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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001456-MR

GLORIA HARRIS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLECRAIG Z. CLYMER, JUDGE
ACTION NO. 13-CR-00092

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Gloria Harris was convicted by the McCracken Circuit Court of second-degree possession of a controlled substance (hydrocodone), and sentenced to three and one-half years' imprisonment. She appeals her conviction and sentence to this Court as a matter or right. Finding no error, we affirm.

BACKGROUND

The evidence at trial established that the Paducah Police Department, with the assistance of a confidential informant, Jerry Purvis, set up a controlled buy from Harris of hydrocodone pills. Two months prior, Purvis had approached the police about working as a confidential informant in an attempt to garner favorable treatment regarding his trafficking in marijuana charge. On October 31, 2012, the Paducah police equipped Purvis with an audio/video recording device, and he was given $120 in "buy" money. Purvis then initiated contact with Harris via three recorded telephone calls in order to set up the drug deal.

The recorded telephone calls were played for the jury. In the first call, Purvis informed Harris that he had arrived at his residence, to which she replied, "Alright, give me a minute; I'll try to go track [th]em back down right quick." Later Purvis made a second call to confirm with Harris that the two were still going to meet. During this conversation Harris asked if the police were around, to which Harris responded, "hell, no." Harris made the third telephone call to inform Purvis that she had arrived at his residence.

After Harris arrived at Purvis's residence, Purvis exited his back door and entered Harris's vehicle on the passenger's side. The hidden camera video played for the jury showed that when Purvis entered Harris's vehicle, Harris was holding a folded white piece of paper in her hand. Purvis testified at trial that, while in Harris's vehicle, Harris gave him twenty hydrocodone pills in exchange

for the $120. Harris can be heard on the video recording telling Purvis to call her if he needed any more.

At trial, Harris took the stand to testify in her defense. Her recounting of the events differs significantly from Purvis's. Harris testified that the day before the controlled buy, she had given Purvis a ride to his mother's house, and to a local pharmacy. She stated that the reason Purvis went to his mother's house was so that Purvis could get the hydrocodone pills that his mother regularly dispensed him. Harris testified that after leaving Purvis's mother's house, she took Purvis to the local CVS. While there, Purvis asked if he could borrow $120 so that he could pay his electric bill and buy diapers and milk. Harris claimed that she loaned Purvis the money and he promised he would pay her back the next day. The next day, Purvis called Harris and informed her that he had left his pills in her car. Harris claims that she went to Purvis's house later in the day only to return Purvis's misplaced pills and retrieve the $120 that Purvis borrowed the day before.

The Commonwealth asked Harris why she was concerned about police being in the area. She responded that she had heard Purvis was an informant and believed that he might be trying to set her up. The Commonwealth also asked Harris why it looked like something was in her hand when Purvis got in the car. Harris responded that it was her money that was in her hand. When asked how she could possibly have already had her money before Purvis entered her vehicle Harris had no explanation. The jury eventually convicted Harris of one

count of trafficking in a controlled substance in the second degree. She was sentenced to three and one-half years' imprisonment and this appeal followed.

Harris raises two arguments on appeal that she believes are grounds for reversal: 1) the trial court improperly prohibited her from cross-examining Purvis about an alleged bias, and 2) the trial court allowed the Commonwealth to make improper remarks in its closing argument. We address each argument in turn. Harris first claims that the trial court committed reversible error by violating her constitutional right to fully cross-examine Purvis as guaranteed to her by the Confrontation Clause. We disagree.

CROSS - EXAMINATION OF PURVIS

Before trial, Harris informed the trial court of her intentions to introduce evidence of Purvis acting as a confidential informant in another case in order to show witness bias. The case occurred several months after the drug sting involving Harris. While housed in the local jail, a Mexican gang member relayed to Purvis where he had hidden large amounts of methamphetamine. Purvis relayed this same information to the police. Purvis also informed the police that the gang member was going to send people to contact two other people, one of whom was found murdered a short time later. In exchange for giving police this information. Purvis received a soft drink, a bag of chips, and a candy bar.

After a hearing on the matter, the trial court found that whether Purvis acted as a confidential informant in another case was of slight, if any, proof of bias. It further found that introducing the evidence would be a waste of time as the

Commonwealth would need to prove that Purvis's allegations in the unrelated case were true. The extra time spent on an unrelated case would likely lead to jury confusion. Finally, the court expressed concern about indentifying a confidential informant in a separate, unrelated case in a separate (federal) venue involving Mexican gangs and a claimed homicide.

Harris argues that introducing evidence that Purvis worked as a confidential informant against the Mexican gang would have shown that Purvis would do anything to curry favor with the police, even with little to no consideration. She believes that had she been permitted to introduce the evidence, the jury would have reasonably drawn negative inferences regarding Purvis's credibility, which would have led to her acquittal.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). "An essential aspect of the Sixth Amendment Confrontation Clause is the right to cross-examine witnesses." *Davenport v. Commonwealth*, 177 S.W. 3d 763, 767 (Ky. 2005) (citing *Douglas v. Alabama*, 380 U.S.415, 418, 85 S.Ct. 1074, 1076, L.Ed. 2d 934, 937 (1965). A defendant's right to expose a witnesses' motivation for testifying is proper and constitutionally protected. *Davis v. Alaska*, 415 U.S. 308, 316-317, 94 S.Ct 1105, 1110-1111, 39 L.Ed.2d 347 (1974).

However, it is well-established that the right to cross-examine is not without its limits. *Davenport*, 177 S.W.3d at 767-68. The trial court "retain[s]

wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall,* 475 U.S. at 679, 106 S.Ct at 1435. Thus, a limitation placed on the "opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." *Id*. at 682, 1437. In order to prove prejudice, a defendant must show "that he was prohibited from engaging in otherwise appropriate cross-examination... [and that a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination." *Davenport*, 177 S.W. 3d at 768 (*citing Van Arsdall*, 475 U.S. at 680, 1106 S.Ct. at 1435-36).

The Kentucky Supreme Court has explained that "[s]o long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." *Id*. (*quoting Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1977). Thus, a trial court's decision to limit the scope of cross-examination is reviewed for abuse of discretion. *Davenport,* 177 S.W.3d at 771. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999).

We are not persuaded that the trial court acted erroneously by prohibiting Harris from cross-examining Purvis about subsequent confidential informant work dealing with a drug dealer who belonged to a Mexican gang. The trial court's limitation on cross-examination was reasonable in this case as the court was concerned about the prejudice to the Commonwealth, confusion of the issues, Purvis's safety, and the fact that the evidence was not relevant. Without using the evidence that Purvis worked as a confidential informant in a case involving Mexican gangs, Harris was still able to paint a complete picture of Purvis's veracity, bias and motivation. On cross-examination, Harris asked Purvis about receiving payment for each successful drug transaction; whether he had done previous and subsequent informant work; whether he received light sentences in his drug-related criminal cases; and whether he had bias against African-Americans (Harris is black and Purvis is white). The jury was clearly aware that Purvis was assisting law enforcement and that he received benefits as a result.

That Purvis informed against a Mexican gang member was of no significance in Harris's trial, and its introduction would not have caused the jury to have a significantly different impression of Purvis's credibility. In fact, introduction of the evidence may have bolstered Purvis's credibility as the information Purvis gave police regarding the Mexican drug dealer turned out to be true. The jury could have inferred that because Purvis provided reliable information in that case, he is likely providing relevant information in the present case. In sum, because the trial court had reasonable concerns about confusion of

the issues, and Purvis's safety, and because the evidence was only marginally relevant, we hold that the trial did not abuse its discretion and did not violate Harris's right to confrontation by limiting Harris's cross-examination of Purvis.

COMMONWEALTH'S CLOSING ARGUMENT

Harris's second argument is that the trial court erroneously permitted the Commonwealth to request that the jury "send a message" to the community. During the penalty phase closing argument, the Commonwealth began discussing theories of punishment. It stated that deterrence was the issue and the sentence needs to send a message to Harris and the public at large.

Harris objected to the argument, but her objection was overruled and the Commonwealth proceeded:

> General deterrence, what that essentially means is that folks may be similarly situated to Ms. Harris in the future, may think "gosh, I'm going to go out and sell some pills, you know, sell some drugs,["] the idea is that if they realized the juries in McCracken County will convict these people but more importantly will set sentences that are appropriate to those actions, they're going to think twice about doing that and will prevent them from engaging in that conduct in the future. If they realized we could get in some trouble and, "I heard what happened to Gloria Harris and I don't want to end up in prison for" however long it is. The other idea is specific deterrence, talking about Ms. Harris in particular, that we need to send a shot across her bow, we need to alert her to the fact that this pattern of behavior she's been engaging in for what looks like to be about 20 years and now has culminated in a felony offense here for trafficking in these hydrocodone pills, the next time she is faced with a similar situation, to think, "You know what? I'm not going to do that again because I remember what happened last time. They caught me, I took it to a

> jury trial, and I got convicted and the jury recommended a big sentence against me." I'm not in the business, ladies and gentlemen, of telling you all what sentence is appropriate. You all are the ones who heard the evidence. . . Take her record back and use these theories and apply them and put everything together and here's what we need to do. Not only to show Ms. Harris that this kind of conduct won't be permitted in Kentucky specifically in McCracken County, but also what message is your sentence going to send to other defendants and other potential defendants down the road, those that sell their hydrocodone pills as well.

Appellant Brief at 11.

Harris argues that the Commonwealth's closing argument in the penalty phase was improper. She insists that the Commonwealth was not permitted to ask the jury to give her a harsh sentence in order to send a message to the community that her type of behavior would not be tolerated. We disagree.

In Kentucky, wide latitude is enjoyed by counsel during closing arguments. *Wheeler v. Commonwealth,* 121 S.W.3d 173, 180 (Ky. 2003), *cert. denied,* 541 U.S. 1051, 124 S.Ct. 2180 (2004). A prosecutor is permitted to use the closing argument to "persuade the jurors the matter should not be dealt with lightly." *Harness v. Commonwealth,* 475 S.W.2d 485, 490 (Ky. 1971). While our Supreme Court has always expressed its rejection of the send a message to the community argument at the guilt stage, it has recently expressed that type of argument is not necessarily barred at the sentencing phase of a trial. *Cantrell v. Commonwealth,* 288 S.W.3d 291, 297-298 (Ky. 2009); *see Brewer v. Commonwealth,* 206 S.W.3d 343, 348–51 (Ky. 2006); *Young v. Commonwealth,*

25 S.W.3d 66, 73 (Ky. 2000); *Ordway v. Commonwealth*, 391 S.W.3d 762, 797 (Ky. 2013). In the sentencing phase, counsel may properly argue for the jury to send a message to the community provided the arguments are narrowly focused on deterrence objectives. *Hall v. Commonwealth*, 337 S.W.3d 595, 612 (Ky. 2011). However, "[a]ny effort by the prosecutor in his closing argument to shame jurors or attempt to put community pressure on jurors' decisions is strictly prohibited." *Cantrell, 288 S.W.3d.* at 299. In other words, "[p]rosecutors may not argue that a lighter sentence will 'send a message' to the community which will hold the jurors accountable or in a bad light." *Id.*

We reject Harris's contentions that the argument advanced by the Commonwealth during closing arguments in the sentencing phase was improper.

> [I]t is essentially illogical, at the sentencing phase, to say that the prosecutor cannot encourage the jury to impose a sentence that speaks to deterrence, as well as punishes the specific crime before it. Deterrence is clearly not intended for that defendant alone, but rather his sentence sends the message to all others so inclined that their crimes will be punished, and that a jury made up of local citizens will not tolerate such offenses.

Id. Here, the Commonwealth advanced deterrence as a sentencing consideration and its argument was narrowly focused on deterrence objectives. The Commonwealth asked the jury to return a harsh sentence in order to send a message to Harris and to the community that the type of behavior in which Harris was engaged would not be tolerated in McCracken County. The statements made by the Commonwealth did not rise to the level of "shaming" the jury by implying

the community would view them in a bad light if they did not impose the maximum sentences. In light of the Supreme Court's recent decisions on the matter, we are of the opinion that the statements made by the Commonwealth were permissible.

CONCLUSION

Accordingly, we find no error by the trial court that would justify reversal of Harris's sentence. The judgment and sentence of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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