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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001118-MR

MICHAEL LEWIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 07-CR-001748

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Michael Lewis appeals from a judgment of conviction and sentence entered by the Jefferson Circuit Court[1] on May 19, 2010. Following a three-day jury trial, he was convicted of trafficking in more than five pounds of

[1] There were two presiding judges during the pendency of this case. Initial rulings, including the ruling on a suppression motion, were made by Circuit Judge Geoffrey P. Morris. Following his retirement, trial was conducted by Circuit Judge Brian C. Edwards.

marijuana.[2] In lieu of jury sentencing, pursuant to an agreement with the Commonwealth, he was sentenced to serve six years by the trial court. At final sentencing, said term was probated for a period of five years. A codefendant, Mary Humphrey, was jointly indicted, tried and acquitted of both charges. Having reviewed the record, the briefs and the law, we affirm.

FACTS

Just before 6:00 a.m. on Thanksgiving Day, November 23, 2006, police officers Harvey Hunt[3] and Ron Hunt went to Apartment C2 in the Creekside Apartments in St. Matthews, Jefferson County, Kentucky, in response to an open 911 line. As the officers repeatedly knocked on the apartment door and announced their presence as police, they heard movement inside the unit, but no one opened the door. Leaving Officer Ron Hunt at the apartment door, Det. Harvey Hunt walked to the rear of the building to check the third floor apartment's balcony for movement and to look for lights within the unit. As he rounded the corner of the building, he saw a black duffle bag being pushed from a window of Apartment C2. When he shined his flashlight at the apartment, he saw an African-American woman and a second African-American person he believed to be a man peeking from the window beside the one from which the duffle bag had just been pushed.

[2] Kentucky Revised Statutes (KRS) 218A.1421, a Class C felony. Lewis was also charged with, but acquitted of, tampering with physical evidence, KRS 524.100, a Class D felony.

[3] By the time of trial, Officer Harvey Hunt had become a detective and will be referred to as Det. Hunt throughout the remainder of this Opinion.

Det. Hunt retrieved the duffle bag which had fallen behind a large bush. Upon opening the bag, he observed a large quantity, more than nine pounds, of suspected marijuana packaged in one-gallon plastic bags. He radioed for backup and announced to the duo peering from the window, "You might as well open the door. If not, we're coming in anyway." At that point, Det. Danny Grant arrived and took possession of the duffle bag of marijuana while Det. Hunt returned to assist Officer Ron Hunt at the apartment door.

In response to Det. Hunt's directive, the apartment door opened and a man and a woman, identified as Lewis and Humphrey, emerged. Officer Ron Hunt radioed "they're coming out" to Det. Hunt and immediately directed the pair to go back inside the apartment. Det. Hunt then returned to the apartment, handcuffed Lewis and placed him on the floor. Officer Ron Hunt took control of Humphrey and had her lay on the floor. A cursory search of the apartment for other occupants revealed no one else inside the unit. During the cursory search, officers observed an amount of cash in the bedroom and noticed suspected marijuana residue floating in the commode.

According to the officers, Lewis and Humphrey were taken into custody and transported separately to the police station. Humphrey denied having called 911. It was ultimately determined the source of the open 911 call was the apartment's landline, the receiver of which was located under a couch cushion. The apartment was then secured until a search warrant could be obtained.

According to the independent investigation conducted by Det. Hunt, as described in relevant part in his affidavit for the search warrant, he

> [c]onducted Criminal history search of arrested subjects, which showed prior criminal history on Michael O. Lewis, FBI # 740316PA6, SSN [XXX-XX-XXXX], which revealed multiple prior felony arrest (sic), involving narcotics, and possession of hand gun by a convicted felon.

Based upon the affidavit, a search warrant was issued and executed on November 23, 2006. The search conducted pursuant to the warrant revealed more marijuana, a handgun,[4] and $5,680.00 in cash.

At a hearing held on Lewis's motion to suppress, Lewis testified that on the morning of his arrest he was awakened by a "boom, boom, boom." He walked from the rear bedroom of the apartment where he was sleeping to the unit's front room where Humphrey had been sleeping. He noticed the television was on and thought that was the source of the noise so he turned down the volume. He then opened the apartment door upon hearing someone say the door would be kicked in unless he complied. He testified that when he opened the door, five or six officers entered the apartment and immediately began searching the unit's kitchen cabinets and refrigerator and under pillows. According to Lewis, when he

[4] There was conflicting evidence about when the handgun was found. Lewis testified during the suppression hearing that it was found during the warrantless search of the apartment and before he was transported to the police station. However, neither the uniform citation nor the affidavit for a search warrant mentioned a weapon being located during the cursory search of the apartment for other occupants. The first mention of a handgun being found appears in the return on the search warrant which reads, "Ruger P94 serial # 34061697 40 col (sic) taken from between mattress back bedroom." It was undisputed that the handgun was retrieved from between the mattresses of the bed in the rear bedroom.

told Det. Hunt his identification was in the back bedroom, the officer went to the bedroom and returned with Lewis's ID and a handgun that had been hidden between the bed's box springs and mattress. Lewis testified he was transported from the scene within four minutes of the officers entering the unit.

At the close of the suppression hearing testimony, Lewis argued that all items seized under the warrant should be excluded because the issuing magistrate had been mislead by the affidavit for the search warrant which he characterized as erroneously indicating he was a convicted felon with numerous prior felony drug arrests. Lewis testified at the hearing that he was not a convicted felon since all prior felony charges against him had been dismissed, including a 2005 charge for being a convicted felon in possession of a handgun. In addition to arguing that the search warrant was deliberately flawed, Lewis also argued that all the evidence seized from the apartment should be suppressed because the officers were inside the apartment illegally, the protective sweep of the apartment they conducted immediately upon entering the unit was not based on exigent circumstances, and the protective sweep exceeded the scope of a permissible search because a person could not reasonably be expected to be found in a commode, between mattresses, or inside a refrigerator.

The trial court upheld the warrantless search, finding that exigent circumstances existed for the officers to enter the unit based on the bag of marijuana being pushed from the apartment window and the unresolved 911 call. The court went on to find the officers had probable cause to enter the apartment

based on concerns about evidence destruction and having witnessed the commission of a felony in their presence. The court upheld the cursory search of the apartment for other people in response to the unresolved 911 call and found that marijuana residue was observed floating in the toilet in plain view. Describing the *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), issue as a "red herring," the court found Det. Hunt had done nothing to deliberately mislead the magistrate into issuing the search warrant by correctly stating in the affidavit that Lewis's criminal history[5] included several prior felony drug arrests. Thus, the court upheld both the search and the search warrant. When specifically asked whether the seized handgun would be suppressed, the court said no because even though Lewis was not a convicted felon, he was less credible than the police officers who had testified.

During *voir dire*, the Commonwealth asked whether any member of the panel believed marijuana should be legalized in Kentucky. The inquiry sparked response from six potential jurors. At the end of questioning by all parties, the court excused the panel from the courtroom and asked the attorneys to make their motions to strike for cause. The first person mentioned by the prosecutor was #165356 who said she did not think she could be fair. Lewis objected to her being struck because she had not said she would ignore or not follow the court's instructions. The court struck #165356, finding that she had indicated a distrust of

[5] The officer had testified during the suppression hearing that he did not know the disposition of Lewis's prior charges.

police and, in the court's view, her opinion on the legality of marijuana would influence her deliberations.

Based on the same line of questioning, the prosecutor mentioned #164611, who had said she was unsure she could be fair due to her views on whether marijuana should be legalized. He contrasted #164611 with the man who was seated beside her who had expressed similar views but ultimately stated he believed he could be fair. The prosecutor then mentioned #164670, who said she believed her views, like those of #164611, would sway her decision. Lewis objected "on both of them" being struck for cause because neither had said they could not follow the court's instructions. The court granted the motion to strike both jurors, #164611 and #164670, because his notes indicated both had said they did not believe they could follow the court's instructions. Importantly, Lewis did not object to #164670 being excused for lack of a specific motion by the Commonwealth to strike her for cause.

On direct examination, Det. Hunt, a twenty-year police veteran, was asked by the Commonwealth why he did not ask that the plastic bags in which the marijuana was packaged be tested for fingerprints. Anticipating an answer that included hearsay, before Det. Hunt could complete his response the prosecutor asked him how likely it was, in his experience as a police officer, that fingerprints could have been lifted from the plastic bags. The question drew a defense objection because Det. Hunt had not been qualified as an expert on the likelihood of recovering fingerprints from various surfaces. At the bench, the court found the

question, limited to the witness's experience as a police officer, to be permissible. The defense asked that the Commonwealth be required to first establish that Det. Hunt had requested fingerprints during his police career. The court ruled that was a topic about which the defense could cross-examine the witness. Counsel then returned to the defense table and the Commonwealth asked Det. Hunt for his success rate in getting fingerprints from plastic bags, to which he responded, "Not good."

On cross-examination, counsel for Humphrey established that Det. Hunt had requested the testing of twenty to thirty guns for fingerprints in his twenty years of police service without having a print recovered. He explained that several surfaces, like a gun and bullets, *might* yield a print, but if a surface has any texture or wrinkling, prints will not usually be recovered. Counsel for Lewis did not question Det. Hunt about fingerprints. Officer Rudy Davis, an officer with at least thirty-eight years of police experience and currently a patrolman for St. Matthews with additional responsibility for photographing crime scenes, collecting evidence and processing items for fingerprints, had testified earlier in the day that it is rare to lift fingerprints from plastic bags. While he had attempted to lift prints from plastic bags several times during his career, he stated he may have been successful in doing so only once or twice. He testified the bags of marijuana in this case were not tested for fingerprints.

During its case-in-chief, the Commonwealth sought to introduce money and papers seized from the apartment. Defense counsel objected to the

introduction of three envelopes containing these items because they were labeled with Lewis's current charges, including a dismissed charge of being a convicted felon in possession of a handgun.[6] The Commonwealth argued the money and papers could be admitted but not published to the jury. The court suggested the labels be redacted before the items went to the jury and stated the matter could be revisited prior to publication. Lewis objected to redaction because that would indicate to jurors that something was being hidden from them. The matter was not revisited with the trial court and the labels that prompted the objection were not included in the record on appeal.

After conviction, Lewis moved for a new trial and/or judgment of acquittal. He argued the excusal of certain jurors denied him a jury that fairly represented the community; the court erred in overruling his suppression motion; and, the jury rendered inconsistent verdicts in convicting him of trafficking in over five pounds of marijuana but acquitting him of tampering with physical evidence based on pushing the duffle bag out of the third floor apartment window. The motion was denied. This appeal followed.

Lewis raises five issues on appeal. First, that the court erred in denying his motion to suppress evidence seized during the warrantless search of his apartment. Second, that the court *sua sponte* dismissed a potential juror for cause without first receiving a motion to strike. Third, that he was unduly

[6] The defense also objected to introduction of a box containing the handgun on the same grounds. However, the box is not mentioned by Lewis in the brief he filed in this Court.

prejudiced by evidence labels that erroneously identified him as a convicted felon. Fourth, that a police officer was allowed to testify as an expert without first being qualified to give his opinion. Fifth, that cumulative error requires reversal. For the reasons that follow, we affirm.

LEGAL ANALYSIS

Lewis's first allegation is that the trial court erred in denying his motion to suppress. Whether a motion to suppress was properly denied is a mixed question of fact and law. We begin by reviewing the circuit court's findings of fact for clear error and deem them to be conclusive if they are supported by substantial evidence. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001); *see also* RCr[7] 9.78. Next, we conduct a *de novo* review of whether the law was properly applied to the facts. *King v. Commonwealth*, 302 S.W.3d 649, 653 (Ky. 2010), *overruled on other grounds, Kentucky v. King,* --- U.S. ---, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011). Throughout our review, we give "due weight to inferences drawn from [the] facts by resident judges and local law enforcement officers." *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996).

The Fourth Amendment to the U.S. Constitution prohibits police from conducting a warrantless search or seizure within a private residence without both (1) probable cause and (2) exigent circumstances. *Kirk v. Louisiana*, 536 U.S. 635, 638, 122 S. Ct. 2458, 153 L. Ed. 2d 599 (2002); *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Here, the trial court found the

[7] Kentucky Rules of Criminal Procedure.

warrantless entry of Lewis's apartment was supported by both exigent circumstances and probable cause, and we agree.

First, police arrived at the apartment in response to an open 911 call, not to conduct a search for illegal drugs. "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Wayne v. United States*, 115 U.S.App.D.C. 234, 241, 318 F.2d 205, 212 (C.A.D.C. 1963). Second, in the midst of their effort to find the source of the emergency, a duffle bag full of marijuana was pushed out of the third-floor apartment from which the emergency call originated and dropped at their feet. Pushing the bag of marijuana out of the window was an attempt to destroy evidence of a crime and gave the police probable cause to enter the unit, *Posey v. Commonwealth*, 185 S.W.3d 170, 173 (Ky. 2006), a point Lewis concedes. Destruction of evidence is a recognized exigent circumstance. *Hallum v. Commonwealth*, 219 S.W.3d 216, 221 (Ky. App. 2007). Thus, pushing the bag from the window constituted probable cause and, in conjunction with the open emergency call, provided exigent circumstances for the entry. We deem the trial court's findings of fact to be supported by substantial evidence and therefore conclusive. *Banks.*

Once inside the unit, the officers were authorized to conduct a protective sweep for other occupants for the safety of the officers. *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 1094, 108 L. Ed. 2d 276 (1990). Lewis testified the search took less than four minutes. According to the testimony of Det.

Hunt and Officer Hunt, the protective sweep of the premises was limited to places where a person could hide. While Lewis testified to the contrary, alleging that the officers searched inside kitchen cabinets and the refrigerator, as well as under pillows before he was taken to the police station, the trial court found his testimony to be less than credible, as was the court's prerogative. *Henson v. Commonwealth*, 20 S.W.3d 466, 470 (Ky. 1999) ("With controverted evidence, the trial court is the sole trier of facts and the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony."). The trial court was initially confused about Lewis's criminal history which included several prior felony arrests but no convictions. The court ultimately corrected its understanding of the proof and stated that it was not going to give a lot of weight to Lewis's lack of a conviction because he had less credibility than the police officers.

In addition to securing the premises for their own safety, the officers were still searching for the source of the emergency call and the fact that only two people had been seen peeking from the apartment window was no guarantee they were the only occupants. Furthermore, Humphrey had denied placing the 911 call. Lewis cavalierly suggests, "[t]he officers could have simply secured the apartment [after Lewis and Humphrey had been arrested] and sought a search warrant." We disagree. The officers had already witnessed an attempt to destroy a sizable amount of marijuana, and they were still responding to the open 911 call.

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar

> police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.

Todd v. Commonwealth, 716 S.W.2d 242, 248 (Ky. 1986) (quoting *Mincey v. Arizona,* 437 U.S. 385, 392, 98 S. Ct. 2408, 2413, 57 L. Ed. 2d 290 (1978)). Contrary to Lewis's assertion, there was no time to secure a search warrant before conducting the protective sweep of the unit.

During the protective sweep, officers noticed money on the bed and suspected marijuana floating in the commode. While those items were in plain view, they were not seized. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (plain view doctrine is recognized exception to warrant requirement). Instead, officers secured a warrant before seizing the money, marijuana residue, and the handgun, which we deem to have been the appropriate course of action.

In seeking the search warrant, Det. Hunt stated in his affidavit that Lewis had several felony drug arrests. Based upon his criminal history, this was a true and accurate statement. While Lewis had no felony convictions, we do not believe Det. Hunt deliberately sought to mislead the magistrate into issuing a warrant on flawed information. *Franks*. Our *de novo* review reveals the trial court correctly applied the law to the facts. Therefore, grounds for reversal do not exist.

Lewis's second allegation is that the trial court erred in *sua sponte* excusing a potential juror for cause without the Commonwealth having moved to strike the juror. Lewis claims the issue is preserved by his contemporaneous

objection during *voir dire* and by his motion for a new trial and/or judgment of acquittal. We have reviewed the record and disagree.

A trial court must be given the opportunity to rule on an issue before an appellate court may review the claim. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593 (Ky. App. 2006); *Payne v. Hall*, 423 S.W.2d 530 (Ky. 1968). In reviewing the record, we have located no point at which counsel[8] argued to the trial court that a specific motion was required for the court to excuse a juror for cause. Had such a motion been made, the trial court could have considered the issue and most likely the Commonwealth would have responded by clarifying its desire to strike #164670 for cause with a formal motion. Having failed to present that precise argument[9] to the trial court, it cannot be raised for the first time on appeal. *Florman.* Furthermore, the Commonwealth was responding to the court's request for motions to strike for cause when it discussed Jurors #164611 and #164670 and, therefore, there was no *sua sponte* dismissal of any potential juror for cause.

Lewis's third argument is that he was unduly prejudiced by labels on three Commonwealth exhibits (items seized during the apartment search) that, according to his brief, "contained a list of the original charges against Lewis, including possession of a handgun by a convicted felon." Defense counsel

[8] We note that different counsel represented Lewis on appeal.

[9] Defense counsel objected to Jurors #164670 and #164611 being struck for cause because neither stated they could not follow the court's instructions. The trial court granted the Commonwealth's motion to strike because it recalled both potential jurors indicating they did not believe they could follow the court's instructions.

objected to the labels being introduced and admitted into evidence since they contained misleading hearsay and it was the actual items seized that were relevant to the prosecution. As the appellant, Lewis is responsible for presenting a complete record to this Court for review. *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303 (Ky. 2008). When the record is incomplete, we assume the omitted record supports the trial court's decision. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985) (citing *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 604 (Ky. 1968)). While the issue was argued vociferously to the trial court, the disputed labels were not included in the record and, consequently, the issue will not be considered further on appeal.

Lewis's fourth argument is that Det. Hunt was not qualified to testify as an expert on the ability to lift fingerprints from a plastic bag. As the gatekeeper of the proof, it is the trial court's responsibility to exercise its discretion and rule on the admissibility of evidence. As an appellate court, we may reverse a trial court's decision to admit evidence only if we find it abused its discretion. *Brewer v. Commonwealth*, 206 S.W.3d 313, 320 (Ky. 2006). To reverse for an abuse of discretion, we must find its decision "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted).

While Det. Hunt's personal experience in attempting to lift fingerprints from plastic bags could have been better developed to satisfy the

requirements of KRE[10] 702 for an expert opinion, in this case we find no error because his testimony was merely cumulative of Officer Davis's prior opinion testimony that plastic bags are "not very good" surfaces from which to retrieve latent fingerprints. *Collins v. Commonwealth,* 951 S.W.2d 569, 576 (Ky. 1997). Furthermore, the defense had full opportunity to cross-examine Det. Hunt about his decision not to submit the bags for testing and his opinion that plastic bags are "not good" surfaces for yielding fingerprints. Counsel for Humphrey queried Det. Hunt about the topics. Lewis, perhaps satisfied with his codefendant counsel's questions, chose not to explore the topics further. Thus, we discern no error.

Lewis's last argument seeks reversal due to cumulative error. Having discerned no error, we are convinced Lewis received a fundamentally fair trial. Therefore, there can be no cumulative error. *See Funk v. Commonwealth*, 842 S.W.2d 476 (Ky. 1992).

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

ALL CONCUR.

[10] Kentucky Rules of Evidence.

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