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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001199-MR

QUINTON HAWKINS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 01-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM,¹ HENRY, AND VANMETER, JUDGES.

BUCKINGHAM, JUDGE: Quinton Hawkins appeals from a judgment of the Kenton Circuit Court convicting him of trafficking in a controlled substance in the first degree and persistent felony offender in the second degree (PFO II). Following a jury verdict, the court sentenced Hawkins to 14 years' imprisonment. Hawkins alleges numerous trial errors on appeal. We affirm.

On August 31, 2000, an FBI and Covington Police Department joint drug task force used confidential informant

¹ This opinion was completed and concurred in prior to Judge David C. Buckingham's retirement effective May 1, 2006. Release of the opinion was delayed by administrative handling.

Peggy Davitt to conduct a controlled drug buy in Covington, Kentucky. The detectives searched Davitt prior to the buy to ensure she did not have any drugs or drug paraphernalia. They provided Davitt with a vehicle, wired with hidden cameras and microphones, and \$50.00 in cash to buy crack cocaine. If she obtained cocaine, she was to meet the detectives at a designated location where they would search her again and take custody of the drugs.

The target of the operation was an individual known only as "Stan." Davitt picked up Stan, and he said that they would have to meet with "Q" to obtain the cocaine. Davitt testified that "Q" was Hawkins. They drove to another location where they picked up Hawkins. He told them to drive to a gas station parking lot and wait while he went into a residence to retrieve the cocaine. Davitt testified that approximately thirty minutes later, Hawkins got back into the car and gave her the cocaine and she gave him the \$50.00. She then dropped Stan off on a street corner and drove Hawkins to his residence. The detectives confiscated the cocaine later at the designated location.

A Kenton County grand jury indicted Hawkins for first-degree trafficking in a controlled substance (cocaine) and PFO II. At trial, the Commonwealth called two detectives involved in the operation to testify. They acknowledged that the video

was of poor quality and did not capture the drug transaction. They likewise acknowledged that the audio was of poor quality and that it did not capture Hawkins making the transaction. The Commonwealth also presented Davitt to testify. She testified that Hawkins, not Stan or anyone else, sold the cocaine to her.

The defense's theory of the case was that Davitt was a drug user and that she implicated Hawkins in an attempt to protect Stan, her drug supplier. The defense questioned Davitt about her criminal history. She claimed she had been arrested once for possession of drug paraphernalia because she had possession of a drug pipe she had used earlier as a prop during controlled buys. She also denied that the police helped her with charges for passing cold checks.

The defense then asked her how many times she had been convicted for drug possession. Davitt said she had one conviction for that offense. The Commonwealth objected, stating that that conviction occurred after the buy in this case. The defense then attempted to impeach Davitt's testimony by introducing CourtNet reports the Commonwealth had provided to the defense less than two days before trial, which it claimed contained evidence of prior drug possession convictions. The court did not allow the defense to use those reports, and they were not admitted into evidence because they were not certified public records. The defense formally objected to the form of

the records provided by the Commonwealth and the timelines of their discovery. The court overruled the objections.

After Davitt's testimony, the Commonwealth closed its case. Hawkins moved for a directed verdict of acquittal, which was denied, and then closed his case. Hawkins moved for a facilitation instruction, arguing that based on the ambiguity of the evidence, the jury could believe Hawkins facilitated the transaction but did not participate in it. He did not argue that facilitation was a lesser-included offense of trafficking. That motion was denied, and the court instructed the jury on trafficking in the first degree.

During the Commonwealth's closing argument, the prosecutor attempted to describe the statements recorded on the tape as being made by Hawkins. The prosecutor said that Hawkins said he was "doing business" and that he would "run and get it." Hawkins's attorney objected to the prosecutor's description of the sounds on the tape, arguing that the evidence already established that the tapes were virtually inaudible. The trial court overruled the objection.

The jury deliberated for a full day without reaching a verdict. On the second day of deliberations, the jury requested a transcript of the tape, a copy of the audiotape recorded by the other listening device, and a replay of the tape of closing arguments. The court told the jury that there was no transcript

and no other tapes. The court replayed the tape of the closing arguments. Shortly thereafter, the jury returned with a unanimous guilty verdict.

After the verdict was rendered, Hawkins pled guilty to PFO II pursuant to an agreement with the Commonwealth and was sentenced to 14 years' imprisonment. As part of the agreement, Hawkins reserved his right to appeal the conviction on the trafficking charge.

Counsel took the opportunity to question the jury about their deliberations. The court and counsel learned that one of the jurors had brought his own camera into the jury room. He apparently used the camera to attempt to get better sound quality by configuring the audio outputs to play sound on both the right and left speakers on the television. Defense counsel questioned a juror on the effect the equipment had on the deliberations. The juror was unsure as to whether the new equipment swayed the jury in any way.

Thereafter, defense counsel moved for a mistrial based on the fact the jury "experimented" with the tape and heard things that were not presented to the defense. The court denied the motion, but it conducted its own inquiry into the matter. The jury told the court that the use of the new equipment did not help the quality of the sound, but it simply made it louder. No changes were made to the actual recording on the tape, and

the jury said that the original equipment was used for the final viewing of the tape.

The jury was dismissed, and Hawkins again moved for a mistrial. He also made a motion for a new trial. The court denied both motions and sentenced Hawkins to 14 years in prison. This appeal by Hawkins followed.

Hawkins first contends that the court erred by denying his directed verdict motion. He claims that the detectives acknowledged their video and audio evidence from the buy did not establish Hawkins's involvement in the actual drug transaction. As a result, he asserts that the only evidence linking him to the transaction was Davitt's testimony. He further argues her testimony was so unbelievable that no reasonable fact finder could find him guilty beyond a reasonable doubt based solely upon it.

On motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). 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. Id. The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would not be clearly

unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. See Commonwealth v. Sawhill, 660 S.W.2d 3, 5 (Ky. 1983).

Kentucky courts have consistently held that the “[c]redibility and weight of the evidence are matters within the exclusive province of the jury.” Potts v. Commonwealth, 172 S.W.3d 345, 349 (Ky. 2005); Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999); See also Estep v. Commonwealth, 957 S.W.2d 191, 193 (Ky. 1997), and Benham, 816 S.W.2d at 187; and Slaughter v. Commonwealth, 45 S.W.3d 873, 875 (Ky.App. 2000) (“The trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth and assume that the Commonwealth’s evidence is true, leaving questions of weight and credibility to the jury.”).

Hawkins’s argument turns on his contention that Davitt’s testimony was not credible. He claims that Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), allows for review of both the quantitative sufficiency of the evidence, *i.e.*, whether the evidence presented satisfies all elements of the crime, and the qualitative sufficiency of the evidence, *i.e.*, whether the evidence presented is sufficiently credible.

The Potts case is particularly helpful to the analysis of this issue because the arguments therein are virtually

identical to Hawkins's arguments on this issue. In that case, the Kentucky Supreme Court stated that the issue in Jackson concerned only quantitative sufficiency. See Potts, 172 S.W.3d at 349. It said that Jackson "placed limits on the standard it announced, preserving the jury's traditional role as arbiter of credibility." Id.

The Potts court analyzed the same cases that Hawkins cites as examples of reversals based on a sole witness's lack of credibility.² The court concluded that in each of those cases the witness's testimony did not lack credibility as to honesty or truthfulness, but rather the accounts were physically impossible or "inconsistent with physical laws or basic human experiences[.]" Id. at 350.

In this case, Davitt's account of the events surrounding the drug buy was not like the situations in the cases Hawkins cites as examples. Davitt's testimony established the elements of the offense, and her account of the events on the tape was plausible. As such, the jury had the exclusive authority to determine the credibility of her testimony. Therefore, the trial court did not erroneously deny Hawkins's motion for a directed verdict of acquittal.

²Those cases are Weinel v. Commonwealth, 302 Ky. 742, 196 S.W.2d 375 (1946); Kentucky Power Co. v. Dillon, 345 S.W.2d 486 (Ky. 1961); and Coney Island Co. v. Brown, 290 Ky. 750, 162 S.W.2d 785 (1942).

Next, Hawkins objected during the trial to the timing of the Commonwealth's disclosure of Davitt's identity and criminal record. He argues that the Commonwealth did not promptly satisfy its discovery duty under RCr³ 7.24 and 7.26 and its constitutional duty to disclose exculpatory evidence. He contends that the court should have declared a mistrial based on the untimeliness of the disclosure.

Hawkins cannot maintain a constitutional argument that exculpatory evidence was withheld. Under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a criminal defendant's right to due process prohibits the government from withholding material exculpatory evidence, in good faith or in bad faith. Id. at 87, 83 S.Ct. at 1196-97. Here, the Commonwealth did, in fact, disclose Davitt's identity and criminal history.⁴

Hawkins's other contention, that the Commonwealth had a duty to promptly disclose Davitt's identity and criminal record pursuant to RCr 7.24(8) and 7.26, carries more weight. At trial, Hawkins attempted to impeach Davitt after she said she had only been convicted of drug possession once. The Commonwealth objected, stating that the conviction Davitt

³Kentucky Rules of Criminal Procedure.

⁴The Commonwealth provided this information to Hawkins's attorney less than 48 hours before the trial.

admitted to was irrelevant because it occurred after the buy in the present case. Thereafter, Hawkins announced that he had records provided by the Commonwealth that prove she had previous drug possession convictions and that he intended to impeach Davitt with those records.

Hawkins argued that the Commonwealth violated RCr 7.26 by waiting until less than 48 hours before trial to disclose Davitt's identity and her criminal record. He also objected to the form of the records, which were uncertified CourtNet reports. He contends that the late disclosure denied his right to a fair trial and prejudiced his ability to present his defense.

The Commonwealth argued that its policy is to withhold the identity of its informants as long as possible for their protection. The court stated that the disclosure was untimely,⁵ but it rejected Hawkins's effort to use the records, reasoning that the court had already given the defense significant leeway on cross-examination regarding Davitt's criminal history.

⁵The court apparently ruled that the 48-hour rule in RCr 7.26 applied to Davitt's criminal records. That rule applies to "all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant." The documents at issue here do not fall within that description. However, RCr 7.24(8) does provide that disclosure shall be made "promptly" upon discovery of material previously requested that is subject to discovery. That rule applies to Davitt's identity and criminal history, and thus the Commonwealth's late disclosure may have violated RCr 7.24(8).

Hawkins objected to the timing and form of the disclosure of Davitt's criminal record, but he did not make a motion for a mistrial. Thus, he argues that the trial court erred by not declaring a mistrial *sua sponte*. "A trial court has discretion in deciding whether to declare a mistrial, and its decision should not be disturbed absent an abuse of discretion." Clay v. Commonwealth, 867 S.W.2d 200, 204 (Ky.App. 1993).

"A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005). "[F]or a mistrial to be proper, the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002).

It should be noted that Hawkins did not object before trial to the timing of the Commonwealth's disclosure of Davitt's identity or her criminal records. Also, he did not move for a mistrial and did not move for a continuance in order to obtain certified records. Hawkins clearly had other procedural devices at his disposal that he did not attempt to use. We conclude that the court did not abuse its discretion by not declaring a mistrial.

Hawkins next argument involves his motion for a mistrial and motion for a new trial following the inquiry into the jury's use of a juror's personal video camera to view the buy tape. He contends that the jury was virtually deadlocked before viewing the tape using the new camera and that it quickly returned a guilty verdict thereafter. Hawkins argues that such circumstances prove the new camera influenced the jury's verdict.

"[A] trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion." Maxie, 82 S.W.3d at 863. Appellate courts "review the trial court's denial of Appellant's new trial motion for abuse of discretion." Brown v. Commonwealth, 174 S.W.3d 421, 428 (Ky. 2005).

Kentucky courts have not yet addressed this precise issue. However, Kentucky has addressed analogous situations. For example, the Commonwealth cites Evans v. Commonwealth, 230 Ky. 411, 19 S.W.2d 1091 (1929), wherein several jurors were allowed to look at a bullet under a microscope for ballistics purposes. The defense's objection to the use of the microscope was overruled. On appeal, the court stated:

Suppose the bullet had been handed to the jury for their examination, there would be no well-founded reason for objecting. Such has been done hundreds of times. Now suppose that one member of the jury had put

on his spectacles in order he might see the bullet better, no objection could be made to that; yet, when he looks through the microscope, the defendant objects. That is just the same as the use of the spectacles. It merely enabled the juror to see and to see better than he could see with his naked eye. So there is no well-founded reason for the defendant's objection.

19 S.W.2d at 1097.

At least one sister state court has articulated the rule for a jury's use of equipment or experimentation with the evidence, when it stated, "[t]he most commonly drawn distinction is between experiments which constitute merely a closer scrutiny of the exhibit and experiments which go 'beyond the lines of evidence' introduced in court and thus constitute the introduction of new evidence in the jury room." Rossell v. Volkswagen of America, 709 P.2d 517, 529 (Ariz. 1985), citing McCormick on Evidence § 217 at 541 (E. Cleary, ed., 2d ed. 1972).

Here, it is clear from the court's questioning of the jury, as well as from the questions asked by counsel, that the jury did not obtain much clarity, if any, from the use of the personal equipment. Hawkins's implication that the jury was virtually deadlocked and that it then quickly returned a guilty verdict after using the equipment does not, by itself, compel the conclusion that the camera influenced the verdict. There is no allegation that the jury changed the evidence or manipulated

it in such a way as to create new evidence. Therefore, the trial court did not abuse its discretion when it denied Hawkins's motion for a mistrial and motion for a new trial based on the jury's use of the camera during its deliberations.

Hawkins next argument deals with defense counsel attempting to impeach Davitt with uncertified records of her criminal convictions. He contends that "the issue before the court was not whether Ms. Davitt's prior criminal record could be put before the jury. Rather, the issue was whether Mr. Hawkins would be permitted to contradict Ms. Davitt's misleading testimony concerning her drug involvement, and her motives for participating in controlled buys[.]" He further argues that "[h]ad Ms. Davitt persisted in stating that she had only on [sic] prior drug offense, the court certainly could have taken judicial notice of the CourtNet report[.]"

KRE⁶ 609 governs impeachment by evidence of conviction of a crime. It states, in part, as follows:

(a) General rule. For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon

⁶Kentucky Rules of Evidence.

which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

"[A] witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions[.]" Hodge v. Commonwealth, 17 S.W.3d 824, 848 (Ky. 2000), quoting Commonwealth v. Richardson, 674 S.W.2d 515, 517-518 (Ky. 1984). Public records of criminal convictions must be certified to be admissible. See KRE 902 and RCr 9.44.

In this case, Hawkins was allowed to go beyond the rules stated above and inquire into Davitt's prior drug convictions and cold check charges. Hawkins asked how many times Davitt had been convicted of drug possession, and she responded that she had been convicted once. The Commonwealth did not object to that question on the grounds that it violated KRE 609, but rather that the conviction Davitt admitted to was irrelevant because it occurred after the buy in this case.

Defense counsel then announced his intent to impeach Davitt on her prior drug convictions with the CourtNet reports given to the defense by the Commonwealth, which he claimed proved that Davitt had been convicted of drug possession numerous times. The court ruled that the discovery of the records was untimely, but it did not allow the use of the CourtNet records.

"[T]rial courts retain broad discretion to regulate cross-examination." Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997). "So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." Id.

Hawkins's argument that the court should have allowed him to impeach Davitt with the introduction of the CourtNet reports fails because they were uncertified records. The rules state that public records must be certified, and it is the responsibility of the party presenting such documents to authenticate them.

The court gave Hawkins considerable leeway in exposing Davitt's potential bias and challenging her veracity. If, as the defense argued to the trial court, the Commonwealth's disclosure did not afford Hawkins enough time to obtain the proper records, he should have requested a continuance on that ground. He cannot use his lack of proper documentation to usurp

the rules of evidence. Therefore, the trial court did not err by preventing Hawkins from using the uncertified records to impeach Davitt's testimony about her drug history.

Hawkins next contends that the trial court erred by not instructing the jury on the offense of facilitation to trafficking in a controlled substance, first degree. He argues that the judgment should be reversed and a new trial conducted, wherein the jury would receive such an instruction.

KRS⁷ 505.020(2) defines lesser-included offenses and states, in pertinent part, as follows:

A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
- (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

⁷ Kentucky Revised Statutes.

In Houston v. Commonwealth, 975 S.W.2d 925 (Ky. 1998), the Kentucky Supreme Court held that facilitation is not a lesser-included offense of trafficking, when it stated:

The offenses of trafficking in or possession of a controlled substance require proof that the defendant, himself, knowingly and unlawfully committed the charged offense. The offense of criminal facilitation requires proof that someone other than the defendant committed the object offense and the defendant, knowing that such person was committing or intended to commit that offense, provided that person with the means or opportunity to do so. Thus, criminal facilitation requires proof not of the same or less than all the facts required to prove the charged offenses of trafficking in or possession of a controlled substance, but proof of additional and completely different facts. *A fortiori*, it is not a lesser included offense when the defendant is charged with committing either of the object offenses.

Id. at 930 (citations omitted).

In this case, the evidence presented charged Hawkins with the single offense of trafficking. Although Hawkins did not testify, his theory was that Stan, not Hawkins, sold Davitt the drugs. Such a set of facts might have supported a facilitation instruction. However, Hawkins was not charged with facilitation, and it was not a lesser included offense of the trafficking charge. Therefore, the court did not err by not instructing the jury on facilitation to trafficking in a controlled substance.

Hawkins's final argument alleges that the trial court erred by overruling his objection to the prosecutor's comments during closing argument. The prosecutor purported to quote Hawkins's voice on the buy tape making incriminating statements. Hawkins argues that the evidence does not prove that the voice on the tape was his. Furthermore, he argues that the detectives acknowledged the tape was of poor quality and, therefore, that the Commonwealth's interpretation of the tape was mere conjecture.

"In any consideration of alleged prosecutorial misconduct, particularly, as here, when the conduct occurred during closing argument, we must determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." Slaughter v. Commonwealth, 744 S.W.2d 407, 411 (Ky. 1987), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 647-648, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974). "The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor." Id. at 411-412.

Here, Hawkins likens the prosecutor's remarks about the evidence to the situation in Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988), where the prosecutor deliberately erased tape-recorded statements of witnesses and then provided the jury

with his own written transcript of the tapes. The court held that such misconduct was reversible error. Id. at 540.

The present case is distinguishable from Sanborn. Here, the prosecutor did not alter or destroy evidence or attempt to mislead the jury about any portion of the evidence. He simply commented on what he claims to have heard on the tape. "A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter, 744 S.W.2d at 412.

The jury took the opportunity to examine the tape during deliberations, and thus each juror was able to make his or her own decision without the risk of misinterpretation of the evidence that existed in Sanborn. Therefore, the trial court did not erroneously overrule Hawkins's objection to the Commonwealth Attorney quoting the voice on the tape as being that of Hawkins. Even if it did err, the error was harmless since the jury had the opportunity to listen to the tape itself.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Timothy G. Arnold
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Robert E. Prather
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Robert E. Prather
Frankfort, Kentucky