Cite as 2011 Ark. App. 545

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 11-104

	Opinion Delivered SEPTEMBER 21, 2011
DARNELL CHARLES PORTER APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, [NO. CR-09-1147]
V.	HONORABLE DAVID L. REYNOLDS, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Darnell Charles Porter was convicted by a jury of two counts of delivery of cocaine and one count of delivery of a narcotic drug commonly called ecstasy. Mr. Porter was sentenced to three fifteen-year prison terms to be served consecutively. Mr. Porter now appeals, and his sole argument for reversal is that the trial court erred in denying his motion for mistrial. Mr. Porter contends that a mistrial should have been granted because, during the State's cross-examination and impeachment of him during the trial, the prosecutor repeatedly and deliberately compared appellant's prior drug convictions to the current drug charges as being the "same thing." We affirm.

During the jury trial the State elicited testimony from Agent Brian Tatum, who is an investigator for the 20th Judicial Drug Crime Task Force. Agent Tatum testified about controlled drug buys that were executed using a confidential informant on July 16 and

September 10, 2009. The confidential informant was Charles Hall, who was acquainted with Mr. Porter and agreed to cooperate with the police in exchange for having drug charges against him dropped.

Agent Tatum explained the procedures for the controlled buys. On each occasion Mr. Hall called Mr. Porter to arrange the transaction, which occurred at an Exxon station in Conway. Law-enforcement agents would search Mr. Hall's person and his truck, and he was given buy money that had been photocopied. Mr. Hall would then drive to the Exxon station and wait for Mr. Porter to arrive. Mr. Hall was given a recording device that allowed Agent Tatum to hear the transactions. Agent Tatum and other agents were positioned in vehicles across the street to observe the activities at the Exxon station.

During the first operation on July 16, 2009, Mr. Hall was given $200 to buy powder cocaine and $100 to buy ecstasy pills. Mr. Hall proceeded to the Exxon station and parked his truck; Agent Tatum observed Mr. Porter get out of a car and into the passenger seat of the truck. Mr. Porter then sold what was represented to be two grams of powder cocaine to Mr. Hall, and after Mr. Hall asked about the ecstasy tablets Mr. Porter drove to a business around the corner and came back. When he came back, Mr. Porter sold Mr. Hall ten ecstasy tablets in exchange for $100. Mr. Porter drove away, and Mr. Hall drove to a predetermined location to meet with the police. Mr. Hall was again searched for contraband, and he gave the police quantities of drugs that subsequently tested positive for cocaine and ecstasy at the crime lab.

On September 10, 2009, Mr. Hall called Mr. Porter and arranged to buy an ounce of crack cocaine for $1200. On that evening Mr. Hall drove to the Exxon station and Mr. Porter again entered his truck. The two men exchanged money for drugs and Mr. Porter returned to his car. At that time the police surrounded Mr. Porter and arrested him, and a large sum of buy money was found in his possession. A quantity of drugs was recovered from Mr. Hall's truck that was determined by the crime lab to be more than twelve grams of crack cocaine.

The confidential informant, Mr. Hall, also testified for the State. Mr. Hall confirmed that he purchased cocaine and ecstasy from Mr. Porter on July 16, 2009, and that he bought crack cocaine from him on September 10, 2009.

Mr. Porter testified in his defense, and he stated that he has been addicted to drugs since he was twelve years old. He stated that in the past he had acted as an intermediary between drug dealers and buyers. Mr. Porter denied selling any drugs on July 16, 2009. However, he admitted transferring crack cocaine to Mr. Hall in exchange for money on September 10, 2009. Mr. Porter testified that after receiving a call from Mr. Hall on that day he called the dealer and obtained the crack cocaine. Mr. Porter said that there was no money in the deal for him, and that had he not been arrested that day he would have given all of the money to the dealer.

During the State's cross-examination of Mr. Porter, the State introduced prior felony convictions for impeachment purposes. In particular, the State offered proof of Mr. Porter's conviction for possession of cocaine and two convictions for delivery of crack cocaine, which

were committed in 2002. The trial court advised the prosecutor that it could ask Mr. Porter about the convictions and dates but could not go into the details of the convictions. The following exchange occurred during the State's cross-examination:

> PROSECUTOR: Mr. Porter, you were convicted of delivery of a controlled substance, crack; is that correct?
>
> MR. PORTER: Yes, sir.
>
> PROSECUTOR: And also in 2002, delivery of controlled substance, crack, which is what you're charged with here today, correct?
>
> MR. PORTER: It's not the same thing.
>
> PROSECUTOR: You're charged with delivery–
>
> MR. PORTER: Yes, sir.
>
> PROSECUTOR: –of a controlled substance–
>
> MR. PORTER: Yes, sir.
>
> PROSECUTOR: –so it is exactly the same thing.
>
> MR. PORTER: Yes.
>
> DEFENSE COUNSEL: We've now crossed the line into impeachment and to prior bad acts to prove, and I ask for a mistrial.
>
> PROSECUTOR: Absolutely not. It's a conviction. I asked about the conviction, and that's exactly what I did. I didn't get in any detail. It's the same charge.
>
> TRIAL COURT: I'm going to deny your motion for mistrial.
>
> DEFENSE COUNSEL: May we have the curative instruction?
>
> TRIAL COURT: And what would you want the instruction to be?
>
> DEFENSE COUNSEL: I think it would be appropriate for the court to instruct the jury that they are not to consider the fact that he has prior convictions as evidence or as

> any proof that he has more likely than not to have committed a crime on this occasion.
>
> PROSECUTOR: I didn't draw that inference. I only asked him if it's the same thing he's charged with now. I didn't get into any details, and the jury shouldn't be given a special instruction for it.
>
> DEFENSE COUNSEL: There can't be any other inference.
>
> TRIAL COURT: I'm going to grant your motion. Ladies and gentlemen of the jury, when a defendant testified we often find that prior convictions are used to impeach the credibility of the witness. That's the only reason. It is not evidence of guilt or innocence of this particular case. Satisfactory?
>
> DEFENSE COUNSEL: Yes, Your Honor.
>
> PROSECUTOR: Two counts of delivery of a controlled substance. One count also in 2002 for possession of cocaine. You were actually on parole when you picked up these charges. Is that correct?
>
> MR. PORTER: Yes, sir.

In this appeal, Mr. Porter argues that the trial court erred in denying his motion for mistrial because of the State's repeated and deliberate comparison of his prior drug convictions to the current charges as the "same thing." Mr. Porter acknowledges that Rule 609 of the Arkansas Rules of Evidence allows evidence of prior convictions of a witness under certain circumstances for the purpose of attacking the credibility of the witness.[1] However, he submits that the State's repeated characterizations of the prior convictions and current charges as the "same thing" went beyond the purpose of impeachment. Appellant cites *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419 (1983), where the supreme court held

[1]The prior convictions at issue in this case were felony convictions within the past ten years as contemplated by the provisions of Rule 609, and Mr. Porter makes no argument on appeal that they could not be used to impeach his testimony.

that evidence of prior criminal convictions is not admissible to bolster the prosecutor's case by showing that the accused is a bad person but is limited for the purpose of discrediting the witness's testimony. Mr. Porter further asserts that the State's actions violated Rule 404(b), which excludes evidence of other crimes to prove the character of a person or to prove that he acted in conformity therewith. Mr. Porter asserts that the State improperly attempted to convince the jury that they should convict him of the drug charges because he is a bad person with a previous drug conviction who was simply doing the same thing again. And Mr. Porter claims that because these circumstances were so highly prejudicial that they violated his right to a fair trial, the trial court's instruction to the jury did not sufficiently cure the error. Because the trial court erred in failing to declare a mistrial, Mr. Porter requests reversal of his convictions.

A mistrial is a drastic remedy, to be employed only when an error is so prejudicial that justice cannot be served by continuing the trial. *Tatum v. State*, 2011 Ark. App. 80, __ S.W.3d __. Granting or denying a mistrial is within the sound discretion of the trial court, whose decision will not be overturned absent a showing of abuse or manifest prejudice to the appellant. *Id*. An admonition to the jury generally cures a prejudicial statement, unless it is so patently inflammatory that justice could not be served by continuing the trial. *Dover v. State*, 2011 Ark. App. 373.

In the present case, we hold that the trial court did not abuse its discretion in failing to grant a mistrial, nor was there manifest prejudice to Mr. Porter. It is well established that the State has a right to impeach the credibility of a witness with prior convictions under Rule

609. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004). That is what occurred during the State's cross-examination of Mr. Porter after Mr. Porter exercised his right to testify. The trial court did not permit the State to inquire about the underlying facts of those convictions. Any possible prejudice caused by the prosecutor's questions and comments was cured when the trial court gave a curative instruction to the jury making it clear that the prior convictions were to be considered for impeachment only and not as evidence of guilt in this case. On this record, we hold that no reversible error occurred below.

Affirmed.

PITTMAN and HART, JJ., agree.