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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000345-MR

DAVID HUFFMAN — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 01-CR-00077

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE. David Huffman brings this appeal from a Final Judgment and Order of Imprisonment of the Pike Circuit Court, entered on January 22, 2003. He argues that evidence of his prior involvement in a drug case should not have been admitted at trial, and that the prosecutor's closing argument was sufficiently prejudicial to warrant reversal of his conviction and sentence. We affirm.

David Huffman was arrested on April 5, 2000, for selling approximately one pound of pressed marijuana to Edna King, a confidential informant for the Kentucky State Police. King had gone to the mobile home of David and his brother Anthony, pretending that she wanted to buy drugs for her brother's friend. She testified that she spoke with David who agreed to sell one pound of marijuana for $1200. The next day, King phoned David and asked him if they had the drugs. He told her to "come on up." This conversation was taped by police. King, accompanied by Mark Cool, an undercover officer posing as her brother's friend, drove up to the Huffmans' mobile home. Cool pretended that he wanted to negotiate the price of the marijuana. David came outside to discuss the price with Cool, but refused to accept less than $1200. King then accompanied David to the mobile home. She gave $1200 in cash to Anthony while David placed the marijuana in two plastic shopping bags. The transaction was covertly audiotaped and videotaped by police.

David and Anthony Huffman were subsequently arrested and charged with trafficking in marijuana, over eight ounces. Anthony Huffman pleaded guilty. David's primary defense at trial was that he had not participated in the sale of marijuana.

Prior to trial, the Commonwealth made two motions to admit evidence that Huffman had been convicted of trafficking in marijuana in 1997. The Commonwealth argued that the conviction

was admissible under Ky. R. Evid. (KRE) 404(b) as evidence of a pattern of conduct. After holding a pretrial conference and hearing additional arguments at trial on the issue, the circuit court ruled that the evidence was admissible. The Commonwealth was instructed not to disclose that Huffman had pleaded guilty to the 1997 trafficking charge.

Detective Tom Underwood testified about the 1997 case as follows:

> Commonwealth: Did you ever have occasion prior to April 5th of 2000 to work a case involving David Huffman?
>
> Underwood: Yes sir, I did.
>
> Commonwealth: And when was that?
>
> Underwood: That would have been on the 19th of June in 1997.
>
> Commonwealth: And what happened? What was David Huffman's involvement – and was that a drug case?
>
> Underwood: Yes sir, it was.
>
> Commonwealth: And what was David Huffman's involvement in that drug case?
>
> Underwood: Well, during that . . . [interrupted by defense counsel's objection].

Huffman's counsel objected on the grounds that Underwood did not have first-hand knowledge of the 1997 case. At a subsequent bench conference, it was established that although Underwood had been the case officer, he had not personally

observed the drug sale, and had only learned the details of the case from another police officer and from listening to tapes of the transaction.

The trial judge reversed his earlier ruling on the grounds that Underwood's presentation of the evidence was inadmissible hearsay. The trial court denied defense counsel's motion for a mistrial, but at his request gave the following admonition to the jury:

> We have had sort of an interesting procedural question . . . You should know that we've started with some testimony from Detective Underwood and we thought that it would be useful information for you, but as it turns out, it wouldn't be, so you should disregard the beginning of that testimony. I don't think he really said much, but whatever he did say, let's not consider that part of the evidence, okay?

Huffman argues that the admonition was insufficient, and that Underwood's testimony was so prejudicial as to warrant a reversal of the judgment.

The remainder of Underwood's testimony was properly excluded by the trial court. Underwood's testimony consisted of out-of-court statements made to him about the prior drug case by another police officer, and statements he had heard when reviewing tapes of the transactions. His testimony was also being offered for the truth of the matter asserted and, thus, constituted hearsay.

Underwood's testimony did not fall within any of the numerous hearsay exceptions. KRE 803 and 804. The Kentucky Supreme Court has clearly delineated the situation in which a police officer may testify about information provided to him by others:

> The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officer's action.

Daniel v. Commonwealth, Ky., 905 S.W.2d 76, 79 (1995).

Underwood's testimony was certainly being offered to prove the truth of the facts told to him, not to prove why Underwood acted as he did. However, we believe the admission of Underwood's hearsay testimony was harmless error and did not have a prejudicial effect on the outcome of the trial. Ky. R. Crim. P. 9.24.

Harmless error has been explained by our highest court as follows:

> The test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different. . . . The question here is not whether the jury reached the right result regardless of the error, but whether there

> is a reasonable possibility that the error might have affected the jury's decision.

Crane v. Commonwealth, Ky., 726 S.W.2d 302, 307 (1987) (citation omitted).

In view of the overwhelming evidence against Huffman, including King's detailed testimony and the videotapes of the marijuana sale, there is not a reasonable possibility that the jury would have arrived at a different conclusion had it not heard Underwood's testimony. Furthermore, it is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition. Maxie v. Commonwealth, Ky., 82 S.W.3d 860 (2002); King v. Grecco, Ky. App., 111 S.W.3d 877 (2002). Upon the whole, the improper admission of Underwood's hearsay testimony was not an event of such magnitude as to deny Huffman a fair and impartial trial, and therefore the trial court did not err in refusing to grant a mistrial. See Maxie, 82 S.W.3d 860; King, 111 S.W.3d 877.

Because we have determined that the admission of Underwood's inadmissible hearsay testimony constituted harmless error, we need not address Huffman's claim that evidence of his prior conviction was inadmissible.

Huffman's second argument concerns comments made by the prosecutor about Huffman's brother Anthony. Anthony was transported from the penitentiary to testify as a witness for the

defense. Prior to Anthony's testimony, Huffman's attorney had informed the court that he opposed allowing Anthony to testify because Anthony had repeatedly told counsel that the sale of the marijuana was "David's deal." David insisted on allowing Anthony to testify, however, over his own counsel's objection. Anthony appeared in court with a black eye, and testified that the marijuana in question had been his, that he had received all the money from the transaction, and that he had not given any of the profits to David. In his cross-examination, the prosecutor attempted to impeach Anthony by asking him to explain the inconsistencies between his current testimony and the statements he had made that were recorded on the police videotapes of the transaction. For example, the prosecutor asked Anthony "When you said on the videotape that it was David's deal – that was a lie?" Anthony responded that he did not remember making such a statement and that if he had, he had meant that customers could contact him through David if they wished to make deals in the future. He also denied that David had sniffed the marijuana and then placed it in the plastic grocery bags for King, stating that he had never seen David do that although it was depicted in the police videotapes. He also admitted, however, that if David had bagged it up, such an action would constitute assisting him in the sale.

In his closing argument, the prosecutor discussed Anthony's credibility and made the following remarks: "You wonder why somebody comes in here . . . Why would he [Anthony] come in here and . . . say that David didn't have anything to do with it? Well, did you see that big shiner on him? Yup, I think you can reasonably assume . . ." [interrupted by defense objection].

Defense counsel objected on the grounds that no evidence had been presented as to how Anthony had got the black eye. The objection was sustained. The prosecutor then told the jury that he had not meant to imply that David had given Anthony the black eye, but had merely meant to inform them that an individual currently serving jail time may be physically intimidated by other inmates not to be a "snitch."

Huffman argues that the prosecutor made an improper inference that Anthony had been beaten in order to coerce his positive testimony at David's trial. The Commonwealth maintains that the comment was permissible as an observation on Anthony's credibility and his motivation to lie at trial.

> Attorneys are allowed great latitude in their closing arguments. They may draw reasonable inferences from the evidence and propound their explanations of the evidence and why the evidence supports their respective theories of the case. However, they may not argue facts that are not in evidence or reasonably inferable from the evidence.

Garrett v. Commonwealth, Ky., 48 S.W.3d 6, 16 (2001) (citations omitted).

The prosecutor's remarks about Anthony's black eye overstepped the boundaries of what is permissible in that he was not commenting or drawing inferences from evidence, or rebutting arguments raised by defense counsel. "It is simply wrong to say that everything the jury sees or observes during the course of a trial is 'evidence.'" Id. at 16 (citations omitted). "Neither the fact nor the cause of [Anthony's black eye] was in evidence at this trial; thus, it was not a proper subject for closing argument." Id. at 17.

"When prosecutorial misconduct is claimed, the relevant inquiry on appeal should always center around the overall fairness of the trial, not the culpability of the prosecutor." Maxie, 82 S.W.3d at 866 (citations omitted).

It is very obvious from the trial record that Anthony's credibility was already so severely compromised by the prosecutor's cross-examination, however, that the closing remarks did not compromise the fairness of the trial. Huffman's conviction was supported by considerable evidence, and he has not succeeded in showing that the closing statement had the potential to inflict manifest injustice to entitle him to reversal of his conviction. Grundy v. Commonwealth, Ky., 25 S.W.3d 76 (2000).

For the foregoing reasons, the judgment and order of the Pike Circuit Court are affirmed.

ALL CONCUR.

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