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 NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000937-MR

ANTONIO D. JACKSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN ADAMS, JUDGE
ACTION NOS. 00-CR-00765-02 & 00-CR-00894

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
*** * * * *

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Antonio D. Jackson appeals from a judgment of the Fayette Circuit Court, wherein he was convicted by a jury of trafficking in cocaine and being a persistent felony offender in the second degree. We affirm.

On May 16, 2000, the narcotics unit of the Lexington-Fayette Urban County Police Department organized a "buy-bust" operation where an informant would purchase illegal drugs from suspected dealers in a targeted area of the city. On this particular evening, the police department targeted the area of Roosevelt and Georgetown Streets for this type of operation after receiving complaints from citizens about drug trafficking in that

particular area. The informant, Rob Wilson, was obtained to go into this particular neighborhood and make the controlled purchase.

Wilson, who has served the Lexington police as an informant for ten years, was given a twenty dollar (\$20.00) bill to purchase crack cocaine. Police detectives set up a listening device in Wilson's vehicle so that the transaction could be captured on audiotape. After searching Wilson and his car for contraband and photocopying the twenty dollar bill used in this purchase, Wilson proceeded to enter the targeted neighborhood.

After pulling onto Roosevelt Street, Wilson began to speak with a possible subject about purchasing some cocaine. Wilson described this person, later identified as the appellant Antonio Jackson, as a man with a stocky build, wearing a "brown flannel shirt." After speaking with Wilson, Jackson walked over to another man wearing a red shirt. This man, Mandrill Cotton, gave Jackson a rock of cocaine. Jackson then proceeded to return to Wilson's car and exchanged the cocaine for the twenty dollar bill. Jackson returned to Cotton's location and gave him the twenty dollar bill. After this sale concluded, Wilson informed the narcotics officers who were listening in on the transaction that the controlled sale "looks good." With this cue, the police moved into the neighborhood and arrested both Jackson and Cotton. Wilson identified Jackson as the man who sold him the cocaine during a subsequent show-up identification. The twenty dollar bill was recovered from Cotton's pocket.

On July 24, 2000, the Fayette County Grand Jury indicted Jackson and Cotton for trafficking in a controlled substance in the first degree. Cotton later pled guilty to this charge and testified for the Commonwealth at Jackson's trial. During his testimony, Cotton acknowledged that he gave Jackson, an acquaintance for approximately three months, twenty dollars worth of crack cocaine which he had on his person. Jackson then sold this piece of cocaine to informant Wilson and brought the twenty dollar bill back to Cotton. Cotton testified that he accepted the money from Jackson and put it with his other money.

After a one day trial, the jury, which consisted of no African Americans, convicted Jackson of trafficking in cocaine. After finding that Jackson was a persistent felony offender in the second degree, the jury enhanced his original eight-year prison sentence to twenty years. The trial court, at Jackson's urging, reduced the total prison sentence to fifteen years. This appeal followed.

Jackson brings forward three arguments for our review. First, Jackson alleges that the trial court erred by denying his motion for a mistrial made at the beginning of the trial because no potential jurors of African American descent were on the jury panel. Jackson further argues that the lack of African Americans in the jury panel violated the requirement that the jurors be drawn from a fair cross-section of the community. We find these assertions to be without merit.

The decision to grant a mistrial is within the discretion of the trial judge, whose ruling will not be disturbed

absent the showing of an abuse of discretion. Jones v. Commonwealth, Ky., 662 S.W.2d 483 (1983). In order for a mistrial, the record must reflect a manifest necessity for such action or real necessity. Miller v. Commonwealth, Ky., 925 S.W.2d 449 (1996), overruled in part on other grounds, Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001). The occurrence complained of must be of such character and magnitude that the litigant will be denied a fair and impartial trial and the resulting prejudicial effect can be removed in no other way. Gould v. Charlton Company, Inc., Ky., 929 S.W.2d 734 (1996). In this matter presently before us, Jackson failed to demonstrate that the lack of African Americans in the jury pool denied him a fair and impartial trial.

In order to establish a prima facie violation of the fair cross-section requirement, a defendant must show:

- 1) that the group alleged to be excluded is a distinctive group in the community; 2) that the representation of this group in venires from which the juries are selected is not fair and reasonable in relation to the numbers of other persons in the community; and 3) that the underrepresentation is due to the systematic exclusion of the group in the jury selection process.

Smith v. Commonwealth, Ky., 734 S.W.2d 437, 442 (1987).

Here, Jackson has not demonstrated that some type of systematic exclusion of African Americans in this jury panel occurred because of the jury selection process. Section Three of the Administrative Procedures of the Court of Justice provides that a jury pool shall be randomly selected by a computer from a list of all registered voters of a county and adults holding

drivers licenses issued in that county. Section Four of the Administrative Procedures of the Court of Justice mandates that names shall be taken from the randomized list in sequential order. While it is unusual for no African American citizens to be on a jury panel in Fayette County, there is no allegation by Jackson that the selection procedure used herein was defective or caused this result. In fact, Jackson admits that there was no systematic elimination of African American citizens from the panel in this case. Therefore, since Jackson cannot make out a *prima facie* case that his right to a jury composed of a fair cross section of the community was violated, we deem Jackson's first argument to have no merit.

Jackson's second assertion of error is that the trial court should not have permitted the Commonwealth to play a portion of the videotape from Cotton's previous statement because questions from the trial court on that videotape implied that Cotton had pled guilty to the trafficking charge. Again, we see no merit in this argument.

On the day prior to trial, co-defendant Cotton pled guilty and responded to questions from both the trial court and the Commonwealth to determine a factual basis for this plea and to learn Cotton's exact role in this crime. At trial, Jackson sought to play certain portions of the video from Cotton's plea hearing in order to impeach the credibility of Cotton and Wilson. Specifically, Jackson wanted to show that Cotton's video statements imply that Jackson made only one trip to Cotton to exchange the cocaine for the twenty dollar bill instead of two

trips as Wilson described. The Commonwealth then requested to play a section of the tape where Cotton told the court that he did observe Jackson give the cocaine to Wilson, for which Cotton got twenty dollars. The defense also wanted to prove that Cotton was contradictory in the exact language he used to describe the rock of cocaine. At no time was Cotton's actual guilty plea ever shown to the jury.

A decision by the trial court concerning the admission of evidence will not be disturbed in the absence of an abuse of discretion. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). It is well-settled law that the Commonwealth cannot introduce evidence that its witness, a co-defendant, has pleaded guilty to the same charges being tried against the present defendant. Parido v. Commonwealth, Ky., 547 S.W.2d 125 (1977). Jackson acknowledges that the actual guilty plea was never shown to the jury. Rather, Jackson argues that the jury could easily imply that Cotton did plea guilty to the charge. This assertion fails based upon a review of the record. The portions of the tape played by the Commonwealth do not imply that a guilty plea occurred. Rather, the court's questions to Cotton mirrored the Commonwealth's inquiry of Cotton in determining his role in this drug transaction. Therefore, we see no evidence that this jury could have implied that Cotton had pled guilty to this charge.

We also believe that allowing the Commonwealth to play the disputed parts of the videotape to the jury was proper under the Kentucky Rules of Evidence. KRE 106 clearly provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse

party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The Kentucky Supreme Court has further clarified this rule by stating, "Once a portion of a statement is introduced by one party, the rule of completeness allows that adverse party to require the introduction of the remainder of the statement."

Slaven v. Commonwealth, Ky. 962 S.W.2d 845, 858 (1997). The fairness aspect of the rule is intended to prevent a misleading impression as a result of an incomplete reproduction of a statement. Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001). Here, the Commonwealth was properly allowed to introduce its requested portions of the videotape so that the jury could obtain a clear and complete picture of the events that transpired on May 16, 2000. To deny the Commonwealth the ability to introduce these portions of the video would have provided the jury with statements that were taken out of context. The jury is entitled to a complete and fair record of Cotton's June 7, 2001 statements so long as no implication of his guilty plea is evident. With the record showing that the jury was not tainted with evidence of a guilty plea by a co-defendant, no abuse of discretion occurred. Therefore, the trial court properly placed Cotton's videotaped statements within the province of the jury so that it could determine the credibility of each witness.

Jackson's final contention of error is that, during closing argument, the trial court should have permitted him to argue that Cotton may have been lying to protect somebody else whom he knew to be the actual seller. From a review of the

record, Jackson's trial counsel thoroughly laid out inconsistencies in Cotton's testimony. The Commonwealth specifically objected to Jackson's trial counsel making statements that Cotton was lying to protect somebody else. The trial court ruled that trial counsel was entitled to argue that Cotton was lying to protect another person, but counsel could not specifically identify the suspect. Also, the trial court held that trial counsel, in making this argument, had to stay within the bounds of reasonable inferences from the evidence.

Generally, counsel are granted wide latitude in their closing argument. A litigant is allowed to draw reasonable inferences from the facts proven at trial. Elswick v. Commonwealth, Ky. App., 574 S.W.2d 916 (1978). Inferring possibilities that are not reasonable based on the evidence, however, is beyond the scope of closing argument. Id. During closing argument, Jackson's counsel was allowed to argue that co-defendant Cotton was lying to protect somebody else. The evidence presented at trial, particularly the possible inconsistent testimony from Wilson and Cotton, plus testimony from a neighborhood resident that several people usually congregate in this particular area, could lead a juror to reasonably conclude that Cotton was lying. The only prohibition issued by the trial court was that Jackson could not disclose the identity of this mystery suspect. The trial court was correct in its ruling because the identity of Jackson's mystery suspect was not in the record, thus making the suggestion to the jury highly improper and contrary to law. Therefore, we adjudge that no

error occurred because the trial court's ruling on this issue was appropriate.

Based upon the foregoing, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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