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RENDERED: MARCH 20, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2007-SC-000476-MR

DATE April 10, 08

MICHAEL L. TAYLOR APPELLANT

V.

ON APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
NO. 05-CR-000063

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Michael Taylor, was convicted by an Adair Circuit Court jury of: (1) two counts of first-degree trafficking in a controlled substance, (2) one count of first-degree possession of a controlled substance, and (3) possession of marijuana, less than eight ounces and second or subsequent offense. He was also convicted of being a subsequent offender and second-degree persistent felony offender. For these crimes, Taylor was sentenced to sixty-seven years incarceration. Taylor now appeals to this Court as a matter of right. Ky. Const. §110(2)(b). He asserts two arguments in his appeal: (1) that extremely prejudicial evidence of prior bad acts was improperly admitted at his trial which should have led to a mistrial and (2) irrelevant evidence was admitted unduly prejudicing the jury. For the reasons herein, we affirm Taylor's convictions.

I. Facts and Background Information

In June 2005, Sergeant Jason Cross of the Columbia Police Department conducted an undercover investigation of Taylor, whom he suspected sold drugs. Sergeant Cross met with a confidential informant who, on two different dates in June 2005, purchased drugs from Taylor. Both times the substances purchased from Taylor tested positive for cocaine base.

Based on the successful drug purchases, a search warrant was executed on Taylor's home. During the search, the police seized packages of narcotics, and multiple electronic devices such as DVD and VHS players, CD players, a digital camera, and a television. Taylor was then charged with various drug crimes and with being a second-degree persistent felony offender.

At trial, the confidential informant testified about both of the drug purchases made at Taylor's house. During the informant's direct testimony regarding the second drug buy, he stated that, additionally, a young girl arrived at Taylor's house, presumably to purchase marijuana. Taylor's counsel then cross-examined the informant, asking him a series of questions regarding the young girl. The informant indicated that while he did not see the girl purchase any marijuana, he presumed that she was there to purchase drugs because she had no other reason for being at Taylor's house. Taylor's counsel then asked again if the informant was assuming that the girl was at Taylor's house to purchase marijuana. He answered, "I've seen it before." This answer implies that he had witnessed this girl purchasing drugs from Taylor before. The judge then instructed the confidential informant to be responsive and admonished the jury to disregard the comment. Taylor's counsel immediately objected.

At the ensuing bench conference, Taylor's counsel requested a mistrial based on the informant's testimony. The trial court denied the motion. Upon the judge's suggestion, both parties agreed that an additional admonition to the jury would draw unnecessary attention to the informant's comment. After the trial resumed, the informant testified that he did not see anyone purchase marijuana while he was at Taylor's house and that he only presumed the young girl was at the house to purchase marijuana.

Later at trial, Sergeant Cross testified regarding his involvement in the case. He testified as to his surveillance of Appellant's residence during the controlled drug buys, his participation in Appellant's arrest, and the seizure of a number of items, pursuant to the search warrant, which he believed were items used for barter in the drug trade. He testified that sometimes drug dealers are willing to trade drugs for items such as the electronic devices found during the search of Taylor's house. Taylor's counsel objected to this testimony. The trial court found that Sergeant Cross was a qualified expert to discuss the general practices of drug dealers because of his experience dealing with drug cases. The trial court believed that the weight of Sergeant Cross's testimony would be determined by the jury and that it was relevant. The trial court further held that the probative value outweighed any prejudice to Taylor.

The jury ultimately found Taylor guilty of numerous drug related offenses and sentenced him to sixty-seven years imprisonment.

II. The trial judge properly denied Taylor's motion for a mistrial after the confidential informant's testimony regarding the young girl

Appellant first argues that the confidential informant's testimony, regarding the young girl present at Taylor's house during the second controlled drug purchase, was improperly admitted. The confidential informant implied that he had previously witnessed the girl purchase marijuana from Taylor. As such, Taylor argues that Kentucky Rule of Evidence 404(b) prohibits such evidence from being introduced since it referred to a prior bad act and had a prejudicial effect on the jury. Thus, Taylor believes a mistrial should have been declared.

It is important to note that the testimony Taylor objects to occurred in response to a question asked by his counsel while cross-examining the confidential informant. After asking the confidential informant several times whether he was assuming that the young girl was at Taylor's house to purchase marijuana, the informant gave the answer, "I've seen it before." While this is not a "yes" or "no" answer to the question, it is a responsive answer. It implies that he assumed that the girl was there to purchase marijuana because he had seen her do it previously. Because Taylor's counsel asked the question, and received a responsive answer to it, he has waived any objection to the answer. Mills v. Commonwealth, 996 S.W.2d 473, 485 (Ky. 1999); see also Estep v. Commonwealth, 663 S.W.2d 213, 216 (Ky. 1983) ("One who asks questions which call for an answer has waived any objection to the answer if it is responsive.")

Additionally, the jury was admonished to disregard the confidential informant's testimony as soon as he said it. Combs v. Commonwealth, 198 S.W.3d 574, 581 (Ky. 2006) ("A jury is presumed to follow an admonition to disregard evidence; thus, the admonition cures any error.") Moreover, Appellant

agreed to forego the additional admonition offered by the court. See Hall v. Commonwealth, 817 S.W.2d 228, 229 (Ky. 1991) (holding that failure to request an admonition from a trial judge will be viewed as an element of trial strategy and thus failure to request an admonition will be treated as a waiver), overruled on other grounds by Commonwealth v. Ramsey, 920 S.W.2d 526 (Ky. 1996). Thus, no error occurred.

III. The admittance of Sergeant Cross's testimony regarding the general behavior of drug dealers and certain innocuous electronic equipment seized in Appellant's home was harmless error.

Appellant's final allegation of error is that Sergeant Cross's testimony regarding items found during the search of Taylor's house was irrelevant and unduly prejudicial. While Appellant contends that all testimony concerning the items seized from his residence is irrelevant to the crimes tried and unduly prejudicial, he takes specific issue with certain items he argues were innocuous in nature.

During the execution of the search warrant, the following items were removed from Appellant's residence: 1) rock crack cocaine; 2) pill bottle with twenty-two (22) blue-shaped, oval pills; 3) clear plastic bag containing marijuana; 4) clear plastic bag containing miscellaneous jewelry; 5) clear plastic bag containing loose change; 6) black leather pouch containing two (2) baggies of marijuana and two (2) baggies of unknown pills; 7) one potato chip canister containing several baggies of marijuana; 8) one band-aid box containing marijuana; 9) plastic bag containing several crack pipes; 9) yellow envelope containing several knives; 10) pill bottle containing twenty-six (26) Darvocet; 11)

black baggie containing marked money from controlled drug buy (located on Appellant's person); 12) two wallets containing cash; 13) milk can containing cash; 14) mason jar containing cash; 15) police scanner; 16) night vision device; 17) digital camera; 18) portable "boom box" sound system; 18) cordless tool set in case; 19) camcorder; 20) two (2) DVD/VCR players; 21) one VCR player; 22) two (2) DVD players; 23) one television; 24) two (2) CD players in box; 25) jumper box; 26) BB pistol; 27) cell phone; 28) miscellaneous lighters; 29) two (2) two-way radios; and 30) a bolt amp. Cross testified that electronic devices like those found in Taylor's house are frequently received by drug dealers in exchange for drugs. Appellant now argues that this testimony was irrelevant and unduly prejudicial because the electronic devices seized were innocuous and there was no evidence that these items were connected to his drug charges.

KRE 401 states that to be relevant, evidence must "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, evidence that is relevant may be excluded "if its probative value is substantially outweighed by the danger of undue prejudice." KRE 403. "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." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). "The standard of review is whether there has been an abuse of that discretion." Id.

Here, Appellant concedes that most of the items seized were contraband. However, he argues that several of the electronic items were innocuous in nature, and, thus, the trial court erred in admitting testimony concerning them, as

it was irrelevant and unduly prejudicial. We agree insofar that the innocuous evidence was irrelevant, but hold such error to be harmless for reasons that the remaining evidence was overwhelming. Thus, there is no reasonable probability that this evidence affected the verdict in this case. See Emerson v. Commonwealth, 230 S.W.3d 563, 570 (Ky. 2007); see also Taylor v. Commonwealth, 995 S.W.2d 355, 361 (Ky. 1999).

As Appellant correctly points out, certain of the items seized were innocuous on their face, and could be present in the home with legitimate reason. While the facts in the present case do not support a compelling indication that the electronic equipment seized from Appellant's residence was, indeed, the fruit of drug trade, we nevertheless are cognizant of the very real implications at play here. As Sergeant Cross alluded to, drug dealers have adopted a litany of tactics in the purvey of their wares, including the direct bartering of merchandise in exchange for drugs. Indeed, drug dealers have supplanted some other traditional outlets for conveying goods and have become some of the leading "pawn shops" in various regions of the Commonwealth. Thus, while the number of electronics and other goods seized here do not represent a *de facto* suggestion of drug dealing, under the correct facts and in the appropriate instance such an inference would be appropriate.

IV. Conclusion

For the reasons set forth herein, the judgment of the Adair Circuit Court is affirmed.

All sitting. Lambert, C.J.; Abramson, Cunningham, Noble, Scott and Schroder, JJ., concur. Minton, J., concurs in result only.

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