

RENDERED: MARCH 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001085-MR

TIMOTHY WASHABAUGH, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 04-CR-01451

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Timothy Washabaugh, Jr. (Washabaugh) brings this appeal from a judgment of the Fayette Circuit Court entered May 10, 2005, upon a jury verdict. He was adjudged guilty of second-degree criminal possession of a forged

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

instrument and first-degree persistent felony offender (PFO I),² and sentenced to ten years' imprisonment.³ We affirm.

On September 16, 2004, the checkbook that Robert Young kept above his car sun-visor and some loose change from the driver-door armrest was stolen sometime before 6:00 p.m. when he left his car unlocked outside his office.

That same evening between 7:00 and 7:30 p.m., Washabaugh presented a check from that checkbook to the owner of the Thriftway Food Mart. The owner, Gus Rayyan, routinely cashed payroll and government checks at the store, and cashed personal checks if he could verify the check with the bank and the writer. Using this latter procedure, Rayyan had cashed a personal check for Washabaugh in the previous two weeks. The check presented for cashing that evening was made out to Washabaugh for \$450.00 or \$470.00. Washabaugh presented identification, and told Rayyan that the check was payment for work he had performed for Mr. Young. As was Rayyan's routine, he attempted to verify the check. His contact with the bank's after-hours automated system was unsuccessful, as it reported that it could not find the account. He called Mr. Young's phone number on the check, reaching only the answering machine. Rayyan left a message that Washabaugh had presented a check on

² Kentucky Revised Statutes 516.060 and 532.080.

³ The jury recommended fifteen years' imprisonment.

Mr. Young's account, asking that Mr. Young call back immediately to verify the check before it could be cashed. Mr. Young did not return the call, and because he could not verify the check, Rayyan declined to cash it. Rayyan returned the check to Washabaugh, who left with it.

The next day, Mr. Young returned Rayyan's call. He also realized that his checkbook and loose change were missing from his car. Mr. Young reported the theft to the police and closed the bank account. He testified that he did not know Washabaugh and had never written Washabaugh a check or authorized one to be written to him.

Before us, Washabaugh argues denial of a fair trial in the introduction of evidence of other crimes. Specifically, Washabaugh argues a violation of Kentucky Rules of Evidence (KRE) 404(b), contending that that he was prejudiced by the testimony from Mr. Young as to the break-in of the car and theft of the checkbook, as well as testimony from the investigating police officer from the Larceny from Auto (LFA) squad describing his job duties as investigating three to four thousand local car break-ins annually along with two other officers on the squad. While admitting that this issue is not preserved for our review, Washabaugh asks us to review the issue under Kentucky Rules of Criminal Procedure (RCr) 10.26 for palpable error.

According to Ernst v. Commonwealth, 160 S.W.3d 744,

758 (Ky. 2005):

Under KRE 103(e), we review unpreserved claims of evidentiary error for palpable error. A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, [Robert G.] Lawson, [The Kentucky Evidence Law Handbook] § 1.10[8] [b], at 54 n. 146 [(4th ed. LexisNexis 2003)], and the error must have resulted in "manifest injustice." KRE 103(e); Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997). Authorities discussing palpable error consider it to be composed of two elements: obviousness and seriousness, the latter of which is present when "a failure to notice and correct such an error would 'seriously affect the fairness, integrity, and public reputation of the judicial proceeding.'" Lawson, *supra*, § 1.10[8][b], at 54 (quoting 1 McLaughlin, Weinstein's Federal Evidence, § 103.42[3] (2d ed.2003)). A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily dependent upon the facts of each case. United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1038, 1046-47, 84 L.Ed.2d 1 (1985).

At issue herein is the application of KRE 404(b) which provides:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;
- (2) If so inextricably intertwined with other evidence essential to the case the separation of the two (2) could not be

accomplished without serious adverse effect
on the offering party.

Clearly, the manner in which Mr. Young lost the checkbook was admissible under KRE 404(b)(1) as relevant to show Washabaugh's opportunity to possess the forged check. The theft of the checkbook was admissible as well under KRE 404(b)(2) as inextricably intertwined with other evidence in the case, to establish how Washabaugh could have possession of the forged check only hours after the loss. As proof of the loss is admissible to establish opportunity to possess the forged check, we also see no error in the investigating officer's explanatory testimony describing his duties with the LFA squad. In light of the totality of the evidence that the store owner, who knew Washabaugh, identified Washabaugh trying to cash the check on Mr. Young's account, and Mr. Young's testimony that he did not write a check to Washabaugh, we conclude that the testimony that Mr. Young's checkbook was stolen from his car several hours before the check was presented for cashing did not unfairly prejudice Washabaugh or have a substantial effect on the outcome of the case. As there was no manifest injustice, we find no error, palpable or otherwise.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky