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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002313-MR

WILLIAM T. POGUE JR. — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 04-CR-00623

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: William T. Pogue Jr. was convicted on two felony counts of Theft by Failure to Make Required Disposition of Property. He appeals. We affirm.

In 2003, Pogue was serving as Treasurer for Mentor Kids Kentucky, which was formerly known as Quest for Kids, a charitable organization in Owensboro. In July 2004, an annual

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS21.580.

audit of the organization turned up that two certificates of deposit, in the approximate amounts of $11,000 and $16,000, were missing. Upon being confronted with the fact that these CDs were missing, Pogue allegedly admitted to two directors of the organization that he had "messed up," had deposited the money in his own account, and had spent it for his own purposes. He promised to pay the money back, and he did so approximately two weeks later.

Pogue's version of the events was somewhat different. He claimed that he had been authorized to borrow the money from the organization and had signed a promissory note at a slightly higher rate than the organization had been receiving on its CDs. Pogue testified that the organization's executive director, Katie Herron, and two of the organization's directors, Brad Rhoads and David Payne, had been aware of this loan and had approved the promissory note.

Following a two-day trial, a jury convicted Pogue and sentenced him to one year on each count. The trial court imposed that sentence. This appeal follows.

On appeal, Pogue raises four issues: the Commonwealth impermissibly commented on his right to remain silent; the Commonwealth impermissibly elicited information about witnesses' religious beliefs to bolster their credibility; the trial court's jury instructions failed to include an instruction on

Pogue's defense of a claim of right; and the trial court failed to declare a mistrial during voir dire when a prospective juror, who was subsequently excused, referred to a witness's religion and the juror's belief that the witness would never lie. All of Pogue's arguments are raised under the palpable error rule of RCr 10.26.

As an initial matter, we note that the Kentucky Supreme Court has stated:

> The palpable error rule in RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. RCr 9.22. The general rule is that a party must make a proper objection to the trial judge and request a ruling on that objection, or the issue is waived. *See Commonwealth v. Pace,* 82 S.W.3d 894 (Ky. 2002). *See also Bell v. Commonwealth,* 473 S.W.2d 820 (Ky. 1971). 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." RCr 10.26.

Lickliter v. Commonwealth, 142 S.W.3d 65, 70 (Ky. 2004).

When a claim of palpable error is raised, our charge is to consider the case as a whole and to determine whether a substantial possibility exists that the result would have been different, absent the error. *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002). If not, then "the error will be deemed nonprejudicial." *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000). *Pace* is especially instructive on palpable error in

that it involved a prior DUI conviction which was introduced during the guilt phase of the defendant's trial in clear violation of controlling Kentucky decisions. However, in looking at the whole case, including the presented evidence which indicated that the defendant had been drinking on the night in question, our Supreme Court held the error nonprejudicial.

In the instant case, Pogue was charged with theft by failure to make a required disposition of property over $300. Supporting the charges was evidence that he transferred two CDs to bank accounts in his own name without the authorization of the organization, that he admitted the theft to board members, and that he made restitution after he was confronted. Pogue's defense was that he had borrowed the money with the board's approval, that he had given a promissory note to the organization, and that he had paid the money back. Having considered the case as a whole, we cannot say that there is a substantial possibility that the result would have been different without the claimed errors.

In reviewing the trial record, Kentucky State Police Officer Woo was asked whether he took any statements from Pogue during the investigation. To this question Woo replied negatively, but he explained that prior to the indictment he had left a message on Pogue's answering machine which Pogue did not

return, and that he had met Pogue only after he was indicted and taken to the Daviess County Detention Center, by which time Pogue was represented by counsel who refused to let Woo question him. In addition, Pogue's trial strategy was to imply that Woo's investigation was inept because Woo had never bothered to get Pogue's side of the story. He defended on grounds that his handling of the CDs had been authorized, that he had borrowed the money from the organization with the consent of the board and executive director, and that he had given a promissory note to evidence the debt.

The Commonwealth's countervailing theory was that the note had been recently fabricated, as Herron, Rhoads and Payne testified that they had never seen the note prior to the trial and Pogue had never raised the issue of the note while they were investigating. While Woo and the Commonwealth made passing references to Pogue's silence at the detention center, in part those references were in response to defense counsel's inquiry as to why Woo never sought out Pogue's side of the story. However, the record is clear that the principal focus of the Commonwealth's theory and argument was based on Pogue's failure to present the note to Herron, Rhoads or Payne while the organization was investigating the missing money.

In *Doyle v. Ohio*, 426 U.S. 610, 618-19, 96 S.Ct. 2240, 2244-45, 49 L.Ed.2d 91 (1976), the Supreme Court held that a

state could not use an accused's silence at the time of arrest and following Miranda warnings for the purpose of impeaching an exculpatory explanation given at the time of trial. However, "not every isolated instance referring to post-arrest silence will be reversible error. It is only reversible error where post-arrest silence is deliberately used to impeach an explanation subsequently offered at trial[.]" *Wallen v. Commonwealth*, 657 S.W.2d 232, 233 (Ky. 1983). The court in *Wallen* further noted that reversal is required when the prosecutor makes repeated, emphasized references to post-arrest silence. *Id.*

In the instant case, such repeated, emphasized references did not occur. The focus of the prosecutor's argument was on Pogue's pre-arrest failure to mention the alleged loan/note to the organization's board when the members were investigating the missing CDs. Thus, *Doyle* does not apply. *See also Commonwealth v. Buford*, 197 S.W.3d 66, 73 (Ky. 2006) (use of pre-arrest silence does not implicate privilege against self-incrimination where suspect was questioned by private citizen who was not acting on behalf of or in concert with the government).

As to the jury instructions, Pogue argues that he was entitled to a separate instruction on his defense of claim of right. *See* 1 William S. Cooper, *Kentucky Instructions to Juries*

Criminal, § 11.35 (4th ed. 1999). Pogue acknowledges that the principal instruction on each count included the following: "[t]hat in so doing, he intended to deprive [the organization] of the money **and was not acting under claim of right to it**." (Emphasis added.) Notwithstanding this instruction, Pogue argues that since claim of right was his principal defense he was entitled to the separate instruction. We fail to see how Pogue's substantial rights have been impaired since the instructions given contained the essential element of the defense, *i.e.*, that Pogue was acting under a claim of right, as asserted by defense counsel in his closing argument.

As to Pogue's argument that witnesses' religious beliefs were impermissibly brought out to bolster their credibility, the record indicates that the organization was Christian affiliated and faith based. We agree with the Commonwealth that some explanation of this background, was necessary since the organization had progressed through several name changes and reorganizations as Big Brothers Big Sisters, Quest for Kids and Mentor Kids Kentucky. In fact, the record indicates that Pogue, as part of his trial strategy, participated in presenting these changes to the jury. This evidence did not constitute either improper character evidence under KRE 404 or KRE 608, or impermissible use of religious beliefs to bolster a witness's credibility under KRE 610.

Finally, Pogue's argument that the trial court failed to declare a mistrial based on a prospective juror's response to the voir dire question of Pogue's trial counsel is likewise without merit. The question was whether any potential juror knew Herron, with a follow up question of whether the juror would give her testimony more weight. Under Kentucky decisions, "a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice." *Gould v. Charlton Co.*, 929 S.W.2d 734, 738 (Ky. 1996). In this instance, Pogue's counsel asked a voir dire question and received an answer which resulted in the disqualification and dismissal of a juror, with the result that the other jurors presumably did not share the biased views of the disqualified juror. In *Shegog v. Commonwealth*, 142 S.W.3d 101, 110-11 (Ky. 2004), in addressing an argument that voir dire responses had tainted an entire jury panel, the supreme court stated:

> [W]e disagree that the three juror's responses to the Commonwealth's voir dire questions tainted the entire panel. "The principal purpose of voir dire is to probe each prospective juror's state of mind and to enable the trial judge to determine actual bias and to allow counsel to assess suspected bias or prejudice." Bertelsman & Philipps, *Kentucky Practice,* (Civil Rules) 4th Ed., Vol. 7, Rule 47.01(2) (1984). The voir dire process in the case worked exactly as it should have, and the two jurors who

expressed bias were removed for cause.

Similarly, the proceedings in the instant case worked as they should have. There was no fundamental defect and manifest injustice did not occur.

The judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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