RENDERED: JANUARY 20, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001819-MR

CHRIS SEARCY — APPELLANT

v.

APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
INDICTMENT NO. 01-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.[1]

PAISLEY, SENIOR JUDGE: Christopher Searcy appeals from a judgment of conviction entered by the Mercer Circuit Court in which he was found guilty of one count of theft by deception over $300.00. There being no reversible error, we affirm.

According to the proof for the Commonwealth, in early 2001, Christopher Searcy, who lived in Harrodsburg, Kentucky,

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

devised a plan to stage the theft of his truck so he could collect the insurance proceeds. Searcy recruited his old friend, Steve Caldwell, to help him. Caldwell asked Dwayne Brown to help him. Brown agreed to help stage the theft, and, in order to dispose of the truck, Brown contacted his former father-in-law, Tommy Evans, and asked Evans if he would be interested receiving a stolen vehicle. Since Brown's request provoked Evans's suspicions, he contacted Detective Monte Owens of the Kentucky State Police. Detective Owens asked Evans to play along with the scheme and to tape any conversations Evans might have with Brown.

On the night of March 20, 2001, Caldwell drove Brown to Searcy's home in Harrodsburg. Searcy's truck was supposed to have been parked in front of his house, but, when Brown and Caldwell arrived, it was not there. Wondering what to do next, Brown and Caldwell went to a local convenience store where, by chance, they ran into Searcy. Brown and Caldwell then followed Searcy to a side street near his home. Searcy walked home leaving his truck with the keys in the ignition. At that time, Brown drove Searcy's truck to Stanford, Kentucky. Caldwell followed Brown to Stanford where Brown gave the truck to Evans. Evans then relinquished the vehicle to Detective Owens. The next day, Searcy contacted the Harrodsburg Police Department and reported his truck stolen.

Afterwards, Detective Owens arrested Brown. Brown gave a statement to the detective confessing his participation in the insurance fraud scheme and implicating Searcy. In this first statement, Brown told the detective that Searcy had contacted him about staging the theft of his truck, and he claimed that he and Searcy had met several times to finalize the plan. Brown told the detective that a third person was also involved but refused to disclose this person's name. This third person was, of course, Caldwell.

On May 16, 2001, a Mercer County Grand Jury indicted Searcy on one count of theft by deception over $300.00. While preparing for Searcy's upcoming trial, the prosecutor who handled the case interviewed Brown. During the interview, Brown told the prosecutor that he never actually spoke with Searcy. Instead, Caldwell had contacted and solicited Brown's help. This second statement clearly contained facts that were inconsistent with Brown's first statement. Even though the prosecutor was aware of these inconsistencies, he did not inform Searcy's defense attorney about the inconsistencies between Brown's first statement and his second statement. The case proceeded to trial on October 27, 2003. At trial, the inconsistencies between Brown's statements came to light. In addition, the prosecutor called Caldwell as a rebuttal witness, but Caldwell asserted his Fifth Amendment right not to

incriminate himself and refused to testify. While Caldwell was still on the stand and before the jury, the prosecutor offered "use immunity" to Caldwell. That is the prosecutor offered to forego prosecuting Caldwell in exchange for Caldwell's testimony against Searcy. Caldwell then testified corroborating Brown's second statement and implicating Searcy. The case was submitted to the jury which was unable to reach a verdict, resulting in a mistrial.

The trial court then scheduled a new trial. In the interim, Searcy moved the trial court to compel the prosecutor to produce his notes regarding his interview with Brown. The trial court denied Searcy's discovery request. Searcy's second trial began on April 28, 2004, and, after two days of trial, the jury convicted him of theft by deception over $300.00. The trial court sentenced Searcy to serve two years in prison, but, after serving thirty-nine days, the trial court placed Searcy on probation. Now, Searcy appeals to this Court seeking reversal of his conviction.

PROSECUTOR'S NOTES

On appeal, Searcy argues that the Commonwealth withheld exculpatory evidence, namely the prosecutor's notes regarding his interview with Brown. According to Searcy, the inconsistencies between Brown's first statement and his second statement were so great that his second statement constituted a

renunciation of his first statement. Searcy argues that Brown's second statement was exculpatory and contends that the contents of the prosecutor's notes might contain additional exculpatory evidence. Citing Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003) and United States v. Nixon, 418 U.S. 708, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), Searcy argues that the prosecutor's notes were not protected by the attorney-client privilege since Brown was not the prosecutor's client and Brown's statement was not confidential. Furthermore, Searcy insists that prior to the second trial he needed the notes in order to effectively cross-examine Brown. Thus, Searcy reasons that the prosecutor should have produced his notes.

According to Rules of Criminal Procedure (RCr) 7.24(2):

> On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. This provision authorizes pretrial discovery and inspection of official police reports, **but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses** (other than the defendant). (Emphasis added.)

And, according to the Supreme Court of Kentucky, RCr 7.24(2) applies not only to a police officer's notes but also to a prosecutor's notes. Hillard v. Commonwealth, 158 S.W.3d 758, 766 (Ky. 2005); See also Cavender v. Miller, 984 S.W.2d 848 (Ky. 1998) and Moore v. Commonwealth, 634 S.W.2d 426 (Ky. 1982). Thus, Searcy was not entitled to the prosecutor's notes since, pursuant to RCr 7.24(2), they were not discoverable. Therefore, the trial court did not err in denying Searcy's request for them.

USE IMMUNITY FOR CALDWELL

At the first trial as mentioned above, the Commonwealth called Caldwell as a rebuttal witness, and, while on the stand, Caldwell asserted his Fifth Amendment rights. Citing Varble v. Commonwealth, 125 S.W.3d 246 (Ky. 2004), Searcy avers that it is prohibited for a party to call a witness knowing that the witness will invoke his Fifth Amendment rights. Searcy insists that the prosecutor knew that Caldwell would assert his Fifth Amendment rights if called to testify. Furthermore, citing Commonwealth v. Blincoe, 34 S.W.3d 822 (Ky. App. 2000), Searcy argues that, during the first trial after the prosecutor offered use immunity to Caldwell, the trial court compelled Caldwell to testify and that such compelled testimony is prohibited. Searcy insists that the Commonwealth's prosecutorial misconduct regarding Caldwell's testimony was so

egregious that the trial court should have been barred his second trial.

The alleged errors regarding Caldwell's testimony occurred during the first trial. These alleged errors, if they were errors in the first place, were cured by the mistrial. Thus, these alleged errors are not properly before this Court.

INVESTIGATIVE HEARSAY

During the second trial, Searcy argues that Detective Owens was allowed to testify in detail about his investigation and about what individuals told him during the investigation. Searcy objected to this "investigative" hearsay but the trial court overruled Searcy's objection. According to Searcy, by overruling his objection, the trial court allowed Detective Owens to later answer this question posed by the prosecutor, "During this first statement did Dwayne Brown tell you that Chris Searcy participated or was an active participant in the taking of the truck?" Detective Owens answered, "Yes." Searcy argues that this question and the subsequent answer bolstered Brown's testimony before he testified.

While we agree with Searcy that Detective Owens's testimony was inadmissible hearsay, we conclude it was harmless error. Brown testified later and his testimony was consistent with Detective Owens's testimony. Moreover, Caldwell testified and his testimony corroborated Brown's testimony. Thus, we

conclude that Searcy was not prejudiced by Detective Owens's hearsay. See RCr 9.24 and Preston v. Commonwealth, 406 S.W.2d 398, 404 (Ky.1966).

PRIOR BAD ACTS

Finally, Searcy argues that the trial court erred in denying his motion for a mistrial after the prosecutor attempted to introduce evidence of inadmissible prior acts. Prior to the trial, the trial court prohibited the Commonwealth from referring to an investigative file generated by Searcy's insurance company. This file contained information regarding a prior theft of one of Searcy's vehicles. During the testimony of the Harrodsburg Police officer who initially investigated Searcy's theft report, the prosecutor asked this question, "Did he (Searcy) indicate to you that he had been involved, that he had other vehicles stolen?" Before the officer could answer, Searcy objected and moved for a mistrial. The trial court sustained the objection, denied the mistrial and admonished the jury to disregard the question. Searcy insists the trial court erred by not granting a mistrial.

We agree with Searcy that the prosecutor acted inappropriately when he tried to solicit evidence of prior acts from the witness. However, Searcy timely objected. The trial court sustained the objection, and the witness never answered the question. More importantly, the trial court admonished the

jury to disregard the prosecutor's question. It is presumed that when a jury is admonished, the jurors will heed the admonition. Boone v. Commonwealth, 155 S.W.3d 727, 729-730 (Ky. App. 2004). However,

> [t]here are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial." Id. at 730.

In the present case, neither of these exceptions applies; thus, the admonition cured the error.

The judgment of conviction entered by the Mercer Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Richard Clay
Clay & Clay
Danville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General

ORAL ARGUMENT FOR APPELLEE:

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky