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RENDERED: SEPTEMBER 23, 2010

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000673-MR

FINAL

DATE *S. Towner*
10.14.2010

ROGER D. CRAWLEY

APPELLANT

V. ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
NO. 09-CR-00138

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Roger Crawley appeals from his convictions for first-degree trafficking in a controlled substance and first-degree persistent felony offender (PFO I). Appellant received, consistent with the jury's recommendation, a PFO-enhanced sentence of 20 years' imprisonment. He therefore appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). Appellant argues that the trial court abused its discretion in admitting evidence of an earlier drug sale. Finding no error, we affirm.

James Berdine, a confidential informant working with the Pennyriple Narcotics Task Force, the Central City Police Department, and the Muhlenberg County Sheriff's Department, testified that he made two controlled buys of narcotics from Appellant: a valium purchase in April 2009, and a methamphetamine purchase in May 2009. Appellant was charged only in

connection with the May sale of methamphetamine. However, evidence of both drug buys was admitted at trial.

On April 2, 2009, Berdine called Appellant and arranged to purchase six valium pills. He then proceeded to Appellant's house to make the buy. A recording of the pre-buy phone call and an audio/video recording of the buy (recorded with a camera concealed on Berdine's person) were admitted into evidence.

The video recording and Berdine's testimony established the following sequence of events. Berdine met Appellant outside his house near his car, where he gave Appellant \$15 in exchange for six valium pills and \$3 in change. During the course of Berdine and Appellant's conversation, Appellant stated, "I got another guy supposed to be bringing me some stuff" Berdine testified that he understood "stuff" to mean methamphetamine.

Berdine told Appellant, "If you get a hold of anything, call me up." Appellant also stated that he had to be careful, because he was on a "hot list" following the arrest at Wal-Mart of four people who were purchasing pseudoephedrine (an ingredient in methamphetamine).

Detective James Jenkins of the Muhlenberg County Sheriff's Department testified extensively about the April controlled buy, including the procedures used, e.g., searching Berdine prior to the buy and providing Berdine with more buy money than he would need so that there would be discussion of change on the recording. In addition to the recording of the pre-buy phone call and the

audio/video recording of the buy, the valium pills were admitted into evidence. The trial court admonished the jury that evidence of the April drug sale “is not evidence of the defendant’s guilt” and is to be considered only as far as it may show “the defendant’s identity with or knowledge or motive with respect to the offense for which he is being tried in this case.”

Berdine further testified that on May 1, 2009, he received a phone call from Appellant, who told him that he had “gotten some ‘stuff.’” Berdine then called Detective Jenkins. Following two recorded pre-buy phone calls, Berdine purchased a half gram of methamphetamine from Appellant during a recorded drug buy at Appellant’s home. According to Berdine, another man, identified only as “Chris,” was present when he (Berdine) purchased the methamphetamine from Appellant. Berdine testified that, when he gave Appellant \$60 for \$50 worth of methamphetamine, Appellant asked Chris to make change.

Appellant testified in his own defense. He testified that Berdine contacted him about purchasing methamphetamine, but that Appellant told Berdine he did not have any. Nevertheless, according to Appellant, Chris arrived at his home on May 1st, sold methamphetamine to Berdine, and left immediately after the sale. While Appellant acknowledged being present for the sale, he denied participating in any way.

Appellant was indicted for first-degree trafficking in a controlled substance as a result of the May methamphetamine sale, but was never

charged in connection with the alleged April valium sale. Appellant's sole argument on appeal is that the trial court erred in admitting evidence of the April sale. He argues that the evidence of the valium sale was irrelevant and thus inadmissible pursuant to KRE 402; unduly prejudicial to the point of outweighing any probative value, and thus inadmissible pursuant to KRE 403; and related to a prior bad act, and thus inadmissible pursuant to KRE 404(b). We review a trial court's evidentiary rulings for an abuse of discretion, i.e., "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) (citations omitted).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. If evidence is not relevant, it is inadmissible. KRE 402. The evidence of the April valium sale was relevant because Appellant and Berdine discussed the methamphetamine sale for which Appellant was ultimately tried and convicted. Appellant's defense was that "Chris" actually sold Berdine the methamphetamine. Therefore, the fact that Appellant and Berdine discussed the sale a month before it took place is highly relevant to the determination of Appellant's intent to sell methamphetamine.

In addition, the evidence of the April sale was admissible under KRE 404(b). While KRE 404(b) excludes evidence of other crimes when offered to

prove the character of a person, it specifies that such other crime evidence is admissible “[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”

The evidence of the April sale was admissible under a number of these “other purpose” exceptions, including to show Appellant’s intent to sell methamphetamine to Berdine, his preparation to sell the methamphetamine at a later date, and his identity as the seller. In addition, the trial court specifically admonished the jury as to the limited purposes for which evidence of the April sale was admissible.

Appellant presented a “mere presence” defense, i.e., that he was merely present at a drug buy conducted by someone else. “Because the ‘mere presence’ defense raises the issues of intent and knowledge, admission of prior bad act evidence is not relevant solely to a propensity inference, and is therefore proper under Rule 404(b).” *Walker v. Commonwealth*, 52 S.W.3d 533, 536 (Ky. 2001) (quoting *United States v. Thomas*, 58 F.3d 1318, 1323 (8th Cir. 1995)) (internal punctuation omitted).

Relevant evidence admissible under KRE 404(b) is, of course, still subject to possible exclusion under KRE 403. Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of undue prejudice” KRE 403. The evidence of the April valium sale was probative of Appellant’s intent, preparation, and identity with respect to the May

methamphetamine sale. It tended to negate Appellant's defense of mere presence at the location of the sale. It was therefore highly probative.

This evidence was also prejudicial to Appellant, in that it made the jury aware of Appellant's prior bad conduct of selling valium—conduct for which Appellant was never indicted or charged. However, the prejudice was lessened by the trial court's admonition to the jury about the limited purpose for which the evidence of the April buy was admissible. Given the highly probative nature of the evidence, we cannot say that the probative value was substantially outweighed by the danger of undue prejudice.

With respect to the evidence of the April valium sale, the trial court did not abuse its discretion in admitting the evidence with an appropriate admonition. Therefore, Appellant having raised no other issues on appeal, the judgment of the Muhlenberg Circuit Court is affirmed.

All sitting. All concur.

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