RENDERED: September 3, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002648-MR

MICHAEL PENMAN — APPELLANT

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES KELLER, JUDGE
ACTION NO. 98-CR-00645

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a conviction of three counts of trafficking in a controlled substance and one count of second-degree persistent felony offender. Appellant, Michael Penman, argues that the trial court erred when it failed to declare a mistrial after the Commonwealth brought in evidence at trial that the court had previously ruled inadmissible. After reviewing the record and the applicable law, we affirm.

The facts of the case are as follows: A confidential informant had provided information to the Lexington Police Department that Leslie Hurrigan, "Hurrigan", was selling cocaine from his residence. The informant indicated that Hurrigan didn't

keep the drugs at his residence but would call other persons, including appellant, who would bring the drugs to him. The informant agreed to participate with the police in controlled drug purchases and was provided with marked drug money and surveillance equipment.

The first drug transaction was conducted on April 3, 1998. The informant went to Hurrigan's residence, and a Kimberly Lyons transported cocaine to Hurrigan's home, which was subsequently sold to the informant. No arrests were made after that transaction, and the informant agreed to participate with the police in further investigations.

On April 6, 1998, the informant contacted Hurrigan for a second drug purchase. Hurrigan placed a call to someone, presumed to be appellant, who indicated they would meet them at Hurrigan's residence in approximately twenty minutes. Appellant was photographed entering and leaving the residence a short time later. The informant purchased a substance, allegedly from appellant, which was identified by the Kentucky State Police Forensic Laboratory as one yellow "rock" weighing approximately 442 mg containing cocaine base.

On April 9, 1998, the informant contacted Hurrigan again for a drug purchase. The informant was told that a pair of Nike Air Jordan XIII tennis shoes would be needed for the transaction, along with $50.00 cash. The informant went to Hurrigan's residence with the requested shoes and cash. The inside of the shoes had been marked by Detective Pete Ford so that he could positively identify them later. After the informant arrived, Hurrigan placed a call to a person, presumed

to be appellant, concerning the transaction. Appellant drove to the residence a short time later and was photographed entering and leaving the residence. The informant allegedly gave appellant the tennis shoes and $50.00 cash in exchange for substances in two plastic bags. The police lab determined one bag contained approximately 627 mg of yellow solid and the other contained approximately 116 mg of white solid; both substances contained a cocaine base.

On April 16, 1998, the informant contacted Hurrigan for another purchase. Upon the informant's arrival, Hurrigan placed a call to a person believed to be appellant. Hurrigan told the informant that they would have to drive to appellant's location on Centre Parkway. Undercover officers monitored the scene, and appellant was observed standing on a balcony while John Walker, a resident of the Centre Parkway area, completed the transaction with the informant. The substance purchased by the informant was identified by the police lab as yellow "rocks" weighing approximately 363 mg containing cocaine base.

Appellant was arrested on May 6, 1998. Hurrigan was arrested on May 6, 1998. Walker was arrested on May 7, 1998. Lyons was arrested on May 28, 1998. After his arrest, appellant was interviewed at the Fayette County Detention Center by Detective Ford. Ford discussed the pending drug trafficking investigation, and appellant allegedly acknowledged his involvement in the sale of drugs. During the interview, appellant also allegedly confessed to Ford that he had flushed 22 ounces of cocaine down a toilet on a prior occasion, although this was unrelated to the transactions with which he was charged.

During a search of appellant's home in Nicholasville, Kentucky, police officers found the Nike shoes marked by Detective Ford that had been used in the April 9, 1998 transaction. On June 23, 1998, appellant was indicted by the Fayette Circuit Court on three counts of trafficking in a controlled substance first degree and one count of persistent felony offender second degree.

Prior to trial, appellant filed a motion in limine, asking the court to rule that certain evidence not be admitted. The court ruled that the statement that appellant allegedly made to Detective Ford, that he had on a prior occasion flushed 22 ounces of cocaine down a toilet, was inadmissible.

Appellant was tried by a jury on September 29, 1998. The informant did not testify. Hurrigan and Walker testified that it was appellant who had sold the drugs. Detective Ford, testifying as to the contents of appellant's post-arrest interview, stated that appellant, "told me that he does sell crack cocaine but that he's not as big a dealer as people make him out to be," that appellant claims that "he doesn't control the crack cocaine scene in the Centre Parkway area," and that appellant stated that he had a source out of Toledo from whom he has acquired over a kilo of cocaine.

Detective Ford then testified that appellant "stated that he flushed 22 ounces of cocaine down the toilet in the early part of 1998 when detectives executed a search warrant that was meant for . . .", at which point appellant objected as it violated the court's prior ruling that this evidence was inadmissible. The Commonwealth argued that previous testimony by

Walker had “opened the door” to the introduction of this statement. Appellant argued that Walker’s testimony had not “opened the door” and moved for a mistrial. The judge noted that there was a break coming up, during which he would decide whether to grant the mistrial. After reviewing Walker’s testimony, the court concluded that it had not “opened the door” as the Commonwealth had asserted. The court found that Detective Ford’s testimony - that appellant “stated that he flushed 22 ounces of cocaine down the toilet” - was clearly a violation of the court’s prior ruling that this evidence was inadmissible. The court stated, however, that, taking everything into consideration, a mistrial was not justified. The court then admonished the jury to disregard the statement, and the trial continued. Appellant testified in his own defense that he didn’t use or sell drugs and that he had purchased the marked Nike shoes from the informant. Appellant also denied making the statements to Detective Ford admitting to his involvement with drugs.

Appellant was convicted of three counts of first-degree trafficking in a controlled substance. Appellant waived his right to sentencing by the jury and entered a plea of guilty to second-degree persistent felony offender. Appellant was sentenced to seventeen years’ imprisonment.

Appellant argues that the trial court erred when it failed to declare a mistrial after the Commonwealth intentionally violated the court’s previous ruling by introducing the statement about appellant having flushed twenty-two ounces of cocaine down a toilet. Appellant asserts that the evidence against him was not strong, and the Commonwealth’s introduction of the

inadmissible statement served only to inflame the jury. Appellant argues that since his defense was that he didn't use or sell drugs, if Detective Ford had not "slipped in" evidence that appellant had, on a prior occasion, possessed a large amount of cocaine worth thousands of dollars, the jury might not have found him guilty.

A motion for mistrial must be reviewed according to the facts and circumstances of the individual case. Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734 (1996). A mistrial should only be granted by the trial court if there is a manifest, urgent, or real necessity for such action. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985), cert. denied, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986). The Kentucky Supreme Court has stated:

> It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. 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.

Gould, 929 S.W.2d at 738.

After reviewing the record, we determine that the judge's admonishment of the jury not to consider the statement made by Detective Ford was sufficient to remove its prejudicial effect. The trial judge admonished the jury as follows:

> Ladies and gentlemen, during Officer Ford's testimony he made a statement that Penman had told him that he had flushed twenty-two ounces of cocaine down the toilet. I had previously ruled that he would not be able to make that statement to you, that he could not state that Penman had told him that . . . and

> the reason why, is there is no evidence of that, there is no proof that that happened or didn't happen. There is no way to prove it either way and there is no additional proof of it . . . and so it is irrelevant, and it only can serve to inflame and prejudice you in determining his guilt of these other charges, and that is something that is completely unrelated and there is no evidence that it happened or it didn't happen and so that's why I'd excluded it. And the Commonwealth intentionally violated my ruling in that regard by bringing that out with that police officer . . . and so I'm going to admonish you do not consider that, do not consider that in any manner whatsoever, because there is certainly no evidence that that happened and the only thing that it could serve is just to inflame you on these other charges and there's no evidence that it happened and it does not have anything to do with this case. Can each of you disregard that testimony and not consider that in reaching the verdicts in this case. Is there anyone who thinks they cannot, raise your hand? O.K., thank you.

It is normally presumed that a jury will follow an instruction to disregard inadmissible evidence that is inadvertently presented to it, unless (1) there is an overwhelming probability that the jury will be unable to follow the court's admonition; and (2) a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant. Alexander v. Commonwealth, Ky., 862 S.W.2d 856 (1993), overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883, citing Greer v. Miller, 483 U.S. 756, 766, n. 8, 107 S. Ct. 3102, 3109, n. 8, 97 L. Ed. 2d 618 (1987). "Absent bad faith, an admonition given by the trial judge can cure a defect in testimony." Alexander, 862 S.W.2d at 859. See also Stanford v. Commonwealth, Ky., 734 S.W.2d 781 (1987); Dunn v. Commonwealth, Ky. App., 689 S.W.2d 23 (1984).

We adjudge that there is no overwhelming probability that the jury was unable to follow the trial court's admonition. The admonition was lengthy, acknowledged that the Commonwealth had intentionally violated the court's ruling, and emphasized that there was no proof of the cocaine flushing incident to which Ford had testified. The judge asked if any of the jurors felt that they couldn't disregard the statement. Furthermore, in light of Ford's other testimony, the introduction of the inadmissible statement was not devastating to appellant. Ford had already testified that appellant admitted to being a small time dealer and that he had a drug source in Ohio from whom he'd previously acquired up to a kilo of cocaine. Additionally, the trial court found that, although the Commonwealth did intentionally violate the court's ruling, it did not do so with malice.

Absent an abuse of discretion, a trial court's decision whether or not to grant a mistrial will not be disturbed. See Miller v. Commonwealth, Ky., 925 S.W.2d 449, 453 (1996). Having determined that the trial court's admonition to the jury was sufficient to remove the prejudicial effect of Detective Ford's statement, we adjudge that the trial court did not abuse its discretion in not granting a mistrial. For the aforementioned reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Shaw
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BRIEF FOR APPELLEE:

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