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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000854-MR

TOMMY RITCHIE

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 00-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Tommy Ritchie has appealed from a judgment of conviction and sentence entered by the Breathitt Circuit Court on March 24, 2001, which convicted him of trafficking in a controlled substance in the first degree.¹ Having concluded that any error committed by the trial court was harmless, we affirm.

On October 6, 2000, a Breathitt County grand jury returned an indictment against Ritchie for the offense of

¹Kentucky Revised Statutes 218A.1412.

trafficking in a controlled substance in the first degree. At a jury trial held on February 13, 2001, Ritchie was convicted of the trafficking offense and the jury recommended a sentence of five years' imprisonment. On March 24, 2001, the trial court entered a final judgment confirming the jury's verdict and sentenced Ritchie in accordance with the jury's recommendation. This appeal followed.

On January 9, 2000, Beverly Little assisted the Kentucky State Police (KSP) in making a controlled drug buy from Ritchie that was videotaped by the KSP. Little testified that Ritchie called her unannounced and indicated that he knew where he could get some oxycodone pills for the two of them. Little testified that she was involved in several controlled buys with the KSP that were recorded on audio tape, but that she was not expecting Ritchie's call and that she did not tape it. Little testified that Ritchie asked if he could borrow \$40.00 from her to buy some pills for himself. She agreed to give Ritchie \$40.00 plus another \$200.00 to use to purchase pills for her. Ritchie went to Little's house and picked up the \$240.00 and returned shortly thereafter with oxycodone pills.

Ritchie testified that Little had repeatedly attempted to contact him by telephone on January 9, 2000, and that he did not initiate the contact with her. Ritchie testified that after Little gave him the \$240.00 he went to purchase the drugs from a man identified as Chester. Ritchie testified that he purchased five "forties" of oxycodone from Chester. Ritchie claimed that

he did not use the \$40.00 that Little gave him to purchase drugs for himself, but instead kept that money as payment for a prior debt that Little owed him.

As rebuttal to Ritchie's defense that he was entrapped by Little and the KSP on January 9, 2000, the Commonwealth called as a witness Detective Dan Smoot of the KSP. Det. Smoot testified that he and Little had made several telephone calls on January 9, 2000, about potential drug deals but that Ritchie had not been contacted. Det. Smoot testified that Ritchie called Little and that they had no idea he was going to call. Det. Smoot also testified that most of Little's telephone calls were recorded but Ritchie's call was not recorded because he was not expected to call and the recording machine was not connected. Det. Smoot claimed that at the time Ritchie called, he had unhooked the recorder to review tapes of previously recorded conversations involving Little.

On appeal, Ritchie claims that the trial court abused its discretion by excusing members of the venire who knew a man named Philip Lovins. The issue arose during voir dire when the Commonwealth asked the venire whether anyone knew Ritchie or any of his family who was with him. A woman stepped forward and stated that she knew Philip Lovins, and she asked if he was related to Ritchie. Apparently, Lovins was sitting with Ritchie's family members.

After a series of questions, it was established that this potential juror would have difficulty convicting Ritchie

because Lovins was there in support of him. The trial judge excused her for cause. This occurrence prompted the Commonwealth to ask the venire the following question:

We are back, just one last time, ladies and gentlemen -- as I remember, Mr. Ritchie had a brother named Dale Ritchie. I don't know if any of you know him or not. As I said, that's the last name that I can give you, as far as the Ritchie family. Do any of you know him? Okay -- one of the jurors came forward and mentioned Mr. Philip Lovins, who is sitting here. Do any of you know him? Your Honor, I would ask that they come to the bench individually.

Several jurors raised their hands and one by one they approached the bench. Four jurors indicated that their relationship with Lovins would cause them difficulty in giving the Commonwealth a fair trial. Ritchie's counsel did not object to the venire being questioned about Lovins; and following voir dire, the jury was sworn without objection by either party.

We do not believe that Ritchie has properly preserved this issue for our review.² During voir dire, Ritchie had ample opportunity to object to potential jurors being questioned about Lovins. In fact, on each occasion the trial court gave Ritchie's counsel the opportunity to ask questions and his counsel declined. Ritchie's counsel accepted the jury and proceeded with trial. Since Ritchie made no specific objection during the voir

²Kentucky Rules of Criminal Procedure (RCr) 9.22. See also Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 182 (2001).

dire and accepted the jury, he cannot raise this objection for the first time on appeal.³

Regardless of the lack of preservation, we note that the trial court has discretion in seating a jury and a judge's decision to excuse a juror for cause will only be reversed on appeal if it was clearly erroneous and an abuse of discretion.⁴ As we noted previously, each member of the venire that was excused for cause expressed an inability to determine the case fairly in light of Lovins's apparent support for the defendant. Although it was unusual that Lovins, someone who was not a member of the defendant's family and someone who was not going to testify, was causing such a concern, it is clear from our review of the record that several members of venire expressed serious concern that they would not have been able to judge the case fairly due to his presence. Thus, we cannot say the trial court abused its discretion by excusing members of the venire who stated that they could not consider the case fairly.

Ritchie also argues that the Commonwealth failed to prove an essential element of the case because it failed to lay the proper foundation in support of its proof that the pills Ritchie gave Little were in fact oxycodone. To prove that the pills were oxycodone, the Commonwealth called John Harris as a

³Hicks v. Commonwealth, Ky.App., 805 S.W.2d 144, 148 (1990) (citing Anastasi v. Commonwealth, Ky., 754 S.W.2d 860 (1988); and McDonald v. Commonwealth, Ky., 554 S.W.2d 84 (1977)).

⁴Foley v. Commonwealth, Ky., 953 S.W.2d 924, 932 (1997); Peters v. Commonwealth, Ky., 505 S.W.2d 764 (1974).

witness. Harris was employed by the KSP laboratory and worked as an analytical chemist/forensic chemist, specializing in drug analysis.

In his brief Ritchie argues:

However, a proper foundation was never established for the witness' testimony identifying the "drugs" as oxycontin. In fact, the minimum foundation required would necessarily involve testimony regarding the witness' laboratory and scientific analysis of the "drug" for identification purposes according to accepted standards in the scientific community and profession; however, the expert witness never attempted to address this essential element of any expert chemist's opinion and his failure to do so should have been fatal to his ability to give an expert opinion as to the identity of the "drug" as oxycontin. Accordingly, the Commonwealth failed to prove an essential element of the charge against the appellant.

From our review of Harris's testimony, we believe that it was sufficient to establish that he had tested the pills and that he had determined that they contained the drug oxycodone. He testified that he initially identified the tablets by looking at the markings on them and that he then used a medical data base to determine what they were supposed to be. Harris testified that he then proceeded to perform the actual testing on the tablets:

I examined them by gastroentography (sic) and massdextrocity (sic) to size them up in a medical data base. I am going to get that out -- that's a method I use to identify the Oxycodone in -- I am a chemist, and I am asked to do a chemical identification on it. So, I used acceptable instrumental testing -- chemical testing procedures to identify the narcotic itself.

While we acknowledge that this is not the most convincing expert testimony that we have ever reviewed, we believe that it sufficiently established that Harris examined the tablets using acceptable methodology. It should be noted that Ritchie's counsel chose not to challenge Harris's methodology. In fact, Ritchie's counsel stipulated to Harris's education credentials. We hold that the evidence submitted by the Commonwealth through Harris's testimony sufficiently established that he performed the necessary tests to determine that the tablets contained the drug oxycodone. Furthermore, since Ritchie's defense was entrapment, the identity of the substance that he transferred to Little was never really an issue.

Ritchie also claims that the trial court erred by denying his motion for a directed verdict of acquittal. In his brief, Ritchie argues that the evidence is clear that Little "hoodwinked" him into obtaining drugs for her in an attempt to gain favorable treatment in her own case. When a trial court considers a motion for a directed verdict of acquittal, it must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.⁵ "If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given."⁶ In reviewing the trial court's decision, an appellate court should not disturb the trial court's denial of a motion for

⁵Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

⁶Id.

a directed verdict of acquittal unless it would be clearly unreasonable for a jury to find guilt.⁷ With this standard in mind, we will review the evidence presented to prove the charge of trafficking in a controlled substance in the first degree.

Ritchie's defense at trial was entrapment. KRS 505.010 provides in pertinent part:

- (1) A person is not guilty of an offense arising out of proscribed conduct when:
 - (a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and
 - (b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.
- (2) The relief afforded by subsection (1) is unavailable when:
 - (a) The public servant or the person acting in cooperation with a public servant merely affords the defendant an opportunity to commit an offense[.]

The obvious issue at trial was whether Ritchie was induced to sell drugs by the Commonwealth, and if so, whether he was already disposed to do so. The Commonwealth's evidence consisted primarily of the testimony of Little, who testified that Ritchie contacted her about the drug transaction; and the testimony of Det. Smoot, who corroborated most of her story.

⁷Id.; Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983).

Ritchie testified that Little contacted him and said that she needed some pain medicine. He claimed that she said that her pain from an injury was so severe that she was crying. He also testified that Little owed him money and that the \$40.00 she gave him was for the prior debt and was not used by him to purchase drugs for himself. Apparently, the jury rejected Ritchie's version of the events, and believed Little's testimony. From our review of the evidence, we hold that the evidence was sufficient for a reasonable juror to find beyond a reasonable doubt that Ritchie was not entrapped into trafficking in oxycodone.

Ritchie's final claim of error is that the trial court abused its discretion by disallowing his testimony as to the reason that Little called him and what he did as a result of her telephone call. The following questioning occurred at trial:

Defense Attorney: What did she [Little] call you for?

Ritchie: She would call and try to get me . . .

Prosecutor: I am going to object, Your Honor, to the hearsay. . .

Trial Court: Sustained.

. . .

Defense Attorney: As a result of the telephone call that night, what did you do?

Ritchie: She called me and said that she needed some medicine. . .

Prosecutor: I am going to object, You Honor, to the hearsay.

Trial Judge: Sustained.

We hold that the trial court erred by ruling that the Ritchie's testimony concerning what Little told him was hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁸ The statement by Little was not being offered in evidence by Ritchie "to prove the truth of the matter asserted." Any statement allegedly made by Little to Ritchie that she wanted him to get her some pain medicine was not being offered by Ritchie to prove that Little actually wanted the pain medicine. The statement was being offered to show that the statement was actually made and that Ritchie acted upon it, not that it was a truthful statement. Ritchie was attempting to demonstrate that he got Little the drugs because she asked him to. "A legitimate nonhearsay use of an out-of-court statement always involves relevancy in the mere utterance of the words comprising the statement (i.e., a logical connection between the utterance of the words and some material element of the case)" [emphasis original].⁹ In the case sub judice, there was a logical connection between Little requesting that Ritchie get some drugs for her and his defense of entrapment, and the objections should have been overruled. However, from our review of the record, we believe this error was

⁸Kentucky Rules of Evidence (KRE) 801(c).

⁹Lawson, The Kentucky Evidence Law Handbook, § 8.05 (3d ed., 1993).

harmless. Even without the admission of this testimony, Ritchie was able to convey to the jury the essence of his conversation with Little. We believe, as a whole, that Ritchie was able to relate to the jury his entrapment defense.

It is ironic that the prosecutor objected to Ritchie being allowed to testify to what Little had said to him that induced him to get her drugs, but on cross-examination the prosecutor asked Ritchie extensively about his conversations and dealings with Little. We believe from the questions and answers set forth below that Ritchie was given ample opportunity to explain his entrapment defense to the jury:

Prosecutor: You knew — you knew [Chester] was — but the point is, is this the first person that came to your door, and announced to you that they were a drug dealer. If you knew anyone that needed anything, they could supply it. Was he the first person that ever done [sic] this?

Ritchie: No.

Prosecutor: Tell us who else had done that to you then.

Ritchie: Beverly done it.

Prosecutor: Anybody — of course, I knew you were going to say Beverly — but anybody else, other than her?

Ritchie: No.

Prosecutor: Okay — so, it was just Beverly and Chester, that come to you and said, "Now, look, we are drug dealers." Of course, why would Beverly come to you and

say, "I am a drug dealer," if she is having to call you to go get drugs for her?

Ritchie: Well, I came down to her house before, and seen her selling them.

Prosecutor: No - now wait a minute! I think you told us that Beverly came to you - to your home, and announced to you that she was going to sell drugs, and that if you knew anybody that wanted any, she would sell them - that she could sell them for you . . .

Ritchie: Yes.

Prosecutor: Okay - when was that?

Ritchie: I don't remember - 1999.

Prosecutor: 1999?

Ritchie: Uh-huh.

Prosecutor: Because I was wondering, if Beverly was selling, why would she come to you, on January 9, 2000, asking you to get drugs for her?

Ritchie: I don't know.

Prosecutor: Well, that wouldn't make sense to you, would it? That doesn't make sense at all, does it?

Ritchie: If she did, it probably did.

Prosecutor: Okay - so, now, Chester comes over, and you said he rolls in about what time?

Ritchie: Twelve or one - it was right in the evening there.

Prosecutor: Okay - so, about twelve or one, and says that - and says

that he can sell drugs, and that same day, lo and behold, Beverly Little needs you to buy her some drugs, and you agree to do it?

Ritchie: Yes.

Prosecutor: Why?

Ritchie: I don't know. She just started crying is one thing - I never had bought them - went and got them before for her.

Prosecutor: You haven't?

Ritchie: No.

Prosecutor: So, she cried on you, and you suddenly decided that well, she was crying and you would go ahead and get involved in the drug trade?

Ritchie: No, it was where she shot herself in the leg. I felt sorry for her.

Prosecutor: You felt sorry for her.

Ritchie: Yeah.

Prosecutor: Okay - now, you first said that she was crying. And now, you are saying you felt sorry for her.

Ritchie: Well, that's the reason she was crying.

Prosecutor: Okay - she was in pain. She told you she was in pain, crying, and she needed drugs, so you decided to start getting in the business for her - to go get drugs and hand them out to her. Is that what happened?

Ritchie: I felt sorry for her.

Prosecutor: Is that what happened, sir?

Ritchie: Yes.

Prosecutor: Okay – so, you felt sorry for her, because she cried around on you, and it was just so convenient, that you have got a supplier now, because Chester showed up. And so, you just decided on January 9, 1999 [sic], between the hours of twelve and one o'clock, when Chester shows up, and whatever time it is that you talk to Beverly Little on the telephone, that you are going to go ahead and get started in the drug trade?

Ritchie: No, I didn't decide that.

Prosecutor: Well, that's what happened, isn't it?

Ritchie: I don't know.

Prosecutor: Well, that was you on the video, wasn't it, going to get the money, and take . . .

Ritchie: Yeah, that's the only time I decided to get started. I don't decide to get started.

Prosecutor: Well, that is the drug trade though – you will agree to that?

Ritchie: Yeah, I guess.

Prosecutor: All right – we are getting somewhere. But you said you wouldn't describe it as deciding to get started. Well, obviously, something went through your mind. You know, you have got Chester showing up, which is so convenient for Beverly and you, on this same day, about twelve or one o'clock, and he

announces to you that he is a drug dealer, and then, as coincidence would have it, that same day, Beverly Little calls you, and she is crying around - called you, according to you - well, she says she didn't call you - and she is crying around, because her leg is hurting, and you get involved in the drug trade there. Now, obviously, you had to make that decision, because you did it.

Ritchie: Yeah.

Prosecutor: So, you did decide that day to get in the drug trade?

Defense Attorney: Objection, Your Honor - he said he went and got the pills for.

Prosecutor: Well, he agreed that that's the drug trade, though, Judge. He has already agreed to that.

Court: Overruled - move along.

Prosecutor: Well, Your Honor, that's important. I think I should be allowed to question him about that.

Court: Well, you have.

Prosecutor: I didn't get an answer, Judge. He just sat there, because his counsel objected, and he never answered.

Court: You can answer the question.

Ritchie: Yeah.

Prosecutor: All right - you were the - you will agree with me, that it is just a little coincidental. It certainly looks odd,

doesn't it, that it all happened that one day?

Ritchie: Yeah.

. . .

Prosecutor: Now, on January 9, you said that Beverly Little called you how many times?

Ritchie: Three to four times that day.

Prosecutor: Did you talk to her three or four times that day?

Ritchie: No.

Prosecutor: You talked to her one time?

Ritchie: Yes.

Prosecutor: And in that one conversation, you actually dialed the phone to her home, didn't you?

Ritchie: No.

Prosecutor: Oh, she dialed you?

Ritchie: Yes.

Prosecutor: Okay - what time was that?

Ritchie: That was up in the night.

Prosecutor: How long was it before you showed up at her house, and your hand reached out for that two hundred and forty bucks?

Ritchie: Five minutes, or something like that.

Prosecutor: Okay - so, you talked to her, and then, five minutes later, you are down to her house?

Ritchie: Yes.

Prosecutor: All right - all right - so, she called you and you talked to her for how long?

Ritchie: It was . . .

Prosecutor: Two or three minutes?

Ritchie: Yes - something like that.

Prosecutor: Okay - that was when you decided to become a drug dealer, wasn't it - or get involved with the drug trade - that two or three minutes. So, it took her two or three minutes to convince you to get involved in the drug trade - is that right?

Ritchie: Yeah.

Prosecutor: She was crying around on you, for all of two or three minutes, wanting you to get her some drugs, and of course, Chester had been down to your house. So, you immediately jump in the car, and run to her house in five minutes?

Ritchie: Yes.

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

ALL CONCUR.

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