

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001619-MR

JESSE RAY NANCE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 00-CR-00199

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2000-CA-001649-MR

BRENDA YOUNG

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 00-CR-00199

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOFF, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: Jesse Ray Nance and Brenda Young appeal their convictions of facilitation of trafficking in a controlled substance. Having reviewed the record and applicable law, we affirm both convictions.

On December 9, 1999, officers of the Narcotics Division of the Fayette County Police Department, assisted by ten or twelve members of the Emergency Response Unit (ERU), executed a search warrant at a house located at 521 North Limestone in Lexington, Kentucky. The house was leased to Jesse Ray Nance and Brenda Young, who resided there along with their young daughter. At trial, Detective Douglas Caldwell, the lead officer, testified that, as the ERU drove past the house, he observed about a dozen people in front of the house, the majority of whom took off running before the ERU vehicle could stop. Three people of the outside group were detained as the police made their entry into the house, but nine or more of the group escaped.

Caldwell entered the house within a minute or so of the ERU's entry, and initially saw Nance running from the living room through a "middle room", where he was caught, and saw Young sitting on the couch holding a baby. He observed two other individuals running through the house, both of whom were subsequently captured. Caldwell took statements from Nance and Young. Caldwell testified that Nance told him that "he (Nance) was allowing people to use his residence to sell and use drugs out of in return for help on the rent." Brenda Young denied any knowledge of drug activity, and Caldwell stated that no drugs, paraphernalia, or money were found on her.

Officer Andrea Carter testified that she searched Young and around her person. Under the cushion where Young was sitting on a sofa, Officer Carter found rolling papers, a crack pipe, and a bag containing crack cocaine. Carter acknowledged that she did

not know how long Young had been seated on the sofa and did not know who had told her to sit there.¹ Carter testified that Young had \$47 in her back pocket.

The search of the house resulted in the recovery of assorted items of drug paraphernalia, and the baggie of crack cocaine found under the cushion. Katrina Featherston of the Kentucky State Crime Lab testified that the baggie contained 587 milligrams of crack cocaine. Officer Carter testified the street value of a half-gram of crack cocaine would be about fifty dollars.

On February 21, 2000, Nance and Young were both indicted on: Count 1, first-degree trafficking in a controlled substance, and Count 2, possession of drug paraphernalia. Nance and Young were tried together on May 17, 2000. Nance and Young did not testify, and the defense presented no witnesses. On Count 1, the jury received instructions on first-degree trafficking in a controlled substance, first-degree possession of a controlled substance, and criminal facilitation of trafficking in a controlled substance.² The jury found both Nance and Young guilty of criminal facilitation of trafficking in a controlled substance, and not guilty on Count 2 - possession of drug paraphernalia. On June 21, 2000 and June 22, 2000, respectively,

¹ The videotape of the entry and search shows Young being placed on the couch by a police officer.

² It appears that facilitation was being considered as a lesser included offense of trafficking. In Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998), the Kentucky Supreme Court held that criminal facilitation is not a lesser included offense of trafficking in a controlled substance. However, this issue was not raised by Nance or Young on appeal.

the trial court entered final judgment against Nance and Young - sentencing Nance to 12 months in the Fayette County Detention Center, and sentencing Young to 12 months probated for two years. From these judgments, Nance and Young appeal.

APPEAL OF JESSE NANCE

On appeal, Nance argues that a mistrial should have been granted based upon statements made by Detective Caldwell at trial regarding the informant process and a reference to a confidential informant. After voir dire, the court granted defense counsel's motion to preclude the police officers from testifying as to the basis for the search warrant. At trial, when asked by the Commonwealth about the types of jobs narcotics officers are asked to perform, Caldwell responded that they conduct "buy-busts" in which informants are used to buy drugs from street level traffickers, and that in some cases they get a complaint about a residence where drugs are being sold and try to confirm the information. At this point, defense counsel moved for a mistrial, which the court denied. A short time later, in response to the Commonwealth's question regarding Caldwell's role in this case, Caldwell responded that he "handled the confidential informant". Defense counsel made a renewed motion for mistrial based on this statement. The court denied the motion, and admonished the jury regarding the statement.

Nance first contends that Detective Caldwell's testimony regarding buy-busts and informants created the clear inference that a buy had occurred earlier and that a confidential informant had participated. Nance contends that the jury was

thus made aware of the situation giving way to the assault on the house, and that this information unduly prejudiced the jury. A mistrial should only be granted by the trial court if there is a manifest, urgent, or real necessity for such action. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985), cert. denied, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986). The Kentucky Supreme Court has stated:

It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The 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.

Gould v. Charlton Co., Ky., 929 S.W.2d 734, 738 (1996). Absent an abuse of discretion, a trial court's decision whether or not to grant a mistrial will not be disturbed. Id. at 741. Caldwell's statements constituted a general explanation of the duties of narcotics officers, and we adjudge no prejudice resulting to Nance therefrom. Hence, we cannot say the trial court abused its discretion in denying Nance's first motion for a mistrial.

Nance next contends that the trial court erred in denying his second motion for a mistrial based on Detective Caldwell's statement that he "handled the confidential informant". The trial court denied the motion, but admonished the jury as follows:

The officer in his testimony made reference to a confidential informant and also a question has been raised concerning the use of the emergency response unit. These are matters that go to the validity of the search

warrant and also police practices. These are not issues that are for you to decide. We do not believe that Caldwell's mention of the confidential informant created an urgent, manifest, or real necessity for a mistrial. Skaggs, 694 S.W.2d 672. "It is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition." Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993). The jury was aware that the police were searching Nance's residence pursuant to a search warrant. The trial court clearly explained to the jury that the issue of a confidential informant went to the validity of the search warrant, which was not an issue for the jury to decide. We believe that the admonition was sufficient to cure any resulting prejudice to Nance, and hence the trial court did not abuse its discretion in denying Nance's second motion for a mistrial.

Nance finally argues that the videotape of the crime scene, which showed the forced entry of the ERU, search of the house, and his arrest, should not have been shown at trial as its probative value was substantially outweighed by the danger of undue prejudice per KRE 403. Nance admits the issue was not preserved, but argues that we should nevertheless consider the issue under RCr 10.26. Having reviewed the videotape, we do not deem its showing to be palpable error as would merit review per RCr 10.26.

APPEAL OF BRENDA YOUNG

Brenda Young contends on appeal that the trial court erred in denying her motion for a directed verdict. "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 is the defendant entitled to a directed verdict of acquittal." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). We believe that sufficient evidence was presented from which a jury could reasonably infer that Young was engaged in trafficking. Detective Caldwell testified that Nance admitted that he allowed people to use his residence for drug activity to help with the rent. Young lived in the house with Nance and her name was on the lease. In addition to the crack cocaine, drug paraphernalia was found scattered throughout the house where Young and Nance lived. The concept of constructive possession is applicable to offenses arising under KRS 218A. Houston v. Commonwealth, Ky., 975 S.W.2d 925, 928 (1998). Accordingly, we conclude that the trial court did not err in denying Young's motion for a directed verdict.

For the aforementioned reasons, the Fayette Circuit Court's judgments of conviction for both Nance and Young are affirmed.

ALL CONCUR.

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