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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001197-MR

LIZ GOBLE — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 03-CR-00085

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.[1]

POTTER, SENIOR JUDGE: Liz Goble was convicted of trafficking in a controlled substance, first degree, and sentenced to ten years' imprisonment. She contends that the trial court committed reversible error when it denied her request for an entrapment instruction; when it permitted testimony from a lay person concerning his observation of drugs; and when it included a definition of manufacturing in the jury instructions. We affirm.

[1] Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

William Wolfe, a convicted drug offender, met with Prestonsburg Assistant Police Chief Stan Farler and two other police officers, Shawn Roop and Wiley Baker, at the old courthouse in Prestonsburg in preparation to conduct an undercover drug buy from Goble who had previously offered to sell Wolfe methamphetamine. At the courthouse, Wolfe was searched for drugs and money and then given $50 to purchase drugs. Officer Farler and Roop left the courthouse in one vehicle and Wolfe and Baker in another and went toward Goble's residence. Wolfe and Baker parked in Goble's driveway and Farler and Roop down the street. At that time, Wolfe was equipped with a tape recorder.

Wolfe left the vehicle, walked to the residence, knocked on the door, and entered the house. Goble was present as were several friends and relatives. After a few minutes, Wolfe returned to the vehicle and gave Officer Baker a plastic baggy containing powder and returned the cassette recorder. Both vehicles returned to the courthouse where Wolfe was again searched. No drugs or money were found. The powder substance given to Baker by Wolfe was tested and found to be .169 grams of methamphetamine.

The defense of entrapment, while often raised in narcotic cases, is rarely successful. As explained in Shanks v. Commonwealth, 463 S.W.2d 312, 314 (Ky. 1971):

> Courts have generally found it difficult to state an all-embracing rule which will define the course of conduct or provocation by government officials constituting entrapment. Each case must usually be analyzed upon its own facts. As a general proposition it may said that to constitute entrapment, the officer must do something that will cause the accused to violate the law when he would not otherwise have done so. His normal course of legal conduct must in some way be diverted into a course of illegal conduct by the acts of the officer. If all the officer does is make a purchase from one known or suspected to be dealing the product, this in no wise (sic) constitutes entrapment.

KRS 505.010 (2)(a) provides that the defense is unavailable when merely the opportunity is provided for the commission of a crime. "It has long been the rule that the fact that a police officer hides his identity and solicits the purchase of illegal goods does not constitute illegal entrapment." Id. The defense is available only in the limited circumstances where a police officer or his confederate implants the disposition to commit a crime into the mind of an otherwise innocent person not otherwise disposed to commit the crime. Commonwealth v. Day, 983 S.W.2d 505 (Ky. 1999).

Goble did not testify so the jury heard only Wolfe's testimony that Goble had previously offered to sell him illegal drugs. The officers, through Wolfe, merely set up the opportunity for Goble to sell drugs, an illegal activity that

she was predisposed to committing. Under the facts, the defense of entrapment was unavailable and there was no error in the denial of the instruction.

Wolfe testified that when he entered Goble's home, Goble and others in the residence, were smoking methamphetamine. Goble's counsel objected stating that Wolfe could not have known what substance was being smoked and he was not qualified as an expert. The trial court overruled the objection on the basis of Wolfe's testimony that he had previously smoked methamphetamine and Goble's taped statement made to Wolfe that she had recently "done three lines of it". Wolfe also testified that he saw three yellow pills on a table in Goble's residence that he identified as "Hydrocodone pills". No objection was made until Wolfe speculated that those present were "getting ready to bust them up and snort them." The trial court permitted Wolfe's testimony that he saw the pills but admonished the jury that he could only testify to what he saw and not what might be done in the future.

Wolfe testified that he had used both methamphetamine and "pills" in the past. In Miller v. Commonwealth, 512 S.W.2d 941, 943 (Ky. 1974), the court held that a witness did not have to be addicted to a specific drug to express an opinion on whether that controlled substance was observed. The witness is qualified if the witness did not taste or feel the substance in

question but has sufficient experience in the drug culture to identify the controlled substance. Goble contends that because Wolfe testified that his knowledge was based on his one time use of crystal methamphetamine, his identification of the substance in her residence was not admissible.

A witness who has smoked methamphetamine on even one occasion is well aware of its appearance and more distinctly, its odor. Furthermore, Wolfe testified that he was involved in drugs and, presumably its culture, to a degree that his drug usage had a negative impact on his life. Wolfe's personal knowledge, combined with Goble's admission that she had just smoked the drug, was more than sufficient to support Wolfe's opinion that those present at Goble's residence were smoking methamphetamine. As to the pills, we find the court's admonition to the jury to ignore any evidence other than Wolfe's testimony as to what he saw was sufficient and the extraordinary relief of a mistrial was not warranted. Matthews v. Commonwealth, 163 S.W.3d 11, 17 (Ky. 2005).

Goble's final contention concerns the jury instructions which defined the term "manufacturing". Goble contends that although she was not charged with manufacturing and the verdict instructions made no reference to manufacturing, she nevertheless was prejudiced by the inclusion of the term and its definition.

The instruction tendered by Goble did not include the definition of, or any reference to, manufacturing. However, during the in camera conference concerning the instructions, Goble made no objection to the court's proposed instructions that included the definition and affirmatively stated that there was no objection to the court's instructions. The mere tendering of an instruction does not necessarily satisfy the requirement of RCr 9.54(2) that the party's position be "fairly and adequately presented to the trial judge. . . ." As pointed out in Grooms v. Commonwealth, 756 S.W.2d 131 (Ky. 1988), the trial court can easily overlook tendered instructions. When there are only minor differences between the language in a tendered instruction and the court's instruction, a party is bound to advise the court of the nature of the objection and the correction sought. Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153 (Ky. 2004).

Goble failed to fairly and adequately inform the trial court of her objection to the inclusion of the definition of manufacturing. Additionally, since she was not convicted of manufacturing, any possible prejudice is speculative and any error committed by the inclusion of the manufacturing definition was harmless. RCr 9.24

The judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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