RENDERED: NOVEMBER 2, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000515-MR

VINCENT B. DOBBINS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NOS. 05-CR-00937 AND 05-CR-01596

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Vincent B. Dobbins (hereinafter "Dobbins") appeals from the final judgment and sentence of the Fayette Circuit Court entered on February 14, 2006, sentencing him to ten years' imprisonment following a jury verdict convicting him of trafficking in a simulated controlled substance, second offense[1] and being a persistent felony offender in the first degree (PFO I).[2] We affirm.

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[1] Kentucky Revised Statutes (KRS) 218A.350.

[2] KRS 532.080.

On February 15, 2005, officers of the Lexington Metro Police Department conducted an undercover "buy-bust" operation. Detectives Walt Ridener (hereinafter "Detective Ridener") and Kevin Patrick (hereinafter "Detective Patrick") were in an unmarked vehicle in the area of Race Street in Lexington when they encountered Darryl Crooks (hereinafter "Crooks") and inquired about obtaining a "twenty," a slang term for a $20.00 rock of cocaine. Crooks attempted to enter the officer's vehicle to facilitate the transaction, but the officers refused him entry and pulled away. A short time later, the officers came into contact with Crooks a second time but refused to stop when he attempted to wave them down. The officers encountered Crooks a third time that evening while he was speaking to an unknown person in a stopped vehicle, and agreed to follow him to a house on Fifth Street. Crooks entered the stopped vehicle and departed the scene with the officers following closely behind in their vehicle.

The two vehicles stopped near 421 East Fifth Street. Crooks again inquired as to what the officers were looking for, to which they responded a "twenty." Crooks went to the front door of 421 East Fifth Street, summoned his cousin Dobbins from inside, and the two exited the porch together and walked between two houses. Crooks returned to the officers and delivered what they believed to be crack cocaine.[3] The officers then signaled their back-up officers to move in and arrest Crooks and Dobbins. Both men were quickly taken into custody.

[3] Although preliminary field tests gave a positive result for cocaine, subsequent testing by the Kentucky State Police revealed the substance was, in fact, paraffin or wax.

On July 26, 2005, Dobbins was indicted by a Fayette County grand jury for trafficking in a simulated controlled substance, second or subsequent offense, and with being a persistent felony offender (PFO) in the second degree. A superseding indictment was returned on December 12, 2005, amending the PFO charge from second degree to first degree.

Dobbins proceeded to trial on December 19, 2005. The Commonwealth presented testimony from eight witnesses, including the undercover officers, the arresting officers, and Crooks. The officers recited the above-stated facts regarding their interaction with Crooks and Dobbins. Crooks testified he indeed had met the undercover officers and offered to sell them a quantity of drugs. However, he denied having drugs on him at the time the buy was set up, thus the reason for traveling to Dobbins' residence. Crooks further testified he obtained the substance he sold to the officers from Dobbins, and that both he and Dobbins knew the substance to be "fleece" or fake drugs. He stated their intent was to take the money from the sale and purchase drugs for themselves. Further, he admitted to signing a handwritten affidavit on the day he was released from jail following his arrest. The affidavit stated, *inter alia*, Crooks had the "fleece" on him when he made contact with the officers; he was using Dobbins' house as a "throw off," acting as if that was where he was purchasing the drugs; and Dobbins was not a part of, and had no knowledge of, the transaction. He also said he signed the affidavit without reading it.

Dobbins took the stand to testify on his own behalf. He testified that Crooks had come to his home and asked him whether he had any drugs and if he wanted to "come out and play." He stated he informed Crooks he no longer engaged in those activities. He then testified he witnessed Crooks completing a transaction with the undercover officers, but that he was unaware of Crooks' intentions until that time. He claimed the next thing he knew, police officers were forcing him to the ground as he asked them what was happening. Dobbins denied any wrongdoing on the night of his arrest. He attributed the idea for the affidavit to Crooks.[4]

The jury returned a guilty verdict on the trafficking charge and fixed Dobbins' punishment at two years' imprisonment. After a finding of guilt on the PFO I charge, the sentence was enhanced to ten years' imprisonment. This appeal followed.

On appeal, Dobbins raises four allegations of error. First, he contends the trial court improperly allowed Officer Ridener to testify regarding certain of Crooks' out-of-court statements as they constituted impermissible hearsay. Next, he contends the trial court erred in allowing Detective Keith Ford (hereinafter "Detective Ford") to testify as an "expert" on drug transactions without first holding a hearing pursuant to *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Third, Dobbins contends the trial court erred in overruling his multiple motions for a mistrial. Finally, Dobbins contends the trial court erred in instructing the jury. Finding no error, we affirm.

[4] A cursory review of the record reveals a great similarity in the penmanship of the affidavit attributed to Crooks and letters presented to the trial court purportedly authored by Dobbins.

First, Dobbins argues testimony the Commonwealth elicited from Detective Ridener that he believed Crooks had no drugs on him when they initially met and arranged the drug buy should have been excluded as violative of the proscription against hearsay since Detective Ridener testified his belief was based on Crooks' statements on the night of his arrest. Dobbins argues the Commonwealth was "bootstrapping" in an attempt to introduce the evidence, but the Commonwealth argues the testimony was admissible as a coconspirator statement under Kentucky Rules of Evidence (KRE) 801A(b)(5),[5] *Commonwealth v. King*, 950 S.W.2d 807 (Ky. 1997), and *Gerlaugh v. Commonwealth*, 156 S.W.3d 747 (Ky. 2005). We agree with the Commonwealth that the statement was properly introduced in light of those authorities.

Detective Ridener, in response to direct examination about the events surrounding Dobbins' arrest, testified he did not believe Crooks had any illicit drugs on his person. Over Dobbins' objection, Detective Ridener stated this belief was based on Crooks' statement "he knew a place on Fifth" where he could obtain the drugs requested by the detective. No further information regarding Crooks' statements was elicited from

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[5] KRE 801A in pertinent part states:

> (b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is unavailable as a witness, if the statement is offered against a party and is:
>
> . . . .
>
> > (5) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Detective Ridener. The trial court found that although Crooks and Dobbins were not charged with conspiracy, the Commonwealth had presented sufficient evidence that Crooks and Dobbins were co-actors in the drug transaction, thus bringing the statement under the exception specified in KRE 801A(b)(5) and *King*.

Specifically, the trial court found the Commonwealth had introduced evidence that Crooks had arranged to sell narcotics to the officers; he then urged officers to follow him to a different location to complete the transaction; Dobbins had exited the residence to which officers were lead and "did something" with Crooks between two houses; and Crooks immediately thereafter sold the officers what they believed to be crack cocaine. Thus, the trial court found the Commonwealth had produced sufficient evidence that a conspiracy existed independent of Crooks' statement in that Crooks and Dobbins were co-actors in the sale of drugs to the undercover officers.

Our review of the record indicates the trial court properly admitted Detective Ridener's testimony. In *Gerlaugh, supra*, the Supreme Court of Kentucky held, in accordance with *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), that trial courts may use partial "bootstrapping" in determining whether to admit an alleged coconspirator's out-of-court statement into evidence. That is to say, the statement itself may be considered as a basis for determining whether a conspiracy existed. The *Gerlaugh* Court cautioned, however, that such statements alone, without independent collaboration, will not support a finding of the existence of a conspiracy. In the case *sub judice*, in addition to Crooks' statement, the Commonwealth presented

independent corroborative evidence that Crooks and Dobbins conspired to transfer the simulated controlled substance to the officers. Crooks' statement was but a part of the entire picture analyzed by the trial court. Thus, under the totality of the circumstances, the trial court properly overruled Dobbins' objection to Detective Ridener's testimony, and Dobbins was not prejudiced thereby.

Next, Dobbins contends the trial court erred in allowing Detective Ford to testify as an "expert" without holding a *Daubert* hearing. He argues Detective Ford's testimony impermissibly suggested Crooks was a "runner" for Dobbins. We disagree. Detective Ford testified without objection regarding his training and thirteen years of law enforcement experience. His testimony included general information about narcotics enforcement and drug trafficking. Detective Ford further testified about typical "buy/bust" operations and opined, based upon his training and experience, that drug dealers rarely participate in the actual transaction, but rather have "runners" complete the narcotics transfer. It is this latter testimony that Dobbins finds objectionable. However, it is well-settled that police officers may testify as experts if their specialized knowledge will assist the trier of fact. *See Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004); *Brown v. Commonwealth*, 914 S.W.2d 355 (Ky. 1996); *Sargent v. Commonwealth*, 813 S.W.2d 801 (Ky. 1991); *Kroth v. Commonwealth*, 737 S.W.2d 680 (Ky. 1987); and KRE 702. Detective Ford testified generally regarding all manner of drug transactions, law enforcement tactics, and the specialized "lingo" utilized in the drug trade. His testimony was based upon experience gained from his participation in over 1,000 drug-related cases

and provided information "outside the scope of common knowledge and experience of most jurors." *Sargent, supra* at 802. His opinions were intended to assist the jury in understanding the evidence being presented. Detective Ford was sufficiently qualified to testify as an expert, and his testimony did not invade the province of the jury as the ultimate finder of fact.

Further, while trial courts are considered "gatekeepers" under *Daubert*, they are to be given "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. . . and to decide whether or when special briefing or other proceedings are needed to investigate reliability. . . ." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 1176, 143 L.Ed. 2d 238 (1999). There is no requirement that a trial judge hold an actual hearing in order to satisfy *Daubert*. *Hyatt v. Commonwealth*, 72 S.W.3d 566, 575 (Ky. 2002). Thus, we cannot find the trial court abused its discretion in permitting Detective Ford to testify without first holding a formal *Daubert* hearing.

Next, Dobbins contends the trial court erred in denying three separate motions for mistrial. Again, this argument is without merit. To grant a motion for a mistrial, a trial court must determine there is a "manifest necessity" which has been described as "an urgent or real necessity," to halt a trial. *Wiley v. Commonwealth*, 575 S.W.2d 166 (Ky. 1978) (citations omitted). As a mistrial is an extreme remedy, it should be utilized with utmost caution. *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), *Hunt v. Commonwealth*, 483 S.W.2d 128 (Ky. 1972). On appeal, a

trial court's denial of a mistrial motion is reviewed for an abuse of discretion. *Shabazz v. Commonwealth*, 153 S.W.3d 806 (Ky. 2005), *Neal v. Commonwealth*, 95 S.W.3d 843 (Ky. 2003) *Clay v. Commonwealth*, 867 S.W.2d 200 (Ky.App. 1993).

Dobbins' first motion for mistrial followed an altercation outside the presence of the jury between Crooks and Dobbins' wife, Virginia, an incident admittedly instigated by the latter. Questioning by the trial judge confirmed jurors were unaware of the confrontation. Citing no authority at trial or on appeal, Dobbins alleged this confrontation could affect Crooks' trial testimony. Nevertheless, the trial court called Crooks to the stand outside the presence of the jury to inquire as to whether the incident would impact his trial testimony, to which he answered in the negative. The trial court then properly refused to grant the mistrial after finding no manifest necessity for such action had been shown. We see no abuse of discretion from the record before us.

The second motion for mistrial was triggered by Crooks' response to the Commonwealth's inquiry as to why he had agreed to sign the affidavit presented to him which purported to clear Dobbins of wrongdoing. Crooks testified he had done so because he believed Dobbins "might get ten years" and he wanted to help. Dobbins argued a mistrial was warranted because Crooks had injected the possible penalty into the guilt phase of the trial.[6] Dobbins did not accuse the Commonwealth of wrongdoing nor imply the statement was responsive to the question being asked. He simply argued the

[6] In *Payne v. Commonwealth*, 623 S.W.2d 867, 870 (Ky. 1987), the Supreme Court of Kentucky held the main function of a jury is to determine guilt or innocence, and therefore "neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial."

prejudicial effect of the statement was sufficient to make a mistrial manifestly necessary. The trial court disagreed and denied the motion. Dobbins declined an offered admonition to the jury. No further mention of penalty occurred during the guilt phase of the trial. We fail to see how any of Dobbins substantial rights were affected by this single statement, nor can we hold the trial court abused its discretion in denying the mistrial.

Dobbins' third and final motion for a mistrial came during defense counsel's cross-examination of Crooks. He was asked whether his plan was to buy real drugs using the money he made from selling fake drugs. In response, Crooks stated, "that's what we do. At that particular time, that is what we do." Counsel then asked if that is what Crooks himself did, to which Crooks responded, "that's what me and my cousin do." Dobbins objected to these answers as unresponsive and moved for a mistrial. In overruling the objection and denying the motion for mistrial, the trial court admonished Crooks to limit his answers to the questions asked. Dobbins again refused an offered admonition, asserting an admonition would not cure the problem. We again see no effect on Dobbins' substantial rights. Further, Dobbins has failed to show how the trial court abused its discretion and we are unable to so conclude.

Finally, Dobbins contends the trial court improperly instructed the jury on the definition of the term "sell." The jury was instructed, without objection, on the statutory elements of the offense of trafficking in a simulated controlled substance under KRS 218A.350. However, the trial court, *sua sponte*, departed from the statutory definition of "sell" when instructing the jury. KRS 218A.010(31) states "'sell' means to

dispose of a controlled substance to another person for consideration or in furtherance of a commercial distribution." The trial court, over Dobbins' objection and contrary to his tendered instruction, amended the definition to read "'sell' means to dispose of a controlled substance *or simulated controlled substance* to another person for consideration or in furtherance of a commercial distribution" (emphasis added).

Dobbins contends the trial court erroneously added language that is not included in the statutory definition nor in the model instructions to juries. We disagree. The trial court modified the proposed jury instruction to comport with the offense charged in the indictment as well as the evidence adduced at trial. The substitution sufficiently "embraced and conveyed the meaning of the statute," *Prince v. Commonwealth*, 987 S.W.2d 324, 327 (Ky.App. 1997) (quoting *Caldwell v. Commonwealth*, 265 Ky. 402, 406-07, 96 S.W.2d 1041 (1936)), and was necessary to correctly instruct the jury as to the charged offense. Dobbins' tendered instruction would not have comported with the evidence and thus would have been improper. The trial court committed no error.

Therefore, for the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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