

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002424-MR

DAPHANE ROBINSON

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT  
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE  
ACTION NO. 02-CR-00076

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Daphane Robinson appeals from the Ballard Circuit Court's judgment sentencing her to ten years' imprisonment after a jury found her guilty of first-degree trafficking in a controlled substance (cocaine). For the following reasons, we affirm.

Debbie Cruise testified at trial that she often gave money to Robinson, who then bought drugs for Cruise. When Cruise got "into trouble" with the authorities for drug-related

charges, she agreed to work undercover with the Ballard County Sheriff's Department. On July 13, 2002, Cruise met Detective Jerry Jones, Deputy Bobby Hickman, and Deputy Gary Wybark at a prearranged location in Ballard County. After Wybark searched Cruise's vehicle and person to ensure that she did not have any money or contraband, Jones and Hickman placed a wireless audio transmitter on Cruise, and Jones gave her \$100.

Cruise further testified that the officers followed her to the home of her cousin, Regina Carmen, where Cruise asked Carmen whether she believed Robinson had any drugs. Carmen answered that Robinson probably did but that Robinson would likely not sell drugs directly to Cruise.<sup>1</sup> Further, Carmen declined to go with Cruise to meet Robinson because Carmen would have to take children with her. Nevertheless, Cruise proceeded to Robinson's house, followed by the officers.

Robinson's grandmother answered the door, and Cruise asked to see Robinson. When Robinson came out from a bedroom, Cruise asked if Robinson had "anything." Robinson asked how much Cruise wanted, Cruise answered that she wanted \$40 worth, and Robinson told her to wait. Robinson went back into the bedroom, returned, and gave Cruise a rocky substance which was later determined to contain cocaine. Cruise proceeded to a

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<sup>1</sup> Apparently Cruise knew Robinson through Carmen.

second prearranged location and gave Jones the remaining \$60 and the drugs.

Robinson was subsequently indicted of first-degree trafficking in a controlled substance<sup>2</sup> (cocaine) and first-degree wanton endangerment<sup>3</sup>. The latter charge was dismissed pursuant to Robinson's motion for a directed verdict at the close of the Commonwealth's case, but the jury found Robinson guilty of the trafficking charge. On October 3, 2003, the trial court adopted the jury's recommendation to sentence Robinson to ten years' imprisonment. This appeal followed.<sup>4</sup>

### **I. Challenges to Indictment**

Robinson alleges that there is reversible error with regard to the wanton endangerment count, which is set forth in her indictment as follows:

That on or about the 13th day of July, 2002 in Ballard County, Kentucky the above-named defendant knowingly and unlawfully committed the offense of Wanton Endangerment in the First Degree when she wantonly engaged in conduct which created a substantial danger of death or serious physical injury to a minor, namely Lucy a five year old<sup>5</sup> by having a controlled substance in the presence of said minor and/or where the minor could gain access to the controlled substance and

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<sup>2</sup> KRS 218A.1412.

<sup>3</sup> KRS 508.060.

<sup>4</sup> Robinson concedes that some of her allegations of error are preserved and others are not. We review each allegation accordingly.

<sup>5</sup> The words "a five year old" are handwritten in the blank.

thereby created circumstances manifesting extreme indifference [sic] to the value of human life.

More specifically, Robinson states that the tape of the grand jury proceeding does not reflect what evidence was presented to support this count, and she insinuates that whatever evidence was presented was insufficient, because the child's full name was not listed and her age was handwritten. However, these issues are not properly before us as

the court has no power to go behind an indictment for the purpose of inquiring into the competency of the evidence before the grand jury. . . . [T]he court will not inquire into the legality or sufficiency of the evidence on which an indictment is based even if it is averred that no legal evidence was produced before the grand jury.<sup>6</sup>

We also disagree with Robinson's contention that the indictment was deficient with regard to the wanton endangerment count, because it failed to provide Lucy's full name and evidence at trial was that any endangered child was an eighteen-month-old boy. RCr 6.10(2) provides in part that an indictment "shall be sufficient if it contains, a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged." Further, RCr 6.12 mandates that an indictment "shall not be deemed invalid . . . by reason of a defect or imperfection that does

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<sup>6</sup> *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000) (quoting *Rice v. Commonwealth*, 288 S.W.2d 635, 638 (Ky. 1956)).

not tend to prejudice the substantial rights of the defendant on the merits." We believe that the indictment herein was sufficient to inform Robinson of the nature of the charged crime.<sup>7</sup> In any event, any error in the indictment was harmless since at the close of the Commonwealth's case the trial court directed a verdict in Robinson's favor on the wanton endangerment count.

## II. Failure to Grant a Continuance

Robinson's next argument is that the trial court erred by failing to grant her motion for a continuance, which was made "less than 48 hours before trial" because the Commonwealth had not yet produced lab results regarding the alleged cocaine. According to Robinson's appellate brief, the lab results were not produced until eighteen hours before trial.

Pursuant to RCr 9.04, a criminal defendant's motion for the postponement of a trial may be granted upon a showing of sufficient cause. Moreover, "[t]he decision whether or not to grant a continuance lies within the sound discretion of the trial court and, unless from a review of the record as a whole it appears that the trial judge has abused his discretion, we will not disturb his ruling."<sup>8</sup>

Here, Robinson's motion alleged as follows:

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<sup>7</sup> *Thomas v. Commonwealth*, 931 S.W.2d 446, 449 (Ky. 1996).

<sup>8</sup> *Stump v. Commonwealth*, 747 S.W.2d 607, 609 (Ky.App. 1987).

Inasmuch as this is a drug case, the lab results are a key element of the Commonwealth's case and Defense Counsel is entitled to receipt of said lab results prior to trial. If these lab results are received at this late date, the undersigned has insufficient time to prepare for trial and the Defendant will be severely prejudiced thereby.

Even if we presume that the Commonwealth failed to produce the lab results in a timely fashion, it is undisputed that the results which ultimately were produced were consistent with the charge alleged in the indictment, i.e., first-degree trafficking in a controlled substance (cocaine). While Robinson alleges that the untimely production left her with no opportunity to obtain additional testing or consult an expert regarding the results, there is nothing in the record to suggest that a continuance of the trial would have produced a different result. Accordingly, we cannot say that the court abused its discretion by denying Robinson's motion for a continuance.

Further, we are not convinced that a different result is compelled by *Anderson v. Commonwealth*,<sup>9</sup> wherein convictions were reversed in part, because the defendant was never provided with either the complaining witness's taped statement or evidence of one of her own incriminating oral statements. Here, by contrast, Robinson received the lab results prior to trial, and there has been no showing that the delay was prejudicial.

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<sup>9</sup> 864 S.W.2d 909, 912-15 (Ky. 1993).

### **III. Failure to Strike Juror for Cause**

Robinson's next argument is that the trial court erred by failing to strike a potential juror for cause. It became known during voir dire that a venireperson, Mrs. Jones, was married to the lead detective in the case and was pregnant with his child. Further, Mrs. Jones and her husband had previously discussed the audiotapes in the case against Robinson "several times." Still, the trial court overruled Robinson's motion to strike Mrs. Jones for cause, because she stated that she could render a fair and impartial decision.

Robinson proceeded to exercise four peremptory strikes, including one against "Marilee Jones". However, as a defendant is entitled to eight peremptory challenges in a felony case,<sup>10</sup> Robinson cannot prevail on this issue since she neither exhausted all of her peremptory challenges nor proved that the jury included an incompetent juror who should have been struck for cause.<sup>11</sup>

### **IV. Allegations of Race Discrimination**

Next, Robinson alleges that the trial court erred by overruling her challenge to the jury composition pursuant to *Batson v. Kentucky*.<sup>12</sup> We disagree.

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<sup>10</sup> RCr 9.40(1).

<sup>11</sup> *Williams v. Commonwealth*, 829 S.W.2d 942, 943 (Ky.App. 1992).

<sup>12</sup> 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In *Commonwealth v. Snodgrass*,<sup>13</sup> the Kentucky Supreme Court explained the *Batson* three-step analysis as follows:

First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Although the defendant in *Snodgrass* premised his *Batson* challenge on the fact that the prosecutor used a peremptory strike against the only black person selected from the jury pool,<sup>14</sup> the court questioned whether the defendant's allegation satisfied the first prong of the *Batson* test, as "*Batson* requires more than a simple numerical calculation. Numbers alone cannot form the only basis for a prima facie showing."<sup>15</sup> However, the *Snodgrass* court found that the issue of whether the defendant met his prima facie showing was moot, because "the prosecutor offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate issue of intentional discrimination[.]"<sup>16</sup>

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<sup>13</sup> 831 S.W.2d 176, 178 (Ky. 1992) (internal citations omitted).

<sup>14</sup> *Id.* at 179.

<sup>15</sup> *Id.* (quoting *Commonwealth v. Hardy*, 775 S.W.2d 919, 920 (Ky. 1989)).

<sup>16</sup> *Id.*

Similarly, Robinson premised her *Batson* challenge on the fact that the Commonwealth used a peremptory strike against the only black person in the jury pool. The Commonwealth responded that it used the peremptory strike because it had recently prosecuted the juror's son for selling drugs to Cruise, who was also the undercover informant against Robinson. Certainly the trial court did not abuse its discretion<sup>17</sup> in accepting this race-neutral explanation. In any event, Robinson's *Batson* challenge was untimely since she did not raise it until after the close of all of the evidence.<sup>18</sup>

Robinson also makes a more generalized allegation of race discrimination, arguing essentially that she was the victim of selective enforcement by the Ballard County Sheriff's Department and the Commonwealth. In support thereof, Robinson cites census statistics and the Kentucky Department of Corrections' Profile of Inmate Population, as well as studies undertaken by all three branches of Kentucky's government. She further urges us to remand this matter for a hearing to determine

whether a pattern of racial bias affected the deputies' selection of an informant and targets, whether an objective analysis shows a fair percentage of the entire racial make-up of the county with regard to jury pools,

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<sup>17</sup> *Id.* at 180.

<sup>18</sup> See *Dillard v. Commonwealth*, 995 S.W.2d 366, 370 (Ky. 1999).

whether the court is equally attentive to the rules of evidence and procedure with regard to the race of the defendant, whether black persons tend to face more serious charges than white persons committing the same offense and whether sentencing is appropriately proportionate according to the defendant's race.

Whom to prosecute is a matter that is within the Commonwealth's broad discretion and "particularly ill-suited to judicial review."<sup>19</sup> The Commonwealth is limited in that its decision whether to prosecute may not be based upon, *inter alia*, race.<sup>20</sup> In order for Robinson to succeed on her claim of selective prosecution, she must "show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose."<sup>21</sup> As Robinson did not raise this issue below, this matter is not properly before us for review.

#### **V. Sleeping Judge**

Next, although the issue was not preserved below, Robinson argues that palpable error<sup>22</sup> occurred when the trial judge slept during a portion of the trial, resulting in a "judicial disparagement of defense counsel's cross examination

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<sup>19</sup> *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985).

<sup>20</sup> *Id.* at 608, 105 S.Ct. at 1531.

<sup>21</sup> *Id.*

<sup>22</sup> RCr 10.26.

[which] affected the jury who determined Robinson to be guilty solely on the word of a convicted felon and disparaged the defense counsel's questioning." While we obviously do not condone the judge's behavior, we disagree.

There is little Kentucky case law regarding sleeping jurors<sup>23</sup> and thankfully even less regarding sleeping judges. Here, it appears from the record that the trial judge was sleeping and snoring at 11:14:20, during the cross examination of the Commonwealth's witness, Deputy Gary Wybark. When defense counsel stated that he had no further questions for the witness at approximately 11:14:48, the judge asked the Commonwealth whether it wanted to redirect. During this period of the jury trial there were no objections made, and the judge was not prompted to make any rulings. We conclude that the error is nonprejudicial, because we do not believe "that a substantial possibility exists that the result would have been any different"<sup>24</sup> had the judge not slept during this portion of the trial.

#### **VI. Failure to Direct Verdict**

Robinson's next argument is that the trial court erred by failing to direct a verdict in her favor on the trafficking count. When faced with a motion for a directed verdict,

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<sup>23</sup> *Lester v. Commonwealth*, 132 S.W.3d 857, 862 (Ky. 2004).

<sup>24</sup> *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky.App. 1986).

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.<sup>25</sup>

On appeal, a criminal defendant is entitled to a directed verdict of acquittal "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]"<sup>26</sup>

KRS 218A.1412(1) provides in relevant part as follows:

A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug[.]<sup>27</sup>

Cruise testified in the matter now before us that she bought a rock containing cocaine from Robinson. Nevertheless, Robinson maintains that Cruise's uncorroborated testimony was insufficient to convict her of first-degree drug trafficking. However, even though the tapes of the audio transmitter were at least partially inaudible, and the officers did not see Robinson, the evidence was sufficient to convict Robinson of first-degree drug trafficking if the jury believed Cruise's

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<sup>25</sup> *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

<sup>26</sup> *Id.*

<sup>27</sup> "Traffic "is defined as" to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance. KRS 218A.010(34). Further, cocaine is a Schedule II controlled substance. KRS 218A.070(1)(d).

testimony. The fact that Cruise was working with the Ballard County Sheriff's Department in the hope of being treated leniently as to her own set of unrelated drug charges does not equate to an absence of sufficient evidence to convict Robinson. Rather, such facts relate to Cruise's credibility and the weight to be given to her testimony -- matters reserved to the jury.<sup>28</sup>

### **VII. Burden of Proof**

Robinson's next argument is that the trial court erred by permitting the Commonwealth to shift to her the burden of proving whether she had nearly \$800 cash as a gift from her father to purchase a vehicle, and whether she was in Tennessee at the time of the alleged transaction. Robinson notes that during closing argument the Commonwealth's Attorney asked the jury why Robinson did not subpoena her father to testify or produce any evidence to support her testimony that she lived in Tennessee at the time of the transaction.

It is axiomatic that the Commonwealth has the burden of proving every element of its case beyond a reasonable doubt.<sup>29</sup> Whether Robinson purchased a vehicle with \$800 cash is obviously not an element that the Commonwealth was required to prove in order to convict her of first-degree drug trafficking. Rather, the Commonwealth introduced this evidence in support of the

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<sup>28</sup> *Benham*, 816 S.W.2d at 187.

<sup>29</sup> KRS 500.070.

inference that the cash was earned through the sale of illegal drugs, as the "possession of cash can be relevant to prove that a defendant is a drug trafficker[.]"<sup>30</sup> Further, the Commonwealth offered Cruise's testimony to prove that Robinson was at the site of the alleged sale, rather than Tennessee, to discredit Robinson's testimony to the contrary.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Bridges Clare  
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BRIEF FOR APPELLEE:

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Attorney General of Kentucky

Janine Coy Bowden  
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<sup>30</sup> *Hayes v. Commonwealth*, 175 S.W.3d 574, 592 (Ky. 2005).