

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000191-MR

EDMUND LEE TYLER

APPELLANT

v. APPEAL FROM McCracken Circuit Court
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 04-CR-00103

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: A McCracken Circuit Court jury convicted Edmund Lee Tyler (Edmund) of one count of tampering with physical evidence, one count of possession for sale of a simulated controlled substance, and being a persistent felony offender in the second degree (PFO II). In accordance with the jury's recommendation, the trial court sentenced him to three years on the tampering charge, a \$250 fine on the possession charge and seven years on the PFO II charge, with the seven year sentence to run in lieu of the other two sentences. He appeals

to this Court as a matter of right, contending that the trial court committed reversible error by: (1) denying Edmund's motion for a directed verdict because the Commonwealth failed to present evidence as to knowledge, intent, access, proximity, drug use by Edmund, drug money, finger prints, or residue analysis of his pockets; (2) failing in the instructions to require the jury to make a determination as to whether Edmund possessed a simulated controlled substance before it made a determination as to whether Edmund tampered with such evidence; and (3) allowing the prosecution to invite the jury to engage in wild speculation of violence during voir dire when violence was not a factor in this case. Because we conclude that (1) under the evidence as a whole it was not clearly unreasonable for the jury to find guilt; (2) there was no error in the jury instructions; and (3) the trial court did not abuse its discretion in allowing the prosecution to examine potential jurors as to the dangers of possessing with the intent to sell a simulated controlled substance, we affirm

In the early morning hours of January 23, 2004, while on patrol, Paducah Police Officer Jason Merrick observed a car driven by Edmund's brother, Rome Tyler (Rome), run a stop sign. Edmund was a passenger in the car.

After running the stop sign, Rome ran a red light. At that point, Officer Merrick activated his emergency lights and

attempted to pull Rome's car over. Rome did not pull over immediately, but continued driving a couple of blocks. Rome finally pulled the car into an alley. After stopping his car, Rome got out and started running through the alley. Officer Merrick chased him until he could see that other police officers were positioned to apprehend Rome. The area where Rome dumped the car was known to be a high-crime area.

After stopping the chase, Officer Merrick turned around and headed back to Rome's car. As Officer Merrick approached the car, he saw Edmund outside the car. Officer Merrick estimated that 60 seconds had elapsed from the time he started chasing Rome to the time he noticed Edmund. Edmund was walking away from the remains of an old cinder block foundation toward the front passenger side of the car. At the time Officer Merrick first saw Edmund, he was about ten feet away from the wall. Officer Merrick ordered Edmund to get on the ground, and Edmund did.

Officer Brandon Barnhill arrived at the scene just as Officer Merrick had ordered Edmund to the ground. Officer Merrick patted Edmund down for weapons, and Officer Barnhill began to look around the area. In the remnants of the foundation, Officer Barnhill found a white paper towel wrapped around a cellophane bag with several individually wrapped pieces of what appeared to be crack cocaine. The temperature at that

time was 18°F. Officer Barnhill did not have on gloves or a jacket, and he noticed that the paper towel concealing the baggies was not cold to the touch, frost-covered or damp.

After finding the substance, the officers did a complete search of Edmund by which they found two white paper towels in his front pocket. One of the paper towels matched the pattern of the paper towel concealing the baggies, but the other did not. Officer Merrick asked Edmund about the substance he had found, and Edmund did not have a response.

The police sent the substance in the baggies to the Kentucky State Police Western Regional Crime Laboratory for testing to determine whether the rocks contained any controlled substance. They did not. Aside from the test to determine the presence of a controlled substance, the crime lab did not do any further testing on the paper towels or the baggies. Edmund was charged with tampering with physical evidence, alcohol intoxication, possession for sale of a simulated controlled substance, and being a persistent felony offender in the second degree. In the course of the proceedings, however, the alcohol intoxication charge was dismissed.

We now turn to Edmund's three arguments on appeal.

I. DIRECTED VERDICT OF ACQUITTAL

Edmund contends that the trial court erred in denying his motion for a directed verdict of acquittal. The Commonwealth claims the issue is unpreserved because Edmund did not renew his directed verdict motion as required by Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998).

In this case, however, Edmund did not put on any evidence. He rested immediately after the trial court denied his motion for a directed verdict. The law only requires a renewal when the motion is made at the close of the Commonwealth's case, the motion is denied, and the defendant then presents additional evidence. See id. But a renewal is not required if the defense rests immediately after the trial court denies the motion. See Commonwealth v. Pevely, 759 S.W.2d 822, 823 (Ky. App. 1988) (construing the phrase in RCr 10.24, "at the close of all the evidence," to mean when all the evidence that is going to be introduced has been introduced).

Turning to the merits of Edmund's claim, Edmund argues that the trial court erred in denying his motion for directed verdict of acquittal because the evidence presented against him was insufficient to support his tampering and possession convictions. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Upon review of the evidence presented by the Commonwealth, it was not clearly unreasonable for Edmund's jury to find him guilty of tampering with physical evidence and possession for sale of a simulated controlled substance.

When law enforcement tried to pull the car over in which Edmund was a passenger, Rome did not stop the car at first. Rome kept driving, and when he finally stopped, he got out and ran. Edmund did not remain in the car either. He got out for some reason. A search of the area within 10 feet of where the police first saw Edmund yielded a package of what appeared to be crack cocaine that was concealed by a paper towel. The pattern on the paper towel matched one of two paper towels found in Edmund's pocket. Despite the temperature outside being 18°F, the paper towel in the cinder block was not damp, frost-covered or cold to the touch, which indicates that it had not been there long.

The cellophane bag that was wrapped by the paper towel contained four individually wrapped rocks of some substance that looked exactly like crack cocaine. The officers testified that, based on their experience, such packaging was consistent with packaging for sale rather than personal use. When viewed as a whole, there was sufficient evidence to submit the issue of Edmund's guilt on the charged offenses to the jury. Therefore,

the trial court did not err by denying his motion for a directed verdict.

II. THE ORDER OF THE JURY INSTRUCTIONS

Next, Edmund argues that the jury instructions were fatally flawed because the trial court gave them in the reverse order. Edmund contends that the jury should have been instructed on possession first, then tampering. Edmund concedes that this argument is unpreserved, but asks that we consider it as palpable error under RCr 10.26.

Edmund cites no authority in support of his argument other than the general statement that the jury instructions impacted Edmund's due process rights. Further, Edmund does not take issue with the substance of the instructions. He takes issue with the order in which they were given. In a challenge arising from jury instructions, however, this Court does not review the instructions in isolation, but must consider them as a whole. See Bills v. Commonwealth, 851 S.W.2d 466, 471 (Ky. 1993). Thus, there can be no error, palpable or otherwise, stemming from the order in which a trial court instructs the jury so long as there is no claimed error that the trial court erred in instructing on the law of the case.

III. PROPRIETY OF COMMONWEALTH'S VOIR DIRE EXAMINATION

As his final point of error, Edmund argues that the trial court abused its discretion in allowing the Commonwealth to question the jury on matters outside of the evidence. Edmund further asserts that such questioning tended to prejudice him and inflame the jury, which, in turn, deprived him of a fundamentally fair trial and due process of law.

The exchange about which Edmund complains occurred when the prosecutor was trying to elicit responses as to the possible dangers of selling fake cocaine. One of the potential jurors responded that a person purchasing the fake drugs could get ticked off that they got ripped off. The prosecutor went on to ask what the real danger was in that case. In response, a potential juror answered that someone could bring back a gun and start shooting. The prosecutor followed up on this comment by asking if the person who sold that fake cocaine was the only person at risk of being shot, at which point Edmund's counsel objected on the grounds that (1) Edmund was not charged with selling fake cocaine; and (2) the prosecutor was not making reasonable inferences from the evidence. The trial court overruled the objection, and the prosecutor continued with the line of questioning.

When Edmund's counsel had a chance to conduct her examination, she stated without objection that there was no sale of drugs in this case, so there was no chance that somebody

would get mad because the facts of this case did not go that far.

Our standard of review in a challenge arising from voir dire examination is abuse of discretion. See Webb v. Commonwealth, 314 S.W.2d 543, 545 (Ky. 1958). In Webb, the court instructed as follows:

The examination of the prospective jurors is for the purpose of obtaining a fair and impartial jury whose minds are free and clear of all interest, bias, or prejudice that might prevent their finding a true and just verdict. A wide latitude is allowed counsel in examining jurors on their voir dire. The scope of inquiry is best governed by a wise and liberal discretion of the court. The exercise of the discretion does not constitute reversible error unless clearly abused and when it appears that harmful prejudice has been caused thereby. 31 Am.Jur., Jury, Sections 138-140, pages 120-123.

Id.

Mindful of these guidelines, under these facts, we do not conclude that the trial court abused its discretion in allowing the prosecution to examine the jury on the dangers of possessing with the intent to sell a simulated controlled substance. A review of the proceedings demonstrates that at least one potential juror was not completely convinced that it should be a crime. It was at this point that the prosecutor became more direct with his questions, and the trial court

afforded the prosecutor some latitude in impressing upon the jury why the law prohibits it.

For the reasons stated above, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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