

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000119-MR

JUSTIN SIMPSON

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 00-CR-00160

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND TACKETT, JUDGES.

TACKETT, JUDGE: Justin Simpson appeals from a judgment of the Henderson Circuit Court convicting him of trafficking in a controlled substance in the first degree and sentencing him to five years' imprisonment. On appeal, he asserts insufficiency of the evidence to support his conviction, that the trial court erroneously excluded the Commonwealth's bill of particulars from evidence, and that the Commonwealth improperly misstated the burden of proof during the closing arguments. After reviewing Simpson's claimed errors, the supporting facts and the applicable case law, we affirm the judgment of the trial court.

Simpson was convicted as a result of a drug transaction between himself and Anthony Estrada, a confidential informant. Estrada was employed by the Henderson Police Department from January through May, 1999. He purchased drugs between 30 and 40 times, earning \$100.00 for each felony drug buy and \$50.00 for each misdemeanor. On the morning of December 29, 1999, Estrada met Detective James Duvall at a firing range prior to making a drug buy. The detective searched him by raising Estrada's shirt, taking off his jacket, pulling up his underwear and looking at the waistline, and taking off his shoes and socks. A camera was placed inside Estrada's car and he wore a wire to produce an audio recording of the transaction. Duvall gave Estrada two twenty-dollar bills to purchase drugs and Estrada drove around before eventually stopping near 320 South Alves Street.

Estrada saw three men on the porch of a residence and asked for drugs. At first, no one wanted to sell him anything, but then one of the men said that Estrada was "cool" so Estrada placed the \$40.00 on the porch and the dealer pulled two rocks of crack cocaine out of his pants and placed them on the porch. On his way back to the car with the drugs, Estrada spoke into his wire identifying the man who sold him the drugs as wearing a red jacket and a beanie. Duvall and Detective Mark Nevells were staying out of sight and listening to Estrada's buy as it

occurred. They drove by and identified the three men as Cedric Hancock, Jerome Brown and Justin Simpson. Simpson was the only one wearing a red jacket fitting Estrada's description of the man from whom he purchased the crack cocaine.

Estrada and the detectives left the area and met at a rendezvous point where Estrada gave them the drugs. Later that afternoon, Estrada returned to South Alves to make additional recorded drug buys although not from Simpson. However, he saw Simpson still wearing the same clothes as he entered his residence at 222 South Alves. Estrada again identified him for police. The substance which Estrada purchased from Simpson tested positive for cocaine, and Simpson was arrested in May 2000 when Estrada's undercover work was complete. Simpson was indicted for trafficking in a controlled substance first degree, tried by a jury, convicted and sentenced, to five years' imprisonment. This appeal followed.

Simpson first argues that the trial court erred by refusing to grant his motion for a directed verdict. He contends that the evidence against him is so uncertain or incredible as to mandate a reversal of his conviction. Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970). Simpson points out that there is a discrepancy between the time of the buy as recorded on the videotape and the time indicated on the police report; however, Duvall testified that the time noted on the

police report is simply an estimate of when the offense occurred. Next, Simpson complains that there is conflicting evidence as to where Estrada met detectives after buying drugs. Estrada, Nevells and Duvall all testified that they met at the firing range after the buy contrary to the police report which indicates that they met at the police department. Nevertheless, after meeting the detectives, Estrada accompanied them to the police department where he gave a taped statement regarding his drug purchase. Finally, Simpson alleges that there is a discrepancy in the evidence as to whether or not the drugs Estrada purchased were placed in a plastic bag. The Commonwealth's case will survive a motion for a directed verdict as long as the testimony "taken as a whole, could induce a reasonable belief by the jury that the crime occurred." Bussey v. Commonwealth, Ky., 797 S.W.2d 483,484 (1990). The credibility of the witnesses is a matter for the jury to evaluate. Owsley v. Commonwealth, Ky. App., 743 S.W.2d 408 (1987).

Simpson also contends that the Commonwealth's proof of Simpson's identity as the person who sold Estrada crack cocaine is equivocal because it fails to eliminate a known drug dealer who was present at the scene. Estrada bought drugs from a man wearing a red jacket on the front porch of Hancock's house. There were three men present and one of them, Hancock, was a

known drug dealer. Nevertheless, only one was wearing a red jacket. A detective who knew Justin Simpson was able to identify him as the man in the red jacket immediately after Estrada purchased crack cocaine from him. The standard for determining whether to grant a directed verdict has been stated by the Kentucky Supreme Court as follows:

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purposes of ruling on the motion, that trial court must assume that the evidence for the Commonwealth is true, but reserving for the jury questions as to the credibility and weight to be given such testimony.

Commonwealth v. Benham, Ky., 816 S.W.2d 186,187 (1991).

Moreover, the standard on appeal for determining that a trial court's refusal to grant a directed verdict was erroneous is whether it was clearly unreasonable for the jury to find the defendant guilty. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). Simpson has failed to show that the trial court acted inappropriately in refusing to grant his motion for a directed verdict.

Simpson further claims that the trial court erred in refusing to admit the Commonwealth's bill of particulars into evidence. Kentucky Rule of Evidence (KRE) 103(a)(2) requires

that evidence be placed into the record by avowal in order to preserve a challenge to its exclusion. While KRE 103(a)(2) and Kentucky Rule of Criminal Procedure 9.52 both refer to oral testimony, the Kentucky Supreme Court also held, in the case of Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001), that documentary evidence must be authenticated and tendered to the court by avowal in order to preserve an objection to its exclusion. Simpson did not seek to enter the Commonwealth's bill of particulars by avowal; hence, the document is not available for appellate review. This failure to preserve the evidence by avowal is fatal to Simpson's challenge of the trial court's exclusionary ruling. Commonwealth v. Ferrell, Ky., 17 S.W.3d 540 (2000).

Finally, Simpson argues that the Commonwealth, in closing argument, misstated the burden of proof, denying him a fair trial. This issue is preserved by Simpson's contemporaneous objection and the trial court's adverse ruling which allowed the remarks. The Commonwealth made statements to the effect that Simpson presented no alibi witnesses, that nobody refuted the testimony of Estrada, Duvall, and Nevells identifying Simpson as the one who sold Estrada drugs, and that the only evidence offered in the case supported the Commonwealth's conclusion that Simpson sold Estrada drugs. The standard of review for alleged prosecutorial misconduct in

closing arguments is whether the conduct was so egregious that Simpson was denied a fair trial. Slaughter v. Commonwealth, Ky., 744 S.W.2d 407 (1987). Counsel for both the Commonwealth and the defendant are given great leeway in closing arguments, and the Commonwealth is entitled to comment on the defendant's failure to introduce a witness to testify on a defensive matter. Id. at 407, 412. Further, a prosecutor does not shift the burden of proof to the defendant by arguing that the defendant failed to present evidence which rebuts the Commonwealth's case. Tamme v. Commonwealth, Ky., 973 S.W.2d 13 (1998). Consequently, the Commonwealth's comments on Simpson's failure to present a witness who could contradict the testimony placing him at 320 South Alves Street when drugs were being sold did not impermissibly shift the burden of proof to Simpson or deny him a fair trial.

For the forgoing reasons, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David T. Eucker
Dennis Stutsman
Assistant Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

John R. Tarter
Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky