RENDERED: DECEMBER 2, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000449-MR

LEAH TRAMBLE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 09-CR-00640

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE, CAPERTON AND CLAYTON, JUDGES.

CAPERTON, JUDGE: Leah Tramble appeals as a matter of right her conviction of Trafficking in Marijuana over five pounds and her corresponding sentence of five years of imprisonment. On appeal Tramble argues that the trial court made multiple evidentiary errors and that during closing arguments the Commonwealth committed prosecutorial misconduct. After a review of the parties' arguments, the

record, and the applicable law, we agree with Tramble that the Commonwealth improperly argued prejudicial facts not in evidence and, therefore, we reverse and remand this matter to the trial court.

The facts in this matter were testified to at trial. U.S. Postal Inspector Karen O'Neill was investigating the transportation of marijuana through the mails from her post in Cincinnati, Ohio. In February of 2009, her investigation had focused on a man named John Cottrell. While investigating the case against Cottrell, Inspector O'Neill became familiar with Tramble. On August 31, 2009, Inspector O'Neill received a phone call from Deputy Michael Kappes with the Boone County Sheriff's Department. Deputy Kappes was assigned to the Northern Kentucky Drug Strike Force as a drug interdiction agent. Deputy Kappes told Inspector O'Neill that he had received a call from Arizona reporting that a package containing marijuana was to be delivered via FedEx to an address in Crescent Springs. Deputy Kappes requested that Inspector O'Neill determine the location of the address in question. Inspector O'Neill discovered that the address was for a box at a UPS Store in Crescent Springs and the person who had rented the box was Tramble.

Pursuant to a warrant, Deputy Kappes, Inspector O'Neill, and other law enforcement officers opened the package bound for Tramble's box and discovered over five pounds of marijuana. Deputy Kappes arranged for the package to be delivered to the UPS Store and for one of his agents to pose as a clerk. Shortly before closing time, Tramble was observed walking into the UPS

Store, where she signed for and received two boxes, including the traced box. Upon leaving the store, Tramble was intercepted by the police. Deputy Kappes and Inspector O'Neill spoke with Tramble. According to them, Tramble knew that the packages contained marijuana and that she was to deliver them to Cottrell in Cincinnati. When both packages were opened the combined weight of the discovered marijuana was seventeen pounds.

Although Tramble offered to cooperate with the authorities, Inspector O'Neill could not make arrangements with the Cincinnati Police Department for a "sting" to incriminate Cottrell. Thus, Tramble was charged with Trafficking in Marijuana over five pounds and Conspiracy to Traffic in Marijuana.

After a jury trial, Tramble was convicted of Trafficking in Marijuana over five pounds and was sentenced to five years of imprisonment. It is from this conviction and sentence that she now appeals.

On appeal Tramble presents three arguments. First, the trial court erred when it allowed the Commonwealth to present evidence of an oral statement of Tramble that it failed to turn over in compliance with the trial court's discovery order and Kentucky Rules of Criminal Procedure (RCr) 7.24. Second, the trial court erred when it overruled Tramble's motion to prevent prior bad acts evidence from being admitted during the Commonwealth's case-in-chief. Third, the prosecutor improperly commented on defendant's silence during closing argument on multiple occasions and argued facts not in evidence, denying her due process of law.

The Commonwealth presents three counterarguments. First, that there was no discovery violation under RCr 7.24 because the report was turned over to the defense twenty-six days prior to trial, the day it was received by the Commonwealth. Second, the trial court properly overruled the Appellant's motion to prevent prior bad acts evidence from being admitted in the Commonwealth's case-in-chief for three reasons, namely: (1) the uncharged act was never admitted; (2) the evidence set forth in Appellant's brief does not amount to prior bad acts pursuant to Kentucky Rules of Evidence (KRE) 404(b); and (3) the testimony was admissible to show knowledge. Third, the Commonwealth asserts that its closing argument was proper in that there was no improper comment on Appellant's failure to testify, the Commonwealth was entitled to respond to the Appellant's closing argument, and the prosecutor clarified any misstatement. With this in mind we now turn to Tramble's first argument.

Tramble first argues that the trial court erred when it allowed the Commonwealth to present evidence of an oral statement made by Tramble that it failed to turn over in compliance with the trial court's discovery order and RCr 7.24. Given that this issue concerns an evidentiary matter, we note that our review is for an abuse of discretion. *See Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Prior to trial, the trial court issued a discovery order which required the Commonwealth to turn over any "oral incriminating statement" of the accused to the defense. After the original trial date had passed and a few weeks before the new trial date, the Commonwealth provided defense counsel with Inspector O'Neill's report which contained an incriminating oral statement made by Tramble. Defense counsel filed a motion in limine arguing that said statement should be excluded because the Commonwealth had violated the trial court's discovery order and RCr 7.24. The trial court denied the motion and Inspector O'Neill was allowed to testify as to the oral statement made by Tramble. At trial, Inspector O'Neill and Deputy Kappes testified that Tramble acknowledged knowing that the packages she picked up from the UPS Store contained marijuana.

We agree with Tramble that the Commonwealth violated RCr 7.24. RCr 7.24(1) states:

> (1) Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth, and (c) upon written request by the defense, the attorney for the

> Commonwealth shall furnish to the defendant a written summary of any expert testimony that the Commonwealth intends to introduce at trial. This summary must identify the witness and describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

As noted in *Chestnut v. Commonwealth*, 250 S.W.3d 288, 296 (Ky. 2008):

> RCr 7.24(1)(a) demands disclosure of "any incriminating statement." This is not a vague or complex concept. Basically anything that the defendant has said to a witness which in any way incriminates himself or herself must be disclosed to the defense. This part of the rule does not require that the statement even be recorded, simply that the Commonwealth know of the statement.

Id. We fail to see how the Commonwealth could not be aware of Tramble's oral incriminating statement to Inspector O'Neill given that the statement was made in the presence of Deputy Kappes.

RCr 7.24(1) requires the Commonwealth to disclose upon request any oral statement known by the Commonwealth to have been made to any witness. Thus, its disclosure was mandated by the rule. Additionally, a plain reading of RCr 7.24 reveals that disclosure is not limited to only those statements made to agents of the Commonwealth as asserted by the Commonwealth but encompasses all those statements made to any witness within the knowledge of the Commonwealth. Thus, the Commonwealth violated RCr 7.24 by failing to disclose the oral incriminating statement Tramble made to Inspector O'Neill.

Pursuant to RCr 7.24(9), the trial court is permitted wide latitude in dealing with a violation under RCr 7.24, including the discovery or inspection of

materials not previously disclosed, by granting of a continuance, or by prohibiting the party from introducing into evidence the material not disclosed, or it may enter such other order as may be just under the circumstances. The trial court did exceed its discretion in not addressing the Commonwealth's violation of RCr 7.24. Nevertheless, we find such error to be harmless since the evidence was cumulative of Deputy Kappes's testimony.

Where impermissible testimony is cumulative of other testimony, its admission is harmless error. *See Torrence v. Commonwealth*, 269 S.W.3d 842, 846 (Ky. 2008). *See also Akers v. Commonwealth*, 172 S.W.3d 414, 417 (Ky. 2005) (internal citations omitted) ("The trial court has broad remedial powers under RCr 7.24(9)…[a] discovery violation justifies setting aside a conviction 'only where there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different."). Additionally, the evidence, though not disclosed before the original trial date, was disclosed before the trial was conducted; thus, any plea negotiations could have been renewed at the time disclosed. Therefore, any error was harmless.

We now turn to Tramble's second argument, namely, that the trial court erred when it overruled Tramble's motion to prevent prior bad acts evidence from being admitted during the Commonwealth's case in-chief. Prior to trial, Tramble made a motion in limine asking the trial court to order the Commonwealth not to reference any mailings containing marijuana to Tramble's residence in Ohio[1]

[1] We note that the Commonwealth did not provide formal written notice under KRE 404(c).

and that the Commonwealth make no reference to prior investigations. The trial court overruled Tramble's motion in limine.

As discussed, *infra,* we review an evidentiary matter for an abuse of discretion. *See Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

KRE 404(b) makes evidence of other crimes, wrongs, or acts inadmissible to prove the character of a person in order to show conformity. Two exceptions exist within the rule. KRE 404(b)(1) allows admission of the evidence if offered for some other purpose, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b)(2) allows admission of the evidence if it is so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party.

If evidence is admissible under KRE 404(b), it may still be excluded under the KRE 403 balancing test. *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994). *See also Davis v. Commonwealth*, 147 S.W.3d 709, 725 (Ky. 2004) ("Although relevant and probative, the evidence can still be excluded if its probative value is substantially outweighed by its prejudicial effect. KRE 403."). In determining the admissibility of "other acts" evidence, it is useful to analyze the evidence using a three-tier inquiry involving its: (1) relevance, (2) probativeness,

and (3) prejudice. *Bell* at 888-891. An appellate court will only reverse the evidentiary ruling if an abuse of discretion has occurred. *Barnett v. Commonwealth*, 979 S.W.2d 98 (Ky. 1998).

We agree with Tramble that the trial court erred by not sustaining her motion in limine to exclude reference to prior uncharged criminal activity. Clearly Tramble would be unduly prejudiced by the admission of such accusations; such prejudice substantially outweighed its probative value, failing the KRE 403 balancing test. Accordingly, we find reversible error in the trial court's denial of Tramble's motion in limine.

Additionally, Tramble argues that the Commonwealth did not provide proper notice under KRE 404(c). KRE 404(c) requires reasonable pretrial notice of the Commonwealth's intention to offer other crimes, wrongs, and acts evidence prior to trial. Our courts have previously upheld the admission of KRE 404(b) evidence on "actual notice" grounds, even where the prosecution fails to provide written notice of its intentions, provided that the defendant had an opportunity to challenge the admission of the evidence through a motion in limine. While in the case *sub judice* the Commonwealth did not give actual written notice under KRE 404(c), defense counsel filed a motion in limine challenging the admissibility of the prior bad act before trial. As noted in *Matthews, infra:*

> Whether reasonable pre-trial notice has been given is decided on a case-by-case basis in light of the intent of the notice requirement in KRE 404(c), i.e., "'to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion in limine

> and to deal with reliability and prejudice problems at trial.'"

Matthews v. Commonwealth, 163 S.W.3d 11, 19 (Ky. 2005) (internal citations omitted). *See also Bowling v. Commonwealth*, 942 S.W.2d 293, 300 (Ky. 1997) *overruled on other grounds by McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011) (finding that "Obviously, no prejudice occurred, because Appellant had actual notice and did raise the 404(b) issue in his in limine motion."). In our case Tramble challenged the admissibility of the evidence through her motion in limine and her argument to the trial court. We opine that, based on *Matthews* and *Bowling*, that the bringing of the motion in limine by Tramble and his argument of it before the trial court constituted the required notice.

We now turn to Tramble's third argument, namely, the prosecutor improperly commented on defendant's silence during closing argument on multiple occasions and argued facts not in evidence, denying her due process of law.

Tramble argues that the Commonwealth improperly commented upon her silence in closing argument. Upon review of the record, we disagree. In the case *sub judice,* the Commonwealth discussed how only two witnesses were presented to testify as to what Tramble said when she was arrested and that the jury did not hear any contradictory witnesses or evidence. We agree with the Commonwealth that this was not an impermissible comment on Tramble's failure to testify, since "Not every comment that refers or alludes to a nontestifying defendant is an impermissible comment on his failure to testify." *Ragland v.*

Commonwealth, 191 S.W.3d 569, 589 (Ky. 2006)(internal citations omitted). Moreover, as in *Ragland,* the comments made by the Commonwealth were "made in response to defense counsel's closing argument." *Ragland* at 590 (internal citation omitted). Thus, we disagree with Tramble that the Commonwealth improperly commented on her silence. We find no error based on this comment.

Tramble also argues that the Commonwealth improperly argued facts not in evidence during its closing augment. During its closing argument the Commonwealth stated: "already one arrest that came out of a package delivered straight to her [Tramble's] house or addressed straight to her house." Defense counsel immediately objected to the statement since it referenced facts not in evidence. After a lengthy discussion at the bench, defense counsel requested the statement be stricken, moved for a mistrial and when that was denied, moved for an admonition.

The trial court declined to give an admonition and instead let the Commonwealth "clarify" his statements. After our review of the record, we agree with Tramble that the statement made by the Commonwealth concerning the prior arrest for mailing marijuana to her residence was a highly prejudicial statement concerning facts not in evidence before the jury.

The law in Kentucky is clear that:

> If this Court (first) determines that a prosecutor engaged in misconduct in closing argument, reversal is required where "the misconduct is 'flagrant' or if each of the following three conditions is satisfied: (1) Proof of defendant's guilt is not overwhelming; (2) Defense

> counsel objected; and (3) The trial court failed to cure the error with a sufficient admonishment to the jury." . . . The four factors to be considered in determining whether the prosecutor's misconduct was "flagrant" are: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused."

Hannah v. Commonwealth, 306 S.W.3d 509, 518 (Ky. 2010)(internal citations omitted).

In the case *sub judice* the evidence establishing Tramble's guilt is substantial. Thus, she is only entitled to reversal if the Commonwealth's comment was flagrant. The sole prejudicial remark concerning a prior arrest for trafficking in marijuana committed at her residence was evidence not before the jury, and its introduction during closing argument tended to mislead the jury and was prejudicial to Tramble. While the record evidences that the Commonwealth thought this matter was an inference that it could make from the evidence, we believe that this was improper comment and not a reasonable inference.

We have repeatedly held that the Commonwealth "should refer only to evidence heard from the witness stand and should scrupulously keep within the record. Likewise, it is his duty to see that no statement that is calculated to mislead the jury or stir up prejudice in their minds is made." *Bowling v. Commonwealth*, 279 S.W.2d 23, 24-25 (Ky. 1955) (internal citations omitted). Thus, we find the Commonwealth's comment to be flagrant, necessitating reversal.

Moreover, this error may have been cured with a proper admonition from the court but is not one that is capable of being explained by the Commonwealth. Our appellate courts presume that juries will follow the admonition of a trial court and that the admonition will cure an evidentiary error. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). However, because no admonition was given, even though requested, we find reversible error and remand this matter back for a new trial.

In light of the aforementioned, we reverse and remand this matter for further proceedings not inconsistent with this opinion.

ALL CONCUR.

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