RENDERED: MAY 19, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000270-MR

JAMES D. CLAXON — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 13-CR-00088

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, STUMBO AND TAYLOR, JUDGES.

ACREE, JUDGE: James Claxon appeals his conviction on two counts of first-degree trafficking in a controlled substance and his resulting sentence of nineteen years' imprisonment. The issues presented are (1) whether the trial court abused its discretion in denying Claxon's motions for a mistrial based upon an allegedly tainted jury pool; and (2) whether it was palpable error for the trial court to allow

into evidence, during the penalty phase of his trial, proof of charges against Claxon that were previously dismissed pursuant to a plea agreement.

After carefully considering the record and the arguments, we affirm.

I. Factual and Procedural Background

James Claxon was indicted on two counts of first-degree trafficking in a controlled substance after he sold hundreds of oxycodone pills in what he later discovered to be two "controlled buy" law enforcement operations.

On the first day of Claxon's trial, thirty-one names were drawn for the venire panel. The court recessed for lunch during *voir dire*. Upon return, the trial court questioned the entire panel if anyone needed to report anything that may have happened during the break. A prospective juror responded and came forward. He was called to the bench along with counsel where he reported that he heard a woman in the hallway outside the courtroom broadcasting surprise that her son, who was on trial, had not pleaded guilty. He further stated that he recognized other panel members in the vicinity, but was not sure if they heard her comments. After further questioning by the court, the panel member responded he could set aside any statements he had heard, and he had not formed any opinion about the defendant based upon the remarks.

The trial court then asked the entire group if anyone had heard anything said about the trial, the defendant, or the allegations, in the hallway, elevators, or parking lot as they returned to the building from lunch. Five additional prospective jurors responded affirmatively. Each were called to the

bench individually, and each reported Claxon's mother's statements to the same effect: it was her son who was on trial and she was surprised he had not entered into a plea bargain. Of the six who reported hearing Mrs. Claxon's statements, one admitted that he would not be able to put it out of his mind. He stated the comment made him believe the defendant was guilty. The others maintained they could disregard what they had heard.

Defense counsel moved for a mistrial, arguing that the six prospective jurors represented a significant portion of the venire panel. The motion was denied. The trial court then directed those who had heard anything about the case, the trial, or the defendant not to repeat it to anyone, except if specifically asked by counsel or the court. Out of caution, the trial court excused the six members that had come forward and called replacements for them. The replacement members were then questioned by the trial court if they had heard anything about the trial or the defendant outside the courtroom as they entered the building. There was no response.

The trial court again repeated the questioning to the entire panel. A juror raised her hand. She was called to the bench. She informed the court that she heard a woman in the hallway announce that her son was here for trial. She asserted that she heard nothing further. Upon questioning, she responded that the statement did not impact her in any way.

Defense counsel renewed their motion for a mistrial, this time arguing that not all of the tainted jurors had come forward and been removed. The motion

was overruled so as not to defeat the purpose of *voir dire*. The trial court also noted there was nothing prejudicial about what the juror reported she heard. Counsel did not move to excuse the seventh juror that came forward.

Shortly thereafter, an eighth person came forward indicating they had heard the comments Mrs. Claxon had made outside the courtroom that other jurors had reported. However, that prospective juror provided that he did not think anything of the comment at the time he heard it, until he saw Mrs. Claxon lean over the railing and speak with the defendant twice in the courtroom. After that, he stated he thought he needed to bring it to the attention of the court. Defense counsel renewed his motion for a mistrial for the same reasons stated previously. The trial court overruled the motion again stating that if he were called, he would be excused through the *voir dire* process and it was clear that the jurors were following the court's previous admonition.

Ultimately, the trial proceeded. Claxon was found guilty on both counts. The jury recommended a sentence of ten years' imprisonment on the first count, and nine years on the second, with the terms to run consecutively. The Carter Circuit Court entered a judgment consistent with the jury's verdict and sentencing recommendation. This appeal followed.

II. Standard of Review

The standard of review of denial of a mistrial is abuse of discretion. *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993). An abuse of discretion occurs when a court acts arbitrarily, unreasonably, unfairly, or in a

manner "unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

III. Analysis

Tainted Jury Pool

Claxon first argues that the trial court erred in failing to declare a mistrial after comments made by Claxon's mother during the lunch break in the presence of several prospective jurors were brought to the court's attention.

"[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a 'manifest necessity for such an action.'" *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004) (quoting *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002)). "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 v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996) (citations omitted). Here, Claxon contends that his mother's comments tainted the pool of prospective jurors, and the trial court abused its discretion in denying his motions for a mistrial, especially after two jurors came forward after the court's questioning and admonition and replacement of six others.

A defendant is required to show actual or implied prejudice which tainted the jury pool. *Shegog v. Commonwealth*, 142 S.W.3d 101, 110 (Ky. 2004). Mrs. Claxon's statements provided justification for the circuit court to strike those particular jurors who heard her make them. But the record also plainly

demonstrates the statements did not reach the entire pool of prospective jurors. A trial court must exercise discretion in determining improper tainting of a panel of prospective jurors. *Maxie v. Commonwealth*, 82 S.W.3d 860, 862 (Ky. 2002). The trial court addressed and questioned each individual that presented themselves as having heard comments about the defendant on their way into the courtroom. Additionally, after excusing the initial six jurors, the trial court admonished the remaining entire panel of prospective jurors not to repeat anything that was heard on the way into court to the others. There is a presumption that the jury follows such an admonition. *Id.* at 863 (citations omitted). Also, after the replacement members were called, the trial court again questioned whether anyone had heard anything about the trial or the defendant on their way into the courtroom.

Claxon contends that because two prospective jurors presented themselves after the replacement members had been called, declaring a mistrial was manifestly necessary. We do not agree.

After naming the six replacements, another person informed the court that she had heard the defendant's mother state in the hallway that it was her son who was on trial, but she heard nothing further. Claxon argued that this demonstrates that the jurors were not forthcoming with information, and expressed concern that tainted jurors remained.

In denying Claxon's motion for a mistrial, the trial court noted that what this particular juror had heard was not prejudicial to Claxon, and that if the trial court granted the motion for a mistrial, it would defeat the purpose of *voir*

dire. "The principal purpose of *voir dire* is to probe each prospective juror's state of mind and to enable the trial judge to determine actual bias and to allow counsel to assess suspected bias or prejudice." *Shegog*, 142 S.W.3d at 110 (quoting Bertelsman & Philipps, *Kentucky Practice*, (Civil Rules) 4th Ed., Vol. 7, Rule 47.01(2) (1984)). When another prospective juror came forward, the trial court questioned them at the bench just as with the others. And in denying Claxon's third motion for a mistrial, the trial court again recognized that if that person were called, he would be removed through the *voir dire* process. The trial court also pointed out that by another juror coming forward that the admonition was being followed and the jurors were forthcoming with any necessary information.

The record demonstrates that the trial court's curative actions of striking and replacing six prospective jurors and questioning the entire venire panel as well as certain individuals sufficiently negated whatever prejudice Mrs. Claxon's comments may have inserted into the trial. Accordingly, we discern no abuse of discretion by the trial court with respect to how it chose to manage the members of the jury pool. Thus, Claxon has failed to show prejudice which tainted the jury pool, and therefore, the trial court did not abuse its discretion in denying his motions for a mistrial.

Evidence in Penalty Phase

Next, Claxon argues that evidence introduced during the penalty phase of his trial included proof of prior charges that were dismissed per plea

agreement in violation of KRS[1] 532.055. This argument is unpreserved. Claxon requests that it be reviewed for palpable error pursuant to RCr[2] 10.26 and KRE[3] 103.

The Commonwealth may introduce evidence of a defendant's prior felony and misdemeanor convictions in the penalty phase of trial, but not prior charges subsequently dismissed or amended to other offenses. KRS 532.055(2)(a)(1); *Robinson v. Commonwealth*, 926 S.W.2d 853, 854 (Ky. 1996). Even if such an error occurs, it may not rise to the level of palpable error. *Chavies v. Commonwealth*, 354 S.W.3d 103, 115 (Ky. 2011); *Martin v. Commonwealth*, 409 S.W.3d 340, 349 (Ky. 2013). Under a palpable error standard of review, "[a]n appellate court may consider an issue that was not preserved if it deems the error to be a palpable one which affected the defendant's substantial rights and resulted in manifest injustice." *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011) (quoting *Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002)). Manifest injustice results when the error seriously affects the "fairness, integrity or public reputation of judicial proceedings." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006) (quoting *United States v. Cotton*, 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860) (2002)).

[1] Kentucky Revised Statute.

[2] Kentucky Rules of Criminal Procedure.

[3] Kentucky Rules of Evidence.

Specifically, Claxon contends he was prejudiced by two pages of the Commonwealth's twenty-nine-page penalty phase Exhibit Two, which shows certain offenses with which he was charged had been dismissed, either on the merits or by plea agreement, including driving under the influence, failure to maintain insurance, failure to register a transfer, violation of an Emergency Protective Order, and carrying a concealed deadly weapon. Claxon argues that this inadmissible evidence encouraged the jury to impose a disproportionately harsh sentence. Claxon was sentenced to nineteen years' imprisonment, nearly the maximum punishment he could have received.

The particular offenses appearing on the Commonwealth's Exhibit Two and about which Claxon now complains were not pointed out or highlighted in any way for particular attention by the jury. We cannot conclude the erroneous introduction of such evidence results in manifest injustice because the Commonwealth's exhibit recounted eleven misdemeanor convictions, including numerous convictions for drug-related offenses, and nine prior felony convictions, including five for trafficking in drugs. We find it likely that the jury's recommendation of a nineteen-year sentence was based on Claxon's extensive drug-related criminal history, rather than a small number of dismissed charges for failure to maintain insurance and the like. Consequently, we find no palpable error here.

IV. Conclusion

For the foregoing reasons, the judgment of the Carter Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I dissent because I believe the entire jury venire was compromised. Had there been but a single juror who indicated that he or she heard the statement and was then removed from the venire panel, I would agree with the majority; however, six prospective jurors admitted to having heard the mother's statement. After these six were questioned, excused, and replaced on the panel, two additional jurors came forward stating that they also heard the mother's comment. I believe this shows that the jury pool was irreparably tainted.

BRIEF FOR APPELLANT:

Linda Roberts Horsman
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky