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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1998-CA-002549-MR

DENZIL "PECK" PRICE — APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 96-CR-00011

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, DYCHE, and McANULTY, Judges.

COMBS, JUDGE: The appellant, Denzil Price (Price), appeals from the judgment of Clay Circuit Court convicting him of first degree assault and sentencing him to ten-years' imprisonment. Finding no error, we affirm the judgment of the circuit court.

On November 30, 1995, while driving home from work in his state vehicle, State Fish and Wildlife Officer Russell Wolfe observed a vehicle being driven in a reckless and suspicious manner. Suspecting that the driver might be intoxicated, Officer Wolfe turned around and followed the truck, which had pulled into Price's driveway. Officer Wolfe asked the driver to exit the truck and step to the back of the vehicle; he told Price, who had been a passenger in the truck, to go inside the house. As

Officer Wolfe was using the radio in his car, Price came outside with a shotgun, which he aimed at Wolfe's head. The gun fired as Wolfe grabbed the barrel of the gun and pushed it down, shooting him in the leg. Price retreated inside his house while Officer Wolfe radioed for assistance.

On February 1, 1996, the Clay County Grand Jury indicted Price for assault in the first degree. A trial was held on January 20 and 21, 1998, and the jury found Price guilty as charged and recommended that he be sentenced to ten years' imprisonment. Subsequently, on January 30, 1998, Price filed a motion pursuant to RCr 10.06 for a new trial on the ground of newly discovered evidence. He asserted that one of jurors, Juror No. 57, had been incompetent to serve as juror because she was "mentally unstable." After conducting a hearing on the motion, the court found that the juror in question was competent and denied Price's motion for a new trial. On September 9,1998, the court entered final judgment, following the jury's recommendation and sentencing Price to ten-years' imprisonment for assault in the first degree. This appeal followed.

Price first argues that the court erred in denying his motion for new trial. He contends that he was denied a fair trial because Juror No. 57 was not competent to serve as a juror. On the juror qualification form, Juror No. 57 indicated that she was "mentally unstable" and, approximately a week before trial, her mother submitted a letter to the judge's secretary from her doctor, stating that she was too emotionally unstable to perform the duties of a juror. The Commonwealth asserts that Price's

motion was untimely as it was not served within five days of the return of the verdict as mandated by RCr 10.06. Price maintained that his motion was based upon newly discovered evidence and that, therefore, it was timely.

RCr 10.06(1) states:

> The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause permits.

A new trial is not warranted when the "newly discovered evidence" is cumulative or merely impeaching in nature. Epperson v. Commonwealth, Ky., 809 S.W.2D 835 (1990). It "must be of such decisive value or force that it would with reasonable certainty, change the verdict or . . . probably change the result if a new trial should be granted." Coots v. Commonwealth, Ky., 418 S.W.2D 752, 754 (1967). Moreover, the movant must show that he or she exercised sufficient due diligence to obtain the evidence prior to trial. Wheeler v. Commonwealth, Ky., 395 S.W.2D 569(1965).

It is undisputed that Price's motion for a new trial was not served within five days. Price nonetheless contends that his motion is timely because it is based upon the alternate ground of newly discovered evidence. However, the record shows that at the hearing on his motion, defense counsel admitted that he had received the qualification form from Juror No. 57 and that he had it in his possession during the period when he was deciding how to exercise his peremptory strikes. He admitted that he did not read all of the juror qualification forms because

he did not have sufficient time; he did not request any additional time in order to do so, and apparently he did not discover the pertinent information form until more than five days following completion of the trial.

We find that Price's motion for a new trial was not timely served. Although he asserts that his motion is based upon newly discovered evidence, the record clearly establishes that Juror No. 57 indicated on her qualification form that she was "mentally unstable" and that defense counsel had a copy of that qualification form. Information regarding Juror No. 57 could have been discovered prior to trial and before the impaneling of the jury. At the very latest, it could have been discovered prior to the passage of five days following the trial.

Additionally, we note that despite the fact that Price's motion was untimely, the court denied his motion on its merits. After an examination in chambers of Juror No. 57 and of her mother, the trial court specifically found that she had the mental capacity to serve as a juror. We can find no grounds that would entitle Price to a new trial.

Price next argues that he was unfairly prejudiced by an improper demonstration (reminiscent of a "re-enactment") during the Commonwealth's closing argument. During his closing argument, the prosecutor for the Commonwealth picked up the shotgun, which had been previously introduced and admitted into evidence as the gun with which Officer Wolfe had been shot. He pointed it at Officer Wolfe, who was seated at the end of the prosecution's table. The prosecutor was standing only a few feet

away from Wolfe, and Wolfe reached up and pushed the gun down and away from his face. Defense counsel immediately objected and requested a mistrial. After conducting a brief hearing in chambers, the trial judge decided to take the matter under further consideration and to hold another hearing after the case had been submitted to the jury. The trial judge admonished the jury to disregard the prosecutor's demonstration, and the prosecutor was allowed to finish his closing argument.

The case was submitted to the jury, and the court held another hearing on Price's motion for a mistrial based upon prosecutor's conduct during closing argument. The prosecutor stated that the incident was spontaneous rather than a planned demonstration; Officer Wolfe also testified that the demonstration was not planned and that his pushing the gun away from his head had been a reflex developed through years of training as police officer. The court found that the demonstration had not been planned and that his admonition to the jury sufficed to cure whatever error or defect that may have resulted from the incident.

"It is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition." Clay v. Commonwealth, Ky. App., 867 S.W.2D 200, 204 (1993). A mistrial should be granted only where the record reveals "a manifest necessity for such an action or an urgent real necessity." Skaggs v. Commonwealth, Ky., 694 S.W.2D 672, 678 (1985). In this case, the court promptly and properly admonished the jury not to consider the incident between the

prosecutor and Officer Wolfe as evidence, stating that "closing arguments are strictly for counsel to make." We find that Price has not overcome the presumption that the admonition cured any resulting prejudice. Whether to declare a mistrial is a matter that is within the sound discretion of the trial court, and its decision should not be disturbed absent an abuse of discretion. Jones v. Commonwealth, Ky. App., 662 S.W.2D 483 (1983). We do not find the circumstances of this case to be so inflammatory that the court's refusal to grant a mistrial amounted to an abuse of discretion.

We therefore affirm the judgment of the Clay Circuit Court.

DYCHE, JUDGE, CONCURS IN RESULT.

McANULTY, JUDGE, DISSENTS BY SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING: Respectfully, I dissent. In order to believe the prosecutor's position that the gun display was spontaneous, one would have to believe that without knowing whether the shotgun was loaded or not, he pointed same at the head of the victim in a courtroom. Whether a planned demonstration or not, the error clearly supports retrial.

As our highest Court has stated, "Representatives of the Commonwealth in arguing the facts should confine themselves to the evidence coming from the witness stand." Davenport v. Commonwealth, 285 Ky. 628, 148 S.W.2d 1054 (1941). While it is a recognized principle that prosecutors should be granted wide latitude in closing arguments, the creation of testimony

(intentional or unintentional) should not be countenanced. I would vacate and remand for a new trial.

BRIEF FOR APPELLANT:

Mark Wettle
Louisville, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Matthew Nelson
Assistant Attorney General
Frankfort, KY