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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001471-MR

LORRIE MITCHELL

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
INDICTMENT NO. 01-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: PAISLEY and TACKETT, Judges; HUDDLESTON, Senior Judge.¹
HUDDLESTON, Senior Judge: Lorrie Mitchell appeals from a judgment based on a jury verdict convicting her of first-degree trafficking in a controlled substance stemming from the alleged sale of OxyContin to a police informant. On appeal, Mitchell takes issue with several parts of the trial, including the

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

Commonwealth's closing argument and the testimony of a police detective.

The specific portions of the Commonwealth's closing argument which Mitchell faults are set forth below:

I was going to say a few other things and then I'll stop. Prescription drug problem is out of control. [sic] That's something everybody knows. It's a huge problem, and I've touched on that. It's ruined lives. It's torn apart families. OxyContin in particular. Hillbilly heroine [sic], that's what CNN calls it. And the problem with these pills is, and we all know, it goes to someone with a lawful prescription and that person turns around and sells to someone else or gives them to someone else, and that person turns around and gives them to someone else or sells them to someone else, and that's how problems start, and that's why the face of the drug dealers change so much. It's not like it used to be. You don't have the long haired hippy guys with the marijuana anymore like back in the 60s or something like that. The access to it is so much easier. You can get from the bathroom cabinet [sic], trade them, sell to someone else. That's how the face of the drug dealers change.

Now here's something else real significant I think. Detective Hunter said that the Defendant has never had a prescription for OxyContin. But she had it, didn't she? She obviously had it, she knew where to get it, she had it on her and she sold it as well. She sold it to somebody without a prescription. That's the problem. Is that dangerous? You bet. You also hear on the tape, near the end of the tape, that she even says she knows of a girl up around Ashland that O.D.ed on Oxy just days before this sale. She knew that. She knew the girl O.D.ed on OxyContin. Did that stop her from selling to [the informant]? No. Did that stop her from snorting eleven (11) pills the day before? No.

* * *

The point I want to make is, is Ladies and Gentlemen, if we are ever going to make a dent in a terrible problem we've got, prescription drugs with OxyContin, its time to send a message to this defendant and to this community that we're going to punish drug dealers for doing what they're doing. It's time we send a message. You know, I hear all the time, it's hard not to. It's on t.v., it's in newspapers, you talk to people on the street in the

community. Tell them something needs to be done. Well, what can be done about this problem? Something can be done and something can be done today. Something can be done now.

There's nothing more that I can do or we can do. The case is in your hands, and it's only you that can hold the Defendant accountable for doing what she did, selling OxyContin. Folks, it's time we make a stand on drugs. It's time we made a stand on prescription pills. It's time we make a stand on OxyContin. There's one way to do that. Everybody else has done their job. It's time for you to do your job. And you make sure the Defendant is punished for what she did in selling OxyContin.

Several states have considered the effect of a prosecutor's use of the so-called "send a message" closing argument. While some states have allowed use of the "send a message" argument,² others have strongly disapproved of its use.³

² See, e.g., People v. Chavez, 265 Ill. App. 3d 451, 460, 637 N.E.2d 469, 476 (1994); Bryant v. State, 249 Ga. 242, 290 S.E.2d 75, 76 (1982).

³ See, e.g., Payton v. State, 785 So.2d 267, 270 (Miss. 1999); State v. Apilando, 79 Haw. 128, 900 P.2d 135 (1995); Coreas v. United States, 565 A.2d 594, 604 (D.C. App. 1989).

Indeed, the Supreme Court of Mississippi is especially condemning of the argument:

The jurors are representatives of the community in one sense, but they are not to vote in a representative capacity. Each juror is to apply the law to the evidence and vote accordingly. The issue which each juror must resolve is not whether or not he or she wishes to "send a message" but whether or not he or she believes that the evidence showed the defendant to be guilty of the crime charged. The jury is an arm of the State but it is not an arm of the prosecution. The State includes both the prosecution and the accused. The function of the jury is to weigh the evidence and determine the facts. When the prosecution wishes to send a message they should employ Western Union. Mississippi jurors are not messenger boys.⁴

The law in Kentucky has not developed on such a per se basis. In analyzing the propriety of a closing argument, the Supreme Court has followed several related principles. "Neither the prosecutor, defense counsel, nor the court should relate to

⁴ Payton, supra, n. 3, at 270, quoting Williams v. State, 522 So.2d 201, 209 (1988).

the jury the future consequences of a particular verdict anytime during a criminal trial.”⁵ A prosecutor may not suggest that a jury convict or punish on grounds or for reasons not reasonably inferred from the evidence,⁶ nor may a prosecutor make a remark in closing argument which tends to cajole or coerce a jury to reach a verdict that would meet with the public favor.⁷

The closest the Supreme Court has come to condemning the precise argument presented in this appeal was in Ice v. Commonwealth,⁸ a case which presented several instances of prosecutorial misconduct. In its opinion, the Court said:

The most serious prosecutorial misconduct in closing involved inveighing the jury that Ice should not be “turned loose to kill again” (“Does he already have his limit or is he entitled to kill some more?”),

⁵ Woodward v. Commonwealth, Ky., 984 S.W.2d 477, 479 (1998), citing Mitchell v. Commonwealth, Ky., 781 S.W.2d 510, 511 (1989); Commonwealth v. Steiber, Ky., 697 S.W.2d 135, 136 (1985); Payne v. Commonwealth, Ky., 623 S.W.2d 867, 870 (1981). However, this total prohibition has been removed in the context of a case, unlike this one, which involves a defendant who may be found not criminally responsible by reason of mental illness or retardation, or guilty but mentally ill. See Ky. R. Crim. P. (RCr) 9.55.

⁶ Wallen v. Commonwealth, Ky., 657 S.W.2d 232, 234 (1983). See also Damron v. Commonwealth, Ky., 687 S.W.2d 138, 142 (1985) (Leibson, J., dissenting).

⁷ Jackson v. Commonwealth, 301 Ky. 562, 192 S.W.2d 480 (1946).

⁸ Ky., 667 S.W.2d 671 (1984).

urging the jury to make an example of the defendant (send a message to "everyone else similarly situated").⁹

However, the Court did not decide if such a closing argument amounted to reversible error by itself.

The function of the jury is to determine guilt or innocence.¹⁰ In this case, the jury was called upon only to determine whether Mitchell was guilty of trafficking in a controlled substance. Anger over a perceived drug problem in the community has no bearing on an individual's guilt or innocence. It was improper for the Commonwealth to suggest that the jury had some obligation to cure the community's problems through its verdict and thereby divert attention from the jury's true function of evaluating whether the evidence presented established Mitchell's guilt. Further, the prosecutor suggested that the only way for the jury to "do its job" was to return a guilty verdict, which is patently untrue. As discussed above, the jury's function is to consider the evidence and return a

⁹ Id. at 676.

¹⁰ Payne, supra, n. 5 at 870. See also Ky. Rev. Stat. (KRS) 532.055(1): "In all felony cases, the jury in its initial verdict will make a determination of not guilty, guilty, guilty but mentally ill, or not guilty by virtue of insanity, and no more."

verdict; whether the verdict is "guilty" or "not guilty," the jury has in either instance fulfilled its obligation.

Although Mitchell is correct that the Commonwealth's closing argument was improper, this objection was not properly preserved. Mitchell did not object to the closing argument until after the jury had begun its deliberations, thereby depriving the circuit court of the opportunity to evaluate whether an admonition would cure the prejudice created by the prosecutor's improper statements.¹¹ Therefore, were we to reverse on this basis it could only be if the improper argument amounted to palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. However, we need not make the difficult decision whether Mitchell's substantial rights were affected by the above error by itself because it is not the only error presented for review.

Kentucky State Police Detective Randy Hunter was in charge of the investigation. He began his testimony by discussing the nature of OxyContin and its opiate-like effects on the body. He testified that it is more effective and more addictive if injected or snorted than if taken orally, and that an addict would require increasing amounts of the drug in order to continue to achieve the same level of intoxication. The

¹¹ The circuit court treated the objection as a motion for a mistrial and denied the motion.

Commonwealth and the circuit court characterized this testimony as general background information within common knowledge; Mitchell characterizes it as expert testimony under Kentucky Rules of Evidence (KRE) 702 which Hunter was not qualified to give.¹²

As an initial matter, Hunter's evidence was of questionable relevance.¹³ Its admission made it no more or less likely that Mitchell sold OxyContin to a police informant, the only issue which the jury was called upon to decide.

OxyContin's effects on the body, tolerance produced by its continued abuse and differences in metabolism created by various methods of ingestion are all matters of specialized scientific knowledge.¹⁴ If upon retrial the Commonwealth demonstrates that this information is somehow relevant to the jury's determination and that scientific testimony regarding OxyContin will assist the jury to understand the evidence, it must produce a toxicologist or other expert whose qualifications

¹² See Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000), and Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995).

¹³ See Ky. R. Evid. (KRE) 401 and 402. Indeed, the Commonwealth conceded as much at oral argument.

¹⁴ See KRE 702.

satisfy Goodyear Tire & Rubber Co. v. Thompson and Mitchell v. Commonwealth.¹⁵

Detective Hunter also testified that his informant had purchased drugs from Mitchell before; that he, Hunter, had received other complaints regarding drug sales by Mitchell; and that in one hundred drug buys involving this defendant, ninety-nine would be like the one which occurred. All of this testimony can be classified as relating to "other crimes, wrongs, or acts" which is not admissible to prove the character of a person in order to show action in conformity therewith.¹⁶ While "other bad acts" evidence may be admissible for some other purpose such as to establish motive, opportunity, intent, etc.,¹⁷ or if it is so inextricably intertwined with other evidence in the case that separation of the two could not be accomplished without serious adverse effect on the offering party,¹⁸ there was no showing that either of the exceptions applied in this case. On retrial, this evidence must be excluded unless the Commonwealth can show some "other use" for it and unless it fully complies with the notice requirement in KRE 404(c), which it did not do in this trial.

¹⁵ Supra, n. 12.

¹⁶ KRE 404(b).

¹⁷ KRE 404(b)(1).

¹⁸ KRE 404(b)(2).

Hunter's testimony was also inadmissible "investigative hearsay."

The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officer's action.¹⁹

No question was raised as to why Hunter's investigation proceeded as it did. Therefore, this testimony was inadmissible hearsay.

Individually, none of the errors enumerated above would cause us to disturb Mitchell's conviction. However, viewing the case as a whole, the cumulative effect of the several errors was to deny Mitchell a fair trial.²⁰ Accordingly,

¹⁹ Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988) (original emphasis).

²⁰ Pennington v. Commonwealth, Ky. App., 577 S.W.2d 19, 23 (1979). See also Sanborn, *supra*, n. 19, at 542; Funk v. Commonwealth, Ky., 842 S.W.2d 476, 483 (1993). While the Commonwealth did produce an audio tape of the alleged

we reverse the judgment of conviction and remand this case to Floyd Circuit Court with directions to grant Mitchell a new trial.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Joseph Lane
PILLERSDORF, DEROSSETT & LANE
Prestonsburg, Kentucky

ON BRIEF:

Ned Pillersdorf
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

William L. Daniel, II
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Dennis W. Shepherd
Assistant Attorney General
Frankfort, Kentucky

transaction, it is not so convincing as to make the above errors harmless. Even taking the Commonwealth's version of what is said on parts of the tape which are of questionable quality, there is no direct admission that a drug buy is taking place, and the jury must decide whether the two persons on the tape are buying and selling OxyContin or whether they are merely talking about the drug.