

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002312-MR

JOHN LEMONTE SCRUGGS

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 02-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

JOHNSON, JUDGE: John Lemonte Scruggs has appealed from a final judgment and sentence of the Owen Circuit Court entered on October 14, 2002, which, following Scruggs's conviction for trafficking in a controlled substance in the first degree,<sup>1</sup> sentenced Scruggs to five years' imprisonment in accordance with the jury's recommendation. Having concluded that all of Scruggs's claims of error are without merit, we affirm.

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<sup>1</sup> Kentucky Revised Statutes (KRS) 218A.1412.

On April 9, 2002, an Owen County grand jury indicted Scruggs on one count of trafficking in a controlled substance in the first degree. The grand jury charged that on or around January 22, 2002, Scruggs "knowingly and unlawfully trafficked in a Schedule II narcotic drug, namely cocaine." Scruggs entered a plea of not guilty to the charge and the case proceeded to trial.

A jury trial was held on September 13, 2002. At the close of the Commonwealth's case-in-chief, and at the close of all of the evidence, Scruggs moved the trial court for a directed verdict of acquittal. Both of Scruggs's motions were denied by the trial court. After hearing all of the evidence, the jury found Scruggs guilty of trafficking in a controlled substance in the first degree, and recommended a sentence of five years' imprisonment. On October 14, 2002, after a pre-sentence investigation had been completed, the trial court followed the jury's recommendation and sentenced Scruggs to five years' imprisonment. This appeal followed.

Scruggs first claims that his conviction must be reversed on the grounds that there was insufficient evidence to support his conviction. Specifically, Scruggs argues:

Without the testimony of Matt Collins, who, prior to his testimony against Scruggs received a favorable plea agreement from the prosecution, and Terry Smith, who although he claimed no deals, ultimately received a

favorable sentencing recommendation (which the [trial] court followed) from the prosecution, the Commonwealth would have not had any chance of obtaining a conviction.

According to Scruggs, his conviction should be reversed on the grounds that the testimony of Collins and Smith was not competent evidence, and that without their testimony, there was insufficient evidence to support his conviction. Essentially, Scruggs is arguing that the trial court erred by denying his motions for a directed verdict of acquittal. We disagree and find no merit in Scruggs's argument.

In Commonwealth v. Benham,<sup>2</sup> our Supreme Court explained the test for a trial court to follow when ruling on a motion for a directed verdict:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

The Court went on to state the appropriate standard for an appellate court to follow when reviewing a trial court's ruling on a motion for a directed verdict:

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<sup>2</sup> Ky., 816 S.W.2d 186, 187 (1991).

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

We first address Scruggs's argument that Collins and Smith were not competent to testify before the jury because of their alleged motivations to lie. A court must always be mindful that "[c]redibility and weight of the evidence are matters within the exclusive province of the jury."<sup>3</sup> In Darnell v. Commonwealth,<sup>4</sup> our Supreme Court stated:

A witness' expectation of a benefit or motive to testify falsely is a factor that goes to the credibility of the witness and to the weight of his testimony. Such matters are within the scope of the jury's duty.

Hence, even though Collins and/or Smith may have had a motivation to provide testimony favorable to the Commonwealth, this motive was simply a factor for the jury to decide in weighing the credibility of their testimony. A criminal defendant is entitled to expose a witness's bias, interest, or motive on cross-examination,<sup>5</sup> and our review of the record shows

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<sup>3</sup> Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999).

<sup>4</sup> Ky., 558 S.W.2d 590, 595 (1977).

<sup>5</sup> Keller v. Commonwealth, Ky., 572 S.W.2d 157, 159 (1978) (holding that "it is well settled that a witness may be cross-examined on any facts which tend to show bias, interest, or motive which might affect the credibility of the testimony of the witness. This is so for the reason that the jury is entitled to hear all the relevant facts calculated to influence a witness so

that Scruggs availed himself of this opportunity. Thus, the jury was made aware of any motives that Collins and/or Smith may have had for testifying, and there was no error in permitting the jury to consider their testimony.

Second, our review of the evidence presented at trial reveals that the trial court properly denied Scruggs's motions for a directed verdict of acquittal. Kentucky State Trooper Derek Boyd testified that he began working with a paid informant, Janet Maiden, at some point prior to January 2002. Maiden testified that Smith had informed her that he could get any amount of drugs she needed from Collins. Maiden relayed this information to Trooper Boyd, who organized a controlled drug transaction.

On January 22, 2002, Trooper Boyd provided Maiden with \$1,100.00 to buy cocaine from Smith. Smith testified that he took the \$1,100.00 from Maiden and approached Collins with a request to buy one ounce of cocaine. Both Collins and Smith testified that they then contacted Scruggs and asked if he could provide the cocaine. Both Collins and Smith also stated that Scruggs eventually came to Collins's home with a bag of cocaine, whereupon the three men separated and weighed several grams of cocaine to sell to Maiden. Collins and Smith further testified that Scruggs took the \$1,100.00 that Trooper Boyd had given

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as to enable the jury to properly estimate the weight to be given the testimony of the witness").

Maiden in exchange for the cocaine. Finally, although he denied being a part of the drug transaction, Scruggs admitted that he was in Collins's home when the drug deal occurred.

Hence, there was ample evidence presented to the jury which could have supported a finding that Scruggs was guilty of trafficking in a controlled substance in the first degree. Accordingly, it was not "clearly unreasonable" for the jury to find Scruggs guilty, and the trial court did not err by denying Scruggs's motions for a directed verdict of acquittal.

Scruggs next argues that he was denied a fair trial on the grounds that a prospective juror was not struck for cause after informing the trial court that he or she was Smith's cousin.<sup>6</sup> In response, the Commonwealth claims that Scruggs waived his opportunity to raise this issue by failing to object during voir dire. We agree with the Commonwealth.

In Pelfrey v. Commonwealth,<sup>7</sup> our Supreme Court stated:

The rule is well settled that a challenge to a juror for cause must be made before the trial. The general rule is that objection to a juror because of his disqualification is waived by a failure to object to such juror until after verdict. The trial lawyer has a specific procedure to follow when he believes a juror is biased. RCr<sup>8</sup> 9.36(1) provides that "challenges for cause shall be made first by the

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<sup>6</sup> The identity of this prospective juror is not clear from the record.

<sup>7</sup> Ky., 842 S.W.2d 524, 526 (1992).

<sup>8</sup> Kentucky Rules of Criminal Procedure.

Commonwealth and then by the defense." Here, since the appellant did not challenge any of the jurors, we can only assume that he was satisfied with the jury. Contrary to trial counsel's argument, a continuance motion for a new panel is not the equivalent of individually challenging jurors for cause. Once trial counsel's general motion was denied, his method for reviewing the bias issue was to specifically challenge jurors. Without doing so, counsel clearly waived his jury challenge [citations omitted].

In the case sub judice, Scruggs has conceded that no objection was made to this unidentified prospective juror prior to trial. Therefore, since "[c]ounsel's decisions during voir dire are generally considered to be matters of trial strategy,"<sup>9</sup> it must be assumed that Scruggs was satisfied with this prospective juror. Furthermore, we reject Scruggs's argument that this was a "palpable error" capable of appellate review under RCr 10.26.<sup>10</sup> Since trial counsel failed to demonstrate obvious juror bias to the trial court, we cannot conclude that the trial court's failure to sua sponte strike this juror met any of the three requirements of RCr 10.26, i.e., (1) any error was not obvious, (2) there was no evidence that appellant's substantial rights were affected, and (3) there was no basis to

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<sup>9</sup> Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 837 (2000).

<sup>10</sup> RCr 10.26 states that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

conclude that a manifest injustice resulted. Accordingly, Scruggs's claim that he was denied a fair trial because of an alleged failure to strike a prospective juror for cause is wholly without merit.

Next, Scruggs claims that he was denied due process of law when, during the penalty phase of the trial, the Commonwealth's Attorney made a reference to the "war on drugs" while addressing the jury. Scruggs argues that this statement was "highly prejudicial," since it invited the jury to consider issues outside the evidence presented at trial. We disagree.

Once again, Scruggs failed to make a contemporaneous objection to the Commonwealth's Attorney's remarks. Thus, since the trial court was never given an opportunity to rule on this issue, Scruggs's claim of error has not been properly preserved for appellate review.<sup>11</sup> Regardless of this procedural defect, however, it is clear that Scruggs suffered no prejudice whatsoever as a result of the Commonwealth's Attorney's remarks. The statement was made during the penalty phase of trial, after which the jury recommended the minimum sentence of five years'

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<sup>11</sup> See RCr 9.22; and Turner v. Commonwealth, Ky., 460 S.W.2d 345, 346 (1970) (stating that "[t]he appellate court reviews for errors, and a nonruling is not reviewable when the issue has not been presented to the trial court for decision").

imprisonment.<sup>12</sup> Accordingly, Scruggs was not harmed by any denial of due process of law.

Finally, Scruggs claims that the trial court abused its discretion by denying his request to have his five-year prison sentence probated. Scruggs offers no argument in support of this claim of error other than his assertion that his prior record consisted only of "traffic tickets," and that denying him probation "defies common sense." Once again, we conclude that this alleged error is without merit.

As Scruggs himself has conceded, the trial court is vested with "substantial discretion in deciding upon the disposition of convicted offenders."<sup>13</sup> In the case at bar, the trial court denied Scruggs's request to have his five-year sentence probated on grounds (1) that there was a substantial risk Scruggs would commit another crime; (2) that Scruggs was in need of treatment which could be provided most effectively in a correctional institution; and (3) that probation would unduly depreciate the seriousness of Scruggs's crimes. Considering that Scruggs was found guilty of taking part in a large, illicit drug transaction, the trial court clearly did not abuse its discretion by denying Scruggs's request to have his five-year

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<sup>12</sup> For a first offense, trafficking in a controlled substance in the first degree is a Class C felony, punishable under KRS 532.060(2)(c) by "not less than five (5) years nor more than ten (10) years."

<sup>13</sup> Turner v. Commonwealth, Ky., 914 S.W.2d 343, 348 (1996)(quoting KRS 533.010).

sentence probated. Therefore, we find Scruggs's final claim of error to be unpersuasive.

Based on the foregoing, the judgment of the Owen Circuit Court is affirmed.

ALL CONCUR.

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