IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MARCH 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 4-8-04 [illegible], D.C.

2002-SC-0552-MR

MITCHELL B. THOMAS — APPELLANT

V. — APPEAL FROM MASON CIRCUIT COURT
HON. ROBERT W. MCGINNIS, SPECIAL JUDGE
01-CR-0008

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant stands convicted of one (1) count of Trafficking in a Controlled Substance In or Near a School and of three (3) counts of First-Degree Trafficking in a Controlled Substance, Second or Subsequent Offense. The jury recommended a three (3) year sentence for the conviction of Trafficking in a Controlled Substance in or near a School and a twelve (12) year sentence for each conviction of First-Degree Trafficking in a Controlled Substance, Second or Subsequent Offense. The trial court imposed an aggregate sentence of twenty (24) years. Appellant appeals to this Court as a matter of right,[1] claiming that the trial court erred (1) by allowing the Commonwealth to introduce

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[1] KY. CONST. § 110(2)(b).

evidence of prior bad acts by Appellant, and (2) by failing to instruct the jury on entrapment.[2] Finding no error, we affirm.

II. BACKGROUND

Between August 18 and October 24, 2000, members of the Buffalo Trace Narcotics Taskforce[3] worked with two (2) civilian informants, John Horn and Billy Joe Kirby, who engaged in four (4) separate drug transactions with Appellant on three (3) separate occasions. Horn and Kirby were well-known to Appellant as each had a history of purchasing and using crack cocaine with Appellant. Horn became a civilian informant as part of a plea bargain in which a felony charge against him, i.e., attempting to falsely obtain prescription drugs, was reduced to a misdemeanor in exchange for his agreement to assist the task force in controlled drug "buys."[4] For each "buy," the informants received compensation of one hundred ($100.00) dollars, in addition to any cash provided by the task force for the buy. The basic maneuvers undertaken by the task force with respect to the civilian informants were (1) to wire the informants with listening equipment, (2) to provide the informants with cash to facilitate a buy, (3) to have the informants approach the defendant at his home and indicate their interest in making a buy, and (4) to conduct surveillance on the vehicle occupied by Appellant. Following this basic plan, the drug buys charged in the indictment took place.

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[2] In addition to these contentions, Appellant originally asserted that he could not be convicted of both second or subsequent offender status and persistent felony offender status. Upon further reflection, Appellant withdrew this contention in his reply brief.

[3] According to Officer Tim Fegan, a narcotics officer for the Buffalo Trace Gateway Narcotics Task Force, the task force investigates mid-level to street-level dealers in eight counties and aids in the prosecution of individuals charged with these types of crime.

[4] A "buy" is the term used by the taskforce to refer to a purchase of drugs.

On August 18, 2002, members of the narcotics task force met with Kirby and equipped his vehicle with a transmitter, placed a recorder on his body, provided him with one hundred ($100.00) dollars, and advised him to attempt to make a drug purchase from Appellant. Kirby went to Appellant's residence and Appellant left with Kirby in search of someone from whom to purchase crack cocaine. Kirby and Appellant drove around the area known as "Commerce Street" and approached a residence. Appellant left the vehicle and went inside, returned and indicated that no one inside had crack to sell, and the two continued to a different location. Appellant again exited the vehicle, and when he returned he provided Kirby with a substance later determined to be crack cocaine. Kirby then returned to the taskforce and surrendered the drugs. On September 19, 2000, members of the task force met with Horn, equipped him with a body transmitter and micro recorder, provided him with one hundred ($100.00) dollars, and advised him to attempt to make a drug transaction. Horn went to Appellant's home, indicated that he was interested in purchasing crack cocaine, and gave him the money provided to him by the task force with which to purchase the drugs. Appellant instructed Horn to meet him at a car wash in Maysville and approximately fifteen (15) to twenty (20) minutes later, Appellant met Horn and provided him with a substance later determined to be crack cocaine. Horn then delivered the drugs to the narcotics task force. On October 24, 2000, Horn again worked with the narcotics task force to arrange a buy between himself and Appellant. Much like the September 19, 2000, arrangement, Horn met with members of the narcotics task force, they wired him and provided him with one hundred ($100.00) dollars, and then they followed his vehicle at a safe distance while he attempted to arrange a second purchase. Horn again went to Appellant's residence. Appellant entered Horn's car and stated that he did not have any

money but that he had Darvocet.[5] Appellant offered to sell the pills to Horn and stated that he could then use that money to purchase crack cocaine. Horn agreed to the transaction and then drove Appellant to the residence of a known drug dealer. Appellant went inside, purchased crack cocaine, and split the drugs with Horn. Horn then delivered the Darvocet pills and the crack cocaine to the narcotics task force.

Appellant's defense throughout the trial was that he was a drug addict who facilitated drug "buys" for Horn and Kirby, but he was not a trafficker. Appellant stated that because both Horn and Kirby were white, they were not able to purchase crack cocaine easily because many dealers would not sell to them. Thus, Appellant's presence ensured that they would be able to purchase the substance. Appellant contended that he was a crack addict in dire financial straits and would take desperate measures in order to obtain drugs. He maintained that he and the informants would pool their money in order to purchase a greater quantity of crack cocaine and would generally smoke the entire amount upon purchase. Appellant made much of the fact that he did not engage in these encounters in order to make a profit and that his intent was not to sell or deal drugs. He maintained that he was not a drug trafficker because his sole intent in facilitating the transactions was to "get high."

The Commonwealth introduced testimony by informant Horn in order to rebut Appellant's contention that he did not sell drugs for profit. Horn testified that the first time he met Appellant, he was in the Fourth Street area and Appellant approached him and asked whether he was interested in purchasing crack. Horn responded

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[5] Testimony at trial revealed that the Darvocet was prescribed to Appellant's wife for an arm injury and was taken without her knowledge.

affirmatively, told Appellant how much he wanted, and Appellant procured a "fifty" ($50.00 worth) of cocaine for him.

The grand jury charged Appellant with three (3) counts of First-Degree Trafficking in a Controlled Substance, Second or Subsequent Offense, and one (1) count of Trafficking in a Controlled Substance In or Near a School. In the guilt phase of the first trial, the jury was unable to reach a verdict on the three (3) counts of First-Degree Trafficking in a Controlled Substance but convicted Appellant of Trafficking in a Controlled Substance In or Near a School for the sale of the Darvocet pills. The trial court accepted the jury's verdict on Trafficking in a Controlled Substance In or Near a School, declared a mistrial on the remaining three (3) counts of First-Degree Trafficking in a Controlled Substance, and proceeded with the penalty phase on Appellant's conviction for Trafficking in a Controlled Substance In or Near a School. The jury recommended a sentence of three (3) years for that conviction.

At Appellant's subsequent trial on the remaining three (3) counts, the jury found Appellant guilty of the remaining counts, found Appellant to be a second or subsequent offender, and recommended an enhanced sentence of twelve (12) years for each conviction. The jury recommended that the second sentence run consecutively with the first sentence and that the third sentence run concurrently. In other words, the jury recommended a total sentence of twenty-four (24) years for the three (3) counts of First-Degree Trafficking in a Controlled Substance, Second or Subsequent Offense.

In accordance with the juries' recommendations, the trial court sentenced Appellant to three (3) years for Trafficking in a Controlled Substance In or Near a School and to an aggregate sentence of twenty-four (24) years for Appellant's three (3) convictions for First-Degree Trafficking in a Controlled Substance, Second or

Subsequent Offense. Additionally, the trial court ran the three (3) year sentence concurrent with the other sentences for a total sentence on all counts of twenty-four (24) years. Appellant appeals his convictions to this Court as a matter of right. We affirm.

III. ANALYSIS

A. PRIOR BAD ACTS

Appellant claims that the trial court erred in allowing Horn to testify over Appellant's objection about Appellant's previous solicitation and sale of cocaine to him more than one (1) year previously. Appellant contends that Horn's testimony, which Appellant characterizes as "uncorroborated prior bad act testimony," merely showed Appellant's criminal disposition and should have been excluded under KRE 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however be admissible:
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

Appellant testified that he did not sell drugs for profit but only engaged in these drug transactions to "get high":

> It didn't have anything to do with profits or anything like that. It was just getting a buzz. If you want to make a profit, you just get out there and sell it, standing on the street with a pocket full of it, and just, you know, just sell it. That's how you make your profit, but it didn't have anything to do with that. All I did was go out to get high off mine.

To rebut Appellant's testimony, the Commonwealth called Horn as a rebuttal witness, and he testified that the first time he met Appellant, Appellant solicited and sold him fifty ($50.00) worth of cocaine:

> Q1. Mr. Horn, would you tell the jury, please, when you first met the defendant, Mitch Thomas?

A. Fourth Street, Maysville, Kentucky.
Q2. What were the circumstances?
A. He come up to me and asked what I needed, and I said, "A fifty of crack cocaine."
Q3. And then what happened?
A. He went and got it and brought it back to me. I gave him the money and then I left.
Q4. And approximately how long was this before you worked for the task force?
A. Better than a year.
Q5. Did you know Mitch Thomas before that?
A. No.
Q6. Is that the first time that you had ever seen him?
A. Yes.
Q7. Is that the first time you ever talked to him?
A. Yes.

The Commonwealth asserts that Horn's testimony concerning Appellant's previous sale of cocaine to him was not offered to show Appellant's criminal disposition. Rather, the Commonwealth claims that the evidence was offered to prove that, contrary to Appellant's assertion, he was not just a user but also engaged in the trafficking of cocaine, and therefore, Horn's testimony was admissible.

We disagree with Appellant's contention that the trial court erred in admitting Horn's testimony. Horn's testimony was relevant inasmuch as Appellant's only "defense" to the charges was that he was not a "drug dealer" but simply facilitated the buying and selling of drugs between individuals in order to obtain drugs to satisfy his own addiction. Testimony that he previously solicited and sold drugs to Horn would tend to refute this claim; thus, the evidence is probative for a reason other than solely showing Appellant's criminal disposition to traffic in drugs. Appellant had previously submitted an entrapment instruction to the trial court, and Horn's testimony rebuts Appellant's claim that he was not predisposed to engage in the drug buys. Accordingly, Horn's testimony about Appellant's prior trafficking in cocaine does not fall under KRE

404(b)'s proscription against evidence of prior bad acts,[6] but rather, it comes under KRE 404(b)(1)'s inclusionary provision, i.e., proof of motive, intent, or predisposition.

Although we agree that the probative value of Horn's testimony was slight and the testimony created a danger of undue prejudice, the balancing of its probativeness against undue prejudice was the province of the trial court,[7] and its ruling is reviewed under the standard of "whether there has been an abuse of that discretion."[8] "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[9] Utilizing this test, we hold that the trial court did not abuse its discretion in admitting Horn's testimony concerning Appellant's prior trafficking in cocaine. Additionally, we would point out that the evidence that Appellant engaged in all of the charged trafficking offenses was

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[6] See United States v. Vance, 871 F.2d 572, 575 (6th Cir. 1989) ("This court has noted that Rule 404(b) 'is actually a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified.'" (citation omitted)).

[7] KRE 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."). Accord Butcher v. Commonwealth, Ky., 96 S.W.3d 3, 10 (2002) ("Under KRE 403, the trial court must weigh the prejudicial effect against the probative value of the evidence sought to be admitted."); Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999) ("The balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge."); Rake v. Commonwealth, Ky., 450 S.W.2d 527, 528 (1970) ("It is within the sound discretion of the trial judge to determine whether the probative value of evidence is outweighed by its possible prejudicial effect and to admit or exclude it accordingly.").

[8] English, 993 S.W.2d at 945.

[9] Id.

overwhelming, and accordingly, any error in admitting Horn's testimony would be harmless.[10]

Appellant argues that because Horn's testimony about the prior cocaine sale was uncorroborated, the trial court should have excluded the testimony since the jury could not "reasonably conclude" that the prior sale took place. We disagree. Although we have not directly addressed this issue in the context of uncorroborated testimony of prior bad acts, we have held that the uncorroborated testimony of an accomplice is sufficient to support a conviction.[11] A fortiori, a jury may reasonably conclude from a witness's uncorroborated testimony whether a prior drug sale occurred.

B. ENTRAPMENT INSTRUCTION

Alternatively, Appellant argues that if this Court determines that the prior bad act evidence, discussed supra, was properly admitted, then the trial court erred in failing to instruct the jury on the defense of entrapment. We disagree.

Appellant concedes that this claim of error was not properly preserved for appellate review. As a result, he asks that we review this claim as palpable error under RCr 10.26. But, we note that although Appellant failed to object when the trial court did not instruct the jury on entrapment, Appellant had previously submitted an instruction on the defense of entrapment to the trial court as part of the "Proposed Defense

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[10] RCr 9.24 ("No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.").

[11] Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 841 (2000).

Instructions." And, we find that the tendering of the entrapment instruction was sufficient to preserve the claimed error under RCr 9.54(2), which reads:

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Thus, because Appellant offered an entrapment instruction, we review Appellant's contention as a preserved error.

Appellant admits that he was predisposed to buy and use cocaine but claims that he was entitled to the entrapment instruction based upon his trial testimony that he did not actively engage in the sale or distribution of drugs, that he did not receive any profits from the transactions at issue, that he only engaged in the behavior because of his addiction, and that he was not pre-disposed to engage in the trafficking offenses. The entrapment statute, KRS 505.010, reads as follows:

> (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.
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> (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.

"The defense of entrapment is available when there is evidence that the defendant was induced by police authorities, or someone acting in cooperation with them, to commit a criminal act which he was not otherwise disposed to commit."[12] Therefore, the issue in this case is whether sufficient evidence[13] existed to create a doubt based on the defense of entrapment.[14] If the answer is yes, Appellant was entitled to a jury instruction on entrapment.[15] "The sufficiency of the evidence to accomplish that purpose is a question of law for the courts to determine on a case-by-case basis."[16] Thus, we review de novo the trial court's decision not to instruct on entrapment.[17]

Appellant testified that he and the informants were "crack buddies" and that they would pool their money and buy crack cocaine together in order to obtain a larger

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[12] Commonwealth v. Day, Ky., 983 S.W.2d 505, 508 (1999).

[13] "Sufficient evidence" also termed "satisfactory evidence" means "[e]vidence that is sufficient to satisfy an unprejudiced mind seeking the truth." BLACK'S LAW DICTIONARY 580 (7th ed. 1999).

[14] Brown v. Commonwealth, Ky., 555 S.W.2d 252, 257 (1977) ("Once there is evidence sufficient to create a doubt, yes then the state has the burden of proof and there must be an instruction so casting it."); Day, 983 S.W.2d at 508 ("As with any other "defense" under the penal code, once the defendant introduces enough evidence to create a doubt, the burden of proof shifts to the Commonwealth and there must be an instruction so casting it.").

[15] Brown, 555 S.W.2d at 257; Day, 983 S.W.2d at 508.

[16] Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 812 (1977).

[17] Carroll v. Meredith, Ky. App., 59 S.W.3d 484, 489 (2001) ("An appellate court reviews the application of the law to the facts and the appropriate legal standard de novo."); 5 AM.JUR.2D, *Appellate Review* §§ 684, 697, 698 (1995).

quantity. He testified that they would generally consume the drugs as soon as they were purchased, and that although he and Horn "hung out" on a regular basis, Kirby would only come to Appellant's residence when he wanted to "get high." Appellant further stated that he would procure the drugs because the two informants are white and it was unlikely that any drug dealers would sell to them, and it was his addiction that induced him to engage in these transactions, not a quest for profits. Thus, he claimed that he was not a typical drug trafficker. However, Appellant states that "this is a trafficking by transfer case[,]" and although he claims that "it is highly unlikely that [he] would have bought and transferred crack cocaine to the confidential informants if they had not come to him and asked him to do it[,]" he candidly admits that "[h]e had to sit around and wait for someone with more money to come by so they could pool their money and get more crack cocaine." We fail to see how these facts demonstrate that Appellant was not predisposed to commit the charged crimes; instead, the evidence, particularly Appellant's testimony, demonstrates that he was predisposed to commit the drug trafficking offenses. Here, it is undisputed that Appellant obtained cocaine for the purpose of selling or transferring it to the confidential informants, and regardless of whether he sold the cocaine to the informants or transferred it to them, his admitted conduct constituted trafficking.[18] The confidential informants merely afforded Appellant an opportunity to commit the charged offenses, and therefore, the entrapment defense

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[18] KRS 218A.010(28)("'Traffic' . . . means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." (emphasis added)); KRS 218A.010(29) ("'Transfer' means to dispose of a controlled substance to another person without consideration and not in furtherance of commercial distribution." (emphasis added)).

was unavailable to him.[19] Accordingly, we find that the evidence was insufficient to warrant an entrapment instruction.

IV. CONCLUSION

For the above reasons, we affirm the judgment of the Mason Circuit Court.

Lambert, C.J.; Cooper, Graves, Keller, Stumbo and Wintersheimer, JJ., concur. Johnstone, J., concurs in results only.

COUNSEL FOR APPELLANT:

Euva D. May
Assistant Public Advocate
Appellate Division
Department of Public Advocacy
100 Fair Oaks Lane
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General

George G. Seelig
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601

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[19] KRS 505.010(2)(a).