RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000937-MR

TROY F. TOWNSEND — APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 01-CR-00085

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Troy F. Townsend appeals from a judgment of the Simpson Circuit Court, entered April 2, 2003, sentencing him to five years' in prison following conviction by a jury for trafficking in a controlled substance (cocaine), first degree. We affirm.

In February 2001, Detective Jere Hopson with the Drug Enforcement Special Investigative Section of the Kentucky State Police arranged for Kerry Hinton to serve as a confidential informant participating in undercover drug buys in Simpson County. Hinton had contacted the police and indicated that he

was willing to provide information and assist the police in arresting persons who had provided drugs to him in the past.

On the afternoon of February 9, 2001, Detective Hopson asked Hinton to arrange a drug purchase from a person who had previously supplied Hinton with drugs and who was known to him as Troy Granger (hereinafter referred to as Townsend)[1]. Hinton made several recorded telephone calls to the seller eventually arranging to buy $40.00 of crack cocaine at the parking lot of a supermarket. Detective Hopson placed an audiotape transmitter on Hinton and they went to the supermarket in separate automobiles. Detective Hopson watched and listened as Hinton exited his vehicle and got into the back seat of a white Nissan Maxima containing a large black male and a black female. The black male sold Hinton a piece of crack cocaine for $40.00 with very little conversation occurring between them. Afterward, Detective Hopson followed Hinton to a church parking lot and received the cocaine purchased in the transaction. Hinton described the transaction to Detective Hopson identifying the seller as Townsend.

The next day, Detective Hopson went to Townsend's apartment and observed a white Nissan Maxima, similar to the one involved in the drug transaction, parked outside. The vehicle was registered to Townsend.

[1] Troy Granger is the same person as appellant, Troy Townsend. His last name was legally changed from Granger to Townsend in 1995.

On May 21, 2001, the Simpson County grand jury indicted Townsend on one felony count of trafficking in a controlled substance, first degree (Kentucky Revised Statute (KRS) 218A.1412). Townsend's trial, which began on December 11, 2002, ended in a mistrial. A second trial was rescheduled for March 6, 2003. On February 27, 2003, the Commonwealth filed a motion in limine, seeking a ruling to permit the admission of Townsend's cell phone records as self-authenticating business records. On March 3, 2003, the trial court conducted a pretrial hearing on the motion and ruled that the cell phone records were admissible business records under Kentucky Rules of Evidence (KRE) 803(6) and KRE 902(11).

Townsend's second trial was held on March 6 and 7, 2003. Detective Hopson, Hinton, and two forensic laboratory chemists testified for the Commonwealth. Townsend, Townsend's half-brother, Stephon Granger, Townsend's friend and neighbor, Justin Reynolds, and Reynolds' mother, Josephine Hall, all testified on behalf of the defense. Townsend denied being involved in the drug transaction and claimed to have been at his apartment with Justin Reynolds at the time of the incident. In addition to the witnesses' testimony, the Commonwealth introduced a short videotape of the incident taken by Detective Hopson showing Hinton getting out of his vehicle, getting into a white Nissan Maxima, and returning to his vehicle. The

Commonwealth also introduced an audiotape containing the telephone calls setting up the drug purchase, along with records for Townsend's cell phone.

The jury found Townsend guilty of trafficking in a controlled substance (cocaine), first degree, and recommended the minimum sentence of five years. On April 2, 2003, the trial court sentenced Townsend to serve five years' in prison. This appeal follows.

Townsend raises three evidentiary issues and also alleges misconduct by the prosecutor during his closing argument. We will address each alleged error raised by Townsend.

First, Townsend contends the trial court erred by excluding evidence of pending criminal charges in Tennessee against Hinton that were pending at the time of the second trial. At the time of the trial, Hinton had seven outstanding felony warrants pending against him in Tennessee. The warrants were dated September 2001 and July 2002 and, thus, were issued after Townsend's indictment in this case. The Commonwealth objected to the introduction of any evidence regarding Hinton's pending charges in Tennessee. Hinton was unaware of the pending arrest warrants in Tennessee. The trial court ruled that unless the defendant could show that Hinton had some motive to lie because of the charges, then the Defendant could not introduce

this evidence at trial. Both the prosecutor and Detective Hobson stated on the record that there had been no agreement to assist Hinton in any manner with the pending criminal charges in Tennessee. Townsend wanted evidence of the pending charges admitted to impeach Hinton by showing the charges conflicted with the testimony he gave during the first trial which, as noted, ended in a mistrial.

We begin our analysis by noting that a witness may be cross-examined on any matter relevant to any issue in the case including credibility. KRE 611(b). Thus, the credibility of a witness my be impeached by evidence that the witness has been convicted of a crime, but only if the crime was punishable by death or imprisonment of one year or more. KRE 609(a), and Slaven v. Commonwealth, Ky., 962 S.W.2d 845 (1997)(holding that only felony convictions can be used for impeachment in Kentucky); see also Ky. R. Civ. R. (CR) 43.07. Evidence that a witness has been arrested or charged with a criminal offense, as opposed to a conviction, is not admissible for purposes of attacking the witness's credibility. See Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982).

However, there are a few exceptions to this general rule including one that permits admission of evidence of a pending charge to show interest, motive, or bias of the witness. See Williams v. Commonwealth, Ky., 569 S.W.2d 139 (1978)(holding

that a defendant may question a witness about criminal charges pending against him to show that he possesses a motive to lie to curry favorable treatment from the prosecution).

In Bowling v. Commonwealth, Ky., 80 S.W.3d 405 (2002), the Supreme Court held that evidence of pending charges in one county was not admissible to show bias of a prosecution witness in a trial in another county because the prosecutor lacked authority to grant any favor or leniency to the witness on the charges in a county outside his jurisdiction. Thus, a defendant must present some evidence beyond the mere existence of pending charges, especially when the charges are in another jurisdiction, to create an inference of bias sufficient to justify admission of evidence on those charges for use in cross-examination of the witness. Townsend's reliance on Adcock v. Commonwealth, Ky., 702 S.W.2d 440 (1986) and Commonwealth v. Cox, Ky., 837 S.W.2d 898 (1992) is misplaced because those cases involved witnesses on active parole and probation in Kentucky, and they predate Bowling.

In the current case, Townsend failed to present sufficient evidence to create a reasonable inference of bias in connection with the pending warrants against Hinton in Tennessee. Both Detective Hopson and the prosecutor stated there was no deal or agreement with Hinton to assist him in any way with the handling of the warrants and any potential

prosecution on the forgery charges. The warrants and alleged offenses were based in Tennessee, so the Simpson County prosecutor had no authority nor apparent ability to influence resolution of those charges. In fact, the record indicates that Hinton was not even aware of the warrants prior to the second trial. We, therefore, conclude Townsend has not established that the evidence of Hinton's Tennessee arrest warrants was admissible to show bias.

Townsend's second alleged error arises from the trial court granting the Commonwealth's motion in limine concerning Townsend's cell phone records. The Commonwealth used this evidence to establish Hinton called Townsend on his cell phone to set up the drug buy. The court ruled that the Cingular Wireless records were admissible as evidence pursuant to the hearsay exception found in KRE 803(6) and the self authenticating requirements for business records in KRE 902(11). Townsend argues the Commonwealth failed to comply with the requirements of KRE 902(11) because the affidavit of the Cingular Wireless's records custodian did not satisfy the "personal knowledge" requirement.

We note that the standard of review of a trial court's decision to admit hearsay evidence under the business record exception is whether the court abused its discretion. See Welsh v. Galen of Virginia, Inc., Ky. App., 128 S.W.3d 41 (2001);

United States v. Given, 164 F.3d 389 (7th Cir. 1999). KRE 803(6) provides an exception to the hearsay rule for records of regularly conducted activity. KRE 902(11) facilitates the introduction of business records under KRE 803(6) by providing for self-authentication of business records if certified by an authorized custodian, thereby permitting parties to satisfy the authentication requirement for admissibility of records without extrinsic evidence or having to call a witness at trial for that purpose. See also KRE 803(6)(A). KRE 902(11)(A) requires the custodian to certify that the record:

> (i) Was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
>
> (ii) Is kept in the course of the regularly conducted activity; and
>
> (iii) Was made by the regularly conducted activity as a regular practice.

Accompanying the cell records produced by Cingular Wireless was a notarized affidavit signed by Rhonda Clark stating as follows:

> 1. I, Rhonda Clark [handwritten], am the Custodian of Records of Cingular Wireless, with an office located at 5600 Glenridge Drive, Atlanta, Georgia 30342 and am authorized to certify those records.
>
> 2. After performing a diligent search, I affirm that, to my knowledge, the attached documents are true and correct

> copies of all the records in Cingular Wireless's possession that are responsive to the Plaintiff, Defendant and/or Government Agency.
>
> 3. Such records are prepared by the personnel of Cingular Wireless in the ordinary course of business and are recorded at the time of the acts, transactions, occurrences or events that the records describe, or within a reasonable time thereafter. These records were not created for the purpose of this or any other litigation.

Townsend asserts the affidavit of certification does not satisfy the "personal knowledge" requirement of KRE 902(11)(A)(i) because it does not state that a person with "personal knowledge" compiled the information. However, the affidavit states that personnel of Cingular Wireless created the records "in the ordinary course of business" at or near the time of the transaction. We believe the identification of personnel within the business acting in the regular course of business is sufficient to satisfy KRE 902(11)(A), and there is no need to provide identification of the specific employees who prepared the records. With respect to the "personal knowledge" requirement, we find the comments of Professor Robert Lawson instructive:

> It is important to understand what the rule [KRE 902(11)] requires and does not require in the way of personal knowledge. It does not require personal knowledge by *foundation witnesses* except for personal

> knowledge about the record keeping system that is needed to satisfy the foundation requirement. In fact, most of the records offered under the rule will be offered by witnesses who have no personal knowledge concerning the preparation of the records or the events recorded therein. It does not require a showing that the maker of the record had personal knowledge of the matters recorded in the record. Instead, it requires a showing that someone in the chain of production of the record (and who was involved in the activity of the business) had personal knowledge of the events sought to be proved by introduction of the record.
>
> In implementing the requirement, courts have taken cognizance of the complexity of modern business practices and the difficulty that would be encountered if foundation witnesses were required to identify specific sources of information contained in the records offered under the exception. Although both the source of the information in a record and personal knowledge by that source are part of the foundation requirement, the case law shows that the requirement can be satisfied by proof that there existed a regular business practice of obtaining information (for the records) from persons in the business who would personally know of the events recorded in those records.

Lawson, The Kentucky Evidence Law Handbook § 8.65[5] at 683-684 (4th ed. 2003)(footnotes and citations omitted). While the affidavit could have been more explicit on the issue of personal knowledge, we believe the certification provided by Cingular Wireless's records custodian was sufficient and the trial court did not abuse its discretion in admitting the cell phone records.

Townsend's third alleged error looks to the trial court's handling of statements by the prosecutor during closing argument. In his closing argument, the prosecutor stated with reference to the testimony of Townsend's brother, Stephon Granger: "If I didn't know his name when he got on the stand, I wouldn't have believed him when he was under oath for even his name. You all take it however you want to. I wouldn't trust him as far as I could throw him." Defense counsel voiced an objection and the prosecutor immediately stated that he was going to withdraw the comment. The trial court then admonished the jury as follows:

> I am going to admonish the jury. It is not counsel's place in the trial to pass on to you who he believes and disbelieves. That is your function. So disregard Mr. Willis's remark. It is your prerogative and your province to weigh the evidence and to decide whether you believe witness Granger, or disbelieve him. Proceed.

The prosecution continued stating, "Let me clarify what I meant to say. What I meant to say was believe the defendant's convicted felon brother if you want to."

Townsend asserts that the trial court "did not admonish the jury to disregard the comments" and his conviction should be reversed because the comments substantially prejudiced him. However, the record reflects that the trial court did in fact admonish the jury to disregard the prosecutor's comments.

It is ordinarily presumed that a jury will follow an admonition. See Clay v. Commonwealth, Ky. App., 867 S.W.2d 200 (1993). Furthermore, "it has long been the law in Kentucky that an admonition to the jury to disregard an improper argument cures the error unless it appears the argument was so prejudicial, under the circumstances than an admonition could not cure it." Price v. Commonwealth, Ky., 59 S.W.3d 878, 881 (2001)(citations omitted). Because prosecutors are given leeway in presenting arguments to the jury, misconduct of a prosecutor in presenting closing argument must be so serious that it renders "the entire trial fundamentally unfair." See Butcher v. Commonwealth, Ky., 96 S.W.3d 3, 12 (2002)(citing Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 805 (2001)).

When prosecutorial misconduct is asserted, the relevant inquiry by the appellate court should always look to the overall fairness of the trial and not the culpability of the prosecutor. Young v. Commonwealth, Ky., 129 S.W.3d 343 (2004). Accordingly, Townsend has not shown that the comments made by the prosecutor were so prejudicial as to render the trial fundamentally unfair or prevent the admonition from curing the error.

Townsend's final argument is that Detective Hopson's testimony included several instances of inadmissible investigative hearsay. "Investigative hearsay" consists of out-

of-court statements made to the police. The Kentucky Supreme Court has rejected the existence of an exception to the hearsay rule for so-called "investigative hearsay" or information obtained through statements of other persons based on offering the evidence to explain the action taken by the police unless the taking of that action is an issue in the case. See Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988). A police officer may provide some testimony on the course of an investigation even though it is based on otherwise hearsay information, but the testimony must be limited to only general information alluding to the defendant as a suspect in criminal behavior. See Gordon v. Commonwealth, Ky., 916 S.W.2d 176 (1995).

Townsend asserts that Hopson made "investigative hearsay" statements throughout his testimony, including that Hinton told Hopson that Townsend was a drug dealer and that Townsend had answered Hinton's cell phone call to get up the drug buy. However, Townsend concedes defense counsel did not object to this testimony during the trial, and now seeks review based on RCr 10.26, the palpable or substantial error rule.

In order to obtain relief under RCr 10.26, the defendant must show the existence of a palpable error that affects his substantial rights resulting in manifest injustice. See also KRE 103(e). "In determining whether an error is

palpable, 'an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.'" Commonwealth v. Pace, Ky., 82 S.W.3d 894, 895 (2002)(quoting Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983)).

Having thoroughly reviewed Hopson's testimony, we believe the admission of this testimony was not sufficient to constitute a palpable error. The drug transaction was set up through telephone calls to a cell phone owned by Townsend. The videotape showed the scheduled meeting between Hinton and a person fitting Townsend's general description driving a car identified as belonging to Townsend. Townsend admitted that he and Hinton were acquainted with each other. Townsend's alibi evidence was not credible and he lived only a short distance from the meeting place. Accordingly, we do not believe that admission of this evidence resulted in manifest injustice substantially affecting the result of the trial.

For the foregoing reasons, we affirm the judgment of the Simpson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul J. Neel, Jr.
Public Advocate
Department of Public Advocacy
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

John R. Tartar
Assistant Attorney General
Frankfort, Kentucky