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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001813-MR

DAVID WAYNE LEWIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 02-CR-00520

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.

KNOPF, JUDGE. David Wayne Lewis, appeals from a judgment of conviction in the Fayette Circuit Court on the charge of trafficking in a controlled substance first degree. The jury found Lewis guilty and fixed his sentence at seven years. On August 12, 2002, the trial court sentenced Lewis accordingly. Lewis raises only one issue on appeal - that the trial court erred in denying his motion for a mistrial when the arresting

officer testified that Lewis had originally given him a false name. We affirm.

On April 2, 2002, Lexington narcotics officers used a confidential informant (CI) for the purpose of making a controlled drug buy. Lewis was arrested by Sergeant James Ensminger after he sold crack cocaine to the CI. Lewis was indicted by a Fayette grand jury on May 13, 2002, for trafficking in a controlled substance first degree¹ and persistent felony offender second degree². Upon motion of the Commonwealth the count of persistent felony offender was dismissed. Lewis proceeded to trial on July 8, 2002.

During the trial Sergeant Ensminger was questioned about the arrest. The prosecutor asked, "Did you learn what the suspect's name was?" The Sergeant stated, "Not at first, he would not give us a correct name at first." Defense counsel immediately objected and requested a mistrial. He argued that the statement was prejudicial because it made his client look guilty. The prosecutor explained to the trial court that what she was attempting to elicit from the officer by the question was that Lewis was the individual detained, not that Lewis lied to the officer about his name. The trial court denied the

¹ Kentucky Revised Statutes (KRS) 218A.1412.

² KRS 532.080.

motion for a mistrial, stating that the statement was admissible because it was all part of the same transaction. On appeal Lewis argues that the trial court erred in not granting a mistrial. He argues that the statement was inadmissible as "Other crimes, wrongs, or acts" evidence pursuant to KRE³ 404(b). He argues in the alternative, that even if it was admissible the Commonwealth did not comply with the notice requirement of KRE 404(c).

Our initial inquiry is one of whether the evidence objected to by Lewis even implicates KRE 404(b). KRE 404 states in pertinent part:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

The Commonwealth argues that the evidence is not "other" crimes, wrongs, or acts at all, but rather is, as stated by the trial court, part of the same transaction. We find support for this

³ Kentucky Rules of Evidence.

argument in Kentucky and Federal caselaw. Factually, United States v. Ramirez-Jiminez⁴ is squarely on point. In Ramirez-Jiminez the appellant claimed that it was error to admit, without prior notice, testimony that he falsely claimed United States citizenship and gave a false name to his arresting officers. He argued that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. The government argued that the testimony concerned acts made during and in furtherance of the crimes for which he was indicted. The court held that while the government had a continuing obligation to give notice pursuant to Fed.R.Evid. 404(b), the evidence was not within the scope of the rule, in that it was "intrinsic" to the crime charged.⁵

In Adkins v. Commonwealth,⁶ the Kentucky Supreme Court cited Ramirez in holding that evidence that a defendant gave a false name and address to police did not violate KRE 404(b) because it was not probative of a propensity to commit the underlying crimes of homicide, robbery or burglary, nor had it been introduced to prove such a propensity.⁷ The Court held that

⁴ 967 F.2d 1321, 1327 (9th Cir. 1992).

⁵ Id.

⁶ 96 S.W.3d 779, 793 (2003).

⁷ Id.

the evidence was admissible in that it was probative of Adkins's consciousness of guilt.⁸ The Court concluded that, "KRE 404(b)(2) allows the Commonwealth to present a complete, unfragmented picture of the crime and investigation."⁹ In the case sub judice, the fact that Lewis would not "give a correct name" to the arresting officer was not introduced to prove, and did not tend to prove, his propensity to traffic in cocaine.

Because the evidence is not KRE 404(b) evidence, Lewis was not entitled to notice. KRE 404(c) requires pretrial notice if the prosecution intends to introduce evidence pursuant to KRE 404(b) as a part of its case in chief.¹⁰ Because the evidence does not violate KRE 404(b), then KRE 404(c) simply does not apply.

The standard of review of denial of a mistrial is abuse of discretion.¹¹ "A mistrial is appropriate only where the record reveals 'a manifest necessity for such an action or an urgent or real necessity.'"¹² The trial court did not abuse its

⁸ Id.

⁹ Id. citing Robert G. Lawson, *Kentucky Evidence Law Handbook*, § 2.25 at 96 (3d ed. 1993).

¹⁰ KRE 404(c).

¹¹ Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993).

¹² Id. at 204 (quoting Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985)); Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002).

discretion in denying Lewis' motion for a mistrial because the evidence was properly admitted.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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