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Commonwealth of Kentucky

Court of Appeals

NO. 2001-CA-002640-MR

HUNTER BYRD, III — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NOS. 01-CR-00827; 01-CR-01007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE.[1]

POTTER, SPECIAL JUDGE: This is an appeal by Hunter Byrd, III, from a jury verdict convicting him of three counts of drug trafficking and one count of drug possession. For the reasons stated below, we affirm.

In May 2001, Victoria Taylor was working as a confidential informant in cooperation with Lexington Police Officer Shane Ensminger. Taylor eventually identified Byrd as a

[1] Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

drug trafficker. On May 15, 16, and 17, 2001, Taylor arranged to meet and purchase crack cocaine from Byrd. In each case Taylor was wired, the transaction was tape recorded, and police surreptitiously monitored the transaction. Byrd was not arrested after these "buy and rides" because the police wanted to protect Taylor's identity. The transactions instead were presented to the Grand Jury.

On August 13, 2001, in Indictment No. 01-CR-827, Byrd was indicted on three counts of first-degree trafficking in a controlled substance. On August 15, 2001, Byrd was arrested. During a search incident to the arrest, Detective Ensminger found a wadded up dollar bill in Byrd's left front pocket which appeared to have cocaine residue on it. As a result, on October 1, 2001, Byrd was indicted for first-degree possession of a controlled substance.

A jury trial covering the four charges was held on October 16, 2001. Byrd was found guilty on all charges, and the jury recommended a total sentence of sixteen years to serve. On November 19, 2001, the trial court entered final judgment and sentencing. The trial court reduced Byrd's sentence to a total of ten years to serve. This appeal followed.

First, Byrd contends that the trial court erred in permitting Detective Ensminger to state to the jury that he knew Byrd prior to Taylor identifying him as a drug trafficker, and

that the error was compounded when Ensminger, after being asked by the Commonwealth how he knew Byrd, stated that he knew the appellant because he had heard reports that Byrd had in the past sold drugs in a Lexington public park.

Prior to trial Byrd moved in limine to exclude any prior "encounters" or "dealings" Ensminger had had with Byrd prior to the May 2001 transactions. Although the relevant in limine proceedings are barely audible, it is apparent that the trial court ruled that Ensminger would be permitted to testify to the limited effect that he knew Byrd prior to the controlled buys. Accordingly, the prosecutor elicited from Ensminger that he knew Byrd prior to the May 2001 transactions.

While it was within the trial court's discretion to permit into evidence that Ensminger knew Byrd prior to May 2001, we are troubled by the prosecutor's follow-up question to this general background question. Presumably having some idea of what the response would be, the prosecutor asked Ensminger how he knew Byrd. Ensminger responded that he knew of Byrd because he had received numerous complaints that Byrd was selling drugs in Douglas Park.

We agree with Byrd that this question and response was an inexcusable violation of KRE[2] 404(b). Moreover, the response repeated hearsay statements in violation of KRE 802. The

[2] Kentucky Rules of Evidence.

Commonwealth's attempt, on appeal, to justify the violation as admissible "to show why the police . . . targeted Byrd" is likewise inexcusable. See KRE 404(b).

Moreover, the Commonwealth's brief misstates the relevant hearsay law by claiming that Ensminger's reference to the complaints was "not being introduced to prove that Byrd had sold drugs in Douglas Park[, but rather] was offered simply to show the jury that the police was [sic] familiar with Byrd." In light of Hughes v. Commonwealth, Ky., 730 S.W.2d 934 (1987), the Commonwealth's position that Ensminger's statement was nonhearsay under KRE 801(c) is untenable.

Despite our dissatisfaction with the manner in which both the prosecuting attorney and the appellate attorney have practiced this issue; nevertheless, we have carefully reviewed the trial testimony and are compelled to conclude that in light of the overwhelming evidence of Byrd's guilt, the evidence was harmless error.

An error is harmless if there is no reasonable possibility that, absent the error, the verdict would have been different. RCr 9.24; Harman v. Commonwealth, Ky., 898 S.W.2d 486, 489 (1995); Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 848 (2000). The harmless error doctrine "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence ... and

promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Hodge at 848 (*quoting* Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).)

In this case, absent the improper testimony, there is not a reasonable possibility that the verdict would have been different. The controlled drug buys were implemented so as to develop evidence demonstrating well beyond a reasonable doubt that Byrd was responsible for selling cocaine to Taylor on the three occasions charged in the indictment.

Taylor set up the sales by contacting Byrd on his cell phone; the recordings of these calls as well as Byrd's cell phone records listing the calls were introduced into evidence. Prior to sending Taylor out for the buys, Taylor and her vehicle were searched to make sure she did not have cocaine on her prior to going on the buys. Following the buys, after meeting with Byrd, Taylor was in possession of cocaine, and the cocaine could only have been a product of the meetings with Byrd.

Further, Taylor was wired for each of the drug transactions, and the resulting audio recordings implicating Byrd as the seller of the cocaine were introduced into the record. Similarly, the first two buys were videotaped and Byrd's distinctive vehicle places him at the scene. Moreover,

Taylor testified that Byrd sold her the cocaine; Ensminger surveilled the buys, and his testimony corroborates Taylor's testimony that Byrd was the seller.

As his defense, Byrd asserts that it was a passenger in the vehicle, rather than him, who sold the cocaine to Taylor. However, on the occasion of the last buy, Byrd delivered the cocaine by bringing it out of a residence to her vehicle. In addition, Taylor testified that the passengers had nothing to do with the drug transactions. Further, while it is true that on the occasion of the first two buys there was a passenger in Byrd's vehicle and Taylor approached the Byrd vehicle from the passenger side, the testimony disclosed that on these occasions Byrd parked his vehicle with the passenger side faced toward Taylor. The lone factor that the transactions were completed on the passenger side of Byrd's vehicle is not enough to offset the overwhelming evidence described above which implicates Byrd as the seller.

In summary, while we are disturbed by both trial counsel and appellate counsel's practice of this issue, we nevertheless are convinced that there is not a reasonable possibility that, absent the error, the result would have been different and that the error was harmless.

Next, Byrd contends that the trial court erred by not granting a mistrial following the introduction of evidence

concerning prior drug use Byrd and Taylor had engaged in together.

Prior to trial, the Commonwealth moved in limine to present testimony regarding prior drug use Byrd and Taylor had engaged in together. The trial court denied the motion. Nevertheless, Ensminger testified that Taylor brought Appellant's name to the police as someone she had bought drugs from in the past. Further, Taylor testified that if Byrd "would sell to her he would sell to her kids." Following each of these incidents defense counsel moved for a mistrial.

"A mistrial is appropriate only where the record reveals 'a manifest necessity for such an action or an urgent or real necessity.'" Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002). For the purpose of appellate review, the trial judge is always recognized as the person best situated to properly evaluate the circumstances as to when a mistrial is required. Kirkland v. Commonwealth, Ky., 53 S.W.3d 71, 76 (2001). Therefore, the trial court has broad discretion in determining when a mistrial is necessary. "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared...." Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166, 169 (1979) (*quoting* Gori v. United States, 367

U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961)); Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 906 (2000).

Here, again, the prosecution crossed the line and violated a pre-trial in limine order of the trial court. Ensminger's testimony that Byrd had, prior to May 2001, sold drugs to Taylor should not have been presented to the jury. The testimony was not admissible under KRE 404(b) and, further, violated the trial court's pre-trial order.

While we express disapproval of this disregard of the trial court's pretrial order, nevertheless, we cannot say that the trial court abused its discretion by denying a mistrial. While the testimony may have had a damaging effect, in light of the overwhelming evidence of Byrd's guilt, as previously discussed, Ensminger's testimony of the pre-May 2001 transactions between Byrd and Taylor did not create a manifest necessity for a mistrial.

Similarly, though Taylor's unfounded conjecture to the effect that if Byrd "would sell to her he would sell to her kids" was incompetent testimony, the comment did not create a manifest necessity for a mistrial. In all likelihood the jury recognized the unsolicited commentary for what it was – a speculative assertion by a witness hostile to the defendant's interests. The trial court did not abuse its discretion by denying Byrd's motion for a mistrial regarding Taylor's comment.

Next, Byrd contends that a mistrial should have been granted as a result of various comments the prosecutor made during her closing arguments.

Specifically, Byrd contends that the prosecutor improperly compared the facts in Byrd's trial to a previous drug trafficking trial in which the defendant was found guilty, and did so with the knowledge that one of the jurors on the Byrd panel was also on the panel in the previous case. Byrd also claims that it was improper for the prosecutor to argue to the effect that if the jury believed that Byrd was guilty of one of the charges then it was only logical that he was guilty of all of the charges.

The comments made by the prosecutor concerning a prior trial were as follows:

> I believe in a trial a couple of weeks ago I said something about a crack fairy. Do you think they [the drugs] just magically appeared from the crack fairy? No. They came from Hunter Byrd. They were sold by him to Victoria Taylor. He was the only one involved and we have proved that to you beyond a reasonable doubt.

The prosecutor's comments to the effect that if Byrd was guilty of one of the charges then it was only logical that he was guilty of the third charge were as follows:

> [Defense Counsel] also wanted to point out to you that he thought that it was maybe the other person involved in the second or third

> transaction. That's fine and dandy if he wants to grasp at straws. But how is he going to explain the third transaction when Byrd was by himself. Not much of an explanation there. And if you believe Hunter Byrd is going to sell once. Why not believe that he is going to sell two or three times or even more. We just happen to monitor these transactions. There is no explanation on how the third deal took place if Hunter Byrd is the only person there.

Attorneys are granted wide latitude during closing argument. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 39 (1998), *cert. denied*, 525 U.S. 1153, 119 S.Ct. 1056, 143 L.Ed.2d 61 (1999). To warrant reversal, misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair. Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 805 (2001), *cert. denied*, 535 U.S. 1059, 122 S.Ct. 1921, 152 L.Ed.2d 829 (2002). When reviewing allegations of error in closing argument, "[t]he required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor.... A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411-12 (1987)(internal citation omitted). Reversal is only justified when the alleged prosecutorial misconduct is so egregious as to render the trial fundamentally unfair. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224

(1996); Berry v. Commonwealth, Ky. App., 84 S.W.3d 82, 90 (2001).

The reference to the previous trial may be interpreted as merely an introductory comment to the "crack fairy" illustration as opposed to a deliberate attempt to signal to an individual juror that Byrd's case should be somehow associated with the previous trial. Further, the mere use of the term "crack fairy" would probably have reminded the juror of the previous trial even without the specific reference to the trial. We believe the comment was within the wide range of latitude permitted in closing arguments, and that the trial court did not abuse its discretion by denying Byrd's motion for a mistrial.

Similarly, the prosecutor's comments to the effect that if the jury believed Byrd committed some of the crimes then he committed all of the crimes was proper commentary. The comments were made in direct response to defense counsel's comments in closing arguments to the effect that a passenger in Byrd's car was actually the person who sold the crack cocaine to Taylor. Clearly the prosecutor's comments were intended to remind the jury that while there was a passenger present during the first two transactions, Byrd was alone during the third transaction. The prosecutor's statements were proper commentary on the evidence and were within the wide-range of permissible argument. The comments did not require a mistrial.

Finally, Byrd contends that if the foregoing arguments are not individually cause for reversible error, then the errors cumulatively resulted in reversible error.

There is no basis to claim cumulative error in this case. Appellant received a fundamentally fair trial and we find that the isolated instances of harmless error are insufficient to create a cumulative effect which would warrant reversal of his convictions for a new trial. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 40 (1998); *compare* Funk v. Commonwealth, Ky., 842 S.W.2d 476 (1992).

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

McANULTY, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Alicia A. Sneed
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Brian T. Judy
Assistant Attorney General
Frankfort, Kentucky