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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000746-MR

LARRY HUGHES — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
NO. 05-CR-000373-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

A McCracken County jury convicted Larry Hughes of first-degree trafficking in a controlled substance, cocaine;[1] possession of drug paraphernalia, second or subsequent offense;[2] and of being a first-degree persistent felony offender.[3] In accordance with the jury's recommendation, Larry was sentenced to ten (10) years for trafficking, and two (2) years for possession of drug paraphernalia. Having been convicted of being a first-degree persistent felony offender, Larry's sentences were enhanced to twenty (20) years in prison. He appeals to this Court as a matter of right[4] and argues the circuit court erred by: (1) admitting evidence of prior bad acts; (2)

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[1] Kentucky Revised Statute (KRS) 218A.1412.
[2] KRS 218A.500.
[3] KRS 532.080.
[4] Kentucky Constitution §110(2)(b).

denying his motion for a mistrial; and (3) denying his motion for directed verdict. Finding no error, we affirm.

II. Factual Background

The McCracken County Sherriff's Office conducted an undercover operation on July 27, 2005, in "The Set," an area in Paducah known for drugs and prostitution. Deputies Jesse Riddle[5] and Greg Moyers participated as undercover officers. Captain Jon Hayden and Detective Matt Carter served as their back-up.

After arriving in "The Set" in a truck wired for audio transmission, the deputies were approached by James Doolittle. Doolittle, after assuring the officers he knew where to find women, got into the truck and directed them to the home of Larry and Ida Hughes.

Upon arriving at Larry and Ida's residence, Doolittle went inside while the officers remained in the truck. Doolittle returned and informed the officers they would have to purchase drugs for the women. Doolittle assured the officers he could get the drugs. He then returned to the residence and emerged a few minutes later with Larry Hughes. Doolittle had Larry show the deputies the cocaine he had in his hand. Doolittle then got back into the truck to conduct the sale while Larry remained outside near the passenger window. When the exchange was nearly complete, Deputy Riddle signaled for the back-up officers. Upon hearing the approaching officers, Larry fled the scene. Despite an ensuing chase, officers failed to apprehend Larry.

The deputies arrested Doolittle. At the residence, Ida Hughes gave them permission to search. When the deputies discovered cocaine, drug paraphernalia, and a surveillance monitor in the living room, Ida attempted to destroy the evidence.

[5] The record reflects the deputy's name is Riddle as opposed to Reynolds.

Following a struggle, Ida was placed under arrest. During a subsequent search of the house, Kimberly Bridget was found hiding under a bed. She was also arrested.

On July 29, 2005, Larry was arrested in Ballard County. At trial, Larry claimed he was not at his home on the night of the incident. His story that he had gone to the home of Mike and Theresa Stewart to work on a car was supported by the testimony of Theresa Stewart.[6] The jury, rejecting Larry's alibi, returned a guilty verdict.

III. Analysis

A. Prior Bad Acts Evidence

Larry contends that the trial court abused its discretion in admitting Bridget's testimony. Specifically, he asserts that the Commonwealth's notice, five days (three business days) before trial, was unreasonable pursuant to Kentucky Rule of Evidence (KRE) 404(c), and that her testimony should have been excluded under KRE 404(b) as evidence of other bad acts used to prove his character in order to show action in conformity therewith. Larry further claims that Bridget's testimony was irrelevant, asserting the case before us is akin to Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky. 1998). Finally, Larry claims the evidence should have been excluded under KRE 403. We disagree.

Bridget testified that on July 27, 2005, she met Larry and Ida in "The Set," where Larry purchased a quantity of cocaine with money Ida provided to him. Bridget then gave Larry and Ida a ride home. Upon arriving, she and Larry smoked some of the cocaine. Shortly thereafter, Doolittle knocked on the door. When Larry answered the door, Doolittle asked him to come outside because he had two people who wanted to

[6] Theresa Stewart's first name has conflicting spellings in the briefs; however, this spelling is consistent with the record.

purchase cocaine. Larry told Ida this was how he would make her money back. Larry then went outside with Doolittle.

Larry has challenged the admissibility of Bridget's testimony. In Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994), this Court stated, "Rulings upon admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion."

Larry's first assertion is that the Commonwealth's notice pursuant to KRE 404(c) was unreasonable. The rule states, in relevant part, "In a criminal case, if the prosecution intends to introduce evidence pursuant to [KRE 404(b)] as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence." KRE 404(c). Interpreting this rule, this Court has held:

> Even in cases where evidence of prior uncharged criminal activity between the defendant and third persons is admissible, fundamental fairness dictates, and we hold, that the defendant is entitled to be informed of the names of the non-complaining witnesses and the nature of their allegations so far in advance of trial as to permit a reasonable time for investigation and preparation.

Gray v. Commonwealth, 843 S.W.2d 895, 897 (Ky. 1992). The Commonwealth provided Larry with faxed notice of Bridget's testimony on Wednesday, September 13, 2006, five days (three business days) before trial. A hard copy notice arrived on Thursday, September 14th. Prior to reaching a plea bargain with Bridget, the Commonwealth did not have authority to speak with her. Upon receiving authority from Bridget's attorney, the Commonwealth spoke to her on September 11th. Further, Larry knew from the start that Bridget was discovered hiding under a bed in his home on the night the incident occurred. Under these circumstances, we believe the circuit court did not abuse its discretion in finding the Commonwealth had given reasonable pretrial notice.

Larry's reliance on United States v. Baum, 482 F.2d 1325, 1331-32 (2d Cir. 1973), is misplaced. In Baum, the prosecution concealed the identity of a witness until the moment that person was called to testify. No such sandbagging occurred in the case before us. As set out above, the Commonwealth provided notice shortly after receiving permission from Bridget's attorney to interview her. Therefore, we conclude Larry has failed to show the trial court abused its discretion in finding that notice was sufficient.[7]

Larry's second assertion is that the evidence was used to prove his character and action in conformity therewith. In Kentucky, "[e]vidence of the commission of other crimes, generally speaking, is not admissible to prove that an accused is a person of criminal disposition." O'Bryan v. Commonwealth, 634 S.W.2d 153, 156 (Ky. 1982) (citations omitted). However, this exclusionary rule is not absolute. Under KRE 404(b), evidence of "other crimes, wrongs, or acts . . . . may, however, be admissible: [i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or [i]f 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." Further, in determining the admissibility of other crimes evidence, inquiries must be made into relevance, probativeness, and prejudice. See Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994).

Under KRE 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more

[7] Larry also relies on Wolbrecht v. Commonwealth, 955 S.W.2d 533, 538 (Ky. 1997), and Brown v. Commonwealth, 378 S.W.2d 608, 610 (Ky. 1964), overruled on other grounds by Payne v. Commonwealth, 656 S.W.2d 719 (Ky. 1983). However, these cases deal with the function of the bill of particulars and late amendments to indictments in a criminal case. As such, they provide no support to Larry's challenge to the Commonwealth's notice under KRE 404(c).

probable or less probable than it would be without the evidence." This Court, in Harris v. Commonwealth, recognized that "[r]elevant evidence in a criminal case is any evidence that tends to prove or disprove an element of the offense." 134 S.W.3d 603, 607 (Ky. 2004) (citation omitted).

Bridget stated Larry was in the residence on the night of the incident. She said he left at Doolittle's request to sell cocaine. These facts are contrary to Larry's claim that he was only there five to ten minutes before he got a ride to the home of Theresa and Mike Stewart. Her testimony is also contrary to Larry's suggestion that Darrell Doolittle, brother of James Doolittle, could have committed the crime. Finally, Bridget's testimony describes the source of the cocaine, confirms it was present on the night of the incident, and provides the motive for Larry's actions, *i.e.*, to recover the cost of the cocaine purchased with Ida's money in "The Set."

Larry's reliance on Jarvis, 960 S.W.2d at 466, is misplaced. In Jarvis, this Court stated that testimony from a witness that she and the defendant had a plan to purchase a controlled substance was not relevant to his trial for wanton murder. Id. at 471. Bridget's testimony, unlike the testimony in Jarvis, is not on a collateral point. We conclude Bridget's testimony was relevant to the contested issues in this case. Further, we find Bridget's testimony is inextricably intertwined. Therefore, Larry has not established that the trial court abused its discretion in finding this evidence relevant.

As to the probativeness and prejudicial effect of the evidence, KRE 403 provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of undue prejudice[.]" This Court stated in Cook v. Commonwealth, "The outcome of a KRE 403 balancing test is within the sound discretion of the trial judge, and that decision will only be overturned if there has been an abuse of discretion, *i.e.*, if

the trial judge's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." 129 S.W.3d 351, 361-62 (Ky. 2004) (citation omitted).

Larry cites Chumbler v. Commonwealth, 905 S.W.2d 488 (Ky. 1995), in support of his argument. However, in that case the defendant's homosexuality was offered to prove intent to murder. This Court held the evidence should not have been admitted. Id. at 492-94. The circumstances in Chumbler are distinguishable from those in this case. Here, Bridget's testimony was offered to show the presence and source of the cocaine, Larry's presence at the residence, and Larry's motive for the sale. These facts, unlike those in Chumbler, were all probative of the trafficking offense.[8] Larry has failed to prove the trial court abused its discretion in finding that the probative value of Bridget's testimony was not substantially outweighed by undue prejudice.

Having made the appropriate inquiries into relevance, probativeness, and prejudice, it is clear that Larry has failed to prove the trial court abused its discretion in admitting the testimony under KRE 404(b).

B. Mistrial

Next, Larry argues the trial court erred when it failed to declare a mistrial after evidence of Bridget's guilty plea was introduced by the Commonwealth. Citing to Tipton v. Commonwealth, Larry argues it was improper to admit evidence of a co-indictee's conviction under the indictment as substantive proof of the defendant's guilt. 640 S.W.2d 818, 820 (Ky. 1982). As we find the facts in Tipton distinguishable from the case before us, we reject his argument.

[8] Likewise, Larry's reliance on Commonwealth v. Johnson, 777 S.W.2d 876 (Ky. 1989), and Barnett v. Commonwealth, 763 S.W.2d 119 (Ky. 1988), is misplaced. These cases are distinguishable in that both involved evidence collateral to the offense charged. Such is not the case with Bridget's testimony.

At Larry's trial, there were two instances where he objected to evidence of Bridget's guilty plea to possession of cocaine and then moved for a mistrial. The first objection occurred during the Commonwealth's opening statement and was quickly overruled based on the Commonwealth's contention that counsel should be allowed to state the evidence the jury would hear during trial. The second objection occurred during the Commonwealth's direct examination of Bridget. During the subsequent bench conference, the Commonwealth argued the guilty plea was not being offered for substantive evidence of Larry's guilt, but rather to rebut an assertion by Larry that Bridget was testifying in exchange for a "sweetheart deal" from the Commonwealth. The Commonwealth then made an offer of admonition. Larry's attorney refused, claiming that the error could not be corrected and that he did not want the jury to hear the damaging testimony again. The trial court overruled both objections.

In Tipton, the defendant and the co-indictee were partners in an effort to rob a convenience store. Each man was charged with robbery, the former in the first-degree and the latter in the second-degree. Id. at 818-19. In that case, "It was the meaning of his testimony, the inference that both he and [the defendant] were guilty, that the Commonwealth attempted to bolster by reference to the guilty plea." Id. at 820. The case before us is distinguishable from Tipton in two ways. First, Larry and Bridget were not indicted for the same offense as were the co-indictees in Tipton. Id. Larry was indicted for trafficking, which arose from the actions occurring at the deputies' vehicle. Bridget pled guilty to possession, which arose from circumstances occurring inside the residence. Second, the Commonwealth did not "blatantly use the conviction as substantive evidence of guilt" as the prosecution did in Tipton. Id. Rather, the Commonwealth introduced the plea to counter any claim that Bridget received a

"sweetheart deal" to testify. Further, the Commonwealth offered to have the circuit court give an admonition to the jury, making it clear as to why the plea was introduced. Larry's attorney rejected the offer and sought a mistrial.

This Court has long recognized that the granting of a mistrial is an extreme remedy. See Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996). "The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." Id. See also Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002) (curative admonition obviated the necessity of a mistrial and sufficiently negated any prejudice). Further, the standard of review for denial of a mistrial in Kentucky is abuse of discretion. See Commonwealth v. Gaines, 13 S.W.3d 923, 925 (Ky. 2000).

Unlike the co-indictee in Tipton, Bridget's plea did not arise from a role in Larry's offense. Thus, while evidence of Bridget's plea deflects a claim that she provided testimony in return for a "sweetheart deal," it is not proof of Larry's guilt under the trafficking offense. While an admonition could have ensured no misunderstanding as to the purpose of the evidence, Larry refused one. Having failed to demonstrate how this evidence denied him a fair and impartial trial, we conclude Larry has failed to demonstrate the denial of the motions for mistrial was an abuse of discretion.

C. Directed Verdict

Finally, Larry argues the circuit court erred when it denied his motion for a directed verdict as to both underlying offenses. In particular, Larry points out that the officers failed to identify him beyond a reasonable doubt. Citing to Savage v. Commonwealth, 920 S.W.2d 512 (Ky. 1995), Larry argues that since the officers' identification was questionable, he was entitled to a directed verdict.

In considering a motion for a directed verdict,

> [T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assure that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id., citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

Applying Benham, under the evidence as a whole, it would not be clearly unreasonable for a jury to find guilt in the case before us. At trial, Deputies Riddle and Moyers testified that the man who approached the passenger side of their truck with cocaine in hand, and who participated in the drug transaction, was Larry Hughes. Moreover, when Larry's photo identification card was found during the search of the residence, both deputies identified him as the man who fled. As weight and credibility are left to the jury, it was not unreasonable for the jury to believe the testimony of the officers. Further, the testimony of the deputies was corroborated by Bridget's testimony that Larry left the residence to sell cocaine at Doolittle's request. Finally, the jury was free to reject Larry's argument that the officers could not have made a correct identification at night, given the distance between the officers and the suspect during the transaction, and the involvement of Doolittle as a middleman.

Contrary to Larry's argument, Savage does not preclude the jury from considering and accepting the eyewitness testimony of the officers. This Court, in Savage, set out five factors to be utilized to determine if an identification procedure

presented by police to a witness was suggestive or questionable.[9] The case before us does not represent a question of a procedure presented by the police. Rather, it concerns the weight and credibility a jury can give to identifications made by eyewitnesses based on their memories of the incident itself. As we recognized in Benham, weight and credibility are left to the jury. 816 S.W.2d at 187.

As the evidence offered by the officers is viewed in a light most favorable to the Commonwealth, we find it sufficient to support the finding that Larry approached the officers with Doolittle, that he had cocaine in his hand, and that he participated in the sale. We cannot conclude that under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt beyond a reasonable doubt in the case before us based on the evidence of identification offered. Thus, the trial court did not err in denying Larry's motion for a directed verdict on the underlying offenses.

IV. Conclusion

For the foregoing reasons, the conviction and sentence of the McCracken Circuit Court is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Schroder and Scott, JJ., concur. Venters, J., not sitting.

[9] Larry's reliance on Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), overruled on other grounds by Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), is misplaced for the same reason. Both cases considered whether procedures utilized by authorities were unnecessarily suggestive.

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