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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001399-MR

RICKY LEE WILSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 09-CR-01657

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND THOMPSON, JUDGES.

MOORE, JUDGE: Ricky Lee Wilson appeals the Fayette Circuit Court's judgment convicting him of first-degree Trafficking in a Controlled Substance; Possession of Drug Paraphernalia; third-degree Trafficking in a Controlled Substance; Possession of Marijuana; Alcohol Intoxication in a Public Place; and of

being a second-degree persistent felony offender (PFO-2nd). After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Detective David Flannery of the Lexington Police Department was working in the residential burglary unit at the time in question. He was working undercover, investigating a series of burglaries. In the course of his investigation, he followed a suspicious vehicle but lost sight of it.

After losing sight of that vehicle, and as he was driving on Detroit Avenue, he saw a white male carrying a Pringles potato chip container in his left hand and staggering and almost falling to the ground. The man was Ricky Wilson. When Detective Flannery passed Wilson, he slowed down to observe Wilson and determine whether he was intoxicated. It was about 3:00 in the afternoon. Wilson looked at Detective Flannery and stared at him in a manner that led Detective Flannery to believe that Wilson wanted to make contact with him. Detective Flannery was not wearing his uniform and was driving an unmarked vehicle at that time.

Detective Flannery turned left into a driveway, and Wilson began walking toward him. As Detective Flannery sat in the driveway, another vehicle came down the road, pulled to the opposite side of the road, against the flow of traffic, and parked with the driver's door facing toward Wilson. Wilson walked toward the driver's window of the vehicle, spoke briefly with the driver, then entered and sat in the back seat of the vehicle. Detective Flannery did not observe

any other passengers in the vehicle at the time, so he found it suspicious that Wilson would have entered the vehicle's back seat.

As Detective Flannery pulled his vehicle closer to the other vehicle, he noticed the female driver of the other vehicle holding something that looked like money up in her hand over the back seat. Detective Flannery was uncertain whether the object that looked like money was being passed from Wilson to the female driver, or from the driver to Wilson. Detective Flannery observed Wilson fumbling with the Pringles can, but he could not tell what Wilson was doing with it. Detective Flannery pulled his vehicle up in front of the other vehicle so that the passenger sides of each vehicle were adjacent to each other. Detective Flannery drove around the other vehicle so as not to arouse suspicion. He pulled down the street, turned his vehicle around, and began driving back toward the other vehicle.

As the detective was reaching for his radio to get another police officer to pull the vehicle over,[1] he saw the other vehicle drive 100 to 200 yards down the street and stop, and Wilson then exited the vehicle. Wilson still had his Pringles can in his left hand, and his right hand was clenched, as if it may have been holding something. Wilson began walking off toward the area he had come from before getting into the vehicle.

[1] Detective Flannery testified that because he was not in uniform and he was driving an unmarked vehicle that had no police emergency lights on it, he did not pull over the other vehicle himself. Rather, he attempted to get another officer who was driving a police cruiser to stop the vehicle, but the vehicle apparently drove away before Detective Flannery could obtain any of its identifying information. So, the vehicle was not stopped by police.

Detective Flannery rolled down his window, and Wilson made the same eye contact with him again. Wilson began approaching the detective's vehicle. Detective Flannery asked Wilson what he was selling. Wilson responded "I got . . .," at which point Detective Flannery's police radio sounded, and Wilson immediately turned around and said "I ain't got anything. I don't have nothing. I don't have nothing." Wilson then walked off toward the sidewalk. Detective Flannery exited his vehicle, informed Wilson that he was a police officer, and made his police badge visible. Wilson did not stop and continued walking away. Detective Flannery observed pills falling to the ground, which he believed to be Xanax pills. Wilson set his Pringles can down on the trunk of a car he passed on the street. Detective Flannery could smell alcohol on Wilson and observed that Wilson was intoxicated, based on the way he was walking, how he was swaying from side to side, his bloodshot and watery eyes, and his slurred speech. Wilson was placed under arrest and set down on the curb.

The Pringles can that Wilson had set down on the car had a clear lid to it, and Detective Flannery could see through the lid that there were several pill bottles inside it. During the search incident to arrest, Detective Flannery found approximately 3.8 grams of marijuana, rolling papers, and $479 in cash on Wilson's person. Inside the Pringles can, Detective Flannery found: a bottle of 15 mg Oxycodone Hydrochloride pills, containing 128.5 tablets; two bottles of 30 mg Oxycodone Hydrochloride tablets, containing a total of 199 tablets; and a bottle of

2 mg Alprazolam[2] pills, containing 12 tablets. Additionally, the pills that had been dropped on the ground were Alprazolam pills, and there were 18 of those.

When the number of Alprazolam pills remaining in the bottle were added to the number that had been dropped on the ground, there were no Alprazolam pills missing from the prescription. However, there were 21.5 of the Oxycodone 15 mg tablets, and 41 of the Oxycodone 30 mg tablets missing from those prescriptions, which had been filled two days earlier.

Detective Randy Hunter of the Kentucky State Police Drug Enforcement Unit testified during trial. Detective Hunter is a task force officer who works with the Federal Bureau of Investigation on "large scale narcotics investigations" that have connections in Kentucky but also affect other states. Detective Hunter attested that he had previously testified before a Grand Jury in Broward County, Florida, concerning the increased number of pain clinics in Broward County and two neighboring counties, Dade and Palm Beach, over a two-year period between 2007 and 2009. Detective Hunter stated that the number of pain clinics in Broward County, Florida, increased from four in 2007 to 115 in 2009, and the number of pain clinics in all three of those counties in 2009 was approximately 190. He testified that in 2009, he traveled to Broward County eight times to investigate the "Florida Pain Train."

Detective Hunter attested that Oxycodone pills are typically sold in two strengths: 30 mg and 15 mg. He said that many of the Oxycodone pills that

[2] According to the Commonwealth's appellate brief, Alprazolam is also known as Xanax.

are available on the streets in Kentucky come from pain clinics in Broward, Palm Beach, and Dade Counties in Florida. The reason for this is that, unlike Kentucky and many other states, Florida does not have a computer system that monitors narcotics prescriptions that are dispensed there. Detective Hunter said that often, people will travel to Florida, get a prescription filled, and return to Kentucky to sell or abuse drugs. Usually, a "sponsor" will pay the travel expenses for a group of five-to-ten Kentuckians to go to Florida and get the prescriptions. In exchange for funding the trip, the sponsor usually gets half of the pills and the patient for whom the prescription was written keeps the other half.[3]

Detective Hunter attested that the Florida clinic where Wilson obtained his prescriptions was one of the five clinics in that geographic area that had been identified as responsible for the greatest number of pills brought into and illegally sold in Kentucky. Detective Hunter stated that the prescriptions obtained by Wilson were identical to the pattern of prescriptions issued by those five clinics, *i.e.*, the prescriptions were for 240 Oxycodone 30 mg tablets, 150 Oxycodone 15 mg tablets, and between 30 and 90 Xanax (Alprazolam) tablets. Wilson's prescriptions were dated September 21, 2009, and he was arrested two days later, on September 23, 2009.

Wilson's employer, Ray Perry, Jr., testified on Wilson's behalf. Perry attested that Wilson worked for him as a mason. The last time Wilson was paid

[3] Detective Hunter testified that the split is usually "50/50," but sometimes it is "60/40" or "70/30."

before he was arrested was September 17, 2009, before he left for Florida. Wilson was paid $1,120 in cash.

Wilson's defense counsel sought to introduce certified copies of records from the Fayette County Detention Center, which stated that Wilson informed jail personnel when he arrived there after his arrest that he was taking Percocet (which Wilson claims contains Oxycodone) and Xanax for back and knee problems he had. The Commonwealth objected to the introduction of this evidence because the records did not refer to Oxycodone, and the prescriptions at issue were for Oxycodone. The circuit court sustained the Commonwealth's objection, so the records were not admitted.

At the close of both the Commonwealth's and the defense's cases, defense counsel moved for a directed verdict. The motion was denied. Defense counsel also requested a jury instruction on voluntary intoxication as a defense to negate the intent element of the two trafficking counts, pursuant to KRS[4] 501.080, and counsel tendered a proposed jury instruction to that effect. The circuit court declined to provide the instruction to the jury. In reaching this conclusion, the court reasoned that after Wilson exited the other vehicle, Detective Flannery asked Wilson what he had or what he was selling, Wilson started to respond, saying "I got," but then he stopped because the police radio sounded, at which point Wilson said something to the effect of "I got nothing" and turned and walked in another direction. Also, the court noted that when Wilson was being arrested, he requested

[4] Kentucky Revised Statute.

an attorney. Therefore, the court held that, based upon these facts and the "stringent requirements of the cases on voluntary intoxication [as] a[n] affirmative defense," Wilson was not entitled to the instruction because he had not shown that he was so intoxicated that he could not communicate with the officer.

Wilson was convicted of all offenses charged. For his conviction for Trafficking in a Controlled Substance -- First Degree, Wilson was sentenced to seven years of imprisonment, enhanced to fifteen years due to his conviction for PFO-2nd. Wilson was sentenced to twelve months of imprisonment each for his Possession of Drug Paraphernalia, Trafficking in a Controlled Substance – Third Degree, and Possession of Marijuana convictions. For his Alcohol Intoxication in a Public Place conviction, he was sentenced to time served in lieu of a fine. The sentences were ordered to be served concurrently for a total of fifteen years in the State Penitentiary at hard labor. Additionally, this sentence was ordered to be served consecutively to any other sentence Wilson had to serve.

Wilson now appeals, contending as follows: (a) the circuit court erred when it failed to direct a verdict of acquittal as to the trafficking in a controlled substance counts; (b) testimony from Detective Hunter about the "Florida Pain Train" should have been excluded because it was not proper expert testimony in this trial; (c) the circuit court erred in refusing to instruct the jury on the defense of voluntary intoxication; and (d) the circuit court erred in refusing to allow the defense to introduce Wilson's records from the Fayette County Detention Center.

II. ANALYSIS

A. DIRECTED VERDICT

Wilson first alleges that the circuit court erred when it failed to direct a verdict of acquittal as to the trafficking in a controlled substance counts. The standard of review on appeal from a circuit court's order concerning a motion for a directed verdict is as follows:

> On motion for [a] directed verdict, the 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 assume 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.
>
> 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.
>
> . . . [T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Commonwealth v. Benham, 816 S.W.2d 186, 187-88 (Ky. 1991) (internal quotation marks and citation omitted).

In the present case, Detective Flannery testified that he saw Wilson climb into the back seat of the vehicle driven by the female driver, even though there was nobody else in the vehicle; he saw the woman holding what appeared to be money over the back seat of the vehicle; and he observed Wilson fumbling with

his Pringles can while he was in the vehicle. Additionally, after he exited the vehicle, Wilson walked toward Detective Flannery; but once Wilson learned that Detective Flannery was an officer, Wilson walked away, even though the detective was trying to stop him. While he was walking away, Wilson dropped eighteen Alprazolam pills on the ground. He placed the Pringles can he was carrying on a vehicle that was parked on the street. When Wilson was arrested, it was discovered that the Pringles can contained various prescriptions for Oxycodone and Alprazolam. Further, Detective Hunter testified that the Florida clinic where Wilson obtained his prescriptions was one of five "problem" clinics in the South Florida area, where many prescriptions for Oxycodone and Alprazolam are obtained and the pills later sold to drug abusers in Kentucky. Evidence was also introduced to show that more of the Oxycodone pills were missing from the bottles than should have been missing, considering the number of days that had elapsed since the prescription was filled and the number of pills per day that were prescribed.[5]

This evidence is sufficient to induce a reasonable juror to find beyond a reasonable doubt that Wilson was guilty of the two trafficking counts. Therefore, the circuit court did not err in denying Wilson's motion for a directed verdict.

B. EXPERT TESTIMONY

[5] Two days had elapsed since the prescriptions were filled. The prescription labels stated that Wilson was to take one 30 mg Oxycodone pill every three hours as needed; one 15 mg Oxycodone pill every five hours as needed; and one 2 mg Alprazolam tablet at bedtime. There were 41 of the 30 mg Oxycodone pills absent from the full prescription and 21.5 of the 15 mg Oxycodone pills absent. No Alprazolam pills were absent.

Wilson next asserts that the testimony from Detective Hunter about the "Florida Pain Train" should have been excluded because it was not proper expert testimony in this trial. We review a trial court's evidentiary rulings for an abuse of discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). Kentucky Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Expert testimony from a police detective is admissible if it is based on extensive experience that the detective has with the particular subject matter. *See Sargent v. Commonwealth*, 813 S.W.2d 801, 802 (Ky. 1991). In *Sargent*, the Kentucky Supreme Court noted that the testimony from the detectives about the marijuana trade was

> specialized in character and outside the scope of common knowledge and experience of most jurors. The opinion of the police aided the jury in understanding the evidence and resolving the issues. The trial judge did not abuse his discretion when he determined that both police officers were sufficiently qualified to give expert testimony.

Sargent, 813 S.W.2d at 802.

In the present case, Detective Hunter testified concerning his extensive experience working as a task force officer with the Federal Bureau of Investigation on "large scale narcotics investigations" that have connections in Kentucky. He particularly noted that in 2009, he had traveled eight times to South Florida to investigate the "Florida Pain Train" and the clinics prescribing much of the Oxycodone that is later sold illegally in Kentucky, one of which was the clinic where Wilson obtained his prescriptions. Detective Hunter further testified about the price that the various pills are sold for by drug traffickers, and how much the traffickers pay to obtain the pills in Florida.

As in *Sargent*, the testimony provided by Detective Hunter was "specialized in character and outside the scope of common knowledge and experience of most jurors." *Sargent*, 813 S.W.2d at 802. Therefore, the circuit court did not abuse its discretion in admitting the expert testimony provided by Detective Hunter.[6]

C. JURY INSTRUCTION

Wilson also contends that the circuit court erred in refusing to instruct the jury on the defense of voluntary intoxication. We review a trial court's

[6] We pause to note that Detective Hunter testified that typically, when a sponsor funds a trip for a "patient" to go to Florida and obtain the pills, the "patient" is then expected to divide the pills either "50/50," "60/40," or "70/30" with the sponsor. However, Wilson still had all of his Alprazolam pills remaining; 128.5 out of 150, or 85.67%, of his 15 mg Oxycodone pills remaining; and 199 out of 240, or 82.91%, of his 30 mg Oxycodone pills remaining. Therefore, although the jury convicted Wilson of trafficking, it could have just as easily found, based upon these numbers, that Wilson was not a participant in the "Florida Pain Train." Regardless, that was a determination for the jury to make.

decision not to give an instruction under an abuse of discretion standard. *Crain v. Commonwealth*, 257 S.W.3d 924 (Ky. 2008).

"In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999) (citing, *inter alia*, RCr[7] 9.54(1)). "A defendant 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." *Id*. "[N]o matter how preposterous, any defense which is supported by the evidence must be submitted to the jury. It is the privilege of the jury to believe the unbelievable if the jury so wishes." *Id*. at 361 (internal quotation marks omitted). "It is equally well established that such an instruction is to be rejected if the evidence does not warrant it." *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010) (citing *Payne v. Commonwealth*, 656 S.W.2d 719 (Ky. 1983)). "[A] judgment will not be reversed for errors in instructions unless upon the whole record it appears that the substantial rights of the defendant were prejudiced." *Taylor*, 995 S.W.2d at 361. "The test for harmless error is whether there is any reasonable possibility that, absent the error, the verdict would have been different." *Id*.

> Pursuant to KRS 501.080:
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> Intoxication is a defense to a criminal charge only if such condition either: (1) Negatives the existence of an

[7] Kentucky Rule of Criminal Procedure.

> element of the offense; or (2) Is not voluntarily produced and deprives the defendant of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

"In order to justify an instruction on intoxication, there must be evidence that not only was the defendant drunk, but that he was so drunk that he did not know what he was doing." *Lickliter v. Commonwealth*, 142 S.W.3d 65, 68 (Ky. 2004). Being in a state of intoxication by itself does not alone warrant an instruction on voluntary intoxication. *Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky. 2002).

"'Traffic,' except as provided in KRS 218A.1431, means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance . . . ." KRS 218A.010(47). The type of first-degree and third-degree trafficking for which Wilson was convicted included an element of intent, as defined in the jury instructions.

Wilson argues that he was arrested for alcohol intoxication. Detective Flannery testified that at the time of the arrest, Wilson smelled of alcohol, he was swaying from side to side and stumbling, he had bloodshot and watery eyes, and his speech was slurred. Wilson also alleges that he was "housed in the alcohol detox unit of the Fayette County Detention Center for five days" following his arrest. Wilson was also charged and convicted of Alcohol Intoxication in a Public Place, pursuant to KRS 222.202(1).

Based on the foregoing, there can be no doubt that Wilson was intoxicated. The question then becomes whether Wilson was so intoxicated that he

did not know what he was doing. In *Harris,* 313 S.W.3d 40, the Supreme Court reviewed a case in which a number of witnesses testified that before and after a murder, Harris, the defendant, was in a drunken state. The testimony in *Harris* included that

> [t]wo of those witnesses testified that shortly after noon they saw Harris walking along the railroad tracks as he often did when drunk, talking to himself, waving his arms, and apparently oblivious to his surroundings. The third witness, Harris' son-in-law, testified that he visited Harris at his apartment between 3:30 and 4:00 that afternoon in hopes of borrowing some money. He found Harris drinking beer and intoxicated to the extent that his speech was slurred. Harris was apparently not so drunk that he did not know what he was doing, however, for he understood his son-in-law's errand well enough to loan him ten dollars. A fourth witness testified that she encountered Harris later that night, after the murder. She too described Harris as intoxicated, but testified that Harris was in possession of a large amount of cash, that his skin appeared blackened as if from smoke, and that he said to her, "See baby, don't tell me I don't care to kill someone."

Id. at 50-51.

The Court noted that even construing this evidence favorably to Harris that he was intoxicated, it was not enough in light of other evidence to "permit a finding that at the time of the offense Harris was so intoxicated that he did not know what he was doing." *Id.* at 51(citations omitted). The Court included in its rationale that at least an hour-and-a-half before the murder, Harris understood his son-in-law's request to borrow money; he joined two others in carrying out the

murder; and after committing it, boasted of it although he appeared intoxicated to a witness who talked to him at the time. *Id.*

Similarly in Wilson's case, we cannot find that the trial court abused its discretion when it denied Wilson's request for an instruction on the defense of voluntary intoxication. Like Harris, Wilson was intoxicated. However, also like Harris, Wilson's overall conduct and other evidence showed that he was not so impaired that he did not know what he was doing. Det. Flannery testified that Wilson approached his car when he pulled up and rolled down his car window. According to Det. Flannery's testimony, he asked what Wilson was selling and that Wilson responded to the question initially with "I've got . . . ." Wilson's response was interrupted by the police radio. After which, he said "I've got nothing." He then abruptly turned and walked away from Det. Flannery's vehicle. He dropped several Xanax pills and put the Pringles can on a nearby parked car.

We further note that Wilson has not directed us to any evidence of record presented to the jury that he did not know or understand what he was doing at the time the crimes were committed. The only evidence was that he was intoxicated, which by itself is not enough to warrant a voluntary intoxication defense. Given Wilson's actions and the lack of any evidence that he did not know what he was doing at the time of the incident, we cannot find that the trial court abused its discretion in determining that Wilson understood he was engaging in criminal conduct. Consequently, the requested instruction was not warranted.[8]

[8] We pause to comment on the circuit court's rationale that Wilson's request for an attorney was proof of his ability to know what he was doing, so as to negate the need for a jury instruction on

D. INTRODUCTION OF JAIL RECORDS

Finally, Wilson argues that the circuit court erred in refusing to allow the defense to introduce Wilson's records from the Fayette County Detention Center. Specifically, Wilson wanted to introduce testimony from Sergeant Jaime Crawford regarding the information Wilson had provided about his medical history when he arrived at the Fayette County Detention Center. We review a trial court's evidentiary rulings for an abuse of discretion. *See Goodyear Tire*, 11 S.W.3d at 577.

Defense counsel sought to introduce the records and testimony at issue to show that Wilson had informed Sergeant Crawford when he arrived at the jail that he had been taking Percocet and Xanax for back and knee problems. Defense counsel asserted that Percocet contains Oxycodone. The Commonwealth objected to the introduction of this evidence because the records did not refer to Oxycodone, and the prescriptions that Wilson was accused of trafficking were for Oxycodone and Alprazolam, rather than Percocet. The circuit court sustained the Commonwealth's objection, and the records were not admitted.

The circuit court did not abuse its discretion in refusing to admit this evidence because the prescriptions were for Oxycodone, and Wilson had told

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voluntary intoxication. We do not know how long after his arrest Wilson requested an attorney. If Wilson requested an attorney immediately upon his arrest, when he was still exhibiting the signs of intoxication, then that may have been proof that Wilson knew what he was doing. But he also may have requested an attorney hours later, after sobering up to some extent. However, regardless of Wilson's intoxication level at the time he requested counsel, we question the correctness of denying a jury instruction on a possible defense simply because Wilson exercised his constitutional right to counsel. Nonetheless, given the facts before us, there was sufficient evidence otherwise to warrant the denial of the instruction.

Sergeant Crawford that he was taking Percocet. Consequently, this claim is without merit.

Accordingly, the Fayette Circuit Court's judgment is affirmed.

ALL CONCUR.

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