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Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001186-MR

DAVID SHEFFEY
A/K/A ALONZO ADAMS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 02-CR-00543

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: David Sheffey challenges his conviction for trafficking in a controlled substance, on the grounds that there was insufficient evidence to support the verdict of the jury, and that a police officer improperly testified about events of which he lacked personal knowledge, thereby bolstering the credibility of the chief prosecution witness. We affirm.

Sheffey was indicted for trafficking in a controlled substance in the first degree after he allegedly sold a police informant, Darnell Dickey, some crack cocaine. At trial, the primary evidence against Sheffey consisted of Dickey's testimony and a videotape of the drug sale, which was recorded by a hidden camera worn by Dickey. The police officer who set up the operation, Brian Fuller, listened to the transaction as it occurred by means of an audio monitor also worn by Dickey.

Dickey testified that he went to Sheffey's apartment and told him that he wanted to buy \$20. worth of crack cocaine. He said that Sheffey broke a small amount of crack from a larger piece and handed it to him in exchange for the money.

Sheffey's primary defense was that he was not the person who sold Dickey the crack. He admitted that he was in the apartment that evening, but that he merely gave Dickey a cigarette. He claimed that another person, Gilbert Cole (nicknamed "O.B."), sold Dickey the drugs in another room of the apartment.

Sheffey contends that he was entitled to a directed verdict of acquittal because of the insufficiency of the evidence. At the close of the Commonwealth's case, defense counsel made a motion for a directed verdict on the grounds that the indictment gave the wrong name for the defendant. At the close of all the evidence, the defense renewed the motion and

also stated that the defendant was entitled to a directed verdict because the Commonwealth had failed to meet its burden of proof. The Commonwealth claims that this was not adequate to preserve the issue of the sufficiency of evidence for our review, arguing that when a party identifies a specific reason for objection at trial, he cannot present a new theory on appeal.¹ We believe the issue was sufficiently preserved when the defense raised the question of the burden of proof in its second motion, particularly because the trial court expressly stated, in denying the motion, that there was sufficient evidence to submit the case to the jury. A defendant is entitled to a directed verdict of acquittal if, under the evidence as a whole, it was clearly unreasonable for a jury to find him guilty.²

Sheffey argues that he was entitled to a directed verdict because the videotape made by the hidden camera did not actually show the drug transaction; no evidence was offered to rebut his testimony that another person was present who sold the crack to Dickey; and Dickey was a completely unreliable witness who used drugs himself and had only become an informant in order to receive leniency from the police in regard to his own drug charges. Sheffey contends that Dickey's testimony was

¹ Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 75 (2000).

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

unreliable as a matter of law because no reasonable juror could have believed him.

The videotape of the transaction made by Dickey does not form part of the record provided to this Court. The tape was viewed by the judge and subsequently by the jury and is therefore partially visible on the videotape of the trial. But, it is not clear enough for purposes of review. According to the testimony of Fuller and Dickey, Sheffey is not visible on the video. Although the videotape was clearly of limited evidentiary value, sufficient evidence to sustain the jury's verdict was provided through the testimony of Fuller and Dickey. The jury was made fully aware, through the cross-examination of these witnesses by defense counsel, of Dickey's own involvement with drugs, the drug charges he faced, and his possible ulterior motives for cooperating with the police as an informant. The jury weighed these factors and chose to believe Dickey. There was no requirement that the Commonwealth rebut Sheffey's contention that a third person sold the drugs to Dickey; indeed, Dickey's own testimony was a rebuttal of this theory. When we view the evidence as a whole, it was clearly reasonable for the jury to find Sheffey guilty, and the trial court did not err, therefore, in denying Sheffey's motion for a directed verdict.³

³ Yarnell v. Commonwealth, Ky., 833 S.W.2d 834, 836 (1992).

Sheffey's second argument concerns the testimony of Brian Fuller, the police officer who was in charge of the drug operation. Fuller was the Commonwealth's first witness, and he testified as to what he had heard on the audio monitor during the drug transaction. At the time he testified, the jury had not yet viewed the videotape of the drug sale. Sheffey contends that Fuller's commentary was inadmissible because he was testifying about an incident at which he was not present and of which he had no personal knowledge. Sheffey argues that the testimony was unfairly prejudicial because it improperly bolstered the version of events later provided by Dickey and also unfairly discredited Sheffey's own testimony.

Several objections were raised by defense counsel regarding Fuller's description to the jury of what he had heard through the audio monitor. The trial court eventually ruled that Fuller could testify only as to what he had actually heard, but that he could not draw conclusions about or offer explanations of what he had heard. Nonetheless, Fuller thereafter testified that he had heard a conversation relating to trafficking activities. He further testified that he had not heard the exact moment when the \$20. changed hands but he had known that the transaction was complete from the portion of the conversation which he did hear. The judge at that point called a bench conference and asked the prosecutor, "what about my

prior ruling didn't you understand?" She repeated her ruling that Fuller was not permitted to offer conclusions as to what he had heard on the audio monitor.

We need not address Sheffey's arguments regarding Fuller's testimony because even if his remarks were inadmissible, their admission was harmless error.⁴ Sheffey himself does not deny that a drug transaction took place; his primary defense was that Dickey bought the drugs from someone else in the apartment. Fuller's comments did not identify or implicate Sheffey as the seller. Fuller merely explained that he had heard a drug sale take place. This testimony did not in any way unfairly bolster Dickey's identification of Sheffey as the person from whom he bought the crack cocaine, or unfairly impeach Sheffey's own testimony.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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⁴ See Kentucky Rules of Criminal Procedure 9.24.