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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001096-MR

CLIFTON GERALD BRISTOL

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 08-CR-00486

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Clifton Bristol was convicted of complicity to commit first-degree possession of a controlled substance; complicity to commit tampering with physical evidence; carrying a concealed deadly weapon; and being a second-degree

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

persistent felony offender. As a result, Bristol was sentenced to seven years in prison. Bristol now appeals as a matter of right. For the reasons set forth herein, we affirm Bristol's convictions.

On July 19, 2008, Bristol had been partying at a friend's house and asked an acquaintance, Leezlee Porter, for a ride to a convenience store. Bristol had been drinking and offered Porter gas money to take him to the store. Another witness at the party later testified that Porter was trying to sell drugs that night to get money for her boyfriend, who was in prison and needed money for his inmate account. However, Porter was not drinking, and therefore Bristol asked her to take him to the store.

On the way to the store, Porter was pulled over by Officer Josh Conner of the Radcliff Police Department. Officer Conner testified that he stopped the vehicle because the front driver's side turn signal was not functioning properly. As Officer Conner approached the car, another officer, Solomon Calazzo, arrived on the scene.

Officer Calazzo testified that his function at the scene was to monitor Bristol and Porter as they sat in the car while Officer Conner conducted the traffic stop. Officer Calazzo stated that while Porter and Bristol were both in the car, he saw no suspicious movements between the two of them. However, once Officer Conner asked Bristol to step out of the car to discuss another matter, Officer Calazzo testified that he "saw [Porter] was trying to conceal something with her right hand between the console and her body."

Officer Calazzo got Porter out of the car and asked her what she was doing and what she had in her pants. Porter then pulled up her shirt and exposed a bag stuck down into her pants. Officer Calazzo testified that when he removed the bag from Porter, he saw that it contained a hard, off-white substance. After the substance was discovered on her person, Porter quickly claimed that the substance was not hers. Sometime later, Porter claimed that even though she and Bristol were under constant observation by a trained law enforcement officer, Bristol had somehow transferred the substance to her.

Both Porter and Bristol were arrested and charged with complicity to commit first-degree possession of a controlled substance and complicity to commit tampering with physical evidence. When the police searched Bristol, they found a belt buckle that had been shaped to look like brass knuckles. Bristol was additionally charged with carrying a concealed deadly weapon. Later, he was charged with being a persistent felony offender (PFO), second-degree.

At the joint trial, the Commonwealth presented evidence that the white substance found on Porter's person was actually 2.87g of crack cocaine. Bristol presented the testimony of Carroll Garvey, who had attended the party that night. Garvey testified that Porter approached him and stated that she possessed drugs that belonged to her boyfriend. Bristol testified to the above events, and stated that he did not possess any drugs on the night in question and claimed that the drugs belonged to Porter.

Porter took the stand and while basically admitting to the crimes, explained that Bristol was not an innocent party. She testified that Bristol wanted a ride from the party to the store and offered her some gas money. After being pulled over, Bristol tossed her an object which hit her right leg and landed in the floorboard. Porter picked the object up and noted that it was a hard white substance in a plastic bag. Porter believed that Bristol had tossed her crack cocaine, and because she was scared, she decided to conceal it in her waistband. Porter testified that after they were arrested, Bristol asked her to say they were smoking the crack in order to get a lesser charge. Porter cooperated with police and gave a written statement.

Officers Conner and Calazzo also testified as described above. On cross examination, Porter's counsel asked Officer Conner if he found any money on Bristol. When Officer Conner indicated that he had, counsel for Porter asked him to count out the number of each denomination. In view of the jury, Officer Conner counted out twelve twenty dollar bills, seven five dollar bills, and eight one dollar bills, for a total of \$283.00. Counsel for Porter then asked about the officers' experience in dealing with low denomination bills, and Bristol's counsel objected. Bristol's counsel stated that such questioning regarding the amount of money Bristol had was not relevant to the crime of possession of a controlled substance and was unduly prejudicial. The trial court overruled the objection.

Porter's counsel continued and asked, "So when you find small denominational bills, a lot of times that's indicative of trafficking in a controlled

substance?” Porter’s counsel then continued intimating that Bristol was a “drug dealer” throughout the remainder of the trial.

Ultimately, the jury found both Bristol and Porter guilty of the charged offenses. By judgment entered May 14, 2009, Porter was sentenced to an aggregate sentence of one year, and Bristol was sentenced to an aggregate sentence of seven years. Bristol’s appeal as a matter of right now follows.

As his first assignment of error on appeal, Bristol argues that the trial court improperly admitted evidence of how much money he had on his person when he was arrested. In support of this argument, Bristol contends that the evidence of the money in his possession was not relevant under Kentucky Rule of Evidence (KRE) 402 regarding the issue of whether he possessed a controlled substance, and even if marginally relevant, the evidence resulted in an undue prejudice that substantially outweighed any probative value under KRE 403.

Evidence is only relevant if it has a tendency to make a fact of consequence to the determination of the case more or less probable than it would be without the evidence. KRE 401. *See also Kroger Co. v. Willgruber*, 920 S.W.2d 61, 67 (Ky. 1996). If the evidence is a “link in the chain” of proof, it is relevant. *Turner v. Commonwealth*, 914 S.W.2d 343, 346 (Ky. 1996). Further, the decision of whether to admit evidence as more probative than prejudicial is reviewed by appellate courts for an abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair,

or unsupported by sound legal principles. 5 Am.Jur.2d *Appellate Review* § 695 (1995); cf. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994).

Given the particular circumstances of this case, wherein each defendant was trying to pin the crimes charged on the other defendant, the trial court did not abuse its discretion in permitting the testimony regarding whether or not Bristol had money on his person when he was arrested. Our Supreme Court has stated that it has been “adamant that a defendant has the right to introduce evidence that another person committed the offense with which he is charged.” *Beaty v. Commonwealth*, 125 S.W.3d 196, 207 (Ky. 2003) (internal quotation marks omitted). The right to present such evidence is “crucial to a defendant's fundamental right to due process.” *Id*; see also *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

In this case the trial court could not have prohibited Porter's counsel from cross-examining the officer about the currency found on Bristol without severely limiting Porter's theory of the case—that the drugs found on Porter belonged to Bristol because he intended to sell them. Similarly, Bristol produced a witness who testified that it was not him but Porter who was the drug dealer. It is hardly unusual for defendants in these circumstances to point accusing fingers at each other, and such a ploy can be very successful especially where the evidence of possession is ambiguous. Unfortunately for these defendants that was not the case here, and there was plenty of proof from which the jury could reasonably conclude that both defendants possessed the drugs.

As his second assignment of error, Bristol argues that the trial court improperly failed to grant a directed verdict at the conclusion of the Commonwealth's case. Specifically, Bristol's counsel argued at trial that the Commonwealth had not put on any evidence demonstrating that Bristol possessed the cocaine or that he attempted to conceal that possession by tampering with it.

“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 the defendant is entitled to a directed verdict of acquittal.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). In the instant case, both defendants denied possessing the drugs. Thus, the jury was left in a position where it had to judge the credibility of Bristol and Porter and the weight of the evidence against each of them. Based on the evidence, it would not have been unreasonable for the jury to find that Bristol or Porter, or both, possessed the drugs in question. Accordingly, the trial court properly overruled Bristol's motion for a directed verdict.

Based on the foregoing, we hereby affirm the judgment entered on May 14, 2009.

ALL CONCUR.

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