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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001005-MR

WILLIAM JAMES SMITH, II — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 06-CR-00381

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

WINE, JUDGE: William James Smith, II ("Smith") appeals a conviction in the Hardin Circuit Court for first-degree possession of cocaine (subsequent offense), possession of drug paraphernalia (subsequent offense), third-degree possession of

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

hydrocodone, and being a first-degree persistent felony offender. Smith was sentenced to twelve years' imprisonment. Finding no error, we affirm.

On May 24, 2006, Lindsay Brown ("Brown") phoned the Elizabethtown Police Department ("EPD") claiming that her boyfriend, Smith, had threatened her at her apartment with a gun. Police were met at Brown's apartment by Smith's friend, Reginald Haire, who opened the door. Officer Matt Hodge immediately detained Smith who was standing in the living room of the small one-bedroom apartment. With his permission, police searched Smith and found $932.00 and two cell phones on his person.

A few minutes later, Sgt. Jamie Land of the EPD arrived and told the other officers present that he had permission for a search of the apartment from Brown, the apartment's lease-holder. Following the search of the apartment, the officers recovered: a pipe with white residue and rolling papers from a small couch in the living room; rolling papers under the same couch; a police scanner with an index card containing the public service agency frequencies in the county; two plastic baggies on top of the mirror in the bathroom that contained cocaine; two sets of scales, three boxes of plastic baggies, and a white tray with white powder on it in a kitchen cabinet; and a white powdery residue beneath the cabinet that field-tested positive for cocaine.

In addition, the officers found a surveillance system that monitored the back door of the apartment and a bag belonging to Smith containing cologne, boxer shorts, deodorant, CDs, a butane torch, a blue pill, a red memo book with

names and numbers on the front page, four nonfunctioning cell phones, and fifty small zip-lock baggies. Another search of Smith at the police station produced a small switch-blade knife and a white pill identified as hydrocodone.

At trial, Smith denied that any of the drugs and drug-related items seized in Brown's apartment that night belonged to him. He testified that while he and Brown did have an argument that night, he never threatened her in any way. Smith stated that he was on his way out of the apartment when police arrived and he did not run away or resist the officers.

On appeal, Smith first argues that the Commonwealth failed to disclose the plea deal which it made with Brown, his co-defendant, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 106 L. Ed. 2d 215 (1963). Specifically, Smith asserts that defense counsel's ability to adequately impeach the credibility of Brown was significantly impaired because of the nondisclosure. Upon learning of the plea deal with Brown, defense counsel preserved this issue by moving for a mistrial.

Under *Brady,* the prosecution's intentional or unintentional non-disclosure of evidence favorable to a defendant violates his procedural due process rights where the evidence is material to guilt or punishment. Undisclosed evidence is material if "there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome." *Bowling v. Commonwealth,* 80 S.W.3d 405, 410 (Ky. 2002),

quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985). We review whether a *Brady* violation has occurred *de novo. Commonwealth v. Bussell,* 226 S.W.3d 96, 100 (Ky. 2007).

On the morning of trial, defense counsel learned that Brown was going to testify for the Commonwealth. Defense counsel then asked whether the Commonwealth and Brown had any plea agreement concerning her testimony in this case. The prosecutor responded that they did not.

Smith's counsel then requested Brown's pre-sentence investigation report for Indictment No. 06-CR-00677, a separate case against Brown involving charges of criminal possession of a forged instrument. In that case, the Commonwealth agreed to recommend that Brown receive pre-trial diversion with a referral to drug court on the condition that she testify truthfully and consistently with her prior statements in the present case against Smith. Additionally, the Commonwealth agreed to recommend a reduction in Brown's bond so that she could enter drug court if accepted.

The trial court found that the Commonwealth should have disclosed the agreement, but concluded that dismissal was not appropriate because discovery of the agreement occurred before Brown testified. We agree. Smith learned of the plea agreement by the morning of the second day of trial. The court was adjourned by 11:55 a.m. Defense counsel was able to cross-examine Brown the following day. If additional time was necessary to prepare for cross-examination, Smith could have asked the court for a continuance. Thus, we do not think a mistrial was

appropriate. In the absence of any showing of prejudice, any *Brady* violation was at most harmless error.

Smith next argues the court erred in allowing the prosecution to define reasonable doubt for the jury during *voir dire*. In the case *sub judice,* the Commonwealth stated:

> The Commonwealth is required to show that a person is guilty beyond a reasonable doubt. I can't define that for you, but I can say it is not beyond any doubt. Can we all agree that we will not require the Commonwealth to prove beyond all doubt?

Defense counsel objected but the trial court overruled the objection. Smith argues that the prosecutor attempted to define reasonable doubt for the jury, as prohibited by *Commonwealth v. Callahan,* 675 S.W.2d 391 (Ky. 1984). We disagree.

In *Callahan*, the Kentucky Supreme Court emphasized that "trial courts shall prohibit counsel from *any* definition of reasonable doubt at any point in the trial, and any cases in this jurisdiction to the contrary are specifically overruled." *Id.* at 393. Nevertheless, the Court in *Callahan* found that the prosecutor had not attempted to define reasonable doubt by making the following argument to the jury:

> Now I submit to you that [defense counsel's definition] is not reasonable doubt. Now, the judge has instructed you in the instructions on what reasonable doubt is. There is a little doubt about whether we are even here today. When I went to college I had some teachers that could practically prove to you that we weren't even here today. *But that's not what reasonable doubt is.* The judge has instructed you in the instructions as to what reasonable doubt is and you read that and follow it.

Id. at 392 (emphasis added). The Court concluded that the prosecutor did not attempt to define reasonable doubt through this statement, but was merely attempting to address an argument by defense counsel concerning what constitutes reasonable doubt. *Id*. at 392-93. As in *Callahan*, the prosecutor in this case submitted that he could not define reasonable doubt but only stated that proof beyond a reasonable doubt was not proof beyond any doubt. Thus, we find no error.

Next, Smith argues prosecutorial misconduct occurred when the Commonwealth failed to comply with the agreed order of discovery. The agreed order of discovery required the Commonwealth to provide copies of requested discovery within twenty (20) days of receiving the request. However, the agreed order also provided that the ultimate deadline for discovery was November 10, 2006. The Commonwealth provided discovery to Smith on August 15, 2006. Smith filed for additional discovery on September 1, 2006. On November 1, 2006, Smith filed a motion to dismiss based on the Commonwealth's failure to provide the additional discovery within the twenty days. The Commonwealth provided the additional requested discovery two days later on November 3, 2006. Following a hearing on the motion to dismiss, the trial court concluded that dismissal was not appropriate as the Commonwealth provided the additional discovery by the ultimate deadline of November 10, 2006. In addition, the trial court noted that the trial date was not scheduled until March 12, 2007, and the amount of discovery

was not so voluminous as to prevent a fair opportunity for Smith to research it before trial.

We review matters involving a trial court's rulings on evidentiary issues and discovery disputes under the abuse of discretion standard. *Sexton v. Bates*, 41 S.W.3d 452 (Ky. App. 2001). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). As the Commonwealth provided the discovery prior to November 10, 2006, pursuant to the agreed order, we find no abuse of discretion.

Smith next argues that the jury pool was not representative of a cross-section of Hardin County. Specifically, Smith contends that African-Americans were underrepresented in the jury pool because the jury selection method in KRS 29A.040 discriminates against the poor and African-Americans make up a greater percentage of poor people. Smith points out that there were three persons of minority groups in the venire pool on the day of Smith's trial. Only one such person was empanelled, and that juror was later removed by the Commonwealth. As such, Smith contends his constitutional rights were violated and reversal is warranted because the minority population in Hardin County was underrepresented in the jury pool. We disagree that this evidence was sufficient to show a *prima facie* violation of the Sixth Amendment's requirement that juries in criminal cases be drawn from a fair cross-section of the community.

The criteria necessary to establish a *prima facie* violation of the fair cross-section requirement was set forth by the Supreme Court in *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 665, 58 L. Ed. 2d 579 (1979). The defendant must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the group's representation in the source from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation results from systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 357, 99 S. Ct. at 665. Smith has failed to meet any of these elements.

Smith contends that the method of drawing potential jurors for a county from licensed drivers, voters, and filers of income tax returns is inherently discriminatory because, according to Smith, poor people and African-Americans are less likely to drive, vote, and file income tax returns. However, Smith supports this argument based on statistics which are not included as part of the trial record. Consequently, we cannot consider such evidence. Moreover, Smith fails to demonstrate that this method of drawing potential jurors was unreasonable, or that any alleged exclusion of a distinctive group was systematic. Therefore, we can find no violation of Smith's Sixth Amendment rights.

Smith next argues the Commonwealth used one of its peremptory strikes in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Specifically, Smith contends the Commonwealth struck Juror 588, the only African-American juror in the panel, based on his race. The juror had

been charged with armed robbery but the charge was later dismissed. The Commonwealth expressed concern about the juror's prior criminal history, which might make him partial. The trial judge held this to be a race-neutral reason for striking the juror and overruled Smith's *Batson* challenge.

The standard we use when we review a trial judge's decisions in a *Batson* challenge is whether those decisions were clearly erroneous. *Hernandez v. New York,* 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). The reason articulated by the prosecutor, that he was uncomfortable with the juror's prior criminal history, is not a characteristic of a particular racial group. Moreover, we can find nothing in the record to support an argument that the prospective juror was removed for discriminatory reasons. The court's decision was not clearly erroneous. We do not find any error.

Next, Smith argues that the trial court erred when it denied his motions to strike two jurors for cause. First, Juror 566 knew an owner of apartments on the same road on which Brown's apartment was located. The owner, who was not Brown's landlord, told the juror that he had a drug problem in the apartments he owned. However, the juror stated that she did not know which of the apartments on the street the landlord owned. The court asked Juror 566 if this knowledge would have any effect on her impartiality and she replied, "I don't believe it would have any effect. I know what the judicial process is and each case is individual and you have to look at the evidence in each case." The trial court

overruled Smith's motion to strike this juror but the court's reason is unintelligible on the video recording.

Smith also motioned the court to strike Juror 595. This juror told the court that her husband had been involved in drugs while in the military and eventually died from using them. She indicated that her husband attempted to introduce her to drugs but that she did not currently use drugs. She also noted that she had brothers that did drugs and a daughter who had recovered from a drug problem, became a nurse and then assisted addicts. Defense counsel asked her if her family history would play a role in her being able to hear the evidence. Juror 595 replied no and indicated that she could be fair. The trial court also overruled Smith's motion to strike this juror.

Whether or not a juror should be stricken for cause is within the sound discretion of the trial court, and an appellate court will not reverse the trial court's decision absent an abuse of that discretion. *Maxie v. Commonwealth,* 82 S.W.3d 860 (Ky. 2002). Once a close relationship, either familial, financial, or situational, with any of the parties is established, the court should sustain a challenge for cause regardless of protestations of lack of bias. *Ward v. Commonwealth,* 695 S.W.2d 404 (Ky. 1985). However, a prospective juror is not automatically disqualified merely because he is acquainted with one of the parties. *Maxie,* 82 S.W.3d at 862. So long as reasonable grounds exist to believe the juror can render a fair and impartial verdict based solely on the evidence, the juror is qualified to sit on a case. *Id.* Juror bias "does not encompass a mere social acquaintanceship in the absence

of other indicia of a relationship so close as to indicate the probability of partiality." *Sholler v. Commonwealth,* 969 S.W.2d 706, 709 (Ky. 1998). In *Sanders v. Commonwealth,* 801 S.W.2d 665, 670 (Ky. 1990), *cert. denied,* 502 U.S. 831, 112 S. Ct. 107, 116 L. Ed. 2d 76 (1991), it was held that a casual business relationship between the prospective juror and one of the victims did not compel a presumption of bias.

In the instant case, it was established that the landlord Juror 566 knew was not Brown's landlord, nor did the juror even know which apartments were referred to when they spoke. Likewise, while Juror 595 previously used drugs and had family members who had used drugs, there was no showing that her experiences had any bearing on the current case. Moreover, the test to be applied is whether the prospective juror, after having heard all the evidence, can conform her views to the requirements of the law and render a fair and impartial verdict. *Bowling v. Commonwealth*, 942 S.W.2d 293, 299 (Ky. 1997). Both jurors indicated that they could be fair and impartial in Smith's case. Therefore, we do not believe the trial court abused its discretion in not striking Juror 566 or Juror 595 for cause.

Smith next argues that the trial court committed reversible error when the trial court allowed evidence of Smith's prior bad acts, in violation of Kentucky Rules of Evidence ("KRE") 404(b). Smith made a motion *in limine* to exclude KRE 404(b) evidence regarding the reason the police came to Brown's apartment. The trial court denied the motion, ruling that the Commonwealth should be able to

explain why the police arrived. The court further indicated that the gun was inextricably intertwined and that Brown could be cross-examined on this point. Officer Matt Hodge testified that the police arrived at Brown's apartment because Brown had told them that Smith had threatened her with a gun. The trial court immediately gave the jury an admonishment that the statement was only allowed to explain why the officer immediately arrested Smith upon entering the apartment and that the information could not be used for any other purpose. On cross-examination, Officer Hodge told the jury that no gun was found in the apartment. During Brown's testimony, she too testified that while Smith had threatened to "blow her brains out" with a pistol, she never saw a gun in her apartment.

The second piece of evidence was introduced during Brown's testimony. The Commonwealth showed Brown a photograph and asked her to identify items she recognized. She identified a plate and scales and testified that they belonged to Smith. The Commonwealth showed Brown another photograph to which she pointed at one of the items in the picture and said, "That's what we used to get high off of." Defense counsel immediately objected and asked for a mistrial. The trial court overruled the motion but admonished the jury that they were to disregard the witness's last statement and any inferences from it with respect to actions before May 24, 2006. After the admonition from the court, the Commonwealth moved to another line of questioning.

Smith argues these two pieces of evidence had nothing to do with whether Smith sold or possessed cocaine or committed any of the other indicted

offenses. Thus, Smith contends both pieces of evidence unfairly prejudiced the jury against him. We disagree.

As the parties correctly note, evidence of a defendant's "other crimes, wrongs, or bad acts" is not admissible as proof of the defendant's character or of his propensity to break the law. KRE 404(b), however, permits the introduction of such evidence

> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

This rule is to be applied cautiously, the Kentucky Supreme Court explained, in accord with its fundamental purpose of "prohibit[ing] unfair inferences against a defendant." *Anderson v. Commonwealth,* 231 S.W.3d 117, 120 (Ky. 2007). To be admissible under the rule, the evidence of other criminal or wrongful acts must be (1) relevant for some purpose other than to prove criminal predisposition, (2) sufficiently probative to warrant introduction, and (3) sufficiently probative so that its probative value outweighs its potential for prejudice to the accused. *Id.; Bell v. Commonwealth,* 875 S.W.2d 882 (Ky. 1994). In other words, the alleged prior wrong must be relevant to a contested element of the charged crime, and the prior bad act evidence must be probative in two senses. First, it must be probative that the prior wrong did in fact occur. This requirement is satisfied "if the jury

could reasonably conclude that the act occurred and that the defendant was the actor." *Davis v. Commonwealth,* 147 S.W.3d 709, 724-25 (Ky. 2004). Second, the evidence must also be sufficiently probative of an element of the charged crime to withstand the KRE 403 balancing test between probative value and prejudicial effect, with the assumption, moreover, that prior bad act evidence is inherently prejudicial and should be excluded absent a sufficiently strong countervailing need for it. *Anderson v. Commonwealth, supra.* The trial court's application of this balancing test should be reviewed under the abuse of discretion standard. *Davis v. Commonwealth, supra.*

We find no abuse of discretion in this case. The evidence that Smith allegedly had a gun was admissible to show why the police came to Brown's apartment and immediately restrained Smith once allowed into the apartment. The fact that no gun was found in the apartment and that defense counsel was able to cross-examine Brown as to this issue diminishes any prejudice that could have occurred from the testimony. Moreover, we find that the trial court's admonition to the jury regarding Brown's testimony that she and Smith used to get high was sufficient to remove any prejudice posed by the improperly introduced evidence. "A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

Next Smith argues the trial court erred when it failed to instruct the jury on mere presence and mere association. This issue was preserved as Smith

tendered proposed instructions to the trial court on mere presence and mere association, but the court rejected them.

Errors alleged regarding jury instructions are considered questions of law and are to be reviewed on appeal under a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). Kentucky's standard for jury instructions originated with *Cox v. Cooper,* 510 S.W.2d 530, 535 (Ky. 1974), in which our Supreme Court held, "[o]ur approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire." As the Court more recently discussed, this standard "is buttressed by a long line of Kentucky cases which call for a substantially similar approach." *Bayless v. Boyer,* 180 S.W.3d 439, 450 (Ky. 2005). Smith's theory of defense throughout the trial was that the drugs were not his. Smith was able to argue mere presence and mere association in his closing argument. He emphasized that the apartment where the drugs were found was not his apartment. He further noted to the jury that he had only moved into the apartment one day prior to his arrest. The jury rejected these arguments and found him guilty. Even so, we cannot say that Smith was deprived a fair trial because the court did not instruct the jury on mere presence or mere association as the two are not essential to the jury's finding of guilt for any of the offenses charged against Smith.

It is apparent that the jury instructions included all of the elements necessary to prove the charges filed against Smith. Mere presence and mere

association are legitimate arguments Smith put forth for the jury to consider. However, mere presence and mere association are not essential as to be part of the "bare bones" of the instructions. We find no error.

Finally, Smith argues the aforementioned trial errors resulted in cumulative error violating his constitutional right to a fair trial. Having found no error, we likewise find no cumulative error justifying relief.

Accordingly, the judgment of conviction by the Hardin Circuit Court is affirmed.

ALL CONCUR.

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