

RENDERED: OCTOBER 9, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000864-MR

STEPHON RAY SMOOT

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CR-01213

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: FORMTEXT LAMBERT AND TAYLOR, JUDGES; HENRY,
SENIOR JUDGE.

TAYLOR, JUDGE: Stephon Ray Smoot brings this appeal from an April 8, 2008, judgment of the Fayette Circuit Court upon a jury verdict finding him guilty of possession of a controlled substance in the first degree and sentencing him to three-years' imprisonment probated for a period of three years. We affirm.

On July 22, 2007, Lexington-Fayette Police Officer Benjamin Stratton was on patrol when he noticed a vehicle with an expired registration tag. Officer Stratton initiated a stop of the vehicle. The vehicle was driven by Smoot. During the stop, Officer Stratton discovered that Smoot had two outstanding warrants for his arrest. Officer Stratton removed Smoot from the vehicle and arrested him. Incident to the arrest, Officer Stratton conducted a search of Smoot's person but found no weapons or contraband. A search of the vehicle revealed marijuana in the vehicle's dashboard compartment.

Officer Stratton placed Smoot in the rear seat of his patrol car and transported him to jail. Upon arrival at the jail, Officer Stratton removed Smoot from the patrol car and, thereupon, searched the rear seat area. A piece of pink plastic fell from the top of the rear seat. The plastic contained several pieces of a white substance, which was subsequently determined to be cocaine.

Smoot was indicted by a Fayette County Grand Jury upon the charges of possession of marijuana, possession of a controlled substance (first degree), and failure to maintain vehicle insurance. Following a jury trial, Smoot was found guilty of first-degree possession of a controlled substance, and the court sentenced him to three-years' imprisonment probated for three years.¹ This appeal follows.

Smoot contends that the circuit court erred by denying his motion for a directed verdict of acquittal and his motion for judgment notwithstanding the verdict (JNOV) upon the offense of first-degree possession of a controlled

¹ The charge upon failure to maintain required insurance was dismissed before trial, and the jury found Stephon Ray Smoot not guilty of possession of marijuana.

substance. Kentucky Rules of Criminal Procedure 10.24. A motion for directed verdict and a motion for JNOV challenge the sufficiency of the evidence to support a conviction, and the same standard applies to both. *Com. v. Nourse*, 177 S.W.3d 691 (Ky. 2005). A directed verdict or JNOV is proper if viewing the evidence most favorable to the Commonwealth a reasonable juror could not believe beyond a reasonable doubt that defendant was guilty. *Com. v. Benham*, 816 S.W.2d 186 (Ky. 1991); *Nourse*, 177 S.W.3d 691.

Possession of a controlled substance in the first degree is criminalized by Kentucky Revised Statutes (KRS) 218A.1415(1), which provides, in relevant part:

A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses . . . a controlled substance analogue

Smoot asserts there was insufficient evidence to prove that he possessed a controlled substance as required by KRS 218A.1415. Specifically, Smoot points to Officer Stratton's testimony that a search of Smoot's person (emptying his pockets, checking his waistband, checking his collar, checking his socks and patting his body down) before placing him in the cruiser did not reveal any contraband. Thus, Smoot reasons that "[s]imply because [he] was the party being transported at the time that [Officer] Stratton discovered the cocaine is insufficient to support the inference" that Smoot possessed the cocaine. Smoot's Brief at 5. We disagree.

It is well established that the jury is free to draw reasonable inferences from the evidence. *See Dillingham v. Com.*, 995 S.W.2d 377 (Ky. 1999). At trial, Officer Stratton testified that Smoot kept bending over and lying down in the rear seat of the patrol car and that the Officer twice instructed Smoot to sit up in the rear seat. Officer Stratton further testified that he checked under the backseat of his patrol car at the beginning of his shift and that he searched the backseat after transporting his only other arrestee earlier that day. Considering the evidence as a whole, we cannot say that it would be clearly unreasonable for a jury to infer that Smoot deposited the cocaine in the patrol car's backseat and, thus, to find Smoot guilty of possessing such cocaine. As such, we conclude that the circuit court properly denied Smoot's motion for directed verdict and motion for JNOV upon first-degree possession of a controlled substance upon first-degree possession of a controlled substance.

Smoot also contends that the prosecutor for the Commonwealth engaged in misconduct by identifying Smoot as a "criminal" during closing argument.

Upon appellate review, our role is to determine "whether the [prosecutorial] conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." *Slaughter v. Com.*, 744 S.W.2d 407, 411 (Ky. 1987). Our inquiry must focus upon the "overall fairness of the trial, and not the culpability of the prosecutor." *Id.* at 411-412. Generally, "great leeway" is afforded counsel in closing argument. *Id.* at 412.

In this case, the prosecutor made the following objectionable statements to the jury: (1) “criminals learn to adapt like everybody else . . .,” (2) “defense counsel expects you to believe that criminals aren’t resourceful enough to hide these drugs,” and (3) “because of the Stephon Smoot’s of the world, they do an inspection of the back seat.” Smoot’s Brief at 9.

Considering these prosecutorial statements in the context of the trial, we are simply unable to conclude that such statements fell outside the proper bounds of a closing argument. *See Slaughter*, 744 S.W.2d 407. Indeed, the defense’s theory at trial focused upon Smoot’s denial that he possessed the cocaine and deposited it in the backseat of the patrol car. And, even if these prosecutorial statements were improper, we do not believe they affected the outcome of the trial. *See Slaughter*, 744 S.W.2d 407. As such, we perceive no reversible error.

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

ALL CONCUR.

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