16-P-406 Appeals Court

COMMONWEALTH vs. ANTONIO A. SMITH.

No. 16-P-406.

Plymouth. April 5, 2017. - October 27, 2017.

Present: Meade, Hanlon, & Maldonado, JJ.

Controlled Substances. Evidence, Expert opinion. Witness, Expert.

Indictment found and returned in the Superior Court Department on July 11, 2014.

The case was tried before Robert C. Cosgrove, J.

Nancy A. Dolberg, Committee for Public Counsel Services, for the defendant.
Nathaniel Kennedy, Assistant District Attorney, for the Commonwealth.

HANLON, J. After a jury trial, the defendant was convicted of possession of a class B substance, crack cocaine, with intent to distribute.[1] He now argues that the improper admission of an

[1] At a jury-waived trial immediately following the verdict, the defendant was found guilty of committing a subsequent offense.

expert witness's "profiling" testimony impinged on the jury's fact-finding role and created a substantial risk of a miscarriage of justice. For the following reasons, we affirm.

Background. We summarize the facts as the jury could have found them, based upon the evidence admitted. On April 22, 2014, officers of the Brockton Police narcotics unit were watching an area near the intersection of North Cary Street and East Ashland Street. At 9:30 A.M., Detective Mercurio observed a green Volvo driving slowly; the driver was talking on a cellular telephone while leaning her head out of the window and looking around at nearby parking lots. After driving back and forth through the intersection, the Volvo came to a stop in the parking lot of a nearby liquor store that was closed. Neither the driver, nor the other occupants, a male and a child in the backseat, got out of the car. A few minutes later, the officers saw the defendant walking down North Cary Street; he went directly to the Volvo and got into the front passenger seat.

About one minute later, the Volvo drove out of the parking lot and south on North Cary Street, turning onto Ashfield Drive, then stopping at an intersection on Anawan Street, a short distance from the original pick up location; the defendant got out of the car there. Shortly afterwards, Mercurio drove his unmarked police car past the Volvo, which was stopped at the next intersection. The defendant, having left the Volvo, was

walking in the travel lane of the street in Mercurio's direction; the detective then stopped his car and said "hey," and the defendant walked toward the driver's side of Mercurio's car. Mercurio showed his badge and identified himself as a police officer; the defendant then stepped back and started running down the driveway of a house at 19 Anawan Street.[2] Mercurio did not see any other individuals in the area of that house.

Mercurio chased the defendant down the driveway, and observed the defendant's hands go to the front of his pants as he was running; there were approximately ten to twenty feet between them. As soon as the defendant turned the corner of the house, Mercurio lost sight of him. At the same time, another officer, Donahue, joined the chase, passing Mercurio and running around the house in the direction the defendant had run. Donahue caught up with the defendant in front of 19 Anawan Street.[3]

Mercurio then went back to the area behind 19 Anawan Street where he had lost sight of the defendant during the chase; he found a clear plastic bag containing two rocklike substances that were individually wrapped "inside the corner of a bag and

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[2] The house was for sale and appeared to be empty.

[3] During the booking process, a twenty dollar bill was removed from the defendant's right front pants pocket.

it was tied in a knot at the top." Approximately three feet away, another officer found "a second plastic bag and inside that plastic bag [were] thirteen more individually wrapped off-white colored rocklike substances." The rocks in the two individual bags first found were larger than the contents of the thirteen individual bags. The bags were tested and the substance was determined to be cocaine.

At trial, an officer who had not participated in the investigation, Detective Keating, testified as an expert, based on his training and experience, regarding illegal drug distribution and drug use.[4] Keating provided for the jury an overview of the consistency and street cost of crack cocaine generally in the Brockton market in 2014.[5] He explained that the

[4] Prior to the beginning of the trial, the judge declined to rule on the defendant's motion in limine seeking to exclude Keating's anticipated testimony relating to the characteristics of drug sellers and users; the judge instead chose to "take it on a question-by-question basis." At trial, the judge did sustain several defense objections to parts of Keating's testimony and each time that testimony was excluded. However, except as noted specifically herein, the defendant did not object at trial to any of Keating's testimony that was admitted.

[5] Keating explained that crack cocaine is an off-white hard rocklike substance derived from cooking the powder form. The most common quantities sold on the street consisted of a "[twenty]," which is very small (.2 grams), "looks like a pebble" and costs twenty dollars; a "[forty]," which is approximately .5 grams and sells for forty dollars; a "[fifty]," which is one gram or a little less, selling for fifty dollars; an "[eight]-ball," which is one eighth of one ounce, or three and one-half grams, with a cost ranging from $150 to $225, depending on the drug purchaser's relationship with the drug

most common packaging of crack cocaine for street sales is for the "rock [to] be placed in the corner of a baggy, twisted, tied off and that's how it's individually wrapped"; the individual packets are then generally "held in one big sandwich bag." The most typical cash denomination in purchasing crack cocaine is a twenty dollar bill.

Keating also testified that, during his time as a narcotics officer, he has spoken with addicts whom he has arrested, as well as addicts used as police informants, learning from them information regarding the methods by which crack cocaine is generally sold and used in the Brockton area. Based on this information, and his experience in conducting surveillance on drug transactions, he testified, over objection, that there are basically three ways that drugs were sold in Brockton in 2014: users purchase directly from the dealer's home; the dealer "flags over cars randomly on the corner" and then makes a quick

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dealer. Keating agreed, however, that every drug dealer has his or her own packaging process. He testified that, based on his experience, purchasing drugs "in bulk" (meaning a larger quantity contained in one package) is generally cheaper than purchasing several smaller packages. He also explained that drug users commonly use homemade pipes (made from "nip bottle" or soda bottles with a straw inserted and heated with a lighter) to smoke crack cocaine.

sale; or through a "delivery service."[6] Keating stated that this last type of sale is "quick."[7]

In addition, Keating testified that, when making drug related arrests, if the arrestee has cash in his or her possession, in addition to individually packaged drugs and a cellular telephone, that is an indication to police that the arrestee may be a dealer; he also stated that "[i]n my training and experience dealing with addicts, usually you don't have much money on you. You're spending it on the drugs. Where a dealer will have extra money on them because they're selling the drugs." Keating opined that the absence of smoking paraphernalia makes a stronger case that the arrestee was selling and not using the drugs.[8] He agreed on cross

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[6] The delivery service entails arrangements made by the user to meet the dealer (most commonly in a parking lot) by car, on foot, or riding a bicycle; if the deal is made in a car, the parties generally drive a short distance, keeping the exchange low so as not to be seen from outside of the car; more specifically, they "go around the block, the deal is made inside the car, [with] a little more privacy. At which time the person, either the user or the dealer, is let out and that person goes on their merry way and the user goes back to their original location."

[7] The defendant's objection was sustained as it related to Keating's opinion about knowing, based solely on observing a delivery service transaction, who in the transaction is the seller and who is the buyer.

[8] Keating explained that a drug user commonly has a pipe on his person or close by, because as soon as the addict purchases the drugs "their urge is so strong they gotta do it right away.

examination, however, that the method used in packaging the drugs in itself is not a definitive indicator as to whether a person is buying or selling drugs.

Further, on cross examination, Keating testified that, in his experience, a person purchasing a larger quantity of crack cocaine would not buy fifteen individual bags, as buying in "bulk" would give them more for their money; however, the addict may purchase one or two bags from a dealer without large quantities in order "to suffice their habit at that time," and then go and search out a dealer they know that would sell a larger quantity for less -- addicts are "shopping and looking for the best deal." He disagreed that it would be common for a dealer on the street selling drugs to have on his or her person a digital scale or empty plastic bags[9]; in his opinion, those are items generally seized with a search warrant at a dealer's home where the weighing and packaging of the drugs is done "behind closed doors." A dealer having only one cellular telephone is not uncommon. The detective also testified that it is common for a dealer involved in a delivery service transaction to have drugs on his or her person for more than one sale; he will

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So not having that paraphernalia on them would show more of a distribution factor."

[9] The detective explained that, in his experience, "a person out on the street dealing drugs - they don't want this paraphernalia on them. They want something that they're going to discard eas[il]y if they're confronted by the police."

commonly conceal the extra supply "in their pants, like in their jock area or between their butt cheeks," or if they have only a few packets, "in their mouth and if they're confronted they can swallow it."[10]

Discussion. The defendant argues that Keating's testimony was admitted improperly because it was based on hearsay and profiling characteristics of drug sellers and users, creating a substantial risk of a miscarriage of justice. We disagree.

"The 'admission of [expert testimony] is largely within the discretion of the trial judge and he [or she] will be reversed only where the admission constitutes an abuse of discretion or error of law.' Commonwealth v. Johnson, 410 Mass. 199, 202 (1991). Where . . . the objection was not preserved, we review the defendant's claim to 'determine whether any error . . . created a substantial risk of a miscarriage of justice.' Commonwealth v. Zimmerman, 441 Mass. 146, 150 (2004)." Commonwealth v. Horne, 476 Mass. 222, 225-226 (2017). "The role of an expert witness is to help jurors interpret evidence that lies outside of common experience." Commonwealth v. Boyarsky, 452 Mass. 700, 716 (2008), quoting from Commonwealth v. Wilson, 441 Mass. 390, 401 (2004).

[10] At the close of the Commonwealth's case, the defendant's motion for a required finding of not guilty as to so much of the indictment as charged intent to distribute was denied.

"An element of the Commonwealth's case in proving a charge of drug possession with intent to distribute is whether the subject drugs, connected to a given defendant, were for personal use or for distribution. This is not a matter within the common experience of jurors." Commonwealth v. Little, 453 Mass. 766, 769 (2009), quoting from Commonwealth v. Grissett, 66 Mass. App. Ct. 454, 457 (2006). As a result, in this case, the judge did not abuse his broad discretion in allowing, without objection, Keating to testify as an expert in narcotics use and distribution. See Commonwealth v. Gollman, 436 Mass. 111, 115 (2002), quoting from Commonwealth v. Johnson, 413 Mass. 598, 604 (1992) ("The use of narcotics investigators to testify in this manner as experts in drug cases has been consistently upheld").[11]

"[I]n determining whether particular expert testimony is lawful, the better practice is to focus the analysis on whether the evidence is explanatory." Commonwealth v. Bienvenu, 63 Mass. App. Ct. 632, 636 (2005), quoting from Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 581 (1998). Here, Keating, a nonpercipient witness, testified, without objection, to his extensive experience and training in narcotics use and

[11] We note that the defendant brought a motion in limine based specifically on Keating's anticipated profiling testimony. However, in contrast to Commonwealth v. Grady, 474 Mass. 715, 719 (2016), here, the defendant's rights as to this issue were not preserved for appeal because the judge did not resolve the motion during the hearing, but rather, determined to do so on a "question-by-question basis."

distribution (more than twenty years).[12] Based on that experience and training, he provided detailed information as to the packaging and quantities commonly sold on the streets of Brockton in 2014. For that reason, we see no error in allowing Keating to testify that, in his opinion, the amount of drugs possessed by the defendant was not consistent with personal use but was consistent with an intent to distribute; Keating's opinion was supported by previously admitted evidence. Certainly, admission of this evidence did not create a substantial risk of a miscarriage of justice. See Little, supra.

In addition, Keating's testimony about observations he had made during the surveillance of various unrelated drug transactions also was properly admitted. Based on his training and observations of over one thousand drug transactions, Keating provided to the jury explicit information about the process of a "delivery service" drug sale and the reason dealers use this method to transact drug sales. Although the defendant objected to the admission of this testimony, the judge rightly overruled

[12] The defendant's argument that Keating's testimony included hearsay when he testified about conversations with persons whom he had arrested or persons who were cooperating with the police as informants fails, because that testimony was not offered for its truth, but, rather, to explain the underpinnings for Keating's expertise; in fact, Keating did not relate the specifics of any such conversation, only the conclusions he drew from all of his experience.

the objection because the prosecutor's request for Keating's opinion as to the ways in which crack cocaine was sold in 2014 on the streets of Brockton was not improper. See Commonwealth v. Almele, 474 Mass 1017, 1018 (2016), where the court held that the testimony of the expert police officer that his "opinion was that the . . . drugs that were found on the [d]efendant were intended for distribution" created neither prejudicial error nor a substantial risk of a miscarriage of justice. Ibid.

Finally, during the judge's final instructions to the jury, he explained properly the appropriate use of expert witness testimony, informing them that "[e]xpert testimony does not inherently have any greater weight than any other testimony of any other witness. . . . As with any witness, you may believe all of an expert witness'[s] testimony, some of it or none of it. In considering an expert's testimony, you may take into account the witness'[s] education, training and experience and background, the reasons given for the opinion and all the other evidence in the case."

Commonwealth v. Horne, supra, decided after this case was tried and after it was briefed, is not to the contrary. There, the expert witness testified about physical characteristics of drug users, concluding that "the majority of them you will notice them to be somewhat unkempt, very thin, physical appearances seem to be deteriorating, sometimes they'll have

rotted teeth or worn down teeth from constantly grinding their teeth based on the addiction that results from the crack use." Horne, 476 Mass. at 225. At trial in Horne, "the Commonwealth attempted to prove that since the defendant did not match the physical characteristics of a drug addict, he must be a drug dealer. On appeal, the Commonwealth maintain[ed] that this use of profiling evidence was permissible because it did not explicitly compare the defendant to the profile of a drug dealer." Id. at 227. The court disagreed, saying "[c]ontrary to the Commonwealth's assertion, however, such so-called negative profiling evidence — where the goal is to demonstrate that a person does not fit a particular profile — falls squarely within the scope of the profiling evidence we have long prohibited." Ibid. In the case before us, none of Keating's testimony involved such profiling, addressing, as it did, how drug transactions typically occurred, rather than what drug dealers (or drug buyers) look like.[13]

Keating's "testimony [that was admitted] was beyond the ken of the jurors and appropriately explanatory, and did not intrude on the fact-finding function of the jury." Commonwealth v.

[13] In fact, when the prosecutor sought to offer evidence that drug buyers "are looking around, that they drive kind of randomly and that it's like it's kind of like a useless or meaningless drive. They are just looking for somebody," the judge sustained the defendant's objection on the ground that this would constitute "improper profile evidence of the buyer."

Bienvenu, 63 Mass. App. Ct. 632, 636-637 (2005). As a result, and given the judge's proper instructions to the jury, we are satisfied that there was no error in admitting that evidence, and certainly no risk of a miscarriage of justice. See Commonwealth v. Madera, 76 Mass. App. Ct. 154, 160-161 (2010).

Judgments affirmed.