

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001175-MR

CARL MARSHALL, SR.

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 04-CR-00113

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ABRAMSON¹ AND HOWARD, JUDGES; GUIDUGLI,² SENIOR JUDGE.

ABRAMSON, JUDGE: Carl Marshall, Sr. appeals from a Lewis Circuit Court judgment entered on April 21, 2006, convicting him of five counts of drug trafficking, in accord with a jury verdict, and sentencing him to sixteen years in prison. The jury found Marshall guilty of two counts of First Degree Trafficking in a Controlled Substance, two

¹ Judge Lisabeth H. Abramson completed this opinion prior to her appointment to the Kentucky Supreme Court effective September 10, 2007. Release of the opinion was delayed by administrative handling.

² Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

counts of Trafficking in Marijuana Within 1,000 Yards of a School, and one count of Trafficking in Marijuana (Less Than Eight Ounces). Marshall contends that he was substantially prejudiced by the trial court's failure to grant his motion for a mistrial, which he made after a prosecution witness testified about a statement that had not been provided to the defense during discovery. The Commonwealth argues that this issue was not preserved for appeal, that the trial court did not err when it overruled Marshall's motion and, in the alternative, any error was harmless due to the overwhelming evidence against Marshall. Finding that the trial court did not err, we affirm.

The Commonwealth alleged that during the months of March and April 2004, Marshall engaged in five drug sales with two confidential informants in Garrison, Kentucky. According to the prosecution, on March 14, 2004, Marshall sold four marijuana cigarettes to a confidential informant for \$20.00. From April 16 to April 23, 2004, Marshall sold the following drugs on four separate occasions to a different confidential informant: a \$25.00 bag of marijuana, two 20mg oxycodone pills, two marijuana cigarettes, and one 40mg oxycodone pill. Marshall was indicted in December 2004, and his trial began in March 2006.

On March 20, 2006, the first day of Marshall's trial, the prosecution called Deputy Dwayne Stone, one of the investigating officers, to testify. During the direct examination, the prosecution asked Deputy Stone if he had come into contact with Marshall since the December indictments. Deputy Stone responded, "Yes." The prosecution then asked Deputy Stone if Marshall had made any statements to him about

this case. Deputy Stone started to respond by saying “Uh,” but before he could give a definitive answer, defense counsel objected. A bench conference followed, in which defense counsel argued that no statements made by Marshall to the police were provided to him during discovery. The Commonwealth countered that they had only found out about the statement on the previous day.

The court excused the jury for a recess, then permitted Deputy Stone to testify by avowal. After eliciting that Marshall's statement to Deputy Stone involved Marshall saying he just wanted to get the case over with and do his time, the prosecution decided not to pursue this line of questioning. When the trial resumed, defense counsel moved for a mistrial, arguing in a bench conference that Deputy Stone's statements were highly prejudicial to Marshall and an admonition would not correct this prejudice. The trial court responded that it would only admonish the jury as to Deputy Stone's testimony, but stated that defense counsel's motion for a mistrial was noted. The trial court then admonished the jury by stating,

The court, at this time, will admonish you not to consider the last answer of the witness that was on the stand. Disregard it. Remove it from your memory and don't consider it for purposes of the outcome of this case.

Following the admonition, Marshall made no further objection and the trial resumed.

Marshall now contends that because this admonition was not sufficiently detailed, it failed to remedy the substantial prejudice he faced from the implication of Deputy Stone's testimony. He argues that this prejudice resulted in a denial of his due process right to a

fair trial and the only adequate relief available now is to reverse and remand for a new trial. We disagree.

Although Marshall argued that an admonishment would not cure the prejudicial effect of Deputy Stone's statement and moved for a mistrial, he certainly did not raise the issue with the trial court that the admonition given was unconstitutionally vague. In order for an issue to be preserved for appeal, the appellant must have presented the claim to the trial court. *Hilsmeier v. Chapman*, 192 S.W.3d 340, 345 (Ky. 2006); *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1977). Since Marshall failed to argue at trial that the specific admonishment given was not detailed enough to explain the prejudice from which he suffered, we decline to address this issue on appeal. However, whether or not the trial court erred in denying Marshall's motion for a mistrial was preserved for appeal and is subject to review.

On appeal, a trial court's decision to overrule a motion for a mistrial is reviewed for abuse of discretion. *Gould v. Carlton Company, Inc.*, 929 S.W.2d 734, 741 (Ky. 1996). For a court to grant a mistrial, it must find that the alleged error is “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.* at 738. In this case, because the occurrence complained of did not rise to this level of manifest injustice and the prejudice could be corrected through a less severe action, the trial court did not abuse its discretion in denying the mistrial.

The utterance from Deputy Stone did not confirm one way or another that Marshall had in fact given a statement to the police about his pending charges. Even if a jury could infer that Deputy Stone was prevented from disclosing an inculpatory statement made by Marshall, this inference still does not rise to the level of fundamental unfairness needed to justify granting a mistrial for two reasons. First, the prosecution introduced overwhelming evidence of Marshall's guilt. Deputy Stone testified that before each attempted drug buy, the informants were searched thoroughly and found to have no drugs on them; but after subsequently spending time in Marshall's residence, they returned to the police officer's car with drugs. Two other investigating officers testified about how the confidential informants got involved in this case and how they were to initiate the drug buys from Marshall. Both of the informants testified against Marshall and confirmed that he sold them drugs on each of these occasions. In addition, four of the drug transactions were recorded with hidden video and audio equipment worn by the informants, and these videos were played for the jury. Because the jury had a plethora of evidence against Marshall on which they could have based their guilty verdict, the inference that Marshall might have made an incriminating statement to Deputy Stone did not result in an unfair trial.

Furthermore, the trial court did not abuse its discretion in denying Marshall's motion for a mistrial because the admonition to the jury cured any prejudice associated with Deputy Stone's testimony. It is presumed that a jury will follow such an admonition given by the court. *Alexander v. Commonwealth*, 862 S.W.2d 856, 859 (Ky.

1993). The two circumstances under which this presumption will not apply are absent from Marshall's trial. *See Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). First, there is no reason in this case to think that the jury was unable to follow the court's admonition not to consider Deputy Stone's answer. Second, the prosecutor had a factual basis for asking Deputy Stone the question regarding Marshall's statement. Thus, since it is presumed that the jury properly disregarded this part of Deputy Stone's testimony, no prejudice arose against Marshall and his motion for a mistrial was properly denied.

In sum, because Marshall failed to allege that the admonition was unconstitutionally vague at trial, we will not review that issue on appeal. We also find that due to the overwhelming evidence against Marshall and the curative admonition given to the jury, the trial court did not err when it denied Marshall's motion for a mistrial. Thus, the Lewis Circuit Court judgment of April 21, 2006, is affirmed.

ALL CONCUR.

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