

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001105-MR

SANDRA BOWLING

APPELLANT

v.

APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR GAYLE HOUSE, JUDGE
ACTION NO. 14-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, D. LAMBERT, AND MAZE, JUDGES.

D. LAMBERT, JUDGE: Sandra Bowling appeals the ruling of the Jackson Circuit Court wherein it denied her motion for new trial based on allegedly erroneous jury instructions. The issue before this Court is whether the evidence supported an instruction as to the affirmative defense of entrapment. After careful review of the record, we find that the trial court did not abuse its discretion and therefore affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Bowling had endured a tumultuous relationship with her husband, Allen Bowling (hereinafter “Allen”), for many years. She offered evidence of Allen’s drug addiction, and that after she finally decided to end the marriage in 2014, Allen threatened to “get back at her” in any way he could. Joyce McQueen is a neighbor and friend of both Bowling and Allen. McQueen and her boyfriend also have substance abuse problems. McQueen’s boyfriend had gotten into significant legal trouble stemming from his problem, which they both attempted to ease by working as confidential informants for the Jackson County Sheriff’s Office.

On September 12, 2014, Bowling gave Allen a ride to Manchester, because Allen did not have a vehicle of his own. Upon their return to Allen’s residence, he asked Bowling for \$16 and provided her with two peach-colored pills to deliver to McQueen. These requests were part of a transaction previously worked out between Allen and McQueen, and Bowling was to act as the intermediary. Allen told Bowling that paying him \$16 would save her a trip back to his home, and that she could keep the \$16 that McQueen would pay her upon delivery of the pills. Bowling testified that she did not wish to take part in this transaction, but capitulated due to Allen’s overbearing insistence. Bowling and McQueen spoke on the phone only to arrange a time and place for the meeting. No

other terms of the exchange were discussed between the two, as the number of pills and the price had already been established by Allen and McQueen.

Bowling did not know of McQueen's arrangement with the Jackson County Sheriff's Office, nor that the transaction was a "controlled buy" operation conducted under the supervision of Deputy Keith Berry. Bowling went to the site of their exchange, and after some delay, McQueen arrived, and the two completed their transaction. Bowling then went home.

Undisputed testimony indicated that Bowling does not have a drug problem, and the transaction on September 12, 2014, was the only time Bowling ever exchanged drugs. Testimony further established that this was McQueen's only transaction as a confidential informant.

After laboratory testing confirmed the pills contained hydrocodone, the grand jury indicted Bowling for trafficking in controlled substances in the 2nd degree. The matter proceeded to trial, during which Bowling took the stand in her own defense. She did not deny her role in the transaction, instead attempting to lay the blame on Allen and McQueen.

At the close of the evidence, Bowling tendered jury instructions which included the affirmative defense of entrapment. The Commonwealth objected to the instruction, arguing that no law enforcement officer or person cooperating with law enforcement had taken any action to entice Bowling into taking part in the exchange. Bowling argued that McQueen had done exactly that, and had been acting as a cooperating confidential informant all the while. The trial court agreed

with the Commonwealth, concluding that an entrapment instruction lacked evidentiary support, and excluded the instruction.

The jury voted to convict Bowling, but recommended the minimum sentence of one year. Bowling moved the trial court for a new trial, based on the denial of the entrapment instruction, which the trial court also denied. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

The trial court has a duty “to instruct the jury on the whole law of the case.” *Carver v. Commonwealth*, 328 S.W.3d 206, 210 (Ky.App. 2010) (quoting *Cannon v. Commonwealth*, 777 S.W.2d 591, 593 (Ky. 1989)); RCr 9.54(1). The Supreme Court of Kentucky had previously held that an accused “has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions. *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). “[N]o matter how preposterous, any defense which is supported by the evidence must be submitted to the jury.” *Id.* at 361.

Conversely, where a proposed instruction lacks a basis in the evidence, the court should not provide that instruction to the jury. *Barker v. Commonwealth*, 159 Ky. 304, 166 S.W. 981, 984 (1914). The responsibility for determining whether the evidence supports a proposed instruction lies with the trial court, and the standard of appellate review of such decision is abuse of discretion. *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015).

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE EVIDENCE DID NOT SUPPORT AN ENTRAPMENT INSTRUCTION

The defense of entrapment is defined in KRS 505.010:

(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; or

(b) The offense charged has physical injury or the threat of physical injury as one (1) of its elements and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

(3) The relief provided a defendant by subsection (1) is a defense.

Here, the trial court found the evidence did not support the instruction.

Bowling did not deny her role in the transaction. The evidence at no point indicates any law enforcement officer spoke directly to Bowling in an attempt to entice her to participate in the transaction. The record contains testimony that

McQueen, acting as a confidential informant, arranged a drug transaction with Allen, who then convinced Bowling to take part.

The evidence reflecting the fact that McQueen arranged the deal with Allen, and not with Bowling, proves the inapplicability of the defense. Bowling's testimony that she agreed to perform this service both as a favor and to bring an end to Allen's insistence, belies her contention that she was not inclined to commit the offense absent law enforcement intervention.

We cannot conclude that the trial court acted arbitrarily, unreasonably, unfairly, or in a manner unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The trial court did not abuse its discretion in refusing to give an instruction which was not only unsupported, but actually contradicted, by the evidence presented.

III. CONCLUSION

This Court, having concluded that the evidence did not support Bowling's proposed instruction, likewise concludes the trial court did not abuse its discretion in refusing to instruct the jury as requested by the defense. The order of the Jackson Circuit Court is hereby affirmed.

ALL CONCUR.

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