

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000313-MR

DAVID ANH DUY DAO

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
INDICTMENT NO. 04-CR-000870

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, HENRY AND HUDDLESTON, SENIOR JUDGES.¹

HENRY, SENIOR JUDGE: On March 19, 2004, in Jefferson County, Kentucky, a 21 count indictment was returned against David Anh Duy Dao, a medical doctor. On November 18, 2004, Dao was convicted by a jury of six of fifteen of those counts (six others were dismissed), namely, complicity in obtaining a controlled substance (hydrocodone) by fraud. He was sentenced to a total of two years and eight months (probated for five years) and ordered to pay a \$5,000.00 fine. On appeal Dao

¹ Senior Judges Daniel T. Guidugli, Michael L. Henry, and Joseph R. Huddleston sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

raises eight issues. Having examined the record and considered each issue on its merits, we affirm.

The facts of this case are well known to the parties and will not be recited herein except as is necessary to the understanding of this opinion.

Dao first argues against the admissibility of certain testimony which he labels investigative hearsay and prior consistent statements. Dao asserts that the testimony in question was used to bolster improperly the testimony of his co-defendant, Brian Case, the Commonwealth's chief witness. Dao specifically refers to the testimony of two witnesses: Betty Prader, an investigator for the Kentucky Board of Medical Licensure, and William Stivers, the head of the Louisville-Jefferson Metro Government prescription drug unit. Both Prader and Stivers testified regarding their separate investigations concerning Dr. Dao. Dao contends that the trial court erred in failing to curtail these witnesses' testimony.

We have examined each instance of alleged error in this argument and cannot find that the trial court abused its discretion in allowing the testimony of Prader and Stivers to proceed. See *Thompson v. Commonwealth*, 147 S.W.3d 22, 36 (Ky. 2004), *cert. denied*, 125 S.Ct. 2966 (2005). Furthermore, Dao was acquitted on nine of the fifteen counts for which he was tried; his six convicted offenses were related to prescriptions

he wrote for two patients without their knowledge. On those counts he was convicted by evidence of his own handwriting. He thus cannot credibly claim that he was unduly prejudiced by the so-called bolstering.

Nor is there any merit to Dao's second argument that there was improper vouching of co-defendant Case's testimony by these two witnesses and the Commonwealth in its closing. Again we are constrained to review for abuse of discretion, and we find none. *Thompson, supra*.

Dao thirdly argues that there was improper comment on his failure to testify. The Commonwealth made the following remark in closing argument: "There's two people in this world who knows (sic) what went on in that hotel room and you've heard from one of them, and he tells a pretty outrageous story." Dao insists that this remark improperly drew attention to his exercise of the right to remain silent. The trial court, before overruling the objection and denying the motion for mistrial, acknowledged that it was a close issue.

"[N]ot every comment upon silence is reversible error." *Ragland v. Commonwealth*, 191 S.W.3d 569, 589 (Ky. 2006). "[T]he prosecutor said nothing that could be construed as a request that the jury should infer guilt from the fact that Appellant failed to take the witness stand and assert his innocence." *Id.* at 590. "Any possible error was cured by the

fact that the court gave a 'no inference' instruction to the jury." *Id.* at 591.

Such is the case here. The remark was an indirect comment at worst, and we decline to find error in the trial court's ruling.

Dao's fourth allegation of error concerns testimony regarding Hardin Memorial Hospital. During the redirect examination of co-defendant Case, the Commonwealth began a line of questioning that involved the hospital's urinalysis test results on Dao. Although the trial court had partially granted Dao's motion in limine to restrict testimony in this evidentiary area, the defense on cross-examination had questioned Case three times about Dao's supposed inability to tolerate prescription painkillers. This line of interrogation, the trial court ruled, sufficiently opened the door to the subject of Hardin Memorial Hospital's testing of Dao. *Muncy v. Commonwealth*, 132 S.W.3d 845, 847 (Ky. 2004). We have not been convinced otherwise.

Dao fifthly complains that evidence of his wealth was improperly introduced at trial. Dao argues that his financial wellbeing was not relevant to the charges against him. The Commonwealth counters that Dao's wealth was in fact relevant as he used it to pursue his relationship with Case. The trial court agreed with the Commonwealth, and we find no abuse of

discretion nor undue prejudice in the admission of this evidence. *Thompson, supra.*

The sixth allegation of error is that the trial court erred in denying Dao's motion to suppress evidence garnered as a result of video surveillance of the hotel room rented by Dao for meeting with Case. Unbeknownst to Dao the police had already entered the room and set up audio and video equipment to record the encounter between the two men. Dao claims that, because he had paid for the room, he had a legitimate expectation of privacy. And since the police had not obtained a search warrant, and evidence seized (*viz.*, the surveillance tapes) should have been suppressed.

As the Commonwealth points out, the surveillance was done with the knowledge and consent of co-defendant Case in his role as informant. "The practice of recording conversations with the consent of at least one party to the conversation has long been recognized in Kentucky jurisprudence." *Major v. Commonwealth*, 177 S.W.3d 700, 710 (Ky. 2005) (citations omitted). "Rulings on the admissibility of evidence by the trial court are not disturbed on review in the absence of an abuse in discretion. There being no illegal government activity here, the contents of this taped conversation were properly admitted into evidence." *Id.*, citing *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999); *Jarvis v. Commonwealth*, 960 S.W.2d

466 (Ky. 1998); and *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996).

Dao's seventh assertion of error is that the trial court erred in denying the motion to dismiss the conspiracy charge. Dao contends that there can be no separate charge of conspiracy when the evidence tending to prove the conspiracy is inevitably incident to the crime's commission. Had the trial court granted the motion to dismiss, the Commonwealth's evidence would have been limited to the prescription writing violations; there would have been no evidence on the subject of homosexual sex in exchange for money and narcotics. Dao pleads prejudice in this regard.

The trial court did not error in denying the motion to dismiss. The indictment cited the separate overt act for the conspiracy charge, which was proper under Kentucky law. See *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996). And the Commonwealth gave notice (KRE 404(c)) of intent to introduce the evidence and, in response to the motion to dismiss, argued its theory to the trial court's satisfaction. The evidence complained of would have been admissible as relevant to show knowledge, intent, motive, and scheme. KRE 404(b); see also *Muncy, supra*. We affirm on this issue also.

Dao lastly argues that the cumulative effect of the errors requires reversal; he cites *Funk v. Commonwealth*, 842

S.W.2d 476 (Ky. 1992). However, where there is no error, as we have held, there can be no cumulative error. *Sanborn v. Commonwealth*, 975 S.W.2d 905, 913 (Ky. 1998).

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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