RENDERED: August 12, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000882-MR

COREY QUANTEZ CHAPMAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 03-CR-001212

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: This is an appeal from the final judgment and sentence of the Jefferson Circuit Court. A jury found the appellant, Corey Quantez Chapman, guilty of possession of cocaine and marijuana as a subsequent offender and sentenced him to imprisonment of seven and one-half years. On appeal, Chapman contends that the trial court committed two errors: (1) in failing to dismiss a juror from the *venire* and (2) in permitting the Commonwealth to introduce evidence tending to show that he

had committed other uncharged crimes. As we find no reversible error, we affirm the convictions.

On September 30, 2002, Louisville Division of Police Officer Ryan Bates and Detective Chad Kessinger observed a 1994 Pontiac Grand Prix speeding down Chestnut Street in Louisville's West End. Upon determining that the car had been stolen, Bates and Kessinger undertook a stop. Detective Kessinger approached the driver's side door while Officer Bates approached the passenger's side. Bates testified that he saw the passenger, Chapman, make a furtive movement as if he were putting something in the pocket of the door panel or under the seat. Concerned for his safety, Bates opened the passenger door. He then saw Chapman stuff something into the right front pocket of his trousers. Bates removed Chapman from the car, handcuffed him, and arrested him for the theft of the car. Meanwhile, Detective Kessinger had arrested the driver, Harry Malone.

Bates testified that he immediately conducted a pat-down search of Chapman and found two pieces of knotted plastic in his right front trouser pocket. One bundle contained marijuana, and the other contained an unidentified white powder. Although Chapman's hands were handcuffed behind him, he began to jiggle his boxer shorts. As a result, another plastic bag, containing several pieces of crack cocaine, was discovered sequestered between his buttocks. Nearly $700.00 in cash (some

hidden in his shoe) was also recovered from Chapman. Finally, Bates testified that he had found a bottle of what he suspected to be codeine in the pocket of the door panel on the passenger's side. Michael Foley testified for the Commonwealth and indicated that his 1994 Pontiac Grand Prix had been stolen on September 28, 2002.

Harry Malone, who had already entered a guilty plea to a charge of theft of the vehicle, testified for the defense and admitted that he had been driving the Grand Prix that day. However, he had not informed Chapman that the car was stolen. He also indicated that he had not observed Chapman in possession of any illegal drugs.

At the close of evidence, the trial court granted Chapman's motion for a directed verdict as to the charge of receiving stolen property. The jury then returned a verdict finding Chapman guilty of possession of cocaine and marijuana. Chapman agreed to serve a thirty-day sentence for his misdemeanor conviction for possession of marijuana. Following the penalty phase of trial, the jury recommended a sentence of five-years' imprisonment for Chapman's possession of cocaine -- enhanced to seven and one-half years based on a finding that he was a subsequent offender as defined by KRS[1] 218A.010(25). The

[1] Kentucky Revised Statutes.

court sentenced Chapman in accordance with the jury's recommendation, and this appeal followed.

Chapman contends first that the trial court erred by refusing to remove for cause Juror 54299, Mr. Fred Cowan, who had formerly served as Kentucky's Attorney General. Chapman claims that he was prejudiced by the court's refusal to strike Juror 54299 because he was required to use a peremptory strike to remove him from the panel.

During the court's examination of the jury panel, Juror 54299 indicated that he knew the Commonwealth's Attorney, Hon. David Stengel. However, he denied that this acquaintance would impair his ability to evaluate the evidence objectively or to render a fair verdict. The court then asked if any member of the panel either was employed by the Office of the Commonwealth's Attorney or worked in the field of law enforcement. Juror 54299 responded that he had served as the Attorney General of Kentucky many years before. Later, at the bench, Juror 54299 explained that there was a slight chance that he might have a scheduling conflict with the proceedings scheduled for the following day. When he indicated that he wanted to serve on the jury, the court offered to accommodate him.

The trial court is deemed to be in the best position to evaluate a juror's demeanor and responses during *voir dire*.

Richardson v. Commonwealth, 161 S.W.3d 327 (Ky. 2005). Accordingly, it enjoys considerable discretion in deciding whether to excuse a juror for cause. Rodriguez v. Commonwealth, 107 S.W.3d 215 (Ky. 2003). A court's decision will not be disturbed unless an abuse of discretion can be demonstrated. Adkins v. Commonwealth, 96 S.W.3d 779 (Ky. 2003).

Chapman argues that the juror should have been dismissed based upon a bias implied or reasonably inferred from his former position as Attorney General. Chapman defines the presumed bias as follows:

> [Juror 54299]'s special knowledge about the criminal justice system would necessarily have affected any decision he made in this case and may have influenced other members of the jury during deliberations. Therefore, it was irrelevant that he thought he could listen to all of the evidence before reaching a decision in this case.

Appellant's Brief at 10.

Chapman relies on our holding in Godsey v. Commonwealth, 661 S.W.2d 2 (Ky.App. 1983). In Godsey, the appellant challenged for cause a prospective juror who had formerly served as the county attorney at the same time that the appellant's preliminary hearing was held in the trial court. As distinguished from the juror described in Godsey, Juror 54299 did not serve in a prosecutorial capacity during the time that Chapman allegedly committed the crimes or during any stage of

the Commonwealth's prosecution of him. The coincidence of time was so critical to our analysis in Godsey that it formed the basis of our conclusion that the trial court had abused its discretion by failing to excuse the disputed juror for cause.

Chapman's reliance on Montgomery v. Commonwealth, 819 S.W.2d 713 (Ky. 1992), is also misplaced. Montgomery holds that a jury panel member otherwise disqualified from jury service by reason of bias or prejudice does not become rehabilitated by answering a "magic question." However, the rehabilitation of Juror 54299 was not at issue in this case. Juror 54299 did not make any disclosure to the court. He simply revealed that he had served as Attorney General more than a decade earlier. He gave no indication that he had any bias or that he had formed any preconceived opinion regarding Chapman's guilt or innocence. On the contrary, he emphasized that he could decide the case fairly based upon the evidence presented. The trial court was wholly satisfied that Juror 54299 could render a fair and impartial verdict. Consequently, the juror's removal for cause was not warranted, and the trial court did not abuse its discretion by refusing to dismiss him from service.

Chapman's second argument is that the court erred by permitting the Commonwealth to introduce irrelevant testimony of collateral criminal activity that was unfairly prejudicial in portraying Chapman as a drug dealer. While he admits that the

only alleged error properly preserved for our review concerns a portion of the Commonwealth's opening statement, he contends that his other claims should be reviewed as palpable error under the provisions of RCr[2] 10.26. Although Chapman has combined these issues, we shall address them separately.

During the Commonwealth's opening statement, the prosecutor indicated that Officer Bates would testify that when he discovered cocaine on Chapman's person, he undertook a search of his shoes. Defense counsel objected to this preview of the evidence, arguing that the fact that cash had been found in Chapman's shoes was irrelevant to the issue of whether he possessed cocaine or marijuana. The Commonwealth contended that the evidence would be admissible since the hidden cash tended to show that Chapman, who was unemployed, also possessed cocaine linked to the cash. When the court overruled the objection, Chapman did not seek to preserve the alleged error by requesting a jury admonition.

Opening and closing statements are not evidence, and wide latitude is granted to counsel in summarizing the evidence at these beginning and ending points of a trial. Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987). Counsel has the right to focus the attention of the jury on the facts and circumstances that he believes are likely to be developed by the

[2] Kentucky Rules of Criminal Procedure.

evidence. Freeman v. Commonwealth, 425 S.W.2d 575, 578 (Ky. 1947). Even if an opening statement is deemed improper, a conviction will not be reversed unless actual prejudice can be shown. Decker v. Commonwealth, 198 S.W.2d 212 (Ky. 1946).

In this case, the prosecutor believed that the evidence of cash hidden in Chapman's shoe was likely to be admitted by the court since it tended to relate to Chapman's possession of the cocaine and marijuana recovered by Officer Bates. The court agreed and admitted the evidence of the money in Chapman's shoes. Chapman cannot show that this limited portion of the prosecutor's opening statement determined the outcome of the trial -- especially in light of other overwhelming evidence against him. Indeed, he cannot show that he suffered any prejudice as a result of the opening statement -- regardless of its propriety. A reversal is not warranted.

Finally, during its case-in-chief, the Commonwealth elicited testimony from Officer Bates regarding a simulated substance found in the front pocket of Chapman's trousers. Bates explained that simulated substances are often offered for sale in an effort to cheat buyers. With respect to the crack cocaine recovered from Chapman's boxer shorts, Bates indicated that dealers commonly conceal their contraband in this fashion. Bates also said that he seized the codeine from the door panel pocket because it has become a popular practice to soak

marijuana in codeine in order to produce an enhanced “high.” Finally, Bates reported (just as the prosecutor had predicted) that although Chapman was unemployed, he carried cash totalling nearly $700 in his pocket and in his shoe.

Although counsel did not raise a contemporaneous objection to the disputed testimony, Chapman contends that it was patently irrelevant and unduly prejudicial. He concedes that the alleged error has not been properly preserved for review, but he argues that its admission by the trial court constitutes palpable error warranting reversal. We disagree.

In order to support a conviction for possession of a controlled substance in the first degree, the Commonwealth must prove that the accused knowingly exercised dominion or control over the controlled substance. In this case, defense counsel argued to the jury that Chapman was merely in the wrong place at the wrong time -- that he was riding in a vehicle that he did not know had been stolen and that all of the controlled substances had been found in the door panel pocket of the car.

The Commonwealth contends that substantial evidence was introduced to counter Chapman’s defense, evidence linking Chapman: to a large sum of hidden cash, to a simulated controlled substance, to codeine (used to enhance a high), and to cocaine hidden in a body cavity. The Commonwealth argues that the disputed evidence was admissible as circumstantial

evidence tending to show that Chapman was knowingly in possession of a controlled substance as opposed to merely being in the wrong place at the wrong time. Regardless of the initial admissibility of the disputed evidence, we conclude that its admission -- even if arguably erroneous -- did not amount to a manifest injustice requiring reversal of the convictions under the provisions of RCr 10.26. Nichols v. Commonwealth, 142 S.W.3d 683 (Ky. 2004).

We affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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