

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002021-MR

WILLIAM ERSKIN SLATER

APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL III, JUDGE
ACTION NO. 05-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

BUCKINGHAM, SENIOR JUDGE: William Erskin Slater appeals from a final judgment of the Mason Circuit Court wherein he was convicted of Trafficking in a Controlled Substance Within 1000 Yards of a School and of being a Second-Degree Persistent Felony Offender. We affirm.

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as special judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

On June 17, 2005, Detective Tim Fagan of the Buffalo Trace Gateway Narcotics Task Force conducted video and visual surveillance from a concealed location on Fourth Street in Maysville, Kentucky. The section of Fourth Street was known for drug activity. Fagan observed Slater conduct a hand-to-hand transaction with a female and also observed him approach passenger cars and lean into the window, after which the cars would drive away. In addition, Fagan observed Slater go to nearby bushes time and again to retrieve something before walking back to the street. At one point, Slater was observed untying a plastic baggy and being surrounded by several males. As one of the males was walking away, he put something he had in his hand into a cigarette pack. Slater was thereafter again observed going back to the bushes and was observed counting his money.

As police moved in, Detective Fagan directed them to the bushes where Slater had been seen going to and from. The officers found a brown bag that contained a large plastic bag containing a quantity of marijuana and several smaller "dime" bags. No other person had been observed in the area of the bushes. The officers then arrested Slater, and he was indicted by a Mason County grand jury.

Slater was subsequently tried by a jury. At trial, he testified that he was on Fourth Street for purposes of drinking and gambling (dice) and that he did not sell any marijuana. Slater explained his presence in the bushes by stating that he had hidden some beer by some steps near the bushes so that no one could take it and that he occasionally went to get another beer.

The jury returned a verdict of guilty of Trafficking in a Controlled Substance Within 1000 Yards of a School and of being a Second-Degree Persistent Felony Offender. Pursuant to the verdict, the trial court sentenced Slater to five years in prison on the trafficking charge, enhanced to ten years due to his persistent felony offender status. His appeal herein followed.

Slater's first argument is that the court erred by denying his motion for a directed verdict at the conclusion of the evidence at trial. He asserts that the Commonwealth was required to present more than a scintilla of evidence to support the charge against him and that it failed to do so. *See Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). In support of his argument, Slater further states that Detective Fagan could not positively testify that he saw him selling marijuana and that the video tape did not show him doing anything illegal. Also, Slater notes that no witnesses other than Detective Fagan and another officer testified against him and that no fingerprints were obtained from the bag. The Commonwealth responds that the evidence, although circumstantial, was sufficient to overcome Slater's directed verdict motion.

In *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991), the Kentucky Supreme Court stated as follows:

On motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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. For purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but

reserving to the jury questions as to the credibility and weight to be given to such testimony.

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.

Id. at 187.

Drawing all fair and reasonable inferences from the evidence, we conclude that the evidence was sufficient to overcome Slater's directed verdict motion. A reasonable juror could conclude beyond a reasonable doubt that Slater was selling marijuana from his location on Fourth Street. Slater was seen conducting a hand-to-hand transaction, leaning into vehicles' windows as the drivers stopped to make contact with him, counting his money, and going to and from bushes where a stash of marijuana was hidden. Based on this circumstantial evidence, it was not clearly unreasonable for the jury to have found Slater guilty.² In short, the trial court correctly denied Slater's directed verdict motion.

Slater's second argument is that the trial court erred when it failed to grant him a mistrial because the prosecutor made an improper reference to Slater's prior "bad acts". Detective Fagan testified that he had recognized Slater from previous incidents. Because Detective Fagan was a narcotics agent, Slater contends that the testimony implied that he must have recently committed a drug crime. The Commonwealth responds that the testimony did not implicate Slater in any specific prior bad acts, that the

² The standard for a directed verdict does not change where the evidence is circumstantial. Sawhill, 660 S.W.2d at 4.

error, if any, was unpreserved, and that the error, if any, was harmless and not cause to grant a motion for a mistrial.

Slater's counsel did not object to the testimony until after almost two minutes of additional testimony had been elicited. Kentucky Rule of Criminal Procedure (RCr) 9.22 requires a timely and contemporaneous objection in order to preserve appellate review. Because this objection was not timely made, appellate review was not preserved.

In *Neal v. Commonwealth*, 95 S.W.3d 843 (Ky. 2003), the Kentucky Supreme Court stated that a mistrial should be granted only when “a manifest necessity for such an action or an urgent necessity” appears in the record. *Id.* at 851-52. Further, a trial judge has the discretion concerning whether to grant a mistrial, and that discretion should be disturbed only when it has been abused. *Id.* We conclude that any error in this regard, even if it had been properly preserved, was not sufficient to warrant a mistrial and that the trial court did not abuse its discretion in declining to grant one.

Slater's third argument is that the trial court erred by not granting a mistrial because Detective Fagan violated the court's order that he not narrate the video as the jury was watching it. The court had ruled prior to showing the video to the jury that Detective Fagan could testify concerning what he had observed and that the jurors could draw their own conclusions concerning their observations of the video. Specifically, Slater complains that Detective Fagan stated at one point that one of the persons seen in the video was a “frequent buyer”. The video did not show this person having contact with

Slater. Following a timely objection by Slater's counsel, the court sustained the objection and admonished the jury to disregard that portion of the testimony. Slater contends that the court erred by not granting his motion for a mistrial on this ground.

In *Gould v. Charlton Co., Inc*, 929 S.W.2d 734, 738 (Ky. 1996), the Kentucky Supreme Court stated that “[t]he occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.” This holding was reaffirmed in *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002). Based on this standard, we conclude that the trial court did not abuse its discretion in denying Slater's motion for a mistrial on this ground.

Slater also argues that the trial court erred in allowing the Commonwealth to continue to press him for an answer to a question that was improper and argumentative. At the end of his direct examination, Slater asserted that he had nothing to hide. The prosecutor's first question on his cross-examination of Slater was: “Is it that you don't have anything to hide or that you think you can fool the jury?” After the court sustained an objection made by Slater's attorney, the prosecutor continued by asking: “Are you telling this jury you would admit to it that you sold drugs?” After again asking the question, the prosecutor asked: “Would you look the jury in the eye and tell them if you sold marijuana?” Slater repeatedly responded that he had not sold any marijuana, and the prosecutor then asked him if he had been convicted of a felony, to which Slater replied

that he had. Although the court sustained the initial objection, it nevertheless allowed the line of questioning to continue.

Slater argues that the aforementioned exchange implied to the jury that he had lied once before about selling drugs and had been caught. The Commonwealth argues in response that the questioning was relevant to Slater's credibility and thus was not improper. The Commonwealth also maintains that the prosecutor persisted in the line of questioning because Slater refused to respond directly to the question. Further, the Commonwealth contends that any error in this regard was harmless. *See* RCr 9.24.

“[T]rial courts retain broad discretion to regulate cross-examination.” *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997).. We agree with the Commonwealth that the prosecutor had the right to cross-examine Slater on his statement because it went to the issue of his credibility. We find no abuse of discretion in the trial court's allowing the questioning, and further conclude that any error in this regard was harmless.

Finally, Slater argues that the cumulative effect of errors deprived him of his right to a fair trial. As we found no errors, there was no cumulative effect. Thus, this argument is likewise without merit.

The judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLEE

Angela Johnson
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Ken W. Riggs
Frankfort, Kentucky