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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000759-MR

JOANNE CANSLER — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 04-CR-00184

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Joanna Cansler appeals from the Harlan Circuit Court's judgment sentencing her to twelve years' imprisonment after a jury found her guilty of first-degree trafficking in a controlled substance (second offense). For the following reasons, we affirm the judgment.

Jennifer Smith testified at trial that she participated in several controlled drug buys under the supervision of Kentucky State Police (KSP) Detective Roy Pace. On April 21, 2004, Pace gave Smith $270, installed cameras in

her car and purse, and searched her car for drugs. Smith then proceeded to the driveway of Cansler's home, where Red Hensley[1] asked her what she wanted. Smith requested and paid Hensley for two oxycodone pills. Hensley then went inside the house, came back outside, and handed the pills to Cansler, who had come outside in the interim. After Smith and Cansler talked for a few minutes, Cansler gave Smith the pills. Smith left and ultimately met Pace at a prearranged location, where she gave him the two pills.

Cansler testified, by contrast, that Smith came to her home two or three times each day and that she sometimes babysat Smith's baby for short periods. On the date of the alleged transaction, there was no discussion about Smith buying pills from Cansler. Nor did Cansler give Smith anything on that day. Rather, Hensley told Cansler that Smith was outside and was "acting funny." Cansler went outside to talk to Smith, who said that she did not have enough money to pay her electric bill but if the Community Action Agency would pay the bill, she would buy two pills. When Cansler replied that she "did not know anything about that," Smith proceeded to talk about her baby getting stung by a bee. Moreover, when Smith said that her boyfriend

[1] Although Smith described Hensley as Cansler's husband, Cansler testified that the two were never married but that Hensley was the father of her youngest son and sometimes stayed at her home.

had bought four pills but did not give any to her, Cansler replied that she also "did not know anything about that."

Additionally, the following exchange took place during the Commonwealth's cross-examination of Cansler:

> Q. Ms. Cansler, you say that when [Smith] first mentioned buying a couple of pills [on April 21] you said, "I don't know anything about that."
>
> A. She was talking about she didn't have enough money to pay her electric bills. She only had 170-something dollars and if she could get CAA to pay her electric bills, she would buy her some pills with the money she had.
>
> Q. And you testified that when she said that you said you don't know anything about that.
>
> A. I said I didn't know anything about it.
>
> Q. And then when she was talking about having bought four pills the day before, you say that you said again, "I don't know anything about that."
>
> A. I don't recall. I didn't know what she was talking about. No, sir, I don't.
>
> Q. Did you listen to the tape [of the April 21 conversation] yesterday [during the first day of trial]?
>
> A. Yes.
>
> Q. In here? You listened to it twice, didn't you?
>
> A. Yes, sir.
>
> Q. Nowhere on that tape did you say, "I don't know anything about that," did you?

A. I said I didn’t know or something ‘cause I didn’t know what she was talking about. Like I say, the conversation was switching from her needing help paying her electric bill to she only had so much money and then she kept shuffling around in her purse and then she was talking about the baby getting bee stung.

Q. Now, the truth of it is you knew that Red was selling pills up there, didn’t you?

A. No, sir. I did not.

Q. As a matter of fact when she talked about the four pills she bought yesterday, she bought those up there from Red the day before. And you were –-

A. I have no knowledge of that.

Q. Let me finish -– and you were present weren’t you?

A. No, sir.

Q. You were not present when that happened?

A. I don’t recall being present when that happened, no.

Q. Okay, are you still in contact with Red?

A. No.

Q. Are you aware that he has been indicted on selling those pills to her the day before?

A. No, I was not.

Q. Are you aware that that was also taped?

A. No, sir.

Q. Isn’t it true that the day before when she bought those pills that you asked her what it is that she wanted and said that Red would have to go get it and that it wouldn’t take him long? You were present when the money was counted out and when the pills changed hands?

A. Conversation between her and Red?

Q. Isn’t that true –- the day before –- yes, ma’am.

Defense: Your honor, at this point I’m going to object to any more questions along this line.

Judge: Well, she has opened it up with her response to the question. I will require the Commonwealth to follow through on its effort to impeach. If not, then I will hear other motions.

Q. Now, isn’t it true that you were there the day before when those pills changed hands and you said the things I just said?

A. I didn’t see pills exchange hands, no.

Q. It’s true that you asked her what it was she wanted.

A. She was coming to my house.

Q. You asked her what she wanted and there was talk about pills. She wanted two 80s and you said that Red would have to go get them and it wouldn’t take him long. Isn’t that true? The day before?

A. I don’t recall.

Q. You don’t recall.

A. No.

> Q. Don't you think you would remember that?
>
> A. I wasn't selling pills, no.

A jury found Cansler guilty of first-degree trafficking in a controlled substance (second offense), and the court sentenced her to twelve years' imprisonment. This appeal followed.

I. Cross-Examination of Cansler

Cansler argues that the trial court erred by allowing the Commonwealth to cross-examine her regarding her knowledge of the alleged April 20 drug sale. We disagree.

KRE 404(b) provides, in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

A trial court must address the relevance, probativeness, and prejudice of other crimes evidence when determining its admissibility.[2] We will not disturb the trial court's decision to admit evidence absent an abuse of discretion.[3]

[2] *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005).

[3] *Id.*

The defendant in *Muncy v. Commonwealth*[4] testified on direct examination in a drug trafficking prosecution that he had no knowledge of drugs found in his sofa cushions pursuant to the execution of a search warrant. The trial court allowed the Commonwealth to introduce evidence regarding two undercover drug buys, which partly served as the basis for procuring the search warrant, although the charges stemming from those buys were not at issue.[5] The Kentucky Supreme Court affirmed the admission of the evidence pursuant to KRE 404(b)(1), reasoning that the defendant "opened the door to the information related to the undercover buys when he testified that he had no knowledge of the drugs recovered from the cushions of his sofa."[6] The evidence demonstrated the defendant's knowledge of the drugs recovered from the sofa and his intent to sell the drugs; moreover, "the probative value of the undercover buys was not substantially outweighed by any undue prejudicial effect."[7] Similarly, in the matter now before us, the evidence of the April 20 drug sale was relevant to prove that Cansler knew that drug trafficking was taking place at her residence. The trial court did not abuse its discretion in allowing the Commonwealth

[4] 132 S.W.3d 845, 847 (Ky. 2004).

[5] *Id.*

[6] *Id.* at 848.

[7] *Id.* at 847-48.

to cross-examine Cansler regarding the alleged April 20 drug sale.

There is no merit to Cansler's unpreserved argument that the trial court became an advocate for the Commonwealth when it "require[d] the Commonwealth to follow through on its effort to impeach." Rather, as the Commonwealth suggests, the trial court's statement simply required the Commonwealth to provide the basis for its line of questioning, or the court would hear other motions from Cansler.

Additionally, there is no merit to Cansler's argument that by allowing evidence of the April 20 drug sale, the trial court violated the rule that trials in Kentucky must be bifurcated. As set forth above, the evidence was admissible pursuant to KRE 404(b). Moreover, evidence that this was Cansler's second drug trafficking offense, i.e., that Cansler was convicted of two counts of first-degree drug trafficking in September 2002, was not introduced until the separate guilt phase.

II. Directed Verdict

Cansler also argues that the trial court erred by failing to direct a verdict in her favor on the trafficking charge. Cansler concedes that this issue is unpreserved, but

she urges this court to conclude that she must be granted relief in order to avoid manifest error.[8]

Smith testified that she went to Cansler's residence, she told Hensley that she wanted to buy two pills, and Cansler thereafter handed her the pills. From this evidence alone, the jury could reasonably find Cansler guilty of trafficking.[9] Further, a different result is not compelled by the fact that KSP paid Smith for her participation in controlled buys, as this related to the jury's determination of her credibility and the weight to be given to her testimony.[10] For the same reasons, Cansler is not entitled to a directed verdict based on the fact that Pace searched Smith's vehicle but not her person before the controlled buy, and the fact that the videotapes were of poor quality. No palpable error[11] occurred.

The Harlan Circuit Court's judgment is affirmed.

ALL CONCUR.

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[8] RCr 10.26.

[9] 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 which is a narcotic drug[.]" Oxycodone is a Schedule II controlled substance. KRS 218A.070. Further, "[t]raffic" is defined as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." KRS 218A.010(34).

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

[11] RCr 10.26.

BRIEF FOR APPELLANT:

Lisa Bridges Clare
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky