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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002100-MR

BILLY RAY DEHART — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 04-CR-00348

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,[1] SENIOR JUDGE.

WINE, JUDGE: Billy Ray Dehart[2] appeals a judgment following a jury trial in the Perry Circuit Court convicting him of cultivating marijuana. He primarily argues that the trial court improperly reversed a pre-trial ruling during trial and allowed introduction of

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] The record in this case reveals a discrepancy regarding the spelling of appellant's last name. While some pleadings use "DeHart," others use "Dehart." However, the documents containing appellant's signature show he signs his name "Dehart" and that spelling will be used in this Opinion.

packaged marijuana found in a wooden box on Dehart's four-wheeler at the time of his arrest. He further claims that he was entitled to a directed verdict due to the insufficiency of the evidence and to a new trial based upon persistent errors in the conduct of the trial. We agree in part and reverse the trial court based on the following reasons.

On August 29, 2003, acting on a reliable tip that marijuana was growing on the property, police officers from multiple agencies drove to Bee Hive, Kentucky. Upon arriving, they came upon at least one parked vehicle in the roadway and several individuals standing around. Lt. Napier witnessed Tim Halcomb leaning into the vehicle and holding out what appeared to be a plastic baggie containing marijuana. Halcomb and the others ran when the officers approached. Detective Hurt chased and caught up to Halcomb in a chicken coop located a few feet from the road.

Detective Smoot witnessed Dehart sitting on his four-wheeler on the road next to the chicken coop. As the officers approached, Dehart immediately slammed the lid to a wooden box that was attached to the front of his four-wheeler. Detective Smoot searched the box and found several pills as well as four rolled-up sandwich baggies, each containing several grams of marijuana.

Three to five feet behind the chicken coop, the officers observed eight maturing, tended marijuana plants growing in a cultivated patch. The officers also noted a wide path that ran behind the coop through a creek and leading to Dehart's double-wide trailer. Detective Hurt obtained permission from Dehart to search his residence but no evidence was seized there.

At the scene, Dehart denied knowing who owned the chicken coop. But at trial, he presented two witnesses who testified that a homeless man named Carter Couch lived in the chicken coop in the summer of 2003. Bobby and Sandra Mize owned the property where the chicken coop is located and they lived about three hundred feet away. Bobby testified at trial that he gave Dehart permission to build the chicken coop and that Dehart and friends had built onto the structure many times.

Initially, Dehart was indicted for possession of a controlled substance in the first degree, possession of a controlled substance in the third degree, and possession of marijuana as a result of marijuana and pills seized from the wooden box on his four-wheeler. These charges were contained in Indictment 04-CR-0200. Dehart pled guilty to those charges and was sentenced on April 7, 2005. Although a copy of this indictment was not provided by either party, it is referred to several times in pleadings filed with the trial court for Indictment 04-CR-0348. On or about November 18, 2004, Dehart was indicted by the Perry Circuit Court Grand Jury and charged with cultivating marijuana (over 5 plants) and persistent felony offender in the first degree (PFO I) under Indictment 04-CR-00348.

On April 21, 2005, the Commonwealth filed notice pursuant to KRE 404(c) of its intention to introduce evidence of the circumstances surrounding the charges in Indictment 04-CR-0200.

The charges of cultivating marijuana over five plants and PFO I were set for a status hearing on June 13, 2005, at which time Dehart's counsel moved to preclude evidence of prior bad acts. The trial court asked what controlled substances were found

in the box. Defense counsel responded that there were some pills found in a cookie tin in the box, but neither defense counsel nor the Assistant Commonwealth's Attorney mentioned the four baggies of marijuana. The trial court ruled that the contents of the box were more prejudicial than probative as to the charge in the indictment of cultivating marijuana and held that any reference to the officer's search of the box on Dehart's four-wheeler would not be admissible. However, in his oral opinion, the trial judge advised if the events were intertwined he would allow the introduction of the evidence.

The following day at trial, the Commonwealth presented evidence without mentioning the pills or marijuana found in Dehart's possession per the trial court's ruling. The appellant made the appropriate motion for a directed verdict after the Commonwealth had closed its case. When the defense began to question its first witness, Detective Hurt, both counsel approached for a bench conference. At that point, the trial court advised it was not aware that four baggies of marijuana were also seized along with pills from the box in Dehart's possession on August 29, 2003. While it is difficult to understand why either the appellant, his counsel, the Commonwealth's Attorney, or the court did not remember the plea and sentencing on these charges which arose out of the same events which gave rise to the matters tried on June 14, 2005, apparently none did.

The trial court then reversed its prior ruling and allowed the marijuana evidence to be admitted under KRE 404(b) as relevant to show Dehart's plan to grow the marijuana and then sell it. The trial court allowed the Commonwealth to disclose the evidence on cross-examination following defense counsel's examination of Detective Hurt.

While Dehart objected to the introduction of testimony relating to the baggies of marijuana found in his possession, he did not claim at the time that he was prejudiced because the trial court allowed the Commonwealth to introduce the evidence on cross-examination after it had closed its case. However, this issue was preserved for appellate review. While the appellant's counsel agreed to a limiting admonition to include that no party would suggest the four baggies were for sale, introduction of this evidence through the appellant's first witness, during cross-examination by the prosecutor, was devastating. Even if not adequately preserved, this Court may consider palpable error under RCr 10.26 where a manifest injustice results from the error. For these reasons, the matter should be remanded for a new trial.

Dehart continues to object to the introduction of the evidence as not meeting any of the exceptions under KRE 404(b) and KRE 403. He argues that his possession of marijuana was not relevant nor did it qualify under any of the exceptions of KRE 404(b), and even if it did, the evidence's prejudicial effect outweighed its probative value. He points out that he was not charged with trafficking and that there was no evidence to show that he had knowledge of how to process marijuana. Dehart also argues that the Commonwealth did not present evidence of where Dehart obtained the marijuana found in his possession or even if the marijuana was owned by him. And he further argues that his possession of marijuana was not similar in kind or close in time warranting its entry into evidence. *See Howard v. Commonwealth*, 787 S.W.2d 264 (Ky.App. 1989). We find these arguments unconvincing.

At the time Dehart was arrested, he was found in possession of marijuana. Dehart's possession of the four baggies of marijuana packaged for sale would be relevant to show his motive, intent, and plan to sell marijuana. *See United States v. Shoffner*, 71 F.3d 1429, 1432 (8th Cir. 1995).

Furthermore, Dehart was found next to the coop that he built, which was adjacent to a path leading straight to his residence and to the patch where the marijuana plants were growing. Although his mere presence in an area near the marijuana patch does not make it more likely that he was involved in growing the marijuana, the fact that he was found in that location in possession of packaged marijuana would support an inference that Dehart was cultivating the marijuana. Consequently, the probative value of the testimony would outweigh the risk of unfair prejudice if the appellant had not relied on the court's earlier ruling. Therefore, we conclude that the trial court did abuse its broad discretion in admitting the testimony in what even the trial court described as a circumstantial case. Because the trial judge stated he did not believe anyone intentionally misled him, the appellant should not be penalized by the court's revised ruling.

Dehart also raises a claim that because the jury asked the judge to define reasonable doubt, the jury somehow did not follow the law when it rendered its verdict. RCr 9.56(2) specifically prohibits the trial court from attempting to define "reasonable doubt." Likewise, the rule also prohibits counsel from attempting to define reasonable doubt at any point in the trial. *Commonwealth v. Callahan*, 675 S.W.2d 391, 393 (Ky. 1984). Thus, the trial court properly declined to answer the question. The mere fact that

the jury asked the question is insufficient to support a finding that the jury was unsure whether they could convict Dehart based on the evidence.

It is not necessary to address the appellant's argument he was entitled to a directed verdict of acquittal at the close of the Commonwealth's case or the close of all the evidence in light of this Court's finding the appellant was unfairly prejudiced by the introduction of the possession of marijuana.

Because this matter shall be remanded for a new trial, this Court is compelled to address the various objections and motions made for a mistrial as a result of the mode of questioning and conduct of the Commonwealth's Attorney who prosecuted this case. The trial judge exercised a great deal of restraint in dealing with the conduct of both counsel for the prosecution and defendant. Repeatedly the court admonished the parties to direct objections to the court, to not direct comments to each other and to not interrupt the court during its rulings. The trial court appropriately addressed the lack of preparation and familiarity with the facts of the case shown by both counsel. Of particular concern was the demeanor of the prosecutor who repeatedly made additional comments about witnesses' testimony, and on at least one occasion, laughed at a witness's answer. The court properly admonished him at that time. While never acceptable, such conduct in a circumstantial case is more likely to deny a defendant the right to a fair trial.

Accordingly, the judgment of conviction by the Perry Circuit Court is reversed and this matter is remanded for a new trial.

PAISLEY, SENIOR JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I respectfully dissent from the majority opinion on the issue upon which it based its reversal – namely, the decision of the court to reverse its own pre-trial ruling as to the admissibility of the four baggies of marijuana into evidence. The court plainly warned that it might re-visit its pre-trial ruling if developments at trial warranted such a decision. They did, and so did the court.

The majority opinion carefully recites that the court had a sound evidentiary basis for admitting the evidence and acknowledges that its probative value properly outweighed its prejudicial impact. That opinion finds error based solely on the appellant's reliance on the earlier ruling to exclude. That reliance was, however, illusory since the court clearly announced the tentative nature of its initial ruling by noting orally that it might re-visit and reconsider this issue. There was no real prejudice to the appellant. I can find no error whatsoever – much less reversible error. Consequently, I would affirm.

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