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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2001-CA-002518-MR

KEVIN BLEDSOE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 01-CR-00760

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, AND McANULTY, JUDGES; AND JOHN WOODS POTTER,
SPECIAL JUDGE.¹

McANULTY, JUDGE. Kevin Bledsoe (hereinafter appellant) appeals his conviction in the Fayette Circuit Court for two counts of trafficking in a controlled substance in the first degree and one count of being a persistent felony offender in the first degree. Appellant raises multiple claims of error on appeal.

¹Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Appellant first argues that he should have been granted a mistrial because two jurors slept during his trial. After the conclusion of closing arguments, defense counsel asked to approach the bench. Defense counsel stated that he had meant to mention earlier to the Commonwealth, but forgot, that there was a juror he suspected of sleeping because he was "laying back" and had his eyes closed. Defense counsel was unsure, however, if he was doing so and also listening to the evidence. He asked that the juror in question be excused as the alternate juror. The prosecutor then indicated there was a female juror who might have been sleeping. Defense counsel requested a mistrial on the basis that the verdict could not be unanimous.

The judge denied the motion for mistrial. The judge's comments at the bench are for the most part indecipherable over the sound system, but the judge at one point stated that it was unclear whether the male juror was actually sleeping. The Commonwealth asked that the court draw an alternate juror in the usual manner. Appellant renewed his request that the juror he cited be excused. The court decided to draw an alternate as usual. Neither of the jurors discussed was dismissed as the alternate.

Following the selection of the alternate and retirement of the jury for deliberations, defense counsel asked to put the deputy in charge of the jury on the record. The

judge agreed and called the deputy to the bench. The judge said he had observed the deputy taking water to the male juror in question, and asked if that was because he had seen him sleeping. The deputy stated, "I couldn't tell. His eyes were open, his eyes were closed, he was moving around." He added, "The lady in back of the lady in red, now she was sleeping. I had the lady beside of her elbowing her periodically. Giving her the signal, then she'd elbow her." He said he didn't give her water, just "the elbow." The Commonwealth Attorney acknowledged that juror was the one she had noticed. Defense counsel asked about the male juror again. The judge remarked that when the deputy brought him water, the juror sat right up and grabbed it. The court ultimately stated this was an issue to be decided by appeal.

Appellant asserts on appeal that the jurors were sleeping during at least a portion of the trial. He argues that he was entitled to a jury that listened to the evidence presented. He also complains that the jurors were never questioned. However, defense counsel did not ask that such a measure be taken, and the court did make an inquiry into the facts when defense counsel and the court questioned the deputy.

There is not a great deal of case law in the Commonwealth regarding sleeping jurors, which reassures us that jurors sleeping through trials is not a persistent problem in

this state. In Shrout v. Commonwealth, 226 Ky. 660, 11 S.W.2d 726, 727 (1928), the Court held that the defendant could not sit by and observe a juror sleeping without asking the court to rouse him from his slumbers. The Court, therefore, found no reversible error. We find Shrout pertinent in this instance. Defense counsel did not raise the issue of his belief that a juror was sleeping until after the trial had ended.

Moreover, the defense failed to show that either juror actually had slept for any appreciable period of the trial. The remarks by the deputy and the court lead to doubt that the male juror was asleep at all; he could have been listening with eyes closed. The deputy placed water in front of the juror for the purpose of checking on him, and when he did so the juror responded immediately. The deputy further stated that he acted upon his belief that the female juror may have dozed off by having her wakened. Thus, it is clear that the court took steps in this case to rouse the jurors from their alleged slumbers. We find no basis for concluding the jurors were not sufficiently attentive to the evidence to render a verdict. Thus, we affirm the trial court's denial of a mistrial.

Second, appellant argues that the prosecutor committed misconduct by asking a question during voir dire that was calculated to inflame the passions of the jury. The Commonwealth Attorney asked, "Does anyone disagree that other

problems or other crimes stem from maybe drug use or drug selling in this community?" Appellant objected and stated that the line of questioning was calculated to inflame the jury because if they found the defendant guilty they would blame him for other crimes committed in the county. The bench conference again is mostly useless, but it seems that the court stated to the prosecutor, "I always leave that alone." The prosecutor did not return to that line of questioning in voir dire.

We find no error. Although it is unclear, it appears that the court sided with the defense that the line of questioning was not proper. Defense counsel did not ask for any other relief. Nevertheless, even if we regard the objection as overruled, we find no error.

A wide latitude is allowed counsel in examining jurors on their voir dire. The scope of inquiry is best governed by a wise and liberal discretion of the court. The exercise of the discretion does not constitute reversible error unless clearly abused and when it appears that harmful prejudice has been caused thereby.

Webb v. Commonwealth, Ky., 314 S.W.2d 543, 545 (1958). We do not believe there was any harmful prejudice from the single question raised by the Commonwealth in its voir dire examination. Any question of prosecutorial misconduct, moreover, concerns the overall fairness of the trial. Dean v. Commonwealth, Ky., 844 S.W.2d 417, 422 (1992). There are no other allegations of impropriety by the prosecutor, and so we

conclude that prosecutorial misconduct was not shown in this case.

Next, appellant argues that the police detective was allowed to bolster the credibility of the informants by his testimony. Detective Eddie Hart testified that he set up the drug transaction by the informants in this case. Detective Hart was asked if he found the informants to be reliable and trustworthy. Defense Counsel objected on the basis that the "officer's conclusion is based on facts not in evidence." The objection was overruled. Detective Hart went on to testify that these informants were always accurate, always honest and always reliable.

After the Commonwealth announced that its case was closed and the court took a short recess, the court delivered an admonition to the jury about the testimony of Detective Hart. (Counsels' discussion of this matter, if any, occurred off the record during the recess.) The court stated,

A little bit ago, when Detective Hart was testifying there was a question that could be construed, or his answer could be construed to bolster the credibility of the two confidential informants in court. You all, the jury is the sole judge of the credibility and truthfulness of the testimony that comes from the witness stand. So y'all should disregard Detective Hart's answer to that question insofar as it goes to what their testimony in court was.

The court asked the defense attorney and prosecutor if there was anything further, and both indicated satisfaction with the court's admonition.

An admonition given by the trial court is presumed to cure the defect in testimony for which it was requested. Neeley v. Commonwealth, Ky., 591 S.W.2d 366 (1979). Appellant argues on appeal that the admonition cannot be seen as curative due to the lapse in time following the detective's testimony. We disagree. There was no other information presented to the jury after the detective's testimony, and the recess was brief. Furthermore, failure to ask for an admonition earlier is the failure of appellant. We find no error. Appellant also argues about bolstering in the Commonwealth's closing argument. There was no objection to these statements, and so we will not consider this unpreserved claim of error.

Next, appellant argues that an entrapment instruction should have been given. Appellant contends that there was evidence to show that he was merely a drug user and not a drug dealer, and so he was entrapped when the informants, who were admitted drug users, called him to set up the buy. The defense of entrapment is available when there is evidence that the defendant was induced by police authorities or a person acting in cooperation with authorities to commit a criminal act which the defendant was not otherwise disposed to commit. Johnson v.

Commonwealth, Ky. App., 554 S.W.2d 401, 402 (1977). The only issue is whether the defendant was otherwise disposed to engage in that conduct or the public servant or the person acting in cooperation with them merely afforded the opportunity to commit the offense. Commonwealth v. Day, Ky., 983 S.W.2d 505, 508 (1999). The criminality of the defendant's act depends on whether the criminal intent originated in the mind of the allegedly entrapping person or in the mind of the accused. Id.

We agree with the trial court that appellant did not show that he was entitled to an entrapment instruction. The Commonwealth's evidence showed that the informants knew appellant as someone who dealt drugs to one of their friends, and so they gave appellant's name to narcotics officers. One of the informants, Wendy Merrill, testified that she met appellant through this drug-using friend and he consented that the friend give his phone number to Wendy. It was this phone number that the informants used to call and set up the buy. Contrary to appellant's assertions, appellant's witnesses did not testify that he was merely a user. Instead, appellant's girlfriend testified that appellant used drugs and she did not know what else he did, since she did not ask him about phone calls he received or inquire about what he was doing. Therefore, appellant did not rebut the Commonwealth's evidence that he was already disposed to commit the crime in question and that the

informants only provided him the opportunity. The entrapment instruction was properly denied.

Next, appellant argues that the trial court should have granted his motion for directed verdict. The appellate standard of review for a directed verdict is, "If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983). Having reviewed the evidence in this case, we agree that the Commonwealth adduced evidence to prove the essential elements of the offenses charged. Appellant attacks the reliability of the informants in this case, but we agree that questions of credibility are properly left to the jury. Thus, the trial court correctly denied the motion for directed verdict.

Finally, appellant argues that the cumulative effect of all of the errors in the case at bar required a reversal of his conviction. Funk v. Commonwealth, Ky., 842 S.W.2d 476 (1992). We disagree. Appellant has not established reversible error, and we certainly disagree that there was cumulative error that would require reversal.

For the foregoing reasons, we affirm appellant's conviction in the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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