

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001876-MR

JEREMY SCOTT WEST

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 01-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Jeremy Scott West has appealed from the final judgment and sentence entered by the Boyd Circuit Court on August 9, 2002, which convicted him of trafficking in a controlled substance in the first degree (oxycodone).<sup>1</sup> Having concluded that the trial court properly denied West's motion for a directed verdict of acquittal on the defense of entrapment, and that the trial court's failure to instruct the jury as to

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<sup>1</sup> Kentucky Revised Statutes (KRS) 218A.1412.

the proper allocation of the burden of proof in respect to the defense of entrapment did not rise to the level of manifest injustice required by RCr<sup>2</sup> 10.26, we affirm.

Sometime prior to November 2000, Detective William Bare of the Ashland Police Department employed Terry Newman as a confidential informant for the purpose of making controlled drug purchases from suspected narcotics dealers in Ashland, Kentucky. On January 2, 2001, Det. Bare and Det. Danny Mooney<sup>3</sup> met with Newman in preparation for a controlled buy involving West. The detectives first searched Newman to ensure that he was not carrying any personal funds or drugs, after which they furnished him with \$160.00 to purchase four OxyContin tablets,<sup>4</sup> a bodywire, and a microcassette recorder and tape to record the transaction. The detectives then drove to an undisclosed location near West's residence. Newman proceeded on foot and when he arrived at West's residence he presented him with the buy money. West informed Newman that he had to drive somewhere else to get the drugs and that he would be back shortly. West returned approximately 20 minutes later with four OxyContin tablets, three of which he gave to Newman. West kept the remaining

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<sup>2</sup> Kentucky Rules of Criminal Procedure.

<sup>3</sup> Det. Mooney is also employed by the Ashland Police Department.

<sup>4</sup> OxyContin is a 12-hour time-release form of oxycodone, an opium-based narcotic used to treat chronic pain. Oxycodone is highly addictive and is considered a devastating street drug. Deaths from oxycodone-based drugs are prevalent in the Appalachian region.

tablet as compensation for his services. Shortly thereafter, Newman rendezvoused with the detectives and gave them the three OxyContin tablets, the bodywire, and the microcassette recorder and tape. The police paid Newman \$100.00 for his services.

On March 29, 2001, West was indicted by a Boyd County grand jury and charged with one count of trafficking in a controlled substance in the first degree. On April 27, 2001, West was formally arraigned and he entered a plea of not guilty. West's case was tried before a Boyd County jury on July 17, 2002.

Det. Bare and Det. Mooney testified at West's trial as to their recollection of the controlled buy that occurred between Newman and West on January 2, 2001. Det. Bare testified that he witnessed West return to his neighborhood with the drugs approximately 20 minutes after Newman provided him with the buy money. Det. Bare explained that while he had not actually seen Newman give West the buy money, he had listened to the entire transaction while it was occurring, and he had recorded the transaction.<sup>5</sup> Det. Bare further testified that he and Det. Mooney rendezvoused with Newman shortly after the transaction took place and that Newman provided them with three OxyContin tablets, the bodywire, and the microcassette recorder and tape. Det. Bare stated that he was aware that West was going to keep

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<sup>5</sup> A recording of the transaction was played for the jury and admitted into evidence.

one of the tablets as compensation for his services. Det. Bare testified that Newman was paid \$100.00 for this particular transaction. Det. Bare explained that he first came into contact with Newman sometime prior to November 2000. Det. Bare stated that Newman contacted him and informed him that he was interested in becoming an informant. Det. Bare further stated that it was Newman's idea to target West. Det. Bare testified that to his knowledge Newman was never given any preferential treatment concerning any criminal charges that had been filed against him. Det. Bare further stated that he was not present when Newman arranged for the transaction with West. Det. Mooney's testimony was consistent with Det. Bare's account of the controlled buy.

Newman also testified at West's trial. Newman explained that in January 2001, he was employed as a confidential informant. Newman stated that as compensation for his services he received \$50.00 for a misdemeanor transaction and \$100.00 for a felony transaction. Newman testified that he telephoned West on January 2, 2001, and told him that he was interested in purchasing four OxyContin tablets. According to Newman, West agreed to purchase the drugs for him. Newman explained that he agreed to provide West with one of the tablets as compensation for his services. Newman stated that West did not object in any way when he asked him to purchase the drugs.

Newman further stated that he met West at his residence on January 2, 2001 and provided him with \$160.00 and that West returned approximately 30 minutes later with three OxyContin tablets. Newman explained that he rendezvoused with Det. Bare and Det. Mooney shortly after the transaction took place and turned over the OxyContin tablets, the bodywire, and the microcassette recorder and tape.

On cross-examination Newman testified that it was Det. Bare's idea to target West. Newman further testified that he had known West for sometime and that he was aware that West was a drug addict. Newman admitted that he was a convicted felon, however, he stated that he was never given any preferential treatment on any of the criminal charges filed against him because of his work as a confidential informant.

After the Commonwealth rested its case, West moved for a directed verdict of acquittal. West argued that the proof presented by the Commonwealth established that he was not guilty as a matter of law based on the defense of entrapment, or in the alternative, that he was only guilty of criminal facilitation<sup>6</sup> as opposed to the actual offense of trafficking in a controlled substance in the first degree. The trial court denied West's motion for a directed verdict of acquittal based on its conclusion that the Commonwealth had presented a prima facie

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<sup>6</sup> KRS 506.080.

case for trafficking and that the question of entrapment was a factual issue for the jury to resolve.

West testified in his own defense and he admitted that he sold OxyContin to Newman on January 2, 2001.<sup>7</sup> West explained that he had a substantial history of prior drug abuse involving morphine, heroin, dilaudid, methadone, valium, Xanax, and OxyContin, and that he had been in and out of several substance abuse treatment centers. West claimed that he initially turned Newman down, but that Newman called him again and complained that he was "really sick" and desperately in need of the drugs. West insisted that he only agreed to provide Newman with the drugs after Newman offered him one of the Oxycontin tablets in exchange for his services. West stated that he never would have agreed to provide Newman with the drugs if he had not offered him one of the tablets. West explained that he had just started attending a methadone clinic in Indiana when Newman contacted him and that he was trying to stay "clean." On cross-examination, West admitted that he had engaged in similar transactions involving drugs in the past. West also admitted that he had a prior conviction for facilitating the trafficking or transfer of Schedule I/II narcotics.

After resting his case, West again moved for a directed verdict of acquittal, which was summarily denied. West

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<sup>7</sup> West refused to disclose the name of the individual who provided him with the drugs.

also tendered a proposed facilitation instruction, which was rejected. The trial court concluded that pursuant to Commonwealth v. Day,<sup>8</sup> West was not entitled to a facilitation instruction. The trial court did, however, agree to instruct the jury on the defense of entrapment. The jury instructions provided, in relevant part, as follows:

INSTRUCTION NO. 2

TRAFFICKING IN A CONTROLLED SUBSTANCE

You will find the Defendant guilty of Trafficking in a Controlled Substance under this Instruction, if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about January 2, 2001 and before the finding of the Indictment herein on March 29, 2001, he sold a quantity of Oxycodone to a co-operating witness;

AND

B. That he knew the substance being so sold or transferred was Oxycodone[;]

AND

C. That he was not induced to do so by entrapment as defined in Instruction No. 4.

INSTRUCTION NO. 3

PRESUMPTION OF INNOCENCE

The law presumes a defendant to be innocent of a crime and the Indictment shall

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<sup>8</sup> Ky., 983 S.W.2d 505 (1999).

not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

INSTRUCTION NO. 4

ENTRAPMENT

The Defendant is entitled to the defense of entrapment if:

- A. Terry Newman induced or encouraged the Defendant to commit any of the acts mentioned in Instruction No. 2 (if he did commit any of them);

AND

- B. That Terry Newman was seeking thereby to obtain evidence against the Defendant for the purpose of criminal prosecution;

AND

- C. At the time of such inducement or encouragement, the Defendant was not otherwise disposed to engage in such conduct.

The jury found West guilty of trafficking in a controlled substance in the first degree. On August 9, 2002, the trial court sentenced West to a prison term of five years. This appeal followed.

West claims in his appeal that the trial court erred (1) by failing to grant his motion for a directed verdict of acquittal based on the defense of entrapment, and (2) by failing

to instruct the jury as to the proper allocation of the burden of proof in respect to the defense of entrapment. The standard of review for a trial court's denial of a motion for a directed verdict of acquittal is well established. In Commonwealth v. Benham,<sup>9</sup> our Supreme Court stated:

On 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 purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

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 the defendant is entitled to a directed verdict of acquittal. [citation omitted]

The defense of entrapment is set forth in KRS 505.010, which provides, in pertinent part, as follows:

- (1) A person is not guilty of an offense arising out of proscribed conduct when:
  - (a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against

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<sup>9</sup> Ky., 816 S.W.2d 186, 187 (1991).

him for the purpose of criminal prosecution; and

- (b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.

The defense of entrapment is not available if the public servant or person acting in cooperation with the public servant "merely affords the defendant an opportunity to commit an offense[.]"<sup>10</sup>

As our Supreme Court stated in Commonwealth v. Sanders:<sup>11</sup>

The critical test is not the extent of the police participation in planning and assisting in the crime, but whether the defendant was disposed to commit the crime regardless of any encouragement or inducement on the part of the authorities.

In order to obtain a directed verdict of acquittal and dismissal of the charge as a matter of law based on entrapment, a defendant must establish "'undisputed evidence [ ] demonstrat[ing] a 'patently clear' absence of predisposition.'"<sup>12</sup> A reviewing court "'may not choose between conflicting testimony or make credibility determinations'" on the issue of entrapment.<sup>13</sup> Moreover, in determining whether the evidence submitted at trial was "'insufficient to establish

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<sup>10</sup> KRS 505.010(2)(a). See also Johnson v. Commonwealth, Ky.App., 554 S.W.2d 401 (1977).

<sup>11</sup> Ky., 736 S.W.2d 338, 340 (1987).

<sup>12</sup> United States v. Harris, 9 F.3d 493, 498 (6th Cir. 1993) (quoting United States v. Barger, 931 F.2d 359, 366 (6th Cir. 1991)).

<sup>13</sup> Id.

predisposition, we must view that evidence in the light most favorable to the prosecution and resolve all reasonable inferences therefrom in its favor.'"<sup>14</sup> In short, "[t]he question of entrapment is generally one for the jury, rather than for the court.'"<sup>15</sup>

We are convinced that the Commonwealth presented evidence which raised genuine issues as to West's predisposition to commit the offense of trafficking in a controlled substance in the first degree. West testified that he had engaged in similar transactions involving drugs in the past and he admitted that he had a prior conviction for facilitating the trafficking or transfer of Schedule I/II narcotics. As the former Court of Appeals stated in Shanks v. Commonwealth,<sup>16</sup> "the defense of entrapment cannot successfully be sustained if the accused has previously been engaged in a course of similar crimes[.]" Moreover, Newman testified that West did not object in any way when he asked him to purchase the drugs. West's contention that evidence of his sympathy for Newman's supposed suffering somehow required a finding that he was entrapped as a matter of law is ill founded. The mere fact that a solicitation is made in

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<sup>14</sup> Id. (quoting United States v. McLernon, 746 F.2d 1098, 1111 (6th Cir. 1984)).

<sup>15</sup> Barger, 931 F.2d at 366 (quoting Matthews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988)).

<sup>16</sup> Ky., 463 S.W.2d 312, 314 (1971).

connection with an appeal to sympathy or to friendship is insufficient to establish entrapment as a matter of law.<sup>17</sup> Thus, the trial court did not err by denying West's motion for a directed verdict of acquittal based on his claim of entrapment.

West also claims that the trial court erred by failing to instruct the jury as to the proper allocation of the burden of proof on the question of entrapment. West concedes that he failed to preserve this issue by objecting to the instructions that were given to the jury.<sup>18</sup> Nevertheless, West urges us to review this issue for palpable error pursuant to RCr 10.26, which provides, in pertinent part, as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In Day, supra, our Supreme Court stated that "where the government has induced an individual to break the law and the defense of entrapment is raised, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by

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<sup>17</sup> State v. Smith, 677 P.2d 100, 104 (Wash. 1984) (quoting State v. Swain, 520 P.2d 950, 952 (Wash.App. 1974)). See also State v. Soule, 791 P.2d 1048, 1051 (Ariz.Ct.App. 1989).

<sup>18</sup> See RCr 9.54(2).

government agents."<sup>19</sup> The Court further stated that once a defendant introduces enough evidence to create a doubt as to the issue of entrapment, "the burden of proof shifts to the Commonwealth and there must be an instruction so casting it."<sup>20</sup> The trial court in the case sub judice specifically instructed the jury that they could only find West guilty of trafficking in a controlled substance if they believed beyond a reasonable doubt "[t]hat he was not induced to do so by entrapment[.]"<sup>21</sup> The jury instructions did not contain a specific burden of proof allocation. The trial court did, however, instruct the jury as to the presumption of innocence. While a trial court's instruction as to the presumption of innocence does not excuse a failure to instruct the jury that the Commonwealth carries the burden of proof as to the issue of entrapment "once the defendant introduces enough evidence to create a doubt,"<sup>22</sup> the instruction is indicative of a lack of palpable error.<sup>23</sup> As the

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<sup>19</sup> Day, 983 S.W.2d at 508 (citing Jacobson v. United States, 503 U.S. 540, 549, 112 S.Ct. 1535, 1540, 118 L.E.2d 174 (1992)).

<sup>20</sup> Id. (citing KRS 500.070(3); and Brown v. Commonwealth, Ky., 555 S.W.2d 252, 257 (1977)). We note that differing views exist as to the proper burden and standard of proof with respect to the defense of entrapment. See, e.g., John H. Derrick, J.D., Annotation, Burden of Proof as to Entrapment Defense—State Cases, 52 A.L.R.4th 775 (1987).

<sup>21</sup> As noted above, the trial court also instructed the jury as to the definition of entrapment.

<sup>22</sup> Day, 983 S.W.2d at 508.

<sup>23</sup> See Patterson v. Commonwealth, Ky.App., 630 S.W.2d 73, 75 (1981) ("[i]t is clearly evident through the presumptions of innocence and reasonable doubt instructions upon whom the burden lies without the need for a specific,

United States Supreme Court stated in Henderson v. Kibbe,<sup>24</sup> “[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court” [footnote omitted]. We are unpersuaded that the trial court’s failure to instruct the jury as to the proper allocation of the burden of proof for the defense of entrapment resulted in a manifest injustice.

Based on the foregoing reasons, the final judgment and sentence of the Boyd Circuit Court is affirmed.

ALL CONCUR

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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separate instruction”); Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 679 (1990); and United States v. Castro, 776 F.2d 1118, 1129 (3rd Cir. 1985). See also 1 Cooper, Kentucky Instructions to Juries, § 1.01A (4th ed. 1999) (“[i]f the jury is instructed on the presumption of innocence, it is unnecessary to instruct them that the Commonwealth has the burden of proof, since the language of the presumption of innocence instruction properly states the Commonwealth’s burden of proof” [footnotes omitted]).

<sup>24</sup> 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977).