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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001422-MR

JUNIS MAURICE DUFFY APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 03-CR-00326

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

HENRY, JUDGE: Junis Duffy appeals from a July 1, 2004 “Final Judgment/Sentence of Imprisonment” of the McCracken Circuit Court sentencing him to fifteen years’ imprisonment. Specifically, he takes issue with certain testimony that was allowed into evidence by the trial court. On review, we affirm.

On July 17, 2003, a Paducah Police Department dispatcher notified police officers patrolling the city that a person wanted by Tennessee authorities had been seen traveling

in a particular car. Officer Brian Laird spotted the car and had the driver, Junis Duffy, pull over at the corner of Kentucky Avenue and 21st Street. Other police officers arrived shortly thereafter. Two other individuals were in the car with Duffy, but neither of them was the person wanted by Tennessee authorities.

Duffy told Officer Laird that he did not have a driver's license, so he was immediately arrested and his car was searched. Officer Wes Orazine found a bag of marijuana under the driver's seat, and Officer William Gilbert found a closed cigar box containing compact discs and a white substance that was later confirmed to be crack cocaine. Duffy admitted that the cigar box, CDs, and marijuana belonged to him; however, fingerprinting of the box ultimately proved to be inconclusive. Officers Laird and Gilbert testified that (after they reviewed the traffic stop tape that recorded the incident) when Duffy was questioned about the cigar box, he stated, "I found the box. There was crack——I hope there was no crack in it." The bulk of Duffy's appeal centers on Laird and Gilbert's testimony about this purported statement.

On September 5, 2003, Duffy was indicted by the McCracken County Grand Jury on one count of first-degree

possession of a controlled substance (cocaine—second offense),[1] one count of marijuana possession,[2] and one count of operating a vehicle without an operator's license.[3] On October 17, 2003, Duffy appeared in court and entered a "not guilty" plea. On February 13, 2004, the indictment was amended to include one count of being a second-degree persistent felony offender.[4] On February 20, 2004, Duffy again appeared in court and entered a "not guilty" plea to the indictment, including the recently added PFO charge.

The matter then proceeded to trial on April 12, 2004, where the jury found Duffy guilty of all charges and recommended sentences of ten years on the cocaine charge, twelve months on the marijuana charge, and fifteen years on the PFO charge, with the PFO sentence to run in lieu of the other two charges. The Commonwealth voluntarily dismissed the charge of failing to have an operator's license. On July 1, 2004, the trial court entered a "Final Judgment/Sentence of Imprisonment" finding Duffy guilty on all charges and sentencing him to a total of fifteen years'

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[1] A Class C felony pursuant to KRS 218A.1415.

[2] A Class A misdemeanor pursuant to KRS 218A.1422.

[3] A Class B misdemeanor pursuant to KRS 186.410.

[4] A Class B felony pursuant to KRS 532.080. The Commonwealth discovered that Duffy had previously been convicted by a Missouri court of one count of unlawful use of a weapon, and that he was consequently sentenced to 2 ½ years imprisonment.

imprisonment, in accordance with the jury's decision. This appeal followed.

Duffy's first argument on appeal concerns the testimony from Officer Laird as to what he heard Duffy say on the video tape of the traffic stop when he was asked about the cigar box. Specifically, he told the jury that Duffy stated: "I found the box. There was crack——I hope there was no crack in the box," when he was questioned about the box. On cross-examination, it was revealed that Officer Laird's testimony about the statement was not derived from his own personal memory, but rather from his multiple viewings of the traffic stop tape in the week before trial. In fact, Officer Laird made no mention of this statement during his testimony before the grand jury or at the preliminary hearing.

Duffy acknowledges that Officer Laird's interpretation of the traffic stop tape was not objected to at trial, and he therefore asks us to review its inclusion as evidence under a "palpable error" standard as set forth by RCr[5] 10.26. That provision reads as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that

[5] Kentucky Rules of Criminal Procedure.

manifest injustice has resulted from the error.

A "palpable error" is one that is easily perceived or obvious. Nichols v. Commonwealth, 142 S.W.3d 683, 691 (Ky. 2004). "Manifest injustice" refers to "[a]n error in the trial court that is direct, obvious, and observable, such as a defendant's guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds." Id., citing Black's Law Dictionary 974 (7th ed. 1999). A showing of "manifest injustice" requires proof that, upon consideration of the whole case, an error must have prejudiced the substantial rights of a defendant to such an extent that a substantial possibility exists that the result of the trial would have been different. Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky.App. 2000), citing Schaefer v. Commonwealth, 622 S.W.2d 218 (Ky. 1981); see also Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

As a general rule, a trial court is vested with broad discretion in determining whether a tape recording or video tape is of sufficient quality to permit its introduction into evidence. See Woods v. Commonwealth, 793 S.W.2d 809, 815 (Ky. 1990), citing Robert G. Lawson, "The Kentucky Evidence Law Handbook," § 7.10 (2nd ed. 1984). The trial court exercised its discretion here and found that the traffic stop tape could be

presented to the jury even though parts of it—including the statement in question—are somewhat difficult to understand.

With this said, there is no question that the trial court erred in allowing Officer Laird to give his personal interpretation of what Duffy said on the traffic stop tape. In Gordon v. Commonwealth, 916 S.W.2d 176 (Ky. 1995), our Supreme Court held that witnesses should not be permitted to give testimony interpreting what is said on a tape recording. Instead, "[i]t is for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness." Id. at 180, citing Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). Here, the record plainly reflects that Officers Laird and Gordon were testifying based upon their review of the traffic stop tape and not their personal recollection of what was said by Duffy. This is simply impermissible. Id.; see also Clifford v. Commonwealth, 7 S.W.3d 371, 374 (Ky. 1999).

The question then becomes whether an error of this nature constitutes a "manifest injustice." We believe that there is no question that the admission of this testimony into evidence was prejudicial to Duffy's defense, which was centered on the position that he was unaware that the crack cocaine was inside of the cigar box and that it did not belong to him. Allowing two police officers to tell the jury what they thought

the video tape said almost certainly carried considerable weight with the jury and influenced its ultimate decision.

Nevertheless, upon consideration of the entire record, we cannot say that the error was so prejudicial that a substantial possibility exists that the result of the trial would have been different had the testimony not come into evidence. See Castle, supra. Duffy admitted that the marijuana and cigar box were his, as well as the compact discs inside of the box. Consequently, it would not require a tremendous leap of faith for the jury to conclude that the crack cocaine was his as well. Moreover, the jury was able to view the traffic stop tape in its entirety and to witness the conversation between Duffy and Officer Laird about the cigar box and its contents, where Duffy's references to "crack"——while certainly not crystal clear——are discernable. Given these facts, we cannot say that Duffy is entitled to relief here under the "palpable error" standard.

Duffy's next argument, closely related to his first, is that the trial court erred in allowing Officer Gilbert to also give his version of what Duffy said to Officer Laird in the traffic stop tape. Given our conclusions above, it is clear that the trial court did err in this respect. Nevertheless, we must conclude that this error was harmless in nature because of the fact that Officer Gilbert's testimony in this respect only

repeated what Officer Laird, without objection, had told the jury. See Allgeier v. Commonwealth, 915 S.W.2d 745, 747 (Ky. 1996), citing RCr 9.24.

As to Duffy's final argument that it was palpable error for the trial court to allow Officer Laird to offer an "expert" opinion that it was not uncommon for persons in possession of more than one controlled substance——specifically marijuana and cocaine——to admit to owning the marijuana while denying ownership of the cocaine, we do not believe that it merits a reversal here under the standards for palpable error.

We note that our Supreme Court has held that the opinions of trained police officers in an area in which they have expertise should be distinguished from the more complex and extensive knowledge required for experts such as accident reconstructionists and forensic pathologists. Allgeier, 915 S.W.2d at 747. However, it is still necessary for a proper foundation to be laid before such evidence is admitted. See Dixon v. Commonwealth, 149 S.W.3d 426, 431 (Ky. 2004); Evans v. Commonwealth, 116 S.W.3d 503, 510 (Ky. 2003) (Citation omitted). We have questions as to whether or not an appropriate foundation was laid here for Officer Laird's opinion, but——again——given the standard for palpable error and after considering the case as a whole, we do not believe that a substantial possibility exists

that the result of the trial would have been different had this evidence not been introduced, see Castle, supra, particularly given the trial court's admonishment to the jury that Officer Laird's testimony that this conduct often occurs in other cases did not necessarily mean that it happened here.

Accordingly, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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