”<sup>17</sup> An appellate court may only reverse a trial court’s KRE 403 ruling if there is a clear abuse of discretion.<sup>18</sup>

The record does not support Deboe’s argument on this point. As we have established, there is nothing that indicates Mick was considered a “qualified expert” with regard to his knowledge of the effects of alcohol and Lortabs. Furthermore, Deboe failed to establish how the introduction of Mick’s opinion was prejudicial. There is no evidence that the jury was particularly swayed by Mick’s testimony or that the testimony had any prejudicial effect on the outcome of the case. As previously stated, any possible “amplifying” effect that the combination of drugs and alcohol may have had on Deboe was

---

<sup>15</sup> Barnett v. Commonwealth, 979 S.W.2d 98, 103 (Ky. 1998).

<sup>16</sup> Partin v. Commonwealth, 918 S.W.2d 219, 223 (Ky. 1996).

<sup>17</sup> Robert G. Lawson, The Kentucky Evidence Law Handbook, §2.10(4)(b) (4<sup>th</sup> ed. 2003).

<sup>18</sup> *Id.*

inconsequential to his conviction. Therefore, we do not believe that introduction of this testimony, albeit erroneous, could have had an "unfairly prejudicial" effect that would "provoke" the jury's "instinct to punish" or cause the jury to "base its decision on something other than the established propositions in the case."<sup>19</sup> Since we do not believe the probative value of Mick's testimony was outweighed by any alleged undue prejudice, we affirm on this issue.

For these reasons, the decision to affirm the McCracken Circuit Court upholding Wayne Deboe's conviction for DUI is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Boone Reed  
Paducah, Kentucky

BRIEF FOR APPELLEE:

David B. Wrinkle  
Paducah, Kentucky

---

<sup>19</sup> *Id.*