

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002282-MR

JUAN LEOTIS SANDERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE W. DOUGLAS KEMPER, JUDGE
ACTION NO. 02-CR-002491

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2006-CA-002283-MR

CECILIA SANDERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE W. DOUGLAS KEMPER, JUDGE
ACTION NO. 02-CR-002491

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

KELLER, JUDGE: On October 6, 2006, in the Jefferson County Circuit Court, Juan Leotis Sanders (Juan) and Cecilia Sanders (Cecilia) were convicted of Planting, Cultivating or Harvesting with Intent to Sell Marijuana and Illegal Use or Possession of Drug Paraphernalia pursuant to KRS 218A.1423, Complicity pursuant to KRS 502.020, and Illegal Use or Possession of Drug Paraphernalia pursuant to KRS 218A.500. Juan was also convicted as a Persistent Felony Offender in the second degree pursuant to KRS 532.080. Juan and Cecilia appeal their convictions. This Court consolidated their appeals which raise the following issues: (1) whether the trial court incorrectly overruled Juan and Cecilia's motions to suppress evidence; (2) whether Juan and Cecilia were denied a fair trial because the prosecution was allowed to refer to them as "Drug Dealers"; (3) whether the trial court incorrectly allowed the prosecution to place marijuana into evidence without testing it or without charging the defendants with a crime related to it; (4) whether the trial court erred in denying Juan's motion for directed verdict; (5) whether the trial court erred by allowing Cecilia's counsel to make remarks against Juan; and (6) whether Juan was denied due process of law and a fair trial when Cecilia's counsel allowed the prosecution to inject information relating to collateral criminal activity. For the reasons set forth below, we affirm.

FACTS

This case has a rather convoluted factual background, which we must set out to more fully explain the issues in this appeal. Juan's multiple residential addresses, set forth below, are particularly important in evaluating whether he was in constructive possession of the marijuana. Juan had previously been convicted of manslaughter, but was free on bond pending his appeal of this conviction. His address listed on the appeal bond was 3902 Vantage Place Louisville, Kentucky. On August 22, 2002, his conviction was affirmed by the Kentucky Court of Appeals and his appeal bond was revoked. Subsequently, a warrant was issued for his arrest listing his address as 4910 Shumake Way or 5307 Regent Way, both in Louisville, Kentucky. Juan was also a suspect in an unrelated shooting incident that occurred on October 28, 2002. On October 29, 2002, a confidential informant notified the police that Juan was located at 3902 Vantage Place, and police began surveillance of that residence.

On October 29, 2002, at 10:20 a.m., Juan was arrested in the driveway of 3902 Vantage Place after leaving the house and attempting to enter a Lincoln Navigator. Apparently unaware that Juan was in custody, an officer was in the process of obtaining a search warrant for the 3902 Vantage Place residence, seeking Juan and any evidence linking him to the unrelated shooting incident. A Jefferson Circuit Court judge issued that warrant at approximately 3:00 p.m.

Subsequently, police officers searched the 3902 Vantage Place residence, but did not find any evidence relating to the shooting. Instead, they

discovered sixty-five marijuana plants, grow lights, potting soil, fertilizer, and large sums of money. The officers also found a small amount of marijuana in a bedroom and a marijuana leaf in the Lincoln Navigator. An officer then obtained a second warrant from a different judge relating to the marijuana and drug paraphernalia, and the officers seized these items, as well as the Lincoln Navigator and another vehicle.

On November 6, 2002, Juan and Cecilia were both indicted for Planting, Cultivating, or Harvesting with Intent to Sell Marijuana, Complicity, and Illegal Use or Possession of Marijuana. Juan was also indicted for being a Persistent Felony Offender in the Second Degree. On January 21, 2003, Juan moved, through counsel, to suppress all items seized from the Lincoln Navigator due to lack of probable cause. Then, on January 23, 2003, Cecilia moved to suppress all items from the residence and vehicle related to drug activity due to lack of probable cause. The trial court denied both Juan and Cecilia's motions to suppress on October 27, 2003, finding that there was probable cause for both warrants.

On December 29, 2003, Juan filed a pro se motion to suppress evidence of the alleged illegal search of the 3902 Vantage Place residence and requested a hearing, pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), arguing that the warrant was based on materially false information. On March 2, 2004, Juan then filed a motion to dismiss the charges against him because there was no probable cause for the search warrant. The trial

court denied Juan's motion and denied his request for a hearing on July 21, 2004. Juan later filed a motion, by counsel, for the court to reconsider his motion to suppress, but the trial court denied the motion. On August 11, 2004, Cecilia moved to adopt Juan's motion to set aside the order denying the motion to suppress. The motion to adopt was granted; however, the trial court denied the motion to reconsider.

Juan and Cecilia were tried together before a jury beginning on August 9, 2006. The trial court continued to deny any suppression of evidence seized during the search of the Vantage Place residence and the vehicles. Both Juan and Cecilia were convicted of Planting, Cultivating or Harvesting with Intent to Sell Marijuana, Complicity, and Illegal Use or Possession of Drug Paraphernalia. Juan's sentence was enhanced by his PFO II status. The trial court entered judgments consistent with the jury's verdicts and it is from those judgments that Juan and Cecilia appeal.

ANALYSIS

1. Motions to Suppress

Both Juan and Cecilia claim that the trial court erred in overruling their motions to suppress evidence and assert that the Vantage Place residence was searched and evidence was seized without probable cause. The standard of review of a trial court's denial of a motion to suppress is two-fold. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). First, the Court must determine whether the findings of fact are supported by substantial evidence. *Id.* If the findings are supported by substantial evidence, they are conclusive and will not be disturbed. *Id.* Second, the Court will conduct a de novo review of the trial court's application of the law to the established facts to determine whether the ruling was correct as a matter of law. *Id.*

It is important to note that the actual record from the suppression hearing that occurred on March 21, 2003 is not before this court. However, after reviewing the record of the case in its totality, we conclude that the trial court's findings of fact are supported by substantial evidence. Juan had a valid warrant issued for his arrest, which had been issued when his appeal bond was revoked after his manslaughter conviction was affirmed. A confidential informant informed the police that Juan could be located at the Vantage Place residence and the police corroborated this information with extensive surveillance. An officer acquired a valid search warrant based on the warrant relating to Juan's previous conviction, information from the confidential informant, police surveillance, and

Juan's status as a suspect in a separate shooting incident. Therefore, substantial evidence supported the trial court's findings of fact. Accordingly, this Court must next determine whether the trial court correctly applied the law to the facts.

Both Juan and Cecilia contend that the Vantage Place residence was searched and evidence was seized when no probable cause existed in support of the issuance of the first search warrant. Cecilia specifically claims that there was insufficient probable cause to support the search warrant because it was based on the information of an unnamed confidential informant that Juan was located at the Vantage Place residence. Juan also contends that he was illegally arrested and charged with contraband found at the Vantage Place residence because this was his estranged wife's home; thus, he was not in constructive possession of the marijuana. This Court disagrees with Juan's assertion that he was not in constructive possession of the marijuana, and that issue will be discussed more thoroughly below.

Officers are required to "seek a warrant based on probable cause when they have a belief in advance that they will find contraband or evidence of a crime." *United States v. Chambers*, 395 F.3d 563 (6th Cir. 2005). Probable cause to arrest exists when there are reasonably trustworthy facts and circumstances sufficient to lead a reasonable person to believe there is a fair probability that the suspect is committing or has committed an offense. *Maryland v Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). Furthermore, the determination of whether probable cause exists does not rest on isolated facts, but rather the

cumulative effect of the facts in the totality of the circumstances. *United States v. Everroad*, 704 F.2d 403 (8th Cir. 1983).

Applying the law to the instant case, we conclude that the affidavits provided in support of obtaining both search warrants sufficiently stated grounds that justified issuing both warrants. The first search warrant provides facts sufficient to establish probable cause because it clearly expresses that Juan was wanted on a previous warrant, had been seen going into the Vantage Place residence, and was a suspect in a separate shooting. Furthermore, this information was supported by extensive surveillance of the Vantage Place residence that demonstrated that Juan was at the residence. Based on the totality of the circumstances, it is reasonable to conclude that this warrant was based on probable cause.

Cecilia's claim that the search warrant was insufficient for lack of probable cause because it was based on the information of an unnamed confidential informant is also without merit. Although an anonymous tip alone may not provide probable cause for an arrest, that tip coupled with some type of verification of the information may, in fact, establish probable cause. *Martin v. Commonwealth*, 592 S.W.2d 134, 138 (Ky. 1979). In the particular circumstances of the case at hand, the confidential informant's tip was verified by lengthy police surveillance which confirmed that Juan was at the residence. The trial court found that each search warrant was based on probable cause; thus, it denied the motion to

suppress the evidence. We find no error in that conclusion, and affirm the trial court's denial of the motions to suppress.

2. Prosecutorial Misconduct

Juan and Cecilia claim that they were denied a fair trial because the Commonwealth referred to them as “drug dealers” in opening statement and closing argument. They both argue that this was improper because they were only on trial for cultivating, but not distributing, marijuana. While Juan’s counsel objected to these statements, Cecilia’s counsel did not object and her argument is not preserved for review. However, even if Cecilia’s counsel had properly preserved this issue for review, this Court holds that no misconduct occurred under either the standard of review for preserved prosecutorial misconduct claims, or the palpable error standard of review in RCr 10.26.

When reviewing claims of prosecutorial misconduct, the reviewing Court “must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings.” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Prosecutorial misconduct will only rise to the level of reversible error, if the misconduct is flagrant or if the proof of guilt is not overwhelming, if the defense counsel objected, and if the trial judge failed to cure the error by sufficiently admonishing the jury. *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002).

The prosecutor's statements in this case cannot be considered misconduct. First, according to KRS 218A.1423, a person is guilty of marijuana cultivation when he knowingly and unlawfully plants, cultivates, or harvests marijuana with the intent to sell or transfer it. The statute further explains that planting, cultivating, or harvesting of five or more marijuana plants shall be prima facie evidence that the marijuana plants were planted, cultivated, or harvested for the purpose of sale or transfer. Second, a prosecutor is permitted wide latitude during opening statement and closing argument and is entitled to draw reasonable inferences from the evidence. *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005). Based on the number of plants at issue, the statement that Juan and Cecilia were drug dealers was such a permissible inference.

The prosecutor's conduct was not improper because, as Juan claims in his brief, the Commonwealth could have easily proven that the defendants were growing marijuana by introducing the marijuana plants and drug paraphernalia. Pursuant to the language of KRS 218A.1423, growing approximately sixty-five marijuana plants would be prima facie evidence that those plants were cultivated for the purpose of sale or transfer. Based on the latitude provided during a prosecutor's opening statement and closing argument, the Commonwealth's statements were not improper, prejudicial, or egregious so as to have undermined the overall fairness of the proceedings. Therefore, the prosecutor did not err in asserting that the defendants were drug dealers. Furthermore, we perceive no palpable error pursuant to RCr 10.26.

3. Placing marijuana into evidence without testing or charging Juan and Cecilia with Possession

Juan and Cecilia both claim that they were denied a fair trial because the prosecution placed marijuana into evidence that was found in a bedroom and a marijuana leaf that was found in a Lincoln Navigator into evidence without testing these items or charging either of them with possession of either of these items.

Because the appellants failed to timely preserve this argument for review as required by RCr 9.54, the Court will review the issue pursuant to Rule 10.26.

Pollini v. Commonwealth, 172 S.W.3d 418, 428 (Ky. 2005). Under the palpable error standard of review, “[a] palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error.” *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996). For an error to be palpable it must have been “easily perceptible, plain, obvious and readily noticeable.” *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1998).

The fact that the Commonwealth did not test the marijuana leaf and the marijuana found in the bedroom is not fatal to the Commonwealth’s case. The issue of whether the Commonwealth is required to test samples from all individual portions of a controlled substance when the charge against a defendant relates to a certain amount of a controlled substance was addressed in *Taylor v. Commonwealth*, 984 S.W.2d 482 (Ky. App. 1998). In *Taylor*, this Court held that the government is not required to test each item appearing to be marijuana for the

presence of marijuana in order to find that the defendant possessed a certain amount of that substance. *Id.* at 485. Although this case is slightly different than *Taylor*, because the untested items were not identical in form to the tested items, the physical appearance of the tested and untested items is merely one factor listed in *Taylor*.

Therefore, despite any lack of testing, it was reasonable for the trial court to presume that the government presented sufficient reliable evidence to attribute the full quantity of marijuana seized to the defendants. This is not a clear error producing manifest injustice. Accordingly, the trial court did not err in allowing the marijuana to be submitted into evidence without prior testing.

4. Constructive Possession

Juan claims that there was no evidence that he was in constructive possession of the marijuana found at the Vantage Place residence because it was his estranged wife's home; thus, the trial court erred in denying his motion for a directed verdict. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Id.*

“Constructive possession exists when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others.”

Johnson v. Commonwealth, 90 S.W.3d 39, 42 (Ky. 2003). Furthermore, possession does not have to be exclusive; two or more people may be in constructive possession of the same drug at the same time. *Franklin v. Commonwealth*, 490 S.W.2d 148, 150 (Ky. 1972).

In *Clay v. Commonwealth*, 867 S.W.2d 200, 202 (Ky. App. 1994), this Court upheld a jury verdict of constructive possession where a defendant disclaimed any knowledge of cocaine found in the kitchen and bathroom of her home, even after a visiting relative claimed that the cocaine belonged to him and was for his personal use. The Supreme Court of Kentucky has also found constructive possession of a controlled substance even when a defendant was a visitor in an apartment, rather than a resident. *Houston v. Commonwealth*, 975 S.W.2d 925, 927 (Ky. 1998).

The case at hand is analogous to *Dawson v. Commonwealth*, 756 S.W.2d 935 (Ky. 1988). In *Dawson*, the presence of bills and letters addressed to the defendant, an identification card containing his photograph, insurance papers in his name, clothing and boxes belonging to him, and evidence that the utilities were registered in his name, were sufficient to prove that the defendant constructively possessed controlled substances also found in an apartment. Similarly, Juan’s clothes, various bills and correspondence addressed to him, and a “grow lamp”

displaying both Juan and Cecilia's names were found in the Vantage Place residence. Moreover, Juan appeared to be the only individual inside the house throughout police surveillance of the residence, which demonstrated that he had control and dominion over the items in the house.

Therefore, drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, it appears that Juan did in fact have constructive possession of the marijuana. Accordingly, the trial court's decision is not clearly erroneous and this Court cannot supplant its decision. Therefore, the trial court did not err in denying Juan's motion for a directed verdict.

5. Statements of Co-Defendant's Counsel

Juan claims that the trial court erred in denying his motion for separate trials and that the court further erred by allowing Cecilia's counsel to make comments designed to inflame and prejudice the jury against him. We will first discuss Juan's claim regarding his motion for separate trials. To constitute reversible error on the issue of improper joinder, there must be a showing of a clear abuse of discretion and a showing of prejudice. *Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993). Absent a clear showing of specific and compelling prejudice resulting from a joint trial, a denial of a motion for severance will not serve as a basis for reversal. *United States v. Dempsey*, 733 F.2d 392, 398 (6th Cir. 1984). In order to justify granting separate trials, the court must determine that the defendants have antagonistic defenses or that the evidence against one defendant tends to incriminate the other defendant. *Tinsley v. Commonwealth*, 495 S.W.2d

776, 780 (Ky. 1973). The mere fact that evidence may be introduced that is competent as to one defendant but incompetent as to the other, and does not establish such prejudice as to require the granting of separate trials. *Underwood v. Commonwealth*, 390 S.W.2d 635, 637 (Ky. 1965). Furthermore, even if defendants attempt to cast blame on each other, severance is not necessarily required. *United States v. Kendricks*, 623 F.2d 1165, 1168 (6th Cir. 1980). To prevail, a defendant must show that the antagonism between the co-defendants will mislead or confuse the jury. *Id.*

The factual issues present in this case were clear. Under the circumstances of this case, it was not an abuse of discretion to deny a severance. The record fails to disclose any prejudice or confusion resulting from the joint trial. Furthermore, Juan cannot demonstrate that Cecilia's defense directly incriminated him. Therefore, we find no error regarding the issue of improper joinder.

We will now address Juan's claim that the trial court erred in allowing Cecilia's counsel to make comments designed to inflame and prejudice the jury against him. Juan points to statements made by Cecilia's counsel in voir dire, opening statement, and closing argument that imply that Cecilia was a mere bystander who allowed Juan to grow marijuana in her house. During voir dire, Juan's counsel objected to questions by Cecilia's counsel as to whether any of the jurors could convict Juan without convicting Cecilia. However, Juan's counsel then readily agreed after voir dire that Cecilia's counsel could engage in all the "finger-pointing" he desired. Juan now claims that the court erred in permitting

Cecilia's counsel to make statements indicating that Cecilia was innocent and should not be punished for any of Juan's actions.

The standard of review of a trial judge's conduct of a voir dire examination is whether the defendant can demonstrate manifest error. *United States v. Sivils*, 960 F.2d 587, 596 (6th Cir. 1992). In voir dire, Cecilia's counsel merely attempted to inquire whether the jury could convict one defendant without convicting the other. Juan cannot demonstrate manifest error with this line of questioning. However, Because Juan's counsel did not object to statements made by Cecilia's counsel in opening statement and closing argument, this court will review those statements under the palpable error standard of review under RCr 10.26.

Comments made by Cecilia's counsel in opening statement and closing argument, such as asking the jury not to convict Cecilia because "she is not the first and won't be the last woman who allowed her husband to do things in her house" and because she is "married to a bum who would put her in this situation," do not establish a palpable error which affect Juan's substantial rights. Juan simply complains that Cecilia tried to blame him. These comments and any apparent attempt to blame the co-defendant do not establish an error resulting in manifest injustice. Therefore, the trial court did not err in allowing Cecilia's counsel to make these statements.

6. Collateral Criminal Activity

Juan claims that he was denied due process of law and a fair trial when counsel for Cecilia allowed the prosecution to inject information relating to Juan's collateral criminal activity. Specifically, a detective witness, in response to a question by Cecilia's counsel on cross-examination as to whether Cecilia would ever engage in criminal activity, indicated that she had "knowledge of the use and sale of drugs," as well as "knowledge of several murders." Juan's counsel objected to this line of questioning, and the court sustained the objection. The court subsequently denied Juan's motion for a mistrial or for a jury admonition.

"For the purpose of appellate review, the trial judge is always recognized as the person best situated to properly evaluate . . . when a mistrial is required." *Kirkland v. Commonwealth*, 53 S.W.3d 71, 76 (Ky. 2001).

Accordingly, a trial court's decision to declare or deny a mistrial should not be disturbed absent an abuse of discretion. *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993).

A mistrial is appropriate only where the record reveals "a manifest necessity" for such an action or "an urgent or real necessity." *Wiley v. Commonwealth*, 575 S.W.2d 166, 168 (Ky. App. 1979). Furthermore, 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 by no other means. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996).

In the case at hand, the trial court was not presented with an urgent or real necessity to declare a mistrial because these statements did not directly incriminate Juan or any of his past acts. The detective's statements indicated that Cecilia had "knowledge of the use and sale of drugs," as well as "knowledge of several murders." Any negative inference from the detective's statement implicated Cecilia, not Juan. The record demonstrates that the detective was careful to only provide information relating to Cecilia, not Juan.

Merely because possible inflammatory evidence is admitted against one defendant does not, in and of itself, prove substantial prejudice in a co-defendant's trial. *United States v. Gallo*, 763 F.2d 1504, 1525-26 (6th Cir. 1985). Moreover, courts presume that the jury will be able to sort out the evidence applicable to each defendant and render its verdict accordingly. *United States v. Horton*, 847 F.2d 313, 317 (6th Cir. 1988). The trial judge is the person best situated to properly evaluate whether a mistrial is required. Here, and in the context of these proceedings, the trial judge found that the detective's statements did not rise to the level sufficient to mandate a mistrial. We perceive no error in the trial court's determination.

Finally, while an evidentiary error may be cured by an admonition to the jury to disregard the testimony, trial courts have broad discretion to regulate cross-examination. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). Here, the detective's statement was not an evidentiary error; therefore, the trial court's decision to decline any admonishment to the jury was not an abuse of

discretion. Accordingly, the trial court did not err in denying a mistrial or admonishing the jury.

CONCLUSION

For the reasons set forth herein, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT JUAN
LEOTIS SANDERS:

Maureen Sullivan
Louisville, Kentucky

BRIEF FOR APPELLANT
CECILIA SANDERS:

Maureen Sullivan
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Louis F. Mathias, Jr.
Assistant Attorney General
Frankfort, Kentucky