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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002469-MR

CLARENCE CARPENTER — APPELLANT

v. — APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 01-CR-002304

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

VANMETER, JUDGE: Clarence Carpenter appeals from the Jefferson Circuit Court's judgment sentencing him to five years' imprisonment after a jury found him guilty of first-degree trafficking in a controlled substance (crack cocaine). For the following reasons, we affirm.

When detectives with the Jefferson County Police Department searched Lacretia Henry's apartment pursuant to a search warrant on June 22, 2001, they found Henry and Carpenter

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

asleep in one bedroom. The detectives also found $491, a cell phone, and 11.5 grams of crack cocaine in the bedside table, two handguns in the closet, and electronic equipment. In a second bedroom, detectives found Deshaun Townes and a seventeen-year-old female as well as $1,281 in a shoe beside the bed. Additionally, the detectives found an empty box for a digital scale in the living room.

Henry, Townes, and Carpenter were subsequently charged, inter alia, with first-degree trafficking in a controlled substance (crack cocaine)[2] while in possession of a firearm.[3] Henry entered a guilty plea, agreed to testify against Townes and Carpenter, and was sentenced to serve two twelve-month terms, probated for two years. Moreover, Townes was granted a directed verdict at the close of all of the evidence against him. However, a jury found Carpenter guilty of first-degree trafficking in a controlled substance, and he was sentenced to five years' imprisonment. This appeal followed.

I. Biographical Information on Police Report

Outside the presence of the jury, the Commonwealth indicated that it intended to call Detective Joe Lamb as a witness regarding his questioning of Carpenter in order to complete a Uniform Citation form. Specifically, Carpenter told

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[2] KRS 218A.1412.

[3] KRS 218A.992.

Lamb that he was unemployed, and he gave his address as the apartment that was searched. Carpenter objected to the admission of this testimony, arguing that the Commonwealth's discovery response indicated that Carpenter had not made any oral incriminating statements. The trial court allowed the testimony to be introduced, because the Commonwealth had provided the Uniform Citation in its discovery response. On appeal, Carpenter argues that the admission of this testimony was reversible error. We disagree.

RCr 7.24(1) provides in part that "[u]pon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness[.]" Further, the trial judge is vested with the discretion "to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing into evidence the material not disclosed, or he may enter such other orders as may be just under the circumstances."[4]

As the Commonwealth points out, Carpenter did not make a written request for discovery. Instead, the discovery response was governed by the trial court's order which required the Commonwealth to "disclose the substance of any oral

[4] *Neal v. Commonwealth*, 95 S.W.3d 843, 848 (Ky. 2003).

incriminating statement known by the attorney for the Commonwealth to have been made by the Defendant to any witness." The Commonwealth did not identify Carpenter's statements as incriminating and, in fact, it stated in its discovery response that it was unaware of any self-incriminating statements by Carpenter. However, by providing a copy of the Uniform Citation in its discovery response, the Commonwealth provided the substance of Carpenter's statements. In any event, the evidence was cumulative and harmless since Henry also testified that Carpenter was unemployed, and that he stayed at her apartment three or four nights a week. Accordingly, we cannot say that the trial court abused its discretion in allowing the testimony to be introduced.

II. Expert Testimony

The Commonwealth indicated in its discovery response that it intended to call "an expert witness in the field of narcotics" at trial. Indeed, David James testified as the Commonwealth's expert that the amount of crack cocaine found and the absence of drug paraphernalia were indicative of drug trafficking as opposed to drug use. Additionally, James testified that crack cocaine users sometimes pay for the substance with electronic goods. Finally, James testified that in his opinion, the people found in the room with the money and drugs (Carpenter and Henry) were drug runners for the people

found in the room with only the money (Townes and the minor girl).

Carpenter argues that the trial court erred by allowing James to testify, because during discovery the Commonwealth neither specifically identified him nor turned over his reports. We disagree.

Neither RCr 7.24 nor the trial court's discovery order required the Commonwealth to disclose a list of all of its witnesses. In fact, "under the discovery rules, a defendant is not entitled to either the names of all Commonwealth witnesses or a list of all persons present at the time of the crime."[5] Moreover, as James did not conduct any examinations, tests, or experiments with regard to this case, there were no results or reports to disclose. Accordingly, the trial court did not abuse its discretion[6] in allowing him to testify despite the fact that before trial the Commonwealth disclosed only its intention to call "an expert witness in the field of narcotics[.]"

Further, we are not persuaded by Carpenter's contention that the trial court erred by admitting the substance of James's testimony. We recognize that other jurisdictions have held that the government may not attempt to establish a defendant's guilt by calling an expert witness to testify that

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[5] 8 Leslie Abramson, *Kentucky Practice*, § 21:17 (4th ed. 2003).

[6] *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577-78 (Ky. 2000).

the defendant has the same characteristics as a drug dealer or drug courier profile.[7] Here, however, James gave his expert opinion that Carpenter was a drug trafficker based on certain specific facts, i.e., the quantity of drugs found and the absence of drug paraphernalia. The admission of this type of testimony was approved in *Kroth v. Commonwealth*,[8] wherein the Kentucky Supreme Court held that reversible error did not occur when a trial court permitted a police officer

> to testify that in his opinion the defendant had the pills in his possession for sale and not for personal use. The officer testified as an expert witness. He referred to the large quantity of drugs found in the home of Kroth and stated that such a large quantity indicated that they were for sale, not personal use, based on his ten years of experience as a narcotics officer.

Similarly, in *Sargent v. Commonwealth*[9] the Kentucky Supreme Court held that a trial court did not err in allowing policemen to opine that the defendants possessed drugs for sale as opposed to personal use. The court reasoned that the marijuana trade

> is certainly specialized in character and outside the scope of common knowledge and

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[7] *U.S. v. Jones*, 913 F.2d 174, 176-77 (4th Cir. 1990) ("the use of expert testimony as substantive evidence showing that the defendant 'fits the profiles and, therefore, must have intended to distribute the cocaine in his possession' is error") (citing *United States v. Quigley,* 890 F.2d 1019 (8th Cir. 1989)); *accord Michigan v. Hubbard*, 530 N.W.2d 130, 133 (Mich. Ct. App. 1995) (following "the majority of circuits of the United States Court of Appeals that have decided this issue by holding that drug profile evidence is not admissible as substantive evidence of guilt").

[8] 737 S.W.2d 680, 681 (Ky. 1987).

[9] 813 S.W.2d 801, 802 (Ky. 1991).

> experience of most jurors. The opinion of the police aided the jury in understanding the evidence and resolving the issues. The trial judge did not abuse his discretion when he determined that both police officers were sufficiently qualified to give expert testimony. There was no invasion of the province of the jury as the ultimate factfinder and there was no error. The police were skilled in a particular field and stated facts from which an opinion could be drawn.[10]

Thus, Carpenter's attempt to distinguish *Kroth* and *Sargent* from the matter now before us is unpersuasive, and the trial court did not abuse its discretion[11] in admitting James's expert testimony.

III. Directed Verdict

Next, Carpenter argues that the trial court erred by failing to direct a verdict in his favor. 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[.]"[12]

KRS 218A.1412(1) provides in part that "[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

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[10] *Id.*

[11] *Goodyear Tire and Rubber Co.*, 11 S.W.3d at 577-78.

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

which is a narcotic drug[.]" The term "[t]raffic" is defined as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance."[13] Further, cocaine is a Schedule II controlled substance.[14]

Circumstantial evidence alone may, in some instances, be sufficient to create a jury issue as to whether a defendant possessed[15] a controlled substance with the intent to sell.[16] Here, Henry and Carpenter were asleep beside a bedside table which contained 11.5 grams of crack cocaine, a cell phone, and $491 cash. Although there was no drug paraphernalia in the apartment, a box for drug scales, two handguns, and electronic equipment were found. Moreover, Henry testified that the crack cocaine and cash did not belong to her, that Carpenter was unemployed, and that he stayed at her apartment three or four nights each week. This evidence as a whole created a factual issue as to whether Carpenter possessed the crack cocaine for

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[13] KRS 218A.010(34).

[14] KRS 218A.070.

[15] "Possession" is defined in KRS 500.080(14) as "to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object[.]" As previously explained by the Kentucky Supreme Court, "'[p]ossession' sufficient to convict under the law need not be actual; 'a defendant may be shown to have had constructive possession by establishing that the contraband involved was subject to his dominion or control.'" *Hargrave v. Commonwealth*, 724 S.W.2d 202, 203 (Ky. 1986) (quoting *Rupard v. Commonwealth*, 475 S.W.2d 473, 475 (Ky. 1972)).

[16] *See Faught v. Commonwealth*, 656 S.W.2d 740, 742 (Ky. 1983).

the purpose of trafficking in it. Thus, we cannot say that it was clearly unreasonable for the jury to find Carpenter guilty of first-degree trafficking in a controlled substance. It follows that the trial court did not err by failing to direct a verdict in his favor.

IV. The Commonwealth's Closing Argument

Finally, Carpenter argues that the trial court erred by failing to grant a mistrial based on several statements the Commonwealth made during closing argument. We disagree.

First, the Commonwealth stated that Henry testified that the money discovered in the bedside table belonged to Carpenter. Carpenter objected, noting that Henry actually had testified only that she did not know who the money belonged to but that it was not hers. The trial court agreed and admonished the jurors to rely upon their own recollection of the testimony.

The Commonwealth then stated:

> They told the police they were unemployed. You got the "unemployed" from Detective Lamb, Sergeant Harr, and Lacretia Henry. Did you get any information from any place else? [Objection] From any witnesses put on by the defense?

Carpenter objected on the ground that the statement commented on his silence. The trial court sustained the objection, reasoning that the prosecution was attempting to shift the burden of proof, and admonished the jury to disregard the Commonwealth's

statement. However, the trial court refused to declare a mistrial.

Then the Commonwealth argued that if Carpenter believed that the police coerced Henry to testify a certain way, Carpenter could have played a tape of her prior statement for the jury. Carpenter objected, arguing that the tape was not admissible since Henry's testimony was not inconsistent with her taped statement. The trial court refused to admonish the jury, stating that to do so would require it to make an evidentiary ruling on a matter not before the court.

As set forth above, the trial court admonished the jury regarding the first two objectionable statements during the Commonwealth's closing argument. Moreover, Carpenter expressly stated that he was not seeking a mistrial as to the third statement. As this court has explained:

> It is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition. A mistrial is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity."[17]

Carpenter has not made any showing that the trial court's admonitions failed to remove any prejudice created by the Commonwealth's statements or that he was prejudiced by the

[17] *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky.App. 1993) (internal citations omitted).

cumulative impact of the statements. Hence, we cannot say that the trial court abused its discretion[18] in failing to grant a mistrial.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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[18] *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002).