RENDERED: NOVEMBER 30, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002568-MR

LUCRETIA L. THOMPSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 05-CR-002118

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Lucretia L. Thompson ("Thompson") has appealed from the Jefferson Circuit Court's November 30, 2006, entry of judgment convicting her of trafficking in a controlled substance in the first degree (cocaine),[1] possession of

[1] Kentucky Revised Statutes (KRS) 218A.1412, a Class C felony.

marijuana,[2] failure to give a proper traffic signal,[3] and failure to wear a seatbelt,[4] and sentencing her to seven years' imprisonment and a $45.00 fine. We affirm.

Officer Kevin Wheatley ("Officer Wheatley") of the Louisville Metro Police Department ("LMPD") had been informed by Detective Brent Routzahn ("Det. Routzahn") that he had received reports Thompson had been making deliveries of narcotics and to be on the lookout for her vehicle. Just before midnight on July 24, 2004, Officer Wheatley observed Thompson's vehicle turning south from Hill Street onto Thirteenth Street without utilizing her turn signal. Officer Wheatley then initiated a traffic stop based on the observed violation. Upon approaching the vehicle, Officer Whitley noticed Thompson was not wearing a seatbelt.

Det. Routzahn and Sergeant Kevin Thompson ("Sgt. Thompson") of the LMPD Flex Unit[5] arrived at the scene as backup shortly after Thompson was stopped. Upon approaching the passenger-side window, Sgt. Thompson detected the odor of marijuana and Thompson admitted to smoking marijuana in the vehicle on the previous evening. He then directed Thompson to exit the vehicle and noticed marijuana residue on the vehicle's floorboard. Det. Routzahn also located a "crumb" of cocaine in the vehicle. Sgt. Thompson conducted a pat-down of Thompson's passenger, Damon Shanklin

[2] KRS 218A.1422, a Class A misdemeanor.

[3] KRS 189.380, a violation.

[4] KRS 189.125, a violation.

[5] According to testimony adduced at trial, the LMPD Flex Unit handles the high crimes of the police division, primarily those involving narcotics.

("Shanklin"), located no weapons or contraband on his person, and released him without lodging any charges against him. Thompson was placed under arrest and a female officer was called to the scene to effectuate a search of Thompson's person.

Thompson refused to submit to a full pat-down, walked with an abnormal gait, and kept her legs locked together. A small amount of marijuana was located in Thompson's sock and a suspicious item was observed in the area of the rear of her crotch. She was taken to the district headquarters for a more complete search and continued her resistance to being searched. An additional female officer was called to assist with the search and ultimately a baggie containing 38.1 grams of cocaine was removed from Thompson's crotch area.

On July 14, 2005, a Jefferson County grand jury indicted Thompson for trafficking in cocaine, possession of marijuana, failure to give a proper signal, and failure to wear a seatbelt. A jury trial was held on August 22, 23, and 24, 2006. The jury found Thompson guilty on all charges, whereafter she and the Commonwealth entered into an agreement as to her sentence. On November 30, 2006, the circuit court entered a judgment of conviction on all counts and sentenced Thompson in accordance with the agreement to serve seven years' imprisonment and to pay a fine of $45.00. This appeal followed.

Thompson contends the trial court erred in (1) permitting hearsay statements regarding an anonymous tip that she had been delivering narcotics, (2) failing to instruct the jury as to a "choice of evils defense", and (3) denying her motion for a

mistrial and failing to admonish the jury following an alleged misrepresentation of the evidence during the Commonwealth's closing statement. After carefully reviewing the record and perceiving no error, we affirm.

Thompson first contends the trial court erred by permitting the Commonwealth to introduce testimony regarding the anonymous tip that Thompson was delivering narcotics. The offending statements came in response to the Commonwealth's inquiry on re-direct examination of Officer Wheatley as to why he had been told to look for Thompson's vehicle. Thompson immediately objected to the question, arguing it called for information outside the scope of Officer Wheatley's knowledge and that Det. Routzahn was in a better position to respond to such inquiry. The trial court overruled the objection on the basis that Thompson's own questions had "opened the door" to this topic during cross examination by repeatedly asking Officer Wheatley questions referring to the proposition that he had been "told to look for this car." Officer Wheatley then testified he had been informed Thompson was making a delivery of a large quantity of narcotics. Det. Routzahn later testified, without objection, that he informed Officer Wheatley he "had information that [Thompson] was delivering narcotics that day." Additionally, Det. Routzahn responded, without objection, to a question from one of the jurors as to why he suspected Thompson was transporting drugs.

Thompson now argues Officer Wheatley's testimony constituted impermissible investigative hearsay without which a substantial possibility existed the outcome of her trial would have been different. However, her theory of error on appeal is

different from that which she presented to the trial court. It is well-settled that a reviewing court will not entertain an argument regarding an alleged error which differs from that presented to the trial court. *See Commonwealth v. Duke*, 750 S.W.2d 432 (Ky. 1988); *Booth v. Commonwealth*, 675 S.W.2d 856 (Ky. 1984); *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1977). An appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Id.* at 222 (citing *Jenkins v. Commonwealth*, 413 S.W.2d 624 (Ky. 1966); *Harris v. Commonwealth*, 301 Ky. 818, 193 S.W.2d 466 (1946)). Thus, Thompson's allegation of error is not properly before us. Further, contrary to Thompson's allegation in her reply brief, after a careful review of the pertinent portions of the record we are unable to ascertain any palpable error affecting her substantial rights or the outcome of the trial. RCr 9.24; *Stiles v. Commonwealth*, 570 S.W.2d 645 (Ky. 1978). Any alleged error in Officer Wheatley's testimony would be harmless at best as Det. Routzahn's corroborating testimony was entered without objection, and the evidence of Thompson's guilt was otherwise overwhelming.

Second, Thompson contends the trial court erred in failing to instruct the jury as to the "choice of evils" defense pursuant to KRS 503.030.[6] She testified the

[6] KRS 503.030 states:

> (1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the

narcotics did not belong to her, but rather she concealed the drugs only because she was ordered to do so by Shanklin, a man she claimed was armed, violent, and caused her substantial fear. Thus, she claims she submitted sufficient proof to warrant the instruction she tendered on the affirmative defense.

Allegations of error in jury instructions are questions of law which are reviewed *de novo*. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 449 (Ky.App. 2006). In order to be entitled to an instruction under KRS 503.030, a defendant must prove:

> (1) that the person believes the necessity of his action is mandated by his subjective value judgment (this must be weighed by the reasonableness standard);
>
> (2) that such action must be contemporaneous with the danger of injury sought to be avoided. *See Duvall v. Commonwealth*, Ky.App., 593 S.W.2d 884 (1980);
>
> (3) that the injury is imminent, requiring an immediate choice if to be avoided; and

---

> offense charged, except that no justification can exist under this section for an intentional homicide.
>
> (2) When the defendant believes that conduct which would otherwise constitute an offense is necessary for the purpose described in subsection (1), but is wanton or reckless in having such belief, or when the defendant is wanton or reckless in bringing about a situation requiring the conduct described in subsection (1), the justification afforded by this section is unavailable in a prosecution for any offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

> (4) that the danger or injury sought to be avoided must be greater than the penalty or offending charge occasioned by the action chosen by the party.

Peak v. Commonwealth, 34 S.W.3d 80, 82 (Ky.App. 2000) (citing *Beasley v. Commonwealth*, 618 S.W.2d 179, 180 (Ky.App. 1981)). A defendant must further show her "conduct was necessitated by a specific and imminent threat of injury to [her] person under circumstances which left [her] no reasonable and viable alternative, other than the violation of the law for which [she] stands charged." *Senay v. Commonwealth*, 650 S.W.2d 259, 260 (Ky. 1983).

In the case *sub judice*, Thompson testified that Shanklin removed the narcotics from his pocket and shoved them down her pants when the vehicle was stopped by police. She further testified he ordered her not to say anything to the police about the drugs. Her testimony revealed Shanklin had previously threatened and assaulted her and she feared he might hurt her. However, no testimony was elicited regarding a specific threat to her person made by Shanklin during the traffic stop. Further, there were multiple officers at the scene, thus reducing or eliminating the possibility Shanklin would be in any position to physically harm her. Contrary to Thompson's testimony that Shanklin was armed, he was searched by the officers and no weapon was located on his person nor in the vehicle. There was simply no evidence presented that Thompson's concealment of the narcotics was the result of immediate choice to avoid injury. Therefore, the trial court correctly found Thompson had not proven the elements necessary to warrant giving a choice of evils defense instruction. There was no error.

Finally, Thompson contends the trial court erred in failing to grant a mistrial or admonishing the jury following certain comments made during the Commonwealth's closing argument regarding testimony presented by Sgt. Clifford Johnson ("Sgt. Johnson"). Sgt. Johnson, after being qualified by the trial court as an expert witness, testified that 38.1 grams of cocaine was an amount consistent with a narcotics dealer rather that a user. During closing argument, the Commonwealth in referring to Sgt. Johnson's testimony stated the cocaine had been packaged and possessed for sale.[7] Thompson immediately objected to this alleged misquote and moved for a mistrial. The trial court overruled the objection and denied the motion for mistrial.

Thompson now argues the trial court should have admonished the jury regarding the allegedly improper statements. However, we note Thompson did not request an admonition from the trial court. Therefore she cannot now be heard to complain, as she is not entitled to relief on appeal which she failed to request from the trial court. RCr 9.22; *Hatton v. Commonwealth*, 409 S.W.2d 818 (Ky. 1966).

A motion for mistrial should only be granted when a manifest necessity exists for such extraordinary relief and trial courts are granted broad discretion in ruling on such motions. *Wiley v. Commonwealth*, 575 S.W.2d 166 (Ky.App 1979). We review such denials for an abuse of discretion. *Gosser v. Commonwealth*, 31 S.W.3d 897 (Ky. 2000). Matters pertaining to closing arguments fall within the sound discretion of the

[7] A Powerpoint slide had been prepared and used during closing argument showing the narcotics which had been recovered and contained a caption reading "Sgt. Johnson's Opinion—Possessed for Trafficking."

trial court, *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 120 (Ky.App. 1999), and prosecutors are granted wide latitude during closing arguments and are permitted to draw all fair and reasonable inferences from the evidence adduced at trial in order to support their theory of guilt or to rebut the arguments of the defense. *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005) (citing *Lynam v. Commonwealth*, 565 S.W.2d 141 (Ky. 1978); *Hunt v. Commonwealth*, 266 S.W.2d 957 (Ky. 1971)); *Tamme v. Commonwealth*, 973 S.W.2d 13, 39 (Ky. 1998).

Thompson contends the Commonwealth's characterization of the evidence was improper and necessitated a mistrial. We disagree. Sgt. Johnson testified the amount of narcotics was consistent with a dealer, not a user. Thus it was proper for the Commonwealth to emphasize this testimony to the jury in order to bolster its theory of guilt on a charge of trafficking as opposed to simple possession. Thompson was free to argue the alternative during her closing argument. The inference raised by the Commonwealth was clearly reasonable based upon the evidence adduced during the trial. Contrary to Thompson's argument, there was no manifest necessity for a mistrial, nor did the trial court err in denying her motion.

For the foregoing reasons, the judgment of conviction of the Jefferson Circuit Court is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott C. Byrd
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky