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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000059-MR

DEON LEE HUNT — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NOS. 00-CR-01000 & 00-CR-01162

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, JOHNSON, and SCHRODER, Judges.

COMBS, JUDGE: Appellant, Deon Hunt, appeals from a judgment based on a jury verdict finding him guilty of possession of a simulated controlled substance, tampering with physical evidence, and possession of drug paraphernalia, for which he received concurrent sentences of twelve months in jail and two fines of $250.00. We affirm.

The events leading to Hunt's indictment and conviction occurred in the early morning hours of August 2, 2000. Working undercover, Detective Byron Smoot of the Lexington Police Department encountered Hunt and asked him for a "twenty" -- a twenty-dollar piece of crack cocaine. Hunt responded, "I got it.

It's tight. Come on up." The two men talked only briefly before Hunt recognized the narcotic squad's back-up team and fled. During the melee that followed, Hunt appeared to swallow what police believed was contraband. Hunt was arrested and searched. Under the insole of his left shoe, Hunt carried $795.00 in cash, consisting mostly of twenty-dollar bills. He told police that the money came from the sale of his car. Plastic sandwich bags and razor blades were recovered from his apartment. While Hunt gave his correct name to police, he originally gave his address as Cincinnati, Ohio. He later said that he was from Detroit.

Hunt was tried in Fayette Circuit Court on November 9, 2000. The jury found him guilty of the three charges previously noted. This appeal followed.

Hunt contends that the trial court erred by failing to grant his motions *in limine*. In a motion filed on November 2, 2000, Hunt argued that information linking him to Detroit was irrelevant and unduly prejudicial. He requested that the court prohibit the Commonwealth and its witnesses from:

> making **any** reference to Detroit, Michigan at the trial of this action including - but not limited to - the conspicuously incorrect and implicitly derogatory pronunciation "**DEE**-troit," the habits and customs of persons - especially black males - with Detroit area origins, and the use of Detroit origins as a factor which implies drug use or drug trafficking.

Defendant's Motion at 1.

In his brief, Hunt reports that frequent references to Detroit were made during the Commonwealth's *voir dire*, that Detective Smoot testified that Hunt was from Detroit, that the

Commonwealth sarcastically referred to him as a "scared little kid from Detroit," and that it mentioned "the Motor City" during its closing argument. He contends that these comments were irrelevant and unduly prejudicial.

We note preliminarily that Hunt has failed to comply with CR[1] 76.12(4)(c)(iv), which requires a statement referencing to the record to show whether and where this issue was properly preserved for review and, if so, in what manner. Error on appeal cannot be considered in the absence of a proper objection to preserve the error for appellate review. Todd v. Commonwealth, Ky., 716 S.W.2d 242 (1986). It is true that motions *in limine* have been used as a proper means of obtaining pre-trial rulings concerning the admissibility and exclusion of evidence. However, the rule requiring contemporaneous objections has not been repealed. Tucker v. Commonwealth, 916 S.W.2d 181 (1996). In order to raise an error on appeal, a litigant may not rely on a broad pre-trial ruling and then omit at trial to object specifically to the matter complained of. Id. If trial counsel is aware of an issue and fails to request appropriate relief in a timely fashion, the matter will not be treated as plain error for consideration on appeal. Id.

Nonetheless, despite the procedural flaw, we believe that the statements which Hunt attacks were admissible. It is undisputed that Hunt misled police about his background upon arrest. A comparison of the information that he initially provided with information later confirmed to be correct (that he

[1]Kentucky Rules of Civil Procedure

was, in fact, from Detroit rather than Cincinnati) was certainly relevant to the criminal proceedings. This evidence tended to show that as soon as Hunt realized that he was dealing with the police, he set out on a course of deception, corroborating the Commonwealth's contention that he had possessed a controlled substance (either real or simulated) and that he destroyed evidence of that crime.

Having determined that the evidence was relevant, we must next consider whether its probative value was substantially outweighed by the danger of unfair prejudice. KRE[2] 403. Hunt characterizes the Commonwealth's references to Detroit as an inflammatory appeal to local prejudice. We are not persuaded — and he has not established — that a prevailing pervasive bias against the residents of Detroit characterized the geographic area in which he was charged. Despite his complaints to the contrary, the Commonwealth's references to Hunt's ties to Detroit were not "demeaning comments" — nor did they amount to an "assault upon his character." Brief at 8. The probative value of the statements was not substantially outweighed by the danger of undue prejudice. We find no abuse of discretion by the court.

In a motion filed on November 8, 2000, Hunt argued that any "expert" testimony offered by Detective Smoot or Detective Mark Simmons should be excluded from evidence. On appeal, Hunt contends that their testimony at trial should have been excluded from the proof since the Commonwealth had failed to provide sufficient information to allow him to defend against the

[2]Kentucky Rules of Evidence

opinions and because the "expert" testimony amounted to "junk science." We disagree.

The trial court did not err by refusing to exclude police testimony based upon Hunt's objection to the alleged insufficiency of discovery information provided by the Commonwealth. By announcing "ready for trial," Hunt waived any alleged deficiency in the Commonwealth's response to his request for information. See Sargent v. Commonwealth, Ky., 813 S.W.2d 801 (1991).

Nor did the trial court err by refusing to strike the testimony of Detective Simmons based upon Hunt's contention that it failed to satisfy the factors enunciated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993); Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995), overruled on other grounds, Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999); and Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000). Simmons testified generally about the drug trade in Lexington and about its lingo. He also testified about a specific connection between Lexington and Detroit, indicating that Detroit is a source-city for drugs integral to street-level dealing and drug trafficking in Lexington.

KRE 104 provides that the trial court shall determine preliminary questions regarding the qualification of a witness. KRE 702 governs the admissibility of the testimony of an expert witness. A trial court's ruling on the admission of expert testimony is reviewed under the same standard as its ruling on

any other evidentiary matter: whether there was an abuse of discretion. See Tumey v. Richardson, Ky., 437 S.W.2d 201 (1969).

In Daubert, the U.S. Supreme Court held that Rule 702 requires the trial judge to act as a "gatekeeper" to ensure that "any and all [expert] testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589, 113 S.Ct. at 2795. The court's gatekeeping function does not replace the traditional adversary system and the role of the jury within that system. See Daubert, 509 U.S. at 596, 113 S.Ct. at 2798. As the Supreme Court noted in Daubert, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Id.

When faced with a proffer of expert testimony, the trial judge must determine "whether the expert is proposing to testify to (1) scientific [technical, or other specialized] knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Daubert, 509 U.S. at 592, 113 S.Ct. at 2796. In order to meet the standard, the expert testimony, which is based on "scientific, technical, or other specialized knowledge," must be both relevant and reliable. Id. at 589, 113 S.Ct. at 2795.

Hunt argues that Simmons's testimony should have been deemed unreliable because it does not satisfy the factors set forth in Daubert, which include: (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3)

whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community. Daubert, 509 U.S. at 592-94, 113 S.Ct. at 2796-97. In adopting the Supreme Court's reasoning in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the Kentucky Supreme Court agreed, however, that "the test of reliability is 'flexible,' and Daubert's [and Mitchell's] list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000).

The reliability inquiry requires the court to assess whether the reasoning or methodology underlying the expert's testimony is valid. See Daubert, 509 U.S. at 589, 113 S.Ct. at 2795. The aim is to prevent expert testimony based merely on subjective belief or unsupported speculation. Id. at 590, 113 S.Ct. at 2795. "[T]he factors identified in Daubert may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Kumho Tire, 526 U.S. 137, 119 S.Ct. at 1175 (quoting with approval Brief for United States as Amicus Curiae 19). The goal "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of

intellectual rigor that characterizes the practice of an expert in the relevant field." Id.

The relevancy prong of the Daubert analysis requires the trial court to determine whether the expert's methodology "fits" the facts of the case and whether it will thereby assist the trier of fact to understand the evidence. See Daubert, 509 U.S. at 591, 113 S.Ct. at 2795-96; Goodyear Tire, 11 S.W.3d 575, 578; KRE 702. KRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

We have upheld the qualification of adequately trained and experienced police officers as experts as to the methods and operations of drug-dealers. Sargent, 813 S.W.2d at 802. In this case, Detective Simmons indicated that he had fourteen years of experience on the police force. Seven of these years had been focused on specialized training and experience in narcotics trafficking operations. He worked undercover to support or supervise investigations relating to the illegal transportation and distribution of narcotics in the Lexington area. He assisted with a hundred or more investigations, discovering a unique pattern among Detroit-based drug-traders. In light of that extensive and particularized experience, we cannot conclude that the trial court abused its discretion by determining that Simmons was qualified to testify about "the Detroit connection": that it is a source-city for illegal drugs sold in Lexington and that

street-level vendors from the area have specific, identifiable methods of operation in Lexington.

We are persuaded that an experienced, adequately trained police officer may testify about the significance of certain conduct or methods of operation unique to the drug trade because such testimony can assist the trier of fact to assess and properly evaluate the evidence presented. Federal courts have admitted expert testimony that certain cities are source areas for drugs. See United States v. Nobles, 69 F.3d 172 (7th Cir. 1995). Based on this analysis, we cannot conclude that the trial court abused its discretion by determining that Simmons was qualified to offer the challenged testimony. Simmons's testimony concerned an area of specialized knowledge outside the understanding of the average juror. The testimony could have been expected to help the jury to determine whether Hunt was intentionally in possession of illegal drugs (real or simulated); whether he disposed of the contraband once he realized that he was dealing with authorities; and whether the items recovered from his apartment amounted to drug paraphernalia. These are all elements of the charged offenses. The testimony was relevant, reliable, and admissible at trial.

Finally, Hunt contends that the trial court erred by failing to grant a mistrial when the Commonwealth introduced "other crimes" evidence during its closing argument.[3] The

[3]Hunt has not characterized the comments as amounting to prosecutorial misconduct. Reversal of Hunt's conviction on these grounds would require misconduct so serious as to render the entire trial fundamentally unfair. Partin v. Commonwealth, Ky., (continued...)

Commonwealth maintains that the prosecutor's comments amounted to reasonable inferences drawn from the evidence presented. It emphasizes that the comments constituted a proper scope of argument and that they were not evidence governed by the procedural and substantive requirements of KRE 404(b). Hunt has failed to identify the specific comment to which he objected at trial. Nonetheless, after reviewing the entirety of the prosecutor's closing statements, we are not persuaded that a mistrial was required.

The judgment of conviction is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bobby L. Amburgey
Lexington, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Dennis W. Shepherd
Assistant Attorney General
Frankfort, KY

[3](...continued)
918 S.W.2d 219 (1996).