RENDERED: January 16, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1199-MR

WILLIAM R. DISHMAN, JR. APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 96-CR-4

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

* * * * * * * *

BEFORE: BUCKINGHAM, GARDNER and HUDDLESTON, Judges.

GARDNER, JUDGE: William Dishman (Dishman) appeals from his judgment of conviction for theft by unlawful taking over $300 and for persistent felony offender, second degree (PFO II). After reviewing the three issues raised by Dishman, the applicable law and the record below, this Court affirms.

Dishman's conviction stems from events occurring on November 27, 1995. Dishman and Daphney Briscoe (Briscoe) went to Hill's Department Store in the South Park Shopping Center in Lexington. Chris Walls, a plain clothes store detective working for Hills, later testified that he observed Dishman and Briscoe shoplift items totalling nearly $700 by concealing them in a

wheelchair, duffel bag, and box. Hills' operations manager, Teresa Pettis (Pettis), also observed much of the shoplifting activity. Dishman and Briscoe were arrested after they left the Hills' store and were unable to produce any receipts for the merchandise.

Dishman and Briscoe were jointly indicted in January 1996 for theft by unlawful taking over $300. Briscoe subsequently pled guilty to the charge and later claimed that Dishman did not assist her in shoplifting the merchandise, and was not with her in the store when she took the merchandise. Dishman's case proceeded to a trial by jury, and he was found guilty of theft by unlawful taking of property over $300 and of PFO II. He was sentenced to ten years in prison in April 1996. Dishman has now brought an appeal to this Court.

Dishman first argues that the circuit court erred by refusing to grant his motion for a mistrial after a witness for the Commonwealth allegedly referred to his past record. Specifically, he objects to a statement made by Chris Walls, a store detective for Hills. In response to a question from the Commonwealth regarding the events surrounding the shoplifting, Walls stated that as soon as Dishman walked into the store, Walls was notified by an employee of Hills "that Dishman had a record of." At this point, defense counsel objected and asked to approach the bench. The Commonwealth's attorney told the trial judge that she did not know Walls would make that statement. Defense counsel moved for a mistrial. After conferring with Walls, the court sustained the objection, but denied the motion for a mistrial. The court ordered

Walls' response to be stricken and admonished the jury not to consider the statement. The court asked at least twice if each juror could do this and stated that there was no place in the trial for the response Walls was about to make. We have uncovered no reversible error.

It is ordinarily presumed that a jury will follow an admonition to disregard inadmissible evidence that is inadvertently presented to it, unless (1) there is an overwhelming probability that the jury will be unable to follow the court's admonition; and (2) there is a stong likelihood that the effect of the inadmissible evidence would be devastating to the defendant. Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993). See Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993). Absent bad faith, an admonition by the trial court cures a defect in the testimony. Alexander v. Commonwealth, 862 S.W.2d at 859. This is especially true where there is overwhelming evidence of guilt presented. See Dunn v. Commonwealth, Ky. App., 689 S.W.2d 23 (1984). A mistrial is appropriate only where the record reveals a manifest necessity for such an action or an urgent or real necessity. Clay v. Commonwealth, 867 S.W.2d at 204, quoting Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985). A trial court has discretion in deciding whether to declare a mistrial, and an appellate court must not disturb its decision absent an abuse of discretion. Clay v. Commonwealth, 867 S.W.2d at 204.

In the instant case, the trial court did not abuse its discretion by declining to declare a mistrial. The trial court's

admonition in the instant case was very thorough and cured any prejudice that may have occurred from Walls' incomplete statement. The record shows that the Commonwealth did not elicit the response from Walls. The evidence presented for the Commonwealth's case was strong. While Walls' statement was unfortunate, it was not completed and was not so prejudicial that it could not be cured by an admonition. The cases cited by Dishman are distinguishable, because the statements presented to the jury in those cases were either deliberate or much more egregious than in the instant case.[1]

Dishman next contends that the circuit court erred by refusing to permit him to ask the arresting officer at trial if Briscoe had told the officer at the time of her arrest that she alone had committed the crime and that Dishman was innocent. This issue is not adequately preserved for two reasons. The record shows that Dishman's trial counsel asked the officer if Briscoe made a statement to him on the night she was arrested, regarding the participation of her and Dishman in the alleged shoplifting on the night she was arrested. The Commonwealth objected, and defense counsel stated he was not asking what the statement was but whether there was a statement. Counsel specifically stated that he was not seeking to ascertain the contents of the statement. Dishman's counsel told the court that he thought the Commonwealth would bring

[1]Dishman in his argument maintains that the Commonwealth contributed to the prejudicial effect of the response by continually referring to him and Briscoe as the shoplifters. We have reviewed the passages cited by him but have found no improper conduct or statements which directly call Dishman or Briscoe "shoplifters."

out that Briscoe had made a statement exonerating Dishman for the first time at trial, and he wanted to show that she made a statement regarding participation in the shoplifting to the officer on the night of the arrest.[2]

Thus, the record shows that trial counsel never sought to ask the witness about the substance of the statement, so any argument regarding this matter was not adequately preserved. Further, it has been held that error cannot be predicated on rejection of evidence where no avowal is made which would disclose what answer would be given if the witness was permitted to testify. Jones v. Commonwealth, Ky., 833 S.W.2d 839, 841 (1992); Caudill v. Commonwealth, Ky., 777 S.W.2d 924, 926 (1989). In the instant case, the record reflects that Dishman sought no avowal. Additionally, we have found no prejudice resulting from the trial court's apparent refusal to permit the asking of defense counsel's proffered question.

Finally, Dishman argues that the circuit court erred by permitting the Commonwealth to show that Briscoe had already pled guilty to the same charge for which he was on trial. The record shows that Dishman's trial counsel at the bench told the trial court that since Briscoe was his witness, he was going to ask her if she had pled guilty to the charge. The Commonwealth's counsel did not object but stated only that she would ask Briscoe about

[2]The trial court's comments regarding this matter at the bench are inaudible, but it is apparent that it ruled for the Commonwealth as there was no further questioning by defense counsel on the matter. The Commonwealth later asked Briscoe whether she had pled guilty to the theft charge.

whether she was waiting to be sentenced. Dishman's counsel then conferred with him and announced that the defense had concluded. The Commonwealth then told the court that if defense counsel was not going to ask the question, she would ask it. Dishman's counsel argued that Briscoe was not a convicted felon until ten days after the final judgment.[3] Dishman's counsel finally told the court that he objected but could not think of a reason for the objection. The Commonwealth did ask Briscoe whether she had pled guilty to which Briscoe responded affirmatively.

We have found no reversible error. Dishman is not now in a position to argue about the question since his counsel was going to ask the same question. When counsel did object, the only reasons provided was that Briscoe's judgment of conviction was not final. Counsel stated he could not think of another reason. One cannot pursue one theory at trial and another on appellate review. Port v. Commonwealth, Ky., 906 S.W.2d 327, 333 (1995). We have found no error which would compel reversal.[4] See Tipton v. Commonwealth, Ky., 640 S.W.2d 818, 820 (1982).

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

ALL CONCUR.

---

[3]There is a good deal of discussion between counsel and the trial court, but the trial court's comments are inaudible.

[4]Under the facts of this case, the Commonwealth's question to Briscoe regarding her guilty plea was admissible and thus not inappropriate. See Kentucky County Judge/Executive Association, Inc. v. Commonwealth of Kentucky, Justice Cabinet, Department of Corrections, Ky. App., 938 S.W.2d 582 (1996); Grace v. Commonwealth, Ky. App., 915 S.W.2d 754 (1996).

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Suzanne E. Baker
Assistant Attorney General
Frankfort, Kentucky