

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001153-MR

MARY ANN ESAREY

APPELLANT

APPEAL FROM PULASKI CIRCUIT COURT
v. HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 00-CR-00035
COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: KNOPF, JOHNSON, AND McANULTY, JUDGES.

McANULTY, JUDGE. Mary Ann Esarey appeals her conviction in the Pulaski Circuit Court for wanton endangerment in the first degree, complicity to retaliating against a witness, and perjury in the first degree. The charges stemmed from appellant's service on a grand jury in Taylor County.¹ The Commonwealth charged that appellant revealed the name of a confidential informant, LaBron Gaither, who was murdered the day after he

¹ Venue was changed from Taylor County to Pulaski County.

testified before the grand jury. Appellant raises numerous claims of error. We affirm.

Appellant first alleges that the case against her should have been dismissed entirely because she had a deal with the Commonwealth that she would not be prosecuted if she passed a polygraph test. In Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), the indictment was required to be dismissed because the Commonwealth had agreed to dismiss if the defendant passed a polygraph examination. The Supreme Court decided that the Commonwealth was compelled to honor its bargain. Id. at 207.

Appellant argues that the trial court erred in finding, following a hearing, that no such agreement existed. The Commonwealth Attorney testified, and submitted an affidavit in which he asserted that the deal was that if appellant passed the polygraph test, the Commonwealth would give that information to the grand jury. He stated that there was never any agreement that he would not pursue the case if appellant passed the polygraph.

An appellate court is bound by the trial court's findings of fact unless there is clear error committed or there is an abuse of discretion by the trial court. General Motors Corp. v. Herald, Ky., 833 S.W.2d 804, 806 (1992). We conclude that in this case there was sufficient evidence for the court to determine that the agreement was as the Commonwealth Attorney

stated. Appellant presents no basis for his assertion that the trial court's determination was clearly erroneous. The agreement of the parties was not committed to writing. As a result, the trial court based its decision on the recollections of the Commonwealth and appellant's former attorney. We conclude that there was no clear error since there was sufficient evidence to support the decision of the trial court.

Next, appellant argues that inadmissible hearsay evidence was introduced when the trial court allowed the Commonwealth to play a videotape of appellant's testimony before the grand jury. Her grand jury testimony formed the basis for the perjury charge. Appellant began her testimony before the grand jury by giving a statement. She stated that on July 16, 1996, when she returned from grand jury duty to the housing development where she lived, a group of her neighbors called out to her to ask her about indictments handed down that day. She said first someone asked if their name was mentioned. Appellant said although she knew she should not have, she replied in the affirmative and turned to go in her residence. Then someone yelled, "Who was the narc?" When appellant said she didn't know, her neighbor Libby Pope asked, "Was it LaBron?" According to appellant, she replied, "Something like that," and went inside.

As shown on the tape, the grand jurors then questioned appellant about the testimony of other witnesses who had testified prior to her statement. They asked about allegations that appellant was involved in using and dealing drugs, that she had volunteered information to the neighbors about the informant, and she had suggested that something needed to be done about him. One of the witnesses the grand jurors asked appellant about was Shaquille Porter, who did not testify at the trial herein. Appellant objected to the grand jury's reference to Porter's testimony on the tape as hearsay.² The trial court overruled appellant's objection, but agreed to admonish the jury. After playing the tape, the court admonished the jury to "disregard and not consider as evidence in this case the statements by members of the Taylor County Grand Jury or the Taylor County Commonwealth Attorney as to what various witnesses had said concerning the defendant before the grand jury." Appellant argues that the admission of statements by a witness who did not testify at trial violated the rule against hearsay and the Confrontation Clause.

We agree that the admission of the tape, in which Porter's grand jury testimony was repeated by members of the grand jury, does not fit within any exception to the hearsay

² Appellant contends on appeal that she moved for a mistrial. We disagree. Appellant's counsel made reference to a mistrial in argument, but never made a motion to the court.

rule. We conclude that the evidence was offered for the truth of the matter asserted in those statements. The evidence was not admissible merely because it was sworn testimony before the grand jury. See Osborne v. Commonwealth, Ky., 43 S.W.3d 234, 239 (2001). Appellant's grand jury testimony should have been redacted to remove references to hearsay statements.

However, we do not believe the admission of the evidence constituted harmful error under the circumstances of this case. First, there was the admonition given by the court. Appellant has not shown any reason to assume that the admonition would not have been followed. An admonition controls the jury and removes the prejudice which brought about the need for an admonition. Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993). Appellant did not move for a mistrial following the admonition, which indicates that satisfactory relief was granted. West v. Commonwealth, Ky., 780 S.W.2d 600 (1989).

Second, we recognize that the testimony of the absent grand jury witness was merely cumulative of witnesses who testified at trial to the same allegations regarding appellant. Libby Pope testified that appellant came to her apartment and told Pope she knew who had signed indictments and identified the informant as someone named LaBron. Pope said appellant later suggested that someone should "do a drive-by". Pope testified that appellant used drugs and had received some that night from

Myron Young for her information. Tiffany Willis testified appellant told her at Pope's apartment who the informant was and who had been indicted. Willis testified that she used drugs with appellant that night. Myron Young testified that he heard appellant say who had been indicted, then later heard appellant say the informant's name. Young testified that he got high that night with Pope, Willis and appellant. Lamont Battee testified that he heard appellant tell the group gathered at Pope's apartment that Gaither was the informant, and heard her say something about a drive-by shooting and that "something needed to be done" about him. Battee also testified to drug use by appellant.

We conclude that the hearsay testimony was merely cumulative of the testimony of witnesses at trial. Upon consideration of the whole case, if there is not a substantial possibility that the result would have been any different, this Court will hold the irregularity non-prejudicial under the harmless error doctrine. Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969). We do not believe that the hearsay testimony of Porter could have had a prejudicial effect. Given the number of witnesses who testified to substantially the same information as the absent witness, any error was harmless.

Appellant's next claim is that it was error to admit "other crimes" evidence concerning allegations of drug use, and

that the evidence of her drug involvement went beyond the Commonwealth's pretrial notice under KRE 404(c). Appellant at trial did not specifically argue that the Commonwealth's evidence did not conform to the KRE 404(c) notice. We find no error.

KRE 404 (b) states, in relevant part:

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[.]

The other crimes evidence in this case was relevant to show more than criminal disposition. The Commonwealth alleged the association with people who were drug users and suppliers provided a motive for appellant to reveal the name of the confidential informant to them. In appellant's opening statement at trial, she denied that she associated with her neighbors and said that she was not a part of the drug scene at Libby Pope's apartment. Her assertions further opened the door to the admissibility of the evidence. We conclude that there was reasonable pretrial notice of the KRE 404(b) evidence, the evidence was relevant to the issues, and was not unduly prejudicial.

Appellant next argues that she should have been allowed to introduce evidence that a relative of LaBron Gaither's had filed a wrongful death claim against the Kentucky State Police in the Board of Claims. We agree that the trial court properly excluded the evidence as not relevant to this prosecution. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. KRE 401. Appellant wanted to show that she was a "scapegoat" for the negligence of persons within state government. Nevertheless, we agree that the fact that a lawsuit was filed is not probative of her allegations. The evidence regarding the Board of Claims action would not have made any facts in evidence more probable, yet it easily could have served to confuse the issues. The trial court properly excluded it. Moreover, appellant was able to elicit evidence at trial to infer that Gaither's death resulted from the Commonwealth's method of transporting him to the grand jury to testify, and from the decision to perform a controlled drug buy using Gaither the day after he had testified before the grand jury.

Next, appellant argues that it was error to exclude testimony of Katina Brockman concerning whether others knew LaBron Gaither was an informant before appellant disclosed it.

Brockman was the girlfriend of Jason Noel, who was convicted of the murder of Gaither. On avowal, Brockman testified that she did not know for sure, but she thought that people she was with at the courthouse knew already that Gaither was the informant. She testified that at the courthouse everybody was talking about an undercover "narc" who had gotten into a particular car with Detective Danny Burton. The trial court disallowed the testimony because of hearsay and lack of basis for knowledge.

Appellant contends that the avowal testimony was non-hearsay. We agree that the evidence was proffered not to establish that Gaither was the informant or that he arrived at the courthouse in a certain car, but to show that other people knew those facts and were talking about them. However, we do not find any error in the exclusion of this testimony, because this evidence was developed at trial by another witness.

Lamont Battee was one of the men who joined in the assault on Gaither the day after the grand jury testimony. Battee testified that before appellant revealed Gaither's name, he had heard in Marion County that Gaither was working for the state police. He stated, "We knew a little bit before, but we wasn't positive." But he stated they didn't act on what they had heard because it was just hearsay, and they needed more than that.

We do not conclude the testimony of Brockman was vital to appellant's case. An error in exclusion of evidence is harmless if it would not have affected the outcome of the trial. Hill v. Commonwealth, Ky. App., 779 S.W.2d 230, 232 (1989). The jury had already heard evidence that Gaither's name had been circulated as a "narc," but only when his name was confirmed was the information acted on. Thus, evidence that Gaither's name was being mentioned at the courthouse would not have made a difference in the outcome of the trial. The exclusion of the evidence was harmless error.

Appellant next argues that she should have been granted lesser included offense instructions on the wanton endangerment charge and on the perjury charge. An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense. Houston v. Commonwealth, Ky., 975 S.W.2d 925, 929 (1998). Wanton endangerment in the first degree requires that the jury find that the conduct was wanton under circumstances manifesting an extreme indifference to the value of human life. KRS 508.060. The lower degree requires only that the conduct be wanton and create a substantial risk of physical injury. KRS 508.070.

We believe the trial court correctly denied the lesser included offense instruction for wanton endangerment in the second degree. The Commonwealth presented evidence regarding the importance of secrecy in grand jury proceedings and the danger to Gaither once his name was disclosed, including concerns raised by appellant's fellow grand jurors. Given the demise of the informant in this case, we do not agree that a reasonable juror could doubt that disclosure of an informant's name created a substantial danger of death or serious physical injury.

Appellant argues that the trial court should have given a lesser included offense instruction on the charge of "false swearing." False swearing differs from perjury in that the Commonwealth need not prove that the person was testifying in an official proceeding or that the testimony was a material false statement. Commonwealth v. Stallard, Ky., 958 S.W.2d 21 (1997). In this case, there is no question that the statement was made during an official proceeding. Whether the statement was material was a question of law. KRS 523.010(1); Commonwealth v. Stallard, supra at 24. Although there is no direct finding in the record, we conclude that the trial court impliedly found that the statement was material by denying the instruction for false swearing. We agree that a lesser included offense instruction was not justified.

Appellant argues that she should have received a directed verdict of acquittal on the perjury charge. On appellate review, the test of a directed verdict is, if under the evidence as a whole it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Perjury in the first degree requires a showing that the defendant made a material false statement, which she did not believe, in an official proceeding under an oath required or authorized by law. KRS 523.020(1). KRS 523.010(1) states that, "'Material false statement' means any false statement, regardless of its admissibility under the rules of evidence which could have affected the outcome of the proceeding. Whether a falsification is material in a given factual situation is a question of law." Appellant states that she *admitted* before the grand jury that she told the people at her housing complex that Gaither was the confidential informant. She contends that the *details* of her statements, such as whether she went over to Pope's apartment, were not material, and so there was no basis for the Commonwealth to pursue a perjury charge.

We conclude that the Commonwealth sufficiently showed evidence of a material false statement from those details. In appellant's testimony at the grand jury hearing, she portrayed

herself as trying to avoid her neighbors and as only responding to their unrelenting questions about the indictments and the informant. The Commonwealth presented evidence, however, that appellant went over to Libby Pope's apartment and freely disclosed the name of the informant and even suggested that something needed to be done about the fact that he had testified. The jury could decide that she, in the hope of avoiding indictment, altered essential details of what happened in order to portray herself as having been coerced by her neighbors. In that way, the false statements were material in that they could have affected the outcome of the grand jury proceeding as to whether or with what offenses she was indicted. The motion for directed verdict was properly denied.

Finally, appellant argues that KRS 523.070 prevents her conviction for perjury based only on a denial of guilt. Appellant did not preserve this claim of error in the trial court, but she argues this is palpable error. We review the claim of error, but we do not agree that appellant may utilize this statute. KRS 523.070 states:

No prosecution shall be brought under this chapter when the substance of the defendant's false statement is his denial of guilt in a previous criminal trial.

Appellant argues that since she was denying guilt in her testimony before the grand jury, her prosecution for perjury

under Chapter 523 as a result of that testimony is barred. The General Assembly chose specifically in this statute to bar prosecutions for denial of guilt "in a criminal trial," rather than using more expansive language to include a denial of guilt in other criminal proceedings. The grand jury proceeding was not a trial. The courts are not at liberty to add or subtract from a legislative enactment, or to discover meaning not reasonably ascertained from the language of the statute. Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994). Therefore, we do not invalidate the conviction on the basis of KRS 523.070.

For the foregoing reasons, we affirm appellant's convictions in the Pulaski Circuit Court.

ALL CONCUR.

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