

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001057-MR

CURTIS HOWARD

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE DAVID L. WILLIAMS, JUDGE
ACTION NO. 14-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: JONES, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Curtis Howard appeals from a Cumberland Circuit Court judgment following his conviction by a jury of third-degree burglary. We affirm.

The charge against Howard stemmed from the theft of a goat from Donnie Watkins. Watkins raised goats, which he kept in a building close to the back door of his residence. When Watkins and his wife returned home after a day

of fishing, they discovered that one of the goats, PeeWee, was missing. Watkins suspected that Curtis Howard may have stolen the goat, because Howard had been at his home a few days earlier, asking if he had any goats for sale. Watkins had shown Howard his goats, including PeeWee, but told him that they were not for sale.

Watkins reported his suspicions to Deputy Craig Groce. Watkins and Groce went to Howard's house where Watkins was able to identify PeeWee among the goats in Howard's stable. She was not wearing her red collar, but its imprint on her neck was still visible.

Michelle Davis, Howard's stepdaughter, initially gave a statement to the police confessing that she had stolen PeeWee as a present for Howard. She was charged with third-degree burglary, but later withdrew her confession, explaining that she had made it at Howard's behest because he was on probation at the time. She stated that she and her mother actually waited in the truck while Howard took the goat from Watkins. She further stated that Howard put the goat on the floor of the truck, and threw its collar out of the window.

Based on Davis's statement, Howard was charged with third-degree burglary. A jury found him guilty and recommended a sentence of two and one-half years imprisonment. The trial court entered a judgment in accordance with the jury's recommendation, and this appeal followed.

Howard argues that he is entitled to a new trial because the trial court improperly allowed the admission of hearsay evidence.

Deputy Groce testified that Watkins told him that Howard had been at his house asking if he had any goats for sale. Defense counsel objected to the testimony as hearsay.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Kentucky Rules of Evidence (KRE) 801(c).

The Commonwealth concedes that Groce’s testimony was impermissible hearsay because it contained an out-of-court statement offered to prove the truth of the matter asserted: that Howard had been at Watkins’s house, asking if he had any goats for sale. The Commonwealth contends that any error in the admission of the testimony was harmless, however, because it did not affect the outcome of the case. Watkins had already testified about Howard’s visit to his residence before PeeWee was taken. He also testified about going with Deputy Groce to the Howard residence and finding PeeWee.

Howard argues that Deputy Groce’s testimony constituted impermissible bolstering. We disagree, because the facts to which Groce testified were not in dispute. Howard never denied that he had gone to the Watkins residence to inquire about goats. Furthermore, the hearsay statement was not incompatible with Howard’s theory of the case, which was that his stepdaughter had stolen PeeWee as a gift for him.

A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed

by the error. The inquiry is not simply whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Winstead v. Commonwealth, 283 S.W.3d 678, 688-69 (Ky. 2009)(internal citations and quotation marks omitted); Kentucky Rules of Criminal Procedure (RCr) 9.24.

Howard has failed to show how the hearsay in this case could have had a substantial influence on the outcome of his trial, and therefore its admission was harmless error.

Next, Howard argues that he was prejudiced by the admission of KRE 404(b) evidence regarding his status as a probationer. Before Michelle Davis testified, Howard's defense counsel moved to suppress the part of Davis's statement in which she explained that the reason Howard asked her to lie about stealing the goat was because he was on probation in Florida. The trial court directed the Commonwealth to redact that portion of her statement, over the Commonwealth's objection. Davis proceeded to testify that she initially admitted to stealing PeeWee, but later recanted. The Commonwealth's attorney asked whether she said anything else to Curtis Howard after he got back into the truck with PeeWee, and she replied that she was "pretty sure she told him they shouldn't be doing this because he was on probation." Defense counsel objected and moved for a mistrial. The trial court sustained the objection but denied defense counsel's motion for a mistrial. The trial court instead admonished the jury, stating "sometimes things are said that are not supposed to be said by witnesses. The

defendant being on probation – you are to disregard that and not consider it in your deliberations at all.”

Howard argues that the testimony that he was on probation was highly prejudicial and irrelevant to determining whether he committed the burglary. He contends that a mistrial was the only appropriate remedy.

“A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity.” *Graves v. Commonwealth*, 285 S.W.3d 734, 737 (Ky. 2009) (quoting *Bray v. Commonwealth*, 117 S.W.3d 741, 752 (Ky. 2005)). Whether such a necessity exists is “determined on a case by case basis[,]” and we review the trial court’s denial of a mistrial for abuse of discretion. *Id.* “We have long held that an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition.” *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005)(footnotes omitted).

There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court’s admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant . . . ; or (2) when the question was asked without a factual basis *and* was “inflammatory” or “highly prejudicial.” (Emphasis in original).

Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) (internal citations omitted).

Howard argues that the admonition in this case was ineffective because no juror could be expected to erase from his or her mind the evidence that he was on probation and hence possessed a criminal tendency to steal.

Although it may have been difficult for the jurors to follow the admonition and disregard the testimony that Howard was on probation, he has not shown a strong likelihood that the effect of the evidence was devastating to his case. The evidence of his guilt was overwhelming. Michelle Davis and her mother both testified that they witnessed Howard steal PeeWee from Watkins's house, and it was undisputed that PeeWee was found in Howard's stable. Furthermore, although it is unclear whether the question that led to the problematic testimony had a factual basis, it simply does not rise to the level of being inflammatory or highly prejudicial. The Commonwealth's attorney attempted to prevent Davis from continuing her statement, and defense counsel described the statement as a slip of the tongue that was not intentionally elicited. Under these circumstances, the trial court did not abuse its discretion in denying a mistrial.

For the foregoing reasons, the Cumberland Circuit Court judgment is affirmed.

ALL CONCUR.

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