

RENDERED: September 10, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001945-MR

JAMES WARREN MORRIS

APPELLANT

v. APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 02-CR-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment convicting appellant of trafficking in marijuana within 1,000 yards of a school and being a persistent felony offender in the second degree ("PFO II"). Appellant argues that evidence that he had sold marijuana to the informant in the past was improperly admitted in violation of KRE 404(b) and that there was

insufficient credible evidence to support the conviction. Because the evidence that appellant had previously sold marijuana to the informant/witness was so inextricably intertwined with impeachment evidence the appellant sought to offer regarding the informant, in particular, how he came to be an informant in the case, it was not error to allow said evidence to be admitted. As for the motion for directed verdict, there was sufficient evidence of appellant's guilt to support the conviction. Hence, we affirm.

On November 22, 2001, Raymond Kirk was arrested and lodged in the Ohio County Jail for possession of marijuana and drug paraphernalia. On November 27, 2001, Detective Charles Cobb came to visit Kirk in his cell and asked if he would be willing to make some undercover drug buys from his supplier for the police in exchange for a lighter sentence. Kirk agreed and that night Cobb and Kirk met at a cemetery near the appellant's house. Cobb conducted a search of Kirk and then placed a wire on Kirk's arm. Cobb then gave Kirk \$60 to make the buy and proceeded to drive Kirk to within a block of appellant's house. At that point, Kirk got out and walked to the home of appellant, James Morris. Morris's wife, Tammy answered the door and Kirk proceeded inside. On that day, several relatives of Morris were gathered at his house because Morris's grandfather had just died. Once in the house, Kirk told Morris that he was sorry

about his grandfather. According to Kirk, Morris then told him that if he was looking for marijuana, he did not have any. At some point, Morris and Kirk went into the kitchen where Morris told Kirk that he did have some marijuana, but not very much. Morris then got a canister from which he pulled a baggy of marijuana and a small scale. Kirk testified that Morris weighed out a half an ounce of marijuana and gave it to him. After Kirk gave Morris the \$60, he stayed for about five minutes longer and then left. Kirk immediately returned to Detective Cobb and gave him the bag of marijuana.

Morris, who testified at trial, maintained that he never sold Kirk any marijuana. Likewise, Tammy Morris testified that she could see everything that transpired between Kirk and Morris that day and never saw Morris give Kirk a bag of marijuana.

The jury found Morris guilty of trafficking in marijuana within 1,000 yards of a school and PFO II, for which he was sentenced to five years' imprisonment enhanced to ten years. This appeal by Morris followed.

Morris first argues that the trial court erred in allowing the Commonwealth to present evidence that he had previously sold marijuana to Kirk. Morris maintains that said testimony by Kirk constituted prior bad act evidence in violation of KRE 404. Prior to trial, the Commonwealth gave

notice pursuant to KRE 404(c) that it intended to present evidence that Morris had sold marijuana to Kirk on numerous occasions from 1995-2001. In response, Morris filed an objection to the notice. After a hearing on the matter, the trial court ruled that the Commonwealth could present evidence of only the one sale when Morris sold marijuana to Kirk on the day preceding his incarceration. The court reasoned that since Morris intended to impeach Kirk's credibility by exposing the fact that he agreed to cooperate with the police to get out of jail by making a buy from his supplier, the evidence that Kirk had bought marijuana from Morris on at least one other occasion would necessarily have to be elicited from Kirk anyway. Accordingly, said evidence was inextricably intertwined with evidence essential to the case and thus admissible pursuant to KRE 404(b)(2). We agree.

Under KRE 404(b), evidence of other crimes or wrongs is not admissible to prove action in conformity therewith. Such evidence may be admissible, however, under subsection (2) of the above rule "[i]f so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party."

From the outset of the case, Morris made it clear that he intended to impeach Kirk's testimony by eliciting the fact

that he made a deal with police to get out of jail wherein he had to make an undercover buy from his supplier. We do not see how such evidence could be elicited from Kirk without the jury being informed that Kirk had bought marijuana from Morris at least once before. As this Court stated in Norton v.

Commonwealth, Ky. App., 890 S.W.2d 632 (1994):

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other. . .'" [and is thus] part of the res gestae of the crime charged."

Id. at 638 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)).

In our view, Morris opened the door to this evidence by seeking to impeach Kirk's testimony with evidence that he made a deal with police to get out of jail by agreeing to make a buy from his supplier. We would also note that even in the absence of this evidence, the testimony of Kirk and Morris relative to the events of November 27, 2001, established that

Morris and Kirk knew each other prior to November 27, and certainly suggested that Kirk had obtained marijuana from Morris before. According to Kirk, before he could even ask Morris if he could buy some marijuana, Morris volunteered that if he was looking for marijuana, he did not have any. Thus, we cannot say that Morris was prejudiced by the testimony that Kirk had previously purchased marijuana from Morris.

Morris's second argument is that there was not sufficient credible evidence of his guilt to support the conviction. Specifically, Morris asserts that the verdict was based solely upon hearsay evidence, the partially inaudible tape recording of the purported transaction which was admitted and played during the trial, and the testimony of Kirk, a drug dealer who was simply "buying" his way out of detention. We would note that Morris did not challenge the tape recording of the buy or the testimony of Kirk as being inadmissible hearsay. In any event, even tapes with poor sound quality have been held to be admissible under KRE 804(b)(3) as exceptions to the hearsay rule if the tapes nevertheless had sufficient indicia of reliability. Norton v. Commonwealth, Ky. App., 890 S.W.2d 632, 636 (1994).

Relative to the testimony of Kirk and the fact that he agreed to be an informant to get out of jail, issues regarding the credibility of a witness and the weight to be put on such

testimony are for the jury. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). The defendant was entitled to and did bring out the fact that Kirk made a deal with police to be an informant/witness in the case.

"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." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). From our review of the record, even without the tape of the buy, the testimony of Kirk regarding the buy, coupled with the marijuana obtained, was sufficient evidence of trafficking to support the conviction.

For the reasons stated above, the judgment of the McLean Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Clare
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky